SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-234
District Docket No. XIV-07-375E

IN THE MATTER OF	:
BEN KATZ	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 21, 2010

Decided: December 3, 2010

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 on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), based on respondent's five-year suspension in New York for knowing misappropriation of client funds in four matters. The OAE

recommends that respondent be disbarred. We agree with that recommendation.

Respondent was admitted to the New Jersey bar in 1994. He is also a member of the New York bar, under the name Benjamin Zev Katz. He has no history of discipline in New Jersey.

In September 2007, the Grievance Committee for the Tenth Judicial District filed a five-count verified petition against respondent in the Supreme Court of the State of New York Appellate Division: Second Department. The first four counts of the petition accused respondent of violating Disciplinary Rule 9-102(A) (22 NYCRR §1200.46) by failing to safeguard funds entrusted to him.[1] The fifth count charged respondent with engaging in conduct that adversely reflected on his fitness as a lawyer, based on the misconduct set forth in counts one through four, in violation of

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[1] New York Disciplinary Rule 9-102(A) states: "A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own."

Disciplinary Rule 1-102(a)(7) 22 NYCRR §1200.3.[2] In December 2007, respondent entered into a stipulation in which he admitted the allegations in the petition filed against him. The facts giving rise to each count are as follows.

Charge One

In January 2004, respondent represented Alan Schraibman, the executor of the estate of Jacqueline Schraibman, the seller of real property. Respondent received $17,837 from the purchasers, as the down payment for the property. The funds were deposited in his IOLA account on January 16, 2004. The closing on the property took place on April 20, 2004. By check dated April 20, 2004, in the amount of $17,837, respondent disbursed the funds to Alan Schraibman. The check was posted on April 22, 2004 and dishonored on April 23, 2004.

Between January 16, 2004 and April 22, 2004, respondent failed to maintain the Schraibman funds in his account. Specifically, on January 31, 2004, respondent's account had only

[2] New York Disciplinary Rule 1-102(a)(7) states: "A lawyer or law firm shall not: 7. Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

$262.72. On February 27, 2004, the account held $862.64. On March 31, 2004, the account balance was -$13,916.33.

Charge Two

In March 2004, Respondent represented Joseph and Donna Masterson, the plaintiffs in a civil action. The parties negotiated a settlement in which the plaintiffs were to receive $3,500. On March 15, 2004, respondent deposited the Masterson settlement funds in his IOLA account. On March 25, 2004, he issued a check to his clients in the amount of $2,500.00, representing their portion of the proceeds. The check was posted to the account on April 16, 2004. Respondent, however, had failed to maintain the Masterson funds intact. On March 31, 2004, the balance in his IOLA account was -$13,916.33.

Charge Three

In March 2004, respondent represented Argent Mortgage, the lender in a refinancing matter. The borrower was Rachel Jean-Louis. On March 16, 2004, the gross proceeds from the loan, $106,512.45, were wired into respondent's IOLA account.

Following his receipt of the funds, respondent issued a number of checks, including a check for $5,054 posted on March

31, 2004, which was returned on April 1, 2004. A $5,054 check was posted again on April 27, 2004.[3] Although respondent should have maintained a minimum of $5,054 in his trust account, on several days between April 5, 2004 and April 27, 2004, he had negative balances in his trust account, ranging in amounts from -$61.54 to -$5,115.54.

Count Four

In April 2004, respondent represented Stephen and Mary Ann Chiarini, the plaintiffs in a personal injury action. The parties negotiated a settlement in which the plaintiffs were to receive $75,000. Respondent received a check for the settlement funds and deposited it in his IOLA account on April 27, 2004. The following day, respondent withdrew $15,000 from his IOLA account, representing a portion of his legal fee in the Chiarini matter. However, he withdrew the fee before the Chiarini settlement check cleared.

On April 30, 2004, the $75,000 settlement check was returned by the bank due to an improper endorsement. The check

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[3] Respondent's disbursements totaled $106,512.45, the amount of the loan proceeds.

was redeposited in respondent's IOLA account on May 10, 2004.[4] On May 24, 2004, respondent issued a check for $50,000 to the Chiarinis, representing their share of the proceeds. The check was posted on May 25, 2004. Despite the requirement that respondent hold the Chiarinis' funds intact, on May 18, 2004, the balance in his account was only $30,839.46.

Count Five

The fifth count of the verified petition charged respondent with engaging in conduct that adversely reflected on his fitness as a lawyer, in violation of Disciplinary Rule 1-102(a)(7) (22 NYCRR §1200.3) by breaching his fiduciary obligations through the misconduct set forth in the first four counts.

As noted previously, respondent stipulated to the facts supporting the charges against him. The matter proceeded to a hearing before Referee John P. Clarke, Esq., in November 2007 and February 2008, when respondent was permitted to offer testimony and mitigating evidence. The referee admitted into evidence respondent's letter of July 8, 2004, in which

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[4] The petition and the OAE's brief both show the redepositing of the check on May 10, 2005, which cannot be the correct date.

respondent discussed the allegations against him. Respondent noted that he had identified four errors in transfers from his trust account to his operating account: (1) on December 8, 2003, $15,000 was transferred from his trust account to his business account, rather than the $1,500 he had intended to transfer; (2) on January 2, 2004, he transferred $2,000 to his business account, after he had already transferred that amount into the account on December 31, 2003; (3) on January 9, 2004, $11,000 was transferred from his trust account to his business account, rather than the $1,100 he had intended to transfer; and (4) on March 17, 2004, $14,000 was transferred from his trust account to his business account, rather than the $1,400 he had intended to transfer. Respondent blamed "certain errors" on his bank, although there was no evidence to support his contention in that regard.

Cross-examination of respondent by the attorney for the grievance committee called into question his explanation as to the improper withdrawals:

> Q. There was, in fact, a deposit into that account on December 8th, of $15,000; correct?
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> A. Yes.

Q. That is the transfer that you are talking about in your letter?

A. I believe so, yes, December 8th.

Q. What was the balance in your account prior to the transfer, do you know? Can you tell from the document?

A. On December 8th, it was $1,024.64.

Q. Isn't it a fact that on December 8th, as soon as the $15,000 was transferred in, you withdrew $8,000 for a bill payment?

A. $8,000 was made for a bill payment, yes.

Q. Do you know what that bill was for?

A. No.

Q. So you used the $15,000 to pay a bill; correct?

A. I used part of it.

Q. The letter you wrote on July 8th, also indicates there was a transfer, inadvertent transfer of $11,000 instead of $1,100; is that correct?

A. Yes.

Q. If you could go to your bank statement for January 2004, ending January, 2004?

A. Yes.

Q. The transfer was made on January 9th; correct?

A. January 9th, yes.

Q. And after that balance – after the transfer was made, what was the account balance?

A. $11,337.31.

Q. And on January 13th, a check was posted to the account, check number 643, in the amount of $9,750; is that correct?

A. When?

Q. January 13, 2004, check number 643, in the amount of $9,750; is that correct?

A. Yes. Check posted January 13th, 643, $9,750, yes.

Q. Do you recall what that check was for?

A. No.

Q. Would this refresh your recollection?

A. Yes. That was for payment of my rent.

Q. So out of the $11,000 transferred in, $9,750 went to pay your rent; is that correct?

A. Yes.

[OAEBEx.C at 42-7 to 44-6.][5]

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[5] OAEB refers to the OAE's brief in support of its motion for reciprocal discipline.

At the hearing, respondent testified that he suffers from bi-polar disorder, which, he claimed, was not correctly diagnosed until the end of 2004.[6] Prior to that time, he had been treated for depression, which did not address the sum of his problems. Respondent's mental condition "was exacerbated by marital difficulties and the difficulties brought about due to the fact that his only child was autistic."

As to respondent's explanation for his misconduct, the referee found the following:

> [I]t is difficult to accept his proffered explanation of the transfer of funds from his IOLA account to his operating account in sums exceeding his entitlement because he may have inadvertently added a zero to the amount. In his answer to the Grievance Committee, he notes that on 12/8/03 he transferred $15,000.00 instead of $1,500.00 and on 1/9/04 he transferred $11,000.00 instead of 1,100.00. On 3/17/04, he transferred 14,000.00 instead of $1,400.00. That explanation is not credible especially when the bank records reflect that the 'intended' smaller amounts would not have covered expenses paid from the operating accounts on the next day after the deposit. The evidence offered in mitigation by him would support an acknowledgement of his impaired

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[6] Two medical reports in the record support respondent's claim that he suffers from a mental illness.

> judgment but I find the explanation of a mistake not credible.
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> [OAEBEx.I at 6 to 7.]

The referee found respondent guilty of the charges against him.

In an opinion and order imposing a five-year suspension on respondent, the Supreme Court of the State of New York Appellate Division: Second Judicial Department stated:

> Notwithstanding the mitigating factors present, in particular, the brief duration of the misconduct, the remedial measures the respondent has undertaken, and his unblemished history, the respondent clearly failed to safeguard client funds and admittedly used escrow funds for office expenses such as rent. His explanation that he inadvertently added zeros to certain transfers thus resulting in overdrafts is suspect. The allegedly intended smaller amounts would not have covered the nonclient related expenses for which he used those funds.
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> [Matter of Katz, (2009 NY Slip Op 01482 February 24, 2009 at 5.]

Respondent's motion to amend the Supreme Court's order was granted to the extent that respondent was given credit for time served under an interim suspension.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-

14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of disciplinary proceeding in this state. We, therefore, adopt the findings of the New York court and find that respondent knowingly misappropriated client funds, a violation of RPC 1.15(a) (failure to safeguard client funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and In re Wilson, 81 N.J. 451 (1979).

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). With respect to subparagraph (E), although respondent received a five-year suspension in New York, in New Jersey the knowing misappropriation of client funds requires disbarment.

In New York, even when an attorney's misconduct involved intentional conversion of client funds, there have been instances where, in light of significant mitigating factors, a suspension has been imposed, rather than disbarment. See, e.g., Matter of Altschuler, 139 A.D.2d 311, 531 N.Y.S.2d 91 (1988) (N.Y. App. Div.) (attorney guilty of conversion of funds belonging to two clients received two-year suspension in light of several mitigating factors, including attorney's contemporaneous notice to clients that he had received their funds, full payment of funds to the clients, lack of intent to steal or deprive, financial distress, cooperation with disciplinary authorities, remorse, record of professional and civic service, lack of harm to any client, and prior unblemished twenty-six years at the bar) and Matter of Einhorn, 88 A.D.2d 95, 452 N.Y.S.2d 437 (1982) (N.Y. App. Div) (attorney guilty of

converting escrow funds to his own use received a censure in light of mitigating factors, including that he had an unblemished record of over fifty years, kept funds identifiable and intact, and acted out of frustration with client who owed balance of fee).

Although compelling mitigating factors may save an attorney from disbarment, following an act of knowing misappropriation in New York, the same cannot be said in New Jersey. Almost thirty years ago, the Court instituted what became known as the Wilson rule. In re Wilson, supra, 81 N.J. 451. "The Wilson rule is simple: attorneys who steal or borrow clients' monies without their consent [will] be disbarred." In re Susser, DRB 95-016 (December 20, 1995) (dissenting slip op. at 1). Wilson defined knowing misappropriation as follows:

> Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
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> [In re Wilson, supra, 81 N.J. 455 n.1.]

The Wilson rule, allows for no exceptions: attorneys who knowingly misappropriate clients' funds invariably suffer the disbarment penalty.

Since Wilson, attorneys have asserted an array of mitigating factors/defenses to either excuse their misappropriation or disprove the knowing element of the offense.[7] Alcoholism, drug-dependency, gambling-addiction, mental or physical illness, and severe personal or financial problems all have been insufficient to defeat the inexorable application of the Wilson rule.

In 1984, the Court decided the landmark case of In re Jacob, 95 N.J. 132 (1984). There, the attorney admitted his misappropriations of clients' funds, but asserted a medical defense (thyrotoxicosis). The Court found that there was no "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." Id. at 137. That

[7] Although some cases state that the attorney advanced mitigation tending to excuse knowing misappropriation, since Wilson the existence of mitigating factors is irrelevant. Only a defense will serve to excuse that conduct.

standard became known as "the Jacob standard." In In re Greenberg, 155 N.J. 138 (1998), the Court equated the "loss of competence, comprehension or will" to the "inability to appreciate the difference between right and wrong or the nature and quality of [the] acts":

> In making the determination whether an attorney lacked competency, comprehension or will, we have considered whether he or she was "out of touch with reality or unable to appreciate the ethical quality of his [or her] acts." *In re Bock*, 128 *N.J.* 270, 273, 602 *A.2d* 1307 (1992) . . . . . Neither of respondent's experts testified that during the time he was stealing money from his law firm he was unable to appreciate the difference between right and wrong or the nature and quality of his acts.
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> [Id. at 156-57.]

So far, no attorney who misappropriated trust funds has satisfied the Jacob standard.

There is no indication in this case that respondent's illness will satisfy the Jacob standard. Indeed, there was no suggestion that respondent's depression or bi-polar disorder prevented his knowing right from wrong or prevented his competent handling of legal matters. Although respondent's illness and his family difficulties evoke sympathy, under Wilson he must be disbarred. We unanimously so recommend.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Ben Katz
Docket No. DRB 10-234

Decided: December 3, 2010

Disposition: Disbar

Members	Disbar	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark	X					
Doremus	X					
Stanton	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	9					

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel