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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-332

IN THE MATTER OF	:
CHARLES J. MYSAK	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 11, 1999

Decided: August 23, 1999

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent appeared *pro se*.

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

This matter was before the Board based on a recommendation for discipline filed by Special Master Toni Belford Damiano. The complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with the knowing misappropriation of client and escrow funds on five occasions, in violation of *RPC* 1.15 and *RPC* 8.4(c), and with giving false information to disciplinary authorities, in violation of *RPC* 8.1(a).

Respondent was admitted to the New Jersey bar in 1977. He was admonished in 1995 for exhibiting disruptive conduct during a trial, leading to a finding of criminal contempt. On July 21, 1997 the Court temporarily suspended him, following a charge of knowing misappropriation. The underlying ethics investigation of that charge has been stayed, pending the resolution of related criminal proceedings against respondent. Currently, three matters pending against respondent allege knowing misappropriation of trust funds, misappropriation of funds designated for payment of expenses in a wrongful death action and improper direct billing of an insurance defense client.

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On March 16, 1993 Mimi Lakind, an OAE auditor, attempted to conduct a random audit of respondent's records for the period from January 1991 to December 1992. Although respondent was aware of the date of the audit, he was not present at his home office, the site of the audit . Instead, his wife, who is also his secretary, produced some bank statements to the auditor, but no other requested records such as checkbooks, check stubs, ledger sheets, client files and deposit tickets. When Lakind went into the kitchen to telephone her office, she observed respondent's trust account checkbook and scattered checks lying in disarray in the kitchen area. Following this observation, Lakind noted for her audit report that the checkbook had not been produced, as requested, and that respondent maintained his checks

and checkbook in a haphazard and disorganized manner. Within a day or two of the audit, Lakind cautioned respondent that he had to write trust account checks in chronological order, make a record on check stubs of checks issued and maintain a running balance in his checkbook. She also informed respondent that a second audit would be necessary because of his failure to provide records at the first audit. Once again, Lakind apprised respondent of which records were required for the audit.

At the second audit, conducted on June 25, 1993, respondent produced only his checkbook, some canceled checks and some bank statements. He did not supply any other requested records, such as deposit tickets, cash receipts and disbursements journals and client ledger cards. Due to the lack of records, Lakind again was unable to perform the audit. She had to obtain the missing bank records by issuing a subpoena to the bank.

According to Lakind, after the first audit respondent continued to write checks out of sequence, did not record checks on the check stubs and did not maintain a running balance. She noted that, these recordkeeping deficiencies notwithstanding, respondent never caused his trust account to be overdrawn. Lakind detected a pattern whereby respondent's trust account balance would become low, funds would be deposited and then a check unrelated to those funds would be issued. Lakind also discovered that respondent often paid himself fees directly from his trust account, instead of first transferring them to his business account, as required by the rules.

The Hollander, Scala and Wolf to MacLachlan Matters

According to the OAE, on several occasions respondent used funds belonging to one client for the benefit of another client. Specifically, in June 1991 Myron Hollander retained respondent to appeal a judgment entered against him by his former attorneys, Robert Vort and Dennis Cipriano, for their fees. Hollander had failed to appear at supplementary proceedings and was concerned that a warrant for his arrest might be issued. By letter dated June 21, 1991, respondent informed Vort and Cipriano that he was holding $26,709 in his trust account and that he would keep those funds intact until the resolution of an appeal. However, on June 25, 1991 Cipriano levied on Hollander's personal account, receiving $16,141.35 in satisfaction of his portion of the judgment. Because the *Cipriano* judgment had been satisfied, Hollander asked respondent to return to him an equivalent amount out of the escrow funds in respondent's trust account. On June 28, 1991 respondent issued a trust account check to Hollander for $14,969.25, leaving in trust a balance of $11,739.75 for Hollander's benefit.[1]

Subsequently respondent issued two trust account checks to himself as legal fees: one on July 26, 1991 for $4,000 and the other on August 2, 1991 for $5,500. According to respondent, he had Hollander's authorization to disburse those fees.[2] The "memo" columns

[1] The record does not explain why respondent did not issue a check to Hollander for $16,141.35, the exact amount of the *Cipriano* judgment.

[2] Hollander was deceased at the time of the ethics hearing. The complaint did not charge respondent with knowing misappropriation for the removal of the $9,500 sum.

on both checks contained the words "Hollander v. Vort." After the two fee disbursements, there was a balance of $2,239.75 standing to the credit of Hollander.

On August 23, 1991 respondent issued a trust account check to himself for $11,500 and purchased a certificate of deposit ("CD") so that the *Hollander* funds used to secure the *Vort* judgment would earn interest. Because respondent was holding only $2,239.75 in his trust account for Hollander, he invaded the funds of another client, Scala Memorial Home ("Scala"), to the extent of $9,260.25. Respondent denied that he invaded other client's funds, contending that he believed that the $14,969.25 given to Hollander had reverted back to his trust account. A detailed explanation of respondent's contention is given below.

On August 23, 1991, the same day that respondent bought the $11,500 CD, he purchased another CD for $1,024 to secure the interest that the $11,500 would generate. According to respondent, he used his own funds to purchase the $1,024, a claim that the OAE did not refute. Indeed, OAE investigator Raymond Kaminski was unable to determine the source of those funds, following his examination of respondent's trust account records.

On February 6, 1992 respondent redeemed both CDs and deposited their proceeds ($12,790.39)[3] in his trust account. Although respondent bought the CDs (with the *Scala* funds) to secure the *Vort* judgment against Hollander, he ultimately used the funds on behalf of Scala, not Hollander, as seen below.

In the meantime, the Appellate Division affirmed the *Vort* and *Cipriano* judgments against Hollander. The Supreme Court later denied Hollander's petition for certification.

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[3] Presumably, that sum represented principal plus interest.

Accordingly, on December 14, 1992 respondent issued a trust account check to Vort for $13,470. However, at that time, respondent was holding only $5,215.14 in his trust account for Hollander.[4] As discussed below, when respondent paid Vort he invaded $8,254.86 (the difference between $13,470 and $5,215.14) of a $15,000 deposit in a real estate transaction from Lance and Meredith Wolf to Angus MacLachlan and Susan Dutter.

Respondent's deposits and withdrawals from the *Hollander* account may be summarized as follows, according to a spreadsheet prepared by OAE auditor Kaminski:

Date	Amount	Transaction	Balance
06/21/91	$26,709.00	Deposit	$26,709.00
06/28/91	14,969.25	Payment to Hollander	11,739.25
07/26/91	4,000.00	Payment to respondent	7,739.75
08/02/91	5,500.00	Payment to respondent	2,239.75
08/23/91	11,500.00	Purchase of CD[5]	<9,260.25>
02/06/92	12,790.39	Deposit from redeemed CDs[6]	3,530.14
10/06/92	1,685.00	Unidentified deposit	5,215.14
12/14/92	13,470.00	Payment to Vort[7]	<8,254.86>

[4] By then Hollander's trust funds had increased from $3,530.14 to $5,215.14 by virtue of an unidentified deposit of $1,685 made by respondent on October 6, 1992.

[5] Respondent invaded the *Scala* funds with the purchase of the *Hollander* CD.

[6] Although respondent deposited the entire CD proceeds in his trust account, those funds served first to cure the *Scala* deficiency of $9,260.25. Only $3,530.14 out of $12,790.39 went for Hollander's benefit.

[7] Respondent invaded the *Wolf* deposit with the *Vort* payment.

Vort testified at the ethics hearing below. According to Vort, it was his understanding that respondent would hold in escrow the *Hollander* funds designed to satisfy the judgment for Vort's legal fees.

Respondent, in turn, denied that he had knowingly invaded any trust funds. As to the invasion of the *Scala* funds, respondent testified that, after he issued the $14,969.25 check to Hollander to replace the funds that Cipriano had obtained through a levy on his personal funds, Hollander agreed to return the check to respondent as a $15,000 retainer for other litigation that respondent was handling for Hollander — a mortgage foreclosure action in Pennsylvania and numerous disputes with Hollander's condominium association. Respondent stated that he repeatedly asked Hollander for the check and that Hollander told him that he had misplaced it. Respondent added that, reasonably believing that the check had not been cashed, he wrote a trust account check against those funds to buy the $11,500 CD. Respondent testified that, six months after he gave Hollander the check, he realized that Hollander had indeed cashed the check. According to respondent, he immediately contacted Hollander, who apologized and gave respondent $7,500 in cash in December 1991 and another $7,500 in cash in January 1992. Respondent stated that, rather than deposit the cash in his trust account, he kept it in a lockbox in his home, treating it as trust funds. Respondent asserted that he had not deposited the cash in his trust account because in the past the Internal Revenue Service (IRS) had improperly levied on his trust account and had also "double-counted" cash deposits as income. Respondent claimed that the IRS considered a fee check as income both when it was cashed and when it was deposited. (Apparently, rather

than simply deposit checks in his trust account, respondent would cash checks and then deposit the cash in his trust account.) As a result, respondent contended, the IRS considered his earnings to be much higher than they actually were. Respondent stated that for these reasons he avoided depositing large amounts of cash in his trust account.

Respondent argued that, since this $15,000 cash sum given by Hollander should be treated as trust funds, there was no misappropriation. He complained that the OAE refused to consider the cash as the equivalent of trust funds.

The OAE countered that there was no documentation of the $15,000 cash sum, that it was never deposited in any account and that, in fact, the cash never existed. The presenter offered the testimony of Ceceile Hollander, Myron Hollander's widow, who stated that her husband always paid bills by check and never carried large amounts of cash. As to this, respondent testified that, because Hollander knew that his wife was not in favor of the litigation with the condominium association, he did not want her to know how much money he was spending on attorney's fees. Respondent further maintained that Mrs. Hollander was not fully acquainted with her husband's business affairs. By way of example, he pointed out that she was not aware of a bank account in Hollander's name that had a balance of $172,000.

The OAE also asserted that, between January 1 and April 14, 1992, respondent deposited more than $380,000 into his trust account, at a time when he was allegedly concerned about an IRS levy. The presenter called as a witness Isabel Matta, a bank officer with Valley National Bank, who testified that, pursuant to a subpoena served by the OAE,

she had searched the bank records and determined that the IRS had never levied on respondent's business or trust account. In turn, respondent contended that Matta's search was faulty because her report referred to the wrong trust account number. Matta, however, pointed out that the incorrect account number was simply a "typo" and that she was satisfied that the records search had been accurately conducted.

* * *

As mentioned above, during 1990 and 1991 respondent also represented Scala Memorial Home in a matter involving violations of Federal Trade Commission ("FTC") regulations. Respondent reached an agreement with the FTC for the reduction of Scala's civil penalty from $20,000 to $12,500. On March 15, 1991 respondent entered into an escrow agreement with the FTC requiring him to retain $12,500 in his trust account until the FTC and the court approved the consent decree. The escrow agreement provided that the escrow monies would be distributed only in accordance with the consent decree, that the agreement was irrevocable and that the escrow funds could not be used for any purpose, other than the payment of the civil penalty. The court entered the consent decree on December 30, 1991.

As of June 21, 1991 respondent was holding $12,000 in his trust account on behalf of Scala. As noted earlier, he invaded $9,260.25 of those funds on August 23, 1991, when he bought the $11,500 CD on behalf of Hollander to secure payment of the *Vort* judgment.

Respondent purchased the two CDs for Hollander and deposited the $12,790.39 proceeds into his trust account on February 6, 1992. Those funds were used to pay the $12,500 *Scala* fine to the FTC, by way of a trust account check dated February 5, 1992. Thus, although respondent ultimately replaced the invaded *Scala* funds and used them for Scala's benefit, the *Scala* funds were misused for the benefit of another client, Hollander, for a period of five months: from the date of the purchase of the $11,500 CD (August 23,1991) until the CD proceeds were put back in respondent's trust account (February 6, 1992).

According to respondent, he used the *Hollander* CDs to pay the *Scala* fine because by that time he had realized that he had inadvertently used the *Scala* funds to buy the CDs. Respondent claimed that he was unaware that Hollander had cashed the $14,739.25 check. Therefore, respondent added, he used the CD proceeds for the *Scala* fine in order to "reverse the transaction." Obviously, when respondent used the *Hollander* funds for Scala, he created a shortage in the *Hollander* funds.

In sum, the deposits and withdrawals in the *Scala* matter were as follows:

Date	Amount	Transaction	Balance
06/30/91	$12,000.00	Deposit	$12,000.00
08/23/91	9,260.25	Purchase of Hollander CD	2,739.75
02/06/92	9,260.25[8]	Deposit of CD proceeds	12,000.00

* * *

[8] The total proceeds were $12,790.39. $9,260.25 was applied to *Scala* and $3,530.14 to *Hollander*.

As discussed earlier, respondent was holding in trust a $15,000 deposit for the *Wolf to MacLachlan* real estate transaction, in which he represented the sellers. He received those funds on October 29, 1992. Although the real estate contract provided that the broker would retain the deposit monies, respondent requested that the contract be amended to permit him to escrow the funds.

The *Wolf to MacLachlan* closing took place on January 12, 1993. Therefore, from October 29, 1992 until January 12, 1993 respondent should have held the $15,000 deposit intact. However, when respondent paid Vort $13,470 on December 14, 1992 to satisfy the judgment against Hollander, respondent invaded the *Wolf* deposit by $8,254.86 because his trust account had only a balance of approximately $5,000 standing to the benefit of Hollander.

* * *

In summary, the OAE alleged that respondent invaded the *Scala* funds when he bought the *Hollander* CDs; that respondent invaded the *Hollander* funds when he paid the *Scala* penalty to the FTC; and that respondent invaded the *Wolf* real estate deposit when he paid Vort to satisfy the judgment against Hollander. According to the OAE, respondent had to be aware at all times of the balance in his trust account because the account never had an

overdraft, despite respondent's deficient recordkeeping.[9] The OAE further argued that respondent's pattern of depositing fees and other funds into his trust account demonstrated his awareness that he was out-of-trust, that he had invaded client and escrow funds and that he needed to replenish his trust account.

In turn, respondent claimed first that he had not knowingly misappropriated the *Scala* funds because he reasonably believed that the $14,969.25 check given to Hollander was still in his trust account. Next, he claimed that, when he realized that the check had in fact been cashed, he requested and received from Hollander $15,000 in cash and that this $15,000, not the *Wolf* deposit, had covered his $13,470 disbursement to Vort. As to the charges of recordkeeping deficiencies, respondent admitted that he did not maintain required records, explaining that, at the time of the above transactions, he represented a client in a murder trial, in which the admissibility of DNA evidence, a matter of first impression, was contested. As a result, respondent stated, he assigned a low priority to recordkeeping matters. Respondent complained that the OAE would not recognize his unorthodox recordkeeping practices, such as depositing and retaining fees in his trust account. Furthermore, respondent argued, the fact that he never overdrew his trust account demonstrated that, although he did not promptly review his bank statements or retain a running balance in his checkbook, he was always aware of the balance in his trust account and, therefore, could not have invaded client funds.

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[9] The spreadsheet prepared by investigator Kaminski showed that, on several occasions, respondent's trust account balance was less than $200.

The Maffucci Matter

In October 1991 respondent represented Marie Maffucci in the sale of her Bronx, New York property to Nissan Cohen, an individual in the business of buying, repairing and selling real estate. In an October 30, 1991 letter to Cohen, respondent asked for a $5,500 check, "which funds I will hold in my trust account until the closing" (Exhibit C-13). On November 13, 1991 respondent again wrote to Cohen, confirming receipt of the check "to be disbursed at closing" (Exhibit C-12). Respondent had deposited the *Cohen* funds in his trust account on November 7, 1991. On November 12, 1991, one day before he sent the letter to Cohen confirming his receipt of the $5,500, respondent issued a trust account check to himself for $2,500, noting "Maffucci" in the "memo" column. Again, on November 21, 1991 respondent disbursed $2,400 from his trust account to himself, writing "Maffucci" in the "memo" column. Although only $600 of the *Cohen* deposit remained on January 17, 1992 respondent issued a $1,000 check to himself, writing "Maffucci" in the "memo" column. Respondent, thus, invaded $400 of other clients' funds. The closing took place on March 10, 1992.

For his part, respondent contended that he had Cohen's authority to disburse the funds to himself and that the monies were used to prepare the property for sale. According to respondent, Maffucci was the cousin of Robert Fleischmann, a longstanding client. Fleischmann had provided financial assistance to enable Maffucci to buy the property; however, after she became unable to maintain the property, Fleischmann asked respondent to handle the sale of the property for her. Respondent negotiated the terms of the contract

with Cohen. Maffucci had leased the house to certain individuals and had rented out the garage to others, who used it for storage space. Although Cohen initially had insisted on a contractual provision requiring that the tenants be evicted before the closing, he had agreed to permit the tenants to remain, in exchange for a reduction in the purchase price. According to respondent, he had obtained Cohen's permission to use the deposit monies to repair the property, which had been cited for housing code violations, and to "buy out" the garage tenants. Respondent contended that he had hired contractors to perform plumbing and painting services and to repair the boiler, alleging that he had paid the contractors in cash to obtain a more favorable price. He had not been able to locate any of the receipts that the contractors had given him. Respondent further claimed that the garage tenants had insisted on being paid in cash and that he had been unsuccessful in locating those receipts as well. Respondent asserted that, because of the housing code violations, the closing did not take place on January 10, 1992, as originally scheduled, but actually occurred two months later.

With respect to the deficit in the *Maffucci* account, respondent claimed that he believed he had sufficient funds from which to draw for the property repairs. He contended that, because the DNA trial discussed above was taking up so much of his time, he neglected his recordkeeping responsibilities. Moreover, respondent argued that there was no reason to invade other clients' funds because he could have obtained from Fleischmann any monies needed for the *Maffucci* property repairs.

The presenter stipulated that the property was in need of repair, but disputed that funds from the deposit were used for that purpose, arguing that respondent had used them for his benefit.

Nissan Cohen, the buyer, testified that, when he bought the property from Maffucci, it was in "very bad shape." He denied that repairs were made before the closing, adding that he had the property repaired after he bought it. Cohen further denied having authorized respondent to use the escrow deposit for any purpose. Cohen testified that his attorney "never would let me do it, spend the down payment before I close." When asked if he could have forgotten giving respondent permission to use the deposit for repairs, Cohen answered "I never would do that to myself. You know, I never spend my money on any house until I take title. There's no reason for me to do that." In any event, for respondent to have properly disbursed escrow funds, respondent needed the consent of both parties to the escrow agreement. In addition to the conflicting testimony concerning Cohen's alleged consent, there is nothing in the record indicating that Maffucci had consented to the disbursement.

The Moallem Matter

In July 1991 respondent represented Dr. Shah Moallem in connection with a lawsuit. Although respondent had no funds from Dr. Moallem in his trust account, on July 21, 1991 respondent disbursed $1,006 from his trust account to Mildred Albarella, a court reporter, to pay for a transcript related to the *Moallem* suit. At that time, respondent's trust account contained funds for the benefit of Scala and Hollander. Thus, the OAE argued, in disbursing

the funds to Albarella for Moallem, respondent knowingly misappropriated funds from Scala and Hollander.

Respondent contended that he had mistakenly issued the check to Albarella from his trust account, instead of his business account. To corroborate his claim that payments in the *Moallem* matter were always made from his business account, respondent produced a $600 business account check previously given to Albarella to pay for transcripts.

The OAE countered that, on July 21, 1991, when respondent wrote the trust account check to Albarella, he had only $567.29 in his business account. The presenter, thus, contended that respondent had intentionally written a check from his trust account because he was aware of the insufficient balance in his business account. In turn, respondent asserted that he believed that he had sufficient funds in his business account, pointing to his July 31, 1991 business account bank statement showing that, on July 22, 1991, the day after he issued the check to Albarella, his business account balance was $1,167.29, an amount sufficient to cover the $1,000 transcript price.

The Raducha Matter

Respondent represented Benjamin Raducha in the sale of property to Donna and Kevin McCauley. The contract, dated November 18, 1991, provided that the deposit was to be held in escrow until closing. On December 18, 1991 respondent deposited into his trust account $7,500 representing the *McCauley* deposit. Two days later, on December 20, 1991, respondent issued a $3,500 trust account check to himself. In addition, respondent disbursed

$800 and $2,300 to himself from his trust account on January 4, 1992 and January 7, 1992, respectively. All three checks, containing respondent's initials in the "memo" column, were cashed. As a result of these disbursements, respondent invaded the *McCauley* deposit to the extent of $6,600.

The closing took place on May 19, 1992, at which time respondent issued three checks: a $3,750 check to Mary Jane Feimer for her real estate commission, a $503.63 check to Breezy Point Co-operative for a closing fee and a $1,231 check to Commodore Abstract Corporation for title work. When respondent issued those three checks, his trust account balance was only $1,787.54. Respondent, thus, issued checks against insufficient funds in his trust account. On the next day, May 20, 1992, respondent deposited $4,200 in cash into his trust account, thereby preventing an overdraft.

On June 17, 1992 respondent disbursed $1,740.37 to his client Raducha and $225 to himself, ostensibly in payment of his fee.

Respondent contended that this was also a matter in which repairs were required to be made before the closing and that the buyer, McCauley, had consented to the use of the deposit for such purposes. He explained that the house was a bungalow previously used only during the summer and that Raducha wanted to use the deposit monies to "winterize" the residence by repairing the boiler and the roof. Respondent testified that, when he advised Raducha that he needed McCauley's consent to use those funds, Raducha indicated that he had McCauley's consent. Respondent asserted that he released the deposit monies to Raducha, with the verbal understanding that, if the purchase did not close, Raducha would

be required to refund the deposit to McCauley. According to respondent, he did not know whether Raducha had spoken directly to McCauley or to the realtor, Mary Jane Feimer, "but I had every impression that he had the approval of either Feimer or McCauley." (7T11).[10] Respondent explained that he trusted Raducha and had no reason to doubt Raducha's representation that he had McCauley's consent.

Respondent related that Raducha believed that conditions addressed in the building inspection report were required to be corrected before the closing. As mentioned above, the closing occurred on May 19, 1992. According to respondent, before the closing he instructed Raducha to bring to the closing receipts for the repairs that had been performed, plus any excess funds that had not been used. Respondent claimed that Raducha had not brought any documentation to substantiate the repairs, but instead had brought $4,200 in cash, which respondent deposited in his trust account to cover the closing disbursements.

In summary, respondent denied taking funds from McCauley's deposit and replacing them after the closing to cover the disbursements.

In turn, the presenter offered the testimony of Kevin McCauley, the buyer of the property. McCauley asserted that neither his attorney, nor the realtor, Raducha or respondent had asked him for authorization to use the deposit money before the closing. McCauley testified that he never spoke to Raducha or respondent before the closing and denied that any repairs had been made before the closing.

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[10] 7T refers to the February 6, 1997 hearing before the special master.

The Anderson Matter

In 1992 respondent represented Donald and Audrey Anderson in the purchase of property from the National Bank of Sussex County. On December 18, 1992 respondent deposited $3,900 into his trust account, representing the Andersons' deposit. Subsequently, respondent made the following disbursements from his trust account, totaling $8,138.28:

- $1,800 to himself on December 21, 1992
- $1,500 to himself on December 21, 1992
- $1,338.28 to his telephone answering service on December 22, 1992
- $2,000 to himself on December 23, 1992
- $1,500 to himself on December 28, 1992

With the exception of the $1,338.28 disbursement, all others bore the designation "Fleischmann" in the memo column of the check.

As a result of the above disbursements, by December 28, 1992, ten days after he received the Andersons' deposit, respondent's trust account balance was only $802, or $3,098 less than he should have been holding for the Andersons alone. On December 30, 1992 respondent deposited $4,900 and $1,472 into his trust account with funds provided by the Andersons. The closing took place on December 31, 1992.

For his part, respondent contended that, once again, the OAE had refused to acknowledge that he was holding $15,000 in cash in a lockbox in his home. He argued that, if those funds were added to his trust account balance, no shortage could exist. Respondent maintained that he had provided legal services to Fleischmann and had disbursed his fees

to himself under the mistaken notion that he had deposited a check from Fleischmann in his trust account, when he actually had cashed it. Respondent, thus, asserted a belief that he had an additional $5,000 in his trust account, which he thought was sufficient to cover the disbursements. Respondent also alleged that he had mistakenly paid the telephone service bill from his trust account, instead of his business account. Finally, respondent claimed that, although the bank restructured the real estate transaction by giving the Andersons a "credit" for $12,000 due to the structural damage, the bank refused to honor the agreement. Respondent contended that, if the $12,000 were added to the amount provided for the closing, the disbursements at the closing would have been appropriate.

Although respondent offered the testimony of his client, Audrey Anderson (now known as Audrey Colletti), she could not recall any of the details of the real estate transaction.

* * *

One additional point warrants mention. Before the hearing below, respondent filed a motion to dismiss count one, the *Hollander, Scala and Wolf* matter, as well as count four, the *Raducha* matter, based on the OAE's delay in conducting its investigation and filing the complaint. Although the initial random audit occurred in March 1993, the complaint was not filed until November 1995. It appears that little or no activity took place from October 1993 to March 1995, when the matter was assigned to Kaminski for investigation. In the interim,

Myron Hollander passed away on March 27, 1995 and Gisela Raducha, Benjamin Raducha's widow, passed away on February 21, 1995.[11] Respondent contended that, had the investigation proceeded in a prompt manner, these witnesses would have been available to corroborate his version of the events.

The special master denied the motion, ruling that *R.* 1:20-5(c) permits a pre-hearing motion to dismiss an ethics complaint only on two grounds: (1) failure to state a cause of action as a matter of law or (2) lack of jurisdiction.

Pursuant to *R.* 1:20-16(f), respondent's constitutional challenges may be reviewed by the Court.

* * *

The special master found that, with the exception of the *Moallem* matter, the presenter had demonstrated by clear and convincing evidence that respondent had knowingly misappropriated trust and escrow funds. In the *Scala, Hollander and MacLachlan* matter, the special master rejected respondent's position that he had refrained from depositing $15,000 in cash in his trust account to avoid an IRS levy, pointing out that the bank records disclosed no such levy and that, during, the same time period, respondent deposited more

[11] Benjamin Raducha passed away shortly after the December 1991 real estate closing. Thus, he would not have been available even if this matter had proceeded more expeditiously.

than $380,000 into his trust account. The special master concluded that respondent had knowingly misappropriated trust funds in that matter.

With respect to the *Maffucci* matter, the special master rejected respondent's contention that Cohen had authorized him to use the deposit monies to repair the property. The special master found that respondent had knowingly misappropriated those funds.

The special master recommended the dismissal of count three of the complaint, the *Moallem* matter, ruling that respondent had erroneously paid the court reporter with a check from his trust account, rather than his business account. The special master concluded that the invasion of funds was the product of a simple mistake, not knowing misappropriation, and that respondent had not given false information to the disciplinary authorities.

In the *Raducha* matter, the special master found that respondent had a duty to verify the information from his client that McCauley had authorized the use of his deposit funds before the closing. The special master found that respondent knowingly misappropriated those escrow funds.

Similarly, the special master found that respondent knowingly misappropriated the *Anderson* deposit, finding no merit in his defenses that he held $15,000 in cash from Hollander, that he mistakenly paid a bill from his trust account, instead of his business account, and that he had made appropriate disbursements based on the restructuring of the real estate transaction.

The special master recommended respondent's disbarment.

* * *

Following a *de novo* review, the Board is satisfied by clear and convincing evidence that respondent knowingly misappropriated trust and escrow funds.

In the *Hollander/Scala/Wolf* matter, respondent deposited Hollander's $26,709 in his trust account to secure the *Vort* judgment. He then disbursed $14,969.25 to Hollander to replace the funds that Cipriano had obtained through a levy on Hollander's bank account. About one month later, respondent issued to himself two checks, totaling $9,500, as legal fees. Thus, within a matter of six weeks, respondent had reduced the *Hollander* funds in his trust account to $2,239.75. When respondent obtained a CD for $11,500 to secure the *Vort* judgment, he did not have sufficient funds standing to the credit of Hollander and, accordingly, invaded $9,260.25 of the $12,000 that he was holding in trust for Scala. At that time, a knowing misappropriation occurred. It is irrelevant to a finding of knowing misappropriation that respondent ultimately used the invaded *Scala* funds for Scala's benefit. The knowing misappropriation took place on August 23, 1991, when respondent bought the CD. The only reason respondent redeemed the CD and put the proceeds back in his trust account on February 6, 1992 was that he needed those funds to cover a check written to the FTC the day before, February 5, 1992, to pay Scala's fine.

Respondent did not dispute the above facts. He contended, however, that, after he issued the $14,969.25 check to Hollander, he understood that Hollander would not cash or negotiate that check because they had agreed that respondent would apply those funds toward his retainer for future legal services. Although Hollander failed to return the check

to respondent, respondent neither asked the bank about the status of the check nor reviewed his subsequent bank statements to determine if the check had been negotiated. According to respondent, he had a close relationship with Hollander, trusted him and, therefore, believed Hollander when he told him that the check had not been cashed. Respondent alleged that it was not until about six months after he issued the check that he learned that Hollander had indeed cashed the check. Respondent insisted that, thereafter, Hollander had given him $15,000 in cash and that he had retained those funds in a lockbox in his home, treating them as trust monies.

Respondent presented no documentation to support his claim. The cash that he allegedly received from Hollander never appeared in any deposit or bank record. Moreover, respondent failed to explain how funds that he was supposed to keep as a retainer for future legal services for Hollander could be used as client funds. If, as respondent claimed, he and Hollander had agreed that he would hold the $14,969.25 as a retainer for other legal services, those funds would belong to respondent as fees and should have been deposited into his business account. Respondent could not and should not have used those funds for Hollander's benefit, absent an agreement to loan those monies to Hollander, a circumstance not present here.

Respondent also claimed that he was reluctant to deposit the $15,000 cash sum because the IRS had placed a lien on his trust account in the past and because the IRS had "double-counted" income, considering funds as income both when he cashed a check and

again when he deposited the same cash funds. During this same period, however, from January through April 1992, respondent deposited more than $380,000 into his trust account, apparently without concern over an IRS levy. Isabel Matta, an officer from the bank, testified that there was no record of any levy on respondent's account. The Board, thus, rejected respondent's explanation.

Even if the Board had accepted respondent's explanation, he would still be guilty of knowing misappropriation because, regardless of whether there were sufficient trust funds to purchase the *Hollander* CD, it is unquestionable that those funds were not physically present in the trust account when the CD was purchased. The issue is not the sufficiency of the funds but, instead, the location of the funds. The writing of a check against the alleged $15,000 in cash necessarily caused the knowing invasion of funds belonging to other clients. Specifically, when respondent disbursed $13,470 to Vort on December 14, 1992 to satisfy the judgment against Hollander, respondent had insufficient funds in his account for Hollander. He, thus, invaded the *Wolf* real estate deposit. Moreover, even if respondent had kept one million dollars in cash, he still would have misappropriated client or escrow funds by issuing checks on behalf of Hollander when Hollander had insufficient funds in respondent's trust account.

In short, the Board found that respondent knowingly misappropriated client funds when he bought the CDs for Hollander using Scala's funds and when he satisfied the *Vort* judgment owed by Hollander with the *Wolf* real estate deposit.

Similarly, there was clear and convincing evidence that respondent knowingly misappropriated escrow funds in the *Maffucci* matter. There, on November 7, 1991 respondent placed into his trust account Cohen's deposit of $5,500. Five days later, on November 12, 1991, respondent wrote a $2,500 check to himself, noting "Maffucci" in the "memo" column. The next day, in a November 13, 1991 letter to Cohen, respondent confirmed that he had received Cohen's deposit and that it would be disbursed at the closing. Once again, however, respondent disbursed funds to himself, this time $2,400 on November 21, 1991, leaving only $514.92 in his trust account as of November 30, 1991. Although respondent claimed that, with Cohen's consent, he had used the funds to make necessary repairs and to "buy out" the garage tenants in order to prepare the property for sale, Cohen denied having consented to the release of the deposit, testifying that he would never have permitted the use of the escrow funds before the closing. Cohen also testified that, despite the fact that the property was in "very bad shape," no repairs had been made before the closing.

Although respondent produced some notices indicating that the City of New York had cited the property for housing code violations, again, he did not offer any documentation to support the following: (1) Cohen's consent to the use of the deposit before the closing, (2) repairs made to the property before the closing, and (3) payment to the garage tenants to remove their property before the closing. Although respondent wrote to Cohen twice to confirm the receipt of the deposit, he did not confirm in writing that Cohen had authorized

him to utilize those funds. Also, there is nothing indicating that respondent had Maffucci's consent to the use of the monies. Thus, the Board found that respondent knowingly misappropriated Cohen's real estate deposit.

In the *Moallem* matter, respondent paid a court reporter with a check issued from his trust account, instead of his business account. According to the presenter, respondent did so intentionally because he knew that he did not have sufficient funds in his business account. When respondent disbursed the funds to the court reporter, he invaded trust funds held for Scala and Hollander. Respondent claimed that he had intended to write a check from his business account, but inadvertently used a trust account check. He contended that, on the day after he issued the check to the court reporter, he had sufficient funds in his business account to prevent an overdraft. In light of the other clear instances of knowing misappropriation, the Board deemed it unnecessary to resolve this issue. The complaint alleged that, although respondent claimed that he had inadvertently written the check to the court reporter from his trust account, he knew that he had done so intentionally due to the shortage of funds in his business account. The Board dismissed the charge of giving false information to the disciplinary authorities.

In the *Raducha* matter, the buyer, McCauley, gave respondent a deposit of $7,500 that respondent placed in his trust account. Two days later, respondent disbursed $3,500 of these funds to himself. In January, respondent issued two checks totaling $3,100 to himself, thereby invading $6,600 of the *McCauley* funds. At the closing, on May 19, 1992,

respondent issued three checks totaling $5,484.63, although at the time his trust account balance was only $1,787.54. The day after the closing, respondent deposited $4,200 in cash into his trust account. It was not until June 17, 1992 that respondent issued a check to himself for his fee and disbursed the balance of funds to his client.

As in the *Maffucci* matter, respondent claimed that property repairs were required to be made before the closing and that, although he represented the seller, Raducha, he understood from Raducha that the buyer had consented to the use of the funds. Respondent further contended that, after Raducha had arranged for the repairs, Raducha had brought the balance of the deposit ($4,200) in cash to the closing, which was then deposited into respondent's trust account. According to respondent, Raducha did not bring to the closing any receipts or other documentation on the repairs. The buyer, however, Kevin McCauley, denied that the property had been repaired prior to the closing and testified that no one had asked him for permission to use the deposit monies for repairs.

Here, too, there is clear and convincing evidence that respondent knowingly misappropriated the real estate deposit. McCauley testified unequivocally that no one – not the realtor, Raducha, respondent or McCauley's own attorney – had approached him about releasing the escrow deposit. Respondent's testimony — that he relied on Raducha's assurance that he had talked to the realtor or to McCauley about releasing the escrow funds — should be rejected as unworthy of belief. The lack of documentation to support respondent's position in the face of McCauley's testimony compels a finding that respondent

knew that he did not have McCauley's consent to the use of the deposit and that, therefore, he is guilty of knowing misuse of escrow funds. A finding of knowing misappropriation would be required even if respondent had relied on Raducha's statement about McCauley's consent. Such reliance, even if true, would have been unreasonable. An attorney cannot rely on a party's assurance that the other party consented to the use of the escrowed deposit before the closing. Such consent must be in writing and respondent had to know of this requirement. In the absence of written permission from both sides of the transaction and in the face of compelling evidence that respondent invaded the deposit with knowledge and deliberation, a finding of knowing misappropriation in this matter is inevitable.

With respect to the *Anderson* matter, on December 18, 1992 respondent deposited $3,900 into his trust account representing the Andersons' real estate deposit. By December 28, 1992, ten days later, respondent's trust account balance was $802, or $3,098 less than he should have maintained for the Andersons alone. Respondent had issued checks to himself and to his telephone answering service exceeding $8,000. Respondent claimed that he believed that he had an additional $5,000 in his trust account because, although he had actually cashed a check from a client, he thought he had deposited it. He further maintained that he had mistakenly paid the telephone answering service bill from his trust account, instead of his business account. Respondent again contended that, if the $15,000 *Hollander* cash were considered as trust account funds, there would have been no shortage. Finally, he

asserted that, if the $12,000 repair credit that the bank had originally offered the Andersons were added to the closing proceeds, the closing disbursements would have been proper.

Once again, respondent produced no documentation in support of any of his claims. The testimony of his client, Audrey Coletti (formerly Audrey Anderson), did not offer much assistance, as she could not recall any of the details surrounding the real estate purchase. Although the presenter did raise the issue of the $12,000 discrepancy in the real estate transaction, the main allegation in the *Anderson* matter was that respondent had invaded the $3,900 real estate deposit before the closing. Respondent's contentions about the restructuring of the transaction to include a $12,000 credit do not address the allegation that he misappropriated the deposit monies. For the reasons expressed above, the Board rejected respondent's assertion that he had retained $15,000 in cash in a lockbox.

Based on the foregoing, respondent committed knowing misappropriation of both escrow funds and client funds, in violation of *RPC* 1.15 and *RPC* 8.4(c), as well as the principles of *In re Wilson*, 81 *N.J.* 451 (1979), and *In re Hollendonner*, 102 *N.J.* 21 (1985). Respondent's misconduct was similar to that of other attorneys who advanced fees in real estate matters before the closings had taken place. In *In re Warhaftig*, 106 *N.J.* 529 (1987), on twenty-two occasions the attorney advanced fees before the real estate closings had occurred. After the closings, the attorney deleted the client's name and fee from a list that he maintained. If the closing would not occur, the attorney would replace the fee. The Court reiterated that, under *In re Noonan*, 102 *N.J.* 157 (1986), whether the lawyer's subjective

intent is 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. That attorney was disbarred.

Similarly, the attorney in *In re Lennan*, 102 *N.J.* 518 (1986), took trust account funds held as deposits on real estate closings, replacing the monies before the closings occurred. The attorney issued seven checks to himself from deposits in four real estate matters. He was disbarred. In yet another case, an attorney advanced fees to himself in nineteen real estate matters, before the real estate closings had taken place. *In re Houston*, 130 *N.J.* 382 (1992). In two of those matters the fees were drawn against funds on deposit, while in the remaining seventeen matters the attorney invaded other clients' funds. Houston, too, was disbarred.

In a recent decision, the Court rejected an attorney's contention that he was keeping at home cash trust funds for a client. *In re Freimark*, 152 *N.J.* 45 (1997). There, it was found that the attorney knowingly misappropriated the funds of four clients. In one of those matters, the attorney asserted that he had withdrawn $20,000 from his trust account and that his wife was holding $18,000 of those funds in a rice bag at home because he was in the process of opening a new trust account and wanted to avoid paying bank fees. The attorney later changed this version of events, claiming that his client had requested that he keep the funds to protect them. Although both the attorney's wife and the client testified in the attorney's behalf, the Court did not find his explanation credible. For his knowing misappropriation of the funds of four clients, the attorney was disbarred.

In this matter, considered in their totality respondent's explanations strain credulity. It is difficult to believe that (1) although he allegedly maintained $15,000 in cash in his home for Hollander, he did not use those funds to pay Vort; (2) he used the *Cohen* deposit to make repairs to the *Maffucci* property, particularly in light of Cohen's denial of any such consent; (3) he used the *McCauley* deposit for repairs to the property, especially in light of McCauley's denial of any consent; and (4) he believed, in the *Anderson* matter, that he had an additional $5,000 in his trust account and $15,000 in cash in his home.

In short, the evidence clearly and convincingly established that respondent displayed a pattern of invading one client's funds for the benefit of either another or himself. As his trust account balance diminished, respondent deposited fees and other funds to prevent overdrafts. Although respondent's trust account balance was dangerously low on several occasions, he never issued a check without sufficient funds on deposit. Thus, despite his deficient recordkeeping, respondent must have been keenly aware of the balance in his trust account at all times.

In addition, in presenting his defenses, respondent showed another pattern; he rarely, if ever, supplied documentation to support his position. For example, although he claimed that he had the consent of the parties in two real estate matters, he did not confirm those arrangements in writing. An experienced attorney, respondent should have recognized the importance of documenting such consent, no matter how much of his time the *State v. Marcus* trial occupied. Similarly, respondent was not able to produce any receipts for the

Maffucci property repairs or payments to the garage tenants. Nor did he submit any documentation of repairs to the *Raducha* property. Most significantly, there was never any record of the $15,000 that Hollander allegedly gave him. In contrast, Ceceile Hollander testified that it was not her husband's practice to carry large sums of cash or to pay bills with cash.

The Board unanimously determined to recommend respondent's disbarment for his knowing misappropriation of escrow and client funds. Two members did not participate.

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

Dated: 8/23/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board