SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-143
District Docket No. XIV-00-135E

IN THE MATTER OF	:
EDWARD D. FAGAN	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 20, 2008

Decided: January 16, 2009

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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 Arthur Minuskin, J.S.C. (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 1980 and to the New York bar in 1988. On December 11, 2008, however, he was disbarred in New York for filing a federal suit in bad faith, deceiving the federal court about critical facts concerning a previous class action settlement, engaging in champerty by purchasing interests in stolen artwork solely for the purpose of bringing lawsuits involving that artwork, and naming a nonexistent plaintiff in the suit. In disbarring respondent, the New York Supreme Court, Appellate Division, also considered his "pattern of prior sanctions for unprofessional conduct," his "lack of contrition or acknowledgement of any wrongdoing," and "the absence of little if any mitigation." In the Matter of Edward D. Fagan, M-2731, M-3148, M-3193 (S.Ct.N.Y., App. Div. December 11, 2008).

In 2002, respondent was reprimanded in New Jersey for misrepresenting to his client that he had filed a motion on the client's behalf and that a court date had been scheduled. In re Fagan, 172 N.J. 407 (2002). In 2003, respondent was admonished for failing to keep his client informed of the status of her personal injury matter and for failing to abide by an agreement in lieu of discipline that required him to attend a diversionary

legal education course. In the Matter of Edward D. Fagan, DRB 03-286 (October 21, 2003).

Since September 27, 2004, respondent has been on the Supreme Court's list of ineligible attorneys for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. Prior to that date, he was ineligible to practice law during the following time periods: July 3 through 21, 1986; July 18, 1991 through February 6, 1992; July 20 through December 17, 1992; December 12, 1994 through May 3, 1995; September 15 through October 15, 1997; September 21, 1998 through March 19, 1999; and September 30, 2002 through February 28, 2003.

In September 1999, the District V-C Ethics Committee ("DEC") began an investigation into whether respondent had practiced law while ineligible between September 1998 and September 1999. The investigation was prompted by a telephone book listing that had appeared during that time. In late October 1999, respondent informed the DEC that the listing was a mistake and requested that the matter be closed.

DEC investigator Lawrence Gaydos, Jr. testified that the investigation remained open because respondent had not complied with the DEC's request for copies of his business and trust account statements. Between October 29, 1999 and March 9, 2000, the DEC made numerous requests of respondent for copies of

various financial documents, including business and trust account statements, "ledgers/statements," and all deposit slips and checks. Respondent typically supplied the documents only after prompting by the investigator.

In January 2000, respondent informed the DEC that some of his business and personal bank records were no longer available, presumably as the result of his "acrimonious divorce." In March, he provided the DEC with a re-creation of his business and trust account ledgers for the relevant period. He never supplied ledger sheets.

In May 2000, the investigation was transferred to the Office of Attorney Ethics ("OAE") because respondent's records demonstrated that he had issued trust account checks to "cash" and that some of those funds had been deposited into his business account.

Respondent is a personal injury lawyer, who has achieved a certain level of fame and notoriety for his work in many class actions instituted on behalf of tens of thousands of Holocaust survivors. He broadly described these matters as "restitution cases related to expropriated assets dating back to the Holocaust period" (1933 to 1945), as well as post-1945, when various countries nationalized assets.

In 1996, respondent filed the "Swiss Banks" case in the United States District Court for the Eastern District of New York. The named plaintiff was Gizella Weisshaus. The case arose out of the claim that some Swiss banking institutions had denied Holocaust victims and their survivors access to assets that their relatives had deposited for safekeeping from the Nazis. The banks refused to turn over any assets to these individuals because they were not able to provide the secret account numbers, which were known only to the account holders, who had died in the Holocaust. The matter was certified as a settlement class for the purpose of valuing the victims' claims.

Eventually, the settlement class was consolidated with a class action seeking slave labor profits that were deposited into the Swiss banks to hide them from the Allies and a class action filed by the World Council of Orthodox Jews as "successor to the Orthodox Jewish assets and the Jewish World." These consolidated cases were captioned In re Holocaust Victim Assets Litigation.

On August 12, 1998, the consolidated cases settled for $1.25 billion. Respondent was awarded a $1.3 million fee in 2002, but he testified that he only received $950,000. The $450,000 difference was, at respondent's request, distributed to

four individuals whose claims had been denied. One of those individuals was Gizella Weisshaus.

Respondent also was involved in other Holocaust-related actions. In one of these matters, he was awarded a $4.3 million fee in July 2001. Respondent claimed, however, that he realized only $75,000 because the rest had been turned over to entities that had advanced him funds and to his former wife, who received $2.6 million from the divorce proceedings.

Respondent's financial condition was at issue in this disciplinary case. In March 1996, he was well behind in office rent payments. In 1997 he and his then-wife began to have marital problems. In the spring of 1998, the IRS was attempting to put a lien on his personal residence, which already had a $22,000 mortgage deficit. In June, a notice of levy was issued in favor of Yellow Book Company Incorporated for $64,906.95. In August, respondent had to borrow $250,000 from a friend to "cover" $180,000 in trust account checks that he had issued to the beneficiaries of an estate. On October 30, 1998, the IRS issued a notice of levy to respondent and his law firm for $290,993.91 in back taxes, interest, and penalties between December 31, 1994 and June 30, 1997. By October 1998, respondent claimed that he had $497,000 in judgments or liens against him.

This disciplinary matter involves two clients: Gizella Weisshaus and Estelle Sapir. Both women were Holocaust survivors. At some point, they were plaintiffs in the Swiss Banks case. As of the date of Weisshaus's testimony in this matter (November 2005), she was approximately seventy-six years old. Sapir passed away in April 1999.

The formal ethics complaint, dated December 3, 2004, charged respondent with knowing misappropriation of escrow funds from the estate of Jack Oestreicher, Weisshaus's cousin, and of settlement monies belonging to Sapir, in violation of RPC 1.15(a), RPC 8.4(c), and the principles of In re Wilson, 81 N.J. 451 (1979). The first count alleged that respondent knowingly misappropriated all but $100 of $82,583.04 from the Oestreicher estate. The second count alleged that respondent knowingly misappropriated $427,500 from a $500,000 settlement on behalf of Sapir. Respondent denied any wrongdoing.

Special Master Minuskin presided over a twenty-seven day hearing, between August 18, 2005 and April 19, 2007. At the conclusion of the hearing, the special master found that respondent had knowingly misappropriated funds from the Oestreicher estate and from Sapir. Accordingly, he recommended respondent's disbarment.

Since the inception of this disciplinary proceeding, in 1999, it has been complicated by respondent's conduct. He dragged out the DEC investigation. He failed to produce complete financial records to the OAE, claiming that they had been either lost or destroyed. He filed three non-compliant answers to the formal ethics complaint, all of which were stricken from the record. The special master denied respondent's motion to file a fourth amended answer to the complaint.

At the hearing, respondent disclosed, for the first time, certain material facts that bore directly on his defenses. Moreover, he often failed to answer simple "yes or no" questions unless the special master forced him to do so.

Former OAE Assistant Chief Investigative Auditor Gus Pangis was assigned to investigate this matter. Pangis testified that a demand audit scheduled for April 24, 2000 had been postponed at respondent's request. At the time, the focus was on respondent's trust account activity between January 1, 1998 and April 12, 2000, and his recordkeeping practices.

On May 5, 2000, respondent's then-attorney, Raymond Barto, wrote a letter to Pangis, explaining that, in May 1998, respondent had obtained a settlement on behalf of an unidentified Holocaust survivor client (Sapir), who had

instructed him to hold the funds in his trust account and disburse portions to her, in cash, as she required. Based on Barto's letter, Pangis understood that, when respondent wrote trust account checks to "cash," he gave the money to Sapir. However, despite the OAE's requests, respondent never submitted written proof that cash payments were made to Sapir and that she received them. Indeed, the parties stipulated that he had no receipts from Sapir, acknowledging the receipt of cash.

Pangis testified that respondent never provided the OAE with an accounting of the Sapir funds. Respondent supplied only an unsigned, undated settlement statement that he had given to Sapir's heirs, after her death.

Respondent did not provide to the OAE all of the records required under the New Jersey recordkeeping rules so that Pangis could determine how the settlement funds had been disbursed. Respondent did not provide client ledgers, bank statements, cash receipts and cash disbursement journals, or reconciliations of his Bank of New York or Summit Bank trust accounts. The parties stipulated that respondent had violated R. 1:21-6(c)(1)(g).

The next audit visit was scheduled for April 26, 2001. This time, the period in question covered January 1997 to April 6, 2001. Respondent was required to produce his business and trust account records from New Jersey and New York. The focus

of the audit was respondent's "handling of funds received in connection with the Holocaust matters as well as [his] trust account in general."

Pangis testified that the April 2001 audit was again postponed, due to the unavailability of either respondent or his attorney or both. The audit did not take place until August 26, when respondent and Barto produced only some records, claiming that others had been turned over to either respondent's or to his wife's attorney in the divorce matter and had not been returned.

Pangis retired in December 2002. In January 2003, OAE disciplinary auditor G. Nicholas Hall was assigned to this case.

The scope of the investigation expanded when, in February 2004, Weisshaus called Hall and expressed her belief that respondent had misused funds from the Oestreicher estate. Among other things, Weisshaus gave Hall a copy of an August 28, 1998 Suffolk County (New York) Surrogate's Court order ("the August 1998 order"), requiring respondent's payment of $82,583.04 for administration expenses, legal fees, and the satisfaction of a lien against the estate.

Based on an interview with Weisshaus and a review of certain documents in her possession, Hall concluded that the Suffolk County Department of Social Services ("Suffolk County")

had a third-party claim against the Oestreicher estate and that respondent was required to deposit the estate's funds into his New York trust account, where they were to remain until the claim had been settled. Yet, when the August 28, 1998 order was entered, the New York trust account contained only $100. The account had been inactive since October 1997. Moreover, no funds from the New York trust account had ever been transferred to a New Jersey trust account that respondent opened at Summit Bank in October 1997. Hall's investigation, thus, included respondent's disposition of the $82,000 funds.

THE OESTREICHER FUNDS

Weisshaus testified that she was born in Romania in 1929, immigrated to the United States in 1950, and became a citizen in 1956. She met respondent in 1992, when she retained him to represent her in a rabbinical court case. She terminated their attorney-client relationship in 1998. During those six years, respondent represented her in a number of matters, including the Swiss Banks case and the Oestreicher estate.

Weisshaus's cousin, Jack Oestreicher, died in 1990. She became the administratrix of his estate.[1] At the time of his

[1] The parties referred to Weisshaus as executrix. For the sake of consistency, we use the term executrix in this decision.

death, Oestreicher, a Holocaust survivor, owned a house that he had purchased with reparations money paid by Germany. Both respondent's firm and New York attorney Andrew Hirschhorn represented Weisshaus as the executrix, albeit not simultaneously.

In 1992 or 1993, Weisshaus retained Hirschhorn in connection with what he described as the Suffolk County lien matter. According to Hirschhorn, although Weisshaus conceded that the county had provided services to Oestreicher, she disputed the amount of the lien and its enforceability against Oestreicher's home, inasmuch as it had been purchased with Holocaust reparations money.

At some unidentified point, respondent's firm became involved in the Oestreicher estate, if only on an "advisory" basis. On August 15, 1994, respondent's associate, Frank Seiler, wrote a letter to a Suffolk County Surrogate's Court judge on respondent's law firm letterhead. In the letter, which was represented to be "a preliminary accounting" of the estate, the claims of Suffolk County and of an unidentified lawyer were identified as "disputed" liabilities of the estate. The letter concluded by stating that, in the future, either Weisshaus or an attorney acting on her behalf would contact the court.

On an unknown date, Weisshaus asked Hirschhorn if he would sue the Swiss banks on her behalf and on the behalf of other Holocaust families. He declined, claiming that the matter was too difficult for him to handle.

In February 1996, when Weisshaus retained respondent to handle the Swiss banks case, Hirschhorn's representation of Weisshaus as executrix of the Oestreicher estate formally ended. According to Hirschhorn, as of that date, he had been holding in escrow $82,583.04, which represented the proceeds from the sale of Oestreicher's property. Hirschhorn understood that the proceeds belonged to the estate and that they were subject to Suffolk County's lien and the claims of other creditors.

On February 16, 1996, respondent sent a fax to Weisshaus (with a "copy" to Hirschhorn), in which he wrote:

> As per our telephone conversation from earlier today, I will receive the $82,000 + monies over which Andrew Hirschhorn Esq. now has control or which he is holding for you relating to the matter in Nassau County [sic]. The check should be written to "Edward D. Fagan Esq., attorney for Gizella Weisshaus."
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> [Ex.C-6D.]

On February 25, 1996, Hirschhorn wrote a letter to Weisshaus, which she acknowledged receiving. The letter stated as follows:

Dear Mrs. Weisshaus:

Let this letter serve to confirm that you have authorized me as the former attorney for the estate to release the monies held in escrow to another attorney EDWARD FAGAN, ESQ. who is representing you on the estate, to hold in his own escrow account on behalf of the estate.

I am releasing this money as per your direction as Executrix of the estate and with the understanding that said monies will continue to be held by Mr. Fagan for the benefit of the estate.

This office has not represented you for some time as Executrix. However, we are aware that several creditors claims have been levied against the estate and that you are holding the monies in trust for them, as well as for the other creditors, and beneficiaries of the estate.

This office would caution you against any preliminary distributions before all claims are resolved unless you receive the approval of the Surrogate. However, due to the length of time that I have been away from this matter, I cannot offer any legal advice on this issue except to direct you to seek the counsel of your present attorneys and the consent of the court.

Please sign the bottom of this letter.

[Ex.C-6c.]

Hirschhorn testified that, when he wrote the $82,583.04 escrow service account check to "EDWARD FAGAN, AS ATTORNEY," with "ESTATE OF OESTREICHER" written on the memo line, he

understood that the monies would "continue to be held by Mr. Fagan for the benefit of the estate." Moreover, Hirschhorn explained, making the check payable to respondent "as attorney" signified that the check was to be held in escrow and not to be used for another purpose. This was and continued to be Hirschhorn's practice, based on what he had learned from senior attorneys, early in his career. Hirschhorn did not recall having had any conversation with respondent about respondent's intended disposition of the funds, either before or after Hirschhorn's discharge as Weisshaus's attorney.

At issue is the propriety of respondent's disposition of the $82,000. He testified that he had Weisshaus's authorization to apply the funds to $70,000 in legal fees that she owed him for his services in the many other cases in which he represented her. Weisshaus, however, testified that she never authorized respondent to use any of the funds for any purpose unrelated to the estate. She believed that respondent would place the funds into an interest-bearing escrow account.

Hall testified that, on March 1, 1996, the $82,583.04 escrow check was deposited into respondent's New York trust account. Before this deposit, the account balance was $140.73.

On March 25, 1996, the balance in respondent's New York business account was $7,947.75. Yet, on that same date,

respondent issued to Constitution Realty ("Constitution") four business account checks, totaling $39,400, in payment of overdue office rent.[2]

On March 27, 1996, Hall testified, respondent wrote a $40,000 trust account check to the order of his business account, which he deposited on the same day. On March 28, 1996, after the rent checks had cleared, the business account balance was back down to $6,094.50.

On March 29, 1996, the balance in respondent's New York trust account was $62,773.76. Therefore, Hall concluded, respondent had invaded the Oestreicher funds.

As of October 23, 1997, respondent's New York trust account had a $100 balance. The balance in his New York interest-only lawyers account (IOLA) was only $51. On October 23, 1997, respondent opened a trust account in New Jersey at Summit Bank with a $35,000 deposit, representing settlement proceeds in the Ida Quinn Sawyer matter. The two New York trust accounts (with only $151 between them) and the newly-opened Summit trust account were the only trust accounts that respondent maintained at the time.

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[2] Caleb D. Keoppel, a Constitution manager, confirmed Hall's understanding regarding the purpose of the checks. Ultimately, respondent's tenancy was terminated for nonpayment of rent.

Hall prepared a reconstruction of the disbursements and receipts for the Summit trust account from October 23, 1997 through February 23, 2001. During this three-year period, respondent never deposited any Oestreicher funds into his Summit trust account – the account from which obligations of the Oestreicher estate were eventually paid.

Hall testified that, during a January 2004 demand audit, respondent stated that "there were no obligations paid from the New Jersey Summit trust account related to client obligations from his New York trust accounts." Notwithstanding this representation, the first check drawn against the newly-opened Summit trust account was in the amount of $3750, payable to Alan S. Porwich, Esquire, in a New York case identified as the McGoy matter, which had settled in August 1997.

The McGoy settlement proceeds were deposited into respondent's New York trust account. The McGoys were paid $29,459.37 in early September 1997. By October 31, 1997, the balance in the New York trust account was only $200.

When Hall confronted respondent with this information, respondent stated that Porwich had previously handled the McGoy representation and, thus, had claimed a portion of the fee. Respondent added that he had disputed Porwich's claim, but paid him $3750 anyway. According to respondent, the $3750 was a

settlement between Porwich and him, rather than an obligation of the client to be paid from the settlement funds.

Thus, Hall testified, contrary to respondent's claim that no obligations in New York cases were satisfied with funds in the New Jersey trust account, the $3750 paid to Porwich for a New York matter were taken from the Summit trust account. Respondent then claimed that this was the only New Jersey Summit trust account transaction related to a New York client matter. As shown below, this statement also was not true.

The August 1998 order entered in the Oestreicher matter required respondent, "as escrowee," to pay $82,000+ in various obligations. Even though the Oestreicher matter was a New York case, respondent paid the obligations with New Jersey trust account checks. The specific checks at issue are as follows:

CHECK NO.	DATE ISSUED	DATE POSTED	PAYEE	AMOUNT
1009	09-02-98	09-18-98	Weisshaus	$33,814.87
2021	10-27-98	11-09-98	Suffolk County	$46,097.18
1022	10-27-98	10-29-98	Faruolo Firm	$ 2,669.25

Hall testified that these funds had been taken from $500,000 in Sapir settlement monies, which were deposited into the New Jersey Summit trust account on May 16, 1998. Respondent had stated to Hall that his fee in the Sapir matter was $60,000.

Yet, by November 9, 1998, when the last of the Suffolk County checks had cleared, the New Jersey trust account balance was only $379,000, instead of $440,000.

In addition, between May 18 and November 9, 1998, only six deposits were made into the New Jersey trust account and none of them were Oestreicher funds. Finally, as of November 9, 1998, each of respondent's New York trust accounts had less than $100 in it and both accounts were inactive. In short, there were no Oestreicher funds in any of respondent's trust accounts in 1998 and, therefore, respondent was not entitled to use any of his New Jersey Summit trust account funds for the payment of Oestreicher liabilities.

Contrary to respondent's claim that Weisshaus had authorized him to apply Oestreicher funds to her outstanding legal fees, Weisshaus insisted that she had never authorized respondent to use any of the estate funds for purposes unrelated to the Oestreicher estate. She testified that, when she hired respondent to represent the estate, in early 1996, she "give [sic] him the escrow money to hold." According to Weisshaus, respondent told her that he would put the funds into an escrow account at the Bank of New York and that she would receive at least five percent interest. She steadfastly maintained that,

if respondent had not agreed to this, she would not have given the money to him.

Respondent, in turn, testified that, notwithstanding the memo line on Hirschhorn's $82,000 escrow check to respondent ("Estate of Oestreicher") and respondent's notation, "estate monies," on a fax to Hirschhorn, he believed that the funds belonged to Weisshaus, who was Oestreicher's sole beneficiary. Respondent conceded that at the time he deposited the $82,000 funds into his New York trust account, Suffolk County had asserted a claim against Weisshaus and the estate. Nevertheless, because it was only a "claim, not a lien," he did not believe there were any restrictions on the use of the $82,000. Thus, according to respondent, the money already belonged to Weisshaus as the estate's sole beneficiary and the issue was how much of those funds she might have to return to Suffolk County, if it prevailed on its claim against the estate. He contended that this is why he had agreed to represent her, instead of the estate.

Notwithstanding respondent's firm's August 1994 preliminary accounting to the Surrogate's Court, he asserted that his firm did not represent Weisshaus, but merely provided her with assistance in preparing the report. In any event, he pointed out, the letter referred merely to a disputed claim, not a

"lien." The point of the letter, according to respondent, was that Weisshaus believed that only she was entitled to the Oestreicher funds and, that, therefore, she could do anything she wanted to do with the $82,000.

Despite respondent's claims that he did not represent Weisshaus as executrix and that he did not believe that the use of the funds was restricted by Suffolk County's "claim," his actions clearly contradicted these assertions. First, respondent did represent Weisshaus as executrix of the Oestreicher estate when he took control of the $82,000 in February 1996. Prior to Hirschhorn's transfer of the $82,000 to respondent, respondent had written to Weisshaus, acknowledging that he would be receiving the "$82,000+ monies over which Andrew Hirschhorn Esq. now has control or which he is holding for you relating to the matter in Nassau [sic] County." Second, on August 28, 1996, he wrote a letter to the Acting Surrogate of Suffolk County in which the first sentence read: "Fagan & Associates represents the executrix and the estate in the above referenced matter." Two days later, respondent submitted a brief on behalf of the estate in which he acknowledged Suffolk County's claim and argued that it should be "disallowed in its entirety." Third, as will be discussed below, in July 1998, respondent stated to New York disciplinary authorities that the

$82,000 was subject to a lien and that the funds were required to remain in escrow until the validity of the lien was determined by a court.

As to what happened to the Oestreicher estate funds after they were deposited into respondent's New York trust account, he testified that he told Weisshaus that he would apply the funds to her outstanding legal fees. Respondent never notified the Surrogate's Court either that he held the $82,000 in payment of past-due legal fees or that he claimed a right to the money. According to respondent, he did not believe that he was obligated to do so.

Respondent claimed that a letter dated March 6, 1996, signed by Weisshaus, corroborated his right to apply the $82,000 not only to outstanding legal fees but to future legal fees as well. The letter, which was typed by someone in respondent's office, presumably at his direction, read:

> Mr. Fagan:
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> Please transfer any monies which you have in your escrow account to an interest bearing account of your choosing so that my monies will earn the highest available rate of interest and so that these monies will continue to be available for and secure payment of legal fees, expenses and other such claims related to my various cases.

Respondent testified that he had Weisshaus sign this letter "before [he] touched the money" because he did not trust her, as

she "sued everybody." Respondent contended that, when he received the $82,000 from Hirschhorn, he believed that he could immediately use the funds because Weisshaus had given permission to do so, as evidenced by her letter.

Respondent did not produce a single bill or invoice to support his claim that Weisshaus owed him any legal fees. He claimed that the hours billed and the rate would have been included in the statements that he had prepared and submitted to her periodically for all her matters, but which he could not find. Thus, he offered only approximations of what she owed, what she paid, and the form of those payments.

With respect to all Weisshaus matters, respondent testified that he had received a total of only $7900 from her, plus the value of "weekly kugel and cake" that she had brought to him during that time. For her part, Weisshaus testified that, between 1992 and 1995, she had paid respondent approximately $8000.

As indicated previously, respondent claimed that Weisshaus owed him $70,000 when he received the $82,000 in February 1996. Thus, the $12,000 difference, he claimed, was to be used for future fees. Respondent testified that he worked on "[a] whole bunch" of cases for Weisshaus, between 1993 and 1997, for which he had not charged her and for which he had not been

compensated. He added that, during this period, on average, one day a week was devoted to Weisshaus's matters, whether by him or one of his associates.

With respect to the Oestreicher matter in particular, respondent did not know how much he had billed Weisshaus for legal services. He did not know whether his firm had charged her for its preparation of the accounting and other documents in the Oestreicher matter.

Between March 1, 1996 and the end of their professional relationship,[3] respondent recorded an additional $90,000 worth of time in Weisshaus matters. Thus, according to respondent's calculation, by the end of their relationship, in April 1998, Weisshaus owed him about $78,000.

Respondent asserted that the four checks to Constitution, totaling $39,440, were properly taken from the Oestreicher funds, given Weisshaus's authorization that he utilize the funds for the payment of his legal fees. By the time that respondent opened the New Jersey Summit trust account, in October 1997, he

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[3] It is not clear in the record when Weisshaus terminated the attorney-client relationship with respondent. We assume, however, that it must have been around April 1998, when she filed a grievance against him in New York.

had expended all of the $82,000. Thus, he never deposited the $82,000 into the Summit trust account.

Respondent testified that he never put the $82,000 into an interest-bearing account because all of the funds were applied to outstanding fees owed by Weisshaus. When questioned as to how the $82,000 had earned "the highest available rate of interest," as directed by Weisshaus in her March 1996 letter, and given his dissipation of all of the funds, respondent replied:

> How did it earn interest? When – well, one thing, for example, when I didn't charge her fees for the services that I performed and gave her back all the money, that would have offset whatever interest would have occurred.
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> [19T49-14 to 18.][4]

Regarding the direction, in Weisshaus's March 1996 letter, that respondent take the steps necessary so that the $82,000 would "continue to be available," respondent stated:

> I worked for her even after the 82,000 is [sic] was gone. It says continue to be available for and secure payment of legal fees, expenses and such other claims related to my various cases. I didn't get paid. That's what I did. It was all used, and I worked for her for another two years – two or more years.

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[4] The appendix to this decision identifies the date of the transcript proceeding, where this testimony is set forth.

[19T55-1 to 6.]

Respondent testified that, in April 1998, Weisshaus filed a grievance against him with the New York Departmental Disciplinary Committee, First Judicial Department, accusing him of taking the Oestreicher money. She also was making "horrible" public statements about him. He chose, however, not to respond to her accusations. He explained:

> So instead of saying this is my money, I was entitled to get it and kept it, she gave it to me, I took $82,000, something like that, designated it into the — in the New Jersey trust account and left it waiting until the surrogate court told me what to do with it. I should have said that's my money maybe. I don't know.
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> [11T157-24 to 11T158-6.]

According to respondent, he viewed Weisshaus's grievance as a fee dispute, but he did not want "a public fight" with her. He believed that this choice served the victims in the Swiss Banks case better because it avoided the appearance of discord between him and Weisshaus, the putative class representative at the time. At the time of Weisshaus's accusation, the parties involved in that litigation were in the midst of protracted settlement negotiations that had been ongoing since the end of 1997.

On July 15, 1998, respondent's attorney in the New York disciplinary matter, Hal R. Lieberman, wrote to the disciplinary

committee denying any wrongdoing on respondent's part and stating that the $82,000 in Oestreicher funds was "in escrow and must stay there until a hearing is held by the Surrogate's Court to determine the validity of a third party lien." Respondent acknowledged that the July 1998 letter made no claim that Weisshaus had authorized him to apply the funds to outstanding legal fees, or even that he had used the funds more than two years earlier.

In support of the statement that the funds were in escrow, Lieberman attached a bank statement and further claimed that "[t]he funds are still in Mr. Fagan's trust account, and these funds must remain in trust, and cannot be distributed to Mrs. Weisshaus or to any other heir, until the Court decided the validity and extent of the lien." Respondent signed Lieberman's letter under a statement that said: "[R]ead and adopted by."

Hall testified that, at the time of the July 15, 1998 letter, respondent's New York trust account had less than $200 in it and had been inactive since October 1997. The bank statement attached to the letter was from respondent's New Jersey trust account for the period ending June 30, 1998, which reflected a balance of more than $450,000 in an account in which the Oestreicher funds were never deposited. The funds in the account related to the Sapir settlement and other cases.

With respect to Weisshaus's New York grievance, respondent testified that the July 15, 1998 letter was supposed to communicate to the New York disciplinary committee that respondent viewed the grievance as a fee dispute. Respondent conceded the inaccuracy of the representation to the New York committee that the $82,000 was in his trust account, where it was required to remain until the validity of Suffolk County's claim was determined. He also conceded that, at the time the letter was written, no Oestreicher funds were in either the New York or the New Jersey trust accounts and that they had never been deposited into the New Jersey trust account.

Respondent testified that, by attaching the New Jersey trust account statement to the July 15, 1998 letter and stating that the funds were "still" in the account, he did not intend to mislead New York authorities that the Oestreicher funds had never been removed from a trust account or that they had continuously remained in the New Jersey trust account. Nevertheless, he testified, at the hearing in this matter, that the funds "were being held. They had been segregated into part of the New Jersey Summit bank account funds. They had been there for months."

Respondent claimed that the source of the segregated funds was monies that he had earned in other cases, including the

Sapir matter. Although respondent adopted the contents of his lawyer's letter to the New York authorities, he stated that, if he had noticed the word "still" in the context of the locations of the funds in his New Jersey trust account, he would have "corrected it."

When respondent was shown the June 30, 1998 New Jersey trust account statement, he stated that the funds in the account were those of Sapir and Weisshaus (Oestreicher). The source of the Oestreicher funds was respondent's portion of the Sapir fee, which he "designated as monies that would be held until there was a court order with regard to Weisshaus." At the time, respondent believed that he was entitled to one third of the Sapir settlement as a fee, although he and Sapir did not agree upon a fee until September 1998, which, it turned out, was only twenty percent of the settlement rather than one-third.

The August 1998 Surrogate Court's order required respondent, "the escrowee," to "pay over the sum of $33,814.87 to Gizella Weisshaus, the Administratix, the sum of $2,669.95 to the firm of Faruolo, Capuri, Weintraub & Neary, Esqs. and the remaining balance to the Suffolk County Department of Social Services." Despite respondent's claim that, after the entire $82,000 was applied to legal fees, he continued to work for Weisshaus for two years without getting paid, and despite having

accumulated $78,000 in additional outstanding legal fees, he then went on to use personal funds to pay the entire $82,000 in obligations required of him by the Surrogate Court's August 1998 order, including the payment of $33,000 to Weisshaus.

In addition to respondent's payment of the $82,000 in court-ordered obligations in the Oestreicher estate, in 2002, he gave Weisshaus $100,000 of the $1.3 million fee that he had received in the Swiss banks case, even though her claim had been denied. According to respondent, he did not think it fair that Weisshaus should get nothing, when it was she who had fought so hard at the beginning of the case. According to respondent, when Weisshaus received the check, she did not express gratitude. Instead, she "reamed us all out." Yet, he still did not sue her for the outstanding legal fees in the other matters.

Weisshaus testified that, in addition to the Oestreicher matter, respondent represented her in litigation arising out of a real estate investment, as well as seven related litigation matters. Although Weisshaus claimed to be dissatisfied with respondent's services in these matters and with respect to the Oestreicher estate, she did not terminate his representation, as she could not afford to pay a retainer to a new attorney.

Weisshaus testified that she did not pay respondent any fees in 1996 because she had given him the escrow account "and

then I started to work [on the Holocaust case] for nothing where he should have paid me."[5] At that point, she believed that she had paid respondent "enough . . . for that he represented me I always paid him." Weisshaus emphatically denied that she had authorized respondent to use the Oestreicher funds for his fees. Rather, she insisted that she "gave him the escrow account" so that she would earn more interest on the monies. She explained:

> Because I mean I give him the escrow account. I told him I want to have more interest. From that I could pay you what you gonna represent me in the Oestreicher estate. I have no money to pay.
>
> [3T87-5 to 9.]

Weisshaus explained that she had not meant that respondent could use the money for his fee at the time. She stated: "How can I give something that's not mine yet," meaning that the estate had not yet been settled. Moreover, the money was "not my money," as she intended to use it to build a memorial for Oestreicher's family, "who were killed without anything."

In an attempt to discredit Weisshaus's testimony, respondent pointed out that she is a litigious individual, who sued "judges and banks and all sorts of people." Indeed, Weisshaus testified that, prior to respondent, six other

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[5] Respondent testified that Weisshaus worked at his office every Friday.

attorneys had represented the Oestreicher estate, although she attributed this to the fact that no lawyer wanted to appear before the Surrogate's Court judge assigned to the matter.

Other witnesses testified that Weisshaus had a cantankerous disposition. Holocaust survivor Alice Fischer, who had a high regard for respondent, testified that, at some point in 1998, Weisshaus "tried to harm Mr. Fagan's name in some way." Weisshaus told Fischer that she did not believe that respondent had attained a good settlement. She complained about the master overseeing the litigation and the judge, contending that they were sending the money to Russia and to others who were not concentration camp survivors and who had not suffered. Weisshaus never told Fischer that respondent had stolen money from her.

Viennese journalist Margaret Endl testified that she interviewed Weisshaus twice in 1999. At the time, Weisshaus made complaints similar to the ones made to Fischer and stated that she felt betrayed "basically by everybody in her life." According to Endl, Weisshaus claimed that she had spent a lot of time in respondent's office "helping out," but that respondent's concern for her had been supplanted by his concern for other Holocaust victims, who, Weisshaus claimed, were more important

to him. Weisshaus never claimed that respondent had stolen or taken funds from her.

Endl believed that Weisshaus felt persecuted, hurt, and betrayed by anybody and everybody. Endl considered her to be "troubled," but not dishonest.

As to his use of the $82,000, respondent acknowledged that, prior to the hearing in this matter, he never stated that Weisshaus had given him the $82,000 in payment of fees. Respondent never informed the OAE of the existence of Weisshaus's March 1996 letter, which he claimed supported his right to apply the funds to outstanding legal fees. Despite an OAE request in October 2004, respondent never provided a statement about his handling of the Oestreicher funds.

Prior to the filing of the formal ethics complaint, respondent did not tell anyone at the OAE that he had used Sapir funds to pay Oestreicher estate obligations. Respondent pointed out, however, that in his pro se answer, he denied that he had invaded Sapir monies for the benefit of the Oestreicher estate. Respondent acknowledged that his analysis of the Sapir funds did not state that he had used any portion of them to satisfy the order entered in the Oestreicher matter. He claimed, however, that the OAE did not ask him about the use of his fees.

THE SAPIR FUNDS

In 1997, Estelle Sapir replaced Weisshaus as the class representative in the Swiss Banks case. However, in May 1998, Sapir received a $500,000 settlement from an individual personal injury claim against Credit Suisse, which was based on the bank's mistreatment of her when she attempted to collect her father's funds. The settlement check was payable to Sapir only. Sapir died in April 1999.

At the time of Sapir's death, she had two sisters, one of whom lived in France. Sapir had no children.

At issue is respondent's disposition of the Sapir settlement funds. He testified that, in addition to his attorney fee from the settlement, he used the bulk of the proceeds to pay for expenses incurred in developing and prosecuting the Holocaust cases and to fund his personal expenses, both before and after Sapir's death. He claimed that he had her permission to do so. He also claimed that, from time to time, and at Sapir's request, he had made cash disbursements to her out of the proceeds.

As already stated, the OAE contended that, after respondent misappropriated the $82,000 from the Oestreicher estate, he then satisfied the terms of the August 1998 order with Sapir's

settlement funds. The OAE also claimed that respondent misappropriated additional monies from Sapir.

The OAE's case regarding respondent's misuse of Sapir's funds turned on three assumptions: (1) as of May 16, 1998, when the Sapir check was deposited, respondent was only entitled to a $60,000 fee; (2) all of the cash disbursements went directly to respondent for his personal use; and (3) Sapir never authorized respondent to use her monies for any purpose.

Hall testified that, according to the unsigned Sapir settlement statement, respondent was due an attorney's fee of $60,000 and that $40,000 was due to the law firm of Kohn, Swift and Graf (which was paid via check posted to respondent's trust account on November 18, 1998).

According to Hall, between May 23 and August 29, 1998, respondent disbursed either to himself or on his behalf $93,750 of Sapir funds in one of the following forms: a trust account check payable to cash, a trust account check payable to his business account, or a direct transfer from the trust account to his business account. Hall added that, because respondent was only entitled to a $60,000 fee, by August 29, 1998, he had overdisbursed the Sapir funds to himself.

Hall also testified that respondent offered no proof that cash payments had ever been made to Sapir. Therefore, Hall

considered all of these checks to be for respondent's benefit, as it was respondent who had gone to the bank and cashed them.

Hall detailed the transactions that occurred after respondent had deposited Sapir's settlement funds, on May 16, 1998. At the time of the deposit, respondent's New Jersey Summit trust account balance was $2,061.09, which Hall credited to respondent. Hall also credited respondent with the $60,000 fee to which he was entitled, bringing respondent's available funds to $62,061.09 of the $502,061.09 in the trust account.

On May 16, 1998, a $2000 debit memo to respondent's trust account reduced his funds to $60,061.09. On May 20, respondent deposited $3,287.50 from the law firm of Cohen and Malad in a case that respondent described as "Holocaust Case." Hall understood from respondent that these monies were provided to him by a law firm participating in the Swiss Banks case to cover the costs of the class action and that respondent "could use these fees for whatever purpose he wanted." Thus, respondent was now entitled to $63,348.59 of the $502,061.09 in the trust account.

Hall also credited respondent with the following additional monies, received between May 20 and July 29, 1998: $5,753.11 in law firm contributions to the Holocaust cases; $5971 from an unidentified source; and an $8,333.34 fee in the Janeal Velez

matter.[6] Thus, as of July 29, 1998, respondent would have been entitled to $83,406.04 out of the funds in his trust account. From this amount, however, Hall deducted $850 for a June 11, 1998 trust account check, payable to the business account, in the Lopez matter and a June 16, 1998 trust account check to the New Jersey Jewish News in the amount of $1250. Hall also deducted $77,250 in additional monies removed from the account between May 23 and July 27, 1998 -- all of which were attributed to respondent. Respondent now had entitlement to $4,056.04 in his trust account.

On July 29, 1998, Hall testified, respondent invaded Sapir's funds when the bank posted a $6000 check payable to cash, which resulted in a negative balance of $1,943.96 in personal funds available to respondent in his trust account. A $9000 transfer to respondent's business account on the same day increased the negative balance in personal funds to $10,943.96. The trust account balance itself was $444,222.70.

Respondent cured the deficit in his available funds on July 31, 1998, when he deposited $165,000 into the trust account, representing a settlement in the Carol and David Sull

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[6] On July 1, 1998, respondent deposited $25,000 into his trust account, representing the settlement funds in the Velez matter. On August 5, 1998, respondent paid $16,667 to the client. The next day, he took his $8,333.34 fee.

matter. Hall credited respondent with a $55,000 fee, even though respondent never formally removed it from the account.[7] As of July 31, then, respondent was entitled to $44,056.04 of the trust account funds, all of which represented his fee in the Sull matter. No more client funds were deposited between July 31, 1998 and September 29, 1999, when the final check was written against Sapir's funds.

On July 31, 1998, respondent took his fee in the Velez matter, leaving him with $35,722.70. By September 2, 1998, he had removed an additional $26,650 from the trust account, reducing his funds to $9,072.70.

On September 15, 1998, $12,500 in Sapir funds were transferred to respondent's business account, constituting another invasion of the trust account funds by $3,427.30. On the same day, an additional $6,995.14 was removed from the account, leaving him with a negative balance of $10,422.44. Two days later, the overdraw increased to $16,607.44, after the bank paid a $6185 trust account check to Cola Travel.

The first invasion of Sapir's funds for the purpose of paying an obligation of the Oestreicher estate took place on September 18, 1998, when the bank paid a September 2, 1998 trust

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[7] The Sulls' $110,000 in proceeds were paid to them by a December 14, 1998 check, which was posted to the trust account on December 21, 1998.

account check to Weisshaus in the amount of $33,814.87. By this point, respondent should have been holding $440,000 for Sapir and $110,000 for the Sulls. Yet, before the check was cashed, the trust account balance was only $531,892.22. After the check was cashed, the balance decreased to $498,077.35. Moreover, respondent's negative balance had grown to $50,422.31.

Between September 21 and December 31, 1998, respondent deposited $9,120.14 in his trust account. This decreased his overdraw to -$41,302.17. Yet, between September 21 and December 23, 1998, he removed $324,015.27 from the trust account. Among the funds were the checks to Suffolk County for $46,097.18 and to the Faruolo firm for $2,669.95.

Hall did not charge respondent with the $40,000 fee paid to attorney Swift in the Sapir matter or the $110,000 payment to the Sulls on December 21, 1998, because the funds had remained intact in the trust account during this time.[8] Thus, by December 31, 1998, respondent had removed for his benefit $173,610.27 in trust account funds that did not belong to him. His overdraw of funds was now $214,912.44; the balance in his trust account was $183,182.22.

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[8] On December 18, 1998, a $405 payment to Citibank appeared on Hall's trust account analysis. However, he made no mention of this payment.

On January 4 and 14, 1999, two $7500 debit memos payable to respondent's business account brought his overdraw to $229,912.44. Between January 19 and March 2, 1999, the bank paid seven trust account checks to cash, totaling $47,500. All of these payments were attributed to respondent, which resulted in a total negative balance to him of $277,412.14. The trust account itself now contained only $120,682.44.

On March 3, 1999, respondent deposited $175,000 into the trust account. Hall testified that, according to respondent, these funds represented fees that he had factored to the Lions Group.[9] Accordingly, Hall characterized the $175,000 as "basically fees that were due to him." Between March 5 and April 14, 1999, respondent withdrew an additional $72,500 from the trust account in the form of checks or transfers to the business account. Hall did not continue to add these funds to respondent's negative balance; however, he made it clear that these funds were attributed to respondent. As stated previously, Sapir died on April 15, 1999.

As of the day before Sapir's death, Hall testified, the ledger balance was $155,750. According to Hall, between May 18,

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[9] Factoring is a word often misused synonymously with accounts receivable financing. Factoring is a financial transaction whereby a business discounts and sells its accounts receivable. http://en.wikipedia.org/wiki/Factoring.

1998 and April 15, 1999, respondent made thirty-seven disbursements to himself from the Sapir funds, totaling $302,750. The only proof that any funds went to Sapir was the June 13, 1998 trust account check for $1500.

After Sapir's death, respondent continued to make withdrawals against her funds. Between the date of Sapir's death in April 1999 and September 19, 1999, respondent made eighteen disbursements to his business account, totaling $124,750. Respondent also disbursed the following funds to the Sapir heirs:

CHECK NO.	DATE ISSUED	PAYEE	PURPOSE	AMOUNT
1083	04-27-99	Jeanette Bernstein	Funeral	$ 7,300.00
1126	05-05-99	Victor Gartenstein	Jeanette's Apartment	95,000.00
1129	08-24-99	Jo Sapir Broner		8,800.00
1130	08-24-99	Herbert Broner	Inheritance	90,676.51
1132	08-24-99	Jo Sapir Broner	Inheritance	90,676.51

The three checks dated August 24, 1999 totaled $190,153.02. However, on that date, respondent's trust account balance was only $3,330.94. The Broner checks did not bounce, however, because, on August 25, 1999, respondent's then-friend Andrew Decter deposited $225,000 into respondent's trust account. As discussed below, Decter claimed that the funds were a loan.

Respondent, however, asserted that they were legal fees disguised as a loan to benefit him in his divorce action.

When Hall questioned respondent, in January 2004, about the $190,000 in payments to the Broners, for the first time in what was then a nearly five-year investigation, respondent stated that Sapir had authorized him to use her portion of the settlement proceeds and that the beneficiaries were aware of the loan. Respondent gave Hall the unsigned copy of the Sapir settlement statement, which, respondent claimed, was an accounting of the $500,000 settlement funds. At the top of page three, the document stated that interest was earned on $300,000 for ten months at 4.7% and on $197,700 for three months at the same rate. Respondent told Hall that the inclusion of the interest figures on the settlement statement put the Sapir heirs on notice that there had been a loan from Sapir to him. Respondent asserted that they did not balk at the interest being paid on this amount of money.

Hall did not believe that respondent's settlement statement corroborated respondent's claim that Sapir had authorized him to borrow from the settlement proceeds. Although the representation that interest was paid on the funds could indicate the existence of a loan, it was not dispositive of the issue.

Moreover, the settlement statement was suspicious in other respects. For example, page two of the statement showed a $3000 payment and a $500 payment after Sapir's death. According to respondent, these funds represented $500 in rent to Sapir's landlord, Gladys Nicosia, and repayment of a $3000 loan from Nicosia to Sapir. Hall found it remarkable that Sapir, who had received a $500,000 settlement, needed to borrow money from her landlord. Hall also found it odd that, according to the settlement statement, respondent did not charge Sapir for the expenses incurred in pursuing her case.

Prior to respondent's assertion that Sapir had authorized him to borrow her settlement monies, there was nothing in the OAE file indicating that she had done so. Respondent made no such statement to Gaydos or Pangis. No such representation was made in Barto's May 2000 letter.[10]

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[10] Respondent's re-created ledgers that he sent to Gaydos in March 2000 and the accounting that he submitted to the OAE also gave no indication of a loan. The ledgers identified the checks to Suffolk County and the Faruolo firm as relating to the "Suffolk Cty NY Case," rather than the Oestreicher matter. Respondent never informed the OAE that the checks related to the Oestreicher matter. Moreover, despite the OAE's request, respondent's accounting did not identify when respondent began to borrow against the Sapir funds. It contained no reference to the checks issued to Suffolk County or to the Faruolo firm. Thus, respondent's accounting also failed to show that he had paid Oestreicher obligations from the Sapir funds.

The OAE requested that respondent provide written documentation that Sapir had given him the authority to borrow from her settlement funds. Respondent provided "some scratch numbers on a piece of paper," which did not satisfy the OAE.[11] Thus, nothing presented to the OAE compelled the conclusion that respondent was ever authorized to borrow Sapir's monies.

Respondent's defense centered on his claims that (1) until the $100,000 fee agreement with Sapir was reached, in September 1998, he held a reasonable belief that he was entitled to one-third of the $500,000, (2) most of the cash disbursements were payments to Sapir, and (3) Sapir authorized him to use her funds to pursue the Holocaust cases and "to survive." Because these claims are key to respondent's defense, we will address them now.

Respondent testified that he and Sapir were very close; she was like a mother to him. Sapir spent Passover with respondent's family and he and his young children visited her at her Rockaway Beach apartment, in Queens.

When respondent gave the settlement check to Sapir, at his regular Saturday morning visit with her, on May 16, 1998, he attempted to discuss his fee with her. Sapir did not want to discuss the issue at that time. Instead, she directed him to

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[11] The notes were not included in the record.

put the money into his trust account and said to him: "when I want money, you'll give it to me, and we'll deal with it."

Respondent claimed that Sapir had told him that her American relatives wanted the settlement funds to be placed in some kind of trust that would pay her a limited allowance. He believed that the family had advocated for a trust so that they would inherit the funds when Sapir died.

