OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY

DAVID E. JOHNSON, JR.
Director

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OFFICE OF DIRECTOR

January 30, 2008

Gizella Weisshaus
203 Wilson Street
Brooklyn, New York 11211

Re: Office of Attorney Ethics v. Edward D. Fagan, Esq.
Docket No. XIV-2000-0135E

Dear Mrs. Weisshaus

Enclosed find a copy of the Hearing Report of Special Ethics Master Arthur Minuskin dated January 24, 2008 in the above-captioned matter.

Very truly yours,

John McGill, III
Deputy Ethics Counsel

JMcG/ldm
Enclosure

HON. ARTHUR MINUSKIN
SPECIAL ETHICS MASTER
NOWELL AMOROSO KLEIN BIERMAN, P.A.
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SUPREME COURT OF NEW JERSEY
District XIV Ethics Committee
Docket No. XIV-00-135E

OFFICE OF ATTORNEY ETHICS,	:	
Complainant	:	**DISCIPLINARY ACTION**
v.	:	**REPORT**
EDWARD D. FAGAN, ESQ.,	:	
Respondent	:	

John McGill, III, Esq., Deputy Ethics Counsel
Office of Attorney Ethics
P.O. Box 963
Trenton, New Jersey 08625
Attorney for Complainant

Alpert, Goldberg, Butler, Norton & Peach, P.C.
449 Mount Pleasant Avenue
West Orange, New Jersey 07052
BY CLARKE E. ALPERT, ESQ.
Attorney for Respondent

Michael P. Ambrosio, Esq.
Seton Hall Law School
1 Newark Center
Newark, New Jersey 07102
Attorney for Respondent

BACKGROUND AND OVERVIEW

The Office of Attorney Ethics (OAE) filed a complaint in the above matter alleging that the respondent misappropriated and improperly disbursed funds entrusted to him. The complaint alleges that the respondent knowingly misappropriated $40,000 belonging to the New York estate of Jack Oestreicher on March 27, 1996, and that he misappropriated $82,582 of the Sapir settlement funds that he maintained in his New Jersey Summit Trust Account on August 19, 1998. The complaint also alleges that the respondent improperly disbursed approximately $303,582 of the Sapir settlement funds.

The complaint resulted from a routine investigation conducted by the OAE when the respondent failed to pay his required annual client security fund fee. After the respondent was suspended for nonpayment of the client security fund fee, the OAE further investigated to determine whether he was practicing during the period of suspension. That investigation raised questions about his possible misuse of trust account funds; many of his trust account checks, for example, had been made out to cash.

The respondent initially chose to represent himself and filed an answer denying the allegations of the complaint. His answer failed to comply with Rule 1:20-4(e) as interpreted by In re Gavel 22 N.J. 248, 263 (1956), which requires setting forth "a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint." The complainant moved for sanctions, the respondent's answer was suppressed, and the matter proceeded to hearings on November 15, 2005. Prior to the hearings, the respondent retained counsel and obtained the complainant's consent to produce witnesses. The parties agreed that the respondent would supply names and

addresses of all witnesses, and the complainant would have reasonable opportunity to interview witnesses before they testified. The complainant consented to this arrangement on the condition that the respondent would testify during the proceedings.

Hearings in the matter took place between November 15, 2005, and April 19, 2007. There were 24 sessions. Fifteen witnesses including the respondent testified. In addition, the videotape deposition of Andrew Decter was received in evidence and reviewed.

One issue presented for determination as the hearings progressed was whether the respondent was authorized to use $82,000 given to him by Gizella Weisshaus. The respondent conceded that he used $39,903.25 of that sum to pay his law office rent, but he contended that this money was due him for prior legal fees.

Also presented for determination was whether the respondent was authorized to make certain use the Sapir settlement funds. He conceded that he used Sapir funds to repay $82,000 to Weisshaus. He contended that he was authorized to do so via an oral agreement with Estelle Sapir that the $500,000 Sapir settlement funds could be used to finance the respondent's work on Holocaust cases and to enable him to survive. At an audit conducted by the AOE on April 26, 2001, the respondent said he had interpreted Sapir's authorization to be limited to Holocaust litigation costs and not to include the respondent's personal use. He later took the position that although the money did not belong to him, he had a right to borrow if for his personal use. However, respondent's analysis of his trust account called those funds as the respondent's monies in determining whether he was ever "out of trust". When questioned directly about ownership of the Sapir settlement funds, the respondent could not answer whether those funds were or

were not his.

At the beginning of these proceedings the respondent was sanctioned for failing to provide an answer setting forth a full, candid and complete disclosure of all facts reasonably within the scope of the formal complaint. He had simply denied the allegations of the complaint. Even at the April, 2001, audit he never stated that authorization of the use of the funds was his defense. This strategy permitted him to tailor the defense of authorization via an elaborate and inconsistent claim of unlimited permission to use monies in his trust account without corroborative and supportive documentary proof customarily provided in those circumstances. The issue, therefore, has to be determined based on the credibility of the witnesses and evidence produced.

The respondent contended for the first time in his opening statement on November 15, 2005, that his use of allegedly misappropriated funds was authorized by Gizella Weisshaus and by Estelle Sapir.

EVIDENCE TAKEN

Caleb Koeppel

On November 15, 2005, Caleb Koeppel testified that he served as manager of Constitution Realty, which owned 26 Broadway, New York, where the respondent's law practice was a tenant in 1996 and 1997. Koeppel testified: that in early 1996 the respondent was in arrears in rent; that he and the respondent entered into a stipulation requiring the respondent to pay the back rent in order to retain possession; that on March 25, 1996, the respondent paid Constitution $39,440 in four checks from his Bank of New

York business account in accordance with the stipulation; that the respondent then failed to comply with the provisions of the stipulation requiring him to continue to pay rent; and that the respondent's tenancy was then terminated.

Gizella Weisshaus

Gizella Weisshaus testified that she first met the respondent in 1992 and retained him to represent her in many of her cases as well as in a claim against the Union Bank of Switzerland and in the Estate of Jack Oestreicher of which she served as administratrix. She stated that she authorized Andrew Hirschhorn, a lawyer who represented her concerning the Estate of Jack Oestreicher, to release monies from the estate to the respondent. Weisshaus testified that the release of funds to the respondent was with the understanding that they would be held by the respondent in his Bank of New York escrow account for the benefit of the estate, and that they would earn a minimum of 5% interest. She further stated that she never authorized the respondent to use any of the estate funds for any purpose not related to the Oestreicher estate. She said she did not authorize the respondent to use the funds for his own benefit. Dissatisfied with the respondent's failure to appear in Surrogates Court in Suffolk County, and not having receiving any statements concerning the monies deposited into the respondent's escrow account, Weisshaus filed an ethics complaint in New York against the respondent alleging that he had mishandled the Oestreicher funds. The respondent denied the allegations; he stated that the money was being held in his Summit Bank trust account and had to remain there pending a determination of a lien. She said she never authorized the respondent to move the Oestreicher funds from the Bank of New York to his Summit Bank account. She

acknowledged that pursuant to the Surrogate Court's order checks were issued to her for $33,814.87, to the Suffolk County Department of Social Services for $46,097.00, and to Faruolo, Caputi, Weintraub & Neary for $2,669.95 in legal fees.

A. Lawrence Gaydos, Jr.

On November 16, 2005, the complainant produced A. Lawrence Gaydos, Jr., Esq., an investigator for the District Ethics Committee. Gaydos was assigned to investigate the respondent to determine if he had practiced law during a period of suspension – September 21, 1998, through March 18, 1999 – for failure to pay his clients' security fund fee. Gaydos testified as follows. On October 20, 1999, he requested the respondent to submit copies of his business and trust account records from September 1998 through March 1999. The respondent replied that he had obeyed all the rules, that he had paid the reinstatement fee, and that he wished the matter to be closed. On November 10, 1999, he again asked the respondent for copies of his business and trust account records. Not having received them, he followed up with yet another request on December 7, 1999. On December 20, 1999, he received copies of the respondent's New Jersey business bank account records and his trust account records, but not trust checks. The documents were accompanied by the respondent's request that the matter be resolved and the respondent's explanation that he had been going through a difficult divorce. The respondent asserted that his wife had stolen and forged his business account checks over an extended period. He again requested that the investigation involving him be closed. Gaydos told the respondent that the records indicated that he was conducting business during his period of ineligibility and that it was necessary for the respondent to produce the trust checks. On

March 12, 1999, the respondent submitted to Gaydos a recreated ledger for his New Jersey business account in Summit and his New Jersey trust account, but this did not satisfy the request for the original checks. In March 2000, Gaydos received copies of the Summit trust account checks and found that respondent often wrote checks payable to cash. Memos on the checks indicated that some of the monies were being transferred to the respondent's business accounts. This appeared to be an improper use of the trust account funds.

Gus Pangis

On November 16, 2005, the complainant also produced Gus Pangis, who was employed by the OAE in April 2000 as Assistant Chief Investigative Auditor. Pangis testified as follows. He was assigned to investigate the respondent's trust account activity because of checks made payable to cash and checks cashed by the respondent. On April 12, 2000, he sent the respondent a demand audit letter requesting that on April 24, 2000, the respondent produce at the OAE his clients' ledgers, bank statements, cancelled checks, check stubs, deposit slips, and cash receipts from disbursements made from his trust and business accounts from January l, 1999, to April 12, 2000. Pangis requested the documents in order to determine whether the respondent had misused or misappropriated funds. The respondent requested an adjournment, which OAE granted. On May 5, 2000, Pangis received a letter from the respondent's attorney, Raymond Barto, detailing the respondent's position with respect to his trust account activity. Bartos's letter said that the respondent's client, Estelle Sapir, had had a dispute with her family over the disposition of the $500,000 proceeds she received in settlement of her case against certain

Swiss banks. The letter said that Sapir wanted monies she received from that settlement paid to her in cash so that her family would not know what she was doing with it. The letter asserted that to accommodate Sapir's request the respondent wrote checks to cash or to himself. He then delivered the monies to Sapir as she periodically requested or they were used for expenses in the Holocaust cases. The letter said that after Sapir died the respondent met with her family, gave them an accounting of the remainder of the funds, and the family never objected. Bartos's letter went on to say that the respondent never provided the OAE with an accounting of those funds, any proof of cash payments to the respondent, or any statement by the respondent that he was authorized to borrow from the settlement funds to cover the costs in the Holocaust cases.

Pangis further testified that despite requests the respondent never produced a reconciliation of his trust account or client ledgers; he provided only his trust account bank statement, which did not document monies that Estelle Sapir received. According to Pangis, the respondent contended, through his attorney, that he never knew he was suspended from practice because his wife, with whom he was in an acrimonious divorce, interfered with his receipt of messages and mail, which she often simply threw out. Pangis said the respondent did submit a "recreated" ledger that included two pages of his business account and two pages of his New Jersey Summit Bank trust account. The document showed two checks – one for $4,097.18 and one for $2,669.95 – issued out of the trust account; both were related to the Estate of Jack Oestreicher. Pangis stated that, when the respondent failed to produce requested books and records, OAE scheduled an audit for April 26, 2001, at which time the respondent was required to submit his New York and New Jersey trust account records from January 1997 to April 2001. The respondent

produced some records at that time, but did not provide a full accounting of the Sapir settlement funds. Pangis testified that the respondent claimed some of his records were turned over to his wife's attorney. Pangis said that he was particularly concerned with getting an accounting of the Sapir settlement funds, as well as monies received and expenses incurred by law firms pursuing Holocaust claims with him.

Andrew Hirschhorn

On January 18, 2006, the complainant produced Andrew Hirschhorn, an attorney who testified that he represented Gizella Weisshaus, administratrix of the Estate of Jack Oestreicher. Hirschhorn gave the following testimony. He held in escrow, subject to a lien of the County of Suffolk, $82,583.04 representing proceeds from the sale of a house owned by Jack Oestreicher. On February 25, 1996, he terminated his relationship with Gizella Weisshaus. He then forwarded to the respondent, as Weisshuas's new attorney, a check for $82,583.04 from his escrow account payable to "Edward Fagan, as attorney." The check bore a memo "Estate of Oestreicher" and was accompanied by a letter from Hirschhorn to Gizella Weisshaus stating "I'm releasing this money as per your direction as executrix of the estate with the understanding that said monies will continue to be held by Mr. Fagan for the benefit of the estate." Although it was Hirschhorn's understanding that the check he issued to the respondent "as attorney" would be escrowed, Hirschhorn admitted that such an understanding would have been more appropriate had the letter accompanying the check gone directly to the respondent instead of Gizella Weisshaus.

Jeanette Bernstein

Also on January 18, 2006, the complainant produced Jeanette Bernstein, niece of Estelle Sapir. Bernstein gave the following testimony. She was not aware of any dispute between Estelle Sapir and the family concerning the disposition of her settlement funds. She was not aware that Sapir wanted funds paid to her in cash. She was not aware that the respondent was authorized to borrow, or that he did borrow, any of the settlement funds. On a visit to Sapir's grave with the respondent, the respondent told her that Sapir had lent him some money and that he had given Sapir money in cash. In the same conversation the respondent indicated he was having some problems with his ability to practice law and that if she (Bernstein) supported him in this situation he would purchase a family plot to inter the entire Sapir family in one area. When Sapir died she was in the process of purchasing an apartment for herself and Bernstein; upon Sapir's death, she (Bernstein) received $95,000 representing funds for the purchase of that apartment. A few weeks after Sapir's death, the respondent met with Bernstein, her sister, and her sister-in-law. In the meeting the respondent said he was entitled to a $100,000 fee in the Sapir Credit Swiss settlement case. He gave the three women a memo stating that he would return his fee when the whole case was settled. The memo also said he was sending a letter to Judge Korman, who presided over Holocaust cases, to that effect, and Bernstein would receive a copy of the letter. But that never occurred. Sapir and the respondent took several trips overseas concerning the settlement. It was Bernstein's understanding that the respondent's friend, Andrew Decter, financed the costs of the trips.

Bernstein described her aunt's lifestyle prior to her death. Sapir lived in a simple one-room, furnished studio apartment. She never spent money extravagantly. After she died only $2,000 in cash was found in her apartment.

Nicholas Hall

On February 17, 2006 complainant produced Nicholas Hall, an investigator employed by the Office of Attorney Ethics. Hall testified as follows. On January 3, 2003, he was assigned as an investigator to the respondent's case. He reviewed various records and files provided by respondent. A memo from his predecessor, Gus Pangis, said that many of the respondent's trust account checks were made out to cash and appeared to come from Estelle Sapir's settlement funds. He received a call from Gizella Weisshaus who complained that the respondent had misappropriated monies from the Jack Oestreicher estate of which she served as administratrix. He analyzed the respondent's New York and Summit Trust accounts (Ex.C-32 and C-13) and concluded that on May 18, 1998, the respondent deposited $500,000 in the New Jersey Summit Trust account, which represented the Sapir settlement funds. The respondent issued three checks from the trust account totaling $82,000 representing disbursements from the Oestreicher estate ordered by Judge Webber. After making those disbursements, the respondent's trust account balance was insufficient to retain $500,000 of the Sapir settlement funds. With no $82,000 deposit having been made to the account, the respondent dipped into the Sapir settlement funds to pay the Oestreicher obligations. (See 2/17/06 transcript, p. 98, line l to p. 101, line 7) He prepared Exhibit C-27 and C-28 using an accounting submitted by the respondent that supported the conclusion that between May 23 and August 29, l998, the respondent disbursed either to himself or in his behalf $397,750 of the Sapir settlement funds. Based on Hall's conversation with the respondent at the demand audit session on January 7, 2004, in his analysis he gave the respondent credit for fees and costs rightfully

due him in connection with cases he was handling. As of March 2, 1999, the trust account had a balance of $277,412.14, which was short of the $440,000 he was required to be holding in trust from the Sapir settlement. He compared the respondent's accounting of the Sapir settlement funds (Ex. C-60) with his own (Ex. C-28) concerning checks written to cash or wire transfers from the Summit trust account between May 18, 1998, and April 15, 1999, totaling $302,750 and from April 19, 1999, to September 19, 1999, of $124,750. The respondent issued three checks on August 25, 1999, to the beneficiaries of the Sapir Estate; the balance in his trust account was only $3,330.94 at the time, and this was insufficient to cover those disbursements on the date they were issued. The respondent's checks did not bounce because on that same day Andrew Decter provided him with $225,000, which he deposited in his trust account. At the January 7, 2004, audit the respondent gave Hall an unsigned settlement statement (Ex. C-26) that he prepared providing for the disbursement of the settlement funds as directed by Sapir. The respondent stated at that time that he had Estelle Sapir's authority to borrow from her portion of the settlement proceeds. The respondent also said that Sapir's beneficiaries were aware of this loan arrangement. Hall noted as strange that the respondent's accounting at the January 7, 2004, audit lists $3,500 payable to Gladys Nicosia, who was Estelle Sapir's landlord, as repayment of a loan. Hall thought it strange that the respondent agreed not to charge Sapir for any expenses in pursuing the Holocaust cases. Hall also noted that the accounting statement was unsigned. Also strange was the fact that the respondent's accounting (Ex. C-50) included monies distributed on behalf of the Oestreicher estate, while the respondent's attorney's accounting (Ex. C-60) fails to mention those disbursements even though those payments affected the Sapir funds. The

respondent told Hall that Sapir had given him authority to use her portion of the settlement funds to cover costs in pursuing its Holocaust cases, but he never claimed to have authority to use those funds for his personal use. According to Hall's analysis, the first time the respondent used the funds for his own benefit was July 22, 1998, when he transferred $5,000 from his trust account to his business account. The transfer brought the balance he should have been holding – $440,000 – down to $435,000. Only the respondent's secretary, Edith Eddy, and a bank teller offered Hall any corroboration of the respondent's contention that he paid Sapir, or on her behalf, $89,600 in cash. Eddy and the teller also offered Hall the only corroboration that Sapir wanted to keep her financial dealings private and concealed from her family. The respondent told Hall the $225,000 he received from Andrew Decter actually represented fees due to the respondent. The respondent asserted that in order to protect those monies from being claimed as assets in his divorce, he agreed to disguise the funds as a loan and executed an agreement to that effect. Hall interviewed Andrew Decter, who said the $225,000 was a loan, that respondent had asked to borrow the money, and that the respondent desperately needed the money "or else he was a dead man".

Hall appeared again on March 15, 2006, and gave the following testimony. He repeated his analysis of the respondent's Summit Trust account concluding that the respondent paid $82,484.82 of monies due to the Oestreicher estate out of the Sapir settlement funds. During his investigation he interviewed Andrew Decter in 2004 and received from him a $225,000 promissory note from the respondent to Decter dated July 21, 1999 (Ex. C-29). Decter also produced for Hall an assignment of the respondent's life insurance policy to Decter (Ex. C-30) to support Decter's position that the $225,000 he

paid to the respondent was a loan and not a legal fee.

On cross-examination Hall conceded that the respondent eventually paid all the monies due in the Oestreicher estate and in the Sapir matter, and that the respondent had met all his obligations and paid everyone he had to pay. Hall testified on redirect examination that the respondent had written $87,500 in checks to cash and the only evidence that Sapir received any of these monies was an interview of Edith Eddy, the respondent's secretary. Eddy told Hall she delivered two envelopes to Sapir that the respondent said contained cash, but Eddy never looked inside the envelopes. When Hall asked the respondent about the authority, he asserted Sapir had given him to use the Sapir funds, the respondent stated the authority was for Holocaust case costs but not for his personal use. He had used the funds to pay the Oestreicher obligations and the rent for his law office in New York.

Edward Fagan, Respondent (March 21, March 22, May 3, 2006)

On March 21, 2006, the respondent, Edward Fagan, testified as follows. He graduated Benjamin Cardoza Law School in 1980. In 1996 he became involved with the Holocaust cases. He was the first person to file a suit in the Federal District Court against the Union Bank of Switzerland, Credit Swiss and Swiss Bank Corporation. He represented Gizella Weisshaus in that case, which was settled on August 12, 1998, for $1.25 billion dollars. In January 1997, he met Estelle Sapir, whom he added as a party plaintiff to the action... He described her as a lovely petite woman with whom he had a very close social relationship considering her as "family". He filed several different types of Holocaust actions. One category, called the insurance cases, settled in December,

1999, for 5 billion dollars. Another category, cases against the Austria Bank, settled in October, 1998, for 40 million dollars. He filed additional claims in 2004 involving stolen artwork, slave labor, and bonds and securities all of which are still pending. In all these cases, the respondent was either lead counsel or one of 10 lawyers representing the claimants. Developing these cases was complex and involved traveling to Europe several times a week between 1996 and the present. Pursuit of these cases was the desire of Estelle Sapir who had promised her father she would do so when she last conversed with him through a barbed wire fence when he was confined in a concentration camp.

On March 22, 2006, the respondent continued his testimony as follows. He discussed additional holocaust claims with Estelle Sapir concluding that they would be pursued after the Swiss bank claims were finalized. Estelle Sapir's bank claim was converted into a negligence action and subsequently settled for $500,000 on May 12, 1998, with a check payable to Estelle Sapir. Sapir told the respondent at that time that she wanted to use the money to finish the fight against the banks and the insurance companies to fulfill her promise to her father. The Respondent had difficulty recalling Sapir's exact words not only from this conversation but also concerning the authorization the respondent says she gave him to use the monies that she turned over to him. He told her he would continue with her fighting to honor the promise and to use the money in any way she wanted. At the time the respondent gave Sapir the check they discussed his fee. She merely instructed him to put the funds in his account and said she would ask him for the money when she wanted it. He had subsequent weekly meetings with Sapir when she would call and ask for money in cash. He gave her the cash she asked for, but the fee issue was never resolved. After a trip to Mydanic, Poland, with Sapir and her sister, the

respondent discussed with Sapir his fee and the monies he was holding. She agreed to a reduced fee from 33 1/3% to 20% and said the respondent could use the monies for the Holocaust cases and "to survive." The respondent understood this to mean that she wanted him to use the funds to continue prosecuting Holocaust cases, to pay for litigation expenses, and for the respondent's financial needs. The respondent had difficulty remembering Sapir's precise words. His paraphrase and interpretation appear to conform to his defense for using the monies as he did. Ninety-nine percent of his practice was devoted to Holocaust cases. The fees he earned in the settlement of these cases approximated between two and five million dollars in one settlement and a portion of a two million dollar fee in another. He was involved in factoring those fees where the cost of factoring amounted to 20 to 40 percent in interest charges as well as forfeiting part of the fee. He was never out of trust with respect to the Sapir and Weisshaus funds and submitted Ex. C-27, C-27k, C-27i, R-8, R-9 to support his claim. The respondent, however, assumed in his defense that he was authorized to use the Sapir settlement funds, and he therefore counted them as his own monies.

On May 3, 2006, the respondent testified further as follows. He described his situation as a tenant renting a home in Short Hills where his records and files were kept. He discussed what occurred after his tenancy was terminated; in particular, he described how he came to believe that his records were destroyed when he observed that the house in which he had been residing had been demolished. He described the litigation that occurred between 1992 and 1998 when he represented Gizella Weisshaus. He spent an enormous amount of time and was paid little for his efforts. On March l, 1996, Gizella Weisshaus received a check for $82,000 for monies in the Oestreicher matter; the check

was made payable to Edward Fagan, attorney for Gizella Weisshaus. At the time, Weisshaus owed the respondent $60,000 to $70,000 in fees for services he had performed, and she told him that that money could be applied to pay his bill. When Weisshaus gave him the check, he deposited it in his New York Bank of New York Trust account to satisfy the outstanding $60,000 in fees due to him. Weisshaus never indicated that there were any funds due to Suffolk County; she told him that any claim by Suffolk County was false and should not be paid. Later on Weisshaus accused him of stealing the $82,000.

Kenneth Torres

On May 4, 2006, the respondent produced Kenneth Torres, a private detective residing in Howell, New Jersey. Torres gave the following testimony. He is a private detective. He is licensed in New Jersey as a private investigator and in New York as a general insurance adjuster. While working for Mutual Merchants Insurance Co. he met the respondent when he was negotiating a settlement with the respondent's office. He retained the respondent to represent his wife in a personal injury case. He helped with the Holocaust cases by serving papers and doing some searches. In the later part of 1998 or early 1999, the respondent asked him on two or three occasions to deliver envelopes of money to Sapir. Sapir told him on one occasion to tell the respondent that "anything he needs he can use".

On cross-examination Torres admitted that he did not know how much money was in the envelopes he delivered to Sapir. He was not compensated even though he was unemployed at the time and even though each delivery involved a three hour round trip. His reward was his experience and knowledge while working with the respondent on the

Holocaust cases.

Harvey Grossman

Also on May 4, 2006, the respondent produced Harvey Grossman, an attorney. Grossman gave the following testimony. He became the principal stockholder in a corporation known as the Lyons Group, which, in 1993, was in the business of purchasing structured settlements at a discount. He met the respondent when the respondent approached him after settling a Holocaust case involving Christopher Meilli. The respondent presented Grossman with documents supporting the deferred settlement. They entered into an agreement by which the respondent sold his $250,000 fee to Grossman's company for $175,000. Grossman subsequently advanced various amounts to the respondent from 1999 to 2003, which together with the Meilli assignment amounted to $500,000. These amounts were cross-collateralized and dependent upon an estimated $5.6 million in fees due the respondent for his Holocaust case services. Grossman conceded that his discount and interest rates were substantially higher than a bank would charge. He was aware that the respondent had serious financial problems involving his divorce situation.

Edward Fagan, Respondent (May 4, May 5, 2006)

On May 4, 2006, the respondent gave further testimony as follows. As of May 17, 2001, he had not received any compensation for his work on the Holocaust cases. In July 2001, he received a $4.3 million fee awarded in the German Global property settlement, which was paid to the Superior Court of New Jersey in October 2001. The funds were disbursed as follows: $1.7 million to one creditor and factor; $200,000 to the Lyons

Group; between $1 million and $1.3 million to the respondent's wife; $30,000 to fund the Kaprun case; and only $75,000 to the respondent. As of September, 1998, the respondent was expecting an additional five to six million dollars in pending fees. On that basis, Harvey Grossman and the Lyons Group gave the respondent a monthly distribution averaging $10,000; as of September, 1998, the respondent owed Grossman and the Lyons Group $500,000. Besides the 4.3 million dollar fee in the German Global property settlement, the respondent received $1.3 million in the Swiss Bank case, and he is expecting hundreds of thousands of dollars in fees in other cases that have been settled.

On May 5, 2006, the respondent testified that he caused about 15 deliveries of cash to be made to Sapir, three by Kenneth Torres, two by his former secretary, Edith Eddy. He made the other 10 deliveries himself. He further testified denying allegations in the ethics complaint. He denied, for example, that he did not make 18 unauthorized disbursements totaling $124,750 to cash or to his business account. He said those amounts were paid to the Sapir family as instructed or agreed by them based on a purported will presented by Lori Bernstein, Sapir's niece. The will was subsequently documented in a settlement statement approved by the family.

- **Letter Dated March 6, 1996**

On May 24, 2006, the respondent produced a March 6, 1996, letter that he received from Gizella Weisshaus requesting that he transfer any monies he had in his escrow account "to an interest bearing account ... so that (her) monies will earn the highest available rate of interest and so that these monies will continue to be available and secure payment of legal fees, expenses and other such claims related to my various cases."

The respondent offered this letter to demonstrate that Weisshaus she believed the $82,000 was her money and that she wanted to use it for the payment of legal fees, expenses and other claims related to her cases. He connected that letter to a February 29, 1996, check for $82,000 that Weisshaus's attorney, Andrew Hirschhorn, issued to her, which she then brought to the respondent. The respondent thought it was necessary to have the document signed by Gizella Weisshaus because he did not trust her the way he trusted Sapir with whom he had a close personal relationship. To elucidate the activity of his trust account in New Jersey, the respondent then produced Ex. R-45 in response to the complainant's Ex. C-13. Ex. R-45 shows the activity of his trust account in New Jersey from October 19, 1997, to September 29, 1999. In Ex. R-45 the respondent included $225,000 from Andrew Decter, which he characterized as a receivable fee from when he represented Andrew and his father in the sale of a business. The respondent claimed that the chart supported his contention that he always was "in trust" and not "out of trust". The method he used to keep track was informal and he was constantly monitoring from his knowledge of invoices for monies coming in and of the checks going out; he stated, "I wouldn't write a check unless I had the money". As of December 26, 1997, the respondent's trust account showed a balance of $37,500 consisting entirely of his own funds. He further testified about the numerous trips he took to Europe with Sapir between January 13, 1997, and December 31, 1998, in support of the Holocaust litigation against Poland, German and Austria Banks.

Draft of Estelle Sapir's Will and Associated Documents

The respondent produced a draft of Estelle Sapir's will, which he received by fax

from her sister, Lori Bernstein, shortly after Sapir's death in April, 1999. He further produced Ex. C-26-"Disbursements as per instructions from Sapir", a settlement statement for the Sapir funds of $190,553.02, which he had prepared and which corresponded to the checks issued by him to the Sapir heirs. Of note was an added amount, namely a sum entitled interest earned on $300,000 for 10 months at 4.7% and $197,700 for 3 months. Sapir's heirs requested the respondent to pay the interest, and the respondent agreed. The heirs made this request at a meeting with the respondent in which they said they felt interest should be paid by the respondent "for the monies he was using out of the Sapir settlement and the agreement he had with Estelle".

Edward Fagan, Respondent (May 25, June 13, June 14, June 15, June 27, June 28, June 29, and August 23, 2006)

On May 25, 2006, the respondent gave further testimony to explain his Ex. R-45 relating to his analysis of his Summit Trust account. He explained in detail, how his account was in trust and not out of trust and that the balance on September 29, 1999, was $6,330.94. In doing this, he attributed $333,000 as Sapir funds with the deposit on May 16, 1998, although he had subsequently agreed with Estelle Sapir on September 15, 1998, to reduce his fee to 20%, leaving $400,000 as Sapir funds. His balance figure on September 29, 1999, to indicate he was "in trust" and not "out of trust" was based on his version of the September 15, 1998, agreement that transferred those settlement funds from "being trust monies to non-trust monies or monies that he would use for prosecuting Holocaust cases and for surviving himself financially and economically, just being able to survive".

On May 26, 2006, the respondent testified that he gave Estelle Sapir various amounts from the Sapir settlement in cash. He said that Sapir did not have a checking account. He then went on to describe his relationship with Andrew Decter. He represented Decter and his father in a case, which involved a $2.25 million dollar settlement; based upon his arrangement with Decter he was owed a 10% fee amounting to $225,000. He further described his role in resolving the dispute between the Sapir family in Paris and the Sapir family in the United States. He said he did this by revising the distribution of Estelle's estate from 90 percent in favor of the United States family and 10 percent favoring the Paris family to 50 percent for each. He said he wrote checks to the various members of both families for that equal distribution. He wrote there checks out of his trust account in early August, 1999, but he post dated them to August 24, 1999, because there were no funds in his trust account at that time. He said he felt he had to do that quickly to keep the peace with the families. He relied on his factor groups – Massachusetts Assets financing and the Lyons Group as well as the Decter fee to provide the cash for checks that he issued. Decter told him the money was coming in early August. He gave Decter deposit slips for his Summit Trust Account with the request that Decter deposit the money he owed, reminding him that checks were coming in in reliance on the deposit. He relied on Decter, whom he considered his best friend , whose business he had just saved, and who was going to get involved with him by selling insurance to the beneficiaries of the settlement cases. On or about August 24 or 25, 1999, the respondent learned from Decter that the deposit was one or two days late because Decter's monies were tied up in a CD which would have forfeited interest if withdrawn on the 24th. As a

result, one of the respondent's trust account checks bounced and created an overdraft charge.

When cross-examined concerning his agreement with Estelle Sapir in September, 1998, and regarding his relationship to the settlement monies, the respondent would not state that the settlement monies belonged to him. He contended that the monies were not trust funds, that he was entitled to use them, and that they were to be repaid to Estelle Sapir when she wanted the money back. Whether those monies were his or not was a question that he said could not be answered.

On cross-examination on June 13, 2006, the respondent recited his background from his admission to law practice in 1990 and his employment with law firms until he started his own practice in 1991. His practice was general and included personal injury cases. When he represented Gizella Weisshaus, he acknowledged that he received a check from her for $82,000 accompanied by a memo noting that the sum represented funds regarding the Estate of Jack Oestreicher. But he said he believed those monies belonged to Gizella Weisshaus. He did, however, deposit the check in his trust account, and, through an associate, he represented Gisela Weisshaus and the estate of Jack Oestreicher in a dispute with the Suffolk County Department of Social Services, which had asserted a lien in excess of the value of the estate assets. The respondent's rationale was that Gizella Weisshaus owned these monies, that others were simply asserting a claim against those funds that he deposited in his trust account, and that if any of the claimants were successful then Gisela Weisshaus would have to reimburse them. Subsequently, in September and October, 1998, and pursuant to a New York Surrogate Court order, the respondent issued checks totaling $82,587,00 ($46,097 to New York Suffolk County

Social Services, $2,669.95 to the law firm Faruolo & Caputi, and $33,814.87 to Gizella Weisshaus). The respondent conceded that in March 1996 he transferred $40,000 of those monies from his trust account to his New York business account. He also testified that on March 28, 1996, he disbursed $39,903.25 to his landlord, Constitution Realty, and had it not been for that deposit he would not have been able to remain in possession of his New York law office. His New York business account at the time had less than $6,000 in it.

The respondent acknowledged that at the time he deposited the $82,000 in his trust account, he knew the Suffolk County Department of Social Services had a claim against those funds. He insisted, however, that when Gizella Weisshaus retained him in the Oestreicher matter she was going to use the $82,000 to pay for his prior legal work – work that he had performed and that was a condition for his taking her case. He conceded that by October 31, 1997, he had depleted the $82,000 in his New York Trust Account so that the balance at that time was only $100. He acknowledged that this occurrence amounted to a "substantial depletion"

On cross-examination on June 14, 2006, the respondent admitted that he did not hold the $82,000 in escrow. He said that when the Suffolk County Surrogate decided the issues in the Oestreicher matter he "put back into escrow the $82,000 or (he) segregated it in the account" – referring now to his New Jersey trust account. He claimed that this was the right thing to do because Gizella Weisshaus's determination that he was not entitled to the money amounted to a fee dispute with Gizella Weisshaus, which he did not want to get involved with. When the respondent was confronted with a July 15, 1998, letter response to a grievance complaint filed by Gizella Weisshaus, he asserted that the $82,000 was still in (his) trust account. He said those funds must remain in trust and not be distributed...

until the court decides the validity and extent of the lien. But he had, in fact, depleted his New York Trust Account and claimed that her funds were part of his New Jersey (Summit) Trust account where they had been segregated. Questioned further the respondent admitted the source of the funds to which he referred were the Sapir settlement monies. In fact, the respondent conceded that the Surrogate Court had already decided the validity of the Department of Social Services lien in its written opinion on November 14, 1997. He also conceded that $82,000 was taken from his fee in Sapir even though a fee agreement with Estelle Sapir was not created until September 1998. He conceded he had taken $82,000 from his fees in Sapir to return the monies. The respondent said that, despite of his statement that the funds were still in his trust account, the $82,000 had not been maintained continuously in his Summit account from the time he received them. He also knew on July 15, 1998, that none of the funds could be disbursed until the Surrogate Court issued an order. In addition, he said that in the OAE investigation into the charges concerning Weisshaus, he never alleged that it involved a fee dispute. Nor did he at any time file any action against Weisshaus for the fees she owed him for prior work. He did not assert that fact during Weisshaus grievance proceedings against him.

On June 15, 2006, on further cross-examination the respondent testified that he never reported any of the monies he received from the Lyons Group as income because he considered it to be a loan that had to be repaid. He stated that Esther Sapir, Estelle's sister-in-law, had knowledge of the respondent's authority to use the Sapir settlement funds based on conversations she had with Estelle between the time of the settlement and the time Estelle died. He said that some time after the OAE began its investigation in

2000 he told Esther that Jeanette Bernstein had testified against him and discussed with her the possibility of her being a witness. He believed that Esther and Estelle had conversations during which Estelle would tell Esther what she was doing with the settlement monies. When contacted as a witness, Esther told respondent that she knew of conversations she had with Estelle and she would be willing to come in and testify in his defense. The respondent reluctantly conceded that during the OAE's investigation he stated that the authority to use the funds was limited to the Holocaust litigation expenses and never said that he was permitted to use the settlement funds to survive personally. With respect to Weisshaus, the respondent testified that in 2002 upon application to Judge Korman, he gave Weisshaus $100,000 out of his award in the Swiss Bank case settlement but did not seek at the time to collect any alleged fees that she owed him for prior legal work he had performed. When, in October 1999, the respondent in received $82,000 from Mr. Hirschhorn from the Oestreicher estate, Weisshaus had directed him to transfer the monies into an account earning the highest available interest. After applying the money to his fees, however, he admitted he used the monies and did not put them in an interest bearing account. Later on, in August 1998, he did repay the sums in accordance with the New York Surrogate Court's order by using the Sapir settlement funds he had received at that time. He claimed he had complied with Gizella Weisshaus' request to put the money in an interest bearing account by not charging her for any fees for two years (or for any fees in the Oestreicher case) and by returning the money later on. He further conceded that he does not have any billing statements that he sent to Weisshaus for fees that she purportedly owed to him.

In response to a question of total fees awarded to the respondent for his work on

Holocaust cases, he stated that it was $5.4 million plus additional fees in pending applications. Still he could not avoid financial problems causing him to be evicted from his home in Short Hills and his office in New York.

On cross-examination on June 27, 2006, the respondent admitted that he used Sapir settlement funds in his Summit trust account to pay $82,000 of Oestreicher estate obligations as ordered by the New York Surrogate Court – having used the $82,000 sent to him by Weisshaus as payment of prior legal fees due him. He contended it was proper for him to do so since the $82,000 sent to him by Weisshaus were monies she owned, free of any lien, and not in anyway restricted. He took those monies as payment of past due legal fees and used them to pay overdue rent for his New York office, but he never disclosed this fact when the OAE began its investigation of his trust account activities.

The respondent testified about his authority to use the Sapir settlement funds after Estelle Sapir died. He stated that her will was her authority to disburse the funds, that there were no restrictions on the use of the money (which he would pay back to her when she needed it), and that there was no written agreement for him to spend the money for his personal use. He never thought he was required to advise Estelle Sapir that a conflict existed if he borrowed the money. He said that at the time he was having financial problems including the cost of litigation, which he probably discussed with her on their weekly meetings.

The respondent testified about his contingency fee agreement regarding the settlement. The respondent and Sapir agreed at a meeting in September, 1998, that it would be 20% ($100,000); he said it was at that time that she authorized him to use the money to continue the Holocaust cases, and to survive. He said the agreement was that if

she ever needed the money back he would repay it to her. The respondent's understanding of his authority with respect to the funds was that the money did not belong to him but that he had a right to use it, and that when he used the funds they were loans from Sapir. He believed the funds belonged to Sapir to be used by him for the Holocaust cases and for him to survive. Remarkably, that statement is not consistent with the respondent's claim that he was never "out of trust." In order for him not to have been "out of trust" those funds would have had to belong exclusively to him.

On cross-examination on June 28, 2006, the respondent gave further testimony about his management of the Sapir funds. He was asked why, if his September 1998 agreement with Sapir gave him ownership of some of the settlement funds, he did not transfer that portion to his business account. He answered that "the monies were like a loan from her and until I actually took them or used them they were her monies and when she demanded them back, I had to give them to her." He said he reasoned that the monies had to remain in his trust account and he could not transfer them to his business account. In further testimony the respondent conceded that the checks that he issued to Weisshaus for $33,814.87 on September 2, 1998, came from his entitlement to fees in the Sapir settlement even though he had not yet finalized his fee agreement with Sapir; he did not finalize his arrangement with Sapir until September 6, 1998, when they agreed he would be entitled to 20%. He rationalized that at the time New York state law permitted him to charge 33 1/3% as his fee and that he had the authority to do so if he wished. When questioned further concerning his authority to use the Sapir settlement funds after Sapir died on April 15, 1999, the respondent said he believed he had such authority and was required "to give the money back to the family when they wanted it." He acknowledged

that he had to do an accounting to satisfy that requirement. With regard to the extent of that authority, the respondent stated he could use the money to continue the Holocaust cases and to survive – both objectives being "synonymous with one another" but if needed for his own survival it had to be paid back. He also testified that he believed it was proper to disburse Sapir settlement funds by writing trust checks to cash because Sapir directed him to do so. He stated that he made a mistake by not being aware of New Jersey Court Rules, which prohibit the issuance of checks to cash out of a trust account.

On further cross-examination on June 29, 2006, the respondent testified that on July 21, 1999, he executed a promissory note to Andrew Decter for $225,000. He deposited the borrowed funds in his trust account on August 25, 1999. The loan was secured by a lien on his fees in certain Holocaust cases. He said the $225,000 was a fee owed to him by Decter. The respondent set up the loan transaction to protect the funds from being reached by his estranged wife, who filed for divorce on July 31, 1999. He claimed by doing this and by depositing the monies in his trust account he prevented her from having access to that money. He vacillated when questioned if he notified the family court of the fee saying, "I notified my ex-wife, I don't know if I specifically said the amount". He said he had no idea whether he put that information in a Case Information Statement and emphatically denied that the transaction was a loan. The respondent conceded that in one of his Holocaust cases, U.S. District Court Judge Shirley Kram on August 19, 2005 dismissed his case and in doing so fined him $5,000 for bringing a claim in bad faith based upon his lack of professionalism and preparation and misrepresenting critical facts. The respondent filed an affidavit dated December 2, 2005 with the court stating that he had "no personal ability to pay the fee award or sanctions" when in fact on

September 2, 2005, he had entered into a legal fee and consulting agreement with a Florida law firm which paid him $3,500 to $5,000 a month for his services plus compensation for other matters in cases in the Florida courts where he appeared as a plaintiff or consultant. He admitted to receiving $209.000 from January 6, 2005, to February 6, 2005, $89,414 as a retainer for travel expenses, and $40,000 from Cory Lakes, LTD. The respondent was reminded that at a prehearing conference held in this matter on August 18, 2005, he claimed not have any money and could not afford a lawyer and needed appointment of counsel to defend the ethics charges.

On an unrelated matter the respondent conceded that in order to accommodate his client, Muhith, he issued a check out of his New York business account because of a settlement for $6,000 when he only had a balance of $4,291.82 causing an overdraft charge of $60. He reasoned that: 1) the client wanted the money immediately and should have it; 2) he (respondent) knew the money was coming in; 3) the check was drawn on his business account; and 4) he was avoiding "bouncing a trust account check" because his standing line of credit at the bank would ensure that the check would be paid.

On August 23, 2006, the respondent testified that he represented Marie Abate in a personal injury claim accident on November 8, l995. She executed a retainer agreement authorizing the respondent to endorse her signature on any release and/or settlement check received. When received the check would be deposited to his attorney escrow account. On April 19, l996, the respondent deposited a $9,000 settlement check in the matter to his business account; the balance of that account prior to the deposit was $679.62. In accordance with the respondent's settlement statement, Abate was to receive $5,981.64 as her share of the settlement proceeds. Instead of depositing the settlement

check in his New York Trust account, the respondent put it in his New York business account. On May 31, 1996, the respondent issued a check for $5,981.64 out of his New York Trust account – which did not contain the settlement funds – payable to Maria Abate. When asked what funds he used to make that payment to Abate, the respondent indicated that there was enough between the two accounts to do so. It was obvious, however, that the trust account check was using other funds in the trust account, namely settlement funds from another case, McCoy, to pay Marie Abate.

Michael Witti

On December 7, 2006, the respondent produced Michael Witti, a prominent attorney from Munich Germany, who specialized in Holocaust cases. Witti said he met with Estelle Sapir in Zurich Germany, New York, Washington and Warsaw about six to ten times. He described her as a very energetic person who was physically and mentally active and devoted to the cause of injustice that occurred in the Holocaust. At a meeting at the Marriott in Warsaw with the respondent, he heard Estelle Sapir say in response to the respondent's need for money to support the expenses of the Holocaust cases that the respondent could use her settlement funds to deal with the ongoing expenses to keep the claims going. Based on their special relationship Witte interpreted this statement as a broad permission. Because it was so broad, he believed it should have been set forth in a written contract to avoid the conflict of interest that might occur when funds were used for the respondent's personal use. Absent any further discussions, he concluded that Sapir's permission for the respondent to use the funds for his personal use would be covered as long as they could be tied to the litigation. Witte conceded that at no time

were the words, "used to survive" part of the conversation. The respondent and Witti are presently working together representing plaintiffs in the pending Borat cases.

Norbert Gschwend

On December 7, 2006, the respondent produced Norbert Gschwend, who is employed as a supporter for attorneys pursuing mass tort cases – Kaprun and Holocaust – caring for the plaintiffs and witnesses and rendering financial support. He testified that he met Estelle Sapir in 1997 in Vienna. At that time, he gave her an envelope containing $5,000 at the respondent's request. He said the funds represented a loan that the respondent was repaying to Sapir. He said that Sapir was appreciative of the work the respondent was doing for her. He further testified that his company loaned $600,000 to the respondent for his German Bond cases, that he stood to profit from the outcome of these cases, and that the success of that litigation would be jeopardized if the respondent were disbarred.

Margaret Endl

On February 5, 2007, the respondent produced Margaret Endl, a journalist researcher from Vienna, Austria, who said that in January, 1999, she interviewed Estelle Sapir on the telephone. She said Sapir told her that she was supporting the respondent in his fight for justice for the Holocaust victims. Endl understood the word "support" to mean financial support. On cross-examination Endl admitted that she never witnessed Sapir make any cash payments to the respondent, that she had no personal knowledge of any agreement between respondent and Sapir as to the respondent's authority to use any of her settlement funds, and that her interpretation was based on speculation and guessing.

She conceded an interest in a decision in this case favoring the respondent since she is employed with him and other attorneys in support of plaintiffs in the pending Kaprum case.

Alice Fisher

The respondent also produced as a witness Alice Fisher, a Holocaust survivor from Hungry now residing in Forest Hills, New York. Fisher testified she met the respondent through Gizella Weisshaus in 1996, that she retained the respondent to represent her in Holocaust insurance policy, art, painting and Swiss bank cases, and that she admired the respondent for his honesty and devotion in the Holocaust cases. She said she disagreed with Gizella Weisshaus' criticism of the respondent.

Esther Sapir

On April 19, 2007, the respondent produced Esther Sapir, sister-in-law of Estelle Sapir, who testified that she was very friendly with Estelle. She said the Holocaust cases were very important to Estelle, who worked for the whole Sapir family in promoting the cause. She said Estelle had a good relationship with the respondent, and she believes the respondent is honest and trustworthy. She said she has no complaints about him. She said Estelle intended to pursue the Holocaust cases and to give that effort priority over her desire to settle on the Riviera. Esther appeared reluctant to admit that there was any disagreement between the French Sapir family and the United States Sapir Family.

FINDINGS OF FACT

As Ethics Master, and based on the testimony and exhibits marked in evidence at the hearing, I make the following determination of facts.

1. The respondent was never authorized to disburse Weisshaus's or Sapir's funds as he claimed.
2. The testimony of the respondent was untruthful. He lied by claiming he had unlimited authority to use the $82,582 given to him by Gisela Weisshaus from the Estate of Jack Oestreicher. He lied by claiming that he had unlimited authority to use the Sapir settlement funds; he also improperly disbursed $302,582 of those funds.
3. The respondent's testimony under oath was evasive. He constantly questioned the complainant's right to seek responses, and he demonstrated a desire to avoid the truth.
4. The respondent falsely claimed that Gisela Weisshaus authorized him to apply to his prior legal fees the $82,000 she had entrusted to him. The respondent was never able to support his claim of fees by producing invoices.
5. The respondent had severe financial problems and had the motive to appropriate $40,000 of clients' funds to pay his New York law office rent.
6. The respondent's claim that he had no knowledge of a lien by Suffolk County on the funds, and that he believed the monies were owned by Gizella Weisshaus, was fabricated to justify his appropriation of those funds.

7. The respondent falsely contended that a dispute between Estelle Sapir and her family over the disposition of the $500,000 settlement proceeds existed; he made this false contention to explain why he made checks to cash out of his trust account; no evidence other than his own statement supports this account.
8. The respondent appeared at a pre-hearing conference in August, 2005, claiming that he was destitute, and he requested to have counsel appointed to represent him. In fact, he had income for that purpose, and when ordered to pay a sanction imposed by a Federal Court he falsely stated in an affidavit that he was unable to pay the sanction imposed.
9. The testimony of Nicholas Hall, Office of Attorney Ethics investigator, is truthful and accurate that the respondent did disburse to himself or on his behalf $397,750 of the Sapir settlement funds between May 23, 1998, and August 29, 1998, and that as of March 2, 1999, the respondent's trust account was short $277,412.14 of the $440,000 he was required to be holding in trust for the Sapir settlement funds
10. Based on the Andrew Decter videotaped deposition and a promissory note signed by the respondent, the $225,000 deposited by Decter into the respondent's trust account was a loan that the respondent desperately; this is supported by his statement that "he was a dead man" if he did not repay it. The funds were not a fee as claimed by the respondent.
11. The respondent's contention that $87,500 of checks he wrote to cash represented monies given by the respondent to Estelle Sapir at her request is not believable absent any proof that the amount was observed by anyone since the cash itself was allegedly contained in an envelope.

12. The respondent had constant financial problems requiring him to factor his fees or borrow money, and this was his motive to misappropriate the Sapir and Weisshaus funds.

13. The respondent's Ex. R-45 analysis to establish that he was never "out of Trust" but "in trust" is not accurate because it incorrectly assumes the Decter $225,000 was a fee and not a loan, and it incorrectly assumes that the Sapir settlement funds belonged to the respondent.

14. The respondent's testimony on May 24, 2006, that he was able to monitor his trust account from his knowledge of invoices for monies coming in and of the checks going out is not credible. He stated that "I would never write a check unless I had the money," but in early August, 1999, he wrote checks to the Sapir family post-dated to August 24, 1999. He did this because there were no funds in his trust account at the time. Furthermore, in another matter – the Muheth settlement – he wrote a check for $6,000 when he knew he had a balance of only $4,291.82, thereby incurring an overdraft charge of $60.00. These actions support the claim the respondent misappropriated funds as alleged in the complaint.

15. The evidence does not support the respondent's claim that he had the authority to use the Sapir settlement funds for his personal use or to pay back funds to Oestreicher or Sapir. The only evidence of authority for personal use was the respondent's own statement, which was hearsay. Even if his statement were acceptable evidence, it is entirely unconvincing because of the contradictory statements he made concerning the funds he used were his or not, at one point responding that it was a question he could not answer.

CONCLUSION AND RECOMMENDATION

I conclude as a matter of law that the clear and convincing evidence establishes that the respondent's conduct in the handling of funds belonging to his clients was a knowing misappropriation of client trust funds in violation of R.P.C. 8.4(c).

My recommendation for discipline is that the respondent be disbarred pursuant to In re Wilson, 81 N.J. 451 (1979). I find that none of the facts set forth by the respondent constitute a negligent misappropriation as in In re Liotta-Neff, 147 N.J. 283 (1997), in In re Konopke, 126 N.J. 225 (1991) and in In re Perez, 104 N.J. 316 (1986).

Dated: January 24, 2008

ARTHUR MINUSKIN, SPECIAL ETHICS MASTER