

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-285
District Docket Nos. XIV-04-290E;
XIV-04-291E; XIV-05-025E; and
XIV-05-028E
Docket No. DRB 05-303
District Docket No. XIV-04-391E

IN THE MATTER OF
VICTOR M. MUSTO
AN ATTORNEY AT LAW

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

Decided: December 27, 2005

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

Pursuant to R. 1:20-4(f), the Office of Attorney Ethics
("OAE") certified the record in these matters directly to us for
the imposition of discipline, following respondent's failure to
file answers to the formal ethics complaints.

Respondent was admitted to the New Jersey bar in 1983. At the relevant times, he maintained a law office in Asbury Park, New Jersey.

In 1997, respondent received a three-year suspension, retroactive to June 15, 1995, the date of his temporary suspension, for his guilty plea to conspiracy to distribute cocaine, possession of methyl ecgonine (a metabolite of cocaine), conspiracy to possess heroin and cocaine, and possession of heroin and cocaine, violations of RPC 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer). In re Musto, 152 N.J. 165 (1997). Respondent was temporarily suspended on June 30, 2004, in connection with his misconduct in these matters. He remains suspended to date.

As discussed below, based on the facts recited in the complaint in DRB Docket No. 05-285, we have found clear and convincing evidence of respondent's knowing misappropriation of trust funds in three matters. Even though disbarment in that matter alone is mandated under In re Wilson, 21 N.J. 451 (1979), and its progeny, we have also considered the merits of the complaint in DRB Docket No. 05-303.

DRB DOCKET NO. 05-303 - DISTRICT DOCKET NOS. XIV-04-290E; XIV-04-291E; XIV-05-025E; and XIV-05-028E

On July 26, 2005, the OAE mailed a copy of the complaint to respondent at his last known office address listed in the attorney registration system, 550 Cookman Avenue, Suite 213, Asbury Park, New Jersey 07712, by regular and certified mail, return receipt requested. The regular mail was returned stamped "ATTEMPTED NOT KNOWN." The certified mail was returned marked "NOT DELIVERABLE AS ADDRESSED," "UNABLE TO FORWARD."

On July 27, 2005, the OAE served respondent by publication in the Asbury Park Press and the New Jersey Lawyer. As of the date of the certification of the record, September 15, 2005, respondent had not filed an answer to the ethics complaint.

The complaint charged respondent, in each of three counts, with violations of RPC 1.15(a) (knowing misappropriation of client funds), the principles of In re Wilson, supra, 81 N.J. 451, and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

At the relevant times, respondent maintained an attorney trust account at the PNC Bank, account number 80-1177-1536.

The Buono v. Shorey Litigation - XIV-05-028E

Respondent represented defendant Michael Shorey in a civil suit in Monmouth County Law Division, charging Shorey with negligent home-construction and/or remodeling. Plaintiffs, the Buonos, were represented by Maxwell Colby.

On November 14, 2002, the parties entered into a settlement agreement requiring Shorey to pay \$16,000 to the Buonos at a rate of \$500 per month, starting January 15, 2003.

Pursuant to the settlement agreement, Shorey made the following payments to respondent, which were to be remitted to the Buonos:

<u>DATE</u>	<u>CHECK NO.</u>	<u>AMOUNT</u>
12/15/02	5712	\$500
01/15/03	5713	\$500
03/10/03	5710	\$500
06/20/03	5717	\$500
10/16/03	5732	\$500
11/15/03	5738	\$500
12/31/03	5744	\$500
02/15/04	5749	\$500

On January 29, 2003, respondent deposited into his trust account Shorey's checks numbered 5712 and 5713. Later, on February 14, 2003, respondent issued trust account check number 1391 for \$1000 to Colby, representing Shorey's first two payments. Shorey's third check, number 5710, was returned for insufficient funds. Thereafter, respondent failed to turn over to the Buonos the balance of the Shorey payments. According to

the complaint, respondent used the rest of Shorey's funds for personal and office expenses, unrelated to the Shorey matter.

According to the complaint, respondent's PNC attorney trust account bank statement showed that, on December 12, 2003, his trust account balance fell to \$22.16.

Thereafter, on numerous occasions, respondent's trust account balance fell below the amount he should have been holding for the Shorey matter. At the end of January 2004, his trust account balance was \$615.16. From February 3, 2004 through the rest of the month, the account showed a negative balance of \$567.34. On March 29, 2004, respondent's trust account balance was \$0.63.

According to the complaint, respondent's invasion and expenditure of client funds was done without the client's knowledge or consent.

The Dunn Closing - XIV-04-290E and XIV-04-291E

Respondent represented Dr. Douglass Dunn in an April 1, 2004 purchase of property in Asbury Park, New Jersey, from the Artisan Group, Inc. On April 1, 2004, Mortgage Warehouse Funding wire-transferred \$187,231.13 to respondent's trust account. Respondent also deposited into that account Dunn's personal check number 1124, for \$41,246.67. Together, the deposits totaled \$228,477.80. As of

April 2, 2004, following these deposits, respondent's trust account balance was \$229,513.43.

Respondent made the following disbursements in connection with the Artisan/Dunn closing:

DATE	CHECK NO.	PAYEE	AMOUNT
04/01/04	1622	Max Investments	\$2,000.00
04/01/04	1623	Giordan, Halleran & Ciesla	400.00
04/01/04	1624	First Savings	145,407.00
04/01/04	1626	KOR Consulting	15,506.00
04/01/04	1627	Vintage Communities	40,557.20
04/01/04	1628	Ron Cambria	7,113.11
04/01/04	1630	William Rogove	10,669.67
04/01/04	1632	Victor M. Musto	100.00
04/01/04	1633	Red Bank Title	1,382.00
04/10/04	1643	Knoxville Operating	1,325.00
04/11/04	1645	Knoxville Escrow	140.00
04/11/04	1646	RPM Mgmt. Co.	100.00

TOTAL \$224,699.98

After making these disbursements, respondent should have been holding \$3,777.82 (\$228,477.80 - 224,699.98) in his trust account in connection with the Artisan/Dunn closing, but he failed to maintain those funds. According to the complaint, respondent used approximately \$3,400 from the closing to pay personal and office obligations, "and or other financial

obligations unrelated to the Artisan to Dunn closing." As of April 21, 2004, respondent had only \$330.45 in his trust account, which created a \$3,400 shortage in the Artisan/Dunn funds alone. Moreover, two trust account checks used to pay closing expenses were returned for insufficient funds: a check for \$1,059.87 payable to Neptune Township¹ and another for \$1,382 payable to Red Bank Title.

From January through May 2004, respondent made 105 cash withdrawals from his attorney trust account, totaling \$24,409. Forty-seven of the withdrawals were made in April, in the total amount of \$9,845. According to the complaint, respondent's invasion and expenditure of those funds was done without the client's knowledge or consent.

The Barreau Refinancing - XIV-05-025E

Respondent represented Marie Barreau in connection with an April 22, 2004 refinancing of the first mortgage on her residence in Barnegat, New Jersey. In connection with the refinancing, on April 27, 2005, Independence Community Bank, wire-transferred \$197,442.02 to respondent's trust account. Respondent was to pay certain closing costs and liens that

¹ This check was not listed in paragraph II7 of the complaint as a disbursement made in connection with the closing.

appeared on the HUD-1 settlement statement, but made only the following payments:

<u>OBLIGATION</u>	<u>AMOUNT</u>	<u>DATE OF PAYMENT</u>	<u>CHECK NO.</u>
Water Assessment	\$ 41.00		
Sewer Assessment	90.00		
Washington Mutual First Mortgage Payoff	143,831.47	04/26/04	1654
Homeq Servicing Loan Payoff	23,797.66	04/26/04	1655
N.J. Dept. of Labor Judgment	4,419.36		
Pierre Barreau Victor M. Musto, Esq.	20,687.43 750.00	04/25/04	1653
Fidelity National Title Service	791.00		
Recording Fees	300.00		
Federal Express	25.00		
TOTAL DUE	<u>194,732.92</u>		
TOTAL PAID	<u>\$188,316.56</u>		

Respondent failed to pay the other closing costs and liens, and failed to maintain in his trust account the remainder of the funds that he had received for the refinancing. The complaint reiterated that, from January through May 2004, respondent made 105 cash withdrawals from his trust account totaling \$24,409, including forty-seven cash withdrawals totaling \$9,845 during the month of April. As of May 5, 2004, respondent's trust account had a negative balance of \$148.28. Therefore, he knowingly misappropriated the balance of the Barreau funds. According to

the complaint, respondent's invasion and expenditure of those client funds was done without the client's knowledge or consent.

DRB Docket No. 05-303 – District Docket No. XIV-04-391E

On June 2, 2005, the OAE served respondent by publication in The Asbury Park Press and, on June 6, 2005, in the New Jersey Lawyer.

On July 26, 2005, the OAE mailed a copy of the complaint to respondent's home address, 21 Barra Street, Interlaken, New Jersey 07712, and to his last-known office address, listed in the records of the New Jersey Lawyers' Fund for Client Protection, 550 Cookman Avenue, Suite 213, Asbury Park, New Jersey, 07712, by regular and certified mail, return receipt requested.

As to the mail sent to the Cookman Avenue address, the certified mail was returned stamped "UNDELIVERABLE AS ADDRESSED, FORWARDING ORDER EXPIRED." The regular mail was returned stamped "ATTEMPTED NOT KNOWN." With regard to the mail sent to respondent's Interlaken address, the certified mail was returned indicating delivery on July 27, 2005; however, the signature of the recipient was illegible. Thereafter, the certified mail was returned with a hand-written note on the envelope, stating "Return to Sender Address Unknown Does not live here anymore moved 10/04." The regular mail was not returned.

As of the date of the certification of the record, October 6, 2005, respondent had not filed an answer to the complaint.

The complaint charged respondent with violations of RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

As stated above, on June 29, 2004, respondent was temporarily suspended from the practice of law. He remains suspended to date. Prior to his suspension, he maintained law offices in Asbury Park, New Jersey. The Lawyers' Fund for Client Protection (the Fund) records show respondent's home address as 21 Barra Street, Interlaken, New Jersey.

The Supreme Court's June 29, 2004 Order directed respondent to comply with R. 1:20-20, which required, among other things, that within thirty-days of his suspension, he file with the Director of the OAE an affidavit detailing his compliance with each of the provisions of the rule.

When respondent failed to comply within the required time, on September 17, 2004, the OAE sent a letter to his home address via regular and certified mail, return receipt requested. The letter informed respondent of his obligation to file the affidavit and requested that he comply with the rule requirements

by October 1, 2004. The certified mail receipt showed that respondent accepted delivery of the letter on September 21, 2004.

On that same date, September 17, 2004, the OAE also sent respondent identical letters (via regular and certified mail) to the three Asbury Park office addresses where he previously practiced law. The certified mail receipts for the Cookman Avenue and Main Street addresses were returned and receipt was acknowledged by "Rich L. Morris" on September 27, 2004. The regular mail to the Cookman office address was returned stamped "NO FORWARD ORDER ON FILE UNABLE TO FORWARD RETURN TO SENDER." The regular mail to the Main Street office address was not returned. As for the letters sent to respondent's Memorial Drive address, the post office returned the certified mail with "VACANT" written on the envelope, and the regular mail stamped "NO FORWARD ORDER ON FILE UNABLE TO FORWARD RETURN TO SENDER."

According to the complaint, respondent did not answer the letters or file the required affidavit.

On December 15, 2005, an OAE employee not identified in the complaint went to respondent's three prior Asbury Park office addresses. Respondent, however, no longer maintained offices at those locations. On that date, the OAE employee also visited respondent's home address, 21 Barra Street, Interlaken, New Jersey, which was undergoing renovations at the time. A

construction worker informed the OAE that respondent no longer lived there.

Following respondent's suspension, other clients complained that they were unable to contact him about their pending matters. In addition, the attorney/trustee appointed to oversee respondent's practice was unable to locate respondent or his client files.

According to the complaint, respondent willfully violated the Court's Order by failing to take the steps required of all suspended or disbarred attorneys, including notifying clients and adversaries of his suspension, and providing clients with their files. In doing so, respondent violated RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

In a memorandum to Office of Board Counsel, the OAE pointed out that it may not be necessary for us to consider this matter because of the pending knowing misappropriation charges in DRB 05-285. The OAE noted, however, that, if we considered this matter, "'presumptively," a reprimand is the appropriate sanction for willful failure to comply with the Court's Order of suspension and [to] timely file the affidavit required R. 1:20-

20, subject to a balancing of the mitigating and aggravating factors present in each individual case."

The OAE further noted that

Respondent's refusal to accept the obligation to notify his clients is a callous and willful disregard of the plight he created for his clients who put their trust in him. As stated in the General Allegations of the Complaint filed against respondent, the OAE notified respondent of his failure to comply with the Court's Order of suspension and R. 1:20-20, and provided respondent a reasonable time to cure his deficiency prior to filing the Complaint against him. Despite the notification and time afforded, respondent failed and refused to comply with R. 1:20-20(b)(15) and file the required affidavit.

[OAE2.]²

The OAE's position is that, because respondent defaulted in this matter and has a significant ethics history, something greater than the "presumptive" sanction is required. The OAE, therefore, recommended a three-month suspension.

Service of process was properly made in each matter. The complaints contain sufficient facts to support findings of unethical conduct. Because respondent failed to answer the complaints, the allegations are deemed admitted. R. 1:20-4(f).

In DRB Docket No. 05-285, we find that respondent knowingly misappropriated funds in each of three matters. In the Buono v.

² OAE2 refers to the OAE's October 6, 2005 memorandum to Office of Board Counsel.

Shorey litigation, respondent settled the matter on behalf of his defendant/client for \$16,000. Thereafter, pursuant to the settlement agreement, Shorey made periodic \$500 payments to respondent to be remitted to the Buonos. Of the \$4,000 Shorey turned over to respondent, respondent only remitted \$1,000 to the Buonos. Respondent used the remaining funds for personal and office expenses unrelated to the Shorey matter.

In the Artisan/Dunn closing, respondent used approximately \$3,400 from the closing funds for his own purposes. Similarly, in the Barreau refinancing, respondent used the excess funds for his own purposes, rather than to pay off closing costs. In none of the three matters did respondent act with his client's knowledge or consent.

In DRB Docket No. 05-303, respondent violated R. 1:20-20(15), which requires that a suspended attorney, within thirty days of an Order of suspension, file with the OAE Director an affidavit specifying how the disciplined attorney has complied with each of the provisions of R. 1:20-20 and the Supreme Court's Order. The rule further provides that the affidavit "shall also set forth the current residence or other address and telephone number of the disciplined or former attorney to which communications may be directed." Respondent failed to comply with the provisions of this rule. Moreover, although the OAE attempted

to provide respondent with notice of his obligations, it was unable to do so because respondent failed to alert it of his "current residence or other address" to where communications could be directed. Respondent's conduct, thus, violated RPC 8.1(b) and RPC 8.4(d).

The only issue left for determination is the quantum of discipline. As to respondent's willful failure to file an affidavit in compliance with R. 1:20-20, the OAE states that presumptively a reprimand is appropriate discipline. That sanction has been enhanced when the attorney has defaulted in the ethics matter or has an extensive ethics history. Recent cases, most of which are defaults, have generally resulted in suspensions. See, e.g., In re Raines, 181 N.J. 537 (2004) (three-month suspension in a non-default matter, where the attorney's ethics history included a private reprimand, a three-month suspension, a six-month suspension, and a temporary suspension for failure to comply with a previous Court Order); In re Girdler, 179 N.J. 227 (2004) (three-month suspension in a default matter; ethics history included a private reprimand, a public reprimand, and a three-month suspension); In re McClure, 182 N.J. 312 (2005) (one-year suspension where the attorney's ethics history included an admonition and two concurrent six-month suspensions; the matter proceeded as a default); In re King, 181 N.J. 349 (2004) (one-

proceeded as a default); In re King, 181 N.J. 349 (2004) (one-year suspension where the attorney had an extensive ethics history, including a reprimand, a temporary suspension for failure to return an unearned retainer, a three-month suspension in a default matter, and a one-year suspension; the attorney remained suspended since 1998, the date of the temporary suspension; default matter); and In re Mandle, 180 N.J. 158 (2004) (one-year suspension in a default case where the attorney's ethics history included three reprimands, a temporary suspension for failure to comply with an order requiring that he practice under a proctor's supervision, and two three-month suspensions; in three of the matters, the attorney failed to cooperate with disciplinary authorities). But see In re Moore, 181 N.J. 335 (2004) (reprimand in a default matter, where the attorney's disciplinary history included a one-year suspension).

Here, respondent's ethics history includes a three-year suspension and a temporary suspension pending the imposition of discipline in his companion case, DRB 05-285. For his failure to comply with the Supreme Court Order of suspension alone respondent should be suspended for one year. Because, however, he knowingly misappropriated trust funds in the matters under Docket No. DRB 05-303, we recommend that he be disbarred under In re

Wilson, supra, 81 N.J. 451 (knowing misappropriation of client funds requires disbarment).³

Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

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

Disciplinary Review Board
Louis Pashman, Esq.

By: Edwin A. Brubaker
for Julianne K. DeCora
Chief Counsel

³ In some instances, respondent's misappropriation occurred in the context of real estate transactions. It is possible, thus, that some of those funds were not technically client funds, but escrow funds, in which case In re Hollendonner, 102 N.J. 21 (1985), would apply. Because the record is not entirely clear that the lenders, as opposed to solely respondent's clients, also had an interest in the stolen funds, we recommend respondent's disbarment under Wilson, as opposed to Wilson and Hollendonner.

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matters of Victor M. Musto
Docket No. DRB 05-285 and DRB 05-303

Decided: December 27, 2005

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					2

Julianne K. DeCere
for Julianne K. DeCere
Chief Counsel