Sapir's niece, Jeanette Bernstein, denied that any family member had suggested to Sapir that a trust be created. Instead, Sapir called Bernstein's son and asked him if there was a way that she could safeguard her settlement monies. He suggested a trust, but stated that someone else would have to handle it.

According to respondent, Sapir had stated to him that she "didn't care what was going to be done with the money as long as the money was going to be used to finish the fight that, she had for the victims" — a fight that she had promised him she would undertake. Respondent assured Sapir that, regardless of how she wanted to use the settlement funds, he would continue to help her fulfill the promise to her father.

On June 13, 1998, respondent met Sapir for dinner. He suspected that she had no money with her, so he wrote her a $1500 check. Respondent explained:

> I said, "Estelle, how much do you want." And she didn't give a specific

> amount and I said, "Look, here take some money so that you can take care of the dog, you do the things you need to do." And she said, "But I can't take too much money because I don't have a checking account." This continued to be the issue and then — so I gave her that check, which was the most that she thought her landlord, or somebody would cash, she endorsed it over to somebody else, they cashed it and gave it to her and that's when the issue of don't give me checks anymore, give me cash [arose].
>
> [16T22-21 to 16T23-8.]

Respondent never gave Sapir another check.

Respondent testified that, between May and September 1998, he continued to visit Sapir weekly. His fee issue had not yet been resolved, although it had been discussed. He stated that, from time to time, Sapir would call him and ask for money. He would write a trust account check to cash, get the money, and then either send it to her or take it to her personally.

Respondent did not believe that it was improper to write trust account checks to cash, if it was done at the client's instruction. He never asked Sapir for receipts for the cash payments because he did not think that she would die "before she got all the money back."

Respondent testified that a private investigator, Kenneth Torres, delivered cash to Sapir on three or four occasions and that his former secretary, Edith Edry, also took cash to her on at least two occasions. Respondent also delivered money to

Sapir, from six to ten times within the United States, as well as on some occasions when they were in Europe.

Hall testified that he interviewed Edry, who told him that, on two occasions, respondent had given her an envelope, which he claimed to contain cash, and had directed her to deliver the envelope to Sapir, at her residence. Edry, however, did not look inside either envelope to confirm whether there was cash in it.

Private investigator Kenneth Torres testified that, in the late 1990s, he assisted respondent with the Holocaust and Kaprun cases by filing and serving papers and conducting internet searches.[12] Respondent did not pay Torres for his work. Instead, Torres testified, his "payment was learning and also going out to lunch or dinner."

Torres stated that, on three occasions, respondent had asked him to take an inch-and-a-half thick envelope of money to Sapir. When Sapir opened the envelopes, she thumbed through what Torres estimated to be several hundred thousand dollars in bills ("a large amount of hundreds"), although the precise amounts were a matter of speculation. According to Torres, on

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[12] On November 11, 2000, in Kaprun, Austria, a funicular car, carrying 167 skier-passengers, caught fire in a tunnel on its way up a mountain. One hundred fifty-five people died. http://news.bbc.co.uk/2/hi/europe/3502265.stm. Respondent instituted a class action as a result of this disaster.

his second meeting with Sapir, she had stated to him: "You tell . . . Mr. Fagan that anything he needs he can use."

Bernstein testified that, in the eleven-month period between the settlement and Sapir's death, she was not aware either that Sapir (or any family member) had authorized respondent to pay the settlement funds to Sapir in cash or that respondent had, in fact, done so. According to Bernstein, prior to the settlement, Sapir lived a simple life in a studio apartment. She did not maintain a bank account. Sapir lived on a small amount of reparation money and social security. According to Bernstein, Sapir was frugal and did not go anywhere.

Bernstein also testified that, after the settlement, Sapir's lifestyle did not change. Sapir still did not have a bank account. In fact, nothing led Bernstein to conclude that Sapir had an increased sum of money available to her. She made no large gifts to anyone. Nevertheless, prior to Sapir's death, she made a $9500 cash down payment on an apartment that she and Bernstein had planned to purchase.

After Sapir died, Bernstein's sister Josie and their sister-in-law Debbie inventoried the studio apartment, where Debbie found $2000 in cash. Bernstein, who was in the apartment

only for a brief time, did not see any indication that Sapir had received large sums of money.

With respect to the legal fee issue, respondent testified that, despite his attempts, he and Sapir had not discussed the amount of his fee until September 1998, when they had agreed that respondent would receive twenty percent ($100,000) of the $500,000 settlement. Of this amount, respondent determined to keep $60,000 for himself and to give $40,000 to another attorney, because he was "trying to be a nice guy."

Respondent claimed that, prior to September 1998, he believed that, under New York law, he was entitled to the standard one-third contingent fee, that is, $166,666.67. Yet, he and Sapir never entered into either an oral or written agreement for this amount.

Between September 6 and 11, 1998, respondent and Sapir visited Poland with two of Sapir's relatives, a reporter and cameraman from a New York local news station. The purpose of the trip was for Sapir to visit the concentration camp where her father had been interned.

German attorney Michael Witti also was with the group in Poland. He and respondent worked together on the U.S. Holocaust cases from 1996 until 2001. They also represented the plaintiffs in the Kaprun case.

In late 2003/early 2004, Witti and respondent had a falling out over how the business end of the Kaprun litigation would be handled. Contact between the two ended until a few months prior to Witti's December 2006 testimony in this matter. Despite their issues, Witti testified that respondent never acted dishonestly toward him.

Respondent testified that, after the visit to the camp, which was documented by the New York news station crew, Sapir had requested a meeting with him. Witti, who participated in the one-hour meeting, testified that it took place in a bar at the Warsaw Marriott. Witti recalled generally that the parties had discussed the events of the Holocaust, logistics, stress, and money.

Respondent testified that, when Sapir had asked him about his strategy with the cases going forward, he had told her that they first needed to agree upon his fee in the Credit Suisse matter. Sapir apparently deflected the question and raised the issue of how they could uncover evidence to support what she believed to be her family's claims for confiscated real and personal property in Poland. She then asked respondent whether he was prepared to change his fee.

Respondent suggested a reduced fee of twenty percent and assured Sapir that they could fight all the cases together.

When Sapir asked him how they would do this, he said that they needed money. Sapir told him that she did not want the other cases to die or for him to stop working on them. He continued:

> I don't remember exactly who said – how it came about, but it was at that meeting that we agreed, the words or substance was, Mr. Fagan, you can continue using the money, you can keep the money, use the money to survive, use the money for the Holocaust cases, use the money for my claims. We agreed to the, we agreed to the fee, to the fee reduction, continue the cases, all of the cases, and if I ever need the money back or want it back sooner, you give it back to me, and that was the end of the discussion on that. In Poland, in Warsaw.
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> [10T77-11 to 22.]

According to respondent, he understood Sapir's reference to using the money to survive to mean

> my survival wasn't an issue of my, so much my financial survival, it was the ability to withstand the fight for the victims against the organizations or to continue the cases, so survival, Ed Fagan's survival or the claim survival was, was the ability to continue running the practice, the ability, devoting all the time to the cases, to continue to pay, to eat, my family to, to eat, the cases to be, to be able to pay the expenses for the cases. That was survival.
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> [10T79-13 to 23.]

At the time of the agreement, respondent was "sure" that he had told Sapir "about things that were going on, everything that was going on." In fact, Sapir knew that he was in "the throws

of divorce" and that he "needed money to finish the case, pay the IRS, and feed his family." Sapir also knew that respondent had been forced out of the World Trade Center office for nonpayment of rent, as well as "how much money people were demanding of me pretty much and she knew of the issue of what I was going to do, do I drop the case, do I continue the cases, do I not continue the cases." Sapir told respondent that he could pay her back when she needed the money.

Witti testified about his recollection of the conversation. He recalled generally that, when the discussion had ensued about respondent's expenses and his need for "much money" to maintain the cases, Sapir had stated "you know you can use mine, my funds." The reason Witti remembered Sapir's permission to respondent was that it was an unusual thing for a client to do, although the relationship between respondent and Sapir was "very special." Witti never observed respondent do anything to influence or force Sapir to do something.

According to Witti, when Sapir had uttered the words "you can use mine, my funds," the three of them looked into each other's eyes "like a yes." Witti explained that there seemed to be a mutual agreement and assent that had been communicated non-verbally between them. Witti viewed this as an oral contract

between Sapir and respondent. Beyond this conversation, Witti never heard any further discussion on the issue.

Witti conceded that Sapir had told respondent that he could use "my funds," not "my settlement funds." Nevertheless, Witti understood Sapir to mean her settlement funds, as he was aware of no other monies that she had; her German pension amounted to only $600 per month.

Witti heard nothing pertaining to the exact terms of respondent's use of Sapir's funds, only that "[s]he just gave the permission" for using them. Yet, Witti's testimony was clear that Sapir had granted respondent "absolute" and "blanket" permission to use her monies to fund "expenses which the cases are involving, the future cases and the current cases, this is expenses about the office, expenses to keep the cases alive." Thus, he understood that respondent could use the funds "within the context of Holocaust cases and keeping the Holocaust cases going."

Witti was not clear in terms of whether Sapir had granted respondent permission to use her funds for his personal expenses. Upon questioning by the special master, Witti replied that he understood that, although respondent could not use the funds for luxuries, he could use them for his personal benefit, if it was necessary for him "to survive and keep the cases

going." Witti conceded, however, that he did not hear Sapir use the words "to survive." Rather, "to survive" was "the interpretation I gave to this oral contract." Moreover, he testified, the context in which respondent had stated that he needed money to maintain the cases, did not include feeding his family. In other words, "[i]t was about the respondent was talking about the expenses of running the cases to keep them alive, to keep the office open, but not to eat.

Other European participants in the Holocaust litigation testified in support of respondent's claim that Sapir had authorized him to use her funds to offset the cost of the litigation and to support himself financially. Swiss national Norbert Gschwend's testimony suggested that he was respondent's assistant in the Holocaust and Kaprun cases, as he described handling the "logistics of the whole team," taking care of the clients, and organizing press conferences. Over the years, Gschwend had loaned approximately $600,000 to respondent. As of December 2006, respondent owed Gschwend about $400,000.

Gschwend testified that, in either 1997 or 1998, respondent had introduced him to Sapir. According to Gschwend, at some point respondent had given him an envelope containing $5000 in it and had asked him to give it to Sapir. Respondent claimed that the funds represented repayment of a loan that Sapir had

extended to him so that he could "keep the cases going." When Gschwend gave the envelope to Sapir, in a Vienna hotel, she told Gschwend that he was "a good boy" and that he should not "stop your work." Gschwend believed that her words "don't stop your work" were actually directed to respondent, who was prosecuting the cases on behalf of victims, who had been "waiting over 50 years."

Endl, the Viennese journalist, testified that she worked for the plaintiffs in the Kaprun disaster case, gathering facts and details about the defendants, translating reports and other information from German to English, and "car[ing]" for the plaintiffs "both in organization capacity and basically as a psychologist." Endl testified that, at respondent's suggestion, she had a five-to-ten-minute telephone conversation with Sapir, who told Endl that she was happy with the Credit Suisse settlement. However, Sapir had also stated her intention to continue to fight for all Holocaust victims. In this regard, Sapir had told Endl that she was "helping" and "supporting" respondent in his fight for justice.

Endl interpreted the term "supporting" to mean financial support. Endl's interpretation, however, was based on her circumstances at the time: she was living in the United States with her boyfriend, who was supporting her financially because

her salary was not enough to sustain her. Endl explained: "I didn't say he is giving me financial support but I use the word 'support' that's why for me that word 'support' included financial support." Endl agreed that the word "support" also encompassed moral support, which she understood that Sapir also was providing to respondent.

Endl had no knowledge of the terms of any agreement between respondent and Sapir regarding the use of her funds. It was not until after the ethics complaint had been filed against respondent that he had told her that Sapir had given him the authority to use her settlement funds. He also told Endl that he had made cash payments to Sapir.

Hall testified that, although respondent had stated to him, in January 2004, that Sapir had authorized his use of her settlement proceeds to cover the cost of pursuing the litigation, respondent never claimed that he had Sapir's authority to use the funds for his personal benefit. The parties stipulated that respondent had never told the DEC, or had ever stated in any of his answers to the ethics complaint, that he could use the Sapir funds either to survive or for his personal use.

Bernstein testified that she was not aware that respondent had borrowed Sapir's settlement funds, either before or after

Sapir's death. Bernstein was "[a]bsolutely not" aware that Sapir, or any family member, had ever authorized respondent to borrow her settlement funds for any reason, either before or after Sapir's death. Bernstein never authorized respondent to borrow Sapir's funds. He never showed her any written or "other kind of" authority permitting him to borrow the settlement funds or pay funds to Sapir in cash.

At some point after Sapir's death, respondent and Bernstein visited the cemetery where Sapir was buried. There, he told Bernstein that Sapir had loaned him money and that he had distributed funds to her in cash. He also told Bernstein that he was "having some problems" – she believed with his law license – and that, if Bernstein would support him, he would get a cemetery plot for her family so that they could be buried together.

Respondent testified that the terms of the Sapir loan were not reduced to writing. He did not see the need for a writing because he did not believe that Sapir would die. He also did not see the need to advise Sapir of any conflict because "we were prosecuting other cases." He did not advise her to seek independent counsel.

Respondent did not provide Sapir with any security, in the event that he died unexpectedly, other than that he "continued

her cases." When asked if he had taken steps to protect Sapir "vis-à-vis" his other creditors, respondent replied: "I was borrowing money from other people to make sure that her moneys were there available to pay her, selling off fees."

Respondent testified that, once Sapir told him that he could use the money, he considered the money to belong to both him and Sapir. He did not transfer the funds into his business account because "the moneys were like a loan from her, and until I actually took them or used them, they were her money, and when she demanded them back, I had to give them to her. I just left them in the trust account."

Respondent believed that his authority to use Sapir's funds continued after her death. He explained that he was "continuing with the agreement that I had with Estelle, and I was continuing to honor her wishes with regard to the instructions in the will. Some of these have to do with payments to the family. I was continuing exactly what the family – what Estelle directed me to do and the family directed me to do after she died."

In light of respondent's assertions that, (1) prior to September 1998, he was entitled to a $166,666.67 fee (one-third of the $500,000 settlement), (2) he had made cash payments to Sapir, and (3) she had authorized him to borrow her funds, he proceeded to explain his trust account transactions to establish

that the account was never out of trust between May 16, 1998 and September 29, 1999. He claimed that he used an "informal" methodology to keep track of whether he was in or out of trust and that he "wouldn't write a check unless [he] had the money."

Respondent testified that, on May 16, 1998, he had deposited the $500,000 Sapir settlement check into his trust account. He agreed that the total in the trust account was now $502,061.09. However, he credited Sapir with $333,333.33 and himself with $168,727.76 (representing his one-third fee plus the $2,061.09 already in the account), bringing the total funds available to him to $168,727.76.

On May 16, 1998, respondent deducted from his funds a $2000 expense. On May 18, 1998, he received a $3,287.50 assessment, thereby increasing his funds to $170,015.26. On May 23, 1998, he wrote a single $8750 check to cash and gave $5000 to Sapir, while retaining $3750. This reduced Sapir's funds to $328,333.33 and his funds to $166,265.26.

Between May 27 and June 11, 1998, respondent took $35,850 to pay "expenses" and to reimburse $850 to his client Lopez. During this time, respondent received a $3,287.50 Holocaust assessment. Thus, as of June 11, 1998, respondent's funds had been reduced to $133,702.76. Sapir still had $328,333.33 in trust account funds.

During the month of June 1998, respondent wrote the single $1500 check to Sapir, thus reducing her funds to $326,833.33. He also paid $13,750 in expenses and received $8,436.61 in Holocaust assessments.

Respondent's available funds were now $128,389.37. Sapir's funds were reduced to $326,833.33.

On July 1 and 27, 1998, respondent removed a total of $21,000 from the trust account. On July 1, 1998, he deposited the $25,000 Velez settlement and credited himself with an $8,333.33 fee. Thus, as of July 27, respondent had $115,722.70.

According to Hall, the next transaction, a $6000 trust account check payable to cash and posted on July 29, 1998 constituted the first invasion of Sapir's funds. Respondent's figures are vastly different. Therefore, by respondent's calculations, the $6000 trust account check and the $9000 trust account check that posted to the account on July 29, 1998 had not invaded Sapir's funds. Moreover, respondent testified, of this $15,000, Sapir received $12,000 and he took only $3000. Accordingly, respondent claimed, as of July 29, 1998, he had available to him $112,722.70 in trust account funds; Sapir had $314,833.33. The total balance in his trust account was $444,222.70. This figure included his and Sapir's funds, plus $16,667 due to Velez from the $25,000 settlement.

On July 31, 1998, respondent deposited into his trust account a $165,000 settlement check in connection with the Carol and David Sull matter. Respondent took a $55,000 fee from the funds. The trust account funds available to respondent for his personal use increased to $167,722.70.

On August 3, 1998, respondent released the $16,667 due to Velez. Three days later, he took his fee, thus reducing his personal funds to $159,389.36. Between August 17 and 28, 1998, respondent removed $26,500 from the trust account. He gave $6500 to Sapir.

On August 30, 1998, respondent paid a $150 filing fee in the Holocaust cases. Thus, as of this date, his available funds were $139,239.36 and Sapir's funds totaled $308,333.33.[13]

Respondent testified that, on September 2, 1998, he had taken $33,814.87 from the trust account for "expenses." (This "expense" was the check to Weisshaus in the Oestreicher matter.) This disbursement reduced his available funds to $105,424.49. At this time, respondent's records showed that his trust account balance was $523,757.49, of which $110,000 belonged to the

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[13] Respondent testified that Sapir had $318,333.33 available at this point.

Sulls, $308,333.33 to Sapir, and $105,424.16 to him.[14] Thus, respondent testified, the total funds available to him and Sapir were $413,757.49.

On September 15, 1998, after the trip to Poland, respondent removed $12,500 from Sapir's portion of the trust account funds to cover "part of the cost for – for the Polish trip and for the cases that we were pursuing for Estelle." Respondent reiterated how the character of the funds had changed by September 15, 1998:

> The monies went from being trust monies to non-trust monies, or monies that I would use for prosecuting Estelle's cases and for prosecuting the Holocaust cases and for surviving myself financially and economically, just being able to survive.
>
> [15T104-5 to 10.]

According to respondent, as of September 15, 1998, Sapir's total trust account funds were $318,333.33. He stated that one hundred percent of these monies were now available to him. However, as indicated previously, this figure should be $308,333.33, according to respondent's own figures. It should

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[14] There is a $0.33 difference between the actual funds available to respondent, and the funds that respondent previously calculated to be his. The $0.33 is due to his payment of $16,667 to Velez, which he had rounded up from what would have been $16,666.66 after he had taken his $8,333.34 fee.

also be noted that, in Poland, respondent and Sapir had agreed to a $100,000 fee in the Credit Suisse matter.

At this point, the calculation of the figures turned in a different direction. Respondent and his counsel now added and subtracted from the total funds available to respondent and Sapir, which respondent now considered to be his, to use for his benefit.

On September 15, 1998, respondent also removed $13,180.14. At the end of the day, he testified, $388,077.35 in trust account funds remained available to him.

Between September 21 and 28, 1998, respondent deposited $8,120.14 into the trust account, representing a $6,995.14 credit memo and a $1125 Holocaust assessment. He also expended $6,995.14 via an outgoing wire and wire fee plus $12,500. Thus, he claimed, as of September 30, 1998, $376,702.35 remained available. During this month, respondent gave $5000 to Sapir.

Between October 7 and November 30, 1998, respondent removed $175,020.13 from the trust account and deposited $1000. Thus, by November 30, $202,682.22 remained available. During this two-month period, respondent claimed that he gave $13,000 to Sapir. Moreover, of the funds removed from the trust account $40,000 went to the Swift firm, $46,097.18 went to Suffolk

County, and $2,669.95 went to the Faruolo firm, although these descriptions were not provided in respondent's analysis.

On December 3 and 4, 1998, respondent removed $17,000 from the trust account. On December 14, respondent finally paid the $110,000 trust account monies to the Sulls. Thus, respondent claimed, all funds in the trust account, $185,682.22, now belonged to him.

Between December 23, 1998 and March 2, 1999, respondent removed $65,000, leaving a trust account balance of $120,682.22. On March 3, 1999, he deposited $175,000 from the Lions Group, which represented the factoring of his legal fee in one of his Holocaust-related cases.[15] This deposit increased his balance in the trust account to $295,682.22.

Between March 5 and 31, 1999, respondent removed $60,000 from the trust account, thereby reducing the trust account balance to $235,682.22. Respondent also deducted $95,000, on March 22, 1999, for what he described as "Sapir NY Apt." Respondent stated that "this was the instructions about the apartment that later becomes Jeanette Bernstein's apartment."

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[15] Harvey Grossman, a principal with the Lions Group, testified that the $175,000 was paid against what turned out to be a $250,000 fee, after the case settled, in either late 1999 or early 2000. When Grossman gave the $175,000 to respondent, respondent was having financial difficulty in prosecuting the cases and in "keeping his family afloat," as a result of his divorce.

(The OAE did not deduct this figure until May 5, 1999, when a check, in this amount, issued on that date, was cashed.) The removal of these funds reduced the trust account balance to $140,682.22. Respondent claimed that, during the months of January, February, and March, 1999, he had given Sapir $44,500.

As stated previously, after Sapir's death, on April 15, 1999, respondent continued to make withdrawals against Sapir's funds. On April 19 and 26, he removed a total of $17,500, thus reducing the balance to $110,682.22.

Respondent testified that, on April 27, 1999, he had written a $7300 check to Bernstein to reimburse her for the cost of Sapir's funeral. Between April 28 and May 26, 1999, respondent removed a total of $34,500 from his trust account, thereby reducing its balance to $68,882.22.

It was not until June 6, 1999 that respondent made another payment pursuant to the terms of Sapir's will. On that date, he wrote the following checks: $338.90 to Lori Bernstein, $3500 to Gladys Nicosia, $95.78 to Josi Broner, and $106.60 to "QUICS." These disbursements reduced the trust account balance to $64,840.94. By the end of the month, an additional $27,500 disbursement brought the trust account balance to $37,340.94.

On July 1, 1999, respondent paid a $2010 medical bill on behalf of Sapir. His trust account balance was now $35,330.94.

Between July 6 and August 9, 1999, he expended $32,000, leaving a trust account balance of $3,330.94. At this point, however, nearly four months after Sapir's death, he had yet to pay $181,353.02 to Herbert and Jo Broner, two of Sapir's beneficiaries named in her will. Respondent testified that, as of August 1, 1999, Andrew Decter and his father owed him a ten percent fee from the $2.25 million sale of their business on May 1, 1999, which amounted to $225,000. Initially, respondent estimated that he would receive his fee in June or July 1999. However, due to further negotiations, which "made the deal better for [Decter]," respondent expected the funds in early August 1999, and, at the time, he believed that Decter had the money.

Upon this belief, respondent wrote the checks to the Sapir heirs in early August, 1999, because there had been some friction between her French and American relatives over the terms of her will and he did not want the deal that he had negotiated between the factions to fall apart. At the time, his trust account balance was under $5000.

Hall testified that he had interviewed Decter after Decter had filed a grievance against respondent. Decter stated that, in August 1999, he had loaned respondent $225,000. Decter gave Hall a copy of the promissory note executed by respondent.

