SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-200

IN THE MATTER OF

JERROLD D. GOLDSTEIN

AN ATTORNEY AT LAW

Decision

Argued: October 19, 2000

Decided: December 20, 2000

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Pamela Brause 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 based on a recommendation for discipline (disbarment) filed by special master Roger J. Desiderio.

The complaint in this matter alleges eleven counts of knowing misappropriation of client or escrow funds, in violation of RPC 1.15 and RPC 8.4(c), and one count of conflict of interest, in violation of RPC 1.7.

Respondent was admitted to the New Jersey bar in 1967. He maintains an office for the practice of law in North Plainfield, New Jersey.

In January 1997, respondent was reprimanded for negligent misappropriation of client funds and failure to comply with the recordkeeping requirements of R. 1:21-6. In re Goldstein, 147 N.J. 286 (1997). In April 1997, he was temporarily suspended, pending a hearing on an order that he show cause why his temporary suspension should not continue until the final resolution of all ethics proceedings pending against him. In re Goldstein 148 N.J. 467 (1997). Shortly thereafter, the Court ordered that respondent be restored to the practice of law, on the following conditions: (1) that he practice only under the supervision of a proctor; (2) that all checks drawn on his attorney accounts be co-signed by his proctor and (3) that he cooperate with the Office of Attorney Ethics ("OAE") in its periodic audits of his attorney accounts. In re Goldstein 149 N.J. 88 (1997).

* * *

This matter is the result of an OAE audit, after respondent's bank notified the OAE that his trust account was overdrawn by $269.34. The OAE's reconciliation of respondent's trust account as of August 31, 1996 showed a $22,854.88 shortage in funds that respondent should have been holding for seven clients, despite the fact that respondent had deposited $3,500 of his personal funds in the account to cover the overdraft. The reconciliation did not include two additional matters for which respondent should have been holding funds:

the Goldstein to Benkovitz real estate matter and the Exxon case.[1] On October 23, 1996, respondent deposited $23,000 of his own funds in the trust account to cover the shortage. Despite that deposit, the OAE's March 31, 1997 reconciliation of respondent's trust account showed a shortage of $78,719.67. The OAE's reconciliations of the account for September 30, October 31, November 30 and December 31, 1996 and for January 31 and February 28, 1997 also showed that respondent's trust account was out of trust.

The material facts are not in dispute. Respondent does not contest that: (1) he was repeatedly out of trust during 1996 and 1997; (2) his trust account was overdrawn on several occasions during that time; (3) in three cases, he withdrew fees from his trust account before the corresponding settlement funds had been deposited in the account; (4) he withdrew fees in excess of what was owed him in two matters; (5) his advancing of fees and excess fees invaded other clients' trust funds or escrow funds; (6) he used real estate deposits without his clients' consents in three transactions; (7) his trust account check in payment of a real estate seller's line of credit was returned for insufficient funds; (8) he paid an expert from his trust account when there were no corresponding funds in the account; and (9) the advanced and excess fees and real estate deposits were usually deposited in his business account when that account was overdrawn.

[1] Respondent disputed that he should have been holding funds for the Exxon case. As set forth below, respondent testified that the funds he had deposited in his trust account for Exxon were for costs that he should have deposited in his business account.

Respondent denied, however, that he knowingly misappropriated the funds. He contended that the problems in his trust account were the result of poor recordkeeping and that he was unable to satisfactorily manage his attorney records because of depression and family illnesses. According to respondent, when he either advanced fees to himself prior to receiving the corresponding settlement funds, took excess fees or used real estate deposits, he always believed he had sufficient fees in his trust account from other clients' matters to cover such disbursements. However, respondent was unable to identify the client matters for which he was allegedly owed fees.

The Cranwell Matter [2]

Respondent represented Yvonne Cranwell in a medical malpractice case that settled for $125,000. On February 26, 1996, respondent deposited the two Cranwell settlement checks, for $62,500 each, in his trust account. Prior to his deposit of the Cranwell settlement checks, respondent had already issued two trust account checks to himself that he attributed to his fees for Cranwell: a $5,000 check on February 6, 1996 and a $500 check on February 8, 1996. There were overdrafts in respondent's business account on February 5 and February 7, 1996.

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[2] The discussion of the various matters does not sequentially parallel the counts in the complaint. To the extent possible, the matters are presented chronologically for better clarity.

During the audit, respondent admitted that he knew, at the time he wrote the fee checks, that he had not yet deposited the Cranwell settlement check and that his disbursements to himself would invade "funds other than Cranwell."

The Goldstein to Benkovitz Real Estate Matter

Respondent represented the sellers in the sale of real estate to Gregory Benkovitz. It was unclear from the record exactly who the sellers were. The real estate contract indicates that respondent was the seller. The buyer's attorney, William Nechert, testified that he understood the seller to be a partnership and respondent to be one of the partners. Respondent testified that the seller entity had been owned by his deceased brother.

It is undisputed that (1) respondent deposited Benkovitz's $9,900 deposit check in his trust account on March 13, 1996; (2) the real estate transaction never closed; (3) on December 9, 1996, respondent issued a $9,900 trust account check to Nechert as a refund of Benkovitz's deposit; (4) respondent did not maintain the Benkovitz deposit intact in his trust account between March 13, 1996 and December 9, 1996; (5) on at least five occasions between March 13, 1996 and December 9, 1996, respondent's trust account was in an overdraft position; (6) respondent did not deposit personal funds in his trust account before issuing the trust account check to Nechert; and (7) respondent's check to Nechert invaded other clients' funds.

Nechert testified that respondent was to hold Benkovitz's deposit in escrow until the closing, pursuant to the terms of the real estate contract, and that he never authorized respondent to use the funds. By letter dated October 10, 1996, Nechert requested that respondent refund the $9,900 deposit. Despite three additional letters and numerous telephone calls, respondent did not return the deposit until December 9, 1996.

Meanwhile, by letter dated October 18, 1996, the OAE provided respondent with its reconciliation of his trust account. The reconciliation reflected a $22,854.88 shortage as of August 31, 1996, but did not show any client balance for the Benkovitz transaction. Despite an October 21, 1996 telephone conversation with the auditor about the shortage and an October 25, 1996 written reply to the OAE, in which respondent stated that he had deposited $23,000 of his personal funds in his trust account to cover the deficiency, respondent did not inform the OAE that its reconciliation did not reflect the Benkovitz deposit. If the Berkovitz deposit is included in the reconciliation, the shortage is $32,758.88.

Respondent testified that he did not realize, in 1996, that the reconciliation did not include the Benkovitz deposit, because he simply accepted the OAE's conclusion as to the amount of the shortage and did not review the OAE's reconciliation.

The Obie/Hooks Matter

Respondent represented Malcolm Obie and Gwendolyn Hooks in the purchase of property from Stewart Cundiff. On July 23, 1996, respondent deposited his clients' $6,250

real estate deposit in his trust account and confirmed the deposit to his clients' mortgage company. On that same date, respondent issued a trust account check to himself for $3,000 and deposited it in his business account to cover an overdraft in that account. On the check and in his disbursements journal, respondent attributed the check to "Obie," but did not list the check on the client ledger card for the transaction.

When the $3,000 check was debited to respondent's trust account on July 24, 1996, it caused the account to be overdrawn by $32.36. It is obvious, therefore, that respondent had already invaded his clients' deposit by July 24, 1996.

The Cundiff to Obie/Hooks closing took place on July 30, 1996. By letter dated that same day, respondent advised Obie and Hooks that he had represented "Cundiff and his company in numerous real estate transactions and business matters. There is nothing in our relationship that would, in any way, impact my representation of you in this closing." Respondent also advised his clients that, if they had any doubts, they were "free to have it reviewed by any other competent New Jersey attorney." His clients signed the disclosure letter consenting to respondent's representation of their interests. Respondent did not disclose to Obie and Hooks that he had already taken funds from their deposit.

According to the RESPA statement signed at the closing, respondent was entitled to an $875 fee. Respondent testified that he took $3,000 from the Obie/Hooks deposit because Cundiff owed him fees for other legal work unrelated to the Obie/Hooks transaction and that Cundiff had authorized the disbursement. Cundiff corroborated respondent's testimony.

Respondent admitted that he did not have his clients' consent to use their funds prior to the closing. According to respondent, he did not believe that his clients' consent was required because "all of the conditions prior to closing had been met and I believed that Mr. Cundiff had a right to that money...He had an equitable right to that money and perhaps a legal right."

The Rothrock Matter

In 1996, respondent represented John and Goldie Rothrock in the sale of property to George Reilly and Donna Mahlstedt. As of August 5, 1996, respondent had received the entire $32,000 deposit from the buyers, which he was required to hold in trust until the closing of the title. However, respondent did not maintain the $32,000 deposit intact in his trust account. In fact, when respondent deposited the second check ($31,000) from the buyers (representing the balance of the $32,000 deposit) in his trust account on August 5, 1996, the trust account had a negative balance.

After depositing the $31,000 check in his trust account, respondent issued three trust account checks to himself: a check for $5,000 on August 5, 1996, a check for $1,000 on August 8, 1996 and a check for $4,500 on August 12, 1996. Respondent did not show any of the disbursements on the client ledger for the Rothrock matter. In his disbursements journal, respondent attributed the $5,000 check to the "Baldwin" case. He did not indicate any client matter on the check itself. Respondent's notation on the $1,000 check indicated

that the check was for "Baldwin fees," while in his disbursements journal, he attributed the check to "Rothrock". Respondent did not write any client name on the $4,500 trust check; in his disbursements journal, he indicated that the check was for "Rothrock."

The three trust checks were deposited in respondent's business account. Prior to each of the deposits, respondent's business account showed a shortage.

By August 22, 1996, respondent's trust account balance was $19,751.54 or $12,248.46 less than he should have been holding for the Rothrock deposit alone.

On September 12, 1996, respondent issued two additional trust account checks to himself, for $2,500 and $1,500, respectively. Respondent did not indicate any client matter on the checks or in his disbursements journal. Both checks were deposited in respondent's business account to cover overdrafts in that account.

The Rothrock real estate contract was terminated effective October 7, 1996 by agreement of the parties. On October 9, 1996, respondent issued a $32,000 trust account check to the buyers to refund their deposit.

When the OAE questioned respondent, at the September 24, 1996 audit, about the three August 1996 disbursements to himself, respondent immediately crossed out the references to Baldwin and Rothrock in his disbursements journal and stated that the disbursements were not related to those matters. He was unable to recall, however, to what client matters the withdrawals were related.

With respect to the two September 1996 checks, respondent testified that he had closed on the sale of his house on September 11, 1996 and believed that he was owed additional money from that transaction. According to respondent, he had not reviewed his client ledger for his real estate closing, prior to issuing the checks. The ledger showed that respondent disbursed the entire proceeds of his house sale on September 11, 1996 and "zeroed out" his ledger for the transaction.

The Cueto Matter

In 1996, respondent represented Iris and Orlando Cueto in a medical malpractice case that was settled for $235,000. According to the settlement statement, respondent was entitled to $79,049.39 as fees and costs in the matter.

On October 7, 1996, respondent deposited the $235,000 settlement check in his trust account. Between October 5, 1996 and October 23, 1996, respondent disbursed the entire settlement proceeds, including $77,086.64 to himself or on his behalf.[3] Among the checks issued was one payable to a Dr. Lawrence Gross, in the amount of $10,000. Respondent explained that he owed Dr. Gross $10,000 as a result of a personal loan. He also explained that he had issued a trust account check directly to Dr. Gross, instead of taking the $10,000

[3] Although two of the checks were dated before the settlement proceeds were deposited in respondent's trust account, they apparently were not negotiated until October 7, 1996. The difference between respondent's fees and costs, as shown on the settlement statement, and the total of the checks that respondent disbursed to himself or on his behalf is attributable to a $1,962.75 payment to a court reporting service.

as his fee and then issuing a personal check to Dr. Gross, because his depression had prevented him from focusing on his attorney accounts.

On October 18, 1996, the OAE notified respondent that its reconciliation of respondent's trust account, as of August 31, 1996, showed a $22,854.88 shortage. On October 21, 1996, respondent told the OAE auditor that he had approximately $23,000 remaining in his trust account from his fees in the Cueto matter and stated that he would leave the fees in the account to cover the shortage. The auditor advised him to first withdraw his fees in order to provide the appropriate "paper trail" for the Cueto settlement funds and then deposit his own funds to cover the shortage.

On October 23, 1996, respondent issued a check to himself for $22,086.64 as fees and costs in the Cueto case. After that disbursement, there were no funds remaining in respondent's trust account from the Cueto settlement. Respondent "zeroed out" the balance on his client ledger for Cueto and in his disbursements journal. On that same day, respondent deposited a $23,000 business account check in his trust account to cover the shortfall found by the auditor.

However, the day before the October 23, 1992 deposit, respondent had issued a trust account check to himself in the amount of $4,500. Neither the check nor respondent's disbursements journal references any client matter. Respondent deposited the check in his business account to cover an overdraft in that account.

On October 30, 1996, respondent issued another trust check to himself, for $2,000, which he deposited in his business account to cover another overdraft in the account. Both the check and the disbursements journal reference "TR/MISC/ACCT." However, respondent admitted that he had no such account or client matter.

Although respondent had "zeroed out" the Cueto matter on his client ledger and in his disbursements journal, he thereafter issued four additional trust account checks to himself: $900 on October 28, 1996; $5,503.21 on October 31, 1996; $2,000 on November 5, 1996; and $2,200 on November 7, 1996. The check notations indicated that the disbursements represented respondent's fees in Cueto. The $5,503.21 and $2,000 checks were listed on respondent's client ledger for Cueto, after respondent "zeroed out" the ledger. The four checks were deposited in respondent's business account, which was experiencing shortages during that time.

Respondent also made a disbursement of $7,500, referenced to the Cueto matter, to Mark J. Bressler, Esq. Respondent stated that the check to Bressler was the repayment of a personal loan and that he noted on the check and in his disbursements journal, "Cueto fees ded." [deducted], so that he would remember that the disbursement was against his fees for the Cueto matter.

In total, respondent made disbursements of $18,103.21 either to himself or on his behalf, utilizing other clients' funds that he referenced to the Cueto matter. Respondent also

issued two checks to himself, not attributed to any client matter, shortly after being told by the OAE that his trust account was out of trust.

Respondent testified that, although the checks for $5,503.21 and $2,000 were listed on the client ledger after he had "zeroed out" the ledger, those entries were not made at the time he issued the checks. According to respondent, when he wrote the two checks, he believed that he was still owed fees for Cueto, because he had forgotten about the $10,000 check to Gross and he did not review his client ledger. Respondent testified that he entered the two checks on the ledger, after he realized that he should not have taken additional fees in Cueto, to remind himself that the funds had to be replaced. However, he never replaced the funds. His explanation was that he believed he had fees owed from other cases that would cover the excess fees taken in Cueto. Respondent could not identify those other cases.

Respondent also attributed his removal of excess fees in Cueto to his failure to use correctly his "One-Write" recordkeeping system.[4] The "One-Write" system requires the attorney to place his or her disbursements journal sheet and his or her relevant client ledger beneath the trust check at the time the check is written so that the check is shown on all three documents. According to respondent, he would frequently write trust checks without placing his disbursements journal and/or his client ledger beneath the check.

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[4] Respondent also advanced this argument in some of the other matters.

It is noteworthy, as pointed out by the OAE, that respondent "flip-flopped" in his use of the "One-Write" system during the relevant time. He correctly used it for legitimate checks unrelated to the Cueto matter, while not using it correctly for checks improperly attributed to Cueto.

The Exxon Matter

Respondent represented twenty plaintiffs in an employment discrimination suit against Exxon, a case he had received from the plaintiffs' prior attorney. The prior attorney also sent to respondent a check for $4,580, which was deposited in respondent's trust account on October 5, 1995. The funds represented retainers received from clients. Respondent explained that each of the plaintiffs was assessed a $1,000 retainer as an advance for costs. By February 1, 1996, respondent had deposited a total of $14,480 of these advances in his trust account.

Between November 30, 1995 and February 1, 1996, respondent issued five trust account checks to himself, totaling $17,000, which he attributed to the Exxon matter in his disbursements journal and on the checks. However, he did not include those disbursements on his client ledger for the case. The five trust account checks were deposited in his business account to cover overdrafts in the account. As of February 1, 1996, respondent had a negative trust account balance of ($2,520) for the Exxon case.

On February 19, 1997, respondent disbursed $15,000 from his trust account to Tinari Economics for expert fees in the Exxon case. Between February 1, 1996 and February 19, 1997, respondent had only deposited $150 in his trust account for Exxon. Therefore, there were no available funds from which respondent could have disbursed the $15,000.

Respondent testified that, when he issued the $15,000 check, he believed that he had sufficient funds in his trust account from fees owed him in other cases. Respondent specifically mentioned the Leap case as one in which he had left earned fees in his trust account. However, as set forth below, that is not accurate. Respondent was unable to recall any other case in which his fees would have covered the $15,000 check. Also, as noted above, on July 18, 1996 and October 23, 1996 respondent had to deposit personal funds in the amounts of $3,500 and $23,000, respectively, in his trust account in order to cover shortages.

The Potenzano Matter

Respondent's firm represented Joseph Potenzano in connection with a medical malpractice claim that was settled for $65,000. An associate of respondent primarily handled the case for the firm. The settlement check was credited to respondent's trust account on December 27, 1996.

However, prior to the deposit of the settlement proceeds, respondent issued two trust account checks to himself that he attributed to his fees for the Potenzano case: one for $8,000, on December 20, 1996, and another, for $2,000, on December 21, 1996.

At the March 12, 1997 audit, respondent stated that he took the $10,000 because he knew the Potenzano settlement check "was on its way." In contrast, at the ethics hearing, respondent testified that, after he made out the two checks, he instructed his secretary to hold them until the settlement funds were deposited in his trust account. According to respondent, he then went to Florida to visit his mother, who was ill. He presumed that, in contravention of his instructions, his secretary had immediately deposited the checks in his business account. However, respondent did not offer that explanation in March 1997. His secretary did not testify at the hearing.

The Flores to Mitzner Real Estate Matter

Respondent represented Jose Flores in his purchase of property from Jere and Michael Mitzner. At the December 31, 1996 closing, respondent issued a trust account check for $162,955.76 to First Union National Bank in satisfaction of the Mitzners' line of credit, which was secured by a second mortgage on the property. Because the check caused an overdraft in respondent's trust account, the check was returned on January 6, 1997.

On March 3, 1997, respondent obtained a $100,000 certified check, which he gave to Michael Mitzner. The Mitzners' line of credit was finally paid off on April 7, 1997.

Michael Mitzner testified that, on February 28, 1997, he received a statement from First Union showing that his line of credit had not been paid and that additional interest had been charged. According to Mitzner, on March 3, 1997, respondent told him that the problem had been caused by a former associate, who "was apparently stealing money from the trust account which [respondent] was unaware of." Mitzner further testified that, during a March 5, 1997 conversation, respondent had told him that the associate had been discharged because he:

> had misdirected a $60,000 settlement check and that [respondent] had had payments stopped on that and was having his trust account checked out to find out what amount of money he still had in it because there was some inability to know what was there because of what subsequently went on with this other attorney.

At the March 12, 1997 audit, respondent stated that he became aware of the overdraft notice at the end of January 1997. The notice indicated that the check to First Union had been paid and that the payment of the check had caused an overdraft. Respondent could not remember when he learned that, in fact, the check had not cleared. He remembered speaking with Mitzner about the problem, after which he obtained a $100,000 certified check and gave it to Mitzner. He subsequently made two additional $10,000 payments to Mitzner and then borrowed the remainder of the funds to pay off Mitzner's credit line. Respondent admitted that he did not obtain a certified check for the full amount on March 3, 1997, because he did not have the funds available. At the March 12, 1997 audit, respondent also

admitted that, as of that date, he was out of trust by $52,955.76 in connection with the Mitzner matter alone.

Respondent denied having told Mitzner that the shortage in his trust account had been caused by a former associate's theft of funds from the account. Respondent admitted that the associate had never stolen any funds from his trust account and that his trust account was not affected by the fact that the Potenzano settlement check had initially been sent to respondent's former associate.

According to respondent, Mitzner apparently misunderstood some remarks that respondent had made about the former associate and the Potenzano settlement check. Respondent did not explain why he would have told Mitzner about the associate when (1) the incident regarding the check occurred in December 1996 and respondent did not speak with Mitzner until March 1997 and (2) the incident had no bearing on the fact that respondent's trust account check in payment of Mitzner's line of credit was returned because of insufficient funds in the trust account.

The Leap Matter

Respondent represented the estate of Cheryl Leap in a medical malpractice case against two defendants. The case was settled for $171,446. According to the settlement statement, respondent was entitled to fees and costs of $60,130.31. Respondent deposited

$163,946 in settlement funds from one defendant in his trust account on February 7, 1997 and $7,500 from the second defendant on February 14, 1997.

On January 29, 1997, prior to his receipt of the settlement funds, respondent issued two trust account checks to himself, for $5,000 and $250, for attorney's fees in Leap. Both checks cleared respondent's trust account on January 30, 1997. The $5,000 check was deposited in respondent's business account to cover an overdraft in the account. The $250 check was cashed by respondent.

After depositing the settlement funds, respondent took an additional $62,000 (for a total of $67,250), although he was only entitled to $60,130.31 for his fees and costs. Respondent issued trust account checks totaling $180,965.69 attributed to Leap, despite having deposited only $171,446 in his trust account, thereby invading other clients' funds by $9,519.69.

The last trust account check that respondent attributed to the Leap case was a check to himself, for $6,000, on February 24, 1997. It was deposited in his business account to cover an overdraft in that account. Respondent testified that he mistakenly took the $6,000 on February 24, 1997, because he had forgotten that he had already taken his costs from the settlement proceeds.

* * *

Jerome Newler, CPA, testified on behalf of respondent. Newler testified that respondent's trust overdrafts and invasion of trust and escrow funds were the results of respondent's "sloppy bookkeeping and negligent office procedure," as well as "improper procedures" by the bank where respondent kept his trust account and the bank's "less than desirable customer assistance and support." Newler concluded that, during the relevant time, respondent would not have known from his records that his trust account was overdrawn, unless his bank notified him of an overdraft.

The "improper" bank procedures referred to by Newler were the following: (1) on twenty-five occasions between January 11, 1996 and February 4, 1997, the bank credited respondent's account with a deposit, one or more days before the date shown on the "received-date" stamped on the deposit slip and, on one occasion, credited the deposit three days after the "received-date" shown on the deposit slip; (2) on one occasion, the bank "recalled" an overdraft notice, then re-issued it on the same date; and (3) one month the bank showed the IOLTA interest on respondent's bank statements and then withdrew the interest the following month.

Newler did not connect any of the allegedly "improper" bank procedures to any of the misappropriations.

In attempting to show that respondent could not have been aware his trust account was overdrawn absent notification from his bank, Newler prepared a "cash register analysis" that "exemplifies the trust checking account balances as seen by [respondent]." However,

Newler's testimony revealed that the analysis did not show the balances "as seen by [respondent]." Rather, it was a report that Newler prepared by taking the disbursements listed on respondent's disbursements journal and adding certain deposits that respondent had not recorded. Newler admitted that his analysis did not take into account the amount of client funds that respondent should have been holding in trust and that it did not show whether or not respondent was out of trust. For example, Newler's "cash register analysis" for September 11, 1996 showed a trust account balance of $36,837.45. His "analysis" did not, however, take into account the fact that respondent should have been holding $32,000 for the Rothrock deposit and $9,900 for the Benkovitz deposit. Newler admitted that respondent would have been out of trust on that date, based on those two matters alone. Newler also admitted that it would not be appropriate for an attorney to issue a check from his trust account simply based on the amount of funds in his trust account, without knowing how much he should be holding in trust for his clients.

Newler disagreed with the OAE's March 31, 1997 reconciliation of respondent's trust account, which showed a shortage of $78,719.67. According to Newler, the reconciliation overstated the shortage by at least $2,293.87, because it included items that respondent should have deposited in his business account as fees, rather than in his trust account. In determining that the items were fees, rather than trust funds, Newler did not make any independent inquiry. He merely accepted respondent's explanations of the items. If

respondent's explanations are to be accepted, then respondent was out of trust by $76,425.80 on March 31, 1997.

Newler testified that he did not perform a reconciliation of respondent's trust account, did not determine what funds respondent should have been holding in his trust account during the relevant times, did not determine if there were non-client funds in the trust account to cover any of the funds allegedly misappropriated by respondent, did not examine whether the checks respondent issued to himself invaded other clients' funds, as alleged by the OAE, and did not make an independent evaluation of the eleven instances of knowing misappropriation alleged in the complaint. In fact, Newler stated that he did not even discuss those eleven transactions with respondent. According to Newler, those activities were not within the scope of his retainer agreement with respondent.

* * *

Respondent testified that the discrepancies in his trust account were the result of poor recordkeeping. He further testified that, during the relevant time, he was unable to concentrate on his recordkeeping because he was depressed. He attributed his depression, in part, to the illness and death of his brother and the illness of his wife. Respondent's wife was diagnosed with breast cancer and his brother with lung cancer in May 1993. His brother

died in September 1993. His wife was successfully treated for the breast cancer. The incidents alleged in the complaint occurred during 1996 and 1997.

Dr. Alan Fine, an internist, has been respondent's doctor, as well as his friend, since 1978. He testified that he believed that respondent was mildly depressed, when he first examined him in 1978. In 1991, Dr. Fine prescribed "a mild medication" for respondent because, while respondent seemed less depressed, he complained of forgetfulness and difficulty in concentrating. Dr. Fine did not refer respondent to a psychiatrist because respondent's symptoms were "relatively mild" and "at least half of the patients that we see manifest some symptoms of depression."

In December 1993, Dr. Fine noted that respondent's depression had "improved" and that he was doing "remarkably well," despite the fact that his wife was in treatment for her breast cancer and that his brother had died after a painful illness. On April 1, 1996, respondent told Dr. Fine that he had "been feeling in general quite well," had a "high energy level" and that his "law practice [was] doing very well." With respect to respondent's depression, Dr. Fine diagnosed it as "unipolar depression, mild, improved."

When Dr. Fine next saw respondent for an examination, in May 1998, respondent reported that he had a very difficult year because both of his parents had died: his mother in January and his father in April 1998. Dr. Fine's notes indicate that, while respondent's "law practice is apparently doing well he continues to have ongoing financial concerns because of a failed business venture of several years ago."

Shortly after his May 1998 examination, respondent experienced heart problems, for which he underwent surgery. In July 1998, Dr. Fine referred respondent to Rhonda Rapps, a psychologist, for stress management.

Dr. Rapps testified that, although she did not see respondent until July 1998, based on what respondent told her, she concluded that, in 1996 and 1997, he had been suffering from a "dysthymic disorder." Dr. Rapps described dysthymic disorder as a form of depression existing for more than six months and severe enough to affect a person's life, although not as severe as a major depressive disorder. Dr. Rapps stated that a dysthymic disorder is not listed as a cognitive disorder by the Diagnostic and Statistical Manual of the American Psychiatric Association.

It was Dr. Rapps' opinion that respondent's misuse of trust funds was the result of "negligence and not having super training and not a great deal of interest. He was more interested in the practice of law. Finance was never his strong suit." She explained that one of the symptoms of depression is a low energy level and that respondent focused the energy he had on the actual practice of law, rather than on its bookkeeping aspects.

As of the September 2, 1999 hearing, Dr. Rapps had not seen respondent for several months. She testified that he had improved during the time she had seen him and that, when she last saw respondent, he was fit to practice law.

Dr. Daniel Greenfield, a psychiatrist, examined respondent on January 30, 1999, at the request of the OAE. Dr. Greenfield testified that, during the relevant time, respondent

suffered from dysthymia, which he defined as a form of depression that a person experiences virtually all of the time for a minimum period of two years.

According to Dr. Greenfield, respondent's dysthymia did not interfere with his ability to practice law. He opined that respondent was competent to manage his financial affairs and had the mental ability to understand his trust accounting responsibilities and to maintain his attorney records. In Dr. Greenfield's opinion, respondent did not suffer from any thought disorder, psychotic processes or severe affective disorders and had no difficulty with cognitive processes. Dr. Greenfield testified that respondent's illness did not deprive him of the ability to understand the difference between right and wrong and did not cause his will to be overborne, so as to prevent him from freely deciding upon a course of conduct.

It was significant to Dr. Greenfield that Dr. Fine, respondent's personal physician, had observed, in April 1996, that respondent had a high energy level because dysthymia is "classically associated with low energy levels, and if he's able to be energetic as he presents to his doctor, that would go against severely symptomatic dysthymia." Furthermore, respondent had reported to Dr. Fine, in April 1996, that his law practice was doing very well. Respondent also told Dr. Greenfield that 1996 and 1997 were "good years" for his law practice and that he was able to try complex cases.

According to Dr. Greenfield, dysthymia does not affect a person selectively, such as only with respect to financial affairs, and there is no type of dysthymia that would permit a

person to successfully try medical malpractice cases and, at the same time, interfere with that person's ability to handle less difficult tasks, such as his attorney records.

Dr. Greenfield concluded that there was no causal connection between respondent's dysthymia and the incidents alleged in the complaint.

* * *

Respondent also presented, through testimony and affidavits, considerable evidence of his good character. Family, friends and colleagues testified that respondent is a good lawyer and an honest and trustworthy person who is committed to community service.

* * *

The special master found that respondent knowingly misappropriated clients' funds and recommended that he be disbarred. While the special master did not specifically state that he found knowing misappropriation with respect to all of the incidents alleged in the complaint, a fair reading of his report allows this conclusion.

The special master found that, although "there was no question that respondent was suffering from depression during the relevant time," such depression did not rise to the standard required by In re Jacob, 95 N.J. 132 (1984). While accepting respondent's testimony that his depression adversely affected his work, the special master remarked that

"an attorney practicing for thirty (30) years, must have recognized at the very least that he was not entitled to take fees on personal injury cases prior to the receipt, deposit and availability of the settlement proceeds." He also found that respondent's prior discipline for negligent misappropriation was "probative" of respondent's knowledge of the attorney recordkeeping requirements.

The special master found credible respondent's statements that it was not his intention to defraud his clients or to abscond with his clients' funds. The special master also found that no client of respondent "suffered any adverse consequences" and that respondent "did not derive any personal financial benefit" from his misuse of trust funds. Finally, the special master gave considerable weight to the extensive character testimony from relatives, friends and colleagues of respondent.

While the special master agreed with respondent's argument that "the Wilson rule should be modified to allow for a review of all of the circumstances surrounding the misappropriation," he concluded that respondent had "knowingly misappropriated clients' funds" and that he "must recommend disbarment."

* * *

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The special master correctly concluded that respondent knowingly

misappropriated trust and escrow funds and that he should be disbarred. However, the special master was mistaken in his finding that respondent did not personally benefit from the misappropriations. Respondent personally benefitted because he paid his business expenses and covered overdrafts in his business account with the misappropriated funds. He also paid two personal loans from his trust account: one paid directly from the Cueto settlement funds and the other, although attributed to the Cueto settlement, paid after all of the Cueto funds had been disbursed.

Respondent misappropriated client trust funds and escrow funds in several different ways. He advanced fees to himself prior to depositing the settlement checks in the Leap, Potenzano and Cranwell matters, thereby invading other clients' funds. In the Leap matter, respondent also took more than was due him in fees. He also took excess fees in the Cueto matter. Again, those excess fees invaded funds that respondent should have been holding for other clients.

Respondent used real estate deposits, without the parties' consents, in the Benkovitz, Obie/Hooks and Rothrock matters. Although he apparently had the seller's consent to use the deposit in the Obie/Hooks matter, the seller was not his client and it was his clients who had funded the deposit.

In the Flores to Mitzner matter, respondent's trust account check in payment of the seller's equity line of credit was returned for insufficient funds. Even after respondent knew

that the check had been returned, he failed to make good on the check for more than a month because he did not have the funds.

Finally, in the Exxon matter, respondent paid an expert's fee from his trust account, knowing that he had already disbursed all of the funds that had been deposited in the trust account for the Exxon case.

Respondent attributed his misappropriations to poor recordkeeping. According to respondent, he thought that he had left enough earned fees in his trust account to cover other fee withdrawals. However, respondent was unable to present any factual basis for his belief.

Respondent's testimony that his misappropriations were simply the result of poor recordkeeping and that he believed that he had undisbursed fees from other clients' cases in his trust account is not credible. There is no question that respondent understood the recordkeeping rules. By letter dated November 18, 1992, respondent explained to the OAE, in detail, the changes he had made in his recordkeeping and stated that he was in compliance with the recordkeeping requirements.

Indeed, respondent should have had a heightened sensitivity to the requirements of R.1:21-6, by reason of his prior ethics proceeding. That proceeding began in 1994, the Board's decision was transmitted to the Court in August 1996 and the Court issued its order of reprimand in January 1997. The misappropriations occurred during the same time period.

Furthermore, respondent could not have reasonably believed that he had undisbursed fees in his trust account because, on July 18, 1996 and October 23, 1996, he had to deposit

in his trust account personal funds in the amounts of $3,500 and $23,000, respectively, to cover shortages in that account. Respondent's bank notified him, on more than one occasion, that his trust account was overdrawn. In fact, his bank statements from May through December 1996 show that his trust account was overdrawn on at least five occasions.

As shown by respondent's cash receipts journal, he did not have a high-volume practice which might have allowed him to have a reasonable, albeit incorrect, belief that he had left earned fees in his trust account. For example, in February 1996, when he advanced his fees for the Cranwell case, his receipts journal showed that he had received funds in only four other matters. Therefore, it is not plausible that, when respondent advanced fees and took excess fees from his trust account, he could have reasonably believed that the account held fees owed him from other clients' cases.

In In re Skevin, 104 N.J. 486 (1986), cert. denied, 481 U.S. 1028 (1987), the attorney was disbarred for taking from his trust account fees and costs owed him from the settlements of clients' cases, before he received the settlement proceeds. Skevin, like respondent, testified that he had assumed he had sufficient funds of his own in his trust account to cover the disbursements, but that he had not kept a running balance or any other accounting of those funds. The Court found that such "wilful blindness" satisfied the knowledge requirement for knowing misappropriation. Id. at 486. See, also, In re Pomerantz, 155 N.J. 122, 135 (1998) ("Even if we accept respondent's contentions that she was unaware that she

was out-of-trust, her wilful blindness satisfies us that she knowingly misappropriated client funds.")

In In re Mininsohn, 162 N.J. 62 (1999), the Court found that the attorney had "failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable," where the attorney did not offer any specific factual basis for his belief and where his own expert testified that his reconciliation of the trust account revealed that there were not "always sufficient funds on hand, and he was always indeed out of trust." Id. at 73-74. Like Mininsohn, respondent did not offer any factual basis for his belief that he had an adequate cushion when he advanced his fees. Although respondent's expert did not perform a reconciliation of respondent's trust account, the OAE's reconciliation of the account as of August 31, 1996, which was given to respondent, showed that he was out of trust. Furthermore, the OAE's reconciliations of the account for September 30, October 31, November 30 and December 31, 1996 and for January 31, February 28 and March 31, 1997 also show that respondent's trust account was out of trust.

The testimony of respondent's accounting expert that the misappropriations were the result of poor recordkeeping is less than compelling. Indeed, the accountant's testimony is more noteworthy for what the expert did not examine, rather than what he did examine. It is logical to assume that the expert did not analyze the relevant transactions because such analysis would have been detrimental to respondent.

We find, thus, clear and convincing evidence that respondent knowingly misappropriated client trust funds and/or escrow funds in all of the matters alleged in the complaint. The evidence against respondent goes beyond wilful blindness – it establishes that respondent intentionally misappropriated the funds. He knowingly advanced fees to himself, took excess fees and invaded real estate escrows in order to cover overdrafts in his business account and to pay personal loans.

There is also clear and convincing evidence that respondent violated RPC 1.7 (b) (conflict of interest) in the Obie/Hooks matter. Although respondent testified that he only represented Obie and Hooks, the buyers in the transaction, and that he did not represent Cundiff, the seller, he did not dispute that he had an ongoing attorney-client relationship with Cundiff. Respondent did not disclose that fact to Obie and Hooks and seek their consent to his continued representation until the date of closing. By that time, respondent had already used part of the Obie/Hooks deposit for fees that Cundiff owed to respondent for other cases. Of course, respondent did not seek his clients' consent to his use of their deposit. Respondent revealed the extent of his allegiance to Cundiff and his disregard of his own clients' interests when he testified that it never occurred to him to seek Obie's and Hooks' consent to his use of their deposit funds. We find, thus, clear and convincing evidence that respondent violated RPC 1.7(b).

Respondent presented evidence that he suffered from dysthymia, a form of depression, during the relevant time. The fact that respondent was depressed does not save

him from the bright-line rule of In re Wilson, 81 N.J. 451 (1979) ("knowing misappropriation of client funds will almost invariably result in disbarment"). There was no evidence that respondent suffered "a loss of competence, 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 137.

Like respondent, the attorney in In re Greenberg, 155 N.J. 138 (1999) suffered from dysthymia, as well as adjustment disorder with major depression. In Greenberg, the Court stated that "all three experts in this case agreed [Greenberg] suffered from depression. Yet '[m]any lawyers have suffered far worse without stealing from their clients or their partners. We cannot excuse [Greenberg] without exonerating every lawyer who suffers personal hardships and misappropriates funds.'" Id. at 159, quoting In re Siegel, 133 N.J. 162, 171 (1993).

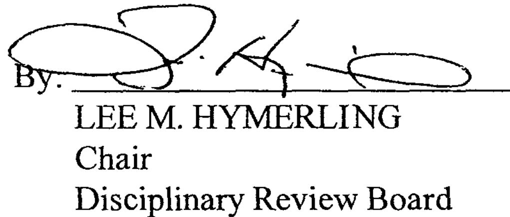
The Court also held that Greenberg's evidence of an "exemplary reputation among his peers and within his community," based on "over 120 letters testifying to his honesty and integrity," did not save him from disbarment. In re Greenberg, supra, 155 N.J. at 161.

Finally, the fact that respondent ultimately repaid the funds that he had misappropriated does not mitigate against disbarment because the attorney's subjective intent – whether to borrow or to steal – is irrelevant; knowing misappropriation consists of the simple act of taking money entrusted to the attorney, knowing that the client has not authorized the taking. In re Noonan, 102 N.J. 157, 160 (1986).

For respondent's knowing misappropriation of client trust funds and escrow funds, we unanimously recommend that he be disbarred from the practice of law. In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985). One member did not participate.

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

Dated: 12/20/00



By: ______________________
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

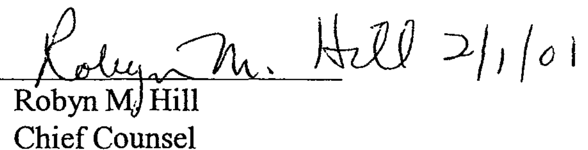
In the Matter of Jerrold D. Goldstein
Docket No. DRB 00-200

Argued: October 19, 2000

Decided: December 20, 2000

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	X						
Peterson	X						
Boylan							X
Brody	X						
Lolla	X						
Maudsley	X						
O'Shaughnessy	X						
Schwartz	X						
Wissinger	X						
Total:	8						1



Robyn M. Hill
Chief Counsel