SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 89-043

IN THE MATTER OF	:
GERALD C. KELLY,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 17, 1989

Decided: February 5, 1990

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder and John A. Brogan appeared on behalf of the respondent.

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

This matter is before the Board based upon a presentment filed by the Office of Attorney Ethics ("OAE").

A review of the procedural history of this matter shows that, on March 5, 1984, the Court denied a motion for the respondent's temporary suspension filed by the OAE on November 7, 1983. This matter was then referred to the District XII Ethics Committee. A formal complaint against the respondent was filed on October 26, 1984. After a hearing on March 28, 1985, the panel issued a presentment dated August 8, 1985, dismissing three of the five counts of the complaint and finding ethics violations as to the remaining two counts.

Following a hearing before the Disciplinary Review Board on May 21, 1986, the Board vacated the presentment and the stipulations of facts entered into by counsel and remanded the matter for a new hearing. The Board directed that, in fairness to the parties, the matter be assigned to another District Ethics Committee (Exhibit P-2 introduced into evidence at the committee hearing on April 12, 1988).

Thereafter, the OAE filed a new complaint on September 25, 1987 (Exhibit P-1 introduced into evidence at the committee hearing on April 12, 1988). The respondent filed an answer on October 29, 1987 (Exhibit R-1 introduced into evidence at the committee hearing on April 12, 1988).

At the subsequent hearing held before the District XIII Ethics Committee on April 12, 1988, a question arose as to the scope of the remand by the Board. After reviewing the transcript of the Board hearing on May 21, 1986 (Exhibit R-2 introduced into evidence at the committee hearing on April 12, 1988), the panel interpreted the remand to prevent consideration of the dismissed charges. The panel, however, adjourned the hearing to allow the OAE the opportunity to seek clarification from the Board.

By letter dated June 29, 1988, addressed to the panel chair, the Board directed that the panel consider all counts of the complaint de novo. Hearings were subsequently held on September 14, September 15, October 5, and October 12, 1988. Following the conclusion of the hearings, the panel recommended that the fifth

count of the complaint be dismissed and issued a presentment on the remaining four counts.

The following facts were adduced in this matter.

A member of the New Jersey bar since 1967, the respondent began practicing law as an associate in the law firm of Louis J. Dughi ("Dughi"). Upon Dughi's death in 1969, the law firm associates formed a successor firm, of which the respondent became one of the partners. Although the composition of the firm has changed significantly since its inception, the respondent has remained a partner thereof to date.

While still an associate in Dughi's law firm, the respondent met Ana Baller, a longtime client of Dughi. Although Dughi himself was Mrs. Baller's attorney, at Dughi's request the respondent handled some legal matters for Mrs. Baller on several occasions. After Dughi's death in October 1969, the respondent became Mrs. Baller's attorney. He "counseled with [sic] her on innumerable occasions relative to items of her will, certain aspects with respect to the maintenance of her investments, family matters and the like" until Mrs. Baller's death in March 1977 (4T 130-16 to 20)[1]. He also became the attorney for the Dughi estate, at the request of Dughi's widow, Mrs. Maybelle Dughi.

Because Mrs. Baller had lost a leg in an accident and was confined to her apartment in Asbury Park, the respondent would

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[1] 4T denotes the transcript of the hearing on October 5, 1988.

visit her at home whenever necessary, usually after office hours.

Pursuant to the respondent's testimony, Mrs. Baller

> was mentally alert, extremely sharp and competent in the management of her own affairs throughout the period [of my representation of her interests]. There was a -- as I recall, a very short period of time not long before her death when she was hospitaled [sic] and recouperated [sic] at a nursing home and came home. But aside from that period of time, she was mentally alert and managed her own affairs using my own services as a counsel.
> [4T 133-22 to 134-3.]

> She was assisted by one of her sons, William Green, Senior,[2] who resided in an apartment next to her and would, with Mrs. Baller, take care of her financial affairs, deposits in bank accounts, maintenance, cross checks, that kind of thing.
> [4T 135-8 to 13.]

The respondent testified further that his relationship with Mrs. Baller,

> both prior to Mr. Dughi's death and for a relatively short period of time after his death, was a purely professional relationship. However, that modified as time and visits progressed into a much closer relationship, a more personal as well as professional relationship based on Mrs. Baller's confidence in me . . . . Mrs. Baller was well aware from her discussions with me and her inquiries of the nature and background of [my] family, asked after them, inquired, encouraged me to introduce [my four daughters] to her. And I did so and they were over there on many occasions with me.
> [4T 161-20 to 25, 162-1 to 16.]

In the course of his representation of Mrs. Baller, the respondent prepared several wills for her execution. Her last will, prepared and executed in August 1972, designated Dughi's son as executor and trustee, and the respondent as alternate executor

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[2]Mrs. Baller had three sons: William, Jerome and Bernard. Jerome and Bernard took their stepfather's last name, Baller. William elected to keep his father's.

and trustee. Following Mrs. Baller's death, however, Dughi's son elected not to assume those fiduciary responsibilities. The respondent then became the executor of the Baller estate and the trustee of a testamentary trust.[3]

In May 1981, four years after Mrs. Baller's death, Jerome Baller, through his wife, Margaret Baller, Esq., filed an action to compel the respondent to file an accounting of the estate assets. Pursuant to court order, the respondent filed both a First and Interim Accounting ("First Accounting"), on September 1, 1981, and a Second and Final Accounting ("Second Accounting"), on February 11, 1983 (Exhibits A and B attached to the formal complaint). On November 2, 1981, the court appointed a guardian ad litem for two infant heirs of the estate. On May 21, 1982 and March 2, 1983, the guardian ad litem filed exceptions (Exhibits C-1 and C-2 attached to the formal complaint) to both accountings. By consent orders dated January 7 and April 4, 1983, the respondent was removed as executor and trustee, respectively, and surcharged approximately $50,000. No findings of fact were judicially determined with regard to the subject matter of the latter consent order.

THE $4,921.67 CHECK MATTER (FIRST COUNT)

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[3]Mrs. Baller's will provided for several specific bequests and for the residuary estate to be distributed as follows: one-third to Jerome; one third to William (in trust); and one third to three grandsons (presumably in trust). The value of the estate was $130,000 to $135,000.

By letter dated March 24, 1982, the guardian ad litem requested that the respondent produce information and documentation concerning certain estate transactions. One of the items specifically requested was a copy of both sides of a $4,921.67 check. In reviewing the estate account records, the guardian ad litem observed that the sum of $4,921.67 had been debited against the account on August 26, 1977, and credited to it on September 7, 1977.

By letter dated April 22, 1982, the respondent forwarded to the guardian ad litem a photocopy of the front only of an unnumbered estate check in the amount of $4,921.67, dated August 24, 1977, payable to a brokerage house. This check copy was stamped "Paid" on its face (Exhibit G attached to the formal complaint). In his letter dated April 22, 1982 (Exhibit G attached to the formal complaint), the respondent explained that the check had been "drawn in anticipation of the acquisition of a bond investment available through the brokerage house; however, the bond's availability at the time were [sic] oversubscribed prior to payment and, accordingly, the funds were returned to the Estate as reflected in the deposit of September 7, 1977."

According to the testimony of the guardian ad litem at the committee hearing, during a subsequent conversation with the respondent,

> . . . as I was speaking to [respondent] he showed me something I never knew before which is that the bank codes checks so that the amount of the check that you fill out matches the bottom of the check when you get it back. I then went back to my own checking account records, looked at it and found it's correct. When you

> write out a check and when you get it back from the bank on the bottom of the check on the right hand side is the amount in their printing of the amount. The check was paid for from the account . . . . At that point I checked everything. I just never saw anything like that before and I went back and looked at all the checks in the file and found that this one didn't match and that the bank coded this check for $1000 and that it paid $1000 and that this check was made out for $4921.67 and I knew I had a problem . . . . That's when I subpoenaed all the records to [sic] the bank as to the checks and then I was concerned the checks he was giving me weren't true copies of the actual checks that were involved in the estate and when I got this one back it showed that the check was not payable to [the brokerage house]. The check shows that -- the checks from the bank that I got shows [sic] that there were two checks that day one for $1000 to Maybelle Dughi and one for $4921.67 that was made payable to Gerald C. Kelly and that the back of the check made payable to Gerald C. Kelly was executed by him and bears his signature.
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> [2T 50-12 to 25, 51-1 to 17.][4]

When the guardian ad litem confronted the respondent with this information, the respondent admitted having altered the check [4T 158-15 to 159-3; 5T 138, 139, 140, 141, 142.][5] According to the respondent's testimony at the committee hearing, he "took an advance against principal commissions" on August 24, 1977, without first determining his entitlement thereto under the relevant statute and the Rules of Court. After the brokerage house returned the check to him and after he reviewed the Rules of Court, he concluded that he "had been in error in taking it in the first place" and deposited the funds into the estate account with an

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[4] 2T denotes the transcript of the hearing on September 14, 1988.

[5] 5T denotes the transcript of the hearing on October 12, 1988.

additional $50 sum by way of reasonable interest thereon. The respondent confessed that he altered the check because "I was embarrassed at having taken [the principal commissions] in the first place without going to the rules. I was certainly experienced enough. I should have done that, and I was embarrassed over the fact that that would have been the case in terms of the disclosure" (5T 138-23 to 139-2).

THE LIBERTY ASSOCIATES PARTNERSHIP SHARE (SECOND COUNT)

On October 28, 1970, Mrs. Baller purchased one unit of interest in a partnership known as Liberty Associates by a capital contribution of $12,500. On May 27, 1977, the respondent assigned this interest to a profit sharing trust and used the $12,125 sale proceeds for his personal benefit. The Certificate of Limited Partnership Interest (Exhibit P-7 introduced into evidence at the committee hearing on September 14, 1988) shows that Mrs. Baller had not formally transferred her interest to the respondent and that the respondent had assigned the interest to the profit sharing trust by signing the certificate as the executor of the estate.

Although the last income tax returns filed before Mrs. Baller's death listed the partnership share as an asset, it was not included in the tax returns filed by the respondent after Mrs. Baller's death or in the two accountings prepared by him. In fact, had Mrs. Baller's son, William Green, not discovered a letter from Liberty Associates among her personal records, that asset would have remained undetected.

Upon inquiry by the guardian ad litem, the respondent explained that, on Christmas of 1973, Mrs. Baller announced her intention to make a gift of her partnership interest to the respondent and his four daughters and insisted that the gift be kept secret from her family members.

According to the respondent's testimony, he initially expressed to Mrs. Baller his reservations about the non-disclosure of the gift to her family and about her future financial security. Mrs. Baller then indicated that she would give the matter additional thought. The respondent testified that Mrs. Baller's "mind was pretty well made up", however. One week later, she again raised the subject, this time showing the respondent a letter in her own handwriting evidencing the gift to the respondent and his daughters. Mrs. Baller retained the letter in her possession. Respondent testified that, although he did not duplicate the letter for his records or disclose the gift to anyone, he saw the letter on numerous occasions thereafter, most recently in February 1977, one month before Mrs. Baller's death. No document evidencing Mrs. Baller's gift was found by the members of her family who gathered and reviewed her personal effects immediately following her death.

The respondent testified further that the partnership certificate had been kept in his office, still bearing Mrs. Baller's name. Based on his aforementioned reservations and concerns, no transfer of her interest had been made to him and his daughters.

At the time of Mrs. Baller's death, the respondent was in Virginia on military reserve duty. Shortly after his return, he looked through Mrs. Baller's personal effects, but did not find the letter. Although the thought occurred to him then that Mrs. Baller might have destroyed the letter to preserve the confidential nature of the gift, he did not believe that Mrs. Baller had revoked the gift because "she never indicated that to me during the course of her lifetime . . . the gift in my mind was absolute subject to a problem which might arise in terms of her financial security . . . " (5T 122-23 to 123-5).

The respondent concluded his testimony by explaining that, after Mrs. Baller's death, "nothing was filed because of the nature of the gift and the confidentiality attached to it. And in my view, nothing was required to be filed because of the gift itself in 1973" (4T 171-21 to 24).

Pursuant to the consent order of April 4, 1983, the respondent was surcharged $12,250, representing the sum received at the time of the assignment to the profit sharing trust plus interest from May 27, 1977 to the date of the order.

THE CERTIFICATES OF DEPOSIT (THIRD COUNT)

Following his appointment in November 1981, the guardian ad litem reviewed the first accounting that had been prepared by the respondent in September 1981. He noted that, under "Investment Acquisitions", the accounting listed certain certificates of deposit ("CDs") purchased at Central Jersey Bank Trust and Company

("CJBTC") between May 1977 and November 1980 (Exhibit A attached to the formal complaint, pp. 18-20). Pursuant to the testimony of the guardian ad litem, after he reviewed copies of the estate account checks obtained from CJBTC, he noticed that

> [T]he accounting [called] for information of certificates of deposit that were never paid to the bank, but rather were either paid to two of them and were paid to cash and were signed on the back by Mr. Kelly. Four of them were paid to the Anna Baller estate and cashed by Mr. Kelly and one of them was made payable to Gerald Kelly. Now, I then made inquiry of the bank as to whether or not these checks that were cashed by Mr. Kelly that were called for in the first interim accounts [sic] were actually used to purchase certificates of deposit with the bank and they were not.
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> . . .
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> I made inquiry of Central Jersey Bank and I not only subpoenaed them to bring with them certified copies of the checks for trial, but also to produce the person that had knowledge as to whether or not certificates of deposit as set forth on pages 18 and 19 of the accounting actually existed and my investigation revealed that the items set forth on pages 18, 19 and 20 [of the first interim accounting] . . . did not actually exist. When I found that out that also caused me problems with other sections of the accounting because not only were those checks cashed by Mr. Kelly and the certificates of deposits didn't exist, he didn't actually physically take the money and place them into an account that gained interest, but also on some of the responses that I got from Mr. Kelly those then turned out to be untrue as well.
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> For example, on page 13 in the accounting there's $1800 worth of interest that was allegedly paid by the Dughi estate to the Baller estate. Mr. Kelly told me that that $1800 was part of the certificate of deposit that was generated on 11-30-79. That's number 14 on page 19 of the accounting. That never

> existed. The CD never existed. So, therefore, I couldn't find any paper trails as to whatever happened to the $1800 that allegedly came from the Dughi estate and paid to the Baller estate.
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> Also, he sets up on page 13 of the accounting that Central Jersey Bank and Trust Company paid interest on all of those CD's [sic]. There's an item $307.68. You'll see it. It goes from page 13 to page 14.
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> . . .
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> There's [sic] three on page 13. There's [sic] allegedly four income items on page 14 and they were never deposited into the estate account and the estate accounting says that they were certificates of deposit. One might say that one would think if they weren't deposited in the estate account they were simply rolled over into the next CD, but the CD's [sic] didn't exist. So, I then came to the conclusion that Mr. Kelly reconstructed the amount of money that he took out of the estate account and reconstructed the amount. For example, the $1800 that came in from the Dughi estate and then from that reconstruction created a paper trail as to certificates of deposit that should have been created from those calculated with interest. Those certificates of deposits should have generated and then on pages 13 and 14 generated [sic] showed paper transactions for certificates of deposits that didn't exist and on pages 18, 19 and 20 created those certificates of deposit so that the explanation for all the money that was taken out of the estate would be there.
> [2T 37, 38, 39, 40.]

When asked whether he had requested the respondent to produce evidence of the CDs listed on pages eighteen through twenty, the guardian ad litem replied:

> A. Yes, I did. I asked him for that and the demand for production of documents and also, I think, that was the demand for production of documents that was on March the 2nd of '82 and is also, I think, I covered it in the request

> for admissions. I answered the request for admissions on August the 30th of '82 and although he admitted that none of the trusts were ever established and that there weren't any -- well, I don't have to go into all the other things he admitted, but just as to the certificates of deposit I asked the question whether or not the certificates of deposits actually existed. It's question number 8 on my request for admissions and he admits, still as of August the 30th of '82, he is still telling me by way of request for admissions that the certificates of deposit exist . . . [2T 40-20 to 25, 41-1 to 9.]

The guardian ad litem agreed, however, that the CDs listed in the second accounting as being in existence as of October 9, 1981 did, in fact, exist. The guardian ad litem did not inquire about the source of the funds used to purchase the October 9, 1981 CD in the amount of $18,000.

Thereafter, the guardian ad litem filed a report taking exceptions to, among other things, the CDs itemized on pages eighteen to twenty of the first accounting. See Second Report of Guardian Ad Litem, at 4, paragraph f (Exhibit C-2 to the formal complaint). The guardian ad litem found acceptable, however, the amount of interest on CDs listed in the accountings. Indeed, the respondent was not surcharged in this regard.

Glen H. Steinberg ("Steinberg"), Assistant Vice-President and Operations Officer at CJBTC, testified at the committee hearings on September 15 and October 5, 1988. He confirmed the accuracy of the statements contained in a letter dated July 21, 1983 signed by

CJBTC's Secretary-Treasurer[6], Robert W. Buck ("Buck's letter") (Exhibit K attached to the formal complaint).

Both the letter and Steinberg's testimony raised a number of issues concerning the veracity of the respondent's accountings, including the fact that: (a) there were no bank records supporting the entries noted under "Investment Acquisitions" on pages eighteen to twenty of the first accounting, covering the years 1977 through 1980, inclusive; (b) items four and five of the first accounting ($300 and $350 CDs) were in direct conflict with the bank's policy requiring a minimum deposit of $500 for a CD; (c) item eleven (six-month CD purchased on May 31, 1979 at an interest rate of 11.5%) violated the Federal Reserve Regulation and the legal limit paid by CJBTC at that time, or 9.409%; (d) item thirteen (six-month CD rolled over at a 10.75% interest rate on November 30, 1979) contrasted with the legal rate paid at that time by CJBTC of 11.022%; (e) item fourteen (six-month CD purchased on November 30, 1979 for $3,425) violated the restrictions contained in the Federal Reserve Regulation prohibiting CDs in denominations of less that $10,000; (f) item fifteen (six-month CD for $16,110 at a 12.75% interest rate) violated the legal limit of 7.753% paid at that time; (g) item sixteen (six-month CD for $17,137.07 at a 15.55% interest rate) contravened the maximum interest rate of 14.28% during that period. The letter and Steinberg's testimony further

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[6]Steinberg clarified that, although the letter bears the signature of the Secretary-Treasurer, Steinberg actually conducted the research that led to the preparation of the letter and prepared the letter himself.

indicated that the earliest record found by the bank pertained to an $18,000 CD opened on October 9, 1981, which continued to be rolled over until its redemption on January 16, 1983.[7] An additional series started with an $8,000 deposit on September 1, 1982 and matured on February 7, 1983.

On the issue of the inexistence of records of CDs from May 1977 through October 1981, Steinberg testified that CJBTC's policy required that records be kept for a period of seven years.[8] He acknowledged the possibility that bank records might get lost through non-observance of the bank's policy (3T 14, 15, 24, 25).[9] He cited as an example a premature destruction of records that occurred in 1988. He added, however, that, while human error is possible, "at the time [1983] these records were all there" (3T 12-16 to 20). In response to a question whether he was telling the panel that, based on his experience,[10] "documentation such as what we're talking about here are [sic] not lost, misplaced or destroyed in terms of bank record keeping", he stated, "Yes, I'm telling you that" (3T 13-6 to 9).

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[7]According to the respondent's second accounting (Exhibit B attached to the formal complaint, at 6), this $18,000 CD was redeemed on January 19, 1983 for $18,469.49.

[8]The Secretary-Treasurer's letter was dated July 21, 1983. The existing bank records, therefore, would have dated back to 1976.

[9] 3T denotes the transcript of the hearing on September 15, 1988.

[10]In 1988, Steinberg had been employed at the bank for a period of 13 years.

Steinberg explained that it would be difficult to lose CD records in light of the fact that, when a CD is purchased, multiple records are generated: the original certificate is given to the customer; one copy is retained at the branch office where the CD is purchased;[11] and one copy is forwarded to the bank's audit department. In addition, a new account form (P-12 introduced into evidence at the committee hearing on October 5, 1988) is prepared at that time, reflecting the same information contained on the certificate. While the new account form is kept in the branch office, a copy is forwarded to the main office on the same day that the form is created (3T 12, 46, 4T 12). Steinberg clarified that, even if the customer lost the original certificate and the bank misplaced or destroyed its two copies kept at the branch office and at the audit department, there would still be computer records reflecting the relevant information.

No bank records of CDs for the Baller estate between May 1977 and October 1981 were found either at the branch office or at the audit department. Steinberg testified that, normally, a CD search is conducted numerically. Because, however, the CD numbers had not been provided in this instance, he conducted the search alphabetically (3T 6-15 to 22) by reviewing the computer records. Steinberg testified that he did not look specifically for cancelled certificates, but for the existence of an account relationship. As he explained, "[t]here would have to be evidence of an account

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[11]All CDs pertaining to this matter were purchased at the Westfield branch office of CJBTC.

relationship before I would go look for [cancelled certificates]" (3T 43-10 to 2).

Bruce Austin ("Austin"), formerly Assistant Vice-President and Assistant Manager of the CJBTC Westfield branch office and, as of February 1988, Vice-President and Regional Commercial Loan Officer, testified at the committee hearing on October 5, 1988.[12] Austin, too, searched the branch office for CD records between 1977 and 1981, but found none. He explained that, as a matter of course, upon maturity of a particular CD, CJBTC notified the customer, by letter, that the CD had matured and advised him/her of the option of surrendering the certificate or rolling it over. In the latter event, a new certificate would be issued. Should the customer, hypothetically, inform CJBTC by telephone of his/her intention to roll over the CD, CJBTC would issue a new certificate and retain it until the customer redeemed the old certificate and retrieved the new one. If the customer failed to do so within two to three days, CJBTC would remind him or her of the above, by telephone. If the customer failed to appear, CJBTC would demand that he or she turn in the old certificate and would stop rolling over the CD (4T 72, 73).

Austin testified also that, once a certificate was redeemed, the original would be attached to the copy previously retained by CJBTC at the time of its purchase. Both would then be stored in

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[12]Austin has known the respondent since 1974. In fact, he has referred clients to the respondent.

the basement of the branch office. After the records of redeemed CDs were accumulated, they would be taken to the basement files.

Austin testified that retrieval of the records would be difficult unless their specific numbers were provided. In this particular instance, he reviewed in 1984 approximately one thousand cancelled certificates. There were none from 1977 through October 1981 pertaining to the estate of Anna Baller (4T 58, 59, 98). Austin conceded that it was entirely possible that "somewhere along the chain the certificates could have been mislaid or destroyed" (4T 60-1 to 3). He opined, however, that the fact that no records could be found at the Westfield branch office and at the main office as well "would place doubts upon their existence, all right" (4T 89-13 to 17). Austin testified also that, although he knew that the Baller estate had purchased CDs at CJBTC, he could not "sit here and recite years, no" (4T 91, 92).

Similarly, no 1099s reflecting interest paid on any CDs from 1977 through October 1981 were located at CJBTC. Austin testified that every January the bank would mail 1099s to its customers reflecting the interest earned during that particular year. A review of the fiduciary tax returns produced by the respondent for the years 1977 through 1981 (R-18 introduced into evidence at the committee hearing on October 5, 1988) shows that, in 1977, CJBTC paid interest of $300 on a debenture only, in the name of Anna Baller, but not on any CDs. Again, in 1978, CJBTC paid interest of $150 on the debenture only. The sole reference to any interest possibly paid on CDs in 1978 is contained in a note, in the

respondent's handwriting, attached to the tax returns. That note refers to interest paid by CJBTC in 1978 in the amount of $366.72 ($307.68 + $59.04). There were no attached 1099s pertaining to interest on CDs. The same holds true for the years 1979 and 1980. The first tax return to show a CJBTC 1099 attached is the 1981 return.

The respondent, in turn, contended that he first invested the estate monies into a CD at CJBTC on May 31, 1977. He explained that he did not have the cancelled certificates in his possession because they were routinely rolled over.[13] Upon maturity, the original certificate would be redeemed to the bank and a new certificate would be issued reflecting the additional or new purchase of a CD. The respondent did maintain worksheets, however, indicating each investment and its rate of interest, which worksheets were then used to prepare his accountings.[14]

When asked about the source of funds utilized to purchase the CDs, the respondent replied that they consisted of monies withdrawn from the estate account or of monies received from the Dughi estate. By way of example, on May 31, 1977, the respondent signed and endorsed a check for $500 made to cash, which, he testified, was used to purchase a CD; on August 20, 1977, he signed and endorsed a $300 check payable to Gerald C. Kelly, also used to buy

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[13]He denied having received any written communications from CJBTC about the maturity of the CDs. 5T 102-15 to 24.

[14]The respondent testified that the worksheets were either destroyed or turned over to either Margaret Baller or the guardian ad litem.

a CD; on November 10, 1977, he signed and endorsed a $2,000 check payable to the estate of Anna Baller, to purchase yet another CD (See P-13 introduced into evidence at the committee hearing on October 12, 1988). None of these checks were endorsed over to CJBTC.

The respondent conceded that, on those occasions when he represented other estates that purchased CDs, the checks would be made payable to the estate itself and endorsed over or made payable to the bank. When asked why the procedure differed in this matter, he replied that he could not recall the reason therefor (5T 189). When asked why the above checks were made payable to the estate and not to CJBTC, the respondent answered that "[it was] [j]ust a simple way of turning it over; six of one, half dozen of the other in my view." He pointed out that the check used to purchase an $8,000 CD in August 1982 (part of P-11 introduced into evidence at the committee hearing on October 5, 1988) was also payable to the estate of Anna Baller (5T 193, 194). By letter dated October 11, 1988, Austin indicated that the checks made payable to cash, to the estate, or to the respondent would have been accepted by CJBTC for the purchase of a CD, if properly endorsed by the payee (R-20 introduced into evidence at the committee hearing on October 12, 1988).

At the conclusion of Steinberg's testimony on September 15, 1988, the panel inquired whether he had been able to ascertain the source of the funds utilized by the respondent to purchase the October 9, 1981 CD in the amount of $18,000. Steinberg replied

that he had not, but that he would search the bank records. At a subsequent committee hearing on October 5, 1988, Steinberg produced a copy of a check dated October 8, 1981, drawn against the respondent's trust account. Said check was signed by the bookkeeper at the respondent's law firm and was payable to CJBTC for the purchase of the $18,000 CD[15] (Part of P-11 introduced into evidence at the committee hearing on October 12, 1988). A deposit slip dated October 2, 1981 showed that a check in the amount of $18,777.31 had been deposited into the respondent's trust account (R-19 introduced into evidence on the committee hearing of October 12, 1988). A search at CJBTC for said check, however, proved unsuccessful. Steinberg testified that it had already been destroyed.

The respondent contended that the $18,777.31 check was a check from CJBTC representing principal and interest on the $17,137.07 CD listed in his first accounting (item 16, at 20). He had not kept a copy for his files and had no recollection why the check had been deposited into his trust account. After the deposit, trust account check number 807 was issued to CJBTC to purchase the $18,000 CD; another check numbered 808 was issued to the estate of

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[15]As stated supra, the earliest record found by CJBTC of any CDs purchased in the estate's behalf related to this $18,000 CD dated October 9, 1981, four years after the first CD was allegedly purchased.

Anna Baller, in the amount of $777.31, to cover certain expenses of the estate.[16]

The testimony of June Scavone ("Scavone"), the bookkeeper at the respondent's law firm for twenty years, corroborated the respondent's testimony that the source of the $18,777.31 deposit was a CJBTC check. She testified that her knowledge stemmed from an entry that she had made on the estate ledger sheet (R-17 introduced into evidence at the committee hearing on October 5, 1988) indicating that the $18,777.31 deposit had come from a CJBTC check. She added that the check would not have been from the estate account at CJBTC, but from the bank itself. She explained that, had the check been from the estate account, she would have written a reference to that effect.

As to whom the check was payable, Scavone was asked on direct examination:

> [A]nd, would you, for instance, note a deposit in the Estate of Anna Baller if that was--just from your own normal procedures that you follow, what would that indicate to you as the bookkeeper and office manager as to the payee of the check?

She initially replied:

> I would say it was a check made payable to the Estate of Anna Baller [4T 116-25, 117-1 to 7.]

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[16]It appears from the record that the OAE conducted an audit of the trust account records of the respondent's law firm. A specific report reflecting the results of the audit is not part of the within record, however.

During subsequent testimony, however, Scavone admitted that she was not aware of the original source of the $18,000 (4T 121-12 to 14). She had also previously admitted that she had no recollection of that particular check (4T 112-22 to 24).

The following testimony took place concerning the time of Scavone's entries on the trust account cash receipts journal and the Baller estate ledger sheet:

> Q. By the way, were these entries that are noted here, were they made contemporaneous [sic]? I'm talking about all the Exhibits 8, [sic][17] were they done contemporaneous [sic] at the time the transaction was handled?
>
> A. Yes [4T 106-18 to 23.]

And yet, Scavone later testified:

> Q. Now, I do note that the date seems to be a little unclear. Is that your handwriting on that?
>
> A. Yes, that's my handwriting. I would say that either I first wrote down -- put a two over it. I don't do those ledgers at the same time I am drawing the checks because I don't have the time. I do them a month later when I have the time. I evidently corrected the date there.
>
> Q. In 1981?
>
> A. Yeah. Might have been a month later than that but in 1981 it would have been [4T 107-12 to 23.]

Grace Miterrando ("Miterrando"), who had been the respondent's secretary for fifteen years until she left the law firm in September 1982, testified at the committee hearing on October 12, 1988. She indicated that the respondent was responsible for the maintenance of the estate books and records, although she usually

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[17]Exhibits R-8 were erroneously marked as R-8. They were later correctly designated as R-17.

made the entries in the check books. Both she and the respondent wrote the checks from the estate account and prepared the deposit slips. She testified that it was unusual for an estate check to be made to cash. She was asked whether the respondent's normal procedure was to write a check payable to the bank or to cash whenever he purchased a CD. She answered, "I don't know, but it seems you could do it either way" (5T 22-7 to 13).

Miterrando recalled receiving telephone calls from CJBTC reminding the respondent that a particular CD had matured on that day. Her initial testimony about the time frame of the telephone calls was as follows:

> Q. Let's deal with the time. The time that you received, began to receive these calls, was this approximate to the time of Anna Ballar's [sic] death?
>
> A. Oh, yes. It was in the estate [5T 21-14 to 17.]

In response to questions posed by the panel members, however, she later testified:

> Q. During the period of 1977 to 1980, okay, and I would like to limit it to that period, to my understanding your testimony is that you remember a representative of the Central Jersey Bank and Trust Company calling Mr. Kelly indicating a rollover or certificate was due on the Ballar [sic] Estate; is that your testimony?
>
> A. I don't know that it was between '77 and '80, but I do recall such telephone calls.
>
> Q. Well, can we pin it down as to was it between -- well, let me ask you this question. Let me rephrase this. Can you say with certainty that that call from the bank indicating about CD's [sic] and rollovers came to Mr. Kelly between the period of 1977 and '81?

A. Well, sure. It was after her death and prior to when I left, but I left in '82.

Q. I understand that, and what I am saying is, is your testimony specific, that that [sic] call that you remember, and you remember them saying that there is a certificate due on the Ballar [sic] Estate, can you say that that call or calls were definitely in the period between 1977 and '81, under oath?

A. No, I can't, but I can't imagine that I would have gotten the calls -- I would have gotten three or four calls in 1982, between January and September, because they didn't come in every week or every month or every two months. They only came in occasionally.

Q. I understand. Would you read back my question.

A. I gave you my answer. I cannot -- I cannot recall the exact date or the exact year. I just know that calls came in [5T 16-21 to 18-3.]

With regard to the purchase of certain CDs in amounts below the $500 minimum requirement established by CJBTC -- more specifically the $300 and the $350 CDs bought on August 23, 1977 and July 7, 1978 (pp. 18 and 19 of the first accounting, Exhibit A attached to the formal complaint) -- the respondent contended that these were not separate CDs but, rather, additional purchases to existing CDs. The respondent concurred with Steinberg's prior testimony that additional sums could not be added to unmatured CDs. He explained, however, that the additional purchases listed in his first accounting were related to increments added to an existing CD on its maturity date. Thus, for example, on August 23, 1977, the $300 sum was added to a $3,500 CD ($500 + $1,000 + $2,000) that matured six days before, on August 17, 1977 (See Exhibit A, at 18, attached to the formal complaint). Similarly, on July 7, 1978, the $350 sum was added to a $10,407.68 CD ($9,407.68 + $1,000) that

matured on June 20, 1977. Another example was the $2,600 sum added on November 3, 1977 to a CD totaling $3,800 ($500 + $1,000 + $2,000 + $300) that matured approximately two months and 12 days before, on August 23, 1977.[18] The respondent clarified that the first accounting (See Exhibit A, at 18 to 20, attached to the formal complaint) erroneously listed May 31, 1978, in all instances as the maturity date of the CDs (5T 96, 97, 98, 99, 100, 101, 102).

In an attempt to refute Steinberg's testimony on the maximum interest rate permitted by law during that period, the respondent produced, at the committee hearing on October 12, 1988, a copy of the Federal Reserve Bulletin and Annual Statistical Digest containing the interest rates on six-month CDs for the period 1976 through 1980 (R-21 introduced into evidence at that committee hearing). A review of R-21 shows that the maximum allowable rates quoted therein differ from the rates listed in Buck's letter (Exhibit K attached to the formal complaint) and confirmed by Steinberg's testimony. Thus, for instance, item 4 of Buck's letter refers to a six-month CD purchased by the respondent on May 31, 1979 at an interest rate of 11.5% According to the letter, the legal limit paid by CJBTC at that time was 9.409%. Yet, R-2 lists a maximum interest rate of 10.44% for that same period. As pointed out by one of the panel members, however, although R-21 was offered to dispute Buck's letter and Steinberg's testimony, it also

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[18]The respondent testified that CJBTC issued CDs with duration ranging from seven days to six months or longer (T10/12/1988 101-8 to 12).

operated to dispute the respondent's contention that 11.5% was a permissible interest rate.

In this regard, Austin testified that, although he was unable to determine whether the rates quoted in the respondent's first accounting were permitted by law without first reviewing certain reference materials, the statements made in Buck's letter must have been accurate because Buck, as CJBTC's Secretary-Treasurer, was responsible for setting the interest rates paid by that bank. Austin explained that Buck would have obtained the information contained in his letter directly from bank records (4T 87-21 to 88-3, 89-24 to 90-6).

As to the possibility of errors made by CJBTC in issuing CDs without observing the limitations imposed by the Federal Reserve Bank Regulations, Steinberg testified that, in the event that occurred, CJBTC would take appropriate action to rectify the error by adjusting the interest rate to conform to the limits established by the Federal Reserve Bank (4T 34-23 to 35-10). Still on the possibility of error by CJBTC, Austin testified that "I never opened anything to my knowledge in violation of any federal regulation" (4T 70-16 to 21).

THE MIDEAST ALUMINUM CHECKS (FOURTH COUNT)

After Mrs. Baller's death, the estate received five checks totalling $1,662.50 from Mideast Aluminum Industries Liquidating Company ("MAI") between June 1977 and December 1981. The June 10, 1977 check for $750 was deposited in the respondent's personal

checking account at CJBTC; the September 21, 1977, February 23, 1979, and December 15, 1981 checks, for $450, $100 and $292.50, respectively, were cashed by the respondent at the CJBTC; and the January 19, 1981 check for $70.00 was deposited into the estate account (Exhibit P-6 introduced into evidence at the committee hearing on September 14, 1988).

While the respondent conceded that he cashed three checks and deposited another in his personal checking account[19], he contended that this $1,592.50 sum consisted of fiduciary income commissions to which he was entitled and which could be distributed without judicial approval. He argued that this sum did not exceed the allowable commission of six percent of the estate income. He calculated his total income commission to amount to $1,764.17, or six percent of the income reported in both accountings (5T 70, 71). (See Answer, Exhibit R-1 introduced into evidence at the committee hearing on April 12, 1988).

The respondent did not list the foregoing estate assets in either of his accountings. The following excerpts from the respondent's testimony at the committee hearing on October 12, 1988 reveal the circumstances leading to the discovery of those assets:

> Q. So that there was no paper trail demonstrating that, in fact, you had taken the money in 1977, isn't that right?
>
> A. That's true.

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[19]See Answer and Stipulations of Fact (Exhibits R-1 and P-1 introduced into evidence at the committee hearing on April 12, 1988).

Q. And the only way this was brought to anyone's attention was when Jerome Baller made inquiry into [sic] Mid East Aluminum and then asked you what happened to the $1,662, isn't that right?

A. From the testimony I've heard it appears that Jerome Baller made inquiry. It was [the guardian ad litem] who brought the question of the checks to my attention during one of the preliminary hearings that we had in Monmouth County.

Q. He obtained the checks, cancelled checks from Mid East Aluminum?

A. Correct.

Q. Showed them to you and said, "What happened here?"

A. He did. You are absolutely right [5T 127-21 to 128-14.]

The consent order of April 4, 1983, provided for a surcharge against the respondent in the amount of $1,662.50 as to corpus and $933.00 as to interest on account of the MAI checks.

THE BALLER-DUGHI CONFLICT OF INTEREST (FIFTH COUNT)

After Dughi's death but during Mrs. Baller's lifetime, the respondent became aware of certain loans made by Mrs. Baller to Dughi. These loans took the form of three unsecured promissory notes, as follows:

Amount	Date	Interest	Due
$30,000	9/28/1967	6%	9/28/1972
$22,000	1/02/1968	6%	6/02/1973
$10,000	10/08/1969	6 1/2%	1 year after demand

After Dughi's death,[20] Mrs. Baller received the interest due on the notes directly from the Dughi estate. The respondent learned of these payments through his periodic conferences with Mrs. Baller on the maintenance of the notes and on the preparation of income tax returns. Respondent testified that Mrs. Baller was aware of the interest rates on the notes and of their unsecured nature. At no time did she express the desire to liquidate those investments. "Quite to the contrary . . . she was very pleased with those investments as such and very pleased with the rate of return and timeliness of the interest payments" (4T 153-22 to 154-4).

Respondent testified further that Mrs. Baller was aware that he was the attorney for the Dughi estate and that at no time did she raise any objections to the dual representation. He added that "[i]ndeed, she seemed somewhat pleased that there was an interrelationship" (4T 135-21 to 136-3). When asked whether he, as Mrs. Baller's attorney, had explained her rights and remedies concerning the transactions with the Dughi estate, the respondent replied: "Oh, I don't know that I explained them to her. I didn't have to explain anything to Mrs. Baller. She explained to you . . . . Mrs. Baller was not bashful or shy. If anything, she was very alert and demanding in her requests. She was very much mistress in her own house, investment-wise and personal" (5T 133-8 to 14).

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[20]As mentioned supra, the respondent was retained by Dughi's widow, Maybelle, as the attorney for the estate.

Respondent testified further that Mrs. Baller had a good relationship with Dughi while the latter was her attorney. "She was very, very high on Mr. Dughi and she indicated that to me after his death on any number of occasions and in terms of her inquiries for and after the family" (5T 132-24 to 133-2).

After Mrs. Baller's death, respondent had a discussion with Maybelle Dughi concerning the adjustment in the interest rates on the notes. Mrs. Dughi agreed that the rates be increased from six or six and one-half percent to eight percent. This new rate prevailed throughout the years 1978 and 1979. In 1980, the rate was re-adjusted to twelve percent. The respondent did not reduce those adjustments to writing.

On several occasions, the Dughi estate was unable to make the interest payments to the Baller estate. For example, in 1980 the respondent prepared a note for Mrs. Dughi's execution in the amount of $3,036, representing overdue interest payments for one year. Although the notes were demand notes, the respondent did not make a demand for their payment. Neither did he discuss the taking of the $3,036 promissory note with the heirs of the Baller estate (5T 117-4 to 8).

Moreover, from time to time, the respondent would return to Mrs. Dughi, at her request, payments made to the Baller estate by way of principal reduction or interest. The respondent explained that, at times, Mrs. Dughi would "overextend" herself financially. Hence the returns of the monies to her. For instance, on July 24, 1978, the Dughi estate paid $5,000 to the Baller estate; the next

day, July 25, 1978, the $5,000 sum was transferred back to the Dughi estate. Similarly, on December 14, 1979, the Baller estate returned $2,000 to the Dughi estate (See Report of Guardian Ad Litem, at 7 to 8, attached to the formal complaint as Exhibit C-1). When the presenter, at the committee hearing, asked the respondent "When Maybelle needed cash, you would make payments from the Baller estate to Maybelle?," the respondent replied, "Yeah. They were effectively, would be deemed returns of monies that she has paid from the estate to, from the Dughi estate to the Baller estate. That's correct" (5T 135-3 to 8). The respondent reasoned that his awareness of the value of the Dughi estate assets, approximately $500,000, eliminated any concerns that the Dughi estate might not satisfy its financial obligation to the Baller estate.[21]

All in all, the estate of Anna Baller sustained no financial injury as a result of the respondent's aforesaid conduct. Although laboring under the suspicion that the respondent had re-created the existence of CDs between May 1977 and October 1981, the guardian ad litem was satisfied that the respondent ultimately accounted for all assets belonging to the estate, principal and income alike. By the consent order dated April 4, 1983 (Exhibit E attached to the formal complaint), the exceptions contained in the reports of the guardian ad litem were allowed. The respondent agreed to be

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[21]Although the testimony at the committee hearings at times refers to the "Costa notes", neither the hearing panel nor the Board considered any evidence thereon inasmuch as they were not alleged in the formal complaint.

surcharged or to reimburse approximately $50,000 to the estate. Among other things, he agreed to pay Margaret Baller's attorney fees, the fees and costs of the guardian ad litem, and to forego any commissions as executor and/or trustee on the corpus or income of the estate.

Following the conclusion of the district ethics committee hearings, the panel filed a presentment, finding that the respondent knowingly gave a false document to the guardian ad litem, an officer of the court, with the intent to deceive him (first count); appropriated one share of the Liberty Associates partnership to his own use (second count); fabricated the existence of CDs purported to have been purchased between May 1977 and October 1981 (third count); and appropriated estate assets for his own use under the guise of taking income commissions (fourth count). The panel did not find clear and convincing evidence, however, that the respondent's conduct in acting both as attorney for the Dughi estate and executor for the Baller estate had been unethical. The panel concluded that the respondent violated DR 1-102 (A)(4), by exhibiting conduct involving dishonesty, fraud, deceit or misrepresentation; DR 1-102(A)(5), by exhibiting conduct prejudicial to the administration of justice; DR 1-102(A)(6), by exhibiting conduct adversely reflecting on his fitness to practice law; DR 9-102, by failing to safeguard client funds; DR 9-102(B)(4), DR 1-102(A)(4) and (6), by misappropriating client funds; and DR 7-102(A)(4) and (5), by making a false statement of fact to a tribunal.

CONCLUSION AND RECOMMENDATION

Because "dire consequences" may follow a finding of unethical conduct against an attorney, such a finding must be sustained by clear and convincing evidence. In re Pennica, 36 N.J. 401, 419 (1962). See In re Sears, 71 N.J. 175, 197 (1976); In re Rockoff, 66 N.J. 394, 396-97 (1975); In re Hyett, 61 N.J. 518, 520 (1972). To recommend the imposition of discipline, each Board member must thus be able to reach "a firm belief or conviction as to the truth of the allegations sought to be established" enabling him or her to find, without hesitancy, the truth of the precise facts at issue. See In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982); Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960).

As did the District XIII Ethics Committee below, the Board has carefully reviewed and independently assessed the record to determine whether the respondent complied with his ethical obligations. The Board concludes that he did not.

Cognizant of the clear and convincing standard governing its de novo examination of the entire record, the Board concurs with the District XIII Ethics Committee in finding the respondent guilty of unethical conduct for (a) manufacturing and giving a false document to the guardian ad litem with the intent to deceive (first count); (b) appropriating a share of the Liberty Associates Partnership (second count); and (c) appropriating estate monies for

his own use under the guise of taking income commissions (fourth count). The Board disagrees with the remaining two findings of the Committee. The Board does not find clear and convincing evidence of the respondent's alleged fabrication of the existence of certain certificates of deposit, which were the topic of the third count of the formal complaint. And, contrary to the panel determination below, the Board does find clear and convincing evidence of a conflict of interest in the respondent's simultaneous representation of the Dughi and Baller estates.[22]

(1) **THE CREATION OF FALSE EVIDENCE**

With regard to the check that the respondent altered and used in an attempt to deceive the guardian ad litem, there can be little doubt that the respondent engaged in the clearest kind of ethical breach. A lawyer who engages in such a practice violates the most fundamental duty of an officer of the court. Not only did he violate DR 1-102(A)(4) which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation, but, by creating false evidence, the respondent knowingly made a false statement of fact to the court in contravention of DR 7-102(A)(3), (5), and (6).

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[22] Because all of the conduct in question preceded adoption of the Rules of Professional Conduct in 1984, the Disciplinary Rules control.

Simply stated, the Disciplinary Rules require honesty and forthrightness. In his communications with the guardian ad litem, respondent Kelly did not act with those precepts in mind.

When, in 1982, the guardian ad litem requested the respondent to send him a copy of the front and back of a certain estate check drawn in 1977, the respondent recast the cancelled check to Mr. Dughi's widow by increasing the amount for which the instrument was drawn from $1,000.00 to $4,921.67. In truth, the respondent had drawn a second check in the amount of $4,921.67 payable to himself as an advance on certain principal commissions he claimed he was owed.

Bluntly put, what the respondent forwarded to the guardian ad litem was a lie. The Board concurs with the panel decision that the respondent "knowingly gave a false document to an officer of the court with the intent to deceive the officer." See Hearing Panel Report paragraph 14A, at 4 to 5. The respondent concocted a scheme in 1982 in an effort to prevent the court from learning what he, as executor, had done in 1977. Rather than transmit to the guardian ad litem the check that the court officer had requested or otherwise explain to the guardian what had occurred, the respondent chose a path of deception. The respondent acknowledged his fabrications and misstatements only when confronted by the guardian.

The respondent maintains that he mistakenly took the estate funds as an advance on principal commissions due him as executor.

This explanation does not earn the respect of the Board. The Board agrees with the hearing panel, who stated, in pertinent part,

> The Panel is skeptical of the accuracy of the Respondent's explanation in that Respondent practiced primarily in the area of decedent's estates and trusts and should have known the proper method of obtaining executor's commissions. Furthermore, Respondent wrote the check on August 24, 1977, only five months after Anna Baller's death and was certainly not entitled to full commissions at that time.
> [Hearing Panel Report paragraph 14A, at 5.]

Moreover, because an infant was involved in the estate, the pertinent court rule (R. 4:88-2) and the statute then in effect (N.J.S.A. 3A:10-2) directed that an executor could receive a commission only upon court approval. A fiduciary is not permitted to evade statutory limitations on fees and commissions by "settling" accounts informally. See Bartel v. Clarenbach, 114 N.J. Super. 79, 87 (Ch. Div. 1971). The Court takes a dim view of an attorney's withdrawal of fees from estate funds without prior consent of the client or approval by the court. See Matter of Miller, 100 N.J. 537, 544-45 (1985) (wherein unique mitigating factors caused the Court to withhold more severe discipline than a public reprimand). The same grave concern with respect to withdrawal of commissions arises in the instant matter.

Given the contested litigation context in which the respondent acted, the Board considers his conduct in this episode to be outrageous. The respondent endeavored to suppress, conceal, and manufacture evidence, thereby subverting the administration of justice. A search for the truth is the primary function of the

court and a fundamental purpose of the adversary system. See In re Selser, 15 N.J. 393, 405 (1954). Conduct similar to the respondent's in this episode has resulted in a lengthy suspension from the practice of law. Matter of Yacavino, 100 N.J. 50 (1985) (the Court suspended an attorney for three years for repeated misrepresentations to his clients on the status of a simple adoption which culminated in his preparation of two fictitious adoption orders to avoid discovery of his failure to act); In re Labendz, 98 N.J. 273, 277-79 (1984) (a respondent who fraudulently misrepresented facts in an attempt to perpetrate a fraud on a savings and loan association received a one-year suspension); In re McNally, 81 N.J. 304 (1979) (a two-year suspension resulted where an attorney forged the sheriff's signature to a deed of foreclosure and witnessed that signature, all to conceal from his client his failure to complete a necessary foreclosure action).

(2) **THE CERTIFICATES OF DEPOSIT**

While the testimony of the guardian ad litem and the bank officers raise a number of issues and inconsistencies challenging the veracity of the respondent's accountings, the Board concludes that the proofs introduced do not establish unethical conduct to a clear and convincing standard.

The evidence conflicted at every turn. For example, the accountings of the respondent for the Bailer estate indicate the purchase of a series of CDs for the estate totaling the amount of $15,167.91 between 1977 and 1980 from CJBTC. Until the purchase

of a CD in the amount of $18,000.00 on October 9, 1981, CJBTC officers testified there existed no records of any earlier purchases of CDs by the respondent on behalf of the estate. Further, certain CDs that the respondent said he did purchase were in denominations (e.g., $300.00, $350.00) less than the minimum deposit required by the bank. Additionally, the interest for some of the CDs that the respondent listed in his accountings as executor conflicted with the rates paid at the time by CJBTC. See factual recitation at pages 13 to 15, supra. Nor did CJBTC locate any Form 1099s reflecting interest paid on CDs allegedly purchased between 1977 and October 1981.

Countervailing proofs presented by the respondent, however, cast doubt upon the reliability of the evidence produced by CJBTC. The respondent explained that he did not possess any canceled certificates because they were routinely rolled over. A CJBTC branch manager said he knew that the Baller estate had purchased CDs at the bank, but he could not remember the particular years (4T 91, 92). The manager's testimony confirmed that of the respondent's secretary who stated she received telephone calls from CJBTC reminding the respondent of maturing CDs, although her memory of the time period in which she received such calls was vague.

The undermining of CJBTC's testimony continued. Although CJBTC's policy directed that records be kept for a period of seven years, and contrary to the blanket claim that "documentation such as what we're talking about are [sic] not lost" (3T 13-6 to 9), CJBTC officers conceded in cross-examination that "somewhere along

the chain, certificates could have been mislaid or destroyed" (4T 60-3 to 13). The respondent also clarified that the amounts invested below the minimum required to purchase a CD were not used to purchase separate CDs, but related to increments added to existing CDs as they matured. So, for example, in August 1977, the sum of $300.00 was added to a $3,500.00 CD that had matured six days earlier. See Exhibit A, at 18, attached to formal complaint. Finally, the interest rates listed in a copy of the Federal Reserve Bulletin and Annual Statistical Digest for the pertinent time period differ from those which CJBTC supposedly paid on the CDs under review.

The hearing panel focused much of their inquiry regarding CDs on the source of funds used to purchase the $18,000.00 CD on October 9, 1981. Hearing Panel Report paragraph 14C, at 6 et seq. There, too, the proofs were not persuasive to a clear and convincing degree. The respondent purchased the $18,000.00 CD in the name of the estate with a check drawn against his trust account and signed by the bookkeeper at his law firm (part of Exhibit P-11 introduced into evidence). $18,771.31 had been deposited into the respondent's trust account a few days earlier. The respondent said the source of the $18,771.31 deposit was a check from CJBTC representing principal and interest on a CD listed in his first accounting. Despite the lack of a copy of the matured CD from which the new $18,000.00 CD was derived, and despite the lack of recollection by the respondent of why the $18,771.31, was deposited in his trust account and not in an estate account, the respondent's

bookkeeper corroborated the respondent's version by stating she made an entry of the check on the estate ledger (Exhibit R-17) indicating that a bank check in favor of the Baller estate was the source of the $18,771.31 deposit; had it been an estate account check, she would have so indicated in the ledger. Subsequent testimony by the bookkeeper about the source of the funds both conflicted with and supported statements she previously had offered and, for all intents and purposes, was generally inconclusive.

With such proofs, the Board cannot find with any certainty that the $18,000.00 investment on October 9, 1981, originated from some source other than existing estate assets. Certainly the Board harbors suspicions otherwise. But something more than a suspicion must exist for a lawyer's guilt in a disciplinary matter to be established by a clear and convincing standard. Inferences and other logical deductions, whether favorable or detrimental, may be drawn only from established fact and cannot be bottomed on speculation or surmise. See Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 488, 494, 496 (1956).

(3) MISAPPROPRIATION OF A SHARE IN THE LIBERTY ASSOCIATES PARTNERSHIP AND THE MAI CHECKS

From its de novo review of the record, the Board determines that the allegations in the second and fourth counts of the complaint about the respondent's wrongful appropriation of (a) a share in the Liberty Associate Partnership and (b) payments made

by Mideast Aluminum Industries Liquidating Co. have been sustained to a clear and convincing standard.

As to the Liberty Associates transaction, the Board rejects the contention that the share was an inter vivos gift made to respondent by Anna Baller in 1973. In view of the testimony regarding the relatively small gifts worth $25.00 to $1,000.00 the decedent would give her children and grandchildren, as well as decedent's habitual lack of generosity to other relatives (3T80-24 to 81-1), the Board finds it incredible that Mrs. Baller would give to the respondent, a person whom she had known for about four years, an asset valued at about $12,125.00 and representing approximately ten percent of her estate. Additionally, although the gift had supposedly been made sometime in late 1973 or early 1974, the last income tax return filed before decedent's death continued to list the partnership share as her asset; only after her death in 1977 did the share not appear as an asset on tax returns or in the accountings filed by the respondent. Moreover, the certificate reflecting the one-unit interest in the partnership (Exhibit P-7) had not been endorsed before her death to anyone, much less to the respondent.

The respondent's claim that the gift was memorialized in a letter that Mrs. Baller wrote in late 1973 is thoroughly unconvincing. Decedent's heirs never found the letter or note during their search of Mrs. Baller's personal papers after her death. The respondent said he had seen the letter in Mrs. Baller's possession about a month before she died. When the note could not

be found after her death, even the respondent momentarily reflected on the possibility that decedent had destroyed the letter. Respondent concluded, nonetheless, that the gift was somehow irrevocable and "absolute."

Shortly after decedent's death in 1977, the respondent signed the certificate as executor and used the proceeds for his personal benefit. The respondent remained silent about the asset. Only a review of Mrs. Baller's personal records by her son after her death led to the discovery of the partnership interest. So, the respondent completed the "gift" after decedent's death by endorsing the certificate as executor when no independent evidence of a gift existed at that time.

Three strains of unethical conduct spring from the respondent's action with regard to the partnership share. First, the respondent should have given heed to the misgivings he felt when Mrs. Baller, a client, initially discussed making a gift to him (5T 124-11 to 125-20). Business transactions with clients are not favored in the law. Because an attorney is bound to the highest degree of fidelity and good faith, any business transaction between attorney and client is presumptively invalid. To validate the transaction, the attorney must show with the clearest proofs that the client acted with full knowledge of all the facts and the equity of the transaction. In re Gavel, 22 N.J. 248, 262 (1956). See In re Gallop, 85 N.J. 317, 322 (1981). It has long been the rule in New Jersey that an attorney should refrain from engaging in a transaction with a client who has not obtained independent

legal advice. Id.; In re Hurd, 69 N.J. 316, 329-30 (1976). See also DR 5-101; DR 5-104. Here, the respondent impermissibly refrained from meeting his ethical obligations.

Second, if the respondent truly believed he had a colorable right to the partnership interest, then he should have disclosed it so that the court might openly adjudicate any opposing claims. As executor, the respondent had a duty to marshal all known and potential assets. He placed himself in an irreconcilable conflict of interest, for his responsibilities as executor compelled him to disclose the asset, whereas his personal advantage counselled him to hide it. He should not have continued to represent the estate if he insisted on retaining the partnership share. DR 5-101(A). The respondent's concealment of his alleged interest in the asset surely was material to the estate and was tantamount to a misrepresentation, a lack of candor with the court. See Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984); DR 7-103(A)(3); DR 7-106(C); cf. In re Del Sordo, 96 N.J. 133, 140-41 (1984); In re Ryan, 66 N.J. 147, 150 (1974).

Third, because the respondent's explanations are plainly unacceptable, the Board determines the respondent knowingly misappropriated the partnership interest to his own use in violation of DR 9-102(B). Respondent's repayment of the estate with interest does not negate his prior indefensible conduct. Because the misappropriation predates the advent of In re Wilson, 81 N.J. 451 (1979), disbarment is not automatic. See In re Smock, 86 N.J. 426 (1981).

But the Liberty Associates matter is not the only episode of misappropriation. In contrast to the equivocal proofs relating to the CDs, there is no doubt that, between 1977 and 1981, the estate received five checks totalling $1,662.50 from Mideast Aluminum Industries Liquidating Co. (hereinafter "MAI"). The estate received one of those four checks -- a check dated January 19, 1981, for $70.00 (Exhibit P-6). The respondent conceded he cashed three checks, deposited another in his personal checking account, and used the proceeds of all four checks for his personal benefit.

The respondent had no colorable claim to the checks or their proceeds. The Board categorically rejects the respondent's argument that he was entitled to the money as a fiduciary income commission. That argument really constitutes nothing more than a post hoc rationalization because, in part, the respondent did not even list the five payments as estate assets in either accounting. As the hearing panel declared, "[i]t is inconceivable that an experienced estate attorney would merely appropriate the estate assets for his own use under the guise of taking income commissions." Hearing Panel Report paragraph 14D at 8. Once again, only when a beneficiary or agent of a beneficiary made inquiry, did the payments and their ultimate disposition come to light (5T 127-21 to 128-14). In the estate proceeding, the respondent was surcharged for the MAI payments he misappropriated.

Here, the evidence manifestly demonstrates a knowing misappropriation. Misappropriation is "any unauthorized use by the

lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 n.1 (1979). The misappropriation that will trigger automatic and almost invariable disbarment "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." Matter of Noonan, 102 N.J. 157, 159-60 (1986). Thus, intent to deprive a client permanently of funds is not a necessary element of knowing misappropriation.

Seldom is there an outright admission by the attorney that he or she knew at the time of the occurrence that he or she was misusing clients' funds. In the absence of such an admission, circumstantial evidence may lead to the conclusion that a lawyer knew or "had to know" client funds were being invaded. See Matter of Johnson, 105 N.J. 249, 258 (1987).

With respect to the MAI checks, the Board is not confronted with facts allowing a conclusion that the respondent was somehow inattentive or negligent in taking the money for his own use. Respondent's experience as an attorney, his concealment of the MAI payments by leaving no paper trail, and the respondent's knowledge of the duties of an executor as a fiduciary all provide clear and convincing evidence that the respondent knowingly misappropriated client funds. The pattern of knowing misappropriation continued after the publication of the Wilson

decision, compare In re Gold, 115 N.J. 239, 248-49 (1989), and thus triggered the strict standard set forth therein. See In re Goldberg, 109 N.J. 163, 168 (1988).

(4) **THE BALLER-DUGHI CONFLICT OF INTEREST**

Contrary to the conclusion reached by the hearing panel below, the respondent's dual representation of the Dughi Estate and Mrs. Baller (later, her estate) created a conflict of interest that should have caused the respondent, at the very least, to make full disclosure to both clients and seek their consent to continued simultaneous representation. DR 5-101(A) and 5-105(A), (B), and (C) compel no less thorough an approach.

Promissory notes were held by the Baller estate, as creditor, and evidenced debts owed by the Dughi estate, as debtor (Exhibits P-8 and P-9). The interests of the two estates were obviously adverse and competing. When asked whether he, as the attorney for Mrs. Baller, advised his client of the rights and remedies concerning the transactions with the Dughi estate, the respondent replied he really did not have to explain anything to her -- in other words, he did not acquaint Mrs. Baller with all of the facts, of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each, and of the potential confidences of one client that might be exchanged, inadvertently or otherwise, with the other. DR 5-105(C). See also In re Blatt, 42 N.J. 522, 524 (1964).

Respondent's untenable position is accented when the reader recalls any one of several events, such as (1) the respondent's (as executor of the Baller estate) choosing not to demand payment of the Dughi notes despite the failure of the debtor to make interest payments for one year (5T 113-6 to 117-13), and (2) making "no-interest" loans from the Baller estate to Dughi's widow without disclosure to the beneficiaries of the Baller estate (5T 134-24 to 138-14).

More graphic is the respondent's adjustment of interest rates on the original promissory notes. The respondent, as executor of the Baller estate, negotiated the new interest rates with himself, as executor of the Dughi estate (2T 74-7 to 15). Which client had the right to complain? The debtor who had a higher interest rate imposed, or the creditor who may have been entitled to an even higher interest rate? Or does an even more startling story unfold when the respondent, as executor of the Baller estate, recounts how he received a $5,000.00 payment from the debtor Dughi estate on one day and then, because Dughi's widow often "overextended" herself, transferred from the Baller estate a $5,000.00 sum back to the Dughi estate on the following day? See Exhibit C-1 attached to formal complaint; 5T 135-3 to 8. Although the respondent's compassion for the plight of the debtor may well be understandable, the question remains whether the beneficiaries of the creditor estate, had they known of the further extension of credit to a cash-strapped debtor, would have approved of the risk of another loan at all, let alone without security.

The divided loyalties that pulled the respondent in different directions should not have been long endured. Unfortunately, the respondent served two competing masters for an extended period. Even if Mrs. Baller had consented to the arrangement during her lifetime, once she died, the consent disappeared. At that juncture, the respondent owed a duty to the estate and to the heirs to make full disclosure and gain an informed consent.

The respondent's misconduct did not manifest itself in isolated instances indicating occasional lapses or poor judgment; his actions were repetitive and constituted a course of conduct. Were the conflict of interest offense the only one, respondent's conduct would merit severe public censure or a short term suspension. See In re Garber, 95 N.J. 597, 614-16 (1984) (attorney who represented a material witness to a crime and who also represented the person charged with the crime committed grievous misconduct warranting a one-year suspension); In re Dolan, 76 N.J. 1, 13 (1978) (in a case involving attorney's multiple representation in a real estate transaction, a public reprimand was imposed, although the opinion was intended as notice that, thenceforth, when dual representation is sought to be justified because of the parties' consent, the Court will not tolerate consents that are less than knowing, intelligent, and voluntary); In re Cipriano, 68 N.J. 398, 403-04 (1975) (attorney's representation of landlord and tenants arising from same agreement between the two sides required a public reprimand); In re Kamp, 40

N.J. 588, 599-600 (1963) (in a case of first impression, practice of representating vendor and purchaser in the sale of realty without disclosure of that fact compelled a public reprimand).

(5) **TOTALITY OF CONDUCT**

As articulated above, each category of misconduct by the respondent justifies public discipline. Had the acts of knowing misappropriation been confined to a pre-Wilson period, then the misappropriations would, when combined with the respondent's other ethical misdeeds, have in their totality mandated a substantial period of suspension. The absence of subjective intent to steal and the ultimate absence of client loss as a result of the unethical conduct are of no moment. See Matter of Warhaftig, 106 N.J. 529 (1987). The relatively modest sums involved here do not diminish the severity with which the misappropriations must be treated. Id. at 530. The continued knowing misappropriation after the Wilson decision causes the Board to recommend unanimously that the respondent be disbarred. Moreover, two members believe that there was clear and convincing evidence of knowing misappropriation in the certificates of deposit count of this matter as well.

The Board is mindful that the primary purpose of discipline is not to punish the attorney, but to protect the public. But that purpose is so vital to the proper functioning of the legal profession that the Court has consistently declined to create exceptions to the Wilson rule. The need to preserve the confidence of the public in the integrity and trustworthiness of

lawyers, In re Wilson, supra, 81 N.J. at 456, mandates adherence to the strictest discipline in this misappropriation case.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

Dated: 2/5/1990 BY: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board