Respondent, who was on his way out of the country at the time, left Decter with a deposit slip and instructions regarding the transaction. Respondent then called Decter and told him that, if the funds were not deposited into the account, he, respondent, would be "a dead man."

Respondent and Decter agreed that, at his request, Decter deposited $225,000 into his trust account on August 25, 1999. They also agreed that his deposit was a day later than respondent had requested because Decter was awaiting the maturity date on a certificate of deposit. They further agreed that the transfer of funds was characterized as a loan and that respondent had executed a promissory note in favor of Decter. They disagreed, however, on the true nature of the $225,000.

Respondent claimed that the funds were not a loan, but the ten percent fee due to him for assisting Decter in the $2.25 million sale of his business. Respondent needed the money to cover the Sapir family checks. Respondent believed that he could rely on Decter to deposit the monies because they were "best friends."

Respondent entered into a loan agreement with Decter to protect the funds from respondent's estranged wife. Respondent claimed that he had notified his wife of the receipt of the funds and that her lawyer had notified the matrimonial court.

Decter, in turn, steadfastly maintained that the funds were a loan. According to Decter, at some point during the middle of 1999, respondent had told him that he needed to come up with $225,000, or respondent "was a dead man." Respondent told Decter that he would give him "anything" in exchange for the money. Decter chose to have respondent sign a Quicken-produced promissory note, which was done on July 21, 1999. Decter, who was doing respondent's bookkeeping at the time, knew that there was a "hole" in the trust account.

On August 25, 1999, Decter wired separate transfers of $109,000 and $116,000 into respondent's trust account. At the time, the trust account had a negative balance of $96,145.57, for which respondent was charged a $60 overdraft fee, as the bank had already paid the two Jo Broner checks. After the Decter deposit, the payment of the Broner checks, the $60 overdraft fee, and a $5000 debit on August 26, 1999, respondent was left with a $38,117.92 trust account balance.

Decter testified that he and respondent had met through their wives. Their friendship had grown over the years, and they had also developed a working relationship. It appears that Decter devoted a great deal of time and money to respondent's financial problems, throughout their friendship. For example, when respondent's wife had locked him out of the house,

respondent stayed with the Decters. When he had moved into a rental home, Decter collected furniture from his relatives and gave it to him. Decter had bought respondent a new mattress and had let him use his car after respondent's car had been repossessed. When respondent traveled, Decter cared for his pets.

Decter testified that he often received phone calls from either respondent or his wife, asking for help in paying bills. Decter bailed out respondent in many ways, from paying his cell phone bill to covering bounced checks. He even paid the rent on respondent's offices and the mortgage on the marital home. In short, Decter testified, he did everything that he could do to keep respondent's family afloat, while at the same time keeping his own family from sinking. Decter died in March 2007.

At the end of the OAE's investigation, Hall concluded that respondent had no outstanding financial obligations to any client, including Sapir.

Sapir's sister-in-law, Esther Sapir, a French citizen, testified that she was the widow of Sapir's brother, who had passed away in early 1983. She and Sapir were friendly and Sapir was like a mother to Esther's children.

Until the time of Sapir's death, Esther and Sapir talked to each other periodically on the telephone. Esther knew that

Sapir was working with respondent on the Holocaust cases. She acknowledged that Sapir had done "such a huge work" for the Sapir family.

Esther confirmed respondent's claim that Sapir was dedicated to the mission of justice for all Sapir family victims of the Holocaust, not just herself. She testified that Sapir never said anything negative about respondent. Esther also had a good opinion of respondent, although she stated that he was disorganized. She had no complaints about him.

According to Esther, Bernstein had called her just prior to the date of Esther's testimony in this matter. When Bernstein had tried to tell Esther about the "bad things" that had been done, Esther had responded that they had their own view and that she "cannot say that I don't know." Thus, Esther testified, "I say what I know." She had nothing negative to say about respondent.

Most of the evidence on the subject of respondent's credibility was offered by the OAE, and it was negative. We will discuss a few examples demonstrating what is germane to this case, namely respondent's misuse of client funds.

The OAE claimed that, in several New York cases, Abate, McGoy, Muhith, Daughtery, and Haque, respondent effectively

"robbed Peter to pay Paul." We will describe only two of these incidents.

In the Abate matter, the $9000 settlement check, dated April 17, 1996, was deposited into respondent's New York attorney business account on April 19, 1996. Abate's share of the settlement proceeds was $5,981.64. On May 13, 1996, respondent issued a trust account check in that amount to Abate. However, the $9000 deposited into the business account was never transferred to the trust account.

In the McGoy matter, which we discussed earlier in this decision, respondent claimed that the $3750 Summit trust account check issued to attorney Porwich, on October 24, 1997, had been drawn against his funds from the McGoy settlement and that the payment represented his personal settlement of a claim on behalf of Porwich. Yet, the McCoy settlement proceeds were deposited into respondent's New York trust account in August 1997; the McCoys were paid $29,459.37 in early September, 1997; and, by October 31, 1997, the balance in the New York trust account was only $200.

When respondent was confronted with evidence that his New Jersey Summit trust account had been opened on October 23, 1997 with the $35,000 Sawyer settlement funds and that the first check written against the trust account was the Porwich check on

the following day, he changed his story and claimed that the $3750 check had been drawn against his fee in the Sawyer matter.

The special master determined that respondent's overall testimony was not credible. He described respondent's testimony as evasive and noted that respondent "constantly questioned the [OAE]'s right to seek responses, and he demonstrated a desire to avoid the truth." The special master disbelieved respondent's testimony that he had unlimited authority to use the $82,583.04 given to him by Weisshaus in the Oestreicher matter and the $500,000 Sapir settlement monies.

The special master rejected respondent's claim that Weisshaus had authorized him to apply the funds to outstanding legal fees, as respondent did not support his claim of fees with invoices. Similarly, the special master rejected respondent's claim that the $87,500 worth of checks made payable to "cash" were at Sapir's request, as there was no proof "that the amount was observed by anyone since the cash itself was allegedly contained in an envelope." He also rejected respondent's claim that he was authorized to use the Sapir funds for his personal use or to pay back funds.

The special master noted many factors that bore on respondent's lack of truthfulness. First, he found that respondent had fabricated stories to justify his use of his

clients' funds. The special master cited as one example respondent's testimony that he knew nothing about Suffolk County's lien and, therefore, believed that the funds belonged to Weisshaus. Second, the special master found that respondent had fabricated the existence of a dispute between Sapir and her family over the disposition of the $500,000, in order to justify the writing of checks payable to cash. Third, the special master observed that, despite respondent's claim that he never wrote a check unless he had sufficient funds to back it up, he proceeded to write post-dated checks totaling $181,000 when there were insufficient funds in his trust account.

The special master noted other aspects of respondent's testimony that shed further light on his propensity to distort the truth. For example, in this disciplinary matter, respondent claimed in August 2005 that he was destitute and required counsel to be appointed. In addition, he falsely stated to a federal court judge that he was unable to pay a $5000 sanction.

The special master also noted that respondent had "severe financial problems" and, thus, the motive to use client funds to pay his New York office rent. Respondent's financial difficulties required him to obtain a $225,000 loan from Decter and to either factor fees or borrow money.

The special master specifically rejected respondent's trust account analysis, on the ground that it incorrectly assumed that the $225,000 from Decter represented a legal fee, rather than a loan, and also incorrectly assumed that the $500,000 Sapir settlement belonged to him.

The special master concluded that OAE investigator Hall's testimony had been truthful and accurate and that Hall had established respondent's disbursement of funds to himself.

For all these reasons, the special master concluded that, "as a matter of law," the "clear and convincing evidence establishe[d] that the respondent's conduct in the handling of funds belonging to his clients was a knowing misappropriation of client funds," in violation of RPC 8.4(c). He recommended that respondent be disbarred.

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

THE OESTREICHER FUNDS

Respondent knowingly misappropriated all but $100 of the $82,583.04 in funds belonging to the Oestreicher estate. At the time respondent took control of the funds, he knew that they belonged to the estate and were subject to a lien, as was

evidenced by (1) his firm's 1994 preliminary accounting, which reported a disputed claim of Suffolk County; (2) his February 16, 1996 fax to Weisshaus, in which he referred to the funds as "relating to the matter in Nassau [sic] County;" and (3) most importantly, his lawyer's July 1998 letter to the New York disciplinary authorities, which he read and adopted, in which the funds were identified as being subject to a lien and, therefore, required to be held in escrow.

Respondent also knew that the funds belonged to the estate and not to Weisshaus personally, as the estate had not yet been closed by the Surrogate's Court. The OAE established that respondent knew the funds belonged to the estate when he wrote his August 1996 letter to the Suffolk County Surrogate, identifying himself as counsel to the executrix (Weisshaus) and the estate. In light of respondent's knowledge that the funds belonged to the estate and were subject to a lien, his testimony – unsupported by any reference to New York law – that Weisshaus was free to do with them as she willed is not believable.

Moreover, if, as respondent testified, Weisshaus had directed him to apply the funds to her outstanding legal fees, respondent was obligated to advise her that he was not permitted to do so until after the validity of the lien was determined by the Surrogate's Court. Respondent received the escrowed estate

funds and placed them in his trust account. He was required to safeguard and account for the assets of the estate. Moreover, he was certainly not permitted to apply those funds to non-estate matters. Cf. In re Estate of Heilbronner, 242 N.Y.S.2d 118, 119-120 (N.Y. Surrogate's Court 1963) (attorney for estate may be compensated with estate funds for services rendered to, or which directly benefit, the estate only).

In addition, respondent offered no proof that Weisshaus had authorized him to apply the funds to her unpaid legal bills and, more troubling, no proof that she even had unpaid legal bills. He offered no time sheets, no ledger, and no invoices. Moreover, prior to his testimony in this matter, he never stated to anyone – the Surrogate's Court, the New York disciplinary authorities, or the OAE – that Weisshaus had directed him to use the $82,000 to pay her legal bills.

Finally, we find it incredible that, given the $78,000 in unpaid legal fees even after the $82,000 had been applied to Weisshaus's previous balances, respondent would have later made the $82,000 payments required by the August 1998 order out of his own pocket (or rather, Sapir's pocket) and then, on top of that, would have requested the judge overseeing the Holocaust litigation to authorize the distribution of $100,000 to her out of the fee that he was awarded in that matter.

Respondent's claim that he wanted to avoid a public fee dispute during the contentious settlement negotiations in the Swiss banks case is unworthy of belief. He did not state to the New York authorities that the matter was a fee dispute, and it simply defies logic that respondent would have effectively donated $182,000 to someone who disliked him, was in the midst of attempting to destroy his reputation publicly, and already owed him close to $100,000.

Respondent's New York trust account records demonstrated that he exhausted all but $100 of the Oestreicher funds by October 23, 1997, when he opened the New Jersey Summit trust account with $35,000 from another client matter at a time when the balance in his New York trust account (where the $82,000 had been deposited) was $100. Respondent never deposited $82,000 into the New Jersey Summit trust account. Finally, respondent admitted that he had exhausted the $82,000 in Oestreicher funds. In particular, he admitted to using $40,000 to pay back rent on his New York City office.

Respondent failed to counter Weisshaus's emphatic denial that she had ever authorized him to apply any portion of the $82,000 to outstanding legal fees. In support of his assertion, respondent relied on a March 1996 letter, which he required Weisshaus to sign because he did not trust her and which his

testimony strongly suggests he drafted. This letter directed respondent to place the $82,000 in an interest-bearing account so that the Oestreicher funds would earn the "highest available interest." Respondent did no such thing. The letter also stated that Weisshaus wanted the funds placed into an interest bearing account so that they would "continue to be available for and secure payment of legal fees, expenses and other such claims related to my various cases." Yet, he rationalized that the funds did continue to be available in the sense that he performed $90,000 in work for her, for which he was never paid.

In addition to the "corroboration" of his understanding that he could apply the $82,000 to Weisshaus's outstanding legal bills by the March 1996 letter, respondent relied on one statement made by Weisshaus during her testimony, which, according to him established her direction that the funds be applied to her outstanding legal fees. The statement is: "'96 I didn't pay him. Because I give him the escrow account and then I started to work for nothing where he should have paid me."

The letter and this statement are not enough to overcome the obvious, namely, that respondent knew that Suffolk County had asserted a claim against the estate; that the monies clearly had been held in escrow by Hirschhorn for that reason, between

the date of respondent's law firm's August 1994 preliminary accounting to the court and the transfer of the funds to respondent in February 1996; and that respondent represented to the New York disciplinary authorities, in July 1998 (more than two years after he had received the funds from Hirschhorn), that the funds were required to be and, in fact, were held in escrow, pending the determination of the validity of a third-party lien.

When viewed as a whole, it is clear that Weisshaus did not intend for respondent to apply the $82,000 to outstanding legal fees. Respondent's claim that she did rests on a single "gotcha" moment during her testimony on the issue of her payments of legal fees to respondent over the years. That colloquy follows:

Q. And the next year 1995, the same question?

A. It's also about 2,000.

Q. And then the year after that, '96, and then I'll ask you a different question.

A. '96 I didn't pay him. Because I give him the escrow account and then I started to work for nothing where he should have paid me.

Q. You didn't pay him because you gave him the escrow account, that's what you just said, correct? Those are the words you just said a minute ago.

A. No. I mean he didn't do me –

Q. Excuse me. Are those the words you just said?

A. Yes.

Q. They are the words you said.

A. Yeah.

[3T80-1 to 18.]

The overall tenor of Weisshaus's testimony was that she did not authorize respondent to take the monies and apply them to the so-called unpaid legal fees. In the face of all the evidence impugning respondent's credibility on this issue, a few lines out of eighty pages of Weisshaus's testimony cannot serve to render clear and convincing that which is the contrary.

Based on the overwhelming evidence that respondent took the Oestreicher funds and spent them, knowing that they were to be held in escrow until the Surrogate Court determined the validity of the claims of Suffolk County, we conclude that respondent knowingly misappropriated the Oestreicher funds. For this reason, we need not determine whether respondent misappropriated the Sapir funds. However, the clear and convincing evidence established that respondent also knowingly misappropriated her funds.

THE SAPIR FUNDS

In this matter, we must first resolve the issue of how much of the $500,000 respondent was entitled to take as his fee, when he deposited the check into his trust account on May 16, 1998.

The OAE contends that, from that moment, respondent was entitled only to the $60,000 fee that, in September 1998, he and Sapir agreed he was entitled to receive. Respondent contended that, under New York law, he was entitled to a one-third fee "from the moment the complaint was filed." Thus, he added, even though there was no formal agreement between him and Sapir at the time of the $500,000 settlement in May 1998, he was entitled to a one-third fee, although they ultimately agreed to $60,000 in September. Respondent offered no legal support for this contention.

We find that, regardless of the absence of a fee agreement in May 1998, the $60,000 agreed upon in September 1998 cannot "relate back" to May. Clearly, respondent was entitled to something when the case was settled, notwithstanding the absence of an agreement, and it was not $60,000. Sapir's claim was based on the tortious conduct of Credit Suisse. Therefore, in New Jersey, respondent was permitted – not entitled - to collect a contingent fee not to exceed thirty-three and one-third percent of the recovery. R. 1:21-7(c). In New York, an attorney may take "[a] percentage not exceeding 33-1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides. . . ." 22 NYCRR § 691.20(e)(1)-(2)(v) (emphasis added). Otherwise, the

permissible fee is based on a sliding scale of percentages, depending on the sum recovered. Ibid.

In the absence of information enabling us to calculate the net sum recovered in the Sapir matter, we cannot determine the precise fee to which respondent was entitled at the time of the Sapir settlement, under either New Jersey or New York law. However, in the absence of an agreement, the amount under any scenario would not have been $60,000. Nevertheless, even if respondent were entitled to recover the full $166,666.67, he well exceeded that amount by August 1999, when the nearly $190,000 in trust account checks to the estate's beneficiaries had to be "covered" by a loan from Decter.

We find, however, that respondent's claims with respect to his disbursement of Sapir's funds are not to be believed. First, he offered no clear and convincing evidence that he made cash disbursements to her in the amounts claimed. Although Torres testified that he took three envelopes to Sapir that contained "thousands of dollars" in cash, Torres had no idea how much money was in the envelopes. In addition, respondent provided no receipts from Sapir evidencing that she had ever been given monies by respondent or anyone on his behalf.

Moreover, Bernstein's unrefuted testimony established that Sapir lived a pauper's existence and that, after the $500,000

settlement, her lifestyle did not change. Yet, respondent claimed that, during the first three months of 1999, he gave Sapir more than $44,000. When she died in April of that year, Sapir's relatives found only $2000 in her apartment. The funds could not have been in a bank account because Sapir did not have one.

While there was some evidence supporting respondent's claim that Sapir had authorized him to use her settlement funds to pursue the Holocaust litigation, there was no evidence, other than respondent's word, to support his claim that she had authorized him to use her monies to fund his personal expenses. Witti, who participated in the meeting at which Sapir allegedly gave respondent this authority, testified only that she had approved his use of the monies for the Holocaust litigation. He heard nothing about respondent's personal expenses. The other witnesses who testified on the issue were unconvincing.

In addition, respondent offered no written document supporting his claim that he was authorized to use Sapir's funds. He provided no security for the alleged loan. In fact, he never even told the OAE that he had this authority until January 2004, more than three years after the investigation began.

Although it is difficult to pinpoint when respondent took more funds than he was entitled to receive from Sapir, what is clear is that, when all was said and done, between May 18, 1998 (after the $500,000 was deposited into his trust account) and April 15, 1999 (the date of Sapir's death), he had made thirty-seven disbursements to himself, totaling $302,750. These funds were well in excess of the fee ultimately agreed upon and the cash disbursements that he claimed to have made to Sapir. Moreover, by early August 1999, when Sapir's heirs were due nearly $200,000 in distributions from her estate, respondent's trust account held less than $5000. In order to make these payments to the heirs, he had to borrow $225,000 from Decter.

In light of respondent's failure to prove that cash disbursements had been made to Sapir or that she had authorized him to use her monies to pay his personal expenses, and the nearly $150,000 deficit in the trust account in August 1999, the record clearly and convincingly established that respondent knowingly misappropriated Sapir's settlement monies.

Respondent raised two points in his supplemental submission, which we are constrained to address, although we find both without merit. First, he contended that the special master erred in denying his request that an affidavit executed by Ester Sapir be admitted into evidence. Second, respondent

argued that, between 2004 and 2006, and without notice to or permission from him, the OAE seized some of his and his clients' files and "private information," removed them from the "jurisdiction" and gave them to persons who did not have his permission to possess or control them.

With respect to the Ester Sapir affidavit, respondent's counsel sought to have it admitted into evidence during the course of her testimony at the hearing. According to counsel, Ester Sapir had "some demonstrable difficulty with the English language." The affidavit, on the other hand, was prepared with the assistance of her son.

The special master declined to admit the affidavit into evidence because Ester Sapir testified at the hearing, her testimony was the best evidence, he had no difficulty in understanding her testimony, and she had no difficulty in understanding or answering the questions. The special master's reasoning was sound and, based on our review of the record, we find no reason why his decision should be called into question.

With respect to respondent's claim that the OAE improperly seized and withheld his personal and professional records, we find that the facts do not support his assertion. In April 2001, the OAE requested certain records from him, which he claimed to be unable to produce because some of them had been

turned over to his former wife's attorney in the divorce proceeding and were not returned.

In March 2004, the OAE requested that respondent produce the original Weisshaus client files. In September 2004, the OAE specifically requested that respondent produce the Oestreicher estate file on the 20th of that month. Although respondent appeared at the September 20th audit, he did not produce the file. He also did not claim that the file had been lost or destroyed. It was not until May 2005 that respondent claimed that the records had been lost when the house that he had rented was torn down – an event that he claimed to have taken place in October 2004.

In March 2006, the purchaser of the home where respondent had been a tenant notified the OAE that she possessed documents that respondent had presumably left behind or abandoned, after his tenancy had ended. At the end of the month, the OAE took possession of the records that were subject to the OAE's request for documents, with the balance of the records having been transferred to a New York University law school professor for safekeeping, pursuant to an agreement between the purchaser and the professor.

On April 5, 2006, the OAE notified counsel for respondent of the existence of the records, both in its possession and in the possession of the professor, and invited him to inspect the documents at the OAE's office. On May 3, 2006, the records were

discussed on the record during the hearing, with the parties agreeing that they would be produced and arrangements would be made for them to be copied at Kinko's. Yet, neither respondent nor his counsel ever inspected the documents or arranged for them to be copied. Finally, on May 19, 2006, the OAE returned to respondent's counsel five of the six boxes of documents, plus complete copies of the documents contained in the sixth box.

In short, respondent's claim that, without notice to or permission from him, the OAE seized some of his and his clients' files and "private information," removed them from the "jurisdiction," and gave them to persons who did not have his permission to possess or control them is simply not true.

In light of our finding that respondent knowingly misappropriated client (Sapir) and escrow funds (Oestreicher), we recommend his disbarment, pursuant to In re Wilson, 81 N.J. 451 (1979) (disbarment for attorneys who knowingly misappropriate client funds) and In re Hollendonner, 102 N.J. 21 (1985) (disbarment for attorneys who knowingly misappropriate escrow funds).

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
Louis Pashman, Chair

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

APPENDIX

TABLE OF TRANSCRIPTS (I/M/O EDWARD D. FAGAN)

Docket No. DRB 08-143

1T	Transcript of Proceedings, dated August 18, 2005
2T	Transcript of Proceedings, dated November 15, 2005
3T	Transcript of Proceedings, dated November 15, 2005
4T	Transcript of Proceedings, dated November 16, 2005
5T	Transcript of Proceedings, dated January 18, 2006
6T	Transcript of Proceedings, dated February 17, 2006
7T	Transcript of Proceedings, dated March 14, 2006
8T	Transcript of Proceedings, dated March 15, 2006
9T	Transcript of Proceedings, dated March 21, 2006
10T	Transcript of Proceedings, dated March 22, 2006
11T	Transcript of Proceedings, dated May 3, 2006
12T	Transcript of Proceedings, dated May 4, 2006
13T	Transcript of Proceedings, dated May 5, 2006
14T	Transcript of Proceedings, dated May 24, 2006
15T	Transcript of Proceedings, dated May 25, 2006
16T	Transcript of Proceedings, dated May 26, 2006
17T	Transcript of Proceedings, dated June 13, 2006
18T	Transcript of Proceedings, dated June 14, 2006
19T	Transcript of Proceedings, dated June 15, 2006
20T	Transcript of Proceedings, dated June 27, 2006

TABLE OF TRANSCRIPTS (Continued)

21T	Transcript of Proceedings, dated June 28, 2006
22T	Transcript of Proceedings, dated June 29, 2006
23T	Transcript of Proceedings, dated August 23, 2006
24T	Transcript of Proceedings, dated August 24, 2006
25T	Transcript of Proceedings, dated December 7, 2006
26T	Transcript of Proceedings, dated February 5, 2007 (confidential)
27T	Transcript of Proceedings, dated April 19, 2007 (confidential)

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward D. Fagan
Docket No. DRB 08-141

Argued: November 20, 2008

Decided: January 16, 2009

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Boylan	X					
Clark	X					
Doremus	X					
Lolla	X					
Stanton	X					
Wissinger	X					
Total:	9					

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel