SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-405
District Docket Nos. XIV-2003-0753E and XIV-2004-028E

IN THE MATTER OF	:
JOHN F. VARLEY, III	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 21, 2009

Decided: July 8, 2009

Nitza I. Blasini 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 was before us on a recommendation by Special Master Charles H. Mandell, Esq. that respondent be "suspended from the practice of law for such time as the Supreme Court deems appropriate." The complaint charged respondent with two counts of knowing misappropriation of law firm funds (RPC 8.4(c) and In re Siegel, 133 N.J. 162 (1993)), practicing law while ineligible for failure to pay the annual attorney assessment to

the New Jersey Lawyers' Fund for Client Protection ("CPF") (RPC 5.5(a)(1)), failure to cooperate with the Office of Attorney Ethics' ("OAE") investigation of the grievance (RPC 8.1(b)), and recordkeeping deficiencies (RPC 1.15(d)).

The OAE urged us to recommend respondent's disbarment. For the reasons detailed below, we voted to dismiss the charges of knowing misappropriation of law firm funds and failure to cooperate with the OAE and to admonish respondent for practicing law while ineligible and failing to comply fully with R. 1:21-6, the recordkeeping rule.

Respondent was admitted to the New Jersey bar in 1985. He has no disciplinary record. On three occasions, however, he was placed on the ineligible list of attorneys for failure to pay the annual attorney assessment to the CPF. Specifically, respondent was ineligible from September 24, 2001 to November 7, 2001, from September 30, 2002 to March 11, 2003, and since September 15, 2003.[1]

We will first address an issue that respondent raised throughout these proceedings, an issue that appears to be of a constitutional nature (deprivation of due process), although

[1] The CPF report does not list the second period of ineligibility. Ex.OAE7, however, a letter from CPF Director and Counsel to the OAE, accurately lists the three instances of ineligibility.

respondent did not specifically characterize it as such. To be sure, we have no jurisdiction to entertain constitutional challenges raised before the trier of fact. They are to be preserved for the Court's consideration, as part of its review of the matter on the merits. R. 1:20-15(h). Nevertheless, nothing seems to prevent us from commenting on the issue, particularly because, as seen below, we find it meritless. The issue should be viewed in the context of the following procedural background.[2]

On July 31, 2001, Bennett Stern, a partner at Stern, Lavinthal, Frankerberg & Norgaard ("Stern, Lavinthal") filed a grievance against respondent with the District VB Ethics Committee ("DEC VB") (Suburban Essex) (Docket No. VB-2001-0050E). Respondent was of counsel to Stern, Lavinthal, when the alleged ethics infractions occurred. The OAE docket records list "MISREPRESENTATION [8.4(C)]" in the field titled "Alleged Violation Code."

On November 19, 2001, the grievance was assigned to DEC VB investigator Sandra Bograd. Her investigative report, dated November 21, 2002, recommended the dismissal of the grievance.

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[2] The procedural history of the grievance in this disciplinary matter was culled from the OAE's computer records, with one exception (the appeal of the dismissal of the grievance).

On January 14, 2003, the Office of Board Counsel ("OBC") docketed an appeal of the dismissal (Docket No. DRB 03-022). The appeal was filed by Robert Pinel, the attorney who replaced respondent at Stern, Lavinthal. On April 17, 2003, we reversed the DEC VB's decision and remanded the matter to the District VA Ethics Committee ("DEC VA") (Newark) for a new investigation. The letter of remand, dated April 25, 2003, directed the new investigator to "consider and resolve all issues raised by the grievant, both in the initial grievance and on appeal, with special attention to the eight points outlined in the appellant's notice of appeal."

Presumably because, at the time, the District IX Ethics Committee ("DEC IX") (Monmouth) had docketed a grievance alleging that respondent had practiced law while ineligible for failure to pay the annual attorney assessment to the CPF (Docket No. IX-2002-0039E), the Stern grievance was forwarded to DEC IX for consolidation of the two grievances, at least for purposes of investigation.

On June 10, 2003, DEC IX docketed the Stern grievance (Docket No. IX-2003-0017E). The "Alleged Violation Code" listed "NEGLECT/COMPETENCE/DILIGENCE [1.1-1.3]." On that same date, the grievance was assigned for investigation.

On December 15, 2003, DEC IX transferred the grievance to the OAE. It was docketed on that same date (Docket No. XIV-2003-0753E). This time, the "Alleged Violation Code" cited "MONEY-KNOWING MISAPPROPRIATION [1.15]." The "practicing while ineligible" grievance was also transferred to the OAE, on January 21, 2004 (Docket No. XIV-2004-0028E).

The Stern grievance was assigned to OAE investigator Cynthia Gehring on December 22, 2003. On two occasions during Gehring's investigation, February 4, 2004 and March 17, 2004, respondent was interviewed by the OAE. After Gehring left the OAE, both grievances were assigned to investigator Jennie Anne Rooth (May 28, 2004). A third OAE interview took place on August 3, 2004. Both the knowing misappropriation matter (Docket No. XIV-2003-0753E) and the practicing while ineligible matter (Docket No. XIV-2004-0028E) were consolidated for hearing.

At the hearings below, respondent raised what he contended to be a serious due process problem, namely, the destruction of the file developed during the 2002 investigation of the Stern grievance by DEC VB.[3]

Specifically, between the first and the second hearings (April 16 and May 28, 2008), respondent expressed his concern to the

[3] Respondent did not make any applications to the special master, however.

special master that a 2001 file containing the original Stern grievance and the resulting investigation conducted by DEC VB member Sandra Bograd had been destroyed. Under R. 1:20-9(j), ["a]ll Ethics Committees shall maintain files for one year after the date a matter is terminated . . . ." That grievance was dismissed in December 2002. Therefore, the file could have been destroyed in December 2003 (the actual destruction date is unknown).

Typically, the OAE keeps a copy of all files handled by district ethics committees. R. 1:20-9(j) provides that "all files maintained by the Office of Attorney Ethics . . . may be destroyed after five years following the date the matter is terminated . . . ." At the last ethics hearing, on June 25, 2008, the OAE presenter informed the special master that the OAE's copy of the file, too, had been destroyed and that, upon inquiry to the OBC, she had been informed that the Board's copy had been destroyed as well. R. 1:20-9(j) allows for the destruction of the Board's ethics appeal files three years after the termination of the matter. The Board's resolution of the appeal took place on April 17, 2003.

The only relevant document that was preserved was a copy of Bograd's investigative report. At the last ethics hearing, on June 25, 2008, the OAE presenter gave respondent a copy of the report, which, he alleged, he had not received at the time of

the dismissal of the grievance. Respondent told the special master that the cover letter transmitting a copy of the report to Stern, the grievant, had not listed him as receiving a copy of the report.[4] Neither the investigative report nor the letter was introduced into evidence. As pointed out by the presenter, however, respondent must have received a copy of the report because, in his answer, he acknowledged that he received "a copy of a decision by the local committee finding no merit to the claims."

Respondent summarized his concern as follows:

> We have a situation where an attorney [the committee investigator] was assigned [to] this matter, investigated for what looks to be like over a year, and made conclusions of fact that there was no wrongdoing and dismissed it. It's an appeal from that dismissal is [sic] how we got to where we are today.
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> My concern is what [sic] information that leads to the conclusion that it should be dismissed, is it beneficial to my position, is there anything by Katic or others, or Tolomeo that might affect the outcome of the

[4] When an investigative report recommends that a grievance be dismissed and the district ethics committee chair concurs with that recommendation, the committee sends a letter to the grievant containing the committee's disposition of the grievance and a copy of the investigative report. The respondent receives a copy of the letter, as well as a copy of the report. Office of Attorney Ethics, New Jersey District Ethics Committee Manual, Figure 25 (2006).

proceeding.[5] It's not about the letter [that led to the investigation]. It may be that was the first letter. My biggest concern is what was in [the investigator's] file, who did he [sic] talk to, what kind of statement did he [sic] have, what kind of things did he [sic] have which led to the conclusion which is somewhat contrary to the position taken in this hearing that there was in fact no wrongdoing.

[2T7-4 to 20.][6]

. . . .

From my perspective as an attorney . . . almost practicing for 20 years, 18 years, if you have an ongoing case that's being appealed, even if the underlying matter was dismissed, you don't destroy the file. It should have been preserved.

And given the fact that [the investigator] found no wrongdoing, the logical assumption is there must be something in there that led him [sic] to the conclusion, and what was it and could it help me here today and why I should have access to it.

. . .

Is that file exculpatory or helpful information which is no longer available to me? It has been destroyed.

[2T8-23 to 2T9-13.]

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[5] Katic and Tolomeo are the clients whose legal fees respondent is alleged to have kept for himself.

[6] 2T refers to the transcript of the ethics hearing on May 28, 2008.

> [I]t [the destruction of the file] clearly severely prejudices my ability to defend myself. There could have been statements in that file by Rachel Katic, Denise Tolomeo who contradicted themselves which really occurred here which is all significant where the key witness in the case (Ed Levinthal] is never spoke [sic] to by the Office of Attorney Ethics and now he is deceased. Ed Lavinthal is the partner who supervised me. He was the guy who I did battle with which I will talk about. Unfortunately he passed away. He was never interviewed, by anyone, never spoken to. I don't know what if he would have said [sic], or if this gentleman [sic] spoke to him. I don't know. This file is the starting point of the whole matter, the case was concluded, and it was restarted, and we know what the result is.
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> [3T8-18 to 3T9-7.][7]

In our view, respondent's position is ill-founded for two reasons. First, as to Katic's and Tolomeo's statements, it is likely that whatever relevant statements they gave to the investigator are contained in her investigative report (which, as indicated above, is not part of the record). Given that the investigator recommended dismissal, it is most likely that all exculpatory statements made by the individuals whom she interviewed are mentioned in her report. In any event, Katic's and Tolomeo's statements to the investigator would have no relevance to whether respondent should be exonerated from the

[7] 3T refers to the transcript of the ethics hearing on June 25, 2008.

knowing misappropriation charges. Instead, it is Ed Lavinthal's statements that would have been critical; he was the partner at Stern, Lavinthal who allegedly authorized respondent to handle the two matters and to keep the fees, ostensibly to compensate respondent for partnership and salary promises that had not been kept. The record does not reveal whether Lavinthal was interviewed by the DEC VB investigator. Respondent asserts that Lavinthal was not interviewed. The presenter did not correct or confirm this assertion. It is safe to assume, however, that the investigative report makes no mention of Lavinthal's version of the events. Otherwise, respondent would not have taken the position that Lavinthal's statements were essential to the presentation of his defenses to the charges of knowing misappropriation.[8]

Second, when we reversed the DEC VB's dismissal and remanded the case for a new investigation, the OAE reviewed the grievance from scratch. It interviewed respondent at least three times in 2004. The resulting complaint was based on the OAE's independent investigation, not on the DEC VB's investigation. Therefore, the destruction of the DEC VB file caused no

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[8] The special master asked respondent whether he had spoken to the DEC VB investigator. His reply was, "I reached out, but I have not spoken to her directly."

prejudice to respondent. In addition, it should be noted that, when the OAE began its investigation, Lavinthal was still alive (he died in 2005). Therefore, respondent himself could have obtained and offered any evidence that he deemed crucial to the issue of Lavinthal's consent to his use of the Katic and Tolomeo fees.[9]

In light of the foregoing, were we to have jurisdiction over constitutional issues raised at ethics hearings, we would have found that respondent's due process claim has no merit.

We now turn to the facts that gave rise to the disciplinary charges against respondent.

Respondent, a certified criminal and civil trial attorney, began his legal career as a law clerk to Judge Alfred Wolin, then the presiding judge of the Criminal Part, Law Division, Union County. Following his clerkship, he worked as an Assistant Prosecutor in Union County for a period of four years. He then joined the commercial litigation department of the law firm of Giordano, Halleran & Ciesla, where he eventually became a shareholder. He left the Giordano firm at the end of six years to take the position of senior vice-president and litigation director with Coldwell Banker, where, according to respondent,

[9] The record does not indicate whether the OAE interviewed Lavinthal.

the compensation was greater and the working hours were fewer. Desirous of doing more trial work, respondent left Coldwell Banker at the end of two years.

In November 1998, respondent became of counsel to Stern, Lavinthal, where he remained until August 2000. Among other things, Stern, Lavinthal did extensive work in the real estate area. At the relevant time, there were four real estate attorneys in its Livingston office and three or four in its Somerset County office. Partner Eric Kapnick, who left the firm in 2001, ran the Livingston real estate department. Kapnick testified that Lavinthal, now deceased, was the managing partner, "so to speak." According to respondent, Lavinthal was "basically" his supervisor.

Respondent described as follows the nature of his employment agreement with Stern, Lavinthal:

> At the time I was offered a position, one of my major concerns was compensation for [sic] clients, things like that. I had been a partner in a big law firm. I was not new to this. I was aware of what the issues are. Ed Lavinthal at the time represented that within a year if things went as expected I would become a partner. He also indicated that any matter I brought in I would receive a 10 percent referral fee which he told me at the time was the same standard fee for everyone in the firm who brought matters, associates and of counsel. Ultimately, it may have been different because I think we had testimony last time around other people might have been getting 25 percent I

> also had a very significant discussion with him about the types - -
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> . . . .
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> I had specific discussions [with Lavinthal] about handling criminal matters, handling potential personal injury claims, handling matrimonial matters, and handling general commercial litigation. The firm already had commercial litigation. That was no issue. There was some concern about the personal injury. He said as long as I felt I could handle it, they could be done . . . . I was hired to replace Walter Thomas who had been ill. I was told that the litigation department had no one running it and I would be running the litigation department. I could build a team, hire people in order to bring it back to where it was. Since Walter had left, there was [sic] some issues. That was how it was left in terms of what the process was going to be.
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> [3T14-14 to 3T16-13.]

Respondent testified that, much to his surprise, as soon as he started at the firm, he discovered that a Stern, Lavinthal attorney, Jim Cutler, also a commercial litigator, who is eight years his senior, thought of himself as the head of the commercial litigation department. According to respondent, "immediately there were issues in terms of exactly what my role was going to be and how it was going to work." He added:

> Ultimately my relationship with Stern, Lavinthal went from, you know, not so great to start and got progressively worse . . . .
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> . . . .

> By the one year anniversary in 1999, things were getting frustrating. We had not hired anybody. Walter Thomas who I replaced, his office was my office, probably about the size from this door to that wall. There was a wall of file cabinets, double decker file cabinets that had been literally not touched for probably two years . . . . Again I found myself basically day to day doing things I wasn't supposed to be doing. I was doing the associate work as well as the partner work on the files and that's the way it was. I -- you did your best. You live with it, you worked on it.
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> In November '99 I get to my one year anniversary. No one says a word, nothing. I approach Ed Lavinthal, what's going on, it's about a year. We talked about partner[ship], we talked about compensation changing, what's going on. Frankly, he said, I will get back to you, and then, you know, never heard another word, never received any compensation increase the entire time I was there, and was never made a partner obviously. I was of counsel to my departure.
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> That was the background scenario in which things were going on. Ed Lavinthal [and] I had a very heated relationship at times based on what I felt promises were made to me that they were not living up to.
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> [3T16-23 to 3T18-7.]

In January 2000, Rachel Katic, a client for whom Howard Wasserman, an associate in Stern, Lavinthal's real estate department, had handled a prior real estate closing, contacted Wasserman about a school disciplinary matter and a juvenile matter involving her son, Eric. Wasserman informed Katic that the two new matters were outside of his realm of expertise. He

referred Katic to respondent. Respondent told the special master that, since his association with Stern, Lavinthal, "this was the first what I will call significant or real juvenile slash criminal type case I was getting involved in."

Respondent talked to Lavinthal about handling the Katic case. At the time, respondent was also handling a personal injury case for his stepfather and another personal injury case involving a neighbor. According to respondent, Lavinthal was not "thrilled" about his handling the stepfather case, but had no problem with his handling the neighbor's case, because respondent was merely attempting to settle it. Allegedly, Lavinthal's disapproval stemmed from concerns about certain limitations imposed by their malpractice carrier on what type of cases the firm's policy afforded coverage.

Respondent testified that an exchange took place between him and Lavinthal about the Katic matters:

> He said he didn't want me doing criminal cases of that nature. I said, Ed, when you hired me, you knew I was a certified criminal trial attorney, you knew I had clients who was [sic] coming in. If I can't do criminal work, this isn't one of my clients, you are taking money, you haven't given a response to me about a raise, partnership, what's going on. I don't give a shit, excuse my French, about that. You are not doing the case, send it out. Walked out of the office a little bit aggravated. It may have been after lunch. I may have

literally walked out of the office at that point.

. . . .

Went home kind of stewed over it, and frankly came up with an idea which I thought would appease my concerns and keep Ed happy. I approached Ed a couple of days later. If I sent this Katic matter out, the best the firm is going to do if they send it to a certified criminal attorney is to get a referral fee. There was some discussion about referral fees, but the bottom line is if you turn it over to a certified criminal trial attorney, the referring attorney is entitled to a referring fee. It's not something new I made up . . . . I know it doesn't seem a lot, that four, five, six hundred bucks I would have generated, and more importantly, if you are going to give me a hard time every time I want to do something criminal, that's a little bit sticky, you know, I'm going to lose a lot of compensation and it's not what we agreed upon.

I approached him with the suggestion rather than refer it to an outside firm, I would handle it on my own and pay the firm back. He wasn't happy about that. We went back and forth, but he reluctantly agreed to it. He specifically told me at that point in time I want you to track your time so that I know what's going on and how much time you are spending on this case and how it's impacting what you do for us. I said, Ed, you know me very well. I said I come here every morning at seven o'clock, I said sometimes six o'clock, I leave at 4:30, that was my arrangement when I was hired, and some nights. I will get the firm work done and also do this as well. That's how it was left.

[3T20-15 to 3T22-13.]

Respondent testified that there had been no discussions on whether the representation would be "on his time." He continued testifying about his and Lavinthal's conversation:

> I knew [the Katic matter] would take me . . . time because it was a court matter. [Ed said] I want you to document your time so I know what you are doing on this case and when you are out of the office on personal matters and there was some discussion . . . if I'm correct about whether he was going to charge me like vacation time or sick time if I was out of the office for an extended period of time on the Katic matter. It wasn't a firm matter. Ultimately . . . I said, Ed, you do what you want to do. I live here. I'm here when you need me. It's not like [I'm] not going to do my job and it was left at [that].
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> [3T61-16 to 3T62-3.]

According to respondent, Lavinthal had told him, "I want to know every waking minute you spend on this file and how it's affecting what you do for me." Respondent complied by keeping time sheets, which Lavinthal would then review.

Respondent summarized his arrangement with Lavinthal as follows:

> That's really what happened with Rachel Katic. The firm didn't want the file. I was losing money. We came to an understanding. Was it an unusual understanding? Very unusual. My relationship with Stern, Lavinthal became very unusual very quickly.
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> [3T25-7 to 11.]

Respondent denied having any reason to hide his representation of Katic from the firm:

> I don't claim to be the brightest person in the world, but if you look at the situation very carefully, if I was looking to hide something from the firm and not have them know I was doing work outside the firm, why would I document my time on Stern, Lavinthal time sheet for them to see?
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> [3T24-22 to 3T25-2.]
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> If I was looking to hide something from the firm why would I do a status memo [Ex.OAE4 below] and tell them there was a matter out there I was doing.
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> [3T30-7 to 9.]
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> It's an example of the fact this was out in the open, it was known about, there were no secrets. They got a check made out to me signed over to them for a referral fee and never questioned it.
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> [3T31-2 to 5.]

Following his conversation with Lavinthal, respondent sent a letter to Katic, dated January 10, 2000, confirming a previously-discussed fee arrangement for the two cases: a flat fee of $3,000, payable, at Katic's request, in three installments: $500 on January 17, 2000, $1,000 on or before February 28, 2000, and $1,500 on or before March 31, 2000.

Katic paid the entire fee by way of five checks: a January 3, 2000 check for $500 (no.242), a January 20, 2000 check for

$500 (no.249), a March 3, 2000 check for $1,000 (no.276), a May 23, 2000 check for $500 (no.304), and a June 22, 2000 check for $700 (no.315), for a total of $3,200. Respondent explained that the fee exceeded the original $3,000 amount because the initial quote had been premised on the possibility of negotiating a plea resolution in the juvenile case. Eric, however, had wanted to go to trial. Accordingly, respondent had told Katic that the fee would have to be raised to $4,000.[10]

All five checks were made out to respondent. With the exception of check no. 249 for $500, dated January 20, 2000, they were deposited in respondent's personal checking account. Katic's first check after respondent's January 10, 2000 letter to her (check no. 249 for $500) was endorsed over to Stern, Lavinthal and negotiated by the firm. According to respondent, that check represented a "referral fee" to the firm, that is, his payment to Stern, Lavinthal for turning over the Katic cases to him.

Respondent testified that, after his discussion with Levinthal, he had a conversation with Katic about her two options, namely, have him represent Eric or choose outside counsel:

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[10] Respondent testified that Katic had not made a last payment, scheduled for July 2000.

> With regard to Rachel Katic's representation there is no question in my mind as I remember it distinctly that I had a discussion with Rachel Katic about the situation and I explained to her that she had two options. I can handle the case outside the firm and pay them a fee back or you need to pick another attorney or I can refer you to another attorney. At that point, Rachel said, no, John, you already did the one meeting with Eric, he likes you, he trusts you. I want you to stay. That's why the checks were made out to me and the fee went to me.
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> [3T24-9 to 21.]

Katic testified that she had no recollection of any discussions with respondent about his billing arrangement with the firm.

Bennett Stern, a partner at Stern, Lavinthal and the grievant in this matter, testified that Stern, Lavinthal's partners and associates are not permitted to practice law outside of the firm: "There is [sic] no extracurricular activities that has [sic] ever been authorized as long as I've been there and that goes back many years." Permitted, however, is the payment of a ten percent referral fee to the partner or associate who brings a case into the firm.

On cross-examination, Stern conceded that he had not been privy to respondent's and Lavinthal's discussions, during respondent's job interview, about compensation and career track. Similarly, he was not aware of any arrangement between

respondent and Lavinthal about respondent's handling of the Katic matters, with which he was not familiar. He also conceded that there was no "absolute rule" that special arrangements with non-partners in the firm would be communicated to him:

> I don't think that there is an absolute rule. It might have been said in passing, and I mean it's not a large firm so we work in close quarters as it were and we discussed many matters with Ed Lavinthal, and but [sic] I don't know that there was an automatic rule that if he had any arrangement with John [respondent] that [sic] he would have said that to me. I would be surprised if he didn't say it.
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> [1T23-16 to 23.][11]

Stern told the special master that he had filed a grievance against respondent because he had been informed that respondent had appropriated funds that belonged to the firm.

Eric Kapnick, a former partner at Stern, Lavinthal, denied that the firm allowed its attorneys to perform "outside work." Howard Wasserman, a former associate with Stern, Lavinthal, "never heard of it being done in the firm. Everything was the firm's." Both lawyers acknowledged that the firm paid "originating attorneys" a fee percentage, but had never heard of a situation in which the firm's attorney would pay a fee to the

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[11] 1T refers to the transcript of the ethics hearing on April 16, 2008.

firm for handling a matter outside of the firm. Wasserman received a "referral" fee for the Katic cases. He stated that referral fees were initially one-third, but were later reduced to twenty-five percent.

In August 2000, respondent left Stern, Lavinthal. According to respondent, Lavinthal had made his life "miserable" in his last year at the firm. He recounted how Lavinthal had asked him to stay one extra week to go over his cases with Robert Pinel, the attorney hired to replace him. Lavinthal promised respondent an extra two-week severance pay. Respondent agreed.

Respondent never got paid, however. When he called Lavinthal, Lavinthal told him, "Oh, we don't like what we saw after you left, we are not giving you the check." Respondent pointed out to the special master that, "[c]oincidentally, the amount of the check is about the same amount to which Rachel Katic and Denise Tolomeo [the client discussed below] paid me."

There was extensive testimony below about a memorandum from respondent to Kapnick, dated July 19, 2000, about one month before respondent's departure from the firm. The memorandum, bearing a reference "Litigation Case List," lists thirty-six cases that were being handled by respondent at the time and provides a status of each case. Item 22 reads as follows: "Eric Kadic [sic] - this was a juvenile matter brought in through

Howard [Wasserman] and had [sic] been resolved. We are awaiting final payment from the client."

As mentioned previously, Katic's last known payment ($700) occurred on June 22, 2000. On its face, thus, it appears that respondent misrepresented the status of the case, as well as who the rightful recipient of the fee was (the firm vis-à-vis respondent). Respondent explained, however, that, in fact, there was a final payment due from Katic. As mentioned previously, respondent testified that the $3,000 fee had been increased because Eric wanted to go to trial. According to respondent, Katic never made the last payment, due in July 2000. He stated that, after he left the firm, he forgot about it.

Respondent testified that the July 19, 2000 memorandum to Kapnick had not been prepared in contemplation of his departure from Stern, Lavinthal because, at the time, he did not know that he was leaving. Indeed, Pinel testified that the memorandum was not a complete list of respondent's files; there were two other lists.

The same month that respondent left, August 2000, the firm hired Pinel to replace respondent. Pinel took over respondent's files. Pinel, too, is no longer with Stern, Lavinthal.

At the last ethics hearing, the OAE presenter called Pinel as a "rebuttal witness for a very limited purpose . . . .

[P]erhaps he could enlighten as to why it was that Mr. Lavinthal and Mr. Varley were not getting along . . . ."

Pinel testified that his review of respondent's files uncovered some problems. For instance, information on case reports that respondent had given him did not match the status of the cases. He added that it had taken "a lot of time and a lot of work to clean up the issues and the messes that were found."

Pinel acknowledged that Lavinthal was "a difficult man to work for." Pinel would not call him "abusive," however.

On September 19, 2000, about one month after respondent's departure from the firm, Katic received a bill from the firm for $3,582.50 ($3,577.50 for professional services and $5 for expenses).[12] Katic then sent copies of her cancelled checks to the firm's accounting department.

The Katic invoice lists respondent's professional services, rendered on six occasions. According to Stern, invoices are prepared from time sheets kept by the attorney in charge of the file. The attorney submits to the accounting department a record of the type of the service performed, the date of the service,

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[12] There is no explanation in the record as to why the firm did not credit Katic with the $500 payment that the firm retained for itself (check no. 249).

and the time spent for the service. The accounting department then prepares an invoice based on that information.

The invoice bears the initials JFV (respondent's initials) next to each service and the initials EML (Lavinthal's) at the top. Stern speculated that Lavinthal's initials were on the invoice because "he was probably the originator of the file".[13]

The OAE charged respondent with knowing misappropriation of the Katic fee, which, according to the complaint, rightfully belonged to Stern, Lavinthal. The OAE also charged respondent with knowing misappropriation of another fee, generated from a real estate closing handled by respondent on behalf of Denise Tolomeo.

Tolomeo contacted respondent at Stern, Lavinthal on a recommendation from her friend, Lon Belvin, a longtime friend of respondent. Tolomeo wanted respondent to handle a real estate closing for her. She had no prior relationship with Stern, Lavinthal, a firm with an extensive real estate practice at the time.

According to respondent,

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[13] Although the significance of Lavinthal's initials on the invoice was not explored or made clear at the ethics hearing, the record shows that Wasserman, not Lavinthal, was the originator of the file.

> I went to Kapnick [the head of the real estate department], I have a potential real estate closing. [Kapnick said,] We don't have the time to do it. If you want to get it, do it yourself. Those were his exact words . . . . At the time they had three people doing real estate closings. I don't know whether they were busy, swamped, or what . . . . The bottom line is they were fully aware that the firm was not going to generate a fee as a result of the Denise Tolomeo situation.
>
> [3T26-24 to 3T27-9.]

According to respondent, he had told Kapnick that he, respondent, did not have the resources to represent Tolomeo, such as a trust account; Kapnick's reply had been, "You can use our people, but do it yourself." Kapnick signed all the checks for the transaction, including one check that is in evidence, trust account check no. 23825, dated July 29, 2000, in the amount of $166, representing reimbursement for expenses incurred by the firm in connection with the closing ($36 for overnight mail delivery and $130 for a recording fee). Kapnick did not sign a trust account check for a closing fee (allegedly) due to the firm, even though checks for legal fees are issued at the time of the closing.

Respondent charged Tolomeo $75 for the closing and $675 to review and modify a lease agreement in connection with the property. Tolomeo made out a check to respondent for $750, which he kept. According to Tolomeo, respondent had told her that, if

she were to write a check to the firm, it would cost her more. Respondent confirmed his statement to Tolomeo.

Respondent explained that he had not given Stern, Lavinthal a "referral" fee from the Tolomeo closing because referral fees are not allowed in real estate matters.

Asked by the presenter why Kapnick (and the firm) had allowed respondent to use the firm's letterhead, its trust account, checks, and staff, respondent offered the same answer as before, that is, Kapnick had instructed him to handle the closing himself and use the firm's trust account and employees. Respondent added:

> Again, Denise Tolomeo was a client that I brought to the firm. It was a client I was willing to give to the firm that essentially the firm didn't want and, you know, to pretend somehow later they [do not] know anything about it, there were notations made to the best of my recollection on the file that was opened to do the trust account work, that there would be no fees to Stern, Lavinthal in this case. The day after the closing, I brought breakfast in for the paralegals who helped me do the closing for the paralegals [sic]. There were outward signs that this was something out of the ordinary and different.
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> [3T29-6 to 17.]

At the ethics hearing, respondent did not specifically question Kapnick about their alleged discussion, asking him simply if he knew why he, respondent, had been designated by the

firm to handle the Tolomeo closing. Kapnick reply was, "I have no idea." Kapnick testified that he would have no authority to allow respondent to handle a case outside of the firm.

Tolomeo's was respondent's second closing in his professional career; his first was his sister's, while he was at Coldwell Banker.

Tolomeo, like Kapnick, received an invoice from Stern, Lavinthal after respondent left the firm. This time, the invoice bore respondent's initials, JFV, as the "originator" of the matter.[14] It listed an outstanding $950 fee for the closing and a zero balance for the expenses in the amount of $166. As indicated above, Kapnick, who signed all the closing checks, also signed a trust account check reimbursing the firm for $166 in expenses incurred with the closing.

The OAE charged that respondent's receipt of a $750 fee from Tolomeo constituted knowing misappropriation of law firm's funds.

The OAE also charged other less serious violations: practicing law while ineligible, failure to cooperate with the OAE's investigation of the grievance, and recordkeeping

[14] Although the invoice is dated July 7, 2000, it was sent to Tolomeo on November 28, 2000. Exhibit R4 is a letter from Stern, Lavinthal to Tolomeo, dated November 28, 2000, enclosing the invoice.

irregularities. Specifically, the OAE alleged, and respondent admitted, that, during respondent's period of ineligibility from September 2002 through March 11, 2003, he handled two closings. Respondent explained that "[t]hose two real estate closings were done from existing people just finishing up as I was transitioning in September 2002, October 2002." He claimed that he had forgotten that he had to "renew his fees" because, as of August/ September 2002, he was "pretty much done with the full-time practice of law." He had accepted a position with the American International Group ("AIG"), "overseeing complex shareholder litigation, the Disney case, the Enron case."

Respondent also admitted that he had handled another real estate closing after his September 2003 ineligibility. He explained that a friend had asked him to conduct a real estate closing scheduled for September 2003.[15] He had agreed, having forgotten to pay the CPF fee because, at that point, he had no intention of practicing law. The closing, however, had been delayed to October 2003, at which time he had become ineligible again.

According to respondent, he has no interest in becoming eligible again. The work he currently performs is unrelated to

[15] Respondent was eligible to practice law in September 2003, having cured a prior ineligibility in March 2003.

the practice of law. Since March 2005, he has been working with his friend Lon Belvin, who owns a ticket brokerage for, among other things, concerts and sports events.

The OAE also charged that respondent failed to comply with its numerous requests for the production of records/documents. Respondent denied this charge, stating that, on at least two occasions, if not three or four, he had met with OAE investigators to provide them with documentation and facts. He claimed that whatever he had in his possession he had turned over to the OAE. He pointed to a handwritten letter that he had sent to the OAE, in early January 2003, in reply to the OAE's requests for records. The letter listed responses to questions previously raised by the OAE and ended with "I believe this addresses all issues raised." According to respondent, the only letter he got from the OAE afterwards pertained to his distribution of funds in a matter unrelated to the ones at hand.

As to the charge that he failed to comply with the recordkeeping rules (failure to maintain a cash disbursement journal and client ledger cards, as well as failure to reconcile trust account, respondent testified that, when he began his own practice of law, in 2000, he was a novice at attorney recordkeeping, having never done it before. But, he added, he knows how to keep records because he has an accounting

background. He claimed that there was no need to keep client ledger cards because most of his clients paid him fixed fees. He contended that, although his trust account records were not strictly in compliance with R. 1:21-6, they were accurate: "I did it from somewhat of an accountant's perspective, maybe not the way a lawyer doing trust accounts should have done."

In its written summation to the special master, the OAE argued that the evidence amply demonstrated that Stern, Lavinthal did not allow its attorneys to handle cases outside of the firm and that respondent had knowingly misappropriated the Katic and Tolomeo legal fees that rightfully belonged to the firm.

Respondent, in turn, urged the special master to consider several factors in deciding whether he had knowingly misappropriated the Katic and the Tolomeo fees or whether there was an arrangement between him and Lavinthal that allowed him to handle the cases "on the side" and keep the fees generated from those two cases. Those factors are: (1) if Katic was indeed a client of Stern, Lavinthal and there was no special arrangement between respondent and Lavinthal, then why was the $500 payment by Katic not credited to her bill? Respondent suggested that it was because the $500 was clearly a "referral fee" to Stern, Lavinthal; (2) if the Tolomeo closing was the firm's matter, as

opposed to his, then why had it not been assigned to one of the several seasoned real estate lawyers in the firm, rather than to him, who had no experience in the real estate area?; (3) why did the OAE not interview Lavinthal as a witness, if the OAE was convinced that there was no agreement between him and Lavinthal about his handling of the two cases?; (4) if he had intended to steal the legal fees in the two matters, he would not have created a paper trail, that is, the letter memorializing the amount of the fee and time sheet entries; and (5) "just because the facts are out of the ordinary does not mean they are not credible."

As to the latter point, respondent explained to the special master that

> Stern, Lavinthal was not foreign to different arrangements. Even though the firm is called Stern, Lavinthal, Norgaard & Kapnick, Gary Norgaard was not a partner in the firm. Gary Norgaard had a separate office with a separate professional corporation which was a partner in Stern, Lavinthal. Norgaard was essentially the PC, not the individual. Those two firms, those two PCs, Stern, Lavinthal, Frankenberg & Norgaard & Kapnick & Norgaard PC routinely shared fees allocations based on the nature of the case.
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> [3T25-12 to 21.]

Respondent added:

> I will say it again, I'm not that stupid. If I was looking to get over, I'm not going to

> generate a bill and I'm not going to do a memo. If I was hiding something, I would have hid [sic] it. The retainer agreement, that was the initial plan. I had no intention of doing this matter myself. I did the Katic matter, I did the Tolomeo closing, it was to service the client because Stern, Lavinthal, Eric Kapnick, in June 2000, didn't want to be bothered with it. They knew they were getting rid of me I suspect and the whole nine yards.
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> [3T42-7 to 17.]
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> To think I would risk my license for $3,000 with all due respect is not something I would do. It's not my character, it's not my nature. I work for a client because the gentleman is a friend and they need my help. I get by when I can get it. That's who I am. I was a lawyer who went and charged lower fees because I felt they needed – certain people needed to have better. I was a quality lawyer at a fair price. I'm not going to steal $3,000.
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> [3T43-2 to 11.]

In his report, the special master expressed his concern for the destruction, albeit "inadvertent," of the DEC VB file (SMR11;SMR12). The special master remarked, however, that, except for Lavinthal, who died in 2005, who may or may not have provided a statement to the DEC VB investigator, all the other witnesses appeared at the ethics hearing and were subject to cross-examination by respondent. Accordingly, the special master

found, "the Respondent was given a fair opportunity to meet the charges levied against him."[16]

As to the less serious charges, the special master found no clear and convincing evidence that respondent failed to cooperate with the OAE's investigation. The special master noted that, although "[i]t does appear that there were difficulties in getting the Respondent to provide requested documentation in a timely fashion . . . there was a modicum of compliance by the Respondent and any measure of failure to cooperate does not, in my opinion, rise to the level of a violation of RPC 8.1(b) and/or R. 1:20-3(g)(4)."

Similarly, the special master determined that, although there might have been "technical record keeping violations in the manner in which the Respondent practiced law . . . I cannot state that there is clear and convincing evidence which would

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[16] Seemingly, the special master misunderstood the crux of respondent's argument, which appears to be two-fold: (1) had the witnesses provided contradictory statements to the DEC VB investigator and had he been given an opportunity to review them, he would have attempted to impeach their credibility by contrasting the former statements with the testimony given at the ethics hearing and (2) their statements might have provided him with exculpatory information. As to the latter, as seen supra, respondent's argument that his presentation of defenses has been prejudiced by the destruction of the file is, in our view, meritless.

rise to the level of violations of either R. 1:21-6 or RPC 1.15(d)."

On the other hand, the special master found that respondent violated RPC 5.5(a) by practicing law while ineligible.

With regard to the more serious charges, the special master found that the evidence clearly and convincingly demonstrated that there was no arrangement between respondent and Stern, Lavinthal concerning respondent's handling of the Katic and the Tolomeo matters and that, therefore, the firm had an interest in the $2,700 that Katic had paid directly to respondent ($3,200 minus the $500 turned over to the firm) and the $750 paid by Tolomeo. The special master concluded that respondent violated RPC 1.15(b) and (c) (failure to safeguard the firm's funds), as well as RPC 8.4(c) (conduct involving dishonesty and deceit).

The special master found, however, that respondent's conduct was the result of his misguided belief that he was entitled to the monies because he had been wronged by Stern, Lavinthal. The special master noted that, absent "extenuating circumstances, said conduct would, no doubt, result in disbarment," citing In re Wilson, 81 N.J. 451 (1979), and In re Siegel, 133 N.J. 162 (1993). The special master reasoned that, "[i]n this case, however, there is an extenuating circumstance - the Respondent believed, albeit improperly, that he had some

color of right to retain the funds. Nevertheless, there is no excuse for not accounting to the Stern Law Firm for the fees that he had received from two of the firm's clients - even if the Respondent believed that somehow said persons had later become his clients." It is not clear if the special master found that respondent's "misguided belief" was reasonable or unreasonable, an important factor, given that a mistaken, but reasonable belief that respondent was entitled to the monies could absolve him of the knowing misappropriation charges. See In re Rogers, 126 N.J. 345 (1991).

The special master recommended that respondent "be suspended from the practice of law for such time as the Supreme Court deems appropriate."

In its brief to us, the OAE argued that the special master had "misapplied the law," in that the "two positions taken by him, specifically, that Respondent was not credible but that he had a reasonable belief of entitlement to the firm's funds, are diametrically opposed."

Following an independent, de novo review of the record, we find that the special master properly concluded that respondent's conduct was unethical. In our view, however, the evidence does not clearly and convincingly establish some of the

charged violations, including those that respondent knowingly misappropriated the Katic and Tolomeo fees.

Findings on the charges of practicing while ineligible, failure to cooperate with the OAE, and recordkeeping deficiencies are not difficult to make. Respondent admitted that he conducted a few closings during his 2002 and 2003 ineligibility periods, explaining that he had forgotten to cure his ineligibility before he handled the matters. In October 2002, respondent was "transitioning," having accepted a position with AIG. He was "done" with the full-time practice of law. In 2003, he was "wrapping up" a closing that had been scheduled for September, when he was still eligible, but the closing had been delayed until October. He claimed that he had forgotten to pay the CPF fee.

Respondent also did not strictly follow the accounting steps mandated by R. 1:21-6. He did not maintain client ledger cards, did not keep a disbursement journal, and did not reconcile his trust account. That his records might have accurately reflected the status of his trust account funds does not excuse his failure to fully comply with the recordkeeping rule. It is true that his violation of R. 1:21-6 was not serious, but it was a violation nevertheless.

We dismiss, however, the charge of failure to cooperate with the OAE. Although the OAE sent respondent numerous letters

asking for certain records, he met with the investigators several times and provided what he had. As respondent pointed out at the ethics hearing, one cannot give what one does not have. Furthermore, the OAE did not take issue with respondent's final letter to that office, in which he addressed ten questions raised by the OAE and requested that he be informed if anything else was required of him. He heard nothing further from the OAE.

The more difficult issue is whether respondent knowingly misused $3,450 ($2,700 plus $750) that might have belonged to Stern, Lavinthal.

"Formal charges of unethical conduct . . . shall be established by clear and convincing evidence." R. 1:20-6(b)(2)(B). The clear and convincing standard was described in In re James, 112 N.J 580 (1988), as

> [t]hat which 'produces[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' [Emphasis added.]
>
> [Id. at 585.]

Because of the dire consequences that flow from a finding of knowing misappropriation, the record developed in such cases must be closely scrutinized to determine if the prosecuting authority presented clear and convincing proofs that the

attorney stole trust (or law firm) funds. As the Court stated in In re Konopka, 126 N.J. 225, 234 (1991),

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

Although the arrangement that respondent described appears unusual on its face and, as a result, raises a suspicion that he improperly availed himself of funds that belonged to Stern, Lavinthal, we must give fair consideration to troubling questions and issues raised by the record that tend to lend credence to respondent's contentions.

First of all, the issue of whether there was a "special arrangement" between respondent and Lavinthal must be analyzed in the context of respondent's employment agreement with the firm. Respondent's testimony, which was unrebutted, was that Lavinthal had promised him a partnership within a year and had hired him to run the litigation department, "build a team, hire people in order to bring [the department] back to what it was." They also discussed the possibility of respondent's handling criminal, matrimonial and personal injury matters. Respondent was an experienced litigator, a certified civil and criminal

attorney, and a former partner at a prestigious law firm, also one of the largest in Central Jersey. Much to respondent's surprise, he quickly discovered that his position in the firm was not what Lavinthal had represented. Another Stern, Lavinthal attorney, Jim Cutler, thought of himself as the head of the commercial litigation department. According to respondent, things quickly went downhill. His first anniversary with the firm came and went without the promised partnership and without a raise. He approached Lavinthal, to no avail. From November 1998 through August 2000, the date of respondent's departure from the firm, he never received a raise. He came in as of counsel and left as of counsel. Furthermore, his relationship with Lavinthal was strained, if not downright hostile.

It was in the midst of this unpleasant state of affairs that respondent undertook the representation of Eric Katic. Katic's matters were, in respondent's words, the first "significant juvenile slash criminal" cases that he would be handling since his affiliation with Stern, Lavinthal. He talked to Lavinthal about handling the matters. At first, Lavinthal did not give his consent. At a later conversation, respondent reminded Lavinthal that he knew that respondent was a certified criminal attorney and that criminal matters would be "coming into" the firm, presumably to be assigned to respondent; that

respondent would be "losing a lot of compensation" if Lavinthal did not allow him criminal cases; that Lavinthal was breaching their initial agreement; and that Lavinthal had not given him a response about his raise and partnership promise. Respondent then proposed to Lavinthal that, rather than refer the matter out, he, respondent, be allowed to handle the Katic cases, keep the fee, and give the firm a "referral fee."[17] At this point, according to respondent, Lavinthal relented. He instructed respondent to keep a strict record of the time spent on the cases, because he wanted to know how respondent's work for the firm would be affected thereby. Respondent reminded Lavinthal that he spent long hours at the firm and assured him that the firm's work would not be adversely affected by his work on the Katic matters. Respondent testified that, true to their

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[17] To be sure, the term "referral fee" appears inadequate to describe the compensation that respondent agreed to give Stern, Lavinthal. Except for matrimonial matters, the payment of a referral fee is permitted when an attorney refers one of his or her cases to a certified criminal or civil lawyer, who then sends a portion of the total fee to the referring attorney. R. 1:39-6(d). Nevertheless, because respondent, the presenter, and the attorneys who testified below used the term "referral fee" to characterize respondent's payment to Stern, Lavinthal, this decision will use that term as well. In fact, throughout the record, the words "referral fee" were liberally employed to describe also the fee percentage that the firm paid the attorneys who originated cases for the firm. Wasserman, for instance, testified that he received a "referral fee" (the presenter's and his words) for the Katic matters.

agreement, he had given the firm a $500 payment, representing the Katic "referral fee."

At the hearing below, the three attorneys who were with Stern, Lavinthal at the relevant time, Bennett Stern, Eric Kapnick, and Howard Wasserman, testified that Stern, Lavinthal would not have authorized any of its attorneys to handle cases privately and that they were not aware of any situations in which attorneys who had such authorization would pay a fee to their firms. The special master, too, remarked that, in his forty years of practicing law, he had never heard of such an arrangement.

That neither the three attorneys nor the special master have heard of such situations, however, does not automatically render them nonexistent. Unusual circumstances may breed unusual agreements. As respondent put it, "just because the facts are out of the ordinary does not mean they are not credible."

Of course, it is always possible that, in order to escape a finding that he took legal fees that belonged to his firm, respondent made up the existence of an odd agreement between him and Lavinthal. But it is equally possible that, having reneged on the promises made to respondent when he was hired, Lavinthal, as the firm's managing partner and respondent's "supervisor," entered into an arrangement with respondent that, although

unusual when viewed objectively, was not so uncommon in the context of the existing situation. Respondent was collecting on a broken promise; in lieu of giving respondent greater remuneration and partner status, Lavinthal might have allowed him to handle, on his own, cases that the firm had no interest in handling; and the prospect of the firm's receiving a "referral fee" from respondent added some attraction to the arrangement.

Moreover, Bennett Stern, one of Stern, Lavinthal's founding partners, conceded that there was no "absolute rule" that a special arrangement with one of the firm's attorneys would be communicated to him. It is possible, thus, that, for whatever reason, Lavinthal did not disclose his and respondent's special agreement to his partners.

We also gave special attention to the following extra considerations, in deciding whether the proofs clearly and convincingly demonstrate that respondent stole Stern, Lavinthal's fees:

(1) Undeniably, Stern, Lavinthal accepted the receipt of the $500 check that Katic made payable to respondent and that respondent endorsed to the firm. Although one could argue that the acceptance of the check could have been based on Stern, Lavinthal's belief that it represented a portion of its fee, why

was the $500 not credited to Katic? Stern, Lavinthal's invoice to Katic makes no mention of that payment. It is possible, then, as respondent suggested, that the $500 was indeed a "referral fee" from him. If it was, then the existence of the Lavinthal/respondent agreement was confirmed thereby.

(2) Was Lavinthal interviewed during the investigation of the grievance and, if so, what did he have to say about the alleged agreement? If he was not interviewed, then why not? Obviously, Lavinthal's statements about the existence or nonexistence of an understanding with respondent would have been critical in this instance. Lavinthal did not pass away until 2005; Stern's grievance was filed on July 31, 2001; on November 19, 2001, the DEC VB assigned one of its members to the investigation of the grievance; one year later, on November 21, 2002, the investigator completed her report and recommended that the grievance be dismissed; did the investigator interview Lavinthal and conclude that respondent's taking of the fees had been proper?

On remand from appeal, the grievance was re-docketed by the DEC IX on June 10, 2003; on December 15, 2003, the DEC IX transferred the matter to the OAE; the OAE docketed the case on that same date; on December 22, 2003, it was assigned to OAE investigator Cynthia Gehring, who met with respondent on

February 4 and March 17, 2004; on May 28, 2004, the case was reassigned to OAE investigator Jennie Anne Rooth; and, on August 3, 2004, respondent had another meeting at the OAE office. Lavinthal was still alive on those dates. Presumably, respondent had already provided his version of the events to the OAE investigators, given that he had been interviewed by them three times. By that point, thus, Lavinthal's statements had become critical. Yet, there is no mention of them in the record. Of course, it is possible that the OAE intended to interview Lavinthal, but, for whatever reason, was unable to do so before 2005, when he passed away. Either way, respondent's testimony about his understanding with Lavinthal was unrebutted.

(3) Respondent's handling of the Katic cases was not surreptitious. He was instructed by Lavinthal to keep track of the time spent on the cases and to account to him. Respondent did so, as seen by the detailed Katic invoice. Had respondent intended to hide his handling of the case from the firm or to convert the fee to his own use, he would not have prepared a letter memorializing the fee agreement and would not have submitted to the firm's accounting department a list of the date, nature, and time spent on each professional service rendered. In a sizable firm, with a full accounting department, his chances of escaping apprehension would have been nil.

(4) Respondent's handling of the Tolomeo closing, too, was overt. All the closing proceeds were deposited in the firm's trust account and disbursed by trust account checks signed by Kapnick, the head of the real estate department. Again, respondent could not have possibly intended to steal the fee from Stern, Lavinthal without being caught. Kapnick and/or the firm's real estate paralegals would have discovered respondent's foul play if the closing statement had listed a fee to Stern, Lavinthal and the fee had not been collected.

(5) If the Tolomeo fee belonged to Stern, Lavinthal, then why did Kapnick not sign a trust account check for the firm's fee at the time that the closing proceeds were disbursed? Was it because he knew that the fee did not belong to the firm?

(6) If Stern, Lavinthal wanted the Tolomeo closing for itself, why was respondent assigned to it, rather than one of the experienced attorneys in the real estate department? By everyone's account, Stern, Lavinthal had a strong real estate practice, both commercial and residential. Respondent, in turn, had handled a single closing before Tolomeo's -- his sister's. Is it possible that, after respondent's purported agreement with Lavinthal, respondent felt authorized to handle the Tolomeo case under the conditions imposed by Lavinthal (time records) and then went to Kapnick, who declined the closing because the

firm's real estate lawyers were too busy and the rewards (a small fee) were not that great? Could it be that Kapnick then said to respondent, "You originated this case; handle it yourself"? Would that not explain why the firm's trust account and the paralegals' services were used overtly for the closing and why Kapnick did not collect a fee for the firm?

(7) Last but not least, the special master erred when he concluded that there was no special arrangement between respondent and Lavinthal because, among other reasons, Katic denied knowledge of any discussions between her and respondent about his, as opposed to the firm's, handling of the two matters. Katic, however, did not testify that respondent had not told her about the arrangement; instead, she said several times that she did not recall having such discussions with respondent. Obviously, lack of knowledge and lack of recollection are two different things. In any event, Katic's lack of knowledge, even if established, would not have been relevant to the issue of whether respondent and Lavinthal had a special arrangement.

It is true that a few troubling questions cast some doubt on either the veracity or the plausibility of certain aspects of respondent's version of the events. For instance, he explained that he had not paid the firm a "referral fee" in the Tolomeo matter because referral fees are not allowed in real estate

matters. However, R. 1:39-6(d) does not include real estate matters in its prohibition of referral fees, only matrimonial matters. Also, respondent's payment to the firm was not strictly a referral fee, but more in the nature of a reward or compensation for allowing him to handle a case outside of the firm's realm. In some instances, the fee was more in the character of a "reverse origination fee," for lack of a better term. Specifically, if a client came to the firm for representation, if the firm professed no interest in taking on the representation, and if the firm allowed respondent to handle the case, to use the firm's resources, and to keep the fee, then respondent would give the firm some sort of monetary compensation. As such, the "fee" was not strictly a referral fee, as contemplated by R. 1:39-6(g), and, therefore, it would not have fallen within the rule's prohibition, even if there had been one.

Potentially troubling also is respondent's status report on the Katic case, in his memorandum to Eric Kapnick, dated July 19, 2000.[18] As mentioned before, respondent reported that the case had been resolved and that "[w]e are awaiting final payment

[18] The record does not explain why respondent's memorandum was addressed to Kapnick, who, by everyone's account, did not supervise respondent's work or caseload.

from the client [emphasis added]." A fair reading of that sentence would lead anyone to conclude that the firm was awaiting final payment, not respondent. Furthermore, the last payment from Katic had been made on June 20, 2000, one month before respondent's memorandum. At the ethics hearing, however, respondent explained that Katic did, in fact, owe one final payment, due in July 2000, and that he had forgotten about that payment after leaving the firm, in August 2000. For the use of the word "we", however, respondent had no plausible explanation.

Those troubling issues notwithstanding, it cannot be said that the evidence is "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy," that there had never been an arrangement between respondent and Lavinthal about the handling of the two matters and that, consequently, respondent stole from Stern, Lavinthal $3,450 in legal fees. In re James, supra, 112 N.J. 585. Strong suspicions alone do not suffice. In re Konopka, supra, 126 N.J. 234. We, therefore, determine to dismiss the charges of knowing misappropriation of law firm's funds for lack of clear and convincing evidence.

The only violations are, thus, respondent's handling of a few closings during two periods of ineligibility (RPC 5.5(a)(1))

and his failure to comply with some of the provisions of the recordkeeping rule, R. 1:21-6 (RPC 1.15(d)).

Practicing law while ineligible is generally met with an admonition if the attorney is either unaware of the ineligibility or advances compelling mitigating factors. See, e.g., In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status); In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during nineteen-month ineligibility; the attorney did not know that he was ineligible); and In the Matter of Juan A. Lopez, Jr., DRB 03-353 (December 1, 2003) (attorney practiced law while ineligible for nine months; no knowledge of ineligibility).

An admonition may still result even if the attorney commits other, non-serious ethics infractions, such as recordkeeping violations. See, e.g., In the Matter of Frank D. DeVito, DRB 06-116 (July 21, 2006) (attorney practiced law while ineligible, failed to cooperate with the OAE, and committed recordkeeping violations; compelling mitigating factors justified only an admonition, including the attorney's lack of knowledge of his ineligibility); In the Matter of William N. Stahl, DRB 04-166 (June 22, 2004) (attorney practiced law while ineligible and

failed to maintain a trust and a business account; specifically, the attorney filed a complaint on behalf of a client and made a court appearance on behalf of another client; mitigating factors were the attorney's lack of knowledge of his ineligibility, his prompt action in correcting his ineligibility status, and the absence of self-benefit; in representing the clients, the attorney was moved by humanitarian reasons); and In the Matter of Samuel Fishman, DRB 04-142 (June 22, 2004) (while ineligible to practice law, attorney represented one client in a lawsuit and signed a retainer agreement in connection with another client matter; the attorney also failed to maintain a trust and a business account; mitigating factors were the attorney's lack of knowledge of his ineligibility, his contrition at the hearing, his quick action in remedying the recordkeeping deficiency, and the lack of a disciplinary history).

A reprimand is usually imposed when the attorney who has practiced law while ineligible has an extensive ethics history, has been disciplined for conduct of the same sort, has also committed other, serious, ethics improprieties, or is aware of the ineligibility and practices law nevertheless. See, e.g., In re Marzano, 195 N.J. 9 (2008) (motion for reciprocal discipline; attorney represented three clients after she was placed on inactive status in Pennsylvania; the attorney was aware of her

ineligibility); In re Davis, 194 N.J. 555 (2007) (motion for reciprocal discipline; attorney represented a client in Pennsylvania when the attorney was ineligible to practice law in that jurisdiction as a non-resident active attorney and later as an inactive attorney; the attorney also misrepresented his status to the court, to his adversary, and to disciplinary authorities; extensive mitigation considered); In re Kaniper, 192 N.J. 40 (2007) (attorney practiced law during two periods of ineligibility; although the attorney's employer gave her a check for the annual attorney assessment, she negotiated the check instead of mailing it to the CPF; later, her personal check to the CPF was returned for insufficient funds; the attorney's excuses that she had not received the CPF's letters about her ineligibility were deemed improbable and viewed as an aggravating factor); In re Coleman, 185 N.J. 336 (2005) (motion for reciprocal discipline; attorney who was ineligible to practice law in Pennsylvania for nine years signed hundreds of pleadings and received in excess of $7,000 for those services); and In re Perrella, 179 N.J. 499 (2004) (Pennsylvania attorney advised his client that he was on the inactive list and then practiced law; the attorney filed pleadings, engaged in discovery, appeared in court, and used letterhead indicating that he was a member in good standing of the Pennsylvania bar).

An admonition, too, is the usual degree of discipline for recordkeeping irregularities, standing alone, so long as they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed checks to remain uncashed, and failed to perform one of the steps of the reconciliation process; no prior discipline); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (numerous recordkeeping deficiencies); In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards); In the Matter of Christopher J. O'Rourke, DRB 00-069 (December 7, 2000) (attorney did not keep receipts and disbursements journals, as well as a separate ledger book for all trust account transactions); and In the Matter of Arthur N. Field, DRB 99-142 (July 19, 1999) (attorney did not maintain an attorney trust account in a New Jersey banking institution).

The question that confronts is whether respondent should receive an admonition or a reprimand. At the ethics hearing,

respondent testified that, in 2002, when he handled two closings, he was switching from private practice to a full-time position with AIG and, therefore, had forgotten to "renew his fees." In 2003, when he agreed to handle a closing for a friend, he was still eligible to practice law. When the closing was postponed to the next month, he forgot to pay the annual CPF assessment because he had already made a decision to quit the practice of law. Under the circumstances, it does not appear that respondent made a deliberate decision that he was going to handle the closing despite his ineligibility. Rather, it seems that it did not occur to him to pay the CPF before conducting the closings.

As to respondent's recordkeeping shortcomings, the OAE auditors found three problems with his trust account records: no client ledger cards, no disbursement journal, and no trust account reconciliation. Respondent maintained some records, although not all of the records mandated by R. 1:21-6.

Because respondent's conduct does not seem to fall on the more serious end of the spectrum of the two found transgressions (practicing while ineligible and failing to comply with the recordkeeping rule), we believe that an admonition for both is sufficient discipline, particularly because some cases involving

both of the violations have resulted in admonitions (DeVito, Stahl, and Fishman).

We also 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John F. Varley, III
Docket No. DRB 08-405

Argued: May 21, 2009

Decided: July 8, 2009

Disposition: Admonition

Members	Disbar	Suspension	Admonition	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel