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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-168

IN THE MATTER OF

JACK N. FROST

AN ATTORNEY AT LAW

Decision

Argued: September 18, 1997

Decided: December 16, 1997

Lee A. Gronikowski 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 the Board based on a recommendation for discipline filed by Special Master Miles S. Winder, III. The formal complaint charged respondent with violations of RPC 1.15 (knowing misappropriation of trust funds), RPC 8.1(a) (false statements of material fact in connection with a disciplinary matter) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1971. He has an extensive ethics history. He was privately reprimanded on May 5, 1988 for engaging in a conflict of interest.

Specifically, respondent represented a client in a criminal matter and the client's co-defendant in another criminal matter and (2) failed to safeguard another client's property by disbursing trust monies without first securing the client's written consent. Respondent was again privately reprimanded on June 19, 1992 for improperly endorsing a client's name on a settlement check without the client's authorization.

On March 10, 1997 the Board determined to impose a three-month suspension for respondent's lack of candor toward a tribunal, conduct involving dishonesty, fraud, deceit or misrepresentation, failure to expedite litigation and failure to act with fairness to opposing party and counsel. On June 30, 1997, the Board determined to suspend respondent for six months for gross neglect and lack of diligence in three matters, failure to communicate in two matters and a pattern of neglect. These two cases have been transmitted to, but not yet reviewed by, the Supreme Court.

* * *

Respondent was retained to represent Lawrence and Callecy Myers in connection with the refinance of a mortgage loan on their residence. The Myerses were substantially in debt. By refinancing the mortgage, the Myerses hoped to avoid foreclosure of that property and of several other properties that were also in danger of foreclosure. Indeed, in his answer to the formal complaint in this matter, respondent declared as follows: "To avert foreclosure and a lawsuit from me for attorney fees, I advised the Myers to attempt to refinance the

properties in Plainfield." On August 30, 1989 the mortgagee, Somerset Trust Company ("Somerset"), issued a mortgage commitment (Exhibit C-1) to the Myerses calling for the distribution of the $133,290 loan proceeds as follows:

Installment Loan	$38,375
Revolving Equity Line	52,350
Judgment #J-50081-89	14,500
Judgment #DJ-71251-88	2,265
Property Taxes/Sewer Assessment	4,400
Closing Costs Due Myers' Attorney	1,250
Somerset Trust Company Attorney Fee	150
Total	$113,290

The commitment also required that the funds earmarked for the satisfaction of the $14,500 judgment (#J-50081-89) be held by the Myerses' attorney — respondent — "pending settlement of judgment." Finally, the commitment mandated that the loan be secured by a first mortgage on the Myerses' residence.

In due course, Somerset issued to respondent its standard general closing instructions (Exhibit C-2), containing the following provision: YOU AS THE CLOSING ATTORNEY, ARE TO CERTIFY ON THE CLOSING STATEMENT THAT OUR MORTGAGE IS A VALID FIRST LIEN. In addition, on September 15, 1989 Somerset's attorney sent to respondent specific closing instructions (Exhibit C-3) for the Myerses' refinance, providing, in part, as follows:

> You will be required to furnish the Bank with a First Lien Certification as closing attorney.
>
> You will be required to comply with all the terms of the Bank commitment letter previously submitted to you dated August 30, 1989.

> Also, the following clause must appear on the first page of the mortgage: 'The within mortgage is a first mortgage given to secure a loan in the amount herein mentioned and constitutes a first and prior lien on said premises.'
>
> All judgments contained in your title binder must be satisfied in full or disposed of by way of Affidavit of Title.

The $14,500 judgment referenced in the mortgage commitment was owed to Dorothy Smith. Through Kenneth Grispin, Esq., her counsel, Smith had obtained a default judgment in the amount of $20,000 against the Myerses. The Myerses had then retained respondent, who successfully vacated the judgment and negotiated a settlement to pay the $14,500 in installments. After the Myerses defaulted on the installment payments, Smith obtained a judgment for $14,500. When both the $20,000 and $14,500 judgments were revealed in the title search conducted in connection with the Myerses' refinance, Susan Murphy, respondent's office manager, called Grispin to inquire about the removal of the $20,000 judgment from the record. According to Grispin, he agreed to remove that judgment if he received the entire payment of $14,500 plus interest; he also agreed to have the $20,000 judgment removed, since it had been vacated by court order. Respondent, in turn, claimed that Grispin agreed to accept $7,400 from the closing proceeds and to have the payment of the balance secured by mortgages on properties owned by the Myerses. The central issue in this matter is whether such agreement existed or whether respondent believed that such agreement existed.

The loan closing took place on September 18, 1989. According to respondent, it was then that he discovered that the amount of the loan, $113,290, would not be sufficient to pay

all of the Myerses' obligations as well as his $7,000 fee for representing the Myerses in the Smith judgment matter and in the refinance. When the Myerses objected at the closing to the amount of respondent's fee, respondent reduced it to $4,875.50 and issued a check to the Myerses for the $2,170.50 difference. Respondent took his $4,875.50 fee from the loan proceeds. In fact, the first check that respondent wrote against the closing funds was for his fee. Respondent did not issue a check to satisfy the Smith judgment or retain $14,500 in escrow, as required by Somerset. After the loan proceeds were distributed at the closing, a balance of $7,500.02 remained. On October 4, 1989, respondent transferred this sum to an interest-bearing trust account.

Respondent drafted numerous documents in connection with the closing. He prepared and supervised the execution of a note and mortgage, pursuant to Somerset's closing instructions. The mortgage instrument recited that it constituted a first and prior lien on the property. In addition, respondent prepared and took the acknowledgment on a "Fannie Mae" affidavit, declaring that the only lien on the property was the mortgage given to Somerset. Respondent also prepared and took the acknowledgment on an affidavit of title, declaring that the Smith judgment was being satisfied from the closing proceeds. The RESPA settlement statement, listing respondent as the settlement agent, recited that the amount paid for the Smith judgment was $7,406.02, omitting any reference to an escrow. In fact, at this juncture nothing had been paid toward the judgment. As seen below, it was only in 1994 that the judgment was finally satisfied. In the closing transmittals that respondent sent to

Somerset and to the title agency. Park Avenue Title Agency, he did not disclose that the Smith judgment remained unpaid.

Smith's attorney, Kenneth Grispin, testified at the ethics hearing that, on August 22, 1989, one month before the closing, respondent informed him that the Myerses would have only $1,500 from the refinance proceeds to pay the judgment. On that same date, respondent sent Grispin a letter stating that the Myerses were proposing a $1,500 payment from the closing funds and an agreement for the payment of the balance. On August 28, 1989 Grispin told Susan Murphy, respondent's office manager, that he would recommend to his clients that she reject the $1,500 offer.

Grispin testified that, in September 1989, before the closing, respondent offered to pay one-half of the judgment amount and to secure the balance by a mortgage on properties owned by the Myerses. According to Grispin, his reply was that he would have to review the title searches and property appraisals to ensure the existence of enough equity, before he could recommend to his client that she accept respondent's offer. Grispin stated that he did not hear from respondent again.

In August and October 1989 the sheriff's office levied on the Myerses' motor vehicles, after Grispin obtained a writ of execution. On December 28, 1989 Grispin sent respondent a copy of a letter from the sheriff's office with a notice scheduling a sheriff's sale of the Myerses' property for January 25, 1990. By letter of January 8, 1990 respondent replied that he no longer represented the Myerses.

After Grispin learned that the closing had taken place, he notified Somerset and the title insurance company that he had a prior lien on the Myerses' property. On January 9, 1990, Callecy Myers telephoned Grispin offering the payment of $7,000 and a second mortgage on the Myerses' property. By letter of January 23, 1990 Grispin rejected that offer. In the interim, on January 10, 1990, Tim Oconsky from Somerset notified Grispin that Somerset held a mortgage of $113,290, issued on the condition that $14,500 be placed in escrow to pay the Smith judgment.

On February 12, 1990 respondent sent to Grispin a letter from Robert F. Cramer, Senior Vice President of Somerset, allowing the Smith judgment as a lien on the property, albeit behind Somerset's mortgage. The lien was in the amount of $8,000. Ostensibly, the correspondence was a settlement offer by which Somerset's mortgage would receive priority over the Smith judgment, the Myerses would pay a portion of the judgment, and the balance of $8,000 would be secured by a second mortgage on the property. On February 13, 1990 Grispin rejected respondent's proposal, suggesting instead that respondent tender $7,500 that, Grispin understood, respondent was holding in escrow, and that the Myerses pay the balance either by increasing the amount of the Somerset mortgage or by obtaining a home equity loan. Significantly, Grispin's letter stated as follows:

> You may recall that after we discussed the possibility of accepting less than the full judgment, we also discussed securing the balance for my client. That was where the discussion ended. I was never advised of what real estate was available to secure the balance; nor was I given any title work and/or appraisals which proved that there was sufficient equity. Moreover, there was never any discussion concerning the term of the loan or the interest rate.
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> [Exhibit C-4 at 9]

Although in his prior letter of January 8, 1990 respondent contended that his clients had discharged him, on March 30, 1990 respondent sent Grispin the following letter:

> Please be advised that my clients have authorized me to pay you the monies in my trust account. In addition, my clients will execute a first mortgage on one home and a second mortgage on the other home for the balance due, plus interest, plus execution fees for 2 years at 10% interest per annum (this is higher than the present post-judgment interest rate). We will secure a title search to insure that you have a first mortgage.
>
> If you accept, please let me know immediately.
> [Exhibit C-4 at 10]

By letter dated April 9, 1990 Grispin rejected the settlement offer because it did not include a provision for the payment of Smith's counsel fees and because Smith preferred to be paid in full, rather than "having to wait two years and be put into the position of foreclosing two mortgages" (Exhibit C-4 at 11).

According to Grispin, the Smith judgment was finally satisfied in April 1994, four and one-half years after the closing, by the title insurance company and respondent's malpractice carrier.

Kenneth Tulloch, investigative auditor for the Office of Attorney Ethics ("OAE"), testified at the ethics hearing that the Union County Prosecutor's Office, which was contacted by the Myerses, referred the matter to the OAE. Because respondent failed to reply to the OAE's request for information, a demand audit of his attorney records was scheduled.

According to Tulloch, at the demand audit respondent contended that, after he realized that there were insufficient funds to satisfy the judgment, he had reached a settlement with Grispin over the telephone on the day of the closing. The settlement, respondent claimed,

called for the payment of some $7,000 from the closing proceeds and for the payment of the balance over an unspecified period of time, secured by a mortgage on property owned by the Myerses. Respondent alleged that, convinced of the existence of a firm agreement, he had conducted the closing, only to find out shortly thereafter that Smith and Grispin had "reneged" on the agreement. Respondent presented no letters or other documents to confirm this alleged understanding.

Michael Wilson, owner of the title agency that issued the title insurance for the Myers refinance, also testified at the ethics hearing. According to Wilson, approximately one week after the closing he was notified by Grispin and an attorney for Somerset that the Smith judgment remained outstanding and constituted a prior lien on the Myerses' property. Wilson then spoke with respondent, who claimed that he had an oral agreement with Grispin. Wilson asserted that, on the day of the closing, respondent did not inform him either that he had compromised the Smith judgment or that there was a problem in satisfying that judgment. During cross-examination, Wilson was shown Exhibit R-3, purporting to be a telephone message from him to Susan Murphy, with the following quotation: "Please call before you close. Very important. Came up with judgment." Wilson denied having any telephone conversations with Susan Murphy on the day of the closing. He added that the message did not make sense because the Smith judgment had already been disclosed in the title binder.

Wilson claimed no knowledge that Somerset had permitted the amount of the Smith judgment to be held in escrow. He expected the judgment to be paid at the closing. He stated that the judgment would have been listed as an exception in the title insurance policy, had

Somerset permitted the judgment to remain unpaid. Wilson asserted that, in his fourteen years in the title insurance business, he had never seen an attorney fail to obtain written documentation similar to a mortgage pay-off or, at a minimum, a telefax confirmation that a judgment had been compromised.

Respondent's testimony conflicted sharply with that of Grispin and Wilson. Respondent confirmed that he had represented the Myerses in vacating the Smith judgment of $20,000 and reaching the $14,500 settlement that eventually was also entered as a judgment. According to respondent, the original amount of the Myerses' refinance was $95,000, $5,000 more than was needed until the Smith judgment appeared in June 1989; thus, Somerset had increased the loan to $113,290, the maximum amount permitted based on the property appraisal. According to respondent, he believed at the time that $113,290 would have been sufficient to satisfy the Smith judgment, as well as another judgment held by Muhlenberg Hospital and his fees. Respondent went on to say that, when it became apparent at the closing that even the $113,290 loan was insufficient to satisfy all of the Myerses' obligations, he notified Grispin that, if the refinance closing did not occur, either the mortgage would be foreclosed or the Myerses would have to file a bankruptcy petition. Under either scenario, respondent continued, Smith would not have received any payment toward her judgment. According to respondent, he and Grispin then reached an agreement whereby the Myerses would pay Smith $7,400 from the closing proceeds and secure the payment of the balance — $7,100 plus interest — by a first mortgage on other property owned by the Myerses in Somerset County. The only issue not settled by this oral agreement,

according to respondent, was the rate of post-judgment interest; he believed, however, that the matter could be easily resolved. Respondent claimed that this conversation took place in the presence of his clients by way of a "speakerphone."

Respondent also contended that, after he settled the Smith judgment with Grispin, he contacted Michael Wilson of Park Avenue Title Agency, informed him of the agreement and received Wilson's approval to proceed with the refinance. Respondent alleged that he wrote a note, Exhibit R-7, memorializing that conversation. The note, which is almost illegible, reads as follows: "Called Mike Wilson - told him of Grispin deal (still to work out how going to handle R. 4:42-11 interest rates) ok to close on Myers as per conv. w/Sue and me."

OAE auditor Kenneth Tulloch testified that respondent sent him his file from the Myers closing. Exhibit C-31 is a letter to Tulloch from respondent enclosing a copy of the file. According to Tulloch, Exhibit R-7, the note allegedly made by respondent memorializing the telephone conversation with Michael Wilson, was not included in respondent's file. In addition, Tulloch testified as follows with respect to respondent's belief that he had reached a settlement with Grispin:

> Q. Was it your impression from Mr. Frost that Mr. Frost thought he had a deal with Grispin as of the day of the closing?
>
> A. In talking to Mr. Frost, my impression was that Mr. Frost thought he had a deal.
>
> [1T25][1]

[1] 1T denotes the transcript of the August 6, 1996 hearing before the special master.

Respondent asserted that, at his instruction, at the closing Susan Murphy had prepared two mortgages for the Myerses' signature, securing the debt owed to Smith. Those mortgage documents (Exhibits R-1 and R-2) list an interest rate of seven percent, despite respondent's testimony that the interest rate had not been settled. That testimony is also inconsistent with the *Gavel* statement in respondent's answer, in which he declared that he and Grispin had agreed on a post-judgment interest rate of seven percent.

With respect to the post-closing series of events, respondent testified as follows:

Q. Now, there has been testimony concerning the $7,000 and your fee of 4,800. How did that result?
A. After the closing and all the documents were signed, the Myers [sic] at that point wanted to negotiate my fees and they had bills that needed -- that they needed to be paid and I agreed to compromise my fee.
Q. Did you have any discussions with them with respect to whether or not they wanted you to send out the $7,400 to Mr. Grispin at that point?
A. Yes.
Q. And what, if anything, did they tell you?
A. They told me that they -- that the bank had made a deal with them that they didn't have to send Mr. Grispin the $7,400 plus the mortgages because they were going to go out and hire another lawyer to attack the judgment that had been entered and they ordered me not to send Grispin the $7,400 plus the two mortgages.
Q. Now, at that particular point did you -- did you inform the Myers [sic] of the deal that you had made?
A. Yes.
Q. And what, if anything, did you do with the $7,400?
A. I told them I would hold it for five days, one week, in which time they would have to get another lawyer and if that lawyer would permit me sending out the $7,400 plus the mortgages, I would send it out.
Q. Now, were you contacted by another lawyer?
A. No.
Q. And what ever happened to the $7,400?
A. I got a call from Grispin reneging on the deal.

Q. And when was that?
A. It was within that week.
Q. What, if anything, did you discuss with Mr. Grispin at that point?
A. That his client -- he told me his client wouldn't accept $7,400 plus the mortgages on the property.
Q. Well, did you discuss with him what had occurred and what position that placed you and your client in?
A. Yes, sir. I told him we would go to court and enforce the settlement.
Q. And what, if anything, occurred after that?
A. I was fired as the attorney.
Q. Now, did you have any subsequent conversations with Mike Wilson or the bank or anybody, Mr. Grispin, involved in this matter and the moneys that you had in escrow?
A. Yes.
Q. And did there come a time when you reported this to your malpractice carrier?
A. Yes.
Q. And why did you do that?
A. Because I thought there could be a claim made against me.

[2T74-76][2]

Respondent added that he did not send a written communication to Grispin confirming the settlement because Grispin "reneged on it within a day or two of this deal." 2T79.

As to his fee, respondent asserted that not only had he disclosed it on the RESPA statement, but that Somerset knew its amount in advance. He explained that, although the RESPA statement listed his fee as $7,000, after he reached a compromise with the Myerses his fee was reduced to approximately $4,800. He denied any agreement with his clients or with Somerset to limit his fee to the $1,250 amount listed on the mortgage commitment.

On cross-examination, respondent revealed that of the two mortgages signed by the Myerses to secure the Smith debt one was a first mortgage on a property that had no liens

[2]2T denotes the transcript of the August 7, 1996 hearing before the special master.

(Exhibit R-1), while the other was a second mortgage on the property that was the subject of the refinance (Exhibit R-2). However, the "Fannie Mae" affidavit prepared by respondent declared that there were no liens against the property, other than the lien created to refinance the mortgage.

Respondent claimed that it is a customary practice at the last minute before a closing to orally settle judgments revealed by title searches, without documenting such agreements in writing. He added that, because it is not his practice to send written confirmation of such agreements to either the lender or the title insurance company, he ordinarily relies on their approval obtained by telephone. Respondent cited as example the settlement of the Muhlenberg Hospital judgment against the Myerses by a telephone conversation between Susan Murphy and the creditor's attorney despite the absence of any written confirmation, adding that the parties subsequently exchanged a check and a release.

The refinance transaction was subject to a right of rescission by the borrowers within three days of the closing. Accordingly, respondent was required by federal law to hold all funds in escrow until three business days after the closing. A *Notice of Right to Cancel* was signed by the Myerses at the closing and witnessed by respondent (Exhibit C-22). Respondent testified that, because he was unaware of the right of rescission, he disbursed the funds at the closing. Respondent conceded that, if the Myerses had exercised their right of rescission, his fee would not have been paid from the closing proceeds. Respondent contended that, had the loan not closed, he would have been paid by his clients' son, Bill

Myers. Although respondent claimed that he had a written guarantee for his fees from Bill Myers, he did not produce any document to substantiate his claim.

To assail respondent's credibility, the presenter introduced into evidence three federal court decisions involving respondent. In two of those, *Decibus v. Woodbridge Township Police Department*, 1991 WL 59428 (D.N.J.) and *Carter v. N.J. State Trooper Gregory Lee Sanders, et al.*, 1992 WL 33844 (D.N.J.), the court determined that respondent's affidavits submitted in support of a request for attorney's fees were grossly excessive. In the third, *Oxfurth v. Siemens, A.G.*, 142 *F.R.D.* 424 (D.N.J. 1991), respondent was sanctioned under *Federal Rule of Civil Procedure* 11. As noted above, for respondent's misconduct in these three federal matters the Board previously imposed a reprimand, subsumed in an accompanying three-month suspension for other ethics improprieties.

OAE auditor Kenneth Tulloch testified that, after the closing, the Myerses filed a request for fee arbitration. According to Tulloch, the fee arbitration committee ordered respondent to refund $708 to the Myerses. Thus, respondent's fee was further reduced to approximately $4,100 from the original amount of $7,000.

Susan Murphy, respondent's former office manager, also testified at the ethics hearing. She asserted that, in addition to preparing the documents for the Myers closing, she reached a compromise with Muhlenberg Hospital on its outstanding judgment against the Myerses. Murphy also contended that, after she ordered a title search from Park Avenue Title Agency, she wrote a note (Exhibit R-4) stating that the search had disclosed the Smith judgment. Murphy maintained that the Myers closing would not have taken place unless

someone from Park Avenue Title Agency had authorized respondent's office to hold only $7,400 in escrow, instead of $14,500. According to Murphy, at respondent's direction she prepared the two mortgages signed by the Myerses to secure the balance of the Smith judgment.

* * *

The special master found that respondent knowingly misappropriated escrow funds, in violation of *In re Hollendonner*, 102 *N.J.* 21 (1985). He attributed the insufficiency of funds at the Myers closing to the payment of respondent's fee. The special master gave great weight to respondent's statement to the OAE auditor that Somerset had approved only a $1,250 fee, instead of the $7,000 that respondent had charged the Myerses.

