SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-010
District Docket No. XIV-2013-0035E

IN THE MATTER OF	
JAMES P. MADDEN	
AN ATTORNEY AT LAW	

Decision

Decided: September 30, 2016

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

This matter was before us on a certification of default, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-4(f). The eight-count complaint charged respondent with violations of RPC 1.4(b) (failure to communicate with a client); RPC 1.8(a) (conflict of interest – improper business transaction with a client); RPC 1.15(a) (failure to safeguard funds and knowing misappropriation of funds) and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985); RPC 1.15(b) (failure to promptly disburse funds to a client); RPC 1.15(d) and R. 1:21-6 (recordkeeping violations); RPC 8.1(a) (false statements to a disciplinary authority); RPC 8.4(c)

(conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

For the reasons set forth below, we recommend respondent's disbarment.

Respondent was admitted to the New Jersey bar in 1990. At the relevant time, he maintained a law office in Kearny, New Jersey.

Respondent has no history of discipline. However, he has been temporarily suspended since May 12, 2015, for failure to comply with the Court's Order directing him to cooperate with the OAE's investigation. In re Madden, 221 N.J. 437 (2015).

Service of process was proper in this matter. On September 3, 2015, the OAE sent a copy of the complaint by regular and certified mail to respondent's last known home address listed in the attorney registration records. The certified mail was returned marked "Return to Sender – Unclaimed." The regular mail was not returned.

By letter dated September 18, 2015, directed to the Honorable Peter F. Bariso, Jr., Assignment Judge, Superior Court of New Jersey, Hudson County, respondent requested the assignment of counsel pursuant to R. 1:20-4(g)(2) due to his indigency. By letter dated September 21, 2015, Judge Bariso requested respondent's financial information.

On October 1, 2015, by letter sent to respondent's home address by regular and certified mail, as well as by e-mail, the OAE pointed out that his application for assignment of counsel was deficient, and that, consistent with their September 28, 2015 telephone conversation, he had until October 16, 2015 to perfect his motion for counsel. The certified mail was returned marked "Return to Sender – Unclaimed." The regular mail was not returned.

In a letter dated November 16, 2015 to Judge Bariso, with a copy to respondent (sent by e-mail, regular, and certified mail) the OAE objected to respondent's motion for the appointment of counsel based on his failure to supply financial records. The certified mail receipt showed delivery of the letter. The regular mail was not returned. On November 17, 2015, Judge Bariso denied respondent's request for the appointment of counsel.

On November 24, 2015, by e-mail, regular, and certified mail sent to respondent's home address, the OAE informed him that an answer to the ethics complaint was due by December 8, 2015. The regular mail was not returned. The certified mail was returned marked "Return to Sender."

Respondent did not file an answer. Therefore, on December 8, 2015, by e-mail and regular mail sent to respondent's home address, the OAE informed respondent that, if he did not file an answer within five days of the letter, the allegations of the

complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b).

As of the date of the certification of the record, December 24, 2015, respondent had not filed an answer to the complaint.

According to the complaint, respondent maintained an attorney trust account at Kearny Federal Savings Bank (Kearny). He maintained a business account at Bank of America N.A. until February 2012, when the bank "forced the closing of that account." Thereafter, on March 12, 2014, respondent opened a business account at Kearny (#2933).

On January 24, 2013, Kearny notified the OAE of a $96.63 overdraft in respondent's trust account following three consecutive $36 electronic charges from UNI Information Inc. (UNI). UNI is a corporate entity located in California that provides adult entertainment in the form of "phone sex talk." Kearny honored the charges, but assessed an insufficient funds fee of $105 for the three overdraft charges, which increased the overdraft to $201.63.

On January 28, 2013, the OAE requested that respondent provide a written, documented explanation for the overdraft within ten days. After having been granted two extensions, respondent replied, on March 11, 2013, that the overdraft was caused by his

use of the trust account to pay for billed telephone calls charged by UNI. From April 12, 2010 to February 2013, respondent disbursed approximately $14,801 from his trust account to UNI for the use of its services.

According to respondent, he was charging the UNI calls directly to his trust account because he had personal funds in the account, at that time, and did not have a business account, but was in the process "of reestablishing one as soon as possible." He added that he began authorizing UNI charges to his trust account in April 2012. UNI charged the following rates: $18 for fifteen minutes; $36 for thirty minutes; $54 for forty-five minutes; and $80 for seventy-five minutes. Respondent maintained that he would never know when the UNI charges would "hit" his account. He stopped using the trust account for the UNI charges after he received the OAE's January 28, 2013 letter.

In a March 11, 2013 letter to the OAE, respondent explained that his mother had been diagnosed with cancer in March 2011. As an only child, with little other family, he moved in with her and became her sole caregiver, driving her to medical appointments, radiation and chemotherapy treatments, and dealing with the attendant paperwork and medical personnel. Eventually, his mother's condition deteriorated to the point that she required hospice care. Approximately sixteen months after her diagnosis,

respondent's mother passed away, in June 2012. Her death had a devastating effect on him. He was not married, had no girlfriend, and no immediate family left after his mother's death.

Respondent sought treatment for his depression, which predated his mother's passing. After her death, he had "little or no motivation" to go into his office and suffered from numerous panic attacks, insomnia, and intrusive thoughts about his mother. Respondent added further that he had engaged in compulsive gambling and binge drinking but realized that it was not the way to address his pain.

Respondent's letter to the OAE added that he intended to follow his doctor's recommendation to attend inpatient treