

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-391
District Docket No. XIV-2011-0121E

IN THE MATTER OF
FRANCIS O. OBI
AN ATTORNEY AT LAW

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Decision

Argued: March 21, 2013

Decided: April 24, 2013

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

Michael P. Ambrosio appeared on behalf of respondent.

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

This matter was before us on a recommendation for disbarment filed by Special Master Edwin H. Stern, J.S.C., ret. It involves respondent's use of trust funds that he was holding on behalf of American Finance, LLC (American), a company that purchases assets. Respondent declined the opportunity to appear at the scheduled hearing, either in person or telephonically. Because he did not provide the special master with the

documentation necessary to obviate the need for the hearing, it proceeded in his absence.

The two-count complaint charged respondent with having violated RPC 1.15(a) (failure to safeguard trust account funds), knowing misappropriation of trust account funds and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985), RPC 1.15(b) (failure to promptly deliver funds or property to a client or third person), RPC 1.15(c) (failure to keep separately funds that are in dispute), RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the most part, respondent's answer admitted the allegations of the complaint. For the reasons expressed below, we agree with the special master's recommendation for disbarment.

Respondent was admitted to the New Jersey bar in 1991. At the relevant time, he maintained a law office in East Orange, New Jersey. He has no history of discipline.

Alice Adeusi retained respondent to represent her in an employment discrimination suit against her former employer, Milford Plaza Hotel. The matter was settled for \$40,000.

Timothy Foley, Esq., testified that he and his wife had formed American, a company that buys assets, including interests in settlements, from individuals who are in immediate need of funds and cannot wait for the proceeds to become available. Foley had dealt with respondent on other of these business matters. At the time respondent contacted him, the Adreusi case had already been settled and respondent knew the amount of fees that he would realize from the case.

Initially, American agreed to give respondent \$10,000 for his legal fees. In return, respondent would pay American \$11,000 within three months. After respondent submitted additional information about his receivables, disbursements and need for more funds, American increased the amount to \$15,000. American and respondent agreed that respondent would pay increasing amounts, the longer it took respondent to pay American.

On July 20, 2007, respondent and American entered into an Assignment of Interest in Settlement and Limited Irrevocable Power of Attorney. The agreement stated, in relevant part:

- (a) I [respondent] represent and warrant to You that I am the attorney for the plaintiff(s) and am entitled to the sum of \$8,051.00 (the "Property") on account of legal fees earned and disbursements made as a result of my legal representation of the plaintiff(s) in the above entitled action. I hereby sell and assign to You [American] my entire right, title and interest in and to the Property to the extent described herein. If payment is

received by You on or before October 19, 2007, You shall be entitled to the sum of \$16,500.00. . . .

- (b) In full payment for the Property assigned herein and in consideration of its sale and assignment to You, You shall pay Me the sum of \$15,000 after confirmation reasonably satisfactory to You that the Settlement is valid and enforceable and is in the amount set forth in the first paragraph above . . .

. . . .

- (i) I shall take all steps necessary to ensure the You receive the Property. If I shall receive any portion of the Property, I shall immediately so advise You and promptly deliver that payment to You (including endorsing to Your order any check issued in my name) in accordance with your instructions. I shall, until such delivery, hold that payment in safekeeping as Your agent and fiduciary [emphasis added].

[Exhibit 13.]

Respondent agreed to pay American approximately \$18,000 within five days "after receipt of the first received proceeds."

On July 20, 2007, American wire-transferred \$14,980 into respondent's Sovereign Bank business account.¹ Respondent also executed a "Notice of Assignment, Irrevocable Direction of Payment & Authorization to Release Information" to allow

¹ A fee had been deducted from the advance to respondent.

American to notify the obligor of payment of the settlement proceeds and of American's interest in the proceeds.

Prior to releasing the funds to respondent, Foley spoke to the defendant's attorney, Heather Boshak, to verify that the Adeusi case had been settled. Boshak confirmed that a settlement check had been prepared, payable to respondent and the client. Because Foley did not want to hold up the client's funds, he authorized Boshak to forward the check to respondent. The assignment agreement had taken into consideration that American might not receive the funds directly. Foley explained that, if that occurred, until respondent disbursed the funds to American, he was to hold American's funds in "safe keeping," as American's agent and fiduciary.

Beginning in August 2007, Foley made numerous inquiries of respondent, by fax and telephone, regarding the whereabouts of American's funds. Foley's efforts proved to be fruitless. At one point, respondent told Foley that he had not disbursed the funds because he was having a disagreement with the client over the disbursement. Eventually, in early 2008, American received a January 2, 2008 letter from respondent, stating that he was working on a matter that he hoped "to close" before the end of February, presumably from which he would pay American, but he never made the payment.

Periodically, Foley continued to follow up with respondent. Ultimately, American filed suit against respondent. Respondent did not file an answer, which resulted in a \$26,244.90 default judgment being entered against him.

According to Foley, American did not authorize respondent to make any disbursements to himself from the Adeusi settlement proceeds. In 2011, American received three payments from respondent totaling \$1,250.

In his answer to the ethics complaint, respondent admitted that he did not remit the amount due to American and that, when he was interviewed by the OAE, he informed that office that he had used for himself the portion of the Adeusi settlement representing, in part, his legal fees. He admitted further that, from August 17 to December 4, 2007, he made eleven trust account withdrawals to or for himself, totaling \$17,250.

The OAE's complaint identified respondent's Sovereign Bank account ending in 2138 as his trust account and the account ending in 2120 as his business account. Both were closed in 2009. Exhibit 20, respondent's trust account statement for August 2007, shows a beginning balance of \$41,738.32.² A July 31,

² Although the statement is titled "free business checking," other documents, including respondent's deposit slips, and the
(Footnote cont'd on next page)

2007 deposit slip showed the \$40,000 deposit from Milford Plaza Hotel (the Adeusi settlement) into respondent's trust account. Exhibit 21 shows that the balance in that account was reduced to \$5,563.32, on September 11, 2007, and that the ending balance that month was \$11,803.32.

OAE Disciplinary Auditor Steven Harasym testified that a demand audit of respondent's books and records was scheduled for May 18, 2011. The day before the scheduled audit, respondent notified the OAE that he had to go to Nigeria because of family matters. The audit was rescheduled to July 7, 2011. In the interim, respondent provided the OAE with some financial information, but he did not comply with the OAE's June 20, 2011 request for additional financial information, such as his checkbook copies or client ledger cards. The OAE sent a follow-up letter, requesting additional information. According to Harasym, respondent failed to provide the "back-up" information that the OAE had requested, including cancelled checks, deposit slips, client ledger cards, and account reconciliations.

Harasym's testimony confirmed the admissions made by respondent in his answer to the ethics complaint. Harasym

(Footnote cont'd)

OAE ethics complaint show that respondent used this account as his trust account.

testified that, on July 31, 2007, respondent deposited the \$40,000 Adeusi settlement check into his trust account. He distributed \$29,875 to Adeusi. The balance remaining in the account after that disbursement was \$10,563.32, less than the amount owed to American. At one point, the balance dropped to \$5,563.32. A series of withdrawals, on August 17, 20, and 24, 2007, further decreased the balance in the trust account. In November 2007, the balance again dropped to \$5,893.32. The withdrawals were for respondent's benefit. Respondent's records did not reference any client matters for the withdrawals. They contained the reference "Francis Obi." Respondent's bank records from September through December 2007 showed that he had insufficient funds to pay American.

According to Harasym, respondent informed the OAE that he used the money pledged to Foley for his own personal expenses. Respondent never alleged that Foley had authorized him to use the money. Harasym concluded that respondent had violated the agreement with American by taking the attorney fees for himself.

Harasym testified that, in 1999, respondent had been the subject of a random audit, during which he had been notified of numerous recordkeeping violations. During its investigation in the current matter, the OAE discovered that respondent had not corrected any of the prior deficiencies. The deficiency

checklist showed the following irregularities with respondent's records: 1) no trust receipts or disbursements journals; 2) no ledger cards identifying attorney funds for bank charges; 3) no individual client ledger cards; 4) no monthly trust account bank reconciliation with client ledgers, journals and checkbooks; 5) no deposits slips; 6) no trust account certifications; 7) no proper designations on business account bank statements, checks and deposit slips; 8) no business receipts or disbursements journals; 9) no deposit of legal fees into the business account; 10) no malpractice insurance; 11) frequent overdrafts in the business account; 12) no deposits of all funds entrusted into the trust account; 13) no corporate designation on bank accounts; and 14) no maintenance of trust and business account financial records for the required seven years. Although the OAE had instructed respondent to correct the deficiencies found in 1991, he never submitted proof that he had done so.

The OAE presenter argued that American became respondent's client, once respondent received the settlement funds; that, pursuant to his agreement with American, he was required to pay a portion of the settlement funds to American; and that he, therefore, misappropriated client funds.

The special master's report and recommendation stated:

I find and conclude that the OAE did not sustain its burden of proving that

Respondent misappropriated the \$15,000 which he was obligated to pay American, and conclude that a mere breach of contract by an attorney does not itself constitute a violation of an ethical obligation or responsibility. However, I also find clear and convincing evidence . . . that Respondent misappropriated from his trust account approximately \$10,125 which was due and payable to American and that that breach of duty constituted a violation of ethical rules warranting disbarment.

[SMRR6.]³

The special master noted that respondent did not make a timely payment to American, at the time that he received the settlement funds, and used, at least some of the funds, for personal purposes. Respondent paid only a small amount to American, as a result of the American litigation.

The special master found that Foley's and Harasym's testimony was credible. The special master found it critical that respondent had assigned his interest in the Adeusi settlement to American and that respondent's share of the settlement proceeds had become American's property. Respondent's failure to pay American and his personal use of a substantial amount taken by withdrawals and payments to himself constituted a willful and knowing misappropriation of trust funds in,

³ SMRR refers to the special master's report and recommendation, dated July 31, 2012.

violation of RPC 1.5(a) and (b), and RPC 8.4(c). The special master did not find it relevant that American was not respondent's client.

The special master also found that respondent's failure to produce lawfully requested documentation to the OAE violated RPC 8.1(b). The special master noted that, in 1999, the OAE had found that respondent had overdrawn his business account and had maintained no trust or business receipts journals, trust or business disbursements journals, or trust ledger cards for individual clients. The special master found this to be an aggravating factor.

Based on respondent's knowing misappropriation of trust funds, the special master recommended respondent's disbarment.

At oral argument before us, the presenter stressed respondent's admission that he had not remitted the funds that were owed to American, that the balance in his trust account had fallen below the amount he was holding on American's behalf, that he had admitted the use of American's funds for his own purposes, and that American had never authorized him to utilize its funds.

Respondent's counsel, in turn, essentially argued that respondent's failure to remit the funds to American was a mere breach of contract; that the \$15,000 payment to respondent was a

loan; that respondent was mistaken about the identity of the funds and, therefore, did not knowingly misuse them; that there is only an "inference" of knowing misappropriation; that disbarment based on an inference alone is inappropriate; and that respondent was "under economic duress," at the time in question, made a mistake in judgment, and did not intend to steal American's money. Counsel urged us to impose a censure on respondent.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence.

Although this issue was not raised, we find that the special master accorded respondent due process and properly proceeded with the hearing in respondent's absence. We so find because respondent stated that he would not contest the complaint and because, most significantly, the special master gave him an opportunity to appear at the hearing or, in the alternative, to appear by telephone. Respondent declined both options.

As to the merits, we do not find that American was respondent's client. However, by agreement, respondent was to hold in escrow, in his trust account, the portion of the Adeusi

settlement funds that he owed American, as American's "agent and fiduciary," until the funds were properly disbursed to the right parties. Respondent admitted, in his answer and to the OAE, that he did not remit the payment due to American and that he used the proceeds for his own purposes. Respondent's trust account bank statements show that, after he disbursed Adeusi's share of the settlement, he had insufficient funds to pay American the full amount it was due. Thereafter, he depleted America's funds by making disbursements to himself. Respondent is, therefore, guilty of knowing misuse of escrow funds, as well as failure to safeguard trust account funds (RPC 1.15(a)), failure to promptly deliver funds to a third person (RPC 1.15(b)), and conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). As to RPC 1.15(c) (failure to keep separately property in which the lawyer and another person claim interests), it is not clear when the American lawsuit was filed and when respondent disbursed American's funds to himself. Moreover, a finding of a violation of this rule does not alter the discipline recommended in this matter. We, therefore, dismiss this charge.

Respondent is also guilty of recordkeeping violations (RPC 1.15(d) and R. 1:21-6) and RPC 8.1(b), for his failure to provide the OAE with the additional documents it requested.

This case is analogous to In re Picciano, 158 N.J. 470 (1999). There, the attorney was disbarred for knowingly invading escrow funds that he had retained from a settlement, \$5,000. He was holding the funds in escrow, pending an agreement with his client's physician about the amount of the physician's bill. The Court found that Picciano had "knowingly made an unauthorized use of escrow funds held for the physician." The Court concluded that "[s]uch an unauthorized use without the permission of the person for whom the escrow funds was held constitutes a knowing misappropriation of trust funds that warrants disbarment."

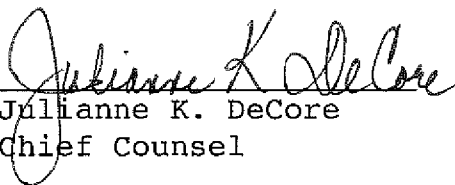
Like Picciano, respondent agreed to "safekeep" the escrow funds from the Adeusi settlement that he was obligated to hold on American's behalf, as American's agent and fiduciary. Because respondent did not obtain American's authorization to utilize those funds, he is guilty of knowingly misappropriating them.

Under the principles of In re Hollendonner, 102 N.J. 21 (1985), respondent must be disbarred. We so recommend to the Court. See also In re Egnasko, 151 N.J. 506 (1997) (on a motion for reciprocal discipline, the attorney was disbarred when he could not defend against charges of failure to account for, or to pay to the appropriate parties, funds entrusted to him as a fiduciary).

Vice-Chair Frost and Member Baugh did not participate.

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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Francis O. Obi
Docket No. DRB 12-391

Argued: March 21, 2013

Decided: April 24, 2013

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost						X
Baugh						X
Clark	X					
Doremus	X					
Gallipoli	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	7					2


Julianne K. DeCore
Chief Counsel