SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-442 and 17-143
District Docket Nos. XIV-2016-0097E and XIV-2017-0199E

IN THE MATTER OF	:
STEPHEN HAROLD LANKENAU	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 16, 2017 (DRB 16-442)
June 15, 2017 (DRB 17-143)

Decided: December 14, 2017

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent appeared _pro se_.

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

We consolidated for disposition these two motions for reciprocal discipline. The Office of Attorney Ethics (OAE) filed the motions following orders from the Delaware Supreme Court, which suspended respondent from the practice of law for eighteen months, effective February 22, 2016 (_Lankenau I_), and for a consecutive six months, effective March 9, 2017 (Lankenau II).

In Lankenau I, the Delaware Supreme Court found respondent guilty of violating the equivalents of New Jersey RPC 1.15(a) (failure to safeguard funds); RPC 1.15(b) (failure to promptly notify clients or third persons of receipt of funds in which they have an interest and to promptly disburse those funds); RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice). In Lankenau II, the Delaware Supreme Court found respondent guilty of violating the equivalents of New Jersey RPC 3.3(a)(1) (false statement of material fact to a tribunal); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The OAE and respondent jointly recommend imposition of a cumulative two-year suspension, the same discipline imposed in Delaware. For the reasons set forth below, we determine to grant the OAE's motions and impose a prospective two-year suspension.

This matter raises the question whether an associate attorney who intentionally misuses funds belonging to his law firm is subject to mandatory disbarment for "knowing misappropriation." Unlike the dissent, we conclude that he is not. Quite simply, this case lacks an element essential to the "knowing misappropriation" trilogy: In re Wilson, 81 N.J. 451 (1979), In re Hollendonner, 102 N.J. 21 (1985), and In re Siegel, 133 N.J. 162 (1993). A New Jersey lawyer will be disbarred for knowingly misappropriating client funds under Wilson, escrow funds under Hollendonner, and law firm funds under Siegel, because in each of those circumstances the lawyer has breached a *fiduciary duty* to the client, to the beneficiary of the escrow, or to fellow law partners. That common element — violation of a fiduciary duty — is implicit in all of the mandatory disbarment cases and distinguishes them from every other form of monetary misdeeds by a lawyer. "All fiduciaries are held to a duty of fairness, good faith, and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others." In re Honig, 10 N.J. 74, 78 (1952). A New Jersey attorney who willfully breaches this greatest of trusts in even the smallest of ways when handling money is generally subject to the single sanction of mandatory disbarment. It is a bright line rule narrowly applied to a bright line relationship.

Our Supreme Court has never imposed mandatory disbarment where the "knowing misappropriation" did not in some way breach a fiduciary duty owed by the lawyer, even if the Court does not always describe it as such. Unlike a law firm partner who has a fiduciary duty to his or her other partners, an associate such as respondent is an employee. His relationship with the law firm is contractual, not fiduciary. In every prior case where a law firm associate has been subject to mandatory disbarment for diverting funds from the firm to his own use, the conduct was first and foremost a knowing misappropriation of client funds. In each such case, the associate pocketed money given to him by clients who intended him to turn the money over to his firm to pay their bills. Each associate was rightly disbarred because he breached a fiduciary duty owed to a client by misappropriating the client's funds.

Respondent was an associate. While respondent's misuse of firm funds is a serious RPC violation, it is not a breach of a fiduciary duty, is not a "knowing misappropriation" within the meaning of Wilson and its progeny, and does not warrant mandatory disbarment.

Respondent earned admission to the New Jersey bar in 2004, the Pennsylvania bar in 2006, and the Delaware bar in 2007. On January 3, 2017, as reciprocal discipline in Lankenau I, Pennsylvania suspended him for eighteen months. He has no history of discipline in New Jersey, but has been ineligible to practice law in our jurisdiction since September 12, 2016, due to both failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection and failure to comply with New Jersey Continuing Legal Education requirements.

During the relevant time frame, respondent was an associate at Lundy Law, a personal injury law firm in Wilmington, Delaware, until his termination, in September 2014. Beginning in December 2014, he was employed at the Law Offices of Joel Kofsky, a personal injury law firm, in Philadelphia, Pennsylvania. During argument for Lankenau II, however, respondent represented that he is not engaged in the practice of law in any jurisdiction.

LANKENAU I (DRB 14-442)

The facts underlying respondent's misconduct in Lankenau I are undisputed. In his response to the September 2, 2015 Petition for Discipline filed by Delaware, respondent admitted the facts underlying all but two of the charges leveled against him. He initially denied allegations that his misappropriation of law firm funds constituted criminal theft under Delaware Code § 841(a). During proceedings before the Delaware Supreme Court, however, respondent stipulated to those allegations. On June 9, 2016, the Delaware Supreme Court issued an opinion, imposing an eighteen-month suspension for respondent's misconduct. We have culled the facts from that opinion.

From October 2008 through September 2014, respondent was an associate at Lundy Law. As the sole attorney in the firm admitted in Delaware, respondent was responsible for the firm's Delaware cases. He had entered into a fee-sharing agreement with Lundy Law, and knew the firm's specific rules for accepting cases. The firm's practice was restricted to personal injury cases; it rejected all cases nearing their applicable statutes of limitation; and it referred all cases that did not meet its stringent requirements to outside firms. Despite knowing his contractual obligations, respondent accepted and litigated four cases during his tenure at Lundy Law, without the knowledge or permission of his firm, and kept the legal fees generated by this work.

Specifically, on July 28, 2009, respondent filed a property damages subrogation complaint against Wal-Mart, on behalf of Albert Tomme, in the United States District Court for the District of Delaware. Respondent filed the case under his name and Delaware attorney identification number, with no mention of Lundy Law, to avoid detection by his firm. In 2010, he settled the case and directly received a fee of $1,111.11, which he deposited into his personal account.

In January 2010, respondent filed a motion to lift a stay, in behalf of a creditor of Orleans Homebuilders, in the United States Bankruptcy Court for the District of Delaware. Again, respondent filed the case under his name and Delaware attorney identification number, to avoid detection by his firm. He directly received a fee of $1,000, which he deposited into his personal account.

In 2012, respondent represented Alverna and Kenneth Warrington in a personal injury matter. He filed a complaint in Delaware state court just days before the statute of limitations expired, and, although Lundy Law was identified as the plaintiff's law firm in the pleading's caption, respondent litigated the case without the knowledge or permission of his firm. Moreover, respondent paid the costs and fees for the case using an old Lundy Law client account, without the knowledge or permission of his firm. By doing so, he eliminated his own out-of-pocket expenses while avoiding detection. He eventually settled the case for $19,500 and directly received a fee of $4,333.33, which he deposited into his personal account.

In 2013, respondent filed a complaint in behalf of Sherry Moore, and again charged the filing fees to an old Lundy Law client account, without the knowledge of his firm. For reasons not set forth in the record, that case was dismissed, and respondent lost contact with Moore.

During the Delaware disciplinary proceedings, respondent admitted that the $6,444.44 in fees he earned in these matters should have been remitted to Lundy Law pursuant to the terms of his employment agreement. Instead, he kept the fees for himself, and reported the income on his tax returns. Respondent maintained that the cases were referrals from friends, and were not cases that Lundy Law would have accepted. He explained that, in 2013, approximately four years after he had filed the first unauthorized case, he felt overwhelmed by bills for his son's private schooling and by his workload at Lundy Law, and had fallen behind on his mortgage payments due to the mismanagement of his personal finances. During the Delaware disciplinary proceedings, however, respondent conceded that he did not need the additional income generated by these matters to meet his financial obligations. He asserted, however, that he was not trying to start his own firm or "steal" Lundy Law clients.

Respondent committed additional misconduct in Lankenau I. Specifically, on August 7, 2013, he wrote to Wells Fargo, which held the mortgage on his personal residence, seeking forbearance of payments. At the time, he was five months behind on his mortgage payments, and had learned that foreclosure proceedings were imminent. Wishing to conceal these financial circumstances from his wife, he misrepresented in the letter that he had been furloughed from Lundy Law on January 10, 2013, and then re-hired, effective July 15, 2013. That same date, he completed and signed a Homeowner Financial Assistance Form that included the same misrepresentations, and submitted it to Wells Fargo. In further support of his forbearance application, respondent created a letter, dated July 1, 2013, on Lundy Law letterhead, memorializing the bogus furlough and re-hiring, and forged the signature of the managing partner, L. Leonard Lundy (Mr. Lundy), on the document. When he made these misrepresentations, he was gainfully employed by Lundy Law, earning $105,000 to $125,000 annually.

