

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 06-012  
District Docket Nos. XIV-03-507E  
and XIV-04-070E

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IN THE MATTER OF  
NICHOLAS W. McCLEAR  
AN ATTORNEY AT LAW

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**Corrected Decision**  
Default [R. 1:20-4(f)]

Decided: March 13, 2006

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

This matter was before us on a certification of default  
filed by the Office of Attorney Ethics ("OAE") pursuant to R.  
1:20-4(f).

Respondent was admitted to the New Jersey bar in 1973. He  
has no prior discipline. However, by Supreme Court Order dated  
December 10, 2003, he was temporarily suspended for failure to  
comply with an OAE demand audit of his attorney trust and  
business accounts. He remains suspended to date.

The two-count complaint charged respondent with knowing

misappropriation of client funds (RPC 1.15(a) and RPC 8.4(c)).

The Ark Matter - District Docket No. XIV-03-507E<sup>1</sup>

In May 2003, respondent represented Ark Mortgage, Inc. ("Ark") in a civil matter (Goffstein v. Ark Mortgage). On May 14, 2003, the matter settled, with Ark paying Goffstein \$75,000, in two \$37,500 installments.

On June 19, 2003, respondent deposited into his trust account at Fleet National Bank ("Fleet") a \$37,500 check from Ark. Respondent also received from Ark's insurance carrier a \$25,000 wire transfer into his trust account.

On June 23, 2003, respondent paid the first installment of \$37,500 with a trust account check, leaving \$25,000 in escrow toward the second installment. However, on that same date, respondent invaded the remaining Ark funds by issuing two unauthorized trust account checks to himself, for \$5,000 and \$9,000, respectively. He deposited the first check into his business account, and the second into his own personal account with Fleet.

As a result of respondent's actions, on June 30, 2003, his trust account balance fell to \$11,191.48, at a time when it should have had \$25,000 for the Ark matter alone.

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<sup>1</sup> Referred to in the complaint as the "Tomasella" matter.

On July 1, 2003, respondent further invaded Ark matter funds by issuing a trust account check for \$8,200, made payable to "Caggiano Memorial Funeral Homes," and bearing the notation "Funeral Expenses W. J. McClear." That disbursement was unrelated to any client matter. As a result, on July 3, 2003, respondent's trust account balance dropped to \$2,942.68.

On the same date, respondent received a final \$12,500 check from Ark to complete the funding for the second \$37,500 installment. Instead of depositing those funds into the trust account, respondent placed them in his business account.

Respondent attempted twice thereafter, on July 28 and August 7, 2003, to make the second installment in the Ark matter. Each time, his \$37,500 trust account checks were dishonored by Fleet, having been drawn on insufficient funds. After the second attempt, respondent's trust account balance was a mere \$5,742.15.

The Petrillo Matter - District Docket No. XIV-04-070E

On August 19, 2003, respondent represented Father Thomas Petrillo in the purchase of a Toms River property and the October 27, 2003 sale of his Seaside Heights property. Petrillo obtained a bridge loan from World Savings to complete the purchase. The bridge loan was to be satisfied with proceeds from

the future sale of the Seaside Heights property.

On August 15, 2003, World Savings made two wire transfers (\$68,800 and \$75,464.31) into respondent's trust account for the purchase of the Toms River property.

On August 15, 2003, without Petrillo's authorization, respondent invaded the Toms River closing funds to finance the second installment in the Ark matter, above. Respondent did so by wiring \$38,800 (\$37,500 plus a \$1,300 court-imposed attorney fee) to Goffstein's attorney.

On that same day, respondent further invaded the Toms River closing funds by issuing a trust account check for \$9,000 to cash and depositing it into his personal account at Fleet. The check bore the notation "Ark fees," although respondent was due no fee for that transaction. This activity left a balance in the trust account of \$99,974.96, when it should have contained \$144,264.31 for the Toms River closing alone - a shortage of over \$44,000.

The Toms River closing took place on August 19, 2003. Petrillo gave respondent a \$42,000 bank check and a \$1,000 personal check, representing his down payment for the purchase. Respondent endorsed those checks and deposited them into his trust account on August 26, 2003. However, Petrillo overestimated his contribution, leaving a \$4,917.17 surplus

after disbursements. Respondent never returned that sum to him.

Thereafter, presumably due to shortages in his trust account, respondent failed to timely pay off the seller's mortgage (\$102,928.46). As of September 2, 2003, respondent's trust account balance was \$66,338.26.

On September 20, 2003, respondent again invaded Toms River closing funds by issuing a trust account check for \$9,000, made payable to cash. The check bore the notation "Ark Legal Fees" and was cashed by respondent's wife, JoAnn McClear. No legal fees were due respondent.

On October 27, 2003, respondent represented Petrillo in his sale of the Seaside Heights property. The buyer's attorney gave respondent a trust account check for \$104,512.92, representing the proceeds of sale. Respondent deposited that check into his trust account.

On October 30, 2003, respondent invaded the Seaside Heights closing funds by making a \$104,247.62 wire transfer to Aurora Loan Services to satisfy the Toms River seller's outstanding mortgage. Respondent further invaded those funds on November 10, 2003, when he drafted a trust account check to himself for \$13,500, with the notation "legal fees," even though he was owed no fees. He deposited that check into his business account, leaving \$43,043.68 in the trust account. At the time, the trust

account should have had \$104,512.92 for the Petrillo matter alone.

On December 2, 2003, Fleet returned "NSF" a November 17, 2003 trust account check to Petrillo for \$51,987.06. According to the complaint, respondent's trust account was frozen on January 6, 2004, with a balance of \$43,013.68.

Thereafter, a February 2, 2004 check for \$30,484.24, also payable to Petrillo, was returned "NSF" on February 4, 2004. On March 18, 2004, respondent wired \$69,293.18 from his Fleet personal account to the World Savings Bank, to satisfy Petrillo's bridge loan. As of the date of the ethics complaint (July 20, 2005), respondent still owed Petrillo \$36,904.72.

On July 26, 2005, the OAE sent respondent a copy of the complaint, by both certified and regular mail, to his last known office address listed in the records of the Lawyers' Fund for Client Protection ("CPF"), 22 South Park Street, Montclair, New Jersey, 07042. The certified mail was returned marked "not deliverable as addressed, unable to forward." The regular mail was returned with the same markings.

On September 1, 2005, the OAE sent a copy of the complaint to respondent's last known home address listed in the CPF records, 27 Norwood Avenue, Montclair, New Jersey, 07043, by both certified and regular mail. The certified mail was returned

marked "unclaimed - returned to sender." The regular mail was not returned.

On November 2, 2005, the OAE received correspondence from respondent, dated October 31, 2005, indicating that he would not defend himself against the charges due to financial constraints. That letter bears the return address for his home, 27 Norwood Avenue, Montclair, New Jersey, 07043.

On November 2, 2005, the OAE sent respondent a "five-day letter" to the 27 Norwood addresses, by both certified and regular mail, notifying him that, unless he filed an answer within five days, the record would be certified directly to us for the imposition of discipline. The certified mail was returned marked "unclaimed - returned to sender." The regular mail was not returned.

Respondent did not file an answer to the complaint.

Service of process was properly made. Following a review of the record, we find that the facts recited in the complaint support the charges of unethical conduct. Because of respondent's failure to file an answer to the complaint, the allegations are deemed admitted. R. 1:20-4(f).

In the Ark matter, respondent invaded escrow funds earmarked for the second installment by cashing two trust account checks made payable to himself for \$5,000 and \$9,000,

respectively. Respondent further invaded those funds by writing a \$8,200 check to a funeral home for a personal matter. Further, respondent also deposited Ark's final check for \$12,500 into his business account instead of the trust account, where it was needed to fund the final installment.

As a result of respondent's misconduct, in August 2003, his trust account balance contained only \$5,742.15, a shortage of over \$31,000 for the second Ark installment. Respondent had improperly converted those funds to his own use, a knowing misappropriation of trust funds.

In the Petrillo matter, in August 2003, respondent invaded his client's Toms River closing funds to make the second installment payment in the earlier, unrelated, Ark matter (\$38,800).

Respondent also wrote unauthorized trust account checks to himself (\$9,000) and his wife (\$9,000) from Toms River closing funds, and converted those funds to his own use.

Thereafter, in October 2003, respondent wired \$104,247.62 to pay an unrelated seller's mortgage obligation left over from the Toms River purchase. In doing so, respondent misappropriated proceeds from the sale of the Seaside Heights property, to cover his earlier misappropriation from the Toms River closing.



On November 10, 2003, respondent further invaded client escrow funds by taking \$13,500 from the trust account for "legal fees," when no fee was due him, and depositing them into his business account.

Finally, respondent was charged with failing to refund to Petrillo a \$4,917.17 overpayment related to the closing on his Toms River property. It may be that respondent never repaid those funds, but it is not clear from the record that respondent knowingly misappropriated them, as his trust account contained \$43,000 when it was frozen by Fleet.

We find that respondent's conduct was appalling. He used his trust account as if it was his own "piggy bank." He deposited the Ark and Petrillo funds in his trust account and did not utilize them for their intended purpose – the payment of obligations incidental to their respective civil settlement and real estate transactions. Instead, respondent used them for his personal benefit and without the parties' authorization. He, therefore, knowingly misappropriated client and escrow funds, a violation of RPC 1.15(a) and RPC 8.4(c). Under the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985), respondent must be disbarred. We so recommend to the Court.

Member Holmes recused himself. Member Lolla did not

participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board  
Mary J. Maudsley, Chair

By: Julianne K. DeCore  
Julianne K. DeCore  
Chief Counsel

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Nicholas W. McClear  
Docket No. DRB 06-012

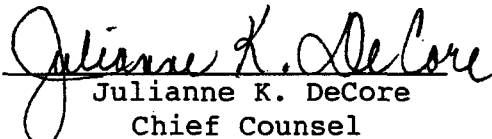
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Decided: March 13, 2006

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley	X					
O'Shaughnessy	X					
Boylan	X					
Holmes					X	
Lolla						X
Neuwirth	X					
Pashman	X					
Stanton	X					
Wissinger	X					
Total:	7				1	1

  
Julianne K. DeCore  
Chief Counsel