The special master remarked that Somerset's commitment letter, its closing instructions and the title insurance company's binder all required that respondent either satisfy the $14,500 judgment or escrow that amount. He observed that respondent's handwritten notes on the judgment search did not indicate that Smith or Grispin had agreed to accept a reduced payment plus mortgages, in lieu of receiving payment in full. According to the special master, the evidence allowed the inference that respondent had agreed to place the full judgment amount in escrow, pending completion of negotiations with Grispin. The special master considered (1) that the Myerses' affidavit of title indicated that the Smith judgment was being satisfied from the closing proceeds, (2) that the RESPA statement

showed that the Smith judgment of $7,406.02 was being paid at the closing, (3) that the RESPA statement did not indicate that the funds were being held in escrow, (4) that respondent's letter to the title insurance company after the closing did not specify that the judgment was not paid in full at the closing and (5) that the transmittal letter to Somerset did not refer to an unsatisfied judgment. The special master also noted that the title insurance company was unaware of the outstanding judgment until almost three years after the closing. The special master found that Somerset and the title insurance company believed that the judgment had been compromised and paid in full by the distribution of $7,406.02, as shown on the RESPA statement. The special master concluded that Grispin's and Wilson's testimony made it clear that, despite settlement discussions, no compromise had been reached. Accordingly, the special master reasoned, respondent should have paid the full amount of the judgment, instead of paying himself $4,875.50 and his clients $2,170.50. The special master noted the lack of corroboration of respondent's testimony that Smith had agreed to accept a reduced payment plus mortgages, instead of the entire amount of the judgment, pointing out that the original mortgages signed by the Myerses were still in respondent's file.

Commenting on Grispin's and respondent's conflicting testimony as to whether a settlement had been reached, the special master found that Grispin's testimony was more credible. The special master pointed out that, although respondent had been conscientious about preparing written documentation when he initially represented the Myerses in

attempting to reduce the default judgment, as of the closing date respondent had not sent any written communication about the settlement discussions. According to the special master,

> [t]here is not one piece of evidence that corroborates Mr. Frost [sic] assertion that he had an agreement to pay only a portion of the judgment and secure the rest. On this issue because of the credibility of Mr. Grispin, I believe him to the exclusion of the respondent. . . . His testimony about reaching a settlement with Mr. Grispin of the Smith judgment is not credible.
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> [Report of the special master at 11]

The special master found that respondent's testimony was inconsistent for several reasons: first, while respondent testified that both the Smith and the Muhlenberg Hospital judgments had been settled by an oral agreement, only the Muhlenberg Hospital judgment had been confirmed in writing on the day of the closing; second, although respondent contended that the settlement called for the balance owed to Smith to be secured by two mortgages, the "Fannie Mae" affidavit (Exhibit C-7) did not mention any other liens against the property; and third, if the Myerses had agreed to give two mortgages, respondent would have ordered title work on the second property; Wilson testified, however, that respondent had not ordered title work and that he, Wilson, was unaware of the escrow agreement that respondent had allegedly reached. Thus, the special master concluded not only that respondent had not reached a settlement agreement with Grispin, but also that respondent could not have believed that he had reached such an agreement.

Finding that respondent's misconduct constituted knowing misappropriation, the special master recommended disbarment.

* * *

Shortly before oral argument before the Board, respondent filed a motion to supplement the record with two certifications. The OAE objected to the motion. After its decision to consider the motion in conjunction with the merits of the case, the Board granted the motion and took into account the certifications in reaching its decision.

Following a de novo review of the record, the Board is satisfied that the Special Master's finding of unethical conduct was clearly and convincingly supported by the evidence. The Board was unable to agree, however, with the Special Master's conclusion that respondent's conduct constituted knowing misappropriation, as seen below, or that he made a misrepresentation to the OAE that he had settled the Smith matter. In light of the OAE auditor's testimony that he believed that respondent "thought he had a deal," it cannot be found that respondent knowingly made a false statement to the OAE.

It is undeniable, however, that respondent committed other extremely serious ethics improprieties. He certified that the lender, Somerset Trust Company, had a first lien on the property, knowing that Smith's judgment had priority over Somerset's lien; he prepared and took the acknowledgment on a mortgage and affidavit declaring that Somerset had a first lien; he prepared and took the acknowledgment on an affidavit of title indicating that the Smith judgment was satisfied at the closing; he also completed a RESPA statement showing that $7,406.02 had been used toward the judgment; and when he sent the post-closing documents to Somerset and to the title insurance company, he made no reference to the

unpaid judgment. More seriously, respondent failed to protect the escrow funds entrusted to him by Somerset. Instead of issuing checks to himself and to his clients, respondent could have paid the Smith judgment in full and secured his fees by a mortgage. Given the shortage of funds, he should have disbursed the funds as he was obligated. He had the duty to follow the instructions from Somerset and the title insurance company, requiring either the satisfaction of the Smith judgment or the escrowing of $14,500. By not honoring those instructions, respondent breached the escrow agreement with Somerset.

Significantly, there is nothing in the record to support the conclusion that respondent contacted Somerset after Grispin allegedly agreed to accept $7,400 plus mortgages, in lieu of full payment of the $14,500. While respondent testified that he received Somerset's permission to escrow $14,500 and to attempt to negotiate a reduced settlement, respondent did not introduce any other evidence that he had Somerset's authority to escrow less than $14,500. Respondent's *Gavel* statement in his answer declared as follows:

> In my discussions with the bank they agreed to allow me to try to compromise the judgment with Mr. Grispin which is why the loan commitment allowed me to close without satisfying the Smith judgment **as long as I escrowed $14,500**. The reason for this was to allow my attorney fees in excess of the closing fees to be collected by me. [Emphasis added].
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> [Exhibit SM-2 at 4]

Respondent knew, thus, that he was duty-bound to escrow $14,500. Such misconduct did constitute breach of escrow agreement, but not knowing misappropriation for the reasons stated below.

In *In re Noonan*, 102 *N.J.* 157 (1986), the Court discussed the elements of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. . . . [I]t is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment.
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> [*In re Noonan*, *supra*, at 159-160]

Here, no client's funds are at stake. Indeed, after the closing, the $14,500 no longer belonged to the Myerses: the character of the funds had changed from client's funds to escrow funds. One of the parties-in-interest was now Smith. But theft of client funds is not the only ethics offense that calls for mandatory disbarment. In *In re Hollendonner, 102 N.J. 21 (1985)*, the Court extended the *Wilson* rule to escrow funds. Obviously, not always is the taking of escrow funds a knowing misappropriation. In some instances, attorneys who have released escrow funds either to a party to the escrow agreement or to themselves, without the consent of all parties, have been found guilty of breach of escrow agreement only, instead of knowing misappropriation. *See, e.g., In re Flayer, 130 N.J. 21 (1992)* (reprimand after lawyer used escrow funds for repairs to his own house. The lawyer twice asked the builder to make the repairs, to no avail. The Court found the lawyer guilty of breach of escrow agreement). See also *In the Matter of Sheldon N. Spizz*, Docket No. DRB 94-277 (June 14, 1995) (attorney received an admonition for releasing funds to his clients, notwithstanding a court order requiring him to escrow those funds until the resolution of a fee dispute between the clients and their prior counsel). In another case, the attorney's reasonable, but mistaken,

belief that he could use the escrow funds saved him from disbarment. *In re Rogers, 126 N.J. 345 (1991)* (two-year suspension after attorney used escrow funds to pay personal debts based on good faith, albeit mistaken, belief that funds had been converted from escrow funds to personal funds).

The instant case deals with the attorney's removal of his fees from funds that allegedly should have been escrowed for other purposes. In the past, attorneys who have taken their fees from their trust account without the clients' consent have been found guilty not of knowing misappropriation, but of failure to segregate funds in dispute. In fact, such unauthorized removal of legal fees, without more, is ordinarily met with only an admonition. What saved such attorneys from a finding of knowing misappropriation was their entitlement to the fee.

Here, although the Myerses took respondent to fee arbitration, they did not dispute respondent's entitlement to at least some attorney's fee. The wrinkle here is the manner in which respondent took his fees, that is, the removal of the fees from funds that allegedly should have been escrowed for other purposes. It is undisputed that, at least initially, those funds had been the subject of an escrow agreement between respondent and Somerset. What remains in dispute is whether respondent and Grispin reached a superseding agreement that closing funds need not be escrowed for the Smith judgment. If (1) there was such an agreement or if (2) respondent reasonably believed that there was such an agreement or if (3) it cannot be determined from this record by clear and convincing evidence that there was not

such agreement, then it cannot be concluded that respondent's conduct was unethical, at least in this regard.

. One case that dealt with the improper retention of legal fees is *In re Banas*, 144 *N.J.* 75 (1996). There, the attorney was retained to represent a defendant in the retrial of a homicide case following the reversal of the conviction. A co-defendant paid the attorney $10,000 toward a $25,000 fee. In the face of the attorney's unwillingness to proceed with the representation until the full $25,000 fee was paid, the defendant's mother gave the attorney an additional $5,000 sum, which she borrowed from two banks. At that time the attorney gave her a receipt with the following words: "[received] on behalf of Carl Grant to be held for bail application. Money is to be returned to M. Grant if bail not obtained." The receipt also bore the notation that the balance due was "zero." Ultimately, bail was set at $100,000. The defendant, however, was unable to post bail. The attorney who had placed the $5,000 in his business account, applied the money to his fees. Eventually, the defendant's mother asked the attorney for the return of the $5,000 sum, as her son had not been released from jail, that is, "bail had not been obtained." The attorney replied that the $5,000 was not returnable and was to be applied to his $25,000 fee. The attorney's interpretation of their agreement was that "obtained" meant "set" and that his fee was earned once bail was set. The Board found that the attorney improperly and knowingly retained the $5,000 as fee. The Court agreed. The Board concluded that the $5,000 had been entrusted to the attorney for the purpose of obtaining the defendant's release from prison; otherwise, the $5,000 was to be returned to the defendant's mother. The Board also determined that the attorney improperly

had the defendant sign an affidavit stating that the $5,000 was to be credited against the $25,000 fee. The Board found that the preparation of the affidavit was belatedly contrived, six months after the mother had asked for the return of the $5,000. The attorney received a reprimand.

Here, respondent testified that he reached a settlement with Grispin by which Grispin's client, Smith, agreed to accept a payment of $7,400 and two mortgages to secure the balance of $7,100. Whether respondent actually reached such an agreement is far from clear. Respondent testified that, immediately after the closing, his clients instructed him not to disburse the $7,400 to Smith because they intended to hire another attorney to set aside the judgment. Yet, respondent contended that, within a week of the closing, Grispin "reneged" on the agreement, prompting respondent to assert that he would go to court to enforce the settlement (2T75). Furthermore, respondent explained that he did not send any written communication to Grispin about the agreement because Grispin "reneged on it within a day or two of this deal" (2T79). There are no writings memorializing the agreement, a risky proposition.

On the other hand, the record does not clearly and convincingly establish that there was no such agreement. Exhibit R-7, a note handwritten by respondent makes some mention of a deal with Grispin and of a telephone conversation with Wilson, from the title company. There is also Murphy's testimony that, at respondent's direction, she prepared two mortgages to secure the payment of the balance of the Smith judgment and OAE auditor Tulloch's testimony that he believed respondent thought he had reached a settlement.

Based on the above, the Board cannot conclude by clear and convincing evidence that there was not an agreement between respondent and Grispin or that respondent could not have reasonably believed that there was such an agreement. Accordingly, the Board cannot find that respondent's conduct amounted to knowing misappropriation.

Nevertheless, respondent committed serious ethics offenses that deserve stern discipline. He breached an escrow agreement, failed to honor closing instructions and prepared misleading closing documents – the note and the mortgage, the "Fannie Mae" affidavit, the affidavit of title and the settlement statement – indicating that the Smith judgment had been satisfied. Respondent's explanations for his conduct were farfetched and his credibility was questionable. Respondent's clients were refinancing their mortgage pursuant to respondent's advice, in order to obtain sufficient monies to pay his attorney's fees. There can be no other conclusion but that respondent was motivated by greed.

In *In re Labendz*, 95 *N.J.* 273 (1984), the attorney assisted his clients in submitting a fraudulent mortgage application. The lender's policy limited loans to seventy-five percent of the purchase price of the property. Although the buyers required a mortgage in the amount of $80,000, the maximum loan they could obtain was $75,000 based on the contract price of $100,000. In order to assist his clients in obtaining a higher loan, the attorney altered the contract submitted with the mortgage application to reflect a contract price of $107,000. For his participation in this fraudulent activity, the Court suspended the attorney for one year.

Given the seriousness of respondent's misconduct and his lengthy disciplinary history, a seven-member majority of the Board determined to impose a two-year suspension, to be

served consecutively to the six-month suspension currently before the Court. In addition, the Board required that all pending disciplinary matters against respondent be consolidated, expedited and resolved prior to his reinstatement. Two members voted for disbarment, believing that the public must be protected from any further harm by this respondent.

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

Dated: 12/16/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jack N. Frost
Docket No. DRB 97-168

Argued: September 18, 1997

Decided: December 16, 1997

Disposition: Two-Year Suspension

Members	Disbar	Suspension Two Years	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody		x					
Cole		x					
Lolla	x						
Maudsley		x					
Peterson		x					
Schwartz	x						
Thompson		x					
Total:	9	7					

Robyn M. Hill
Chief Counsel