In September 2014, Mr. Lundy learned that respondent had litigated the above-described cases without the firm's knowledge. Mr. Lundy confronted respondent and terminated his employment. Respondent admitted his misconduct to Mr. Lundy and reimbursed $900 to the firm, representing the three filing fees he had charged to Lundy Law court accounts. He reported respondent to the Delaware disciplinary authorities. Although Mr. Lundy did not request disgorgement of the $6,444.44 in fees respondent had improperly taken, respondent tendered the full amount of the fees to Lundy Law.

On December 17, 2014, respondent wrote to Wells Fargo, admitting the misrepresentations he had made in his forbearance application. In the same letter, however, he maintained that he had received no windfall from his lies, claiming that all of the debt that had been delayed by the forbearance had been "rolled into the mortgage."

During the Delaware disciplinary proceedings for Lankenau I, respondent offered evidence, in mitigation, that he was under active treatment by both a psychiatrist and a psychologist to address mental health issues, stemming from his childhood, that allegedly caused him to avoid confronting personal problems. His providers opined that, given his progress made under their care, he was fit to practice law.

The Delaware Supreme Court found the following aggravating factors: respondent, practicing law since 2003, had substantial experience when he committed the misconduct; he engaged in a pattern of misconduct over an extended period of time; he engaged in multiple forms of dishonesty (improperly advanced costs and took fees, forged a letter and a signature, and made misrepresentations for his own benefit); and he admitted that he had committed the misconduct for dishonest and selfish motives.

The Delaware Supreme Court found the following mitigating factors: respondent had no history of discipline; he was professional and cooperative throughout the disciplinary proceedings; he was genuinely remorseful; and his misconduct was exacerbated by his reluctance to confront personal problems, stemming from an "abusive childhood."

On balance, the Delaware Supreme Court determined that the aggravating factors outweighed the mitigating factors and that a suspension of at least one year was the presumptive quantum of discipline for the knowing misappropriation of law firm funds. The Delaware Supreme Court further determined that respondent's violations of RPC 8.4(c) warranted a consecutive six-month term of suspension. For those reasons, the Delaware Supreme Court determined to impose a prospective suspension of eighteen months on respondent.

LANKENAU II (DRB 17-143)

The facts underlying Lankenau II are largely undisputed. Respondent failed to reply to the October 10, 2016 Petition for Discipline filed by Delaware disciplinary authorities and, thus, pursuant to Delaware disciplinary rules, the facts underlying the charges levied against him were deemed admitted. On March 9, 2017, the Delaware Supreme Court issued an order imposing a six-month suspension, consecutive to his prior eighteen-month suspension. The order incorporated the findings and recommendations made by the Delaware Board on Professional Responsibility, which issued a report, dated February 7, 2017, following respondent's disciplinary hearing in Lankenau II.

Following respondent's termination by Lundy Law, in December 2014, he began working for the Law Offices of Joel Kofsky, which did not have a Delaware office. On September 2, 2015, more than two months prior to the Lankenau I hearing, respondent filed a personal injury lawsuit in the Delaware Superior Court, Kent County, on behalf of Amos and Jessica

Pickens (the Pickens matter). Then, on November 9, 2015, only three days before the hearing in Lankenau I, respondent filed a personal injury lawsuit in the Delaware Superior Court, Kent County, on behalf of Kawauan Chavis, Marshall Kelly, and Bilal Rahim (the Chavis matter). In both of those personal injury actions, respondent had listed a Philadelphia, Pennsylvania law office address on the pleadings. Respondent admitted that he knew of the bona fide office rule in Delaware, but had filed those complaints to preserve the clients' claims. By filing the personal injury suits in the Pickens and Chavis matters, respondent was found to have violated (1) Delaware Superior Court Civil Rule 90, which requires that lawyers maintain a bona fide Delaware office in order to practice in Delaware Superior Court; (2) Delaware's version of RPC 3.4(c), by knowingly disobeying an obligation under the rules of a tribunal; and (3) Delaware's version of RPC 8.4(d), by engaging in conduct prejudicial to the administration of justice.

During his November 12, 2015 disciplinary hearing in Lankenau I, in response to questioning by his own counsel, respondent testified that, while working at the Kofsky firm, he had handled only one Delaware case — the "Medford Holmes" matter. During respondent's disciplinary hearing in Lankenau II, held on November 17, 2016, the panel confronted him regarding the veracity of that representation. Respondent then admitted that he had not disclosed the existence of the Pickens and Chavis matters during his hearing in Lankenau I, but asserted that his intent was to file the lawsuits solely to preserve the clients' claims, and then substitute another attorney if the matters did not settle. He claimed that he had no intent to deceive the Lankenau I disciplinary panel, but just gave a "vague answer," and, thus, made a negligent, not a knowing, misrepresentation. The hearing panel rejected respondent's position, finding that his prior testimony "can only be viewed as evasive and deliberately incomplete." Accordingly, the panel concluded that respondent had made a misrepresentation to the Lankenau I disciplinary panel, a violation of both RPC 3.3(a)(1) and RPC 8.4(c).

The hearing panel further found that respondent's misrepresentations were intended both to create a misimpression and to avoid additional discipline. The panel discussed an attorney's obligation to be truthful while testifying:

> While we doubt that the [Delaware Supreme] Court requires an attorney to speak perfectly in every instance, the Panel believes that the Court expects that when an attorney testifies before an adjudicatory body, the testimony will be responsive, accurate and complete. Evasive or deliberately vague answers are

> inappropriate, because they can be equally deceptive. We feel that the obligation of full candor is heightened in circumstances when the attorney has a personal stake in the outcome, such as a disciplinary proceeding. The consequence of Respondent's inaccurate testimony was that the *Lankenau I* Panel did not have a complete understanding of his professional (mis)conduct for the purposes of considering the balance of aggravating and mitigating factors in the sanctions determination for the charges he was facing then and, he avoided having additional charges of misconduct considered in that proceeding.
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> [Report of Delaware Board on Professional Responsibility in Lankenau II, February 7, 2017, at 5, 8.]

The Lankenau II panel found no mitigation applicable in respect of respondent's most recent misconduct. In aggravation, the panel concluded that respondent had "selfish motive to give the misleading testimony in that it tended to downplay the severity of his overall misconduct in the prior hearing and left the impression that no further misconduct was occurring, when, in fact, Respondent was committing misconduct during the pendency of the prior disciplinary proceedings." For his ethics violations underpinning Lankenau II, Delaware suspended respondent for six months, consecutive to the eighteen-month suspension imposed in Lankenau I.

* * *

Following a review of the record in these matters, we determine to grant the OAE's motions for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's adjudication of unethical conduct shall establish conclusively the facts on which it rests for purposes of disciplinary proceedings. Therefore, we adopt the Delaware Supreme Court's disciplinary findings of fact and determine that respondent's conduct violated New Jersey RPC 1.15(a) (failure to safeguard funds); RPC 1.15(b) (failure to promptly notify clients or third persons of receipt of funds in which they have an interest and to promptly disburse those funds); RPC 3.3(a)(1) (false statement of material fact to a tribunal); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice). The sole issue to be determined is "the extent of final discipline to be imposed." R. 1:20-14(b)(3).

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the

> record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

Subparagraphs (A) through (E) do not apply here. With respect to subparagraph (E), however, we must undertake a careful review of New Jersey case law concerning misconduct similar to that committed by respondent.

For his misconduct in Lankenau I, Delaware imposed on respondent an eighteen-month suspension for, among other serious ethics violations, a finding that he knowingly misappropriated law firm funds. In Delaware, disbarment is generally not imposed for that offense. See, e.g., In re Vanderslice, 55 A.3d 322, 327 (Del. 2012) (suspending an attorney for one year for misappropriating law firm funds eight times in a ten-month period); and In re Staropoli, 2005 WL 27791 (Del. 2005) (suspending attorney for one year for misappropriating firm funds one time). The dissent's position that we are somehow bound to disbar respondent based on Delaware's conclusion (and respondent's admission) that he "misappropriated" the legal fees he received in the four cases he handled directly is misplaced. It does not answer the legal question of whether his failing to turn over the legal fees and charging the filing fees to the firm is a "knowing misappropriation" under our rules. In a motion for reciprocal discipline, we must accept "the facts on which [another jurisdiction's conclusion] rests," not the other jurisdiction's legal conclusions. R. 1:20-14(a)(5).

