SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-047

IN THE MATTER OF

JOHN E. CALLAGHAN

AN ATTORNEY AT LAW

Decision

Argued: April 15, 1999

Decided: August 23, 1999

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics

Steven D. Altman appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). The amended complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with knowing misappropriation of client funds,

in violation of *RPC* 1.15(c) and *RPC* 8.4(c) (counts one, seven, eight and nine), conflict of interest, in violation of *RPC* 1.8(a) (count two), lack of diligence, in violation of *RPC* 1.3 (counts three, four and six), gross neglect and a pattern of neglect, in violation of *RPC* 1.1(a) and (b) (count four), and failure to comply with recordkeeping requirements, in violation of *RPC* 1.15(d) (count five).

Respondent was admitted to the New Jersey bar in 1985. He has no prior disciplinary history.

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Because respondent did not contest most of the evidence that the OAE presented, the facts are not substantially in dispute. There is no doubt that respondent used client funds for himself and other clients. The issue is whether he is guilty of knowing misappropriation. Also at issue is the extent to which respondent's bipolar condition should mitigate his misconduct.

This matter came to the OAE's attention after a random audit of respondent's books and records on December 5, 1995. Because it appeared that respondent had made unauthorized withdrawals from his attorney trust account and because he had not produced

all of the requested records, the OAE scheduled a demand audit for March 20, 1996. At the request of respondent's former counsel, that audit was delayed for more than one year, until April 17, 1997. During this time respondent's psychiatrist had been attempting to stabilize his condition with medication.

The Marcelo Matter

Respondent was retained to represent the Marcelo family in numerous legal matters after Rolando Marcelo apparently suffered a psychotic episode and killed his mother, one of his brothers and two neighbors and wounded several others. Respondent had been acquainted with the Marcelo family because his son and Ronald Marcelo, one of Rolando's three brothers, had been classmates and friends. Respondent successfully pursued insurance coverage for the civil lawsuits that had been filed as a result of Rolando's actions. Respondent eventually handled twelve separate matters on behalf of the Marcelo family, including a trust in which Rolando was the grantor and Ruel, Rolando's brother, was the trustee. Because Rolando had been found not guilty of the criminal charges by reason of insanity, he was eligible to receive a one-third share (along with the two surviving brothers) of the proceeds of a life insurance policy that had been issued to his mother. Rolando had been committed to Trenton Psychiatric Hospital. Because Ruel resided in Colorado and

wanted the trust to be administered locally, he authorized respondent to receive and disburse the trust's funds.

Respondent prepared a trust agreement dated November 21, 1990. On March 12, 1992 he deposited $19,630 into his attorney trust account.[1] Those funds represented Rolando's one-third share of the proceeds from his mother's life insurance policy. Respondent disbursed from the *Marcelo* trust $5,000 as fees and costs to himself, as follows:

$2,500	May 26, 1993
$1,000	August 5, 1993
$1,500	August 30, 1993

Respondent did not recall obtaining authorization from Ruel before disbursing the above fees.

In addition to the above fee and costs disbursements, on September 1, 1993 respondent issued a check from the *Marcelo* trust to Raritan Valley Community College to pay for his son's college tuition. The check, issued for an amount not to exceed $1,200, was negotiated for $464 and bore the notation "RE tuition. John E. Callaghan, Jr. Fall 1993." Respondent testified that, because he was owed a fee for his work in the various *Marcelo*

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[1] The presenter questioned the need for the existence of the trust account, pointing out that, in a January 22, 1992 letter to respondent, the psychiatrist supervising Rolando's treatment in the Forensic Psychiatric Hospital opined that Rolando was capable of managing his financial affairs. Respondent countered that both Rolando and Ruel had instructed him to place the insurance proceeds in his trust account.

matters and because he did not have sufficient funds in his personal checking account, he believed that he was entitled to draw his fees from the *Marcelo* funds.

On three occasions in 1994 respondent borrowed a total of $7,700 from the *Marcelo* trust account, as follows:

Amount	Date	Repaid	Amount Repaid	Memo Notation
$2,500	07/23/94	08/20/94	$2,550	None
$1,200	08/06/94	12/05/95	$6,000	"Auto loan"
$4,000	10/20/94	12/05/95		"Auto loan Gussis/Barbaris"

Respondent could not recall the reason for the July 23, 1994 loan. He testified, however, that he had borrowed $1,200 on August 6, 1994 because he needed a car and "I decided I could probably lend myself this money from that account against whatever fees from that account that [sic] were due to me." Respondent testified that he borrowed $4,000 on October 20, 1994 because he needed the funds to satisfy a judgment that had been entered against him. Indeed, on October 20, 1994, the same date that respondent borrowed $4,000, he issued a $4,215.72 business account check to pay for the judgment. Respondent admitted that this time he had not taken these funds as fees, as he had in 1993, because he had not yet prepared a bill and was not certain that he had additional fees coming to him. Respondent added that, if he would have discovered later that he was entitled to additional fees, he would

have changed the transactions from loans to fee disbursements. Respondent, thus, borrowed a total of $7,700 and repaid $8,550, explaining that the extra $850 represented interest on the loans.

It is undisputed that, before taking these funds, respondent had not received authorization from Ruel or Rolando, had not prepared any loan documents, had not obtained their written consent to the transactions and had not advised them to seek independent legal counsel. Respondent acknowledged that, although he had been in touch with Ruel during this time, he had not discussed these loans with him.

Respondent repaid the August and October 1994 loans on December 5, 1995, the day of the random audit. He contended that he had forgotten about the loans and had not remembered them again until he had seen the checks, while preparing for the audit. Respondent claimed that he then asked advice from a friend, also an attorney. Respondent stated that he had repaid the loans immediately, at his friend's suggestion.

On January 22, 1996, three years after the last service performed and approximately seven weeks after the December 5, 1995 random audit, respondent sent a bill to Ruel Marcelo for the work performed on the twelve *Marcelo* files. In his cover letter to Ruel, respondent announced that he was charging for 177.5 hours of legal services at $100 per hour

for a total fee of $17,750. After acknowledging receipt of $7,000[2] in fees, respondent stated the following:

> As we discussed there was what I thought was a loan to me of $5,200 in August and October of 1994 which I repaid with $6,000.00 in December 1995. This should have been treated as payment on account towards the $10,750.00 in unpaid legal fees. My understanding is that you have consented to the loan transaction or in the alternative that you approve the amounts as payments on earned legal fees.

Respondent enclosed with the fee statement to Ruel an $11,117.26 check, representing the balance of the *Marcelo* trust funds. Although respondent requested that Ruel pay the balance of $10,750 ($17,750 less $7,000 received as fees), Ruel paid no additional fees to respondent. Although Ruel did not testify at the ethics hearing, in a telephone conversation with the chief auditor of the OAE's Random Audit Program, Ruel indicated that respondent's bill of about $17,000 appeared accurate and reasonable. Respondent has taken no steps to collect the $10,750 fee balance.

OAE auditor Karen Hagerman testified that, at the April 17, 1997 demand audit, respondent provided a copy of the January 1996 bill. She mentioned that the number of hours in the bill added up to only 123. Hagerman remarked that, on November 4, 1998, the day of the DEC hearing, she received another bill from respondent, totaling 176 hours. Respondent explained that, although the bill had been printed on legal-size paper, the copy given at the

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[2] Even though respondent mentioned a $7,000 amount, it appears that he took only $5,000.

demand audit had been copied on letter-size paper and, thus, the bottom portion of each page had been omitted. According to Hagerman, both bills contained two entries for seven hours, on November 2, 1990, that she considered as duplicate. Furthermore, she observed that respondent billed for sixty hours on June 2, 1991.

For his part, respondent stated that his agreement with the Marcelo family was that he would provide legal services on all matters for a fee of $100 per hour. Although he testified that this agreement was reduced to writing, he did not produce the fee agreement. He contended that he worked on the various *Marcelo* matters without compensation for almost four years, from July 11, 1989 through May 26, 1993, when he took a fee of $2,500. He also claimed that he incurred some unreimbursed expenses. According to respondent, in May 1993 the insurance carriers had settled the claims filed by Rolando's victims; he believed that he was entitled to a fee at that time. Respondent testified that he did not recall discussions with Ruel when he took the $2,500 fee. Similarly, respondent acknowledged that he had not talked to Ruel or Rolando before taking additional fees of $2,500 in August 1993.

Respondent asserted that, although he had kept records of the work performed, he had not maintained time sheets or records of the number of hours spent on the various matters. According to respondent, the bill contained an erroneous date that Hagerman viewed as duplicate work. He explained that, on November 1 and November 2, 1990, he had attended Rolando's criminal trial, in which an attorney from the Office of the Public Defender had

represented Rolando. Respondent contended that he had mistakenly billed both trial dates for November 2, 1990.

With respect to the June 2, 1991 entry for sixty hours, respondent asserted that he had spent sixty hours preparing a malpractice action against Rolando's psychiatrist for prescribing medication that led to the Memorial Day tragedy.[3] Respondent explained that he had inadvertently listed all sixty hours for the same date. He, thus, maintained that the number of hours on the bill was accurate.

The Escheat Matters

On October 27, 1995 respondent allowed small amounts of client trust funds ($583.04), which he had retained in his attorney trust account for a long time, to escheat to the state. Respondent told OAE auditor Hagerman that he had reimbursed two of the three clients affected by the escheat, alleging that he had been unable to locate the third client. At the ethics hearing, respondent conceded that allowing clients' funds to remain in his trust account until they escheated to the state constituted neglect or lack of diligence. According to respondent, the matters involved real estate, a personal injury claim and a contractual dispute.

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[3] According to respondent, the malpractice action was dismissed after Rolando refused to answer interrogatories.

Recordkeeping Violations

In his answer to the formal complaint and through his testimony at the ethics hearing, respondent conceded that he had violated *RPC* 1.15(d) by failing to maintain a trust account in accordance with the Interest On Lawyers' Trust Account program ("IOLTA"), trust or business account receipts and disbursements journals, a running checkbook balance and individual client ledger cards. Moreover, respondent acknowledged that he had failed to perform trust account reconciliations.

The Martinez Matter

In 1985 respondent, a patent attorney, was employed by the Exxon Corporation ("Exxon"). He also maintained a small part-time practice. Elizabeth Garcia, an engineer at Exxon, asked him to look into the estate of her late aunt, Lucille Martinez. Martinez' sister, Portia Predmore, who was in her eighties and in poor health, retained respondent to administer the *Martinez* estate, of which she was the only heir. According to respondent, he understood that Predmore had retained him to perform legal, as well as administrative services. Respondent obtained letters appointing him administrator of the estate. Although he never discussed fees with Predmore, respondent expected that, if the estate were solvent, he would be paid a "reasonable fee" for his services.

The main asset of the estate was Martinez' residence in Middletown, New Jersey. According to respondent, the property was in poor condition and required massive cleanup

efforts. Respondent claimed that he had spent at least ten days cleaning out the property and that he had rented a dumpster at his expense to remove the debris.

On July 10, 1986 respondent sold the house to John and Diane Gribbin, taking back a $37,000 mortgage. Personnel in the nursing home where Predmore resided had explained to respondent that, if she were to receive the proceeds from the sale of the property in a lump sum, her Medicaid assistance would be terminated. Respondent, thus, determined to keep the estate administration open, giving Predmore a monthly allowance of $50.

After Predmore's death in November 1989, respondent should have satisfied a lien held by Medicaid and closed the estate. Instead, he kept the administration of the estate open. According to respondent, when he contacted the county board of social services for guidance about how to satisfy the Medicaid lien, he did not receive the required information and simply put the matter on the "back burner."

On various dates in 1992 and 1993 respondent paid himself from the estate account a total of $7,600 in fees. Respondent withdrew $2,000 on February 6, 1992 and $2,500 on May 25, 1992. The "memo" portion of both checks bore a notation that the payments constituted administrator's fees. Respondent withdrew an additional $3,100 in September 1993.

* * *

On February 8, 1993 respondent deposited $34,880.32 in the estate account representing the mortgage payoff received when the Gribbins refinanced the mortgage loan from the estate. More than five years later, $42,960.89 remained in the non-interest bearing estate account. Respondent finally contacted the Department of Human Services on August 31, 1998 and paid the $33,952.40 Medicaid lien on October 16, 1998, about two weeks before the ethics hearing.

Respondent conceded that he did not satisfy the Medicaid lien until 1998, nine years after Predmore's death. He also admitted that, after Predmore's death, he failed to negotiate twenty-two of the Gribbins' mortgage checks, totaling $7,742.58. Indeed, OAE auditor Hagerman noticed that these checks were still in respondent's file. Respondent's excuse was that he had become "grief-stricken" and depressed after Predmore's death and, therefore, could not bring himself to cash the checks. Respondent denied, however, that he had exhibited any gross neglect or a lack of diligence in the *Martinez* matter.

* * *

In September 1993, respondent used funds from the *Martinez* estate to pay an attorney for legal services performed in an unrelated matter. Specifically, on September 4, 1993 respondent disbursed a $2,000 check from the *Martinez* estate, which he then deposited in the *Marcelo* subaccount. Respondent then issued a check from his trust account to attorney

Paul Wurm, noting on the check the number of the *Marcelo* subaccount. Wurm testified that respondent represented a client named Sampao Chai Bong Sai, the owner of a gasoline station, in a suit about contaminated soil. Because respondent had recently accepted a job and could not appear in court, he asked Wurm to represent Chai Bong Sai at the trial.

Wurm asserted that, when he went to respondent's home to review the file, respondent gave him a $2,000 check as his fee for representing Chai Bong Sai. According to Wurm, when he asked respondent why the check had been drawn on respondent's trust account, respondent assured him that the funds were his.

As to why he would have paid Wurm with either the *Martinez* or the *Marcelo* funds, respondent contended that Wurm had expertise in medical malpractice cases and had reviewed draft medical malpractice complaints that respondent had prepared in the *Marcelo* matter. According to respondent, he believed that he could pay Wurm $2,000 from the *Marcelo* account, based on Wurm's services in the medical malpractice matter. Respondent explained that he did not contact the client for the fee because it was Labor Day weekend and he did not know if Chai Bong Sai would be available. When questioned by his attorney, respondent testified as follows about the payment to Wurm from the *Martinez* account:

> Q. What was the reason why you would have taken the money for Martinez and put it into Marcelo to pay this $2,000 when there was enough money in Marcelo to cover this check?
>
> A. Because if any way I was wrong in my decision, that he was entitled to be paid out of Marcelo for work on Marcelo, then the money for the Martinez

estate also represents fees that was [sic] owed that was done for Martinez. That was going to be the back up.

Q. So you just testified you thought you were owed money for Martinez, so you took what you thought was owed to you?

A. I took part of it.

Q. Part of it and put it in Marcelo?

A. Yes.

Q. Was there a reason why you just didn't take the $2,000 from Martinez that was owed to you as a fee and put it in your regular checking account and then pay him?

A. Well, one reason was I believed that Wurm was entitled to $2,000 for Marcelo and was entitled to be paid by a check drawn on Marcelo.

In turn, although Wurm denied having provided any legal services for *Marcelo*, he stated that respondent had discussed with him the possibility of filing a medical malpractice action in that matter. Wurm also denied having any expertise in medical malpractice cases.

* * *

In 1993 respondent made two loans from the *Martinez* account to an attorney named Michael Chasan. Chasan is the son of Leon Chasan, the chief patent counsel at Exxon. After representing Michael Chasan in litigation, respondent agreed to loan him $35,000, allegedly to be secured by a fee that Chasan stood to receive in the near future. On April 15, 1993

respondent disbursed $35,000 to Chasan from the *Martinez* account. Chasan repaid the loan plus $60 in interest, two weeks later.

On June 10, 1993 respondent lent Chasan an additional $12,800 from the *Martinez* account. The check bore the following notation: "Loan to M. Chasan, interest 8% per annum." Respondent claimed that this loan, too, was secured. Specifically, respondent testified, Chasan's former law firm had agreed to hold as security for the loan a fee due to Chasan in a matter. The firm, however, refused to honor its agreement to pay respondent. In addition, Chasan refused to repay the loan. Finally, on December 12, 1995, about two and one-half years after the loan, Chasan repaid $1,000 to the *Martinez* estate. Chasan's father, Leon, paid $9,000 in three installments of $3,000, on December 22, 1995, March 27, 1996 and June 25, 1996. A shortfall of $2,800 remained, however. Respondent explained to the OAE that, aware of the shortfall and of his failure to deposit many of the Gribbins' mortgage checks ($7,742.58), he deposited $6,000 of his own funds into the *Martinez* account to replenish the deficiency. Respondent did not explain how this $6,000 deposit could serve to reimburse the estate for the $7,742.58 mortgage payments and the $2,800 shortfall.

In his defense, respondent contended that, as the administrator of the estate, he had not been required to consult with anyone or to obtain anyone's consent before disbursing the estate funds.

* * *

Respondent also lent money from the *Martinez* estate to another client, P Squared, Incorporated ("P Squared"), a restaurant business. In 1987, when P Squared had bought the restaurant, the seller had taken back a mortgage. Because of a subsequent dispute, P Squared sent the mortgage payments to respondent, who, after depositing each check, would issue a trust account check to the seller. In July 1993 respondent received from P Squared the last mortgage payment of $3,867, deposited the check into his trust account and wrote a trust account check to the seller. When P Squared's check was returned for insufficient funds, respondent's trust account check to the seller was dishonored. Respondent then issued a check from the *Martinez* account to cover his trust account check. In essence, thus, respondent made a loan of $3,867 to P Squared from the *Martinez* funds. Five months later, on December 31, 1993, P Squared repaid the *Martinez* estate $4,020, including interest.

Respondent testified that, after he had received the mortgage check from P Squared, he had issued a trust account check to the seller/mortgagee without waiting for the funds to clear. Respondent stated that, because the owner of P Squared was out of the country, respondent had been unable to contact him to request a new check.

Respondent's Psychiatric Condition

In mitigation, respondent presented evidence that he suffered from bipolar disorder. By way of background, respondent stated that he had worked as a patent attorney, first for United States Steel, in Pittsburgh, from 1970 to 1977 and then for Exxon from 1977 until 1986, when his position was eliminated. In 1986 respondent opened a solo practice in Plainfield and then moved his office to his house about a year and one-half later, due to financial considerations and his wife's illness. Respondent's practice consisted primarily of municipal court *pro bono* cases, real estate closings and personal injury matters. At the time of the DEC hearing, although respondent was employed by the United States Army at Picatinny Arsenal, he had been on sick leave for the prior two and one-half weeks, subject to returning to work only with his psychiatrist's approval.

According to respondent, in 1980 he began suffering from panic attacks, for which he received treatment in 1980 and 1981. Also during this time, he received therapy for alcoholism. In 1986 the panic attacks returned. In 1988, when respondent encountered family problems and became very depressed, he began attending Alcoholics Anonymous meetings, which he continues to attend.

Dr. Arlene Sherer, respondent's treating psychiatrist, testified that she first met respondent on December 8, 1995, three days after the random audit. After several sessions with respondent, Dr. Sherer diagnosed his condition as bipolar, which she described as a

disorder with mood swings ranging from deep depression to mania. According to Dr. Sherer, respondent recounted a history of depression over the past twenty years. She noted that he "self-medicated with alcohol." Dr. Sherer explained that panic attacks are characterized by severe anxiety, heavy breathing, sweating, clammy palms, and sometimes headaches, dizziness and vertigo. She observed that respondent is "medication sensitive," meaning that many medications cause him to become drowsy. After trying different medications on respondent, Dr. Sherer settled on a regimen of Depakote, an antiseizure drug similar to Lithium, and Stelazine, a major tranquilizer often used as an antipsychotic. Dr. Sherer stated that respondent continues to take both medications. According to Dr. Sherer, respondent received bimonthly psychotherapy treatment from her between 1995 and September 1998, when she started seeing him weekly. Dr. Sherer testified that she had recommended that respondent take a six-month leave of absence from his job because his work was a "stressor."

Dr. Sherer conceded that, despite respondent's bipolar condition, he knew the difference between right and wrong, appreciated the nature and quality of his actions, was not psychotic or delusional, had not experienced hallucinations and was oriented in time, place, person and circumstances.

The OAE submitted a report by Dr. Daniel P. Greenfield, a psychiatrist who examined respondent at the OAE's request. Dr. Greenfield diagnosed respondent as suffering from bipolar disorder and panic disorder with agoraphobia. He opined that, despite these disorders,

respondent's basic cognitive ability to work as an employed attorney and to conduct a private law practice was not impaired, although his judgment and insight into his work were impaired to some extent. Dr. Greenfield concluded that

> [w]hatever impairment [respondent] may have experienced from these conditions did not so adversely affect his mental state, ability to plan in purposeful, sequential, complex and goal-directed behaviors, or otherwise impair his ability to engage in the complex behaviors and thought necessary to conduct a law practice and to work as a lawyer, both of which Mr. Callaghan did throughout the periods of time in question.

* * *

The DEC found that respondent knowingly misappropriated client trust funds in both the *Marcelo* and *Martinez* matters. With respect to the *Marcelo* matter, the DEC found that respondent misused the client's funds for personal purposes, such as unauthorized loans and payment of his son's college tuition. The DEC remarked that the loans had not been authorized by the grantor of the trust and had been made before respondent had prepared an accounting. The DEC, thus, found that respondent knowingly misappropriated the *Marcelo* funds, in violation of *RPC* 1.15(c) and *RPC* 8.4(c).

The DEC further found that respondent violated *RPC* 1.8(a) in the *Marcelo* matter, by failing to give notice to his client of his disbursement of fees and of his loans from the

Marcelo account. The DEC also found that respondent exhibited a lack of diligence, in violation of *RPC* 1.3, by permitting the *Marcelo* trust to remain dormant for more than three years before submitting a bill to the trustee.

With respect to the three matters in which respondent permitted his clients' funds to escheat to the state and the *Martinez* matter, in which he allowed $42,960.89 to remain dormant for seven years in a non-interest bearing account, the DEC found that respondent exhibited a pattern of neglect and a lack of diligence, contrary to *RPC* 1.1(b) and *RPC* 1.3, respectively. The DEC did not address the charged violation of gross neglect (*RPC* 1.1(a)).

In light of respondent's admission to the charged recordkeeping violations, the DEC found that he violated *RPC* 1.15(d).

As to the *Martinez* matter, the DEC found that respondent's failure to deposit the Gribbins' mortgage checks for twenty-two months and his failure to close out the estate in a timely fashion amounted to gross neglect and lack of diligence. The DEC observed that, when respondent disbursed $2,000 from the *Martinez* account to Paul Wurm, respondent had not yet prepared an accounting of the fees and costs to which respondent was entitled. Therefore, the DEC concluded, respondent could not have reasonably believed that he was entitled to take the $2,000 as fees. The DEC further determined that, by making unauthorized loans from the *Martinez* estate to Chasan and P Squared, respondent knowingly misappropriated client funds, in violation of *RPC* 1.5(c) and *RPC* 8.4(c).

Rejecting respondent's contention that his bipolar disorder mitigated his conduct, the DEC recommended disbarment.

* * *

Following a *de novo* review, the Board is satisfied by clear and convincing evidence that respondent knowingly misappropriated trust and escrow funds.

In the *Marcelo* matter, respondent treated escrow funds as his personal bank account, advancing fees and borrowing money for himself as he saw fit. Although respondent was retained in 1989, he did not calculate his fee or submit a bill to his client until 1996, three years after he had last performed any work in the matter and six weeks after the random audit. Yet, without knowing the amount of his fee, respondent disbursed $5,000 to himself as fees in 1993, paid his son's college tuition from the *Marcelo* account and borrowed an additional $7,700 in 1994. Respondent admitted that he had made those disbursements without his client's knowledge or consent. Respondent testified that, because he was not certain of the amount of his fees, he took the $7,700 as loans, reasoning that, if it turned out later that he was entitled to additional fees, he would have changed the transactions from loans to fee disbursements.

Although respondent admitted that he had disbursed fees and taken loans from the *Marcelo* account without authorization, he denied that his use of those funds constituted

knowing misappropriation. Respondent argued that, because he had a good-faith belief that he had an entitlement to fees in the *Marcelo* matter, he had no intent to steal or borrow client funds. However, while respondent's belief of entitlement, if reasonable, could save him from a finding of knowing misappropriation with respect to the disbursements as fees, *see In re Frost*, 156 *N.J.* 416 (1998) and *In re Rogers*, 126 *N.J.* 345 (1991), that argument does not apply to the loans to himself. Aware that he had not yet calculated his fee and uncertain of his entitlement to additional funds from Marcelo, respondent advanced loans to himself without his client's authorization. On September 1, 1993 he issued a check not to exceed $1,200 for his son's college tuition. The check was negotiated for $464. In 1994 respondent borrowed a total of $7,700 from the *Marcelo* account as follows: $2,500 on July 23, $1,200 on August 6 and $4,000 on October 20. Although respondent stated that he could not recall the purpose of the July loan, he testified that he borrowed money in August to buy a car and in October to pay a judgment against him. Respondent took the monies, labeled them as loans and later produced a bill – about seven weeks after the audit – ostensibly justifying the removal of the $7,700 not as loans, but as earned fees. Respondent argued that, even though at the time he took the funds he was not sure if he was borrowing money or receiving payment for earned fees, his current position is that the disbursement was, in fact, for fees. Yet, respondent repaid the loans on December 5, 1995, the day of the OAE audit, contending that he had forgotten about them until he reviewed his records in preparation for the audit.

Thus, as of December 5, 1995, respondent considered the August and October 1994 transactions to be loans, not fees.

Other violations in *Marcelo* were respondent's failure to calculate his fee and submit a bill in the *Marcelo* matter for more than three years after providing legal services, in violation of *RPC* 1.3.

Also, respondent was guilty of several recordkeeping violations, as he conceded, in violation of *RPC* 1.15(d).

There remains the *Martinez* matter. There, respondent issued a check for $2,000 to Paul Wurm. This transaction was peculiar. Allegedly believing that Wurm had earned a fee in the *Marcelo* matter, respondent issued a check from the *Martinez* account, deposited it into the *Marcelo* account and then paid Wurm $2,000 from the *Marcelo* account. Respondent offered two different explanations for this payment. First, he stated his belief that Wurm had earned the fee in *Marcelo* by reviewing the drafts of the medical malpractice complaint. However, respondent added, in the event that he was mistaken about Wurm's entitlement to the $2,000 fee for his work in *Marcelo*, then it should be found that the source for the $2,000 payment was respondent's own funds, represented by his administrator's fees in *Martinez*.[4] Wurm, in turn, testified that the Sampao Chai Bong Sai matter was the only case involving respondent in which he was owed a fee. According to Wurm, he appeared in court for

[4] That would mean that respondent received $9,600 ($7,600 plus $2,000) from an estate valued at approximately $50,000.

respondent, who had recently accepted a job and could not attend the trial. Wurm denied having any expertise in medical malpractice and having reviewed draft complaints in the *Marcelo* matter, disputing respondent's version of events. The evidence, thus, leaves no doubt that respondent's payment to Wurm of fees earned in the *Chai Bong Sai* matter with funds from the *Martinez* estate constituted the knowing misappropriation of client funds.

Respondent also made two loans from the *Martinez* account to attorney Michael Chasan, totaling $47,800. He also loaned $3,867 from the *Martinez* estate to another client, P Squared, Incorporated. Respondent did not dispute that he had lent these monies. His defense, however, was that he did not have to account to anyone prior to disbursing the estate's funds, because he was the administrator of the estate. Because the Board found that respondent knowingly misappropriated funds from the *Marcelo* trust by making unauthorized loans to himself and from the *Martinez* estate by paying fees to another attorney for an unrelated matter, the Board found it unnecessary to resolve the issue of whether respondent's loans in the *Martinez* matter amounted to knowing misappropriation. It is clear, however, that respondent exhibited gross neglect, a pattern of neglect and a lack of diligence in the *Martinez* matter, by failing to deposit twenty-two mortgage checks, by allowing the estate funds to remain in a non-interest bearing account for seven years and by failing to close the estate in a timely fashion. In the "*escheat*" matters, too, respondent violated those *RPC*s when he allowed trust funds to escheat to the state after they languished in his trust account for a long period of time.

Respondent presented evidence that he suffered from bipolar disorder during the relevant time of his misconduct. However, the proofs fell short of those required to excuse knowing misappropriation. In *In re Jacob*, 95 *N.J.* 132 (1984), the Court declared that, for an attorney to escape mandatory disbarment for knowing misappropriation, the attorney must show

> by competent medical proofs that [the attorney] 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]

The Court recently affirmed the continued viability of the *Jacob* standard in *In re Greenberg*,155 *N.J.* 138 (1998). Although the attorney in *Greenberg* admitted that he had knowingly misappropriated funds from his law firm, he claimed that his depressive disorder both excused and mitigated his misconduct, thereby sparing him from disbarment. The Court, however, determined that Greenberg had not met the *Jacob* standard:

> 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). Respondent relies on the testimony of two experts to support his claim that he was 'out of touch with reality' and had no conscious awareness of his actions when he misappropriated firm funds. . . . Neither expert goes so far as to claim that respondent was out of touch with reality or, alternatively, that he did not know what he was doing when he committed multiple acts of misappropriation . . . . 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.
> [*Id.* at 156-157]

Here, even respondent's treating psychiatrist, Dr. Sherer, testified that respondent knew the difference between right and wrong, appreciated the nature and quality of his actions, was not psychotic or delusional, had not experienced hallucinations and was oriented in time, place, person and circumstances. Moreover, Dr. Greenfield's report indicated that, although respondent's judgment and insight into his work were impaired to a certain extent, his disorder did not impair his ability to engage in the behavior and thoughts necessary to practice law.

The unfortunate picture that emerges from this record is one of respondent's possible unawareness that borrowing money from clients without their authorization is prohibited and, moreover, invariably met with disbarment under *In re Wilson*, 81 *N.J.* 451 (1979). Respondent presents a sympathetic figure. He has practiced law in New Jersey since 1985 and in other jurisdictions since 1970, with no prior disciplinary history. In addition, respondent suffers from bipolar disorder. Nevertheless, ignorance of the law is no excuse. *In re Eisenberg*, 75 *N.J.* 454 (1978).

In summary, the evidence clearly and convincingly established that respondent knowingly misappropriated trust funds. Respondent, therefore, must be disbarred. In *In re Wilson, supra,* 81 *N.J.* 451 (1979), the Court announced the rule that knowing misappropriation of client funds will, almost invariably, result in disbarment. The Court placed the highest priority on the maintenance of the public's confidence in the Court and in the bar, such that "mitigating factors will rarely override the requirement of disbarment."

Id. at 461. Although the use of such terms as "almost invariable" and "rarely override" might raise the possibility of a departure from the automatic disbarment rule, since 1979 the *Wilson* rule has been applied without exception. Every attorney found guilty of knowing misappropriation of client funds has been disbarred, even where the funds were "borrowed" for compelling reasons. In *In re Noonan*, 102 *N.J.* 157 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' - all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since *Wilson*, it has been invariable. [Footnote omitted].
>
> [*In re Noonan, supra,* 102 *N.J.* at 159-160]

Under *Noonan*, thus, neither intent to steal or defraud nor dishonesty are required. So long as the lawyer knows that the funds are not his or hers and knows that the client has not consented to the taking, the absence of evil motives, the lack of intent to permanently keep the monies, the good use to which the funds may be put, the lawyer's prior unblemished

character and, moreover, the circumstances or pressures impelling the lawyer are all irrelevant. All that is needed to mandate disbarment is proof that the lawyer took the funds knowing that they were not his or hers and knowing that the taking was unauthorized. No amount of mitigation will be sufficient to excuse misappropriation that was knowing and volitional. Thus, it is of no consequence that, here, respondent may not have intended to permanently deprive his clients of their funds. It is enough that respondent used their money without their consent, knowing that he had no authority to do so. *In re Wilson*, *supra*, 81 *N.J.* 451 (1979); *In re Noonan*, *supra*, 102 *N.J.* 157 (1986). See *also In re Blumenstyk*, 152 *N.J.* 158 (1997); *In re Freimark*, 152 *N.J.* 45 (1997); *In re Warhaftig*, 106 *N.J.* 529 (1987); *In re Lennan*, 102 *N.J.* 518 (1986).

For his knowing misappropriation of escrow and client funds, respondent must be disbarred. The Board unanimously so recommends to the Court. One member did not participate.

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

Dated: 8/23/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board