SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-363

IN THE MATTER OF

PATRICK J. MOORE

AN ATTORNEY AT LAW

Decision

Argued: December 20, 2001

Decided: June 20, 2002

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for discipline (disbarment) filed by special master Ronald N. Manos. For the reasons expressed below, we voted to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1989. He maintains an office for the practice of law in Runnemede, New Jersey. He has no disciplinary history.

The ethics complaint alleged violations of RPC 1.15(a) (knowing misappropriation of escrow funds); RPC 1.15(c) (failure to safeguard funds in which an attorney and a third person claim interests); RPC 5.5(a) (practicing law while ineligible); RPC 4.1(a)(1) (false statement of material fact or law to a third person); RPC 8.1(a) (false statement to disciplinary authorities); RPC 8.1(b) (failure to cooperate with disciplinary authorities) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

* * *

In 1997, respondent represented Coastal Associates, Inc., a construction company that had a contract with the city of Wildwood to make road improvements. Although there was a disagreement about the total amount of money Wildwood owed to Coastal, they agreed that it was at least $40,000. However, Wildwood was unwilling to release the funds because two of Coastal's subcontractors had complained that they had not been paid. By letter dated March 25, 1997, respondent confirmed an agreement with Wildwood's counsel that, upon receipt of Wildwood's $40,000 check, he would disburse $36,001.70 to Shore Slurry Seal ("Shore"), one of the subcontractors. Respondent further agreed that the remaining $3,998.30 "designated for Mitchell Nichols [the other subcontractor] will be held in my

escrow account until we resolve Coastal's claims against Nichols and Nichols' lien claim. Either way, you will be fully involved prior to the release of any funds."

Respondent deposited Wildwood's $40,000 check in his trust account on April 10, 1997 and disbursed Shore's funds. The remaining $3,998.30 remained in his trust account until October 10, 1997. Respondent issued three trust account checks to himself - for $1,300, $2,000 and $800 – on October 10, October 20 and October 27, 1997, respectively. It is undisputed that Coastal owed respondent legal fees in those amounts. He did not deposit them in his attorney business account. As of October 31, 1997, respondent trust account balance was $258.77.[1] It is undisputed that respondent did not have Wildwood's or Nichols' authorization to take the funds and that he did not notify them of the disbursements. In fact, Nichols was unaware of the escrow.

In late November or early December 1997, respondent promised Nichols' counsel that he would "check his file" and provide information about Nichols' claim, but did not do so.[2] Sometime thereafter, Nichols' counsel learned of the escrow. On January 9, 1998, by then obviously aware of the escrow, Nichols' counsel demanded that respondent remit the funds to Nichols, threatening that, if respondent continued "to ignore my request or provide

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1 Respondent's trust account bank statements showed the following end-of-month balances: November 1997, $256.65; December 1997, $256.65; March 1998, $819.45; and April 1998, $769.45. Between June 30,1998 and February 28, 1999, the balance remained at $6.45.

2 The record does not reveal the date of that conversation. However, in Nichols' counsel's letter to respondent, dated January 9, 1998, he stated that it had occurred "almost six weeks" before the letter.

to me any explanation for your past activities, I will report your actions to the appropriate ethics authorities." Respondent admitted that he did not submit a written reply to Nichols' counsel, but claimed that he had informed an individual at Nichols' law firm that he would have Coastal forward "a breakdown of the claims or the issues and downgrades directly to [Nichols] unless he wanted to do it between the attorneys."

In June 1998, Nichols filed suit against Coastal. Coastal's answer, which was drafted and filed by respondent in October 1998, contained a representation that the funds "still remain[ed] in escrow." Respondent also represented to Nichols' counsel, in an October 1998 letter, that "the funds [were] in escrow." As noted earlier, respondent released those funds to himself in October 1997.

On December 11, 1998, counsel for Ulico Casualty Company ("Ulico"), Coastal's surety, requested that respondent confirm that the $3,998.30 remained in his trust account. By letter dated January 29, 1999, respondent represented to Ulico's counsel that the funds "were placed into my trust account and have not been distributed to my client. Further, they will not be withdrawn until the present matter is formally resolved one way or the other." However, as of January 29, 1999, respondent's trust account balance was only $6.45.

In the interim, because respondent had not timely replied to Ulico's inquiry concerning the escrow, Ulico's counsel filed a grievance against respondent. By letter dated February 2, 1999, the Office of Attorney Ethics ("OAE") requested that respondent provide an accounting of the Wildwood/Coastal escrow by February 17, 1999. When respondent

did not comply with that request, the OAE telephoned respondent on two occasions. On March 3, 1999, respondent "faxed" a letter to the OAE, stating that he had already sent a reply on February 22, 1999. He attached copies of that letter and of his January 29, 1999 letter to Ulico's counsel. Respondent's February 22, 1999 letter again stated that the escrow funds had not been released to Coastal and that they "will not be released until the litigation between the parties is resolved...and I am directed to distribute them by the court."

On March 16, 1999, the OAE requested that respondent produce his client ledger card for Coastal and his bank statements for the prior six months by March 24, 1999. The OAE also stated that, according to records of the New Jersey Lawyers' Fund for Client Protection ("the Fund"), respondent had been ineligible to practice law since September 15, 1997, because of his failure to pay the Fund's annual assessments.

On March 17, 1999, respondent sent a "fax" to the OAE, stating that he had recently become aware that he was ineligible to practice law, had already requested and received an updated bill from the Fund and was "making arrangements to pay same." Respondent also promised that he would "work on responding to your other requests over the next week or so."

Respondent did not produce the requested records by March 24, 1999. However, by letter dated April 19, 1999, respondent forwarded to the OAE a copy of his March 31, 1999 bank statement, which showed a balance of $26,006.45. Respondent represented that the escrow was included in those funds. In fact, respondent had deposited $4,000 of his own

funds in the account on March 26, 1999.[3] However, he did not advise the OAE of that fact. Nor did he disclose to the OAE that he had previously taken the funds. His April 19 letter also stated as follows:

> Because the lien claim has long since expired, I believe that my client is entitled to the funds in question. In fact, my client previously advised me that they wanted me to retain the funds as partial payment of significant legal fees owed by them for a variety of matters. However, because the matter was recently put into litigation, and because Coastal Associates desires to protect [Ulico], I am maintaining these funds in my trust account until the current litigation is resolved.

Because respondent did not produce all of the requested records, the OAE scheduled a demand audit for May 10, 1999, which was rescheduled to May 12, 1999. It is undisputed that, during a May 10, 1999 telephone conversation with the OAE investigator, respondent told the investigator that he had taken the $3,998.30 escrow as partial payment for fees owed by Coastal.

Because respondent still did not produce all of the requested documents at the May 12, 1999 audit, it was continued to May 18, 1999. By "fax" of May 17, 1999, respondent requested that the audit be adjourned because he wished to be represented by counsel. He stated that, because he could not afford counsel, he had obtained an application from the court for the appointment of counsel and was in the process of completing the application. The OAE denied the adjournment request, but respondent did not appear. The audit was rescheduled to June 9, 1999.

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[3] Respondent settled Nichols' claim for $2,700 in June 1999 and paid the claim from the $4,000.

On June 8, 1999, respondent sent a "fax" to the OAE, stating that the copy center had not yet completed copying his client file for Coastal and that he still had not located some of the requested records. The following day, respondent's secretary "faxed" some documents to the OAE, stated that respondent could bring the remaining documents later that day and asked if the OAE preferred that respondent appear the following day. Apparently, there was some confusion about whether respondent should appear; the "fax" had been sent to an OAE attorney, rather than the investigator, and the OAE attorney was not in the office. On June 9, 1999, respondent also "faxed" to the OAE the Fund's notification that he had been reinstated as of March 31, 1999.

On June 23, 1999, the OAE filed an application for respondent's temporary suspension. The Court denied the application, but required that respondent provide the OAE with the requested documents by July 29, 1999. Respondent produced some, but not all of the required documents by that date. Apparently, he submitted the documents by March 2000.

* * *

Antonio Guevara, Coastal's vice-president, testified that respondent represented Coastal in a number of matters. According to Guevara, it was his opinion, in 1996 and 1997, that Coastal did not owe any monies to Nichols because of Nichols' poor job performance and because Nichols did not file a lien claim within ninety days of May 1996, the date Nichols completed its work. In fact, according to Guevara, he was unaware that

Nichols had filed a claim at any time.[4] With respect to the escrow, Guevara testified that, after the expiration of the time for Nichols to file a lien claim, respondent asked if he should send the escrow funds to Coastal. According to Guevara, he told respondent to apply the funds to his outstanding fees. Guevara was unable to recall the date of this conversation.

Respondent, in turn, testified that the funds were placed in escrow because Nichols had filed a municipal lien claim against Wildwood, but Coastal was disputing Nichols' entitlement to the funds. Respondent expressed his opinion that lien claims expire if not pursued within three months. He, therefore, told Coastal that Nichols' lien claim against Wildwood had expired even before the funds were placed in escrow "but that, to be sure, we should wait at least three months before acting upon said belief/advice." Respondent claimed that he had forgotten his promise to contact Wildwood's counsel, prior to releasing the escrow funds. He contended that he had no obligation to notify Nichols of the escrow release because Nichols was not involved in the settlement discussions that led to the escrow agreement. Moreover, respondent explained, Coastal did not want him to "provide Nichols with any additional reminders to renew or otherwise act upon their lien claim."

Respondent denied that he knowingly misrepresented, in his answer to Nichols' civil complaint and in his various letters, that the funds remained in escrow. According to respondent, he had forgotten that he had taken the funds and had not reviewed his records to verify that the funds were in his trust account. Respondent testified that, as a rule, he

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[4] In fact, Nichols filed a notice of claim against Wildwood on September 24, 1996.

would write few checks from his trust account. He stated that his usual practice was to ascertain that he had sufficient funds in his trust account before writing a check on the account, either by obtaining the balance from the bank or checking his ledger. However, according to respondent, he was unaware of his trust account balance in 1997 and 1998 because his life was so "chaotic." He added that even the January 9, 1998 letter from Nichols' counsel, threatening to report him to the "ethics authorities," did not cause him to verify that the escrow funds remained in his trust account.

Respondent testified that he and his wife were experiencing marital problems. In addition, his wife suffered from chronic depression, was not taking her medication and, as a consequence, was "really, really out of control." Respondent stated that, although he moved out of the house in May 1997, he continued to maintain his office there because he could not locate a suitable alternative and his wife was out of the house during the day. According to respondent, because his wife began looking through his files, he put some of them in storage. He testified that, because of his wife's behavior, his part-time secretary was unable to work at his home office. Therefore, according to respondent, his secretary would complete his work at her home. Respondent relocated his office in September or October 1997, then relocated it again in September 1998 to another office in the same building.

Respondent testified that he and his wife filed restraining orders against each other and that his wife thereafter attempted to interfere with his visitations with his son. According to respondent, his domestic problems ultimately led to a false arrest warrant

against him. Respondent stated that he filed suit against the township and obtained a settlement because of the false arrest.

Respondent denied that he deliberately attempted to avoid the OAE audit. According to him, he had difficulty locating the documents requested by the OAE due to the office moves and file storage.

With respect to the appointment of counsel, respondent testified that he contacted Judge Orlando's chambers about the issue and was given a "5-A counsel application based upon indigence." After he began to fill out the application form, respondent stated, he spoke with Judge Orlando's law clerk about the applicable standards and was told that he probably would not qualify for appointed counsel. Respondent stated that he related these facts to the OAE investigator and asked the investigator if he knew of any other way of obtaining an attorney to represent him. According to respondent, the investigator replied that he would have to speak with OAE counsel. Respondent claimed that he also attempted to retain an attorney, but was unsuccessful.

With respect to his failure to pay the Fund's annual assessment, respondent testified that he learned that he was ineligible to practice law when he asked the editor of the New Jersey Lawyers' Diary why he was not listed in the latest edition. According to respondent, he paid the outstanding assessment soon after he ascertained how much he owed to the Fund. Respondent denied having told the OAE investigator that he did not open the Fund's letter because it did not look official. He explained that he discovered the unopened letter

while searching for documents for the OAE's audit, told the auditor that he did not know why it had not been opened and speculated that his employee may have put the letter aside "as possible junk mail since it did not look like any correspondence related to litigation."

* * *

The special master found that respondent took the escrow funds without Wildwood's or Nichols' authorization and that such taking constituted the knowing misappropriation of escrow funds. The special master also found that respondent misrepresented that the funds remained in escrow (1) in the answer he filed on behalf of Coastal, (2) in his correspondence to Ulico's attorney and (3) to the OAE. The special master rejected as incredible respondent's contention that the misrepresentations were the result of a mistaken belief that the funds remained in his trust account. Finally, the special master found that respondent failed to cooperate with the OAE's investigation and practiced law while ineligible.

The special master recommended that respondent be disbarred.

* * *

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. However, we are unable to agree that respondent's conduct constituted knowing misappropriation of escrow funds.

"[A]n early release to a party to the escrow agreement does not invariably result in disbarment when the attorney has reasonable grounds to believe that the purposes of the escrow have been completed and the circumstances do not otherwise demonstrate that the attorney has 'made a knowing misappropriation' of the funds within the meaning of [In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985).]" In re Susser, 152 N.J. 37, 38 (1997). In Susser, the attorney released escrow funds to a developer-seller of real estate, an entity in which Susser had a financial interest, without the consent of the buyer. The Court suspended Susser for three years for the "unauthorized release" of the escrow funds and misrepresentations to the buyer's attorney.

More recently, in In re Valore, 169 N.J. 225 (2001), the Court suspended an attorney for six months for failure to hold in escrow settlement funds belonging to third-parties. With his clients' consents, the attorney invested the funds in other clients' complex litigation cases. See, also, In re Milstead, 162 N.J. 96 (1999) (reprimand where the attorney disbursed escrow funds to his client, in violation of a consent order); In re Margolis, 161 N.J. 139 (1999) (reprimand where the attorney breached an escrow agreement requiring the attorney to hold settlement funds in escrow until the completion of the settlement documents; attorney used part of the funds for his fees, with his client's consent).

Like the attorneys in Susser, Valore, Milstead and Margolis, respondent failed to safeguard escrow funds. His conduct did not amount to knowing misappropriation, however.

Respondent testified, credibly, that, when he released the funds, he and his client believed that Nichols' lien claim had not been perfected within the requisite statutory period and, therefore, the purpose of the escrow had been "completed." His testimony was corroborated by his client. Although the record is not clear, respondent's understanding of the lien claim was apparently based upon the municipal mechanics' lien law, N.J.S.A. 2A:44-125 et seq. One of the statute's provisions is that a lien is not binding on the municipality "unless an action to enforce the lien claim be brought within 60 days from the time when the whole work to be performed by the contractor is either completed or accepted by resolution of the public agency." N.J.S.A. 2A:44-138. Recently, in In re Frost, 171 N.J. 308 (2002), the Court rejected as "simply unbelievable" the attorney's argument that the purpose of the escrow had been completed because the attorney's argument was not supported by any case law or statute. In contrast, there is statutory law to support respondent's belief that Nichols had not perfected its lien.

Furthermore, there is no question that the escrow funds belonged to Coastal, respondent's client, not Wildwood, the other party to the escrow agreement. In essence, respondent released the funds to his client, who, in turn, used the funds to pay respondent the fees he was unquestionably owed. In Frost, the Court, in rejecting the attorney's claim that he had a good faith belief that the escrow funds that he took as a loan from his client belonged to the client, cited In re Callaghan, 162 N.J. 182 (1999) and quoted from the Board's decision in Callaghan that "while [the attorney's] belief of entitlement, if reasonable,

could save him from a finding of knowing misappropriation with respect to the disbursements as fees, that argument does not apply to the loans to himself." In re Frost, supra, 171 N.J. at 326. Unlike the attorneys in Frost and Callaghan, respondent did not borrow the escrow funds from his client; rather, he applied the escrow funds to his outstanding legal fees, at his client's direction.

Respondent had reasonable grounds to believe that the purposes of the escrow had been completed and that the funds belonged to his client. Therefore, there is no clear and convincing evidence of knowing misappropriation. Because, however, respondent did not involve Wildwood's counsel prior to the release, as he had promised, respondent violated RPC 1.15(c).

We also noted that respondent has never been disciplined before, that neither party to the escrow agreement was harmed by the premature release of the escrow funds and that respondent paid Nichols a reduced amount.

For all of the above reasons, we were convinced that this is not a Wilson situation, mandating automatic disbarment.

We agreed, however, with the special master's finding that respondent misrepresented the status of the escrow in Coastal's answer to Nichols' complaint and in respondent's letters to Nichols' counsel, Ulico's counsel and the OAE. Respondent's contention that he did not remember that he had taken the funds for his fees is not credible. He took the funds between October 10 and 27, 1997. Fewer than six weeks later, in late November or early December

1997, he promised Nichols' counsel that he would "check his file" and provide information about Nichols' claim. He must have remembered, at that time, that he had taken the funds. Thereafter, there were continuing inquiries about the escrow that would have prompted any attorney, even one experiencing respondent's personal problems, to ascertain the status of the escrow. Furthermore, given respondent's affirmative representations about the escrow, particularly in Coastal's answer, he had an obligation to make sure that the funds were in his trust account, as represented. Finally, in respondent's April 19, 1999 letter to the OAE, he stated that he was "maintaining these [escrow] funds in my trust account until the current litigation is resolved." However, respondent did not inform the OAE that he had replaced the escrow funds with his own monies on March 26, 1999. In light of the foregoing, there is clear and convincing evidence that respondent violated RPC 4.1(a)(1), RPC 8.1(a) and RPC 8.4(c), by misrepresenting the status of the escrow.

There is also clear and convincing evidence that respondent failed to cooperate with the OAE's investigation of this matter. He continually failed to reply to the OAE's requests for information and to produce documents. Even after the OAE filed a motion for his temporary suspension, respondent did not comply with the Court's order requiring him to produce the requested documents. Respondent's claim that he had difficulty locating documents due to his office moves and storage of files is not credible, at least with respect to the initial documents requested by the OAE. At first, the OAE requested only the client ledger card for the Coastal/Wildwood escrow and the bank statements for the prior six

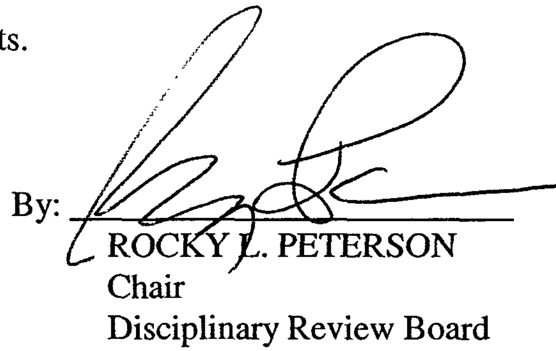
months, namely, from September 1998. Respondent's office moves and storage of files ended in September 1998. Respondent's ledger card for the escrow would not have been placed in storage prior to that time, because Nichols' claim had not yet been resolved. In addition, the bank statements post-dated the office moves. Therefore, there is clear and convincing evidence that respondent violated RPC 8.1(b).

Finally, it is undisputed that respondent practiced law while ineligible, in violation of RPC 5.5(a).

If respondent's misconduct were confined to the improper release of escrow funds, a reprimand would have been the appropriate discipline. See In re Milstead, supra 162 N.J. at 96 (reprimand); In re Margolis, supra 161 N.J. at 140 (reprimand); In re Zeitler, 158 N.J. 182 (1999) (reprimand for failure to escrow funds from a third-party settlement for a workers' compensation lien after representing to the third-party carrier that the lien would be paid). However, respondent also made misrepresentations in a court pleading, in his correspondence to other attorneys and in his initial statements to the OAE. In addition, he failed to cooperate with the OAE's investigation. Finally, respondent practiced law while ineligible. In light of the foregoing, we unanimously determined that a three-month suspension is the appropriate degree of discipline for respondent's ethics transgressions. See, e.g., In re Chasan, 154 N.J. 8 (1998) (three-month suspension where the attorney distributed a fee to himself after representing that he would maintain the fee in his trust account, pending the resolution of a dispute with another attorney over the division of the fee, misled the court and his adversary

into believing that he retained the fee in his trust account and violated the attorney recordkeeping requirements; the attorney had been previously reprimanded).

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



By: ______________________
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

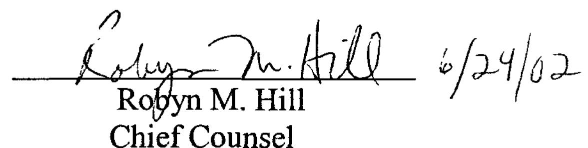
In the Matter of Patrick J. Moore
Docket No. DRB 01-363

Argued: December 20, 2001

Decided: April 12, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan		X					
Brody		X					
Lolla		X					
O'Shaughnessy		X					
Pashman		X					
Schwartz		X					
Wissinger		X					
Total:		9					


Robyn M. Hill
Chief Counsel