Whether respondent's charging three filing fees totaling $900 to the law firm's court account is "knowing misappropriation" within the meaning of Wilson, Hollendonner, and Siegel is a legal question not addressed by the Delaware Supreme Court. Most relevant is In re Siegel, supra, 133 N.J. 162, where the Court first addressed the question of whether knowing misappropriation of law firm funds should result in disbarment. During a three-year period, Siegel, a partner at his firm, had converted more than $25,000 in funds from his firm by submitting false disbursement requests to the firm's bookkeeper. Id. at 163-64. The disbursement requests listed ostensibly legitimate purposes, but they represented Siegel's personal expenses. Ibid. While the payees were not fictitious, the stated purposes of the expenses were. Ibid. Although we did not recommend the attorney's disbarment, the Court disagreed, concluding that there is "no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners." Id. at 167.[1]

This application of the Wilson principles to a law partner's misappropriation of firm funds is settled law. See, e.g., In re Greenberg, 155 N.J. 138 (1998); In re Malanga, 227 N.J. 2 (2016). The Court has further refined the analysis, accepting that a law firm partner who takes firm funds under a disputed but reasonable belief that he is entitled to them may have violated RPCs, but has not committed a "knowing misappropriation." See, e.g., In re Nelson, 181 N.J. 323 (2004); In re Glick, 172 N.J. 319 (2004); In re Bromberg, 152 N.J. 382 (1998). The dissent misses the point

[1] The Supreme Court later underscored the fiduciary context of a law firm partner disbarred for wrongfully taking firm funds in In re Denti, 204 N.J. 566 (2011). The Court noted that the lawyer "carried out a longstanding and pervasive scheme of defrauding two law firms of which he had been a partner, thereby violating his fiduciary obligation to the members of those law firms." Id. at 567; see also Matter of Perez, 104 N.J. 316, 323 (1986) ("An attorney's personal use of trust fund monies is a violation of that fiduciary duty.")

in arguing that respondent failed to show that he had a reasonable dispute with the firm over his entitlement to the funds at issue. Respondent did not need to fit into this exception to Siegel when Siegel does not apply in the first place.

Siegel and its exceptions involve law firm partners. A partner and an associate are very different creatures under the law. Partners have a fiduciary duty to each other that has been recognized for centuries. A partner cannot act antithetically to the firm; self-dealing is forbidden; his or her knowledge is imputed to the other partners and vice versa; failure to disclose material information to the partnership is per se fraudulent. None of this applies to a law firm's associates. An associate, such as respondent, is an employee. The relationship is based on an express or implied contract. An associate does not have the rights — or the fiduciary duties — of a partner. While an associate is obviously expected to be highly trustworthy in dealings with his or her firm, that can be said of nearly all employee/employer relationships. Unless New Jersey employment law changes, that nearly universal expectation does not transform an employment into a fiduciary relationship.[2]

As an associate, respondent's relationship with Lundy Law was purely an employment arrangement. Even the profit-sharing terms were contractual and did not create a partnership. Respondent admittedly breached several contractual obligations

[2]The record does not contain any evidence or findings whatsoever that respondent was entrusted by Lundy Law with any special authority beyond what a typical associate would have. The dissent erroneously states that respondent "was clearly a fiduciary of Lundy Law" because he was supposedly managing the firm's Delaware office and had control of the office "funds" and "coffers." That is both factually and legally wrong. First, the dissent's statement that respondent was "the only attorney who had control of decisions made in respect of the firm's Delaware legal office" lacks any support in the record. There is nothing in the record suggesting respondent controlled anything in the firm's Delaware office other than himself and the cases he was assigned. Nor is there any evidence that he had access to a single bank account. Being able to charge fees to the firm's Superior Court filing fee account is a far cry from having control over firm bank accounts. Second, under New Jersey law, an employee does not become a fiduciary simply by virtue of access to corporate funds. Rather, the essence of a fiduciary relationship has two parts: (1) one party places trust and confidence in another and (2) the trusted party is in a dominant or superior position. F.G. v. MacDonell, 150 N.J. 550, 563 (1997); In re Stroming's Will, 12 N.J. Super. 217, 224 (App. Div. 1951), certif. denied, 8 N.J. 319 (1951) (essentials of fiduciary relationship "are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction.") A law firm associate is hardly in a dominant position over his or her firm, and there's nothing in the record suggesting that respondent somehow otherwise met the second prong of this test. We have found no New Jersey court that has ever held that an associate has a fiduciary duty to his or her law firm.

to the firm. He further admitted to secretly profiting from legal work done outside the firm, forging a partner's signature, and lying about his employment status to a mortgage lender. As to misappropriation, the sum total of the evidence is that respondent wrongfully charged $900 in filing fees to the firm's court account.[3] His assorted misdeeds were certainly dishonest and violated several RPCs. But what he did or failed to do was not a breach of a fiduciary duty. An associate improperly charging a filing fee to his firm's account is just not the sort of "knowing misappropriation" that triggers mandatory disbarment.

As noted, every mandatory disbarment under Wilson, Hollendonner, and Seigel has involved misuse of funds constituting a breach of a fiduciary duty. In contrast, a lawyer

[3] Failing to turn the four legal fees over to the firm may have been a breach of respondent's employment contract, but we cannot even say that with certainty because the employment contract is not part of the record. Moreover, we do not typically treat a contract breach as an ethics violation. That respondent personally handled the four cases cannot validly be construed as a misappropriation of fees the firm would otherwise have earned but for respondent's acts. The record clearly shows that Lundy Law would not have accepted these cases and does not support a suggestion that the firm would have received a referral fee. Matter of Lankenau, 138 A.3d 1151, 1154 (Del. 2016). Moreover, there is no precedent in New Jersey requiring that a lawyer be disbarred for misappropriating a firm's potential business opportunity.

in a non-fiduciary context can knowingly "misappropriate" all sorts of things without facing mandatory disbarment. See, e.g., In re Walzer, 203 N.J. 582 (2010) (censure for stealing food and drink from a blind vendor); In re White-Morgen, 202 N.J. 30 (2010) (three-year suspension for using dead mother-in-law's credit cards and taking substantial amounts of money from father-in-law incapacitated after an auto accident); In re Pariser, 162 N.J. 574 (2000) (six-month suspension following conviction for theft of cash and other property from co-workers). Just labeling something a "knowing misappropriation" is not the be-all and end-all of the matter; we need to know whether the lawyer broke faith with a fiduciary obligation.

Prior cases involving non-partners perfectly illustrate the point. The Court previously has disbarred law firm associates for what could broadly be labeled a knowing misappropriation of firm funds in In re Leotti, 218 N.J. 6, (2014), In re Staropoli, 185 N.J. 401 (2005), and In re Epstein, 181 N.J. 305 (2004). However, the misconduct of the lawyers in each of these cases more accurately constituted the knowing misappropriation of client funds. The associates in Leotti, Staropoli, and Epstein each tricked clients into giving them money that the clients believed the associate would then turn over to his law firm to pay the client's debt to the firm. In Leotti, the associate took a total of $33,000 in 12 payments he had received by misleading six different clients. He promptly deposited the client's money into his personal bank account rather than the firm's account as the clients had intended. In the Matter of Darren P. Leotti, DRB 13-344 (April 11, 2014) (slip op. at 4-7). In Epstein, the associate actively misled six clients into making their checks for fees payable to him rather than to the firm, covered his tracks, and then lied about it to both his firm and the disciplinary authorities. In the Matter of Charles S. Epstein, DRB 04-061 (May 19, 2004) (slip op. at 3-4). In Staropoli, the lawyer similarly misdirected the client to endorse a settlement check to him, deposited the check in his personal account, disbursed the client's share, and kept the rest. The associate initially misrepresented to his firm that he did not collect any fees because the client was a friend, and then misled the firm about the amount of the fees he had collected. In the Matter of Charles C. Staropoli, DRB 04-319 (March 2, 2005) (slip op. at 2-3). Each associate thus breached a fiduciary duty to a client (not to the firm) by pocketing money that the clients had entrusted them to deliver to his firm. Although the Court also cited Siegel in these cases, all three fit squarely under Wilson and therefore compelled disbarment for the associate's knowing misappropriation of client funds — not law firm funds.

The same is true of the "of counsel" attorney disbarred in In re LeBon, 177 N.J. 515 (2003). Just as the associates in Leotti, Staropoli, and Epstein, respondent LeBon had

> instructed Black Clawson [the client] to make its check for legal fees payable to him, rather than to White and Williams. When Black Clawson asked respondent's secretary to verify that the check should be made payable to respondent, respondent told his secretary to confirm that advice. Respondent received the $5,895.23 check on or about October 15, 1999 and deposited it in his personal account.
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> [In the Matter of Raymond T. LeBon, DRB 02-432 (May 2, 2003) (slip op. at 3).]

Again, that is a direct misappropriation of client funds mandating disbarment under Wilson. In sharp contrast, the record here does not suggest that any of the commercial clients directly represented by respondent thought they were hiring and paying Lundy Law. Those clients intended respondent to keep the fees. There is no evidence that respondent misled the clients or misused their funds in any way.[4]

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[4] In re Sigman, 220 N.J. 141 (2014), an associate attorney "admittedly instructed the client's father to write a $5000 check payable to respondent personally, as payment for a portion of the legal work performed on the client's behalf." Id. at 147. Rather than turning the fee over to his firm, the associate "deposited the check in his account and spent the money on

(footnote cont'd on next page)

To be clear, a lawyer can still be disbarred for egregiously dishonest misconduct outside a fiduciary duty. There are too many examples of this outcome to bother citing. However, unlike Wilson's mandatory disbarment for even the slightest knowing misappropriation, the magnitude of the misconduct matters for discretionary disbarment. Mitigation matters too. Where an associate's overall conduct in misusing firm funds is sufficiently reprehensible, disbarment may still be appropriate. While respondent's combination of dishonest conduct here deserves serious discipline, it does not rise to the level warranting discretionary disbarment. Disbarment is the most severe punishment, reserved for circumstances in which "the misconduct of [the] attorney is so immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." In re Templeton, 99 N.J. 365, 376 (1985). It is worth noting that even the Office of Attorney Ethics did not characterize respondent's conduct as a "knowing

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(footnote cont'd)

personal expenses." Id. The Court nevertheless imposed a 30-month suspension, rather than disbarment, finding that the associate had a reasonable (later vindicated) belief that he was entitled to the disputed funds.

misappropriation" under Wilson or Siegel. Nor did the OAE seek disbarment. No such sanction was identified in the OAE's motion for reciprocal discipline. It proposed an aggregated two-year suspension, the same discipline imposed by Delaware on which the OAE rested its motion.[5]

The distinction we draw between a "knowing misappropriation" that breaches a fiduciary duty and one that does not is not a new rule, exception, or mitigating factor. Nor is it a deviation from established precedent. It faithfully applies the principle that has tacitly run through each and every mandatory disbarment case under Wilson, Hollendonner, and Siegel. That principle is crystal clear. A New Jersey lawyer is subject to mandatory disbarment under the "knowing misappropriation" cases where the misappropriation violates a fiduciary duty to a client, to an escrow beneficiary, or to a fellow law partner.

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[5] The dissent criticizes respondent for failing to raise these arguments himself. The Supreme Court has properly concluded "that the sanction of disbarment should not turn on whether an attorney contends that his misappropriation" fits an exception to disbarment. In re Sigman, 220 N.J. 141, 162 (2014). Our task is to apply the law to the clear and convincing facts, regardless of how skillfully or poorly a respondent has framed the legal arguments. Even more, there was no reason for respondent here to have carefully distinguished Siegel when Siegel was not at issue in Delaware and the OAE's motions never sought disbarment.

Applying this sensible and straightforward principle to respondent's conduct, mandatory disbarment is not warranted. Nor does respondent's combination of RPC violations rise to the level justifying discretionary disbarment for life. We determine that a two-year prospective suspension is the proper quantum of discipline for respondent's misconduct, parallel to what Delaware imposed, Pennsylvania reciprocally adopted, and the OAE sought.

Chair Frost and Members Gallipoli and Rivera voted to recommend respondent's disbarment, and have filed a separate dissenting decision.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Edna Y. Baugh, Vice-Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Stephen Lankenau
Docket Nos. DRB 16-442 and DRB 17-143

Argued: March 16, 2017 and June 15, 2017

Decided: December 14, 2017

Disposition: Two-year suspension

Members	Two-year Suspension	Disbar	Did not participate
Frost		X	
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera		X	
Singer	X		
Zmirich	X		
Total:	6	3	

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