SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-133

IN THE MATTER OF

JACK N. FROST

AN ATTORNEY AT LAW

Decision

Argued: October 19, 2000

Decided: February 6, 2001

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics.

Frank P. Sahaj 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 based on a recommendation for discipline filed by special master Miles S. Winder, III.

The complaint in this matter alleges violations of RPC 1.8(a) (conflict of interest/prohibited business transaction with a client), RPC 1.15(a) (knowing misappropriation of escrow funds and failure to safeguard the funds of a third party) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1971. He is presently suspended

from the practice of law. During the relevant times, he maintained an office for the practice of law, under various firm names, at 705 Park Avenue, Plainfield, New Jersey.

Respondent has an extensive ethics history. He received two private reprimands in May 1988 for engaging in a conflict of interest in a criminal matter and for failing to safeguard client funds in another matter. In the Matter of Jack N. Frost, Docket No. DRB 85-340 (May 5, 1988) and In the Matter of Jack N. Frost, Docket No. DRB 87-272 (May 5, 1988). He was again privately reprimanded, in June 1992, for endorsing a client's name on a settlement check without the client's authorization. In the Matter of Jack N. Frost, Docket No. DRB 91-338 (June 19, 1992).

In November 1997, respondent was suspended for three months for misconduct in five cases, including lack of candor toward a tribunal, conduct involving dishonesty, fraud, deceit or misrepresentation, failure to expedite litigation, failure to act with fairness to opposing party and counsel, charging an unreasonable fee, assisting in the unauthorized practice of law, conflict of interest and conduct prejudicial to the administration of justice. In re Frost, 152 N.J. 25 (1997). In December 1997, respondent was suspended for six months and until all pending matters against him were concluded. His misconduct included gross neglect and lack of diligence in three matters, failure to communicate in two matters and a pattern of neglect. In re Frost, 152 N.J. 23 (1997).

In November 1998, respondent was suspended for two years for failure to safeguard escrow funds and conduct involving dishonesty, fraud, deceit or misrepresentation. There,

respondent breached an escrow agreement, failed to honor mortgage closing instructions and prepared misleading closing documents. In re Frost, 156 N.J. 416 (1998).

* * *

This matter was referred to the Office of Attorney Ethics ("OAE") in October 1996 by a workers' compensation judge, after testimony at a hearing before him suggested that respondent might have misused a client's funds. On December 19, 1996 and January 17, 1997, the OAE conducted a demand audit of respondent's books and records. Thereafter, a complaint was filed, alleging, among other things, knowing misappropriation of escrow funds.

The facts are as follows:

On February 29, 1988, Bruce Hagerman, who worked as a commercial roofer for E.R. Barrett Roofing Company ("Barrett"), suffered serious injuries when he was thrown from the roof of a five-story building while operating a power broom manufactured by Aeroil Products Company, Inc. ("Aeroil").

Hagerman was initially represented by Michael Rubino, an attorney who had referred several matters to respondent. However, on March 16, 1988, respondent and Rubino became co-counsel to Hagerman.

On May 18, 1988, respondent filed a workers' compensation claim on behalf of Hagerman and, on October 21, 1998, a third-party products liability action against Aeroil.

In October 1990, the Aeroil matter was settled for $500,000, consisting of a $400,000 cash payment and a $100,000 annuity.

Prior to the Aeroil settlement, Rubino had negotiations with the workers' compensation carrier, CNA Insurance Companies ("CNA"), in connection with its claimed net lien of $105,333. Based on those discussions, Rubino believed that he had compromised CNA's lien to $79,000. On October 12, 1990, Rubino sent a letter to CNA confirming his understanding.

On November 19, 1990, respondent deposited in his trust account the $400,000 check from Aeroil's insurance carrier. By letter dated December 3, 1990, respondent sent CNA a $79,000 trust account check.

On December 6, 1990, CNA notified Rubino that it was returning the unnegotiated $79,000 check to respondent, denying that it had agreed to compromise its lien. Thereafter, the funds were transferred from respondent's trust account to his escrow account, in a sub-account for Hagerman.

On October 17, 1991, Hagerman agreed to lend to respondent the $79,000 returned by CNA. Respondent used a power-of-attorney form as the loan agreement, adding the following terms:

- as of October 17, 1991, $80,636.89 was being held in escrow;
- Hagerman agreed to lend $79,000 to respondent at a fifteen percent annual interest rate;
- respondent was to pay Hagerman $987.50 in monthly interest until full payment of the principal and a lesser amount as the principal was paid

down;

- respondent could make full or partial payments against the principal, without penalty;
- all payments of principal were to be placed into a special escrow account;
- respondent was to pay the full $79,000 within ninety days, if CNA demanded payment;
- if respondent defaulted on the loan, he would hold Hagerman harmless and indemnify Hagerman for all expenses and attorney fees incurred by Hagerman;
- respondent would not encumber six acres of land he owned free of any mortgages or liens, worth between $150,000 and $200,000, and a one-half interest in a house in North Carolina; if so requested, respondent would give Hagerman a first mortgage on these properties;
- respondent represented that his law firm's assets were worth more than $2,500,000, after payment of all debts.

It is undisputed that, contrary to respondent's representations, as of October 17, 1991 he owned only the one-half interest in the North Carolina property. The six-acre parcel had been purchased by respondent's wife in July 1985. Respondent represented his wife in the transaction. The deed, which respondent prepared, did not list his name.

On October 17, 1991, respondent transferred $80,636.89 from the Hagerman sub-account to the main escrow account. He then issued three escrow account checks to Hagerman, who endorsed two of the checks over to respondent: one for $39,000 and the other for $40,000. Hagerman negotiated the third check, in the amount of $1,636.89, for "interest earned on account."

It is undisputed that the $40,000 check was deposited in respondent's attorney business account on October 18, 1991 and that respondent used the funds for his law firm expenses. There is some question as to what respondent did with the $39,000 check. Respondent initially told the OAE that he deposited $22,000 in his payroll account and put the $17,000 balance into his "pocket." At the ethics hearing, however, respondent testified that the $39,000 check was deposited in his wife's checking account. It is undisputed that respondent did not deposit the $39,000 check in either his trust or his business account. Respondent did not have a personal checking account and used his attorney business account as his personal checking account.

On November 4, 1991, respondent and CNA settled the lien dispute. CNA prepared a settlement agreement whereby respondent would pay CNA $83,740 by April 24, 1992. In the event payment was not received by that date, respondent "individually and on behalf of [Hagerman]" would pay reasonable attorney's fees and costs to CNA to enforce the agreement. Respondent did not sign the settlement agreement, however, and ultimately did not make any payments to CNA. Respondent testified that he did not sign the agreement because it did not comport with the terms he had negotiated with CNA.

On June 23, 1992, CNA filed a civil action against Hagerman, respondent, Rubino, Rubino's law firm and Aeroil's insurer for payment of its workers' compensation lien.[1] On the return date of an order to show cause, July 15, 1992, respondent represented to the court

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[1] The complaint was actually filed by Continental Insurance Co., which had been acquired by CNA. For ease of reference, the name CNA will continue to be used.

that the $79,000 loan to him was secured by fees in excess of $150,000 owed to him by the Joint Underwriters Association ("JUA").

By letter dated August 4, 1992, respondent offered to settle the CNA action by paying $95,000 between January and August 1993. Apparently, CNA rejected the offer.

On October 1, 1992, respondent filed a Chapter 11 bankruptcy petition. Upon a motion by the trustee, respondent's case was converted to Chapter 7 bankruptcy on or about April 20, 1994. Respondent's bankruptcy filing stayed his participation in the CNA action.

On December 12, 1995, Hagerman and Rubino settled with CNA. Respondent paid Hagerman's $10,000 share of the CNA settlement, as well as Hagerman's attorney's fees, allegedly from the interest on the $79,000 loan.[2]

Hagerman's workers' compensation case, which apparently had been delayed by the CNA action, was settled on October 9, 1996.

* * *

Respondent denied that he knowingly misused funds that should have remained in escrow until the resolution of the lien dispute with CNA. Respondent claimed that he researched the law of tender and concluded that CNA's lien was extinguished when he tendered the $79,000 to CNA and CNA returned the check without any instructions. According to respondent, although Hagerman remained liable for the debt, Hagerman had

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[2] It is not clear from the record whether Rubino also paid $10,000 to CNA or whether the total settlement amount was $10,000.

the right to spend the $79,000. Respondent added that, after he completed his research of the law of tender, he decided to ask Hagerman to lend him the $79,000 because he needed $500,000 to $600,000 to purchase the building in which his office was located. Ultimately, according to respondent, he was unable to purchase the building.

Respondent had no documentation of his research. He testified that he remembered that the cases on the law of tender were very old and that he had to borrow the New Jersey Equity or the New Jersey Miscellaneous reports from another attorney. Respondent testified – and Hagerman agreed – that, on October 17, 1991, respondent showed relevant case law to Hagerman.

Respondent testified that he had approached Hagerman about the loan when Hagerman was in his office to discuss the results of respondent's research on CNA's lien. According to respondent, he advised Hagerman of the following:

> I would like to -- if he wants the money back, that I would like to borrow any amount of the money that he wanted to loan me. And I went over with him all the terms of the loan and I told him that he had to seek independent counsel. That I would not do the deal unless he sought independent counsel.

According to respondent, Hagerman first replied that he wanted to think about the loan and then later declined to lend respondent the funds. Respondent testified that, on October 17, 1991, however, Hagerman asked respondent to disburse the funds to him, whereupon he would lend some of the funds to respondent. Therefore, respondent testified, he had his secretary call the bank to transfer the funds from the Hagerman sub-account to the master escrow account because the checks had to be issued from the master account.

According to respondent, at the October 17, 1991 meeting with Hagerman, respondent advised him that, although Hagerman was legally entitled to the funds at that juncture, eventually Hagerman would have to pay $79,000 to CNA. Respondent testified that, because Hagerman initially did not know how much he was going to lend respondent, respondent prepared three checks, in the amounts of $39,000, $40,000 and $79,000. Respondent added that, although Hagerman told him that he had consulted with Rubino about the loan, Hagerman did not relate the details of that conversation. According to respondent, he was then unaware that Rubino had advised Hagerman not to lend the funds to respondent.

Respondent stated that he used a power-of-attorney form for the loan agreement because it "was the most convenient document available. It wasn't meant to be a power of attorney."

As to the misrepresentation in the loan agreement — that he owned six acres of land worth $150,000 to $200,000 — respondent testified that he had forgotten that the property was in his wife's name and that, when his wife brought that fact to his attention shortly after October 17, 1991, he immediately advised Hagerman of the error. According to respondent, he offered to either redo the loan agreement or return Hagerman's funds, but Hagerman declined his offer.

Respondent testified that his 1992 bankruptcy petition "had nothing to do with financial problems whatsoever. It was a legal strategy with respect to another case," a case

respondent had filed against National State Bank.

As of the October 5, 1999 ethics hearing, respondent had not paid CNA because he was still in bankruptcy. Respondent's interest in the North Carolina property was conveyed to his wife in 1998, along with his interest in certain law firm fees, in order to discharge respondent's debt to his wife. According to respondent, he owed his wife between $300,000 and $400,000.

* * *

Hagerman, in turn, testified that, sometime after CNA refused to accept the $79,000 check, respondent suggested that Hagerman lend him the funds, at a higher interest rate than the one generated by the escrow account. Hagerman could not remember whether respondent had advised him to consult with another attorney about the loan. He recalled discussing the loan with Rubino, however, who advised him against it. He then told respondent that he was not interested in such an investment. Sometime later, respondent again called him and requested that he come to the office to discuss the investment of the $79,000 as well as the pending workers' compensation case.

Hagerman testified that he was concerned about lending the $79,000 to respondent because he believed that the funds belonged to CNA and Rubino had advised him not to invest the funds with respondent. Respondent, however, assured Hagerman that the funds belonged to him and that there was nothing improper about the investment. According to

Hagerman, respondent told him that he wanted to borrow the funds for a business venture involving golf, such as a golf course or a driving range; respondent added that he had stocks and bonds, but that "they weren't ready to – for him to cash them in, and that he always – he could in the future cash them in to repay the debt if he had to, but at that time they hadn't matured or they weren't ready to be cashed in." According to Hagerman, he decided to lend respondent the funds because it was his understanding that any interest earned would belong to him, not CNA.

Hagerman stated that respondent set all of the terms of the loan; he did not question respondent about the terms because respondent was his attorney and "I was believing him at his word so there was not any reason really to question that."

Although the loan agreement called for monthly interest payments, Hagerman stated that he did not receive the payments because respondent was "going to hold on for me [sic] until we settled the case and paid CNA their $79,000; and then at that point, whatever interest for however many months it would be before we would pay CNA back their $79,000 that interest money would be mine."

According to Hagerman, he had no further discussions with respondent about the loan until he was served with CNA's complaint seeking payment of its lien. Hagerman then obtained another attorney to represent him in the CNA case.

* * *

Rubino testified that, at the October 9,1990 settlement conference in the Aeroil case, Hagerman would not agree to the proposed settlement unless the workers' compensation lien was compromised. According to Rubino, he spoked with CNA's representative several times on that date before she confirmed that CNA would accept $79,000.

After Rubino learned that CNA had rejected the $79,000 check, he told respondent that the funds should continue to be held in respondent's trust account until the lien problem was resolved. Although Rubino had subsequent conversations with respondent about CNA's lien, the $79,000 was not discussed because Rubino assumed that the funds were being kept in respondent's trust account.

Rubino further testified that, when Hagerman told him about respondent's request to borrow the funds, Rubino replied, "It's not your money. It's not Jack's money. It's the carrier's money, and that's the minimum that they had agreed to accept. Now especially in the face of a rejection position by the carrier, that money has got to stay in Jack's trust account." Hagerman then assured him that he would reject respondent's proposal.

According to Rubino, he did not learn of the loan until after he was served with CNA's complaint. He testified that he was surprised by the CNA complaint because respondent and Hagerman had told him that the CNA lien problem had been resolved. After he received CNA's complaint, Rubino testified, he spoke with respondent, who assured him that he would pay CNA.

Rubino further testified that, prior to the CNA action, respondent never discussed the

"tender" argument with him. He recalled that, after he received CNA's complaint, respondent told him, "Well Mike, you advised Hagerman not to make the loan. So therefore, he did have the benefit of independent counsel before he agreed to make that loan to me."

* * *

The complaint alleges that respondent's conduct constituted knowing misappropriation of escrow funds belonging to CNA, in violation of RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 579 (1979), and In re Hollendonner, 102 N.J. 555 (1985); failure to safeguard the funds of a third party, CNA, in violation of RPC 1.15(a) (inadvertently cited as RPC 1.15(c)); conflict of interest/prohibited transaction with a client, in violation of RPC 1.8(a); and conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c).

During the ethics hearing, the OAE amended the complaint to add a violation of RPC 8.1(b) (failure to cooperate with ethics authorities) for respondent's failure to produce the $40,000 and $39,000 checks that Hagerman had endorsed over to him. The OAE had made repeated requests that respondent produce those checks, beginning in December 1996. Respondent ultimately submitted them during the ethics hearings, which took place in September and October 1999. Respondent maintained that he had located the checks only after remembering that his former secretary kept a separate folder for his escrow account statements.

* * *

Prior to the ethics hearing, respondent filed with the special master a motion to dismiss the complaint because we had directed, by letter dated January 5, 1998, that "all pending disciplinary matters against respondent be consolidated, heard before a special master, and resolved by June 30, 1998" and the complaint in this matter had not been filed until July 20, 1998.

On November 2, 1998, however, the Court relaxed our directive. In its order suspending respondent for two years, the Court directed that all ethics matters pending against him be consolidated and considered "on an expedited basis," rather than by a date certain. Furthermore, the rules specifically state that there are "no time limitations with respect to the initiation of a discipline or disability matter" and provide only two limited bases for the dismissal of an ethics complaint. The rule regarding dismissal of an ethics complaint, R. 1:20-5(c), states as follows:

> No motion to dismiss a complaint shall be entertained except:
> (1) a prehearing motion addressed either to the legal sufficiency of a complaint to state a cause of action as a matter of law or to jurisdiction; and
> (2) a motion to dismiss at the conclusion of the presenter's or ethics counsel's case in chief.

Finally, although there are time goals for the completion of investigations, hearings, our review and the Court's review of ethics matters, the rules state that such time goals "are not jurisdictional and shall not serve as a bar or defense to any disciplinary investigation or

proceeding." R.1:20-8(e).

For all of the above reasons, we denied respondent's motion to dismiss the complaint based on the OAE's failure to meet the deadline stated in our January 5, 1998 letter.

* * *

Respondent also filed a second pre-hearing motion before the special master, requesting that the special master recuse himself, which was denied. Although respondent did not specifically pursue that motion before us, we nevertheless conclude that the special master correctly denied the motion.

Respondent argued that, pursuant to R. 1:12-1, the special master should disqualify himself because he had heard prior matters involving respondent and was acquainted with Rubino, a witness in the matter.

The only potentially applicable section of R.1:12-1 is section (f), which states that a judge should disqualify himself "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." The special master heard two other disciplinary cases involving respondent, unrelated to this matter.[3] In the first case, the special master recommended a four-month suspension; the Court imposed a six-month suspension. In the second case, the special master found that respondent misappropriated escrow funds and recommended his

[3] The special master also certified a third matter to us as a default, after respondent failed to answer a complaint.

disbarment. We — and the Court — disagreed, finding that respondent's conduct constituted breach of an escrow agreement, for which he received a two-year suspension.

The special master assured respondent that his previous rulings would not affect his findings in the present matter. Indeed, there was no evidence of unfairness or bias revealed in the hearing transcripts or in the special master's report.

With respect to the special master's acquaintance with Rubino, the special master stated that he was not sure whether Rubino had been his employee or a co-worker and that he had not had any contact with Rubino for "approximately twenty years."

Therefore, the special master correctly denied respondent's motion for the special master's recusal.

* * *

The special master dismissed the charge that respondent knowingly misappropriated client or escrow funds, finding instead that he negligently misappropriated the $79,000. The special master relied on respondent's legal argument regarding tender, reasoning that "[t]he fact that there is the argument of tender...saves [respondent] on this count. However, he should have done something more than simply construct the legal argument. To fail to do so is negligence on his part and sustains the charge of negligent misappropriation." For the same reason, the special master found that respondent also failed to safeguard funds belonging to CNA.

With respect to the loan transaction, the special master found that it was "not arm's

length in any respect. No one did title or lien searches, no one did security instruments and Hagerman was treated like a poor relative in the transaction. This transaction is the poster child for why lawyers should not get into financial transactions with their clients." The special master concluded that respondent had entered into a prohibited business transaction with a client. He also found that respondent had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the loan transaction, based on respondent's assurances to Hagerman that he would provide certain security for the loan, which he failed to do. The special master remarked that respondent appeared to be incapable of "candor."

Although the special master dismissed the charge that respondent failed to cooperate with the OAE, he noted that the "disorganized and disjointed responses made by [respondent] were very close to non-cooperation."

The special master recommended that respondent receive a one-year consecutive suspension, to be served at the expiration of his present two-year suspension.

* * *

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.

The special master correctly determined that respondent's release of the $79,000 did

not constitute knowing misappropriation of client trust or escrow funds. Undisputedly, respondent released the funds to Hagerman, who then lent them to respondent. Absent any other fiduciary obligation to anyone, respondent could disburse the funds to Hagerman, as client funds, without running afoul of any disciplinary rule. It cannot, thus, be found that respondent knowingly misappropriated client funds.

The question is whether the funds were more than client funds, that is, funds that had to be kept in escrow for CNA, notwithstanding Hagerman's request that they be released to him. The answer hinges on whether respondent had a fiduciary obligation to CNA — created by statute, court order, case law or agreement. We conclude that he did, by agreement.

The workers' compensation statute requires an employee to reimburse the employer or the employer's insurance carrier for the workers' compensation benefits paid to the employee where the employee recovers the equivalent or a greater amount from a third party. N.J.S.A.34:15-40(b). The statute does not require that the reimbursement by the employee be made directly from the third-party's settlement proceeds, but merely that the employee reimburse the employee or its carrier.

In Danesi v. American Mfrs. Mut. Ins. Co., 189 N.J. Super. 160 (App. Div. 1983), certif. denied, 97 N.J. 544 (1983), the court held that the failure of the employer or its insurer to perfect a workers' compensation lien in accordance with N.J.S.A. 34:15-40(d) "does not affect the underlying obligation intended to be secured thereby" and that such failure "does not alter [the employee's] statutory obligation to reimburse his employer or its workers'

compensation insurance carrier. That is so because the Legislature never intended extinguishment of the reimbursement obligation where the lien, which is the security, is not perfected." Id. at 166.[4]

Danesi, thus, like N.J.S.A.34:15-40, requires that the employee reimburse the employer or its carrier for benefits paid by the entity. It does not automatically create a lien on the settlement proceeds. Therefore, it cannot be said that respondent had an obligation created by statute or case law to tender payment to CNA from the settlement proceeds.

Instead, respondent's fiduciary obligation was created by an agreement between Rubino — his co-counsel — and CNA. Rubino told respondent that he had negotiated a settlement of the workers' compensation lien with CNA prior to settling the Aeroil case. Indeed, Hagerman would not accept Aeroil's settlement offer until CNA's lien had been compromised. Hagerman, Rubino and respondent all recognized that respondent had an obligation to pay CNA from the Aeroil settlement proceeds. In fact, respondent admitted that, initially, he was the escrow agent for CNA and Hagerman, as well as for Aeroil's insurance carrier, and that he had an obligation to forward the $79,000 to CNA. Although

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[4] Respondent argued that he was not required to maintain the funds in escrow because there was insufficient evidence to show that CNA had perfected its workers' compensation lien, citing Trump Taj Mahal Assoc. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., 761 F.Supp. 1143 (D.N.J. 1991), aff'd 958 F.2d 365 (3d Cir. 1992), cert. den., 500 U.S. 826 (1992). However, CNA's attorney testified that a CNA claims person had certified that the statutory notice requirement had been satisfied. Furthermore, the Trump Taj Mahal case concerned the employer's right to recover workers' compensation benefits from third parties where the employer did not serve notice of its lien on the third parties. The case did not concern, as here, the employer's right to recover from its employee, which is addressed in Danesi.

it is not clear from the record, respondent's admission that he was the escrow agent for Aeroil's insurance carrier suggests that Aeroil's insurer had been promised that CNA's lien would be paid from the settlement proceeds. We have no difficulty finding, thus, that respondent was required to maintain the funds in escrow for the benefit of CNA and that, by releasing them to his client, he breached his fiduciary duty to CNA to keep the funds intact, in violation of RPC 1.15(a).

Like the special master, we cannot find, however, that his failure to do so constituted knowing misuse of escrow funds under In re Hollendonner, 102 N.J. 21 (1985). That is so because, in essence, respondent released the settlement funds to his client – a party to the agreement – who, in turn, lent the funds to respondent. The Court has never held that, when escrow funds are released to a party-in-interest, the attorney is guilty of knowing misappropriation and must be disbarred. As the Court recognized in In re Susser, 152 N.J. 37 (1997), premature release of escrow funds to a party-in-interest, absent some evidence of malice or other ill motive on the attorney's part, constitutes a breach of the escrow agreement, but does not rise to the level of knowing misappropriation. Therefore, absent clear evidence of ill motive, respondent's borrowing of the $79,000 from Hagerman does not subject him to disbarment. See, e.g., 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 that required that the attorney 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).

The OAE argued, however, that respondent's conduct warrants disbarment. The OAE relied on In re Picciano, 158 N.J. 470 (1999); In re Gifis, 156 N.J. 323 (1998); In re DiLieto, 142 N.J. 492 (1995); and In re Howard, 121 N.J. 173 (1990). All of those cases are distinguishable, however.

In Picciano, Howard and in the two relevant instances in Gifis, the attorney did not have their clients' authorization to take the funds. In DiLieto, in turn, the attorney had obtained his client's – the seller's – consent to use a $15,000 real estate deposit that was to be held in escrow "until closing of title and deed transfer." The attorney did not, however, obtain the buyer's authorization. DiLieto argued that his use of the monies was proper because his client had told him that the buyer had agreed that the deposit was nonrefundable. The Court rejected this argument. The Court noted that DiLieto himself had drafted the escrow agreement, which did not provide for a forfeiture of the deposit, and that he had never spoken with the buyer about the use of the deposit. The Court concluded that DiLieto's "intentional and purposeful avoidance of knowledge" of what the buyer would have said satisfied the "wilful blindness" requirement for knowing misappropriation. Id. at 506.

Similarly, in one instance in Gifis, the real estate contract required that the $51,000 deposit be held in escrow until closing of title. The attorney claimed a reasonable belief that the deposit was nonrefundable. As in DiLieto, the Court dismissed the attorney's argument, finding that the clear language of the real estate contract could not have justified the

attorney's alleged belief. Moreover, both DiLieto and the above instance in Gifis involved an escrow in the context of a real estate transaction, while this case involves settlement funds to be disbursed to a third-party.

The cases on which the OAE relied are, therefore, distinguishable from this matter and, as such, do not support a finding of knowing misuse of escrow funds, a disbarrable offense.

* * *

In his defense, respondent argued the law of tender applies to this case and that, once CNA returned the $79,000 without instructions, he was no longer obligated to hold them in escrow. We find that argument meritless.

Tender is "an unconditional offer of payment consisting in the actual production...of a sum not less than the amount due on a specific debt or obligation." 74 Am.Jur.2d Tender § 1. "It is the duty of the debtor to make sure that his tender is sufficient in amount...any deficiency in amount is at his peril." 74 Am.Jur.2d Tender § 22.

There are no recent New Jersey cases dealing with the effect of the law of tender in these circumstances. Respondent relied on two old cases: Thorne v. Mosher, 20 N.J. Eq. 257 (Ch. 1865) and Trenton Street Railway Co. v. Lawlor, 74 N.J. Eq. 828 (E. & A. 1908). However, those cases are not on point. In Thorne, the mortgagor went to the home of the mortgagee to make the required semi-annual interest payment on the mortgage. She carried

the cash in her handbag, which she showed to the mortgagee. The mortgagee refused to accept the payment because it was one day late and filed suit to compel payment of the entire mortgage amount. The court found that the interest payment was not due until the end of the day on which the mortgagor had tendered the payment. Furthermore, the court found that the mortgagor's offer was sufficient tender since she had the funds in her handbag and "whether it was strictly a legal tender or not, the bona fide offer to pay, coupled with ability, was sufficient, for the [mortgagee's] refusal to receive the money was a waiver of tender." Id. at 258. Thorne did not deal with the issue of a tender of less than the amount of the debt, as here.

Nor was that issue involved in the Trenton State Railway case. In fact, the case does not turn on the issue of tender of payment at all. In Trenton State Railway, Lawlor's attorney had settled Lawlor's personal injury action, with Lawlor's consent. Lawlor later repudiated the settlement and refused to sign the release. Trenton State Railway then filed suit to compel Lawlor to comply with the settlement terms. Among other things, Lawlor argued that Trenton State Railway was not entitled to the relief sought because it had not tendered the settlement funds to Lawlor. The court stated that "a tender to one who announces in advance that he will not accept it is unnecessary." The court ruled "that upon [Trenton State Railway] paying into court, for the benefit of [Lawlor], the sum of $1,850, [Lawlor] be perpetually enjoined from prosecuting or proceeding [with his suit against Trenton State Railway], or any other suit in that or any other court for the same cause of action."

We find, thus, that the case law relied upon by respondent does not support his argument.

Neither does the law of tender provide sufficient basis for respondent's position. The general law of tender, as set forth in Am.Jur.2d, does state that, in certain circumstances, a lien may be extinguished by a valid tender of payment. However, that same law also holds that the tender must be for the total amount due, that it is the duty of the debtor to make sure that the amount tendered is sufficient and that any deficiency in the tender is at the peril of the debtor.

* * *

As to the charge of a conflict of interest, we find that the special master correctly found that the Hagerman loan transaction violated RPC 1.8(a). That rule prohibits an attorney from entering into a business transaction with a client unless, among other things, the transaction and the terms are fair and reasonable to the client.

Here, the transaction was not fair and reasonable to the client. Hagerman's unrebutted testimony was that respondent set all of the loan terms. Respondent did not give Hagerman any real security for the $79,000. Although the agreement stated that respondent owned two properties and that respondent's law firm was worth in excess of $2,500,000, respondent did not give Hagerman any security interest in those assets. Nor did respondent provide Hagerman with any documentation of his assets. In fact, although respondent represented

in the agreement that he owned six acres of land worth between $150,000 and $200,000, he did not own that property. Finally, as stated by the special master, "there was no discussion of payment of more than the compromise amount to the worker's [sic] compensation carrier...no discussion of what would happen if [respondent] went bankrupt. Simply put, there was no discussion of the financial issues that affected Hagerman because the lawyer in the transaction was acting in dual capacities as both lawyer and business partner."

Respondent's subsequent failure to repay Hagerman or to pay CNA, even after CNA filed suit for payment of its lien, highlights the worthlessness of the agreement. It is obvious that respondent took advantage of an unsophisticated client who trusted respondent because of the attorney-client relationship.

Furthermore, respondent's misrepresentation, in the loan agreement, that he owned land worth at least $150,000 violated RPC 8.4(c). Respondent's testimony that he had forgotten that his wife owned the property is not credible in light of the fact that respondent and his wife had previously put into effect a plan to protect their assets by placing them in the wife's name. Respondent had even deeded his interest in their residence to his wife prior to 1991.

Finally, we find that the special master correctly dismissed the charge that respondent failed to cooperate with the ethics investigation. Although there is a strong hint that respondent "played games" in producing documents to the OAE, there is no clear and convincing evidence that he failed to cooperate with the investigation.

There remains the issue of discipline. The underlying events took place nine years ago. In certain circumstances, the passage of time may be considered in mitigation, when meting out discipline. In re Kotok, 108 N.J. 314, 330 (1997). Because, however, respondent was disciplined for unethical conduct prior to 1991, when this conduct took place, and because he has been disciplined since 1991, we did not consider the passage of time to be a mitigating factor.

It is obvious from respondent's disciplinary history that he has little regard for the ethics rules governing the legal profession. He has been disciplined on six occasions for misconduct in twelve cases. But for the fact that the misconduct that gave rise to this matter predates most of the actions for which respondent has been disciplined, we would recommend his disbarment. Nevertheless, we are convinced that stern discipline is required for respondent's flagrant disregard of his ethics obligations. In fashioning the appropriate sanction, we considered that, if this matter had been reviewed together with the prior matter that led to respondent's two-year suspension, a three-year suspension would have been warranted. See In re Susser, 152 N.J. 37 (1997) (three-year suspension for unauthorized release of escrow funds and misrepresentation to buyer's attorney that funds were in escrow. The attorney had previously received a private reprimand and a three-year suspension); In re LaVigne, 146 N.J. 590 (1996) (three-year suspension where the attorney represented buyers and sellers, including himself, in multiple and complex property transactions, failed to safeguard funds of his clients and third parties and engaged in a pattern of deceit and

dishonesty). Therefore, six members determined to impose a one-year suspension, to be served at the expiration of respondent's two-year suspension. Two members voted to disbar respondent. One member did not participate.

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

Dated: 2/6/2001

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Jack N. Frost
Docket No. DRB 00-133

Argued: October 19, 2000

Decided: February 6, 2001

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		X					
Peterson		X					
Boylan							X
Brody		X					
Lolla	X						
Maudsley		X					
O'Shaughnessy		X					
Schwartz	X						
Wissinger		X					
Total:	2	6					1

Robyn M. Hill 4/10/01
Robyn M. Hill
Chief Counsel