SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-274
District Docket No. XIV-2002-473E

IN THE MATTER OF	
THOMAS J. FORKIN	
AN ATTORNEY AT LAW	

Decision

Argued: November 17, 2005

Decided: December 21, 2005

Lee Gronikowski appeared on behalf of the Office of Attorney Ethics.

George Sapanaro 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 on a recommendation for disbarment filed by special master Marvin N. Rimm. For the reasons expressed below, we agree with the special master's

conclusion that, among other acts of misconduct, respondent knowingly misappropriated $7,124.49, which he held in escrow and which he was to distribute to his client's former wife pursuant to the terms of a final judgment of divorce and an order enforcing litigant's rights. Accordingly, we also agree with the special master's recommendation that respondent be disbarred.

The first count of the ethics complaint charged respondent with (1) failing to safeguard funds, a violation of RPC 1.15(a) and (b); (2) knowingly misappropriating trust funds, in violation of In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979); and (3) knowingly disobeying an obligation under the rules of a tribunal, a violation of RPC 3.4(c). The second count charged respondent with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1995. At the relevant times, he maintained law offices in Atlantic City, Northfield, and Absecon, New Jersey.

On April 27, 2001, the Supreme Court imposed a one-year suspension upon respondent (effective May 29, 2001) "for multiple acts of unethical conduct in a number of matters," including four client matters. In re Forkin, 167 N.J. 154

(2001). In addition, the Court ordered that, prior to respondent's reinstatement, he demonstrate his fitness to practice law. Ibid. Finally, upon reinstatement, respondent would practice under a proctor's supervision for two years and until further Court Order. Ibid. On May 24, 2001, the Supreme Court denied respondent's motion for reconsideration and for a stay of the suspension.

On June 25, 2001, the Supreme Court imposed a three-month suspension upon respondent, which was to be served concurrently with the one-year suspension that had begun the month before. In re Forkin, 168 N.J. 167 (2001). The Court also imposed the same conditions of the previous matter. Ibid.

On June 24, 2002, the Supreme Court ordered respondent restored to the practice of law, albeit under the two-year supervision of a proctor. In re Forkin, 173 N.J. 390 (2002).

In this case, respondent did not dispute most of the allegations in the ethics complaint. In his answer, however, he asserted a number of affirmative defenses, including, but not limited to, the following: (1) the escrowed funds at issue were premarital assets, not subject to equitable distribution; (2) he suffered from clinical depression, memory loss, and alcoholism; and (3) he never received copies of the final judgment of

divorce or its amendments, as well as certain correspondence from opposing counsel.

Respondent represented the plaintiff, Anthony DiSalvatore (Anthony), in an Ocean County matrimonial matter captioned Anthony DiSalvatore v. Doreen DiSalvatore (the matrimonial matter). The defendant, Doreen DiSalvatore (Doreen), was represented by the now-deceased Ralph McKay.

On September 22, 2000, after the trial had begun, the parties reached a settlement agreement and placed its terms on the record. Before that, respondent announced in court that he did not think that the matter would "be able to be settled." Respondent claimed that McKay had informed him that Doreen had made "some substantial changes" to the proposed property settlement agreement that respondent had last submitted to McKay. However, respondent identified only one problem: the value, or perhaps even the existence, of Doreen's $34,000 Solomon Smith Barney account. After some discussion with Anthony, respondent reported back to the judge that his client was "making another financial concession" and presumably waiving any claim that he had to that account. The attorneys then proceeded to place the settlement terms on the record.

When the subject turned to the distribution of a stock fund arbitration award, the following exchange (which reflected the level of animosity between the attorneys) took place:

> MR. MC KAY: Okay. The Arbitration award. There was an Arbitration award which is being held in an attorney's trust account in Philadelphia is my understanding.
>
> THE COURT: Arb award on stock.
>
> MR. MC KAY: Right.
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> MR. FORKIN: Your Honor, it's my understanding that that was worked into this agreement. I didn't — I disagreed with this yesterday. There's about $10,000 after everything is all said and done, and now Mr. McKay wants to drag this in at this point.
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> THE COURT: We agreed yesterday.
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> MR. MC KAY: We agreed yesterday. You're backtracking, Mr. Forkin.
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> THE COURT: Yes, we agreed yesterday —
>
> MR. FORKIN: Mr. McKay —
>
> MR. MC KAY: You're backtracking.
>
> THE COURT: -- there was an Arb award that was a joint —
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> MR. FORKIN: If you had done your homework, we wouldn't have to waste the Court's time with this.
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> THE COURT: Mr. Forkin, we talked —

MR. MC KAY: I wish it were 1802.

THE COURT: -- we talked yesterday that that was a marital asset. It was a marital asset.

Mr. McKay, sit down and take it easy.

MR. MC KAY: Yes, sir.

THE COURT: Mr. Forkin, don't be trying to antagonize. I'm going to tell both of you, I've been very nice. Not my usual self, because I'm trying to be more understanding in my old age. Don't misconstrue my being nice by being easy because that, I'm not. Everybody knows that. See, my motto is I'm nice to everybody until they don't deserve it anymore. Then I can get pretty mean.

But, at any rate, we all know that that came from a suit against brokers as a result of marital assets. It wasn't a premarital asset. Right? Right, Mr. DiSalvatore? It was a litigation that you had during your marriage about something that happened during the marriage.

MR. DI SALVATORE: The investment monies that were spent were results of —

MR. FORKIN: Premarital assets.

MR. DI SALVATORE: -- monies I incurred — that I made prior to the marriage in terms of my father left me monies when he passed away [and] from my Workmen's Comp settlements. What we agreed to yesterday was 10,000 of the Guardian Fund was monies that were —

THE COURT: No, we didn't talk out here outside. We talked inside.

MR. DI SALVATORE: Oh, you guys all talked.

THE COURT: We were talking inside about the Arbitration.

MR. DI SALVATORE: And that's when this was drafted, and the number 53 which I guess is now close to the 58 –

MR. FORKIN: Your Honor, I believe I have no next to that on that agreement when we did discuss it.

THE COURT: We talked – you, Mr. McKay, and I talked about it inside out of the presence of the clients yesterday.

MR. MC KAY: If we go back to the original agreement which he prepared, it provides at page two the funds from the binding Arbitration being held in an attorney trust account, 25,000 is being held; the parties agree to equally divide the residue of the award after the attorney's fees.

THE COURT: That was what we talked about yesterday.

MR. FORKIN: And that was also the number that I had in my original Property Settlement Agreement, Your Honor, was $43,000 – not I'm sorry -- $33,000, not $53,000. But my client, Your Honor, is just taking a beating in this.

THE COURT: Well, we're all taking a beating.

MR. FORKIN: That's correct. And I missed visitation with my son yesterday, Your Honor.

MR. MC KAY: I'm sorry about that.

MR. FORKIN: No, you're not.

MR. MC KAY: I haven't seen my daughter's soccer game, and she's in high school, since she started this year. So don't whine.

MR. FORKIN: We're not getting divorced, Your Honor.

MR. MC KAY: Arbitration award, 50 percent to each. Whatever the Arbitration number is, the net after attorney's fees.

THE COURT: Next subject. Next subject.

[Ex.R-1p.66,l.5 to Ex.R-1p.69,l.19.]

Respondent did not preserve an objection to this term. In fact, upon the conclusion of the proceeding, he thanked "the Court for its indulgence in helping settle the case." Moreover, Anthony testified at that hearing that he understood the terms of the settlement and believed them to be fair and equitable under the circumstances. The distribution of the stock fund arbitration award is what is at issue in this disciplinary matter.

After the terms of the settlement were placed on the record, and prior to the entry of the final judgment of divorce (final judgment), respondent drafted at least two proposed judgments. Paragraph 21 of both drafts provided for the equal distribution of the arbitration award. Although the second proposed judgment apparently contained some changes, the paragraph pertaining to the arbitration award remained essentially the same. The only change to that paragraph was the description of how the money would be divided, with the first draft stating "50/50" and the second stating "equally."

Ultimately, McKay prepared the final judgment that the court signed. Respondent consented, in writing, to the proposed form of judgment. Specifically, respondent stated: "There will be NO Objection to your draft of Order Under the Five Day Rule, as it is consistent with the clerks [sic] notes, which I did use in my draft. I will not quibble over phraseology."

The final judgment was signed on October 17, 2000. Paragraph 24 provided:

> IT IS FURTHER ORDERED that there exists [sic] proceeds from a certain Arbitration Award as and for a Stock Fraud Arbitration filed by both the Plaintiff and Defendant. The proceeds of the Arbitration Award which is [sic] held by the Attorney for the Plaintiff and Defendant, that is, Fox &

> Rothchild [sic], Philadelphia, Pa. shall be divided 50% to the Plaintiff and 50% to the Defendant. All costs and expenses incurred by the attorneys shall be paid from the aforesaid award. The intention of the within Order is that the Arbitration and any other amounts received as and for the Arbitration Award or any other amounts due to the Plaintiff and Defendant as a result of the stock fraud suit shall be divided 50% to each party.
>
> [CEx.1¶24.[1]]

As of October 18, 2000, Fox, Rothschild, O'Brien and Frankel, LLP (Fox Rothschild) held $25,000 in its trust account, which represented the total arbitration award. Fox Rothschild represented Anthony in that matter.

The final judgment was amended three times: October 17, November 13, and December 18, 2000. Despite the amendments, paragraph 24 remained unchanged.

On November 15, 2000, respondent wrote a letter to attorney Theodore Jobes of the Fox Rothschild firm, in which he stated that he was writing to follow up on his receipt and review of the final judgment in the matrimonial matter. In the letter, respondent wrote: "Based upon the final Order of Divorce in this matter, I would respectfully request that you release said

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[1] "CEx.1" refers to Exhibit 1 to the ethics complaint.

funds and forward the same to my Northfield office so that I may disburse the same to my client and opposing counsel, Ralph McKay, Esq."

On January 23, 2001, Jobes wrote to McKay and informed him that the net proceeds of the arbitration award available for distribution, after payment of fees and expenses, were $14,248.98. Thus, Jobes stated: "[T]he net proceeds of the arbitration can now be released for distribution between Anthony DiSalvatore and Doreen DiSalvatore in accordance with the terms of the final judgment of divorce." The letter reflected a copy having been telecopied to respondent, albeit at a fax number that, by all accounts, was likely erroneous.

On February 9, 2001, Jobes sent to respondent a check made payable to "The Thomas J. Forkin, Esquire Attorney Trust Account" in the amount of $14,248.98. Five days later, respondent deposited the check into his attorney trust account.

Respondent's client ledger card and bank records reflect the following activity in his trust account between February 13 and May 25, 2001:

Date	Check No.	Description	Amount	Balance
2/13/01		Balance of all client funds		$ 85.58
2/14/01		Deposit of escrow funds	14,248.98	14,334.56
2/21/01	1030	Check to Anthony	7,000.00	7,334.56
3/7/01	1031	Check to Dr. Gary Glass	250.00	7,084.56
3/8/01	1032	Check to Respondent	6,000.00	1,084.56
5/25/01	1033	Check to respondent	1,083.00	1.56

Respondent admitted that, contrary to the plain language of paragraph 24 of the final judgment, he did not distribute any of the escrowed funds to either McKay or Doreen.

On February 22, 2001, McKay wrote to respondent and requested that he remit to Doreen "immediately a check in the amount of $7,124.49," pursuant to paragraph 24 of the final judgment. McKay followed up with two more letters, dated February 28 and April 5, 2001. Respondent did not reply to any of these letters.

On May 22, 2001, McKay filed a motion to enforce litigant's rights in the matrimonial matter, seeking an order requiring respondent to distribute Doreen's $7,124.49 to her, pursuant to

the terms of the final judgment. In response, respondent submitted an affidavit in which he stated that the funds were premarital, thereby improperly suggesting that he was not aware that the final judgment had required him to distribute half the funds to McKay. Moreover, respondent asserted that the funds had been provided to Anthony "in full, for his sole use and enjoyment." Yet, the records pertaining to respondent's attorney trust account show that respondent disbursed only $7000 to Anthony, $250 to a Dr. Glass, and the $7083 balance to himself.

On July 13, 2001, Judge Sheldon R. Franklin entered an order requiring respondent to turn over the $7,124.49 to McKay and to appear with Anthony at McKay's office for a deposition on a date selected by McKay. On July 20, 2001, McKay sent a copy of the order to respondent and also requested that he appear for a deposition at McKay's office on July 31, 2001.

On August 1, 2001, respondent wrote to McKay and stated that he would forward a check to McKay "within the next week." Apparently, McKay had canceled respondent's deposition upon this promise.

On August 9, respondent wrote to McKay again and stated that the check had not yet been sent due to "an administrative

oversight." According to respondent, the "administrative oversight" was his overpayment to Anthony. He further contended that he had been "unable to retrieve that amount" from him. In fact, respondent had paid Anthony less than half of the proceeds ($7000), had paid a bill ($250), and had kept the remaining funds ($7083) for himself. It is undisputed that respondent never transmitted the $7,124.49 to either McKay or Doreen.

In August 2002, Doreen filed an ethics grievance against respondent. On October 3, 2002, OAE investigator William Ruskowski and OAE deputy ethics counsel Walton Kingsberry interviewed respondent at the office of respondent's proctor, attorney Mark Biel. Respondent told Ruskowski and Kingsberry that Anthony had owed him approximately $9895 in legal fees, which, respondent claimed, he then compromised by $3000. Respondent produced a copy of a December 6, 2000 bill to Anthony, which reflected the $9895 balance. After paying Anthony $7000, respondent used the remaining funds as his payment.

Respondent's testimony focused mainly upon his lack of recollection of most important events in the matrimonial matter, his explanations with respect to certain documentary evidence that established his knowledge of his obligation to disburse

funds to Doreen, and his defenses. According to respondent, he started representing Anthony in the matrimonial matter in June 1999. He testified that he was Anthony's second attorney and that the matter was bitterly contested. Because Anthony was a state trooper, respondent had agreed to represent him at a reduced rate.

According to respondent, Anthony always maintained that the stock fund, though purchased soon after he was married, had been acquired with premarital funds inherited from his father and with funds that Anthony received in a workers' compensation award. The account was in Anthony's name only. The broker took money from that fund and used it to buy another stock, which resulted in Anthony's instituting an arbitration proceeding.

Respondent recalled having spoken to Jobes once or twice. He first called Jobes at Anthony's request, at which time Jobes informed respondent that McKay had called and advised him that the money would be placed in escrow.

Respondent was shown the transcript from the September 22, 2000 hearing when the settlement agreement in the matrimonial matter was placed on the record. When asked if September 22 was the date that the divorce had become final, respondent answered that "the document speaks for itself." According to respondent,

McKay tried to "back door" the division of the arbitration award "because I hadn't nor my client hadn't [sic] consented to that stock arbitration being conceded."

Respondent acknowledged that his two draft judgments of divorce had provided for an equal division of the arbitration award. Although he could not recall having received a copy of the final judgment entered in the matrimonial matter, he conceded that paragraph 24 of the final judgment provided for the equal division of the proceeds.

At the time the final judgment was entered, respondent was in the midst of litigating the ethics proceeding that resulted in his one-year suspension. That ethics proceeding was argued before us on December 16, 1999; we issued our decision on October 9, 2000; and the Supreme Court issued its decision on April 27, 2001. The ethics proceeding that resulted in the concurrent three-month suspension was argued before us on May 11, 2000; our decision issued on October 30, 2000; and the Supreme Court issued its decision on June 25, 2001.

According to respondent, he relapsed from his alcohol recovery and resumed drinking in December 2000, when he learned of our decisions in the prior ethics matters. However, he also

stated that the relapse occurred at various times between October 2000 and January 2001.

In light of his relapse, respondent approached attorney Kevin Shannon and arranged for the merger of their practices, effective January 1, 2001. Prior to respondent's merger with Shannon, his office was located in Northfield. After the merger, the partnership's office address was in Absecon. Respondent lived at 101 South Raleigh Avenue in Atlantic City, but used an Atlantic City post office box.

When respondent's and Shannon's practices merged, respondent no longer worked on Anthony's case, as he had closed the file. According to respondent, he did not recall that the distribution of the arbitration proceeds remained outstanding in January 2001. He also stated that he typically did not close out a file without having in his possession the final document that ends the litigation.

Respondent testified that, in January 2001, he began to reduce his case load and prepare for his upcoming suspension, although he still practiced law. In January or February 2001, respondent also began to treat with either Dr. Glass "or David Frankel." Respondent was suspended from May 2001 until August 2002, during which time Shannon took over his files.

Respondent testified that, when he suffered the relapse, the excessive drinking was accompanied by debilitating depression. This caused him to be less attentive to details, including the review of court orders and what they required. Yet, notwithstanding his difficulties during this time, respondent obtained positive results for clients whom he had represented in trials. He also settled cases and paid the bills. In other words, respondent could still function as a practicing attorney.

Respondent claimed that, as of his March 8, 2005 testimony, he had been clean and sober for six or seven months. He testified that his recovery programs consisted of going to "as many meetings as [he] can."

Respondent provided detailed testimony with respect to the events that transpired in the matrimonial matter in 2001. He claimed that, when he closed the DiSalvatore file, Anthony owed him about $10,000. Although respondent did not recall having received, in February 2001, either the arbitration proceeds or Jobes' transmittal letter, he conceded that he must have received them, as "[t]he documents speak for themselves." Respondent stated that he did not look at the final judgment when the check came in, and that he did not call McKay to

determine whether he had received any money on behalf of Doreen. Indeed, respondent acknowledged, he "should have done a lot of things." Moreover, he did not recall his reaction to Jobes' statement that respondent and McKay had agreed to work out distribution of the monies themselves. Instead, respondent testified, he gave half the $14,000 to his client and took his "portion of the fees out."

The following exchange between respondent and his lawyer represents respondent's attempted explanation of his thinking when the arbitration proceeds were sent to him:

> Q. At that point in time when you received the check from Mr. Jobes, what was your belief and understanding of the check that you received from Mr. Jobes?
>
> . . . .
>
> A. I really — George, I don't have any specific recollection of what my thoughts were then, but in looking at this and preparing for this case, you know, the more I look at it, that, you know, I — I don't know what I was thinking, you know. I think that in looking at the numbers that we are dealing with here, I think at that time, and I can't be 100 percent sure, but the $14,000 which was received is just about half of the money that we thought was in that fund any way.
>
> I think that there was a presumption on my part that is half the money and that was

[Anthony] DiSalvatore's money and that was it and that's how it was handled.

You know, in retrospect, that's – that appears to be what happened. I can't believe, you know, almost 50 percent of that money would have gone to Mr. Jobes, but apparently it did. It's my mistake and, you know, if I would have picked it up at the time, you know, and if I was going to dispute the disposition of that, and I think there was some statements as to, you know, the funds weren't subject to equitable distribution.

I think the record is pretty clear neither my client nor I consented to the distribution of the fund on [sic]. The equitable distribution analysis that I could have filed if I was in control of my practice as I should have been, I could have filed a Rule 4:50 motion which would have been a timely motion to get back into the meats and potatoes of the case and said here are the proofs, this was not subject to equitable distribution. I could have done it then.

This again shows you how I was impacted. Did it matter to me at that time if I gave the money to Mr. DiSalvatore, Mrs. DiSalvatore? It didn't matter to me. Clearly, I'm – I'm not going to jeopardize my legal career to, you know – for $7,000. I think that's the contention of the Office of Attorney Ethics, that I intentionally took this money and misled – it was a bookkeeping error on my part.

You have to remember this is almost five months after this file is closed. I mean this is not like a week later, it's not

two weeks later. This is five months after this divorce from hell.

[1T114-8 to 1T116-6.][2]

Respondent could not recall having received McKay's February 22, February 28, and April 5, 2001 letters, which were sent to the Raleigh Avenue post office box address. According to respondent, he did not "believe" that he maintained the post office box during that time period. Later, however, respondent testified that he had closed his post office box sometime after he severed the partnership with Shannon, which was in May 2001, the time of his suspension. Respondent conceded, however, that, in his certification in response to the motion to enforce litigant's rights, he never disputed that he had received McKay's February and April, 2001 letters. Contrary to the testimony of other witnesses, respondent did not recall having told anyone in McKay's office that he needed a partner's signature on signature cards, before a check could be issued.

Respondent acknowledged that he had deposited the check into his attorney trust account, although he claimed that he "thought it was in my business account." With respect to the

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[2] "1T" refers to the transcript of the hearing on March 8, 2005.

$85 balance in the trust account that pre-existed the deposit of the arbitration proceeds, respondent did not know to whom it belonged. He acknowledged having written all checks drawn against the arbitration proceeds, although he could not remember having done so. Respondent could not recall what the payment to Dr. Glass represented, but he surmised that it may have been for "a lengthy report that he wrote as to Tony's ability to visit with the children."

With respect to the $1083 check, which was written on May 25, 2001, respondent stated that the purpose in writing the check was to close the account, as his suspension neared. According to respondent, he believed that the funds were his because he knew that all other monies had been disbursed.

Respondent further testified that, when McKay filed the motion to enforce litigant's rights, he told McKay that, if Doreen were owed the money, he would "get her the money one way or another." In this regard, respondent claimed, he tried to recover the money from Anthony, who rejected the idea. He then tried to borrow the money, to no avail. Respondent told McKay that he had mistakenly thought that all of the proceeds were Anthony's. He denied having knowingly taken money that belonged to Doreen.

With respect to his affidavit submitted in opposition to McKay's motion to enforce litigant's rights, respondent claimed that his statement that the proceeds had been distributed to Anthony in full for his sole use and enjoyment was truthful because it referred only to the $7000 paid to Anthony, not the $14,000. Respondent admitted that, in his affidavit, he never disputed McKay's assertion that he had ignored McKay's three letters asking for the money.

Respondent was suspended at the time that McKay's motion was filed. Therefore, he claimed, he could not have filed a motion for reconsideration of the order requiring him to turn over the funds. With respect to the July 2001 order enforcing litigant's rights, respondent stated that he did not challenge it within forty-five days because he "was having problems," which included eviction from his residence, front page articles in the local paper (presumably about his ethics difficulties), being taken to court for back child support, and depression and alcoholism.

Respondent was evicted from his residence in late summer 2001, after Labor Day. At the time, he was two-to-three months behind in the rent; at times during the spring, he had fallen behind as well.

With respect to the two proposed final judgments that respondent sent to Judge O'Brien after the September 22 hearing, respondent acknowledged that paragraph 21 provided that the funds being held by Fox Rothschild would be divided equally. Respondent testified that, when he wrote the letter stating that he had no objection to McKay's proposed form of judgment of divorce, he "just want[ed] to get this case over with." Also, respondent conceded that, as of the date of his November 15, 2000 letter to Jobes, he had received a copy of the final judgment. Respondent further conceded that, in that letter, he stated that he would disburse the funds to his client and opposing counsel. However, respondent claimed that, when the letter was written, he believed that the fund amounted to $25,000, not $14,000. Nevertheless, when he received the check for $14,000, he did not complain to anyone about the amount. According to respondent, he "didn't give it much thought apparently."

Respondent stated that, during the time period in which he disbursed the funds, he knew right from wrong. He asserted, however, that he had made a mistake in the manner in which he distributed the arbitration funds.

On cross-examination, respondent admitted that he was behind in his rent when he wrote the May 2001 check to himself. He also admitted that he had never done anything to obey the final judgment or the order enforcing litigant's rights. He claimed that he did not return the money because his attorney in the previous ethics proceeding told him that he could be accused of tampering with the ethics matter if he did so.

Upon the special master's questioning, the various versions of respondent's explanation for what had happened to the money were brought to light. The first explanation was that respondent believed that the funds were a premarital asset and, as such, belonged solely to Anthony. Accordingly, he suggested to Anthony that Anthony receive half and use the other half to pay his legal fee. The second explanation was that, in retrospect, he surmised that the $14,000 may have represented Anthony's share of the funds, and that Doreen's share already had been turned over to her attorney. Admittedly, however, respondent never called McKay to learn whether he had received any money from Jobes. The third explanation was that he committed either a bookkeeping or an administrative error, or was simply sloppy. Respondent explained the meaning of this statement: "[I]f I had kept better books and if I was in better

shape at that time, I would have gone to the file and looked at the order to see the order the judge signed." He considered sloppiness a form of bookkeeping error.

Respondent told the special master that he did not realize that the $14,000 was to be divided equally, until he received McKay's motion to enforce litigant's rights and saw the attached copy of the final judgment. Yet, despite respondent's representations to McKay that he would get Doreen's money to him, respondent never followed through.

Respondent also told the special master that, after the OAE investigation began, he made no arrangement to pay Doreen because "it was never an option presented to me that I could repay the money." He stated that he also had been informed by friends and colleagues that he could not interfere with the ethics investigation, which he would potentially do if he repaid Doreen because it could have been and it was interpreted as a bribe. Respondent did not ask the OAE if he could repay Doreen.

Ruskowski testified about his investigation of this disciplinary matter. During the OAE's October 3, 2002 interview, respondent was confronted with the following facts: (1) the language of the final judgment and its amendments, (2) respondent's own proposed forms of judgment, and (3) the letter

in which respondent stated that he had no objection to McKay's proposed final judgment. According to Ruskowski, respondent "had several explanations." First, respondent told Ruskowski that he believed that the stock fund was a premarital asset. When asked to explain his position in light of his own letters and what the judge had stated on the record, respondent told Ruskowski that "he didn't believe the Judgment was what occurred." Respondent also disputed that he had received correspondence from McKay in this regard.

Respondent admitted to Ruskowski that he had not complied with Judge Franklin's July 13, 2001 order, and that he had not appealed it. Respondent maintained his position that the funds were premarital assets, and he also stated that he had already paid over the money to his client. Because respondent had received some portion of the funds in payment of his fee, he had no funds left.

Ruskowski testified that respondent wrote "1/2 settl. Amount from Fox Rothchid [sic]" on the memo line of the February 17, 2001 check to Anthony, in the amount of $7000. The March 6 or March 8, 2001 check that respondent wrote to himself in the amount of $6000 contained the notation "fees/billables." The May 25, 2001 check in the amount of $1083, payable to

respondent's business account, contained the notation "legal fees" on the memo line. All disbursements from respondent's attorney trust account between February and May 2001 were for the matrimonial matter.

The OAE obtained from McKay's office copies of McKay's February 22, February 28, and April 5, 2001 letters to respondent, which he had denied receiving. According to respondent, he had relocated his office when the letters were sent to him, but the post office had not forwarded his mail to the new address. Yet, respondent "did not indicate" to Ruskowski that he had arranged with the post office to have his mail forwarded to him. Therefore, Ruskowski went to the Atlantic City post office to find out whether a forwarding order had been implemented with respect to respondent's different addresses.

The post office representative informed Ruskowski that first-class mail is forwarded for one year. With respect to respondent, the post office had no record of a forwarding order. However, the representative also said that, after a certain time period, the post office's retention policy requires the destruction of forwarding orders. Because Ruskowski made the inquiry outside the time frame when the record would have been

retained, the post office was not able to confirm or deny that respondent had requested that his mail be forwarded to the new address.

Ruskowski explained that McKay's office procedure required staff to handwrite on documents the identity of the persons to whom copies were sent. On the October 2000 amended final judgment, the names of Doreen and respondent were handwritten at the bottom of the first page. According to the notation, Doreen's and respondent's copies were sent to them on October 23, 2000. Based on his understanding of McKay's office procedure, Ruskowski also was able to determine that copies of the November and December 2000 amended final judgments were sent to Doreen and respondent on November 17 and December 20, 2000, respectively.

One of McKay's former employees, Elisa Figliola, confirmed Ruskowski's understanding of McKay's office procedure for mailing copies of documents. Figliola testified that this procedure was used in the matrimonial matter. According to Figliola, she had experienced no difficulty in delivering mail to respondent, and that no mail addressed to him had ever been returned to McKay's office.

Ruskowski offered testimony in support of the proposition that respondent had misrepresented the truth on a number of occasions. For example, in his August 1, 2001 letter to McKay, respondent stated that, pursuant to the affidavit he had filed in response to McKay's motion to enforce litigant's rights, the funds had been disbursed to his client. Yet, according to Ruskowski, respondent had disbursed only a portion of the funds to Anthony, as established by respondent's trust account records. Ruskowski asserted that respondent misrepresented the truth again when he wrote to McKay on August 9, 2001, claimed that he had been unable to retrieve from Anthony the amount owed Doreen, and explained that the overpayment to Anthony was an administrative oversight.

In addition, according to Ruskowski, although respondent claimed that he did not receive the final judgment, he wrote a "closing letter" to his client on December 6, 2000. According to Ruskowski, respondent stated that he was able to write the letter in the absence of a judgment because it was his assumption that the judgment did not include the arbitration award as an asset. Yet, respondent never sought to obtain a copy of the judgment. In fact, the facts established that respondent (1) had expressly consented to the language of the

proposed judgment prior to its entry by the court, (2) had received a copy of the judgment, and (3) had not appealed the order.

According to Ruskowski, at some point in the investigation, respondent faxed to Ruskowski a copy of the invoice that was attached to a December 6, 2000 letter to his client. Upon review of the bill, Ruskowski observed that the total outstanding charges for the representation upon its conclusion were $9895, and respondent stated that he had compromised the bill by $3000, which would have left Anthony responsible for paying only $6800. Yet, Anthony had paid respondent more than this amount when respondent kept the $7200 from the arbitration award that was left over after he had given Anthony $7000 from the award.

To check this discrepancy, Ruskowski asked to see respondent's computer. With Ruskowski and Kingsberry standing over him, respondent pulled up the invoice on the computer's hard drive. The computer's records showed that the invoice was not generated in December 2000; rather, it was generated on September 23, 2002, the date that the OAE had faxed the demand audit letter to respondent.

Ruskowski testified that respondent made two statements when this information was uncovered. First, respondent stated "I didn't know that you could do that," although this comment did not appear in Ruskowski's report. According to Ruskowski, respondent was "shocked and he was surprised that we were able to figure out that date that it was created based on just clicking on a computer." Respondent also told Ruskowski that he believed that the 2002 generation date was a computer error and that the computer may have had a problem. However, respondent could not identify the problem.

Respondent disputed the suggestion in Ruskowski's testimony that respondent had fabricated the December 2000 bill. According to respondent, all documents generated in the matrimonial matter were created "contemporaneously with the time that they were sent or generated." Moreover, respondent testified, in early September 2002, he had experienced a problem with his computer, which a friend repaired for him. When the computer was returned to him in mid- to late-September 2002, it was working. Respondent conceded that he may have stated to OAE investigator William Ruskowski "I didn't know you could do that" because, in fact, he did not know that the generation date of a document could be discovered.

Ruskowski's testimony concluded with several concessions on his part. On cross-examination, Ruskowski testified that respondent had cooperated in the investigation. Ruskowski conceded that he had limited training in computer technology. Although Ruskowski had no specific recollection, respondent may have told Ruskowski that his computer had crashed "around that period of time" and that documents had been transferred from one computer to another. (Presumably, the time period was September 2002.)

Fox Rothschild attorney Theodore Jobes testified that the arbitration award involved an account that Anthony had with Oldy Discount Brokers. When Jobes received a copy of the award, he mailed it to Anthony. Shortly thereafter, Jobes received from McKay a copy of a court order prohibiting distribution of the funds to Anthony because Doreen had claimed an interest in the funds. Accordingly, Jobes placed the funds in a Fox Rothschild trust account.

At some point, McKay sent Jobes an order requiring that the escrowed funds be divided equally between Doreen and Anthony. During the time period between Jobes' receipt of the two orders, Jobes had had periodic contact with respondent and McKay about the procedure to be employed when the rlease of the funds was

authorized. Both attorneys agreed that the funds would be released to respondent. Thus, Jobes released the funds to respondent "with the understanding that he would place them in his escrow account and distribute them according to the Order."

Prior to Jobes' release of the funds, he spoke to respondent on the telephone. Based on that conversation, Jobes "[a]bsolutely" believed that respondent understood that the money was to be divided equally between the parties. In fact, shortly before he released the funds, Jobes participated in a conference call with both attorneys, in which the division of the funds was discussed. Jobes recalled that McKay and respondent had agreed that the funds were to be divided equally and that the check could be sent to either attorney. According to Jobes, McKay later told him to send all of the money to respondent.

Terry Day, a former McKay employee, testified that she had spoken to respondent during the course of the matrimonial matter, specifically in or about March 2001. Day stated that that the matrimonial matter was the only case with respondent in which McKay's office was involved. At that time, McKay asked Day to call respondent to check on the status of a check that McKay was waiting to receive from him. Respondent told her that

he had just joined a partnership, and that he had to wait for his partner to sign signature cards before a check could be issued. Respondent did not deny that any funds were due McKay or that there was any question as to the amount. To Day's knowledge, a check was never received.

Respondent produced six witnesses, who testified about his good character, particularly his honesty. In addition, letters from three lawyers attesting to respondent's good character were admitted into evidence.

Township of Hamilton (Mays Landing) employee Thomas Forkan testified as respondent's expert in computers. According to Forkan, he was the township's "one man IT department." His testimony focused on creation dates of computer-generated documents. Forkan explained that the creation date of a document on a computer's hard drive is typically the day the document is generated. However, the date can change if a file is moved. In particular, the creation date will change if a computer is in danger of crashing or crashes, and the files are copied from the damaged drive onto a different computer drive. When the files that are rescued from the damaged drive are then transferred to another computer or back to the hard drive that

was damaged, another creation date is generated. Computer viruses also can change creation dates.

Atlantic City attorney Mark Biel testified as respondent's family law expert. Biel had been respondent's proctor for approximately two-and-a-half years, prior to his March 9, 2005 testimony. The purpose of Biel's testimony was limited to whether there was a meeting of the minds at the time the settlement in the matrimonial matter was placed on the record.

Biel detailed the various ways in which matrimonial matters are generally settled. With respect to cases that are settled in the courthouse on the eve of trial, he explained that the stipulations are sometimes placed on the record at that time. However, according to Biel, the preferred practice is for the attorneys to retreat to their offices and prepare a comprehensive agreement that is later placed on the record, after the parties have signed off on it. If the placement of stipulations on the record is to "work," there must be a meeting of the minds on all issues. According to Biel, his review of the pertinent pages of the September 22, 2000 transcript did not indicate that both sides had "concur[red] with the assessment that it's not pre-marital or that it's fifty-fifty or that it's anything else."

Biel admitted, however, that, contrary to the transcript, paragraph 21 of respondent's proposed final judgment, which was received by Judge O'Brien on October 2, 2000, indicated that the parties had concurred with the terms. When asked if the paragraph was consistent with what had transpired at the hearing, Biel answered: "It's not, it's not inconsistent, but it's not necessarily consistent." In short, Biel did not know whether the paragraph was consistent or not.

On cross-examination, Biel conceded that it would be bad practice for a matrimonial lawyer to close a file without having had the final judgment of divorce in his or her possession. He also conceded that, while the transcript was equivocal in terms of whether there was a meeting of the minds on the issue of the arbitration award, there was no equivocation in the two draft judgments of divorce prepared by respondent or the November 15, 2000 letter he sent to Jobes in which respondent clearly indicated that the proceeds would be distributed equally.

Biel never saw respondent under the influence of alcohol in his dealing with him as his proctor, as a fellow attorney, or in his observations of respondent, while respondent was carrying out his duties as an attorney. Respondent was always groomed well and dressed appropriately to the occasion.

Psychiatrist Gary Michael Glass, M.D., testified for respondent as an expert in forensic psychiatry. Glass issued five reports over the years: June 28, 1998; August 10, 1998; January 19, 1999; December 14, 1999; and January 8, 2001.

In addition, Glass had seen respondent as a patient sporadically from 1998 to 2005. However, he clarified that not all of these visits were for treatment. For example, Glass testified that the last time he treated respondent was in December 1998, and that he did not see him again until April 2002. Moreover, although Glass saw respondent in 2002, he stated that he "did not see Mr. Forkin throughout the year of 2000, 2001 or into 2002 in [sic] a clinical basis."

Glass described respondent's treatment with him as "chaotic." Often, the visits would be precipitated not by respondent's need to deal with an issue, but because respondent and Glass had "bumped into each other someplace and he would then call and make an appointment." Respondent would explain the long periods of absence as "I should have been here, things were busy."

In addition, the record suggests that some of the visits to Glass's office were prompted by respondent's need for the doctor's assistance in ethics proceedings. For example, Glass

testified that he had prepared his 1999 reports at the request of respondent's counsel in respondent's prior ethics proceedings. Similarly, Glass testified that his January 2001 report was not a clinical report or an evaluation, and that it was not related to respondent's January 3, 2001 office visit. Glass explained: "It was a report at the request of Mr. Hartman to review the decisions of the disciplinary board and to comment on certain specific elements that they had referred to my report, so that did not include anything different clinically." The report did not contain a diagnosis. In the January 2001 report, Glass wrote that respondent had simplified and stabilized his personal life, and opined that respondent's mental status at the time was good.

Finally, it appears that respondent's February 18, 2005 visit to Glass was prompted by the upcoming ethics hearing in this matter. Prior to the visit, respondent sent Glass a note telling him that this disciplinary matter was scheduled for hearing on March 7, 8, and 9, 2005. At the appointment, respondent and Glass discussed the proceedings. Indeed, according to Glass, the purpose of his testimony for this proceeding was to "provide an opinion about Mr. Forkin's mindset about his awareness, his intent at the time that he

misappropriated these funds and placed this check in his account as opposed to the appropriate account." Glass did not treat respondent during this time period.

Glass described respondent's condition over the years that he saw him, professionally and within the community where they lived. Glass first saw respondent in June 1998, when respondent was "going through a difficult marital separation." Glass described respondent's past and testified that respondent's first DUI occurred on his way home from his father's funeral. From that moment, he stated, respondent "entered into a downward spiral that was a combination of depression, anxiety and intermittent alcohol addiction or abuse."

In January and December 1999, Glass prepared two reports, but made no mention of respondent's bipolar disorder. Glass had no visits with respondent in the year 2000. Nevertheless, Glass testified that, during that time period, he would have diagnosed respondent with bipolar disorder Type II. According to Glass, unlike Type I bipolar disorder, which is characterized by major mood swings from severe depression to severe mania, Type II is "more confined," and people with this type are able to function in jobs such as law enforcement, medicine, and the law.

Glass first decided upon the 2000 bipolar diagnosis during the week of his testimony in this matter, which took place on May 18, 2005. He explained that often a diagnosis is best determined over a period of time. The bipolar disorder diagnosis, however, was based upon observations that Glass had made with respect to respondent's behavior, rather than respondent's representations to him. Some of respondent's behaviors were found in Glass's treatment records, some through his discussions with respondent, and some through his recollection of interactions with respondent in the community, when respondent appeared to be hypomanic and engaged in inappropriate conversation with Glass. Specifically, Glass reported that respondent had considered running for State Assembly while he was in the midst of the previous ethics investigation, a thought that, Glass opined, had represented a "break in sound judgment." On another occasion, respondent invited Glass to a local "gentlemen's club," that, respondent stated, was one of his clients and that provided him with "some special favors." According to Glass, this reflected an impaired judgment, although respondent was not "crazy."

When asked to describe respondent's state of mind in February 2001, Glass stated that there was no doubt that

respondent "was overwhelmed with stress, both legitimate and internalized, and was also impaired by the alcohol abuse that he was having, the alcohol intake that he was having at that time;" respondent was trying to wind down his law practice during the day – in anticipation of his suspension going into effect – and "drinking himself into oblivion in the evening." With respect to the impact of the alcohol abuse on respondent's memory, Glass could only say that, in general, "you can't perform at your normal level or at a reasonable level of professionalism under those circumstances." Moreover, most people with "intense alcohol consumption have memory problems."

In preparation for his testimony, Glass did not review any medical records or any documents pertaining to the ethics proceeding, including the complaint. The only information he had about the present proceeding came from what respondent had represented to him during some of their meetings.

Upon questioning by the special master, Glass opined that respondent suffered from bipolar disorder between October 2000 and May 2001, a condition that was "hampered dramatically by a very high level of alcohol intake during that period." With respect to respondent's three different explanations of why he

did not distribute half the $14,000 to Doreen, Glass stated that there were "three possibilities." He explained:

> Possibility A is that it was based on alcoholic confusion because he wasn't functioning appropriately at the time; explanation B is the fact that that is the alcohol in combination with his bipolar disorder which just had him flying all over the place; and explanation C is that it's a fabrication.
>
> [2T106-25 to 2T107-6.][3]

Glass could not say if respondent did not know what he was doing at the time the funds were taken. Although Glass did not think that respondent "knew it was wrong," Glass could not rule out that respondent had fabricated his explanations of what had happened. In addition, Glass could not opine as to whether respondent was or was not able to function sufficiently during the time period.

The special master concluded that respondent committed all of the violations charged in the first and second counts of the complaint, that is, RPC 1.15(a) and (b) (failure to safeguard property), the Wilson rule, RPC 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal), and RPC 8.4(c)

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[3] "2T" refers to the transcript of the hearing on May 18, 2005.

(conduct involving dishonesty, fraud, deceit or misrepresentation.

According to the special master, respondent violated RPC 1.15(a) and (b) and the Wilson rule when he failed to comply with the terms of the final judgment of divorce and the amended final judgment of divorce, which required him to distribute one half of the $14,248.98 net arbitration award to Doreen. The special master found that respondent also had violated RPC 3.4(c) when he ignored the final judgment, refused to comply with the July 13, 2001 order, and then failed to appear for a deposition, which he led McKay to cancel upon his promise to send Doreen's funds "expeditiously."

Although the special master concluded that there was insufficient evidence to support a finding that respondent's December 6, 2000 bill to Anthony in the amount of $9895 had been generated on December 23, 2002, he nevertheless concluded that respondent had violated RPC 8.4(c) because "[h]e was dishonest in his dealings with Mr. McKay and repeatedly made misrepresentations to him concerning the payment of the stock fund."

The special master gave no weight to the defenses that respondent advanced. First, the special master rejected

outright respondent's argument that, at the divorce settlement, there was no meeting of the minds with respect to the distribution of the arbitration award. According to the special master, the evidence established that respondent knew that fifty percent of the arbitration funds were to go to Doreen.

Second, the special master rejected respondent's bipolar disorder defense. After noting that the evidentiary standard in disciplinary matters is "clear and convincing evidence," he wrote: "I cannot come to a clear conviction, without hesitancy, that the Respondent suffered from bipolar disorder during the period of time involving his misappropriation of funds." The special master listed the reasons: (1) the defense was not asserted in respondent's answer to the ethics complaint; (2) none of Glass's five reports issued between June 28, 1998 and January 8, 2001 included that diagnosis; (3) none of Dr. Glass's notes to which he had referred during the hearing contained the diagnosis; and (4) although Glass testified that respondent's behavior was due to bipolar disorder or alcoholism, he could not rule out the possibility that respondent's explanation of his behavior was a fabrication.

In addition, according to the special master, even if it were true that respondent suffered from bipolar disorder, the

evidence did not satisfy the standard set forth in In re Jacob, 95 N.J. 123 (1984). He wrote: "There is no evidence that bipolar disorder so impaired the Respondent's will that otherwise purposeful actions are excusable."

In light of the special master's finding of facts, his conclusions with respect to the ethics violations charged, and his consideration of respondent's defenses, he recommended disbarment as "the appropriate discipline."

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent violated RPC 1.15(a) and (b), the Wilson rule,[4] RPC 3.4(c), and RPC 8.4(c) is supported by clear and convincing evidence. He also rightly rejected respondent's defenses. Finally, the special master correctly determined that disbarment is the appropriate form of discipline.

RPC 1.15(a) provides, in relevant part: "A lawyer shall hold property of clients or third persons that is in a lawyer's

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[4] A finding that respondent violated the Hollendonner rule is more appropriate. Because Doreen was not respondent's client, he did not technically misappropriate client funds, a violation of the Wilson rule. Instead, he knowingly misused escrow funds, a violation that also requires disbarment. In re Hollendonner, 102 N.J. 21, 26-27 (1985) (disbarment mandated for misappropriation of escrowed funds).

possession in connection with a representation separate from the lawyer's own property." RPC 1.15(b) provides, in relevant part:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client is entitled to receive.

In this case, respondent knew from the time of the September 22, 2000 hearing that, notwithstanding his subsequent insistence that the proceeds from the arbitration award were a premarital asset, the funds were to be divided equally between Anthony and Doreen. Although respondent resisted this term of the settlement agreement at the hearing, he eventually acceded to it, as he raised no formal objection and did not preserve an objection before, during, or after that hearing. Moreover, following the hearing, respondent prepared and submitted two proposed final judgments that called for the equal distribution of the funds. In addition, respondent stated, in writing, that he had no objection to McKay's proposed final judgment, which was the judgment that the court entered and which provided for equal division of the funds.

While respondent claimed, at varying times during the investigation and the hearing, that he had never received a copy of the final judgment, we find this claim unworthy of belief. As early as November 15, 2000, respondent wrote to Jobes and specifically stated that he had received and reviewed the final judgment; and, pursuant to the terms of the order, respondent requested the release of the funds so that he could distribute them to Anthony and to Doreen's lawyer. In short, the evidence clearly and convincingly establishes that respondent (1) agreed that the funds would be divided equally between his client and Doreen, (2) received the judgment, (3) considered it an accurate representation of the settlement terms, and (4) understood and agreed that, upon receipt of the arbitration proceeds, he would distribute one half to Doreen.

Other considerations add strength to our conclusion that respondent knowingly took Doreen's money. First, respondent's claim that the amount of the check from Jobes, $14,000, suggested that Doreen must have received her half separately was inconsistent with his contention that the funds were a premarital asset that belonged solely to Anthony. Moreover, Jobes' transmittal letter clearly stated that the funds were "the entire net proceeds of the arbitration award" and described

Jobes' understanding that respondent and McKay would work out how the funds would be distributed between Anthony and Doreen. Respondent, thus, could not have misunderstood to whom the funds belonged.

We reject respondent's suggestion that his alleged failure to receive McKay's three letters seeking remittance of Doreen's money affected his obligation to turn over the money in any way. Respondent had an obligation to distribute the funds upon their receipt. His obligation did not depend on the receipt of repeated written requests from McKay for the release of the funds. Accordingly, respondent's claims that he believed that the arbitration award was a premarital asset, that he believed (given the size of the check) that Doreen must have received her money, and that he had not received a copy of the final judgment or McKay's letters are, in our view, disingenuous, at best.

We find, thus, ample support for our conclusion that respondent knowingly misused Doreen's funds. In Hollendonner, the Supreme Court noted the "[t]he parallel between escrow funds and client trust funds is obvious" and decreed that, in the future, attorneys who knowingly misused escrow funds would face the disbarment rule of In re Wilson, 81 N.J. 451 (1979). In re Hollendonner, supra, 102 N.J. at 28-29. Here, respondent held

half of the escrowed funds in trust for Doreen. Respondent did not turn them over to her or her lawyer, but instead knowingly used them for his own benefit.

Respondent repeatedly claimed that it would have made no sense for him to have knowingly misappropriated such a small amount. That the misappropriated funds are not sizable, however, is irrelevant to a finding of knowing misappropriation. See, e.g., In re Cassidy, 122 N.J. 1 (1990) (knowing misappropriation of $4962 in client funds); In re Epstein, 181 N.J. 305 (2004) (knowing misappropriation of $6800); In re LeBon, 177 N.J. 515 (2003) (knowing misappropriation of $5900 in law firm funds); In re Waltershied, 172 N.J. 97 (2002) (disbarment by consent for knowing misappropriation of $1900). In addition, the record shows that respondent's financial situation was quite precarious at the time that the funds were taken.

Like the special master, we reject respondent's bipolar disorder defense. The testimony of his expert simply does not sustain the conclusion that respondent even had the disorder at the time he took the money or, if he did, that it impaired him to the degree required to avoid the consequences of his misconduct.

In Jacob, supra, 95 N.J. at 13, 137-38, the Supreme Court considered the attorney's claim that a condition called thyrotoxicosis caused him to misappropriate client funds. The Court rejected the attorney's defense and made it clear that, in knowing misappropriation cases, disbarment is certain unless there has been a "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. Accord In re Tonzola, 162 N.J. 296, 304 (2000).

In Tonzola, the Supreme Court applied the Jacob standard in its analysis of whether the attorney's bipolar disorder should result in a sanction less than disbarment. Id. at 305. In determining that the attorney failed to meet the Jacob standard, the Court noted several deficiencies in the expert's opinion and the proofs. First, the expert acknowledged that the attorney "may have been aware that the funds misappropriated were client funds and that the utilization of those funds in the manner he did was unauthorized." Id. at 307. Second, the expert also acknowledged that, "if the measure of a person's sanity is the rudimentary ability to appreciate the nature of his or her actions and to be able to differentiate whether those actions

are right or wrong, then Mr. Tonzola was not 'insane' during the relevant times in question." Ibid. Third, the Court stated:

> Nor can we overlook the fact . . . that respondent was able to function properly and well in other settings and in respect of other client matters, despite his illnesses. Moreover, as noted, even respondent's expert has admitted that respondent may have been able to differentiate between right and wrong during the relevant time periods. Viewed within the context of the entire record, respondent's proofs are insufficient to satisfy the exacting standard of Jacob. We cannot conclude with confidence that respondent's mental condition influenced or motivated his criminal conduct to the point of excusing it.
>
> [Id. at 308.]

So, too, here. Respondent's proofs, in the form of Glass's testimony, are woefully insufficient to avoid a finding of purposeful conduct. First, Glass was not treating respondent between February and May 2001. In January 2001, which was just one month before Jobes sent the check to respondent, Glass asserted that respondent had "simplified and stabilized his personal life." According to Glass's report, respondent was in recovery and had not had a drink since June 1998. Moreover, respondent's mental status was good.

The juxtaposition of Glass's January 2001 report and respondent's claim that he was so impaired one month later as

not to be responsible for his actions is significant. Respondent's alleged mental condition seemingly depends on the status of his disciplinary matters at any given time. Thus, the January 2001 report was issued on the heels of our previous determination to suspend him for one year in another matter. In an effort to avoid that consequence, respondent sought a favorable report from Glass. Now, in the context of this proceeding, it is in respondent's interest to be impaired beyond the ability to function one month later when the conduct at issue occurred. Thus, in his effort to avoid the consequences of his latest transgression, respondent sought and obtained a different opinion from Glass.

There are several other problems with Glass's report. First, his opinion that respondent suffered from bipolar disorder during the time period in question appeared nowhere in any of his reports between 1998 and 2001. Second, Glass's opinion was not based upon any examination of respondent but, rather, 20/20 hindsight at a time when it best suited respondent to suffer from the disorder — during the ethics hearing. Moreover, at the time of the diagnosis, Glass had not treated respondent for a number of years.

Third, and most significant, is what Glass did not say. Glass did not say that respondent had suffered "a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In fact, Glass said nothing that could remotely lead to that conclusion. At best, he said only that respondent was impaired (by the alcohol abuse) and overwhelmed (by stress).

Glass could not say whether respondent did or did not know what he was doing at the time he took the money; he could not offer an opinion as to whether respondent was or was not able to function sufficiently during the time in question; and, in fact, he could not even rule out that respondent had fabricated his explanations of what had caused him not to turn over the money to McKay.

We also take note, as did the special master, that respondent did not assert the bipolar defense in his answer to the complaint.

In short, neither the facts developed at the hearing nor Glass's testimony constitute sufficient medical evidence to excuse conduct that was clearly volitional and, therefore, to justify a sanction less than disbarment.

We find also that respondent clearly violated RPC 3.4(c) and RPC 8.4(c). RPC 3.4(c) prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Respondent violated this rule twice: when he failed to comply with the final judgment, and again when he failed to comply with the order enforcing litigant's rights.

RPC 8.4(c) provides that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Here, as the special master found, the record does not establish by clear and convincing evidence that respondent fabricated the December 2000 bill to Anthony. However, the record clearly establishes that he made misrepresentations, on a repeated basis, when he (1) insisted that the arbitration proceeds were a premarital asset, (2) denied that he had received a copy of the final judgment, and (3) misled McKay into believing that the check was on its way. Obviously, his knowing misappropriation of escrow funds constituted dishonest conduct, a violation of RPC 8.4(c).

We, therefore, adopt the special master's conclusion that respondent committed all of the violations charged in the ethics

complaint, that is, RPC 1.15(a) and (b), the Hollendonner rule, RPC 3.4(c), and RPC 8.4(c).

For his knowing misappropriation of escrow funds, respondent must be disbarred. In re Wilson, supra, 81 N.J. at 455 n.1, 461; In re Hollendonner, supra, 102 N.J. at 26-27. In light of our recommendation, we need not consider what would be the appropriate discipline for the other ethics offenses.

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

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

Disciplinary Review Board
Louis Pashman, Esquire

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas J. Forkin
Docket No. DRB 05-274

Argued: November 17, 2005

Decided: December 21, 2005

Disposition: Disbar

Members	Disbar	Suspension	Admonition	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. DeCore
Chief Counsel