SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-436
District Docket Nos. XIV-99-299E
and XIV-99-381E

IN THE MATTER OF	:
	:
WARREN RANDOLPH KRAFT	:
	:
AN ATTORNEY AT LAW	:
	:

Decision

Argued: March 17, 2005

Decided: September 14, 2005

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

Michael P. Ambrosio appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (disbarment) filed by Special Master Robert C. Shelton, Jr., J.S.C. (ret.). The three-count complaint charged respondent with knowing misappropriation of clients' trust funds. For the reasons expressed below, we agree with the special master's recommendation.

Respondent was admitted to the New Jersey bar in 1989. At the relevant times, he maintained a law practice in Jersey City and Middletown, New Jersey.

In October 1999, respondent was temporarily suspended from the practice of law, pending resolution of these ethics proceedings against him. In re Kraft, 162 N.J. 6 (1999). His suspension continues to date. In May 2001, respondent was admonished for lack of diligence and failure to communicate with a client in a medical malpractice case. In the Matter of W. Randolph Kraft, DRB 01-051 (May 22, 2001). In June 2001, respondent was reprimanded for misconduct in five matters, including lack of diligence, failure to communicate with a client, failure to permit a client to make informed decisions about the representation, failure to communicate the fee in writing, and conflict of interest. In re Kraft, 167 N.J. 615 (2001). He was again admonished in October 2001, for gross neglect, lack of diligence, and failure to communicate with the client. In the Matter of W. Randolph Kraft, DRB 01-211 (October 2, 2001).

This disciplinary matter arose from a demand audit conducted by the Office of Attorney Ethics ("OAE") in 1999, after Francesca Smith, one of respondent's clients, filed a grievance in connection with his handling of her settlement funds. Following the audit, the OAE petitioned the Supreme Court for respondent's

temporary suspension, pending an investigation of charges of knowing misappropriation of client funds. As detailed below, in a certification to the Court in opposition to the OAE's motion, respondent made an admission that, in November 1998, he utilized $10,000 of Francesca Smith's settlement funds to pay for his child support obligations and other "divorce expenses." Respondent's then-counsel's accompanying letter-brief stated that respondent "had utilized approximately $10,000 of those funds for a three-month period to make payments on account of child support arrearages and other expenses relating to his divorce;" and that

> his utilization of funds in trust for Ms. Smith is excusable due to the loss of competency, comprehension and will that he suffered during the later part of 1998 and early 1999. Mr. Kraft's sense of reality had been severely affected due in large part to a series of actions and threats made against his safety, liberty and life by his ex-spouse and her father in connection with an exceptionally bitter divorce proceeding and custody battle that was coming to a head at the time.
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> [Ex.SM15;A3.]

Respondent's then-counsel further argued that respondent's psychologist would "adduce such proofs" to show respondent's "loss of competency, comprehension or will of a magnitude" to excuse him from the penalty of disbarment even of such egregious misconduct as

utilization of trust funds," citing In re Jacob, 95 N.J. 132 (1984), and In re Greenberg, 155 N.J. 138 (1998).[1]

As seen below, respondent later contended that, although he had invaded Smith's funds, he had done so inadvertently, as a result of inattention to his trust account responsibilities.

The three-count formal ethics complaint charged respondent with knowing misappropriation of Smith's and other clients' funds (Gloria Walker and Shanay Curry; Francisco Rodriguez and other plaintiffs in a suit against Merrill Lynch and other defendants; and Eleanor Ertel). Respondent conceded that he misappropriated Walker's, Curry's, and Smith's funds, but contended that inattention to his recordkeeping obligations during a tumultuous period in his personal life had caused him to negligently misappropriate those funds. Respondent denied having invaded Ertel's, as well as Rodriguez' (and the other plaintiffs') monies, claiming that they rightfully belonged to him as legal fees.

To bolster his contention that his invasion of Walker's, Curry's, and Smith's funds was unintentional and the result of "sloppiness" during what he labeled a period of "personal turmoil" in his life, respondent attempted to show that, at the time, he was suffering from post-traumatic stress disorder/syndrome,

[1] Respondent has been represented by three different attorneys during these proceedings.

anxiety disorder, and depression. Respondent blamed his mental illness for what he claimed to be a negligent misappropriation of clients' funds.

PROCEDURAL HISTORY

This matter has an extensive procedural history.

On July 30, 2003, the special master issued a procedural and scheduling order requiring, among other things, the parties' exchange of a list of all witnesses and copies of all documents to be offered in evidence, including experts' reports. Said documents were to be pre-marked as exhibits. The order set a deadline of August 30, 2003.

On September 3, 2003, at a pre-hearing proceeding on the status of the parties' compliance with the special master's order, the OAE made a motion for sanctions, pursuant to R. 1:20-5(b)(6), based on respondent's failure to comply with discovery provisions of the order.[2] In turn, respondent's then-counsel, Pamela Lynn Brause, requested a thirty-day extension to retain a psychiatrist and an accountant. The OAE opposed counsel's request. The OAE pointed out that respondent, who had been represented by another attorney during the investigation of this matter, knew at the

[2] R. 1:20-5(b)(6) permits the suppression of an answer, the barring of defenses, or the barring of any evidence that is in substantial violation of the case management order, discovery obligations, or any other order.

investigative stage the discovery requirements and, therefore, should not be afforded additional time to retain experts or obtain the records requested by the OAE.

After hearing the parties' arguments, the special master found that respondent's lack of compliance with discovery was "irresponsible" and ruled as follows:

> Based upon the lack of compliance with the procedural scheduling order as well as the general responsibility of the Respondent to comply with the rules respecting this type of proceeding, I'm going to bar the Respondent from presenting any psychiatric evidence whatever [sic]. Including any type of report that was previously available or made available to the Office of Attorney Ethics. As far as I'm concerned, that's just talk. And until there is a psychiatric examination, until there was an expert's report submitted to the Office of Attorney Ethics, there is no basis on which the Respondent should be permitted to present such psychiatric testimony . . . . Therefore, pursuant to the provisions of the rule providing for sanctions, I will bar any expert witness with respect to the Defendant's [sic] psychiatric condition as it may have affected his acts. And beyond any witnesses, I will bar any documentation since I will not allow that issue to be raised.
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> (1T26-1 to 19.) [3]

The special master also denied counsel's request to extend the time to retain a forensic accountant or "provide any further

[3] 1T refers to the transcript of the hearing on September 2, 2003.

witnesses that are known to or should have been known to the Respondent as of now."

On March 8, 2004, respondent's counsel filed a motion in limine, seeking to preclude the OAE from alleging knowing misappropriation of settlement funds from a matter captioned Rodriguez et al. v. Merrill Lynch Co. Inc. et al. ("the Rodriguez matter" or "the Merrill Lynch matter") as a separate cause of action.

Specifically, respondent alleged that, during the investigation of these matters, the OAE had docketed three separate grievances: Glass/Walker, also known as Walker/Curry (Docket No. XIV-99-381E), Smith/Ertel (Docket No. XIV-99-299E), and Rodriguez v. Merrill Lynch (Docket No. XIV-00-042E), thereby suggesting that each matter was a separate and distinct investigation. Yet, the OAE's formal ethics complaint listed only Docket Nos. XIV-99-299E (Smith/Ertel) and XIV-99-381E (Glass/Walker or Walker/Curry), thus allowing the inference that the Rodriguez grievance was not the subject of the complaint. Respondent pointed to the absence of a separate count for the Rodriguez grievance and to a mere reference to it in the first count of the complaint (Walker/Curry).[4]

[4] The first count of the complaint charges that respondent knowingly misused the funds of clients Walker and Curry and then utilized funds belonging to other clients – the plaintiffs in the Rodriguez matter – to cover that shortfall.

Respondent argued that, because the OAE had not provided him with adequate notice that it intended to pursue a separate knowing misappropriation charge relating to the Rodriguez funds, respondent had not produced documentation in defense of that charge. The motion sought to preclude the OAE from pursuing that charge or, in the alternative, to compel the OAE to amend the complaint to add a separate charge.

The OAE opposed the motion, which the special master denied. The special master ruled that "[a]dequate notice of the violation is set forth in the complaint. Moreover, the nature of these proceedings is investigatory as well as fact-finding."

On April 5, 2004, respondent's counsel moved before the special master for an adjournment of the first ethics hearing (scheduled for April 8, 2004), a stay of the proceedings, and the restoration of respondent's defenses, pending an appeal to the Supreme Court. The special master denied that motion as well.

On April 6, 2004, respondent's counsel notified the special master that respondent had been involved in a car accident. As proof of the accident, counsel provided copies of respondent's records from a hospital emergency room and of a prescription given to him. Apparently, respondent had sustained a sprained shoulder. The OAE took the position that respondent had contrived a medical excuse to delay the ethics proceedings and to create a scenario to support another application to restore his defenses.

The special master, nevertheless, adjourned the hearing to April 12, 2004. The rescheduled date was limited to hearing respondent's counsel's motions, which the special master denied. In addition, the special master ordered respondent to provide a factual statement of the accident that caused the injuries that allegedly prevented him from appearing at the hearing. Although respondent was not present on April 12, 2004, he had authorized counsel to proceed in his absence. Respondent never provided the narrative required by the special master.

After the special master denied counsel's motion for a stay pending an appeal, counsel filed a motion with the Supreme Court on April 23, 2004, seeking leave to appeal the special master's decision and a stay of the proceedings. The motion also sought to vacate the special master's order barring respondent from offering evidence of his defenses. On April 30, 2004, the Court denied respondent's motion for leave to appeal.

On the next scheduled hearing date before the special master, May 3, 2004, respondent's counsel filed a motion for an adjournment of the hearing until at least May 11, 2004, when, according to respondent's doctor, respondent was able to return to work.[5] Respondent was not present at the May 3, 2004 hearing.

[5] Although the record does not disclose why respondent was out of work, apparently it was due to the condition that required his visit to the emergency room.

Although the special master received some documentation about respondent's purported accident -- proof that respondent had been seen at an emergency room, a blank prescription form with the notation "Please excuse from work up to May 4, 2004," and a prescription for medication -- the special master denied the motion, finding no good cause for respondent's absence:

> There is no indications [sic] as to why [respondent] can't be here, why he cannot assist counsel. I'm not sending him off to do heavy work. The involvement would be to sit next to counsel and listen to what's going on, point out to her anything that she might need to know, be available in case she had a question of him.
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> And he simply hasn't appeared, and he's given no reason why he is not here, other than the documentation I've just referred to, and I'm satisfied that this establishes that he has voluntarily absented himself from being here today. His presence is mandatory; but if he chooses not to be here, and in the face of that requirement, it does not oust this hearing from proceeding.
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> (3T22-3 to 18.)[6]

The hearing went forward as scheduled, with a continuation date set for the next day, May 4, 2004.

On May 4, 2004, respondent's counsel renewed her application for an adjournment until respondent was able to assist her in his defense. Counsel informed the special master that respondent was taking pain medication that made him "nauseous" and "dopey," and,

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[6] 3T refers to the transcript of the hearing on May 3, 2004.

therefore, unable to drive and to write. Counsel told the special master that she was having great difficulty cross-examining witnesses and putting forward a defense without respondent's ability to participate in the proceedings. The special master denied the application on the ground that the documentation that he received was insufficient to excuse respondent's absence:

> Now, if he were here and there were some difficulty in your communicating with him, or if he could not manage to remain here, that might be a basis for me to reconsider this. But this man simply hasn't been here, hasn't shown up. He is ambulatory, he is mobile, he is articulate, he is all of the things that I think are necessary for you to have him offer you assistance. He hasn't demonstrated any substantial injury, as I see it.
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> (4T13-3 to 11.)[7]

The hearing proceeded in respondent's absence and continued into the next day, May 5, 2004. At the beginning of the May 5, 2004 hearing, respondent's counsel once again made an application for an adjournment, stating to the special master that respondent had been "prejudiced by his inability to assist [her] in this event and [that] there were areas of inquiry that had been developed that [she] didn't necessarily anticipate and had not previously conferred [about] with [respondent]." At that time, counsel informed the special master that, although respondent had been seen in the emergency room, he had not been involved in a

[7] 4T refers to the transcript of the hearing on May 4, 2004.

car accident. Nothing indicates that counsel was aware of this circumstance. The special master denied counsel's application. On that day, the OAE formally rested its case.

Respondent appeared and testified at the next hearing date, May 11, 2004. First, however, he attempted to have his counsel discharged and to obtain an adjournment to engage another attorney. The special master denied the adjournment request, but gave respondent the option of either proceeding pro se or continuing with present counsel. Respondent elected to proceed with counsel.

On May 26, 2004, respondent sent an e-mail to the special master, again indicating his desire to discharge his attorney and asking for an adjournment to give him the opportunity to retain new counsel.

The parties reconvened on May 27, 2004, at which time counsel made an application to be relieved from respondent's representation. Counsel cited respondent's stated displeasure with her performance and the difficult situation that a denial of her application would create because of her and respondent's possible disagreement on strategy determinations. The special master again denied respondent's request for an adjournment and gave him the option of proceeding pro se on that day or continuing to be represented by present counsel. Respondent chose to proceed with counsel.

On that same day, counsel petitioned the Supreme Court for leave to appeal the special master's decision. On June 7, 2004, the Court granted the motion. The Court relieved counsel from the representation and stayed the proceedings for twenty days to allow respondent to retain a new attorney. The Court's order precluded the relitigation of all applications previously decided by the special master.

At the last day of hearing, June 29, 2004, respondent appeared pro se.

Although the special master barred respondent from introducing any expert opinion or documentary evidence on his alleged mental disability, the OAE stipulated into evidence both a preliminary and an amended psychological report prepared by Luis R. Nieves, Psy.D., a clinical psychologist, diagnosing respondent with traumatic stress syndrome. Moreover, respondent was allowed to testify about his mental condition.

Respondent testified at length about problems he encountered as a result of his separation and divorce. According to respondent, after his wife left him, in early October 1996, his life took a downward spiral and did not improve until the end of 1999, when he started treatment with Dr. Nieves. Respondent highlighted several events in his life, which, he claimed, caused him to experience an emotional breakdown. One such incident occurred when he was physically assaulted by his father-in-law.

Respondent reacted in self-defense and, as a result, was arrested. Respondent also claimed that he feared for his life, based on direct verbal threats from his ex-wife. According to respondent, his wife left hundreds of threatening messages on his answering machine; threatened to kill him and to ruin him professionally; made two attempts to "run [him] down;" and broke into his house, broke windows and a door, took personal items, and ransacked his house.

Respondent also believed that his wife was trying to prevent him from having a relationship with his children. Respondent claimed that these problems caused him to be inattentive to his law practice; he stopped going to his office, stayed at home, and "isolated" himself from others.

Respondent testified that he ceased paying attention to his mail and to his attorney records, and became inattentive to the business side of his practice. From October 1996 through 1998 and early 1999, he stopped maintaining his accounts, opening his mail, looking at bank statements, and keeping client ledgers. As a result, he claimed, he made serious recordkeeping errors. He testified that his inattention to his attorney records made him unable to recognize which funds were trust funds. He also testified that, because of his lack of records, he attempted to keep information in his head, which resulted in a "multitude of errors." He claimed that he was disoriented, confused, and

preoccupied with his own well-being, instead of paying attention to the maintenance of his attorney accounts.

More specifically, respondent testified that he did not keep a trust receipts or disbursements journal, did not open or review his bank statements, did not reconcile his accounts, did not maintain a running cash balance in his trust account checkbook, did not maintain client ledger sheets, and commingled personal and trust funds. He admitted that all of the above procedures were required to safeguard client funds. He claimed, however, that he always verified his trust account balance with the bank, before writing checks.

Notwithstanding respondent's inattention to his practice during this time, he continued to practice law. He admitted that he should not have been practicing law at that time, but claimed that he did not realize the magnitude of his neglect and the problems it was causing.

Respondent claimed that his neglect of his practice caused him to lose income, clients, and staff. He feared being arrested and was, in fact, arrested because he fell behind in his child support payments. He also lost the two people closest to him: his father in early 1996, and his grandmother in September 1998.

Respondent contended that his mental condition also affected his daily life. His mortgage fell into arrears, the mortgage loan was the subject of a foreclosure, and he failed to keep track of

his personal accounts. In addition, he stopped taking care of his house and of his personal hygiene, and stopped communicating with family and friends. Looking back, he realized that, at times, he was in a dream-like existence, and was conducting himself in a "bizarre" manner.

According to respondent, Dr. Nieves diagnosed him with post-traumatic stress disorder, and Dr. Donald Williams diagnosed him as suffering from depression, anxiety disorder, and post-traumatic stress disorder. When questioned whether his mental illness prevented him from understanding the difference between right and wrong during his period of "personal turmoil," respondent did not answer, claiming that he was not an expert in the area of mental illness. Similarly, he could not say whether his mental illness resulted in a loss of competency. While initially he claimed that he could not answer if his doctors would have testified that he suffered from a condition that prevented him from knowing right from wrong, he later stated that he believed that one of his doctors might have given an opinion that he "suffered from a lack of competency and knowing right and wrong."

Respondent's doctors' reports do not state that respondent did not know right from wrong. The September 9, 1999, preliminary psychological report of Dr. Nieves states, in relevant part:

> The essential characteristic of the divorce process was its violent nature. While many divorces can be characterized as stressful and emotionally draining, Mr. Kraft's was, in addition, exceptionally violent.[8]
>
> . . . .
>
> These events represent a sustained period in which Mr. Kraft believed he was in danger of losing his life or being physically harmed or professionally ruined. Mr. Kraft's presentation of events are [sic] convincing that he believed he was in significant danger. Such a belief would reprioritize an individual's moral and ethical considerations.
>
> In assessing traumatic stress syndrome an essential element is that the individual must have been exposed to a traumatic event that involved actual or threatened death or serious injury to which they respond with intense fear, helplessness or horror. It is likely that the prolonged exposure to these life threatening conditions produced a cumulative stress response. This condition is characterized by periods of anxiety, sometimes panic, difficulty concentrating, and impaired judgment and often behavioral dysfunction.
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> Mr. Kraft's post-trauma adjustment appears positive and will be the focus of future treatment and evaluation.
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> [Ex.C38a.]

On March 13, 2000, Dr. Nieves prepared an addendum to his earlier report, indicating that he had met with respondent periodically, but consistently, over the preceding six months,

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[8] The report references the attack by respondent's father-in-law, his wife's constant threats of physical assault, threats on his life and professional ruin, verbal harassment, and his several arrests for non-payment of child support.

and that his earlier report was still valid. Dr. Nieves determined that the foundation of respondent's condition rested on the belief that he was in danger of losing his life, as well as his professional and financial capabilities. The addendum stated, in relevant part:

> The transference of the initial traumatic event (fear of losing his life) to his current fear of being unjustly portrayed resulting in an unjust prosecution has maintained the elements for the diagnosis of Post Traumatic Stress Syndrome. Consequently, Mr. Kraft, while improved still, has the cognitive impairments characterized by memory lapses, judgment errors, and diminished cognitive (executive) functions.
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> In regard to your specific question "whether Mr. Kraft's psychological condition could be the basis on which he could commit unintentional errors in his bank accounts", the answer is yes. In a state of psychological trauma there are lapses of information and of sequences in time. Consequently, information can get reorganized by the executive functions of the brain which is suppose[d] to keep events, sequences and the time relationships in order. These lapse patterns could occur intermittently so that some functions are correctly executed at some times and others are not at other times.
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> [Ex.C38b.]

COUNT ONE

I - THE WALKER/CURRY MATTERS [9]

At various times, respondent maintained five trust accounts: account number 8216401256 at First Fidelity Bank ("trust account #1"); account number 190103973 at Summit Bank/United Jersey Bank ("trust account #2"); account number 6103792310 at Bank of New York ("trust account #3"); account number 2030000467381 at First Union National ("trust account #4"); and account number 2030000467831 at First Union National ("trust account #5").

Raymond Kaminski, formerly an investigative auditor with the OAE, testified about his investigation of respondent's conduct. Kaminski reviewed respondent's financial records; some were kept by respondent, but the majority were obtained from the various banks where respondent had funds on deposit. Kaminski reviewed bank statements, deposit tickets, and cancelled checks. Although Kaminski requested respondent's trust account ledgers, respondent claimed that a number of his records had been destroyed by his wife or were otherwise missing.

Kaminski utilized a computer program known as "trust account analyzer." According to Kaminski, this program is "a database in conjunction with a spreadsheet and the information was gathered or

[9] These matters are sometimes identified in the record as the Glass/Curry matter or the Glass et al. v. Port Authority of New York and New Jersey matter.

inputted from the bank statements, deposit tickets and cancelled checks regarding Mr. Kraft's attorney trust account . . . ."

In April 1995, in the Glass et al. v. Port Authority of New York and New Jersey matter, respondent obtained settlements on behalf of several plaintiffs, including two minor clients, Gloria Walker and Shanay Curry. Walker's and Curry's net settlements amounted to $16,321.69 and $51,571.69, respectively. By court order, respondent was required to deposit those funds with the Surrogate of Hudson County.

On May 1, 1995, respondent received and distributed net settlement checks to all plaintiffs, with the exception of Walker and Curry. On that same date, respondent deposited in his trust account #1 the gross settlement amounts for the two minors: $22,500 for Walker and $69,500 for Curry. According to respondent, because he was unfamiliar with the procedural requirements of "friendly hearings," he did not know that the proceeds had to be placed with the Surrogate. In addition, he claimed, "the court had not provided me a copy of the filed order that I needed in order to disburse the funds to the Surrogate. I did not follow up to obtain the order, and the funds remained in my account."

On June 1, 1995, respondent transferred $74,920.40 to his trust account #2, representing $67,893.38 in net settlement amounts for Walker and Curry plus $7,000 in unidentified funds.

According to respondent, the transfer of the funds to a different bank had been prompted by the relocation of his office from Hoboken to Jersey City.[10] It is undisputed that, for more than two years, the $67,893.38 Walker/Curry funds remained untouched in respondent's trust account #2.

Starting in September 1997, however, respondent's trust account balance fell below the $67,893.38 required to be kept in trust for the minors. According to Kaminski, those funds were depleted "over time" and infused with other client's funds to raise the account balance.

Kaminski's review showed that respondent made two disbursements to himself on September 5, 1997, each for $3,121.88. Neither check referenced a client matter. With those disbursements, the balance in trust account #2 fell to $64,514.40, thereby causing an invasion of the Walker/Curry funds.

On September 19, 1997, respondent made two $11,000 deposits, for clients Clarke Livingston and Veda Wickham. These deposits brought the trust account balance to $86,514.40.

On February 27, 1998, the balance in trust account #2 was $73,079.16. According to Kaminski, on March 11, 1998, respondent drew three checks from the account: one to Summit Bank ($4,500),

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[10] The bank where trust account #2 was kept is cited in the record as either Summit Bank or United Jersey Bank.

and two to himself ($937.50 and $8,693.63 – apparently to cover an overdraft in his business account). All three checks referenced a matter titled Palmieri. These three disbursements brought the account balance to $58,948.03, approximately $9,000 less than the $67,893.38 Walker/Curry funds. According to Kaminski, at the time of these withdrawals, a $40,000 settlement relating to Palmieri still had not been deposited into the trust account. The Palmieri settlement was deposited on March 23, 1998, twelve days after the above disbursements, raising the trust account balance to $98,948.03. By May 1, 1998, that balance had been reduced to $77,415.77. Kaminski concluded that respondent had advanced his fee in Palmieri by using a portion of the Walker/Curry funds, a conclusion that respondent disputed. Respondent questioned the accuracy of Kaminski's analysis and claimed that he would not have made a disbursement to himself unless he believed that the Palmieri settlement funds had already been deposited.

On May 8, 1998, respondent issued a $31,415.83 check to Jeffrey Nichols, Esq., the attorney for Palmieri. The check was drawn against the Palmieri funds. That check caused the trust account balance to drop to $45,999.94, well below the $67,893.38 Walker/Curry funds. One week later, on May 15, 1998, a $7,500 deposit for client Desai raised the account balance to $53,499.94. On that same day, respondent wrote a check to himself for $7,500,

without correlating it to a client matter. Kaminski's reconstruction of that trust account activity also references a "returned deposit check" for $7,500 on May 22, 1998. From May 8, 1998 until July 14, 1998, when respondent zeroed out the account by purchasing four bank checks totaling $24,045.53, the account balance remained below the $67,893.38 that had to be kept intact for Walker and Curry. The amounts and payees of the four bank checks were as follows: $4,730.59 to Atul Desai; $4,500 to respondent; $8,000 to Cynthia Dyson; and $6,814.94 to respondent's trust account #3 (Bank of New York).

On June 28, 1999, respondent sent the Walker/Curry funds to the Surrogate by issuing a check against his trust account #5 (First Union National Bank). The complaint charged that this disbursement invaded settlement funds obtained on behalf of the plaintiffs in the Rodriguez et al. v. Merrill Lynch Co. Inc. et al. lawsuit. Respondent, in turn, contended that he had used his own monies -- legal fees earned from the Rodriguez suit – to fund the Walker/Curry disbursements. [11]

For his part, respondent admitted that the Walker/Curry funds were not kept inviolate in his trust account, but denied any knowing misappropriation. Although he had drafted the orders in the matters, he claimed that he was unfamiliar with the

[11] The details of the Rodriguez matter are described below.

"friendly" process, because it was the first one in which he had been involved. As stated earlier, respondent testified that, when he did not receive filed orders from the court, he did not follow up on the matters and, over the years, forgot that he was holding funds on behalf of the minors. He claimed that his failure to send the monies to the Surrogate was an oversight. It was only in 1999, when he received a call from Gloria Walker's mother, that it came to his attention that the funds had not been placed with the Surrogate. He promptly forwarded a check to the Surrogate by utilizing his own funds. Respondent stated that he had wire-transferred the balance of his legal fees from the Rodriquez/Merrill Lynch matter into his trust account so that he could turn over the Walker/Curry funds to the Surrogate. As seen below, respondent vigorously maintained that funds from three settlements obtained in the Rodriquez/Merrill Lynch matter were rightfully applied to his legal fees, as authorized by the retainer agreement executed by the plaintiffs.

Later, when the Surrogate informed respondent that the interest that should have been accruing on the Walker/Curry funds amounted to more than $20,000, he paid that sum as well, allegedly with his own monies.

Although respondent claimed that he had forgotten about the Walker/Curry funds, he conceded that he received them prior to the period of his "personal turmoil," and that his attorney

records were not in poor condition at the time. He maintained, however, that he would never knowingly utilize client funds for his own purposes.

As to the invasion of the Walker/Curry funds that began in September 1997, respondent contended that his serious inattention to his recordkeeping responsibilities caused him to negligently misappropriate those funds.

II - THE RODRIGUEZ/MERRILL LYNCH MATTER

In Rodriguez et al. v. Merrill Lynch Co., Inc. et al., an employment discrimination lawsuit, respondent represented 167 plaintiffs. In addition to Merrill Lynch, respondent also joined as defendants, three employment agencies identified throughout the record as Action, Pomerantz, and Progressive. These agencies entered into settlement agreements with the plaintiffs, providing for equitable and monetary relief. The settlement monies were paid by checks made out to respondent as the attorney for all plaintiffs.

The Pomerantz settlement agreement stated, in relevant part:

> Pomerantz shall pay to the Named Plaintiffs the sum of $36,000 ("Settlement Sum") by check to be made payable to W. Randolph Kraft, Esq., as attorney for all persons named as Plaintiffs in Rodriguez, et al. v. Merrill Lynch Co., Inc. et al. . . . which shall be distributed and allocated as per agreement among Kraft, The Named Plaintiffs

> and all other persons named as Plaintiffs in the Action and the proposed Amended Action.
>
> [Ex.C31¶4.a.]

The Progressive settlement agreement likewise required the distribution of the $150,000 settlement "as per agreement among KRAFT and PLAINTIFFS and all other persons named as plaintiffs in the Amended Civil Action."

As to the Pomerantz plaintiffs, respondent began representing them in May 1998. According to respondent, he ceased representing them around June 18, 1999, when he received the $36,000 Pomerantz settlement check. Respondent also began representing the Progressive plaintiffs in May 1998. He received the $150,000 Progressive settlement check on June 11, 1999. In March 1999, he received a $20,000 Action settlement check, which he kept as attorney's fees. Respondent kept the entire settlement amounts, claiming entitlement under the retainer agreement. A blank retainer agreement attached to respondent's reply to the grievance states, in relevant part:

> In the event that the attorney recovers for the client a sum of money, the attorneys' fees for his services shall be paid immediately out of this sum, even if a separate recovery of attorneys' fees is contemplated, and shall be the greater of "a percentage contingent fee" or "a reasonable hourly fee in a contingent case" as those terms are defined in this section, or the attorney fees and costs awarded by the court or specifically paid in a settlement paid by the defendants.

> A "percentage contingent fee" shall be defined as thirty three and one third percent (33 1/3%) of the recovery if the case is concluded before any appeal is taken, and forty percent (40%) if any recovery after an appeal is taken by any party.
>
> Where a separate recovery of attorneys' fees or costs or both is secured after an initial recovery of damages for the client, "the recovery" for purposes of computing the attorneys' fees shall include such later recovery of fees or costs or both and shall include the value of any nonmonetary relief. The client recognizes that this separate recovery of fees and costs may be significantly larger than the initial recovery of damages for the client.
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> A "reasonable hourly fee in a contingent case" shall be defined as the attorney's fees computed at his regular hourly rates (at the attorney's discretion, either using those rates which were current when the services were performed and adding interest at the attorney's regular rate for paying clients or using those rates current at the time the payment is made) plus a contingency enhancement factor of thirty percent (30%).
>
> [Ex.C29Ex.B4.]

Respondent stated that, although the Progressive, Pomerantz, and Action claims were settled in early 1999, the plaintiffs continued to have claims against Merrill Lynch. Eventually, Merrill Lynch settled the case for an undisclosed amount.[12]

[12] The settlement is subject to a confidentiality agreement.

Respondent testified that his retainer agreements in the Merrill Lynch matter were different from those he typically used in personal injury matters; they entitled him to advance fees to himself. Respondent claimed that he used the advanced fees to continue to prosecute the main portion of the case that had not settled. Respondent prepared a computerized statement of legal services provided to the 167 plaintiffs in the Merrill Lynch matter. That document showed that he worked on the matter from May 2, 1998 to October 8, 1999, for a total of 3,440.6 hours.[13] Thereafter, he was temporarily suspended (October 1999).

In support of his position that he could have collected the entire settlement funds as fees, respondent relied on two Supreme Court cases that purportedly allow, in some instances, attorney's fees in employment cases to exceed actual recoveries. Respondent claimed that, based on these cases and some seminars that he attended, he crafted his retainer agreement to allow him to take his fee immediately upon recovery of the greater of either his hourly fee or of a percentage of the recovery. According to respondent, he believed that he was not limited to a "one-third"-legal fee, given case law and the fact that employment cases historically result in equitable relief as well. According to

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[13] Counsel representing a dissident group of Merrill Lynch plaintiffs questioned the accuracy/reasonableness of respondent's time spent on this matter. As of the date of the ethics hearings, that issue had not been resolved.

respondent, in addition to their monetary settlements, the plaintiffs obtained equitable relief in the form of the implementation of an anti-harassment, anti-discrimination policy.

Respondent admitted that, because of his personal difficulties, he was not acting competently when he provided at least some of the services to the plaintiffs. He also admitted that, even in the absence of his personal problems, it would have been difficult for him to competently represent 167 plaintiffs as a sole practitioner.

According to respondent, he was overwhelmed while his divorce was pending; he undertook the Merrill Lynch plaintiffs' representation to resolve his problems (presumably financial). However, the representation further complicated his life and he felt overwhelmed by the magnitude of the case. He conceded that he did not represent the plaintiffs competently and that taking on the case was not particularly rational. He claimed that he was afraid to go to his office, which was located in his home, for fear of being arrested, or being killed. He, therefore, met with his clients in remote locations.

According to Kaminski, the complaint correctly charged that respondent utilized settlement funds from the Rodriquez matter to pay the Walker/Curry net recoveries plus interest. However, presumably because respondent maintained that the Rodriquez settlement deposits were fees to which he was entitled, Kaminski

was unable to conclude that respondent's handling of these funds constituted knowing misappropriation of client funds.

Nevertheless, the OAE argued that respondent did not prove his entitlement to the Rodriquez settlement funds because he failed to provide evidence of any actual binding agreements between himself and the plaintiffs. Instead, the OAE noted that respondent relied on the New Jersey Law Against Discrimination fee-shifting statute (N.J.S.A. 10:5-27.1), and a copy of what he alleged to be his standard fee agreement in discrimination cases. The fee agreement allowed for a thirty percent contingency enhancement factor. However, the OAE pointed out that the cases on which respondent relied to support his right to a contingency enhancement factor give sole discretion to the trial court to determine whether to permit a higher fee. Thus, the OAE argued, respondent's reliance on those cases for support for his entitlement to the entire Action, Pomerantz and Progressive settlement proceeds was undertaken in bad faith.

Moreover, the OAE argued that, in light of respondent's claim that he was acting incompetently at that time, he could not have reasonably believed that he was entitled to unilaterally take the entire Rodriquez settlements. Otherwise stated, if respondent was unable to provide competent and diligent representation to the plaintiffs, then his claim that he spent 3,440.6 hours on the case was untenable. Therefore, the OAE

concluded, the evidence supported a finding that respondent knowingly misappropriated not only the Walker/Curry funds, but also the Rodriquez settlements.

COUNT TWO

THE ERTEL MATTER

Eleanor Ertel retained respondent in April 1997 for an age discrimination matter. She had been discharged from her bookkeeping position at Cardinal, Inc. As of the hearing before the special master, May 3, 2004, she was seventy-one years old and retired.

Initially, Ertel attempted to file a law suit pro se, but soon realized that she was "in over her head." In April 1997, she retained respondent, who requested a $10,000 retainer. Ertel paid him an initial $5,000, which she borrowed from her sister-in-law. Respondent never requested the balance.

The retainer agreement stated, in relevant part:

> The client understands that the client could retain the attorney to represent the client by compensating the attorney on a monthly basis at the attorney's regular hourly rates. The client expressly declines to do so, believing that such terms are beyond his or her means, and chooses the terms of this agreement instead.
>
> . . . .
>
> In the event that the attorney recovers for the client a sum of money, the attorneys'

fees for his services shall be paid immediately out of this sum, even if a separate recovery of attorneys' fees is contemplated, and shall be the greater of "a percentage contingent fee" or "a reasonable hourly fee in a contingent case" as those terms are defined in this section, or the attorney fees and costs awarded by the court or specifically paid in a settlement paid by the defendants.

A "percentage contingent fee" shall be defined as thirty three and one third percent (33 1/3%) of the recovery if the case is concluded before any appeal is taken, and forty percent (40%) if any recovery after an appeal is taken by any party.

Where a separate recovery of attorneys' fees or costs or both is secured after an initial recovery of damages for the client, "the recovery" for purposes of computing the attorneys' fees shall include such later recovery of fees or costs or both and shall include the value of any nonmonetary relief. The client recognizes that this separate recovery of fees and costs may be significantly larger than the initial recovery of damages for the client.

A "reasonable hourly fee in a contingent case" shall be defined as the attorney's fees computed at his regular hourly rates (at the attorney's discretion, either using those rates which were current when the services were performed and adding interest at the attorney's regular rate for paying clients or using those rates current at the time the payment is made) plus a contingency enhancement factor of thirty percent (30%).

[Ex.C8.]

Although Ertel could not recall if respondent had reviewed the retainer agreement with her, she remembered that he had spent

approximately one hour with her discussing the matter and the fee. She claimed that she did not read the retainer very carefully because everything had been done in a hurry; she read only the back part, where she signed it. Ertel could not remember if respondent had ever mentioned charging her an hourly rate, but a transcript of her OAE interview reveals that she recalled a discussion with respondent about an hourly fee as well as his statement that, in his opinion, it would be "cheaper" for her to pay him on a contingency basis. According to Ertel, respondent never explained to her that he could retain the entire settlement if his hourly fees were greater than the total settlement.

According to Ertel, respondent never discussed with her the amount that she would recover if the lawsuit were successful. She, in turn, did not want to ask, "How much am I getting, how much will you give me?" According to Ertel, she trusted respondent. Unlike Ertel, however, respondent recalled telling her that she might not recover anything from her case. Respondent conceded, though, that Ertel's expectation was to recover something, as well as to "stand up for her rights."

Contrary to Ertel's testimony, respondent claimed that, because of the difficult nature of her claim for age discrimination, he would not have agreed to a contingent fee. According to respondent, Ertel's employer's position was that her

dismissal was part of an overall downsizing plan because of the company's economic troubles.

In late summer 1998, respondent settled the suit for $17,500, payable in two equal installments. Initially, respondent took the settlement amount as his fees, claiming entitlement under the retainer agreement with Ertel. Respondent took all but $1,260.88 of the settlement. As seen below, months later he gave Ertel a check for $13,115.75.

Ertel testified that respondent brought a settlement check to her house very late one night and, on a small scrap of paper, wrote down some figures showing his expenses and her share of the settlement. He did not give her the paper, or any bills for his services, nor did he tell her that she had incurred a bill for $25,000, based on his hourly fee.

Ertel claimed that she never authorized respondent to settle the matter or to use her portion of it. She did not recall discussing a release with respondent or signing it. The retainer agreement specifically stated that respondent would not settle the case without Ertel's prior authorization and that she had the right to make all decisions regarding settlement. Respondent did not address Ertel's statements in this regard.

Although Cardinal had issued two settlement checks, payable to both Ertel and respondent, Ertel could identify her endorsement on only one of the cancelled checks. The endorsement

on the other check was misspelled and, to Ertel, did not look like her signature. She did not believe that she had endorsed that check.[14]

Respondent's amended answer stated that he had spent in excess of 100 hours preparing the Ertel matter. Respondent did not submit any documentation to support this contention, however. Respondent believed that he had done a reconstruction of his hours on a "yellow piece of paper," but did not know its whereabouts. According to respondent, however, he believed that he was entitled to the whole settlement amount:

> [W]hen I got the money from Ertel, I had been arrested shortly before that with respect to child support and was put in jail in Monmouth County. I had -- my grandmother had just died. I needed the money at that point in time given what was going on with my divorce and the child support. And I knew that technically I could take that money at that point in time pursuant to the agreement. Although after I did it I realized that she, you know -- that it would be reasonable for her to expect that she would -- maybe that's not a good way to put it. That there would be some expectation that she would get some monetary amount out of it.
>
> (6T155-7 to 10.)[15]

Several months after respondent took the entire settlement proceeds as fees, he gave Ertel a check for $13,115.75 -- seventy-five percent of the settlement -- because he believed it

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[14] Respondent was not charged with forging Ertel's signature.

[15] 6T refers to the transcript of the hearing on May 11, 2004.

fair that she should receive some monetary compensation. Respondent explained his actions in one of his certifications to the Supreme Court, in connection with the OAE's motion for his temporary suspension:

> 5. In the late summer of 1998, I settled an employment case for a client, Eleanor Ertel, for $17,500. The Settlement monies came in two installments of $8,750, one in August, 1999 and one on or about September 30, 1999.
>
> 6. Although I had put in time on Ms. Ertel's case that entitled me to a fee of approximately $25,000, my original intention was to substantially reduce my fee and to give Ms. Ertel, who was in need of money, half of the settlement proceeds.
>
> . . . .
>
> 8. When the second installment of the Ertel settlement came into my possession, my obligations to my children, the threats made against me if I did not pay, and my need to finalize the divorce were foremost in my mind, and I decided to exercise my right to take the full settlement as my fee. I utilized my fee monies to repay funds I had borrowed in order to pay child support, defray costs of divorce, and to pay for the services of an expert in my divorce litigation.
>
> 9. Although my arrangement with Ms. Ertel, pursuant to our written agreement for legal services, entitled me to take the entirety of the $17,500 Ertel settlement as my legal fee, I felt that Ms. Ertel should receive a significant portion of the proceeds of the settlement. On December 8, 1998, I wrote Ms. Ertel a check for $13,115.75, representing 75% of the settlement.
>
> [Ex.C34 at 2 to 3.]

When respondent gave Ertel the $13,115.75 check, other clients' funds were invaded. Respondent admitted the invasion, but claimed that it was inadvertent. According to respondent, he believed that he had sufficient personal monies in his trust account to cover that disbursement, but did not clarify the source of those monies. Kaminski's review, however, showed that monies belonging to other clients, Francesca Smith and Pruthika Patel, were used to fund the Ertel disbursement.[16] In his September 1999 certification to the Supreme Court, respondent acknowledged the invasion of Smith's (and Patel's) funds, but asserted that it was the result of his negligent recordkeeping:

> 10. When I wrote the check for $13,115.75 to Ms. Ertel, it did not occur to me that writing that check to my client would impact funds belonging to other clients. In fact, the Ertel check did impact other client funds. I now realize that the check to Ms. Ertel impacted not only Francesca Smith, but another client of mine, Pruthika Patel, whose monies ($2,503) were also in my trust account. Both Francesca Smith and Pruthika Patel were paid in full in February, 1999.
>
> 11. I realize that I am responsible for the fact that funds for both Francesca Smith and Pruthika Patel were absent from my trust account for a period of time. I did not, however, understand that I was impacting the funds of either client when I wrote the check for $13,115.75 to Eleanor Ertel on December 8, 1998.
>
> [Ex.C34 at 4.]

[16] The Smith matter is discussed below. The complaint did not charge respondent with knowing misappropriation of Patel's funds.

Respondent claimed that his trust account records were in "disarray" during the period of his divorce, from the latter part of 1998 through March 1999.

Based on Kaminski's analysis and testimony, the OAE took the position that respondent had to know that he was using other clients' funds when he gave Ertel $13,115.75, since he had already disbursed to himself all but $1,200 of the $17,500 settlement. The OAE gave no consideration to respondent's claim that he was suffering from a mental disability at the time. According to the OAE, respondent demonstrated that, during the period of his "personal turmoil," he knew the difference between right and wrong, thereby failing to satisfy the standard set forth in In re Jacob, supra, 95 N.J. 132, to avoid a finding of knowing misappropriation.[17]

When respondent was asked whether he believed he had represented Ertel competently, he replied, "I think I was failing her. . . . I shouldn't have been practicing law at that time period." "I was not competent in a lot of ways."

[17] The standard necessary for a medical condition to exonerate knowing misappropriation is a demonstration by competent medical proofs that the attorney suffered a loss of competency, comprehension or will of a magnitude that would excuse egregious conduct that was clearly knowing, volitional, and purposeful. Id. at 137.

COUNT THREE

THE SMITH MATTER

Francesca Smith testified that she retained respondent to represent her in connection with an automobile accident. Smith signed a retainer agreement dated April 4, 1994. Smith understood that respondent would get a percentage of any recovery for his fee, and that she would not incur any expenses unless the case was settled. She also understood that there was a chance that there could be some undisclosed "legal fees."

Smith testified that she believed that her case was settled for $15,000. She signed a release dated August 25, 1998. At that time, she also endorsed the settlement check for $15,000. Respondent presented her with a handwritten settlement statement dated November 4, 1998, which she also signed. Smith understood that she would receive $10,962.61, and that respondent's fee would be $3,600. Smith found it odd that both the release and the settlement breakdown were handwritten, but chose not to question respondent about it.

According to Smith, she did not want to settle the case, but respondent was "pushing" her to do so, claiming that she had a weak case. Smith ultimately capitulated. Respondent agreed to reduce his fee in order to obtain her consent to the settlement.

Smith complained that, from the outset, she had trouble communicating with respondent. She would make repeated telephone

calls to him before finally reaching him. Moreover, after signing the settlement statement, she had trouble getting her funds from respondent, despite her repeated telephone calls and letters to him. Whenever Smith was able to contact respondent, he would tell her that her "money was coming."

On December 30, 1998, Smith sent respondent a letter requesting her money, to no avail. Finally, Smith enlisted the help of her uncle, a lawyer, who filed a lawsuit against respondent on February 1, 1999. On February 2, 1999, Smith filed a grievance against him. As seen below, respondent finally paid Smith in early February 1999.

Kaminski analyzed respondent's deposits and withdrawals in connection with the Smith matter. According to Kaminski, on November 4, 1998, respondent deposited in his trust account #3 (Bank of New York) the $15,000 Smith settlement. This deposit increased the trust account balance to $31,840.17. On November 10, 1998, respondent wrote, among others, a check to himself for $4,000, referencing the Smith matter. This withdrawal and other activity left a trust account balance of $26,050.17. Following another deposit and some withdrawals, respondent deposited $3,000 on behalf of a client (Black) on November 16, 1998, and $4,000 on behalf of Patel on November 23, 1998, thereby bringing the account balance to $17,900.17.

On December 11, 1998, respondent drew the $13,115.75 check to Ertel, when he was holding only $1,200 on her behalf in his trust account #3. This left a balance in the account of only $423.47. Kaminski concluded that respondent's payment to Ertel caused an invasion of other clients' funds, including Smith's. According to Kaminski, respondent's trust account #3 was closed with a zero balance on January 29, 1999.

On February 8 and February 9, 1999, three months after respondent deposited Smith's settlement funds in his trust account, he gave Smith $7,300 and $3,662.61, respectively, by issuing two checks from his First Union Bank trust account #5.

Kaminski's analysis of respondent's trust account #5 showed that, a few days before the above disbursements (February 3, 1999), respondent had made a cash deposit of $3,662.61, the same amount as the second check to Smith. Prior thereto, on January 28, 1999, respondent had deposited $790.22 relating to client Claude Garrison. However, on December 11, 1998, there had been a negative balance of $141.99 in the account. The Garrison deposit brought the balance up to $648.23. On January 28, 1999, a second Garrison deposit raised the balance to $7,358.01.

According to Kaminski, when respondent disbursed the funds to Smith, the only amount in the trust account that could be attributed to him was the $3,662.61 cash deposit, with which he had infused the account; the remaining monies in the account were

being held for Garrison. Kaminski did not know the source of the cash deposit.

Respondent acknowledged that he invaded Smith's funds when he paid Ertel $13,115.75 from his trust account. He denied, however, that such invasion was knowing. According to respondent's answer, he believed that he had sufficient monies of his own to fund the Ertel disbursement. At the ethics hearing, however, respondent was unable to say which funds he thought he had used to pay Ertel, at times testifying that he "paid Ertel out of Ertel," and at other times asserting that, because of his mental state ("[a]t that point in time, I did not have a rational mind"), he did not know what he had in his account. Respondent claimed that he did not know, until after he got "the records," that he had invaded Smith's funds by paying Ertel. He acknowledged, however, knowing that he did not have the funds to pay Smith when she requested her money, as there was an insufficient balance in the account; in other words, he knew that he was out of trust. Respondent believed that he had contacted the bank about his balance and knew that he had to wait until he had sufficient funds of his own to pay Smith. He contended that he had used his own funds to pay Smith.

In one of respondent's certifications to the Supreme Court, he made the following admissions relating to Smith's settlement proceeds:

13. . . . I had significant other expenses in connection with the divorce, and attempted to borrow the money from various sources, to no avail. My telephone service was cut off. I had no credit. On another occasion, my wife tricked me into believing that we had a court date at which the divorce would be finalized, and I was again arrested and handcuffed. My brother again provided emergent funds for me which I had to repay.

14. It was at this point in time (November, 1998) that I utilized approximately $10,000 in proceeds that were held in trust from a personal injury settlement for Francesca Smith in order to make payment on account of the arrearages and to defray certain other expenses associated with my divorce.

15. Within less than three months, when I had earned sufficient income from my practice, I repaid the money in Ms. Smith's trust account and disbursed the funds to her.

. . . .

18. During the period of my divorce, I was unable to function coherently. I was slow to respond to other people and to the demands of my work. I was unsure of my judgment. The moral and ethical boundaries that defined my professional life before and since became unclear to me.

19. I utilized client funds on only one occasion, i.e., $10,000 [of] the funds from the settlement of Francesca Smith's case to make payment on account of my child support arrearages and other divorce expenses.

. . . .

20. . . . In addition, Francesca Smith complained about my failure to promptly turn over settlement proceeds. . . .

> 21. . . . I have conceded my one-time utilization of client funds.
>
> [Ex.C33 at 4-6.]

At the ethics hearing, respondent contended that he was mistaken about his use of the Smith funds to pay for child support. Indeed, Kaminski's analysis revealed that it was respondent's $13,115.75 check to Ertel, drawn on December 11, 1998, that caused the invasion of Smith's funds. Respondent explained that he did not have the benefit of his "records" when he drafted the certification, that it was the "only thing that [he] could try to think of at the time as to why Smith was out [of funds]," and that he did not know that his statements were inaccurate at the time. Specifically, respondent testified:

> I realize the moneys weren't there to pay Smith when Smith was asking for a check.
>
> . . . .
>
> I think I had a small balance at that point in time. Looking at the records now -- and I didn't have these answers again when the OAE was asking for information and answers back in 1999, because I didn't have the records to go to. If these records were in order, I'd be able to get quick answers. There was a -- they were going to issue a cause [sic] to suspend me. Fred Dennehey, who was my attorney at the time, was on vacation where he couldn't be reached in the Himalayas. An attorney I had never dealt with before . . . was contacting me and asking me to provide answers that I couldn't provide because I really didn't know.

> Which was part of the problem. I was making mistakes. I didn't know the exact mistakes I was making at the time. And didn't know in 1999 when they were asking questions and didn't have the records to be able to piecemeal this together.
>
> I made a mistake in my certification, initial certification, which is clearly when -- when we finally got records that came from the OAE, the Bank of New York records from -- by subpoena, because the OAE had subpoenaed them and then provided them to Fred Dennehey, I got those records and went over them and he said, you know what, your certification is inaccurate. It's false. I said, that's what I've been trying to say. I really don't know. And they wanted me to give an answer. And the answer I ended up giving is that I had taken Smith money when in fact I didn't. Because I knew that it wasn't there. And that was the only explanation I could put. [sic] It's not there. I didn't think somebody robbed my account at that point in time. But looking at the records that were provided from the OAE, it was clear, and Kaminski's report actually points to it, that what happened was that when I wrote the check to Ertel, I ended up impacting Smith funds . . . . But that's . . . one reason for the second certification.
>
> (7T66-15 to 7T68-11.)[18]

Based on Kaminski's analysis and testimony, the OAE concluded that respondent had to know that he used Smith's funds when he paid Ertel seventy-five percent of the settlement, since he had already disbursed the majority of those funds to himself. In addition, the OAE charged that, when respondent gave Smith the second check ($7,300), he knowingly invaded other clients' funds.

[18] 7T refers to the transcript of the hearing on May 27, 2003.

Although the complaint did not specifically identify the clients, Kaminski testified that the funds belonged to Claude Garrison.

In his brief to us, respondent's current counsel stated that the funds used to pay Smith were respondent's own money and fees earned in the Garrison matter.

RESPONDENT'S RECORDKEEPING

Respondent conceded that, from time to time, he inadvertently was out of trust, but placed the blame on his inattention to his practice because of what was going on in his life.

Specifically, respondent testified that, during his period of "personal turmoil," he stopped paying attention to whether there were enough funds in his accounts to cover his disbursements. Although he admitted a substantial lack of compliance with the recordkeeping requirements during the period of his "personal turmoil," he stated that, at the time, he did not have an appreciation for the problems in his accounts. He professed to be embarrassed by this lack of appreciation and apologized for it. He claimed, however, that he would not write checks in excess of the account balance because he would first confer with the bank to ensure that he had sufficient balances to cover his withdrawals.

In his brief to the special master, respondent stated that, during the period of his "personal turmoil," he kept virtually no records that would enable him to determine his trust account balances. He admitted that he had paid a client from trust funds prior to collecting corresponding funds, and that, on occasion, he paid clients more than what they were entitled to receive. Respondent also testified:

> I became inattentive to keeping the records and devoting the time and energy to keeping the records that I had maintained before the onset of my problems. And as a result of the sloppiness and shoddiness of the way in which I conducted myself with respect to my bank accounts during this period of time, I was making mistakes that I had not made in the past and I otherwise would not have made. They are inadvertent. But they were happening as a result of me not having the records and not doing the things that an attorney should do. And that would include things such as in Wisov, where there was a settlement, and the client is calling me up asking me about the settlement money, and believing that it came in and then writing her, you know, a check for it thinking that the moneys had come in when in fact later on it was learned that they hadn't come in. That's the kind of stuff that I was doing off the top of my head because I couldn't make mince meat out of, you know, my records, at that point, because, again, I wasn't paying attention. I would have to rely on what was in my head, and at that point I was really disoriented a lot. I had a lot of confusion. A lot of fear.
>
> . . . .
>
> I would scribble down on the closing sometimes. I would scribble down off the top of my head, you know, information. I would

> give closing statements that were written polygraphically in pencil or pen. There were times when I paid clients money that they weren't supposed to get. Not only with Wisov, but I guess, again, I didn't have anything to point to identify and I had to try to go off the top of my head.
>
> And my head wasn't in a good place at that point. My head was a mess . . . . I wasn't even looking at my bank statements. Looking back, there were deposited items that were returned that affected balances in which I never addressed. That ended up lending [sic] to mistakes.
>
> (6T86-9 to 6T88-8.)

Respondent also blamed his lack of sufficient trust account balances on other problems. Specifically, respondent stated that, when he reviewed his records in connection with the ethics hearing, he discovered that a check had been written on his Bank of New York trust account (trust account #3) for $1,859.91 -- negotiated in May 1997 -- and that the check appeared to be forged. Respondent suspected that one of his former employees had forged that check as well as a check for $500, dated December 25, 1997, from his Summit Bank business account. Also, he had discovered some odd charges to his trust account, including photocopying fees, returned check fees, forced debits totaling close to $60,000, returned deposits for insufficient funds, and default judgments. Respondent contended that all of these items affected his account balances.

On cross-examination, Kaminski acknowledged that there may have been some bank charges against the trust account, of which respondent was not aware. For example, there was a $60 reduction in the account for photocopying fees, a $250 debit for a returned check, a returned deposit check of $7,500, and additional photocopying fees: $240 on June 4, 1998, and $210 on June 12, 1998. Kaminski could not accuse respondent of shoddy bookkeeping because he had never seen his client ledgers or trust account journals. Moreover, Kaminski could not say whether respondent kept any ledgers or journals at all, but only that respondent had never provided them to the OAE. Respondent turned over to Kaminski only bank statements, cancelled checks, and deposit tickets. Nevertheless, Kaminski noted that, even if respondent had not been maintaining the required documents, a review of his bank statements would have put him on notice of the bank charges.

Respondent conceded that he negligently misappropriated client funds (RPC 1.15(a)) and failed to maintain the required attorney records (RPC 1.15(d)). He further conceded that, during the time of his "personal turmoil," which, according to him, lasted from October 1996 through the end of 1999, he had financial obligations that he had to fulfill, including overdue child support and mortgage payments. He could not recall, however, "borrowing" funds from clients to satisfy his obligations or to avoid incarceration. He apologized to the special master, to his

clients, to us, and to the public. He admitted that he neglected his clients, but denied that he knowingly took their funds.

Kaminski examined respondent's bank records back to 1993, and found nothing problematic in the records for the years 1993, 1994, and 1995; respondent's accounting problems arose sometime in 1996, 1997, or 1998. Indeed, according to the OAE, prior to respondent's period of "personal turmoil," he had been the subject of a random audit and his attorney trust and business accounts were in "substantial compliance" with the recordkeeping rules at the time. Kaminski admitted that respondent's recordkeeping problems seemed to coincide with his personal troubles.

The OAE's position on respondent's "personal turmoil" claim was that he was aware of and understood his fiduciary obligations to his clients during that time. The OAE observed that, at the time of respondent's personal difficulties, he was functioning enough to obtain information about the balances of his accounts from his banks, prior to writing checks. In addition, the OAE pointed out that respondent did not suffer from any medical disability that prevented him from knowing the difference between right and wrong. The OAE's position was that respondent's abdication of his fiduciary trust obligations was knowing and purposeful, and intended to satisfy his desperate need for funds.

The OAE pointed to respondent's testimony about his dire financial circumstances during that period and to his admission under oath, in his certification to the Supreme Court, that those circumstances had led him to use client funds for personal purposes. The OAE, thus, gave no consideration to respondent's claim that he was suffering from a mental disability at the time that he invaded client funds. According to the OAE, respondent demonstrated that, during his period of "personal turmoil," he knew the difference between right and wrong, thereby failing to satisfy the Jacob standard. The OAE urged us to recommend respondent's disbarment.

At oral argument before us, respondent, through his new counsel, conceded that there had been an invasion of client funds, but attributed such invasion to his shoddy recordkeeping practices during the period of his "personal turmoil." Counsel drew a close parallel between this matter and In re Johnson, 105 N.J. 249 (1987). In Johnson, the attorney, too, represented the guardians ad litem of infants, settled their cases, was directed to deposit the funds with the Surrogate, did not comply with this direction, and eventually misappropriated the funds.

Like respondent, attorney Johnson acknowledged that he was out of trust and that he did not comply with the recordkeeping rules, but claimed that the admitted misuse was entirely unknowing because he had "lost control of his office," as he was busy

building up a law practice, working long hours, and not getting enough sleep. The Court found that Johnson's misappropriation of client's funds was not knowing.

In his brief, respondent's counsel argued that the circumstances that led to respondent's misconduct are

> even more compelling than in Johnson. Whereas Johnson claimed that he 'lost it' in the pursuit of building a law practice, Respondent claims that he was not in control of his life during the period in which the misappropriation took place as a result of both the impact on him of a marital dispute that involved violence and threats on his life and triggered a severe psychological depression, subsequently diagnosed as Post-traumatic Stress Disorder, and an enormous commitment of time to complex cases.

Counsel argued that

> for [respondent's] negligent misappropriation of client funds the level of sanction imposed should take into account his suspension since October, 1999 until the present, a period of five years and five months, which period of suspension is consistent with the level of sanction imposed in other similar cases, particularly In re Johnson, supra, In re Noonan, supra and In re Orlando, supra.

Respondent's counsel argued that the six-year term that respondent has already served since his temporary suspension is sufficient discipline for his conduct, and that respondent should be required to provide proof that all of his problems are behind him and that he is "psychologically fit" to practice law.

SPECIAL MASTER'S FINDINGS

As to count one of the complaint (Walker/Curry), the special master found that respondent had represented the plaintiffs in the Glass matter prior to his period of "personal turmoil;" that the judge entered an order in April 1995, requiring that the net recoveries in that matter be paid to the Hudson County surrogate; that respondent prepared the draft of the final orders in that matter; that he made timely payments in 1995 on behalf of other plaintiffs; and that his claimed lack of knowledge that he was to turn over the funds to the Surrogate was incredible. The special master, thus, concluded that respondent's failure to timely pay the Walker/Curry funds was intentional.

The special master also found that respondent knowingly misappropriated the Walker/Curry funds when he disbursed those funds for purposes unrelated to the clients' matters. The special master noted that to avoid the risk of overdrawing the account respondent first would determine the status of his trust account balance. The special master also pointed to Kaminski's reconstructed ledger, which demonstrated that respondent made numerous disbursements to himself, between September 1997 and July 1998, and that some clients or descriptions were identified, and some were not. The special master, thus, found that respondent's conduct in this regard constituted knowing misappropriation of the Walker/Curry clients' trust funds.

Respondent was also charged in count one with the knowing misappropriation of the Rodriguez settlement funds. The special master found clear and convincing evidence that respondent knowingly used the Rodriguez settlement funds, which he received in June 1999, to pay his Walker/Curry obligation to the Surrogate. The special master noted that the settlement agreements relating to the Action, Progressive, and Pomerantz matters required respondent to distribute the settlement funds pursuant to his agreement with the plaintiffs. According to the special master, respondent did not offer any objective evidence of an actual binding fee agreement between himself and the named plaintiffs. Thus, the special master concluded that respondent did not meet his burden of proving his defense that his clients had authorized him to take the entire settlement as his fee. The special master observed that, rather than providing actual copies of such agreements, respondent relied on N.J.S.A. 10:5-27.1, Rendine v. Pantzer, 141 N.J. 292 (1995), Szczepanski v. Newcomb Med. Center, 141 N.J. 346 (1995) and a copy of his standard fee agreement in employment discrimination matters. The special master adopted the OAE's analysis and concluded that respondent could not have held a reasonable belief that he was entitled to unilaterally take the entire Action, Progressive, and Pomerantz settlement funds as his fee, under Rendine and Szczepanski. The special master, thus, concluded that, without a reasonable belief

of entitlement, respondent's taking of the entire settlements as his fee was intentional, in bad faith and, therefore, a knowing misappropriation of these funds.

With regard to the Ertel matter, the special master found that respondent never informed Ertel that he could take the entire settlement for himself if his hourly fees were greater than the total settlement; never gave her a bill for his legal services, and never advised her that he had incurred hourly fees in the matter that entitled him to collect approximately $25,000. As noted earlier, on August 25 and September 28, 1998, respondent disbursed the entire Ertel settlement to himself, claiming that he was entitled to those funds as attorney's fees pursuant to his agreement with Ertel. He was unable to show, however, that he had worked in excess of 100 hours in the matter. Taking into account respondent's testimony that he did not perform competently while representing Ertel, the special master determined that respondent could not have held a reasonable belief that he was entitled to the entire settlement.

The special master found that respondent improperly relied on Rendine and Szczepanski to substantiate his alleged entitlement to the entire settlement as his fee because neither case provided legal support for respondent's unilateral determination to utilize a contingency enhancement factor of thirty percent. The special master also considered respondent's statements regarding his

desperate need for funds, both in sworn statements to the Supreme Court, and at the ethics hearing. As in Rodriguez, the special master found that, without a reasonable belief of entitlement, respondent's taking of the entire settlements as fees was deliberate, in bad faith and, therefore, a knowing misappropriation of client trust funds.

In the Smith matter, the special master found that respondent's statement in his verified answer -- that he believed that there were sufficient funds of his own on deposit to pay Ertel -- was "simply incredible." The special master noted that respondent recanted that statement at the ethics hearing, when he maintained that he knew that there were sufficient funds on deposit, but would not say that the funds were his.

The special master found that respondent's testimony was "substantially and materially inconsistent" with the sworn statement he had given to the Court, and that his numerous, inconsistent sworn statements concerning material issues in dispute rendered his testimony in support of his defense unworthy of belief. According to the special master, after respondent disbursed funds to himself in the Ertel matter, he held only $1,260.88 on her behalf. Thus, when respondent gave Ertel $13,115.75, he knew that he was using other clients' funds. At that time, he had only $13,539.22 in his trust account, $11,000 of which belonged to Smith.

According to the special master, the clear and convincing evidence in the record demonstrated that respondent misused Smith's trust money to pay Ertel and that he, thereafter, made a trust disbursement to Smith by substantially misusing the settlement proceeds belonging to another client, Claude Garrison.[19] The special master concluded that respondent's conduct constituted knowing misappropriation of client trust funds.

As to respondent's mental disability claim, the special master noted that, because of respondent's failure to comply with the discovery orders, he had been barred from introducing either an expert opinion or documentary evidence to establish this affirmative defense. Thereafter, by order dated June 8, 2004, the Court precluded respondent from relitigating applications previously decided by the special master. The special master, nevertheless, permitted respondent to testify at length about his personal problems.

The special master concluded that neither of Nieves' reports demonstrated that respondent's condition resulted in a loss of comprehension, competency, or will that would render him unable to distinguish between right and wrong. Moreover, the special master noted, respondent's testimony showed that, during his

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[19] Even though respondent was not specifically charged with misappropriating Claude Garrison's funds, the third count of the ethics complaint charged that by disbursing funds to Smith, when none of her funds were on deposit, respondent "invaded the funds of other clients."

period of "personal turmoil," he was still able to differentiate between right and wrong: for example, respondent was able to invoke his Miranda rights when arrested for retaliating against his father-in-law; he believed that his acts of self-defense were justified; he knew that it was wrong for his wife to try to run him down with her car; and he would check the balances in his bank accounts before writing checks, in order to avoid overdrawing his accounts. Thus, the special master concluded that respondent was aware of the status of his accounts and of the impropriety of overdrawing them.

The special master found that respondent's mental disability defense did not meet the standard set forth in In re Jacob, supra, 95 N.J. 132, that is, that he suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional, and purposeful. The special master noted that Nieves' reports merely indicated that respondent's belief that he was in significant danger caused him to reprioritize his moral and ethical considerations, and impaired his cognitive functioning in judgment, comprehension, emotion, and behavior, but did not indicate that he suffered from a condition that would prevent him from knowing right from wrong. The special master concluded that respondent's alleged "post-traumatic stress syndrome/depression and anxiety disorder" were insufficient to excuse his multiple

acts of knowing misappropriation. The special master recommended respondent's disbarment, under In re Wilson, supra, 81 N.J. 451.

Respondent's current counsel disagreed with the special master's conclusions and, in his brief to us, pointed out that the special master had

> little interest in Respondent's testimony about his personal life and its impact on his behavior, and utterly failed to consider Respondent's state of mind when he committed the acts of misappropriation. After he precluded Respondent from presenting any witnesses and any documents because Respondent's prior counsel had failed to comply with the terms of his orders, the Special Master indicated that he regretted doing so because he would have liked to hear the evidence. But he clearly was not interested in a long narrative, anything about Respondent's personal life or testimony regarding the circumstances surrounding Respondent's errors and mistakes. Thus, Respondent Kraft's efforts to give a full account of the facts and circumstances surrounding his misconduct was [sic] thwarted . . . . Although the Special Master considered the expert reports of Dr. Nieves, he simply dismissed them as irrelevant to the issue of whether Respondent negligently rather than knowingly misappropriated funds.
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> . . . .
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> The findings and conclusions of the Special Master, in which he indicates he substantially adopted the summation of the evidence submitted by the attorney for the Office of Attorney Ethics, fail to consider and completely ignore the fundamental contention of Respondent that the confusion, uncertainty, poor memory, inattentiveness and specific acts of negligence are all manifestations of Post-traumatic Stress Disorder which caused Respondent's negligent misappropriations.

The OAE, in turn, argued that respondent "did not simply walk away from his fiduciary obligations, as evidenced by his trust account activity . . . rather he deliberately and purposefully avoided maintaining his client funds. The OAE submits that this 'defensive ignorance' constitutes conduct designed to prevent respondent from knowing when client funds were used. In re Johnson, 105 N.J. 249, 260 (1987)." The OAE added that, unlike the attorney in Johnson, whose "intense dedication [to his practice and some clients] became his undoing," respondent's misappropriations were "motivated by his own personal financial desperation and self interest."

As to the special master's decision to exclude witnesses and documentary evidence on respondent's alleged mental disability, the OAE's position was that it was "warranted, reasonable and proper under the circumstances . . . . In fact, the Court sustained the sanctions, upon respondent's interlocutory appeal for constitutional review . . . . The preclusion of evidence, moreover, was based upon the irresponsible failure of respondent to comply with the Special Master's procedural and scheduling orders, not his prior counsel."

DRB FINDINGS AND CONCLUSION

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

As noted earlier, the special master denied all of respondent's motions, after he barred respondent from presenting expert reports or witnesses. Respondent moved to obtain an extension to hire a forensic accountant, to preclude the OAE from alleging knowing misappropriation of the Merrill Lynch funds, to restore his defenses, and to adjourn the hearing and obtain a stay. The special master's rulings were of some concern to us, in light of respondent's offer to present a mental illness defense to charges that, if proven, would lead to respondent's disbarment.

Despite these concerns, we accept the special master's reasoning that his rulings were required because of respondent's behavior in attempting to delay the proceedings and because of his failure to comply with the prehearing orders. The Court, too, approved the special master's decision in this context. Following respondent's counsel's motion to the Court to be relieved as counsel, which was granted, the Court barred respondent from relitigating applications previously decided by the special master. Any possible perception, however, that such rulings might

have been unduly detrimental to respondent has been eliminated by the OAE's subsequent agreement to admit Nieves' reports into evidence and by the special master's decision to hear respondent's testimony about his mental condition.

Shortly before oral argument before us, respondent made a motion to supplement the record, purportedly to support his mental illness defense. Although the OAE objected to the motion, we granted it and considered the supplemental materials. After a careful review of those materials, however, we are not persuaded that they shed a different light on respondent's mental disability defense.

Respondent argued, in his motion brief, that he was unable to cope with his professional obligations because of his traumatic personal circumstances, which were exacerbated by his very heavy workload. He contented that these problems caused him to negligently misappropriate client funds. In support of his argument, respondent attached to his brief a morass of documents -- among them, the prehearing report prepared by prior counsel, listing potential witnesses and hearing exhibits; Nieves' preliminary report, already in evidence, together with photocopied pages from an unidentified text about stress and traumatic reactions; photocopies of photographs, some of which presumably depicted his chaotic living conditions; certifications from his clients in the Merrill Lynch matter; confidential documents

relating to a settlement; bank checks and bank statements; and a certified public accountant's letter stating that, following a review of certain documents provided by respondent, the accountant had concluded that it was "at least as likely that the trust fund shortage was caused by [respondent's] carelessness as by knowing misappropriation."

Respondent's brief made little mention of the majority of the documents attached to it. Respondent referred to a fee agreement (Ex.R28;RbB17)[20] purportedly used in the Merrill Lynch matter. The language in that document is virtually the same as the language used in the Ertel retainer agreement, and was offered to justify respondent's taking of the Merrill Lynch settlement as fees. As discussed more fully below, we find that respondent's argument has no merit.

Respondent's brief made a passing reference to Nieves' reports. According to respondent, the reports concluded that traumatic stress disorder entails, "among other things, cognitive dysfunction including memory loss, paranoia, inattentiveness, isolation and disorientation." Also, the brief reiterated respondent's testimony about his marital problems, the turmoil that resulted therefrom, and his personal losses, including his parents' separation and the

[20] Rb refers to respondent's brief to us, dated February 21, 2005.

deaths of his father (1995)[21] and of the paternal grandmother (1998) who helped raise him. Respondent claimed that, as a result of these problems, he had "lost it" and "[had become] unable to cope with his professional responsibilities." We note that this information added nothing new to the record. Also, in his brief, respondent admitted that he misappropriated client funds. However, he continued to argue that his misappropriation was negligent, without advancing any new argument in this regard.

At oral argument before us, respondent's counsel maintained that respondent's misappropriation of funds was negligent. Counsel argued that "the conclusions of the master below totally ignores [sic] any of the evidence that should be considered as relevant to the issue of knowing and intentional versus negligent misappropriation." On the other hand, counsel also asked us and the Court to make a distinction between "those lawyers who really should be disbarred because they clearly lack the kind of character that's an essential ingredient and those lawyers who perhaps deviate from the accepted path and are contrite and have solved their problem and should be given an opportunity to redeem themselves."

When we questioned counsel whether he was urging a finding that respondent meets the Jacob standard or whether he was asking us to exercise "merciful and compassionate treatment," counsel replied:

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[21] Respondent had testified that his father died in early 1996.

I say both. I say I think he meets the standard. If we think in terms of Jacob as a standard that says, a person, under all of the circumstances, did not appreciate what exactly he was doing. At some level there was an awareness, yes, but not the kind of awareness that suggests venality, suggests a purposeful attempt to steal a client's funds. So I think the first level -- I think there's evidence in the record that would suggest that the Jacob standard applies to this case. But then I would say further, to the extent that the facts are not assessed would lead you to that conclusion. As a member of the Board, it seems to me, you could amply say, in the light of the changing view of the Wilson doctrine, this is a case that measures up very well with in re [sic] Johnson and in Newman . . . . I would suggest to you that the Johnson case is the most apropos [sic] -- the most analogous case. And especially when we think in terms of the age of the lawyer, the initial problem with forgetting about funds that were -- that should have been in the surrogate's office, and the fact that this attorney did not have the kind of systemic -- 57 trips to the ATM machine is the one case. I forget which one it was, where there is disbarment. Or the clear stealing of funds -- with blatant stealing of funds with Wilson, accompanied with lying to clients and a whole hose of other problems that would suggest a clear character defect.

So in a long answer to you question . . . it seems to me both of these standards can be applied in this case. But I would respectfully suggest that if the Board and the court found the wherewithal in Johnson and in Newman not to disbar, this is a case that falls very much within that pattern of cases.

(BT14-15.)[22]

[22] BT refers to the transcript of oral argument before us.

THE WALKER/CURRY FUNDS

In these matters, respondent represented the minor plaintiffs, Walker and Curry, whose settlements were approved by the court in April 1995. Pursuant to R. 4:48A, the court orders required that the net settlement proceeds be deposited with the Hudson County Surrogate. Respondent prepared the orders containing these requirements and, therefore, had to know the contents of the orders. Like the special master, thus, we find unworthy of belief respondent's claim that he did not timely remit the funds to the Surrogate because he was unfamiliar with the procedural requirements of "friendly hearings." The logical conclusion is that respondent deliberately availed himself of the minors' funds, knowing that, because they were to be deposited with the Surrogate, Walker's and Curry's guardians ad litem would not be clamoring for their distribution.

The following considerations add strength to our conclusion: (1) respondent received the Walker/Curry funds more than one year before the onset of his "personal turmoil;" (2) at the time, he was properly maintaining his attorney records, including the trust account in which he deposited the funds; he, therefore, had to be aware of the amount and identity of the funds that he was keeping in trust, including Walker/Curry's, and could not have "forgotten" their existence; (3) in September 1997, when respondent first invaded the funds, he was in the midst of his divorce and,

admittedly, in need of funds; and (4) two of the disbursements (for respondent himself) that invaded the Walker/Curry funds were purportedly made against the Palmieri funds, but such disbursements were made twelve days before respondent even deposited the $40,000 Palmieri settlement in his trust account; therefore, respondent had to know that he was using other clients' funds, not Palmieri's, to cover these withdrawals to himself; simply stated, he had to know that the Palmieri funds were not yet available for withdrawal; this conclusion is reinforced by the fact that he did not simultaneously disburse his other trust obligations in connection with the Palmieri matter, but waited until he deposited the settlement funds to disburse $31,000 to the attorney for Palmieri.

We, therefore, agree with the special master's findings that respondent failed to rebut the reasonable inference that his failure to timely remit the funds to the Surrogate was intentional and that his invasion of the Walker/Curry funds was knowing, as opposed to inadvertent.

THE RODRIGUEZ/MERRILL LYNCH SETTLEMENT FUNDS

It is undisputed that, on July 26, 1999, respondent disbursed $16,321.69 and $51,571.69 from his trust account #5 to the Hudson County Surrogate, representing the Walker/Curry net recoveries. Because respondent had already dissipated the Walker/Curry funds, he paid the Surrogate with funds obtained

from the agency settlements in the Rodriguez employment discrimination matter.

On July 30, 1999, the Surrogate notified respondent that he owed interest on the Walker/Curry funds in the amount of $4,987.02 and $15,757.51, respectively. On August 2, 1999, respondent transmitted two First Union Bank checks to the Surrogate, again using the settlement funds he had received in the Rodriguez matter. The complaint charged that respondent's use of those funds was unauthorized and constituted the knowing misappropriation of trust funds.

As noted above, respondent claimed that he had used his fees in the Rodriguez matter from the Action, Progressive, and Pomerantz settlements to pay the Surrogate. Respondent, however, offered no evidence of any actual binding agreements between himself and the named plaintiffs that would authorize him to take the entire settlements as his fees. He submitted only a blank, standard retainer agreement that he allegedly used for employment discrimination cases. He relied on the following language in the agreement:

> In the event that the attorney recovers for the client a sum of money, the attorneys' fees for his services shall be paid immediately out of this sum, even if a separate recovery of attorneys' fees is contemplated, and shall be the greater of "percentage contingent fee" or "a reasonable hourly fee in a contingent case" as those terms are defined in this section . . . or

> specifically paid in a settlement by the defendants.
>
> . . . .
>
> A "reasonable hourly fee in a contingent case" shall be defined as the attorney's fees computed at his regular hourly rates (at the attorney's discretion, either using those rates which were current when the services were performed and adding interest at the attorney's regular rate for paying clients or using those rates current at the time the payment is made) plus a contingency enhancement factor of (30%).
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> [Ex.29ExB4.]

In addition, respondent purportedly relied upon Rendine v. Pantzer, 141 N.J. 292 (1995), and Szczepanski v. Newcomb Med. Center, 141 N.J. 346 (1995), to support his contention that he was entitled to unilaterally charge a "contingency enhancement" factor in the Rodriquez matter. We find, however, that respondent's reliance on these cases is misplaced.

In Rendine, the Court addressed the issue of how to calculate the "reasonable attorney's fee" payable under fee-shifting statutes such as N.J.S.A. 10:5-27.1. Rendine v. Pantzer, supra, 141 N.J. at 316. The first step in the fee-setting process was to determine the "lodestar": the number of hours reasonably expended, multiplied by a reasonable hourly rate. Id. at 335. The Court viewed the trial court's determination of the lodestar amount to be the most significant element in the award of a reasonable fee, because that function required the trial court to

evaluate carefully and critically the aggregate of hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application.

The Court cautioned trial courts not to accept "passively the submissions of counsel to support the lodestar amount," and observed that "no compensation is due for nonproductive time." Ibid. The trial court was obliged to exclude from the proposed lodestar calculation hours not reasonably expended by the prevailing party's attorney. Ibid. Moreover, the Court determined that trial courts were to reduce the lodestar fee if the level of success achieved in the litigation was limited as compared to the relief sought. Id. at 336.

The Court held that, after carefully establishing the amount of the lodestar fee, the trial court should consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome. Id. at 337. As to contingency enhancements, the Court determined that such enhancements should never exceed one-hundred percent of the lodestar, and that an enhancement of that size would be appropriate only in rare and exceptional cases where the risk of nonpayment has not been mitigated at all. Id. at 343.

In Szczepanski v. Newcomb Med. Center, supra, 141 N.J. at 356, the Court reiterated that the trial court should carefully

and closely examine the lodestar fee request to verify that the attorney's hours were reasonably expended; that the trial court's responsibility to review carefully the lodestar fee request is heightened in cases in which the request is disproportionate to the damages recovered; and that the use of contemporaneously-recorded time records is the preferred practice to verify hours expended by counsel in connection with a counsel fee application. Id. at 366-67.

Clearly, respondent failed to satisfy his burden of showing compliance with the requirements of Rendine and Szczepanski. He provided no proof of valid, signed copies of the fee agreements used in the Rodriguez matter;[23] he admitted that he acted incompetently during his representation of the plaintiffs; he reconstructed his calculation of the legal fees; and he did not apply to the trial court for a fee award, thereby precluding the court's determination as to the reasonable number of hours spent on the matter. Respondent removed the fee decision from the trial court's consideration, instead improperly taking the entire settlement as compensation for his work. Attorneys have been disbarred for, among other things, taking fees over and above those sanctioned by the rules, without prior approval from the courts. See In re Carney, 165 N.J. 537 (2000).

[23] The fee agreement that respondent submitted in his motion to supplement the record was not signed, authenticated, or subject to examination at the hearing below.

In light of respondent's claimed reliance on the above cases, he could not have reasonably believed that he was entitled to take the Action, Progressive, and Pomerantz settlements without the trial court's endorsement. Moreover, in view of the alleged depths of his "personal turmoil," he could not have spent 3440.6 hours on the Rodriquez matter from May 2, 1998 to July 30, 1999 (close to eight hours a day, seven days a week), in addition to handling other cases. Indeed, respondent testified that he nearly abandoned his clients during the period of his mental difficulties.

We find, thus, that respondent did not carry his burden of going forward with his defenses. R. 1:20-6(c)(2)C states, in relevant part:

> (B) Standard of Proof. Formal charges of unethical conduct, medical defenses, and reinstatement proceedings shall be established by clear and convincing evidence.
>
> (C) Burden of Proof; Burden of Going Forward. The burden of proof in proceedings seeking discipline or demonstrating aggravating factors relevant to unethical conduct charges is on the presenter. The burden of going forward regarding defenses or demonstrating mitigating factors relevant to charges of unethical conduct shall be on the respondent.

Under these circumstances, we find that respondent's desperate need for funds during this time period provided sufficient motive for his taking the settlements, knowing that he

was not entitled or authorized to do so. We, therefore, conclude that he knowingly misappropriated the Rodriquez settlement funds.

THE ERTEL FUNDS

On April 10, 1997, during respondent's period of "personal turmoil," he began representing Eleanor Ertel, in an age-discrimination matter against her employer, Cardinal, Inc. Ertel understood that respondent's fee would be a one-third share of any recovery. Respondent never disclosed to Ertel that he would be entitled to the entire settlement if the total of his hourly fees exceeded the settlement, never provided her with a bill for services, and never advised her that his hourly fees in her matter entitled him to a fee of approximately $25,000. In addition, the retainer agreement specifically provided that Ertel had declined paying respondent an hourly rate, "as such terms were beyond her means." Moreover, respondent led Ertel to believe that he would take a contingency fee in her matter because it would be "cheaper" than paying his hourly fee.

Ertel testified that she never authorized a settlement of her claim, never authorized respondent to use her funds, and never knew that she might not recover anything from her case. Respondent never presented Ertel with a settlement statement or any bills. Respondent did not give her anything to memorialize the amount of time expended in her behalf. Instead, when he

finally presented her with her portion of the settlement, he merely scribbled down some numbers on a yellow sheet of paper to show her the breakdown of the funds, but did not give her a copy for her review. Ertel never knew the actual amount of her gross settlement, which was $17,500. It is clear that respondent took advantage of Ertel's trusting nature.

On August 18, 1998, respondent deposited Cardinal's $8,750 check into his trust account #3. On September 28, 1998, he deposited the remaining $8,750, representing the balance of the settlement. On August 25 and September 30, 1998, respectively, respondent disbursed to himself $8,650 and $7,589.12 from the Ertel settlement. Only $1,260.88 of Ertel's funds remained in his trust account #3.

Respondent claimed an entitlement to the entire Ertel settlement, again relying on Rendine v. Pantzer, 141 N.J. 292 (1995), and Szczepanski v. Newcomb Med. Center, 141 N.J. 346 (1995). For the same reasons that we cited in the Rodriquez matter, however, respondent's reliance was not only unreasonable, but rooted in bad faith. As such, we find that his "defense" was contrived, in order to attempt to justify his knowing misuse of funds that were not rightfully his.

We view with equal skepticism respondent's contention that the 100 hours that he worked on Ertel's case entitled him to take the entire $17,500 settlement proceeds. Respondent did not submit

any documentary evidence to support his claim that his fees amounted to $25,000. Moreover, he admitted that he had provided incompetent representation to Ertel because of his mental state at the time, which had caused a near abandonment of his clients' interests.

In light of respondent's bad faith reliance on Rendine v. Pantzer, 141 N.J. 292 (1995), and Szczepanski v. Newcomb Med. Center, 141 N.J. 346 (1995); his failure to document earned fees in excess of 100 hours; his admitted abandonment of his clients' interests during his "personal turmoil" period; and his dire financial straits at the time, as acknowledged in his certification to the Court – he admitted that he needed the entire Ertel settlement to repay funds he had borrowed for his child support obligations – we find that respondent failed to carry his burden of going forward with his defense of entitlement to the entire $17,500 settlement funds and that, therefore, he knowingly used for his own purposes monies that belonged to his client, Ertel.

THE SMITH FUNDS

Francesca Smith retained respondent in April 1994, in connection with a personal injury matter. On October 6, 1995, respondent filed a complaint on her behalf. On September 4, 1998, pursuant to a settlement between the parties, Smith executed a

release. Respondent received the $15,000 settlement on November 4, 1998. On that same day, he deposited the settlement into his trust account #3.

On November 19, 1998, respondent issued a $4,000 check to himself from trust account #3, representing his fees and costs in the Smith matter. He did not remit to Smith her share of the settlement proceeds.

On December 8, 1998, respondent disbursed from trust account #3 a $[illegible],115.75 check to Eleanor Ertel, thereby invading Smith's funds. At that point, there remained only a balance of $423.47 in respondent's trust account #3. Respondent was not authorized to use Smith's funds to pay Ertel.

It was only after Smith's uncle filed a civil complaint against respondent and Smith filed an ethics grievance on February 3, 1999, three months after respondent received Smith's settlement, that he disbursed from a different trust account, trust account #4, two checks to Smith for $3,662.61 and $7,300. Because Smith's funds had already been dissipated, none of her settlement proceeds had been deposited into trust account #4. Therefore, a substantial portion of the funds that respondent used to pay Smith came from another client's funds, Claude Garrison.[24] Respondent admitted the he "knew that [Smith's] money wasn't there

[24] As noted above, respondent was not specifically charged with knowing misappropriation of Garrison's funds, although the complaint refers to "other clients' funds."

and that it had been dissipated . . . and that [he] needed to make the payment, and [he] had to use his own money for that [and that he] was out of Trust at that point."

It is undisputed that respondent used Smith's funds to pay Ertel. In his certification to the Court, respondent admitted that he misappropriated Smith's funds, but stated that he had used them for child support arrearages and other divorce expenses. He certified as follows:

> . . . . I had significant other expenses in connection with the divorce, and attempted to borrow the money from various sources, to no avail. . . .
>
> It was at this point in time (November, 1998) that I utilized approximately $10,000 in proceeds that were held in trust from a personal injury settlement for Francesca Smith in order to make payment on account of the arrearages and to defray certain other expenses associated with my divorce.
>
> . . . .
>
> I utilized client funds on only one occasion, i.e., $10,000 [of] the funds from the settlement of Francesca Smith's case to make payment on account of my child support arrearages and other divorce expenses.
>
> . . . .
>
> I have conceded my one-time utilization of client funds.
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> [Ex.C33 at 4-6.]

Kaminsky's investigation uncovered, however, that, although respondent was correct that he had misused Smith's funds, he was

incorrect as to the purpose for the misuse. Kaminsky's analysis of respondent's records disclosed that the funds were used to pay the $13,115.75 to Ertel, instead of child support and other divorce expenses, as respondent asserted in his certification. That respondent was mistaken, in his certification to the Court, about his reasons for taking Smith's funds is irrelevant to a finding of knowing misappropriation. Respondent admitted that he knowingly invaded $10,000 of Smith's funds: "I have conceded my one-time utilization of client funds."

At the ethics hearing, however, respondent recanted the statement made in his certification, which, he claimed, had been made in haste. Respondent contended that "they" (presumably the OAE) wanted an answer about the dissipation of Smith's funds; because his attorney was on vacation in the Himalayas at the time, the only explanation that he could summon was that he had taken Smith's money, since he knew that her funds were "not there" and that no one had "robbed" his trust account.

Respondent's newly-begotten explanation is not worthy of belief. Notwithstanding the exigencies of the moment, an innocent attorney would vigorously disavow any wrongdoing, instead of owning up to an impropriety solely to satisfy the inquirer. This is particularly true if the "confession" would inevitably lead the attorney to the portals of disbarment.

The only logical conclusion is, thus, that respondent, with either the advice or the acquiescence of counsel that substituted for his absent attorney, made a conscious decision to concede his knowing misappropriation of Smith's funds because to deny it would be futile. The OAE investigation would have undoubtedly uncovered it. Presumably, respondent hoped to succeed with a Jacob defense. His certification alludes to his purported inability to "function coherently" during the period of his divorce. It alleges that respondent was "unsure of [his] judgment. The ethical and moral boundaries that defined [his] professional life before and since became unclear to [him]."

Respondent attempted to excuse his conduct by blaming it on a period of "personal turmoil," when, allegedly, he was not acting rationally and was in "a dream-like state" because he feared for his life and also feared losing his children. Because of his emotional state, he claimed, he stopped attending to the business side of his law practice. He contended that he stopped reviewing his bank statements and keeping required records, and began to disburse funds from memory. He maintained that his misappropriation of client trust funds was negligent, not knowing and purposeful. However, he admitted that he verified his trust account balances with the banks before disbursing funds. Furthermore, he continued to practice law during this period of

"personal turmoil." In his brief to us, respondent stated that his

> personal crisis was exacerbated by a very heavy work load including work on complex cases in which he was attorney for plaintiffs in a class action with 23 representative plaintiffs and more than 100 putative class members against Dunn & Bradstreet for employment discrimination . . . .
>
> [RbB3.]

Respondent asserted that he worked on the Dunn & Bradstreet case from 1996 to 1998 and the Merrill Lynch case from May 1998 until his temporary suspension in October 1999. Respondent devoted "much of his time" to these "major" cases while in the midst of his marital conflict. Although respondent may have represented these clients negligently, he could not have represented them at all if he had been rendered so incompetent, so devoid of the comprehension and will required of a practicing attorney.

Respondent also asserted that his misappropriation of client funds was caused by returned checks and other miscellaneous charges by the banks. Respondent did not develop this defense and failed to establish that any such charges against his accounts came close to the amounts he misappropriated from clients. He, therefore, failed to discharge his burden of going forward with this defense and never proved that the bank charges were responsible for his invasion of client funds.

R. 1:20-6(c)(2)(C) places the burden of going forward with regard to defenses or mitigating factors on respondent. He failed to meet that burden. In his brief to us, he claimed that he was thwarted in his attempts to present evidence of the unusual and extenuating circumstances that led to his inability to cope with his professional obligations and that supported his claim that he did not knowingly misappropriate client funds. Respondent's claim is not accurate. As noted above, the special master permitted him to testify about those circumstances over several days of the hearing. The special master merely prevented him from giving cumulative and repetitive testimony.

The special master also permitted respondent to submit the reports of his treating psychologist. Respondent first offered those reports in opposition to the motion for his temporary suspension when he raised a Jacob defense. Nieves' reports stated that respondent's belief that he was in danger of losing his life or being physically harmed or professionally ruined would "reprioritize an individual's moral and ethical considerations." Nieves also stated that traumatic stress syndrome is characterized by "periods of anxiety, sometimes panic, difficulty concentrating, and impaired judgment and often behavioral dysfunction." Nieves opined that respondent's psychological condition could cause him to commit unintentional errors in his bank accounts. There was no evidence presented, however, that

respondent "suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly, knowing, volitional and purposeful." In re Jacob, supra, 95 N.J. at 138.

The Court affirmed the continued viability of the Jacob standard in In re Greenberg, 155 N.J. 138 (1998), cert. denied, 526 U.S. 1132, 119 S.Ct 1807, 143 L.Ed.2d 1011 (1999). Although the attorney in Greenberg admitted that he had knowingly misappropriated funds from his law firm, he claimed that his depressive disorder both excused and mitigated his misconduct, thereby sparing him from disbarment. The Court, however, determined that Greenberg had not met the Jacob standard:

> In making the determination whether an attorney lacked competency, comprehension or will, we have considered whether he or she was 'out of touch with reality or unable to appreciate the ethical quality of his [or her] acts.' In re Bock, 128 N.J. 270, 273, 602 A.2d 1307 (1992). Respondent relies on the testimony of two experts to support his claim that he was 'out of touch with reality' and had no conscious awareness of his actions when he misappropriated firm funds . . . . Neither expert goes so far as to claim that respondent was out of touch with reality or, alternatively, that he did not know what he was doing when he committed multiple acts of misappropriation . . . . Neither of respondent's experts testified that during the time he was stealing money from his law firm he was unable to appreciate the difference between right and wrong or the nature and quality of his acts.
>
> [In re Greenberg, supra, 155 N.J. at 156-57.]

More recently, the Court rejected an attorney's argument that his bipolar disorder justified a sanction less than disbarment. In re Tonzola, 162 N.J. 296 (2000). In Tonzola, the Court concluded that, although the attorney's mental illness was severe, he had failed to meet the Jacob standard because the evidence established that he knew that he was taking client funds without the client's authorization. See also In re Dean, 169 N.J. 571 (2001) (attorney disbarred for misappropriation, despite her claims of depression and misplaced trust on another; the defense did not meet the Jacob standard).

Likewise, respondent has not met the Jacob standard. There is no evidence in the record that he was "out of touch with reality" and had no conscious awareness of his actions when he misappropriated his clients' funds. The fact that respondent checked his balances with the banks prior to making disbursements demonstrates that he knew what he was doing when he was doing it. His conduct is, therefore, not excused by his psychological defense.

Respondent also claimed that, during his period of "personal turmoil," he did not properly maintain his accounts. He blamed the misappropriation of clients' funds on his deficient bookkeeping practices, claiming that he virtually ignored his recordkeeping responsibilities and did not open his bank statements. For the reasons supporting our finding of knowing

misappropriation, however, we are not persuaded that respondent's accounting derelictions were responsible for his intrusion into his clients' funds.

Finally, we note that respondent's testimony in many respects was rendered untrustworthy by his inconsistent sworn statements, his attempts to have the proceedings adjourned by concocting a car accident, and his attempt to blame prior counsel for the delays that ultimately cost him the opportunity to present witnesses in his behalf. For instance, in the proceedings for his temporary suspension, respondent's letter-brief raised the Jacob defense for his knowing misappropriation of funds. He later changed attorneys and changed his theory of the case as well -- that his state of mind at the time caused him to negligently misappropriate clients' funds.

Moreover, we pay heed to the special master's determination that respondent's testimony was not credible. The special master had the opportunity to observe respondent's demeanor and was, therefore, in a better position to assess his credibility. We defer to the special master with respect to "those intangible aspects of the case not transmitted by the written record, such as, witness credibility . . . ." Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Because the tribunal below "hears the case, sees and observes the witnesses, and [hears] them testify, it has a better perspective than a reviewing [tribunal] in evaluating the veracity

of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961).

In his brief to us, respondent cited a number of cases in which attorneys were not disbarred because of lack of clear and convincing evidence of knowing misappropriation. Those cases, however, are distinguishable from respondent's misconduct.

In In re Simms, 170 N.J. 191 (2001), the attorney entered into a disciplinary stipulation with the OAE for negligent misappropriation and recordkeeping violations. The attorney negligently misappropriated $73,638 from August 1997 to July 1999. The misappropriation was caused by, among other things, the attorney's erroneous deposit of $51,406 into his business account, rather than in his trust account, and a $16,300 bank error. In re Simms, Docket No. DRB 00-324 (August 1, 2001) (slip op. at 2). The attorney also made "over-disbursements" on behalf of some clients. Id. at 3. The attorney's shoddy bookkeeping practices contributed to the errors and his failure to discover them. There was no evidence that the attorney used the funds for personal purposes, as was the case here. Simms was reprimanded.

In re Daniels, 157 N.J. 71 (1999), also involved a disciplinary stipulation in which the attorney admitted that he engaged in the inadvertent invasion of client funds, partly due to his inadequate recordkeeping practices. That attorney, too, received a reprimand.

In In re Shelly, 140 N.J. 501 (1995), the Court was unable to conclude that the attorney's conduct -- borrowing funds from his client -- occurred with the knowledge that he lacked authorization to do so. The Court determined that the attorney was justified in assuming that he had his client's consent to borrow from her closing proceeds because of the longstanding and exceedingly informal nature of his relationship with her. The attorney was suspended for six months. Id. at 514.

The attorney in In re Stransky, 130 N.J. 38 (1992), turned over the control of his trust account to his wife, who served as his secretary/bookkeeper. The attorney's wife used trust funds to cover outstanding bills of the law practice, without her husband's knowledge. Although the Court stated that the fiduciary responsibility of client trust funds is a nondelegable duty, it found the attorney guilty of negligent, rather than knowing, misappropriation. Stransky was suspended for one year. Id. at 45.

A random audit of the attorney in In re Konopka, 126 N.J. 225 (1991), revealed that he failed to maintain trust account records, commingled personal and client funds, failed to safeguard client funds, and misappropriated client funds. The attorney had been involved in a complicated family arrangement whereby he was to keep current two mortgages on family property. The attorney regularly made payments related to the property that exceeded the amount on deposit in his trust account. Id. at 228.

The Court found no clear and convincing proof that the attorney knew that he was invading clients' funds when he made the disbursements, because at any given moment there might have been uncollected fees in his trust account. Id. at 232. In addition, the attorney did not use his trust account for his own, venal purpose. The disbursements "were related to the purposes of [his family's] account." Ibid. The attorney received a six-month suspension.

In In re Librizzi, 117 N.J. 481 (1990), the attorney attempted to reconcile his trust account records because of an OAE random audit and discovered a $25,000 shortage. Id. at 485. The shortage was due to mistakes in two matters. The attorney reported it to the OAE auditor. Ibid. The Court determined that to say that the attorney's records were in disarray was an understatement. Ibid. The attorney failed to comply with recordkeeping requirements and did not even open envelopes containing trust account statements. Ibid. Librizzi was suspended for six months.

Although the Court found that Librizzi was grossly negligent in maintaining his trust account records, ibid., it did not find that he intentionally set up his bookkeeping to use clients' funds. Id. at 492. The attorney had no bookkeeping experience and knew little about sound recordkeeping practices. The attorney was operating under the credible notion that recording fees that had

accumulated in his trust account for ten years exceeded the amounts withdrawn for the payment of interest to clients. Although the Court condemned the attorney's poor accounting practices, it could not conclude that he had knowingly misappropriated clients' funds. Id. at 493.

The attorney in In re Gallo, 117 N.J. 365 (1989), had formed a professional relationship with a Hudson County attorney, from whom he learned his inappropriate bookkeeping practices. Id. at 368. Gallo abruptly took over another attorney's practice of more than 200 files, which were in a state of complete disarray. Gallo had to reinstate complaints and deal with unanswered discovery requests. In addition, the prior attorney had not had a filing system. Id. at 369.

Gallo was unable to hire an accountant because of limited cash flow problems. His recordkeeping practices mirrored that of his former employer. He paid his business expenses from his trust account, left his fees in the trust account, and engaged in a number of other recordkeeping violations. When he believed that his trust account balance was too low, he would deposit his own funds into the account. Ibid.

The Court determined that Gallo had not designed an accounting system to prevent himself from knowing whether he was invading funds. Rather, he was following the practices of his prior employer. Id. at 374. The Court could not find knowing

misappropriation, based on the attorney's unfamiliarity with recordkeeping practices and his lack of knowledge of the daily balance in his accounts. Ibid. No clients suffered any financial injury and the attorney took numerous corrective measures. Id. at 375. Gallo received a three-month suspension. Unlike Gallo, respondent was familiar with proper recordkeeping practices as was clear from the absence of any such problems prior to his period of alleged "personal turmoil."

In another case, In re James, 112 N.J. 580 (1998), the Court did not find knowing misappropriation of trust funds where the attorney's inadequate recordkeeping practices were inherited from his legal mentors. Id. at 588. There was no clear and convincing evidence that the attorney had knowingly misappropriated client funds. The attorney was suspended for three months.

In In re Orlando, 104 N.J. 344 (1986), the attorney was spared disbarment where, because of his recordkeeping violations, he negligently invaded client funds. The negative balances in his accounts were due to his delays in depositing checks he had received. Whenever the attorney learned that he had received checks, he would disburse funds without verifying if his secretary had deposited the checks. The bank would always honor the attorney's checks because he was a substantial depositor and did legal services for the bank. Id. at 349. The attorney did not

misappropriate the funds or divert them for his personal use. He received an indefinite suspension.

Respondent relied heavily on In re Johnson, supra, 105 N.J. 249, where the Court imposed an indefinite suspension on an attorney who misused client funds because he "lost control" of his office. Id. at 255. In two of three cases that involved misappropriations, the attorney represented the guardians ad litem of infants. After the attorney deposited the infants' checks into his trust account, he did not timely deposit the funds with the county surrogate, as was required of him. Id. at 253, 254.

Although the attorney acknowledged that he misused clients' funds, he contended that he did so unknowingly. Id. at 256. The attorney was so busy trying to "build a law firm," that he was working over ninety hours per week, seven days a week, often operating on three hours' sleep and occasionally with no sleep at all. Id. at 257. The staff upon whom he relied to maintain his books and records failed to do so. He did not blame his staff but, rather, accepted responsibility for failing to supervise his employees. The attorney had hired a law clerk who stayed with him until he passed the bar. The law clerk acted as his accountant, law clerk, and firm administrator. The attorney admitted that it was his responsibility to supervise the law clerk and his office. The attorney believed that any mistakes the law clerk made were

honest mistakes, because he just did not know better. The attorney did not know he was out of trust because he was too busy with the legal end of his practice. The Court stated that circumstantial evidence can add up to the conclusion that a lawyer "knew" or "had to know" that clients' funds were being invaded, but concluded that the record fell short of the requisite proofs in that regard. The Court added that, if the record demonstrated, by the requisite degree of proof, that Johnson "had to know" that he was misusing client's funds, it would not hesitate to disbar. It found that Johnson was "spectacularly misguided in his all-consuming effort to build a practice at the expense of other considerations — most of them ethical and professional considerations, some of them personal . . . ." Id. at 259. The Court stated:

> Respondent's intense dedication became his undoing. His tireless industry in the interest of some clients made him a danger to others. The shambles he created in his office has brought him perilously close to the permanent loss of the right to practice, which he worked so hard to earn.
>
> . . . .
>
> [W]e do not intend to suggest that henceforth a respondent who just walks away from his fiduciary obligation as safekeeper of client funds can expect this Court to take an indulgent view of any misappropriation. We will view 'defensive ignorance' with a jaundiced eye. The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a

> shield against proof of what would otherwise be a 'knowing misappropriation.' There may be semantical inconsistencies, but we are confident that within our ethics system, there is sufficient sophistication to detect the difference between intentional ignorance and legitimate lack of knowledge. . . . [We] do not retreat one bit from the principle that ["i]t is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using client's trust funds." In re Fleischer, 102 N.J. 440, 447 (1986).
>
> [Id. at 261.]

Respondent's conduct differed from Johnson's in that (1) he did not delegate his recordkeeping responsibility to anyone, (2) he badly needed funds because of his dire financial circumstances, and (3) he knew the status of his funds. This was shown by his practice of "lapping" and by verifying his account balances before making disbursements. Respondent's "defensive ignorance" of his accounts does not shield him from a finding that he knowingly misappropriated client trust funds.

None of the attorneys' actions in the above cases are analogous to respondent's. As the Court observed in In re Roth, 140 N.J. 430, 445 (1995):

> The line between knowing misappropriation and negligent misappropriation is a thin one. 'Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission.' In re Johnson, 105 N.J. 249, 258, 520 A.2d 3 (1987). However, this Court has noted that 'an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that circumstantial evidence

> can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded.' Ibid. In this case, that circumstantial evidence includes repeated invasions of client funds that were required to be held inviolate. The testimony adduced convincingly suggests that respondent 'knew,' or 'had to know' that he was invading client funds.

The evidence in this case clearly and convincingly establishes that respondent knew the status of his accounts and, therefore, knew that he was misappropriating client trust funds. Respondent's state of mind, brought on specifically by his abysmal financial circumstances and his dire need for funds, distinguishes his conduct from that of the above attorneys. See In re Spagnoli, 115 N.J. 504 (1989) (in justifying the attorney's disbarment, for among other reasons, defrauding his clients, the Court considered the attorney's state of mind in taking clients' retainers without any intention to perform any work). Respondent was unable to obtain loans and faced arrest and incarceration for nonpayment of child support. He, therefore, consulted with banks to determine if clients' settlement funds had already been deposited, took those funds for himself, and delayed disbursing the clients' share of the proceeds until he could replace the borrowed funds.

In In re Noonan, 102 N.J. 157, 160-61 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment that is 'almost invariable,' id. at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' — all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since Wilson, it has been invariable. [Footnote omitted.]

We find that respondent surely suffered through an extremely stressful and emotionally taxing period while his divorce was pending. He feared for his life and his ability to maintain his profession, and may not have acted rationally at all times. In fact, we considered these compelling circumstances to mitigate the discipline imposed in respondent's prior disciplinary matters. However, despite respondent's depression, anxiety, and post-traumatic stress disorder, there is no indication in this record, even after it was supplemented, that "respondent could

not distinguish between right and wrong or that he did not understand the nature and quality of his acts." In re Baker, 120 N.J. 496, 504 (1990).

We conclude, therefore, that respondent was in desperate need of funds to defray his personal expenses and, thus, borrowed funds from his clients, without their authorization. The record clearly and convincingly supports a finding that, after admitting as much in his certification to the Court, respondent had a great deal of time to reflect on his sworn statements and, first, attempted to devise a mental incapacity defense, then later engineered a negligent misappropriation defense. We find neither defense persuasive. On both scores, respondent did not sustain his burden of going forward, as required by R. 1:20-6(c)(2).

Five members, therefore, reject respondent's mental illness and negligent misappropriation defenses and recommend that he be disbarred for the knowing misappropriation of client funds.

Chair Mary Maudsley and Vice-Chair William O'Shaughnessy found knowing misappropriation only in the Smith matter and believe that the remaining instances of misappropriation were the result of "wilfull blindness." When an attorney is aware of the highly probable existence of a material fact, but does not satisfy himself or herself that it does not in fact exist, that state of mind goes beyond recklessness and equates with knowledge. In re Skevin, 104 N.J. 476, 486.

Although aware that wilfull blindness satisfies the requirement of knowledge in misappropriation cases and warrants the application of the mandatory Wilson sanction, the dissenting members believe that the traumatic circumstances that beset respondent -- his several incarcerations and constant fear of death or physical injury -- were temporary in nature and, as such, explain his total lack of attention to his trust account records and consequent failure to safeguard clients' funds. These members are convinced that respondent's conduct is not likely to be repeated and that the prospect of redemption is extremely favorable. Accordingly, they would suspend respondent for an indeterminate period and afford him the opportunity to show rehabilitation.

Members Matthew Boylan, Esq. and Robert Holmes, Esq. did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Warren Randolph Kraft
Docket No. DRB 04-436

Argued: March 17, 2005

Decided: September 14, 2005

Disposition: Disbar

Members	Disbar	Indeterminate Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
Maudsley		X					
O'Shaughnessy		X					
Boylan							X
Holmes							X
Lolla	X						
Neuwirth	X						
Pashman	X						
Stanton	X						
Wissinger	X						
Total:	5	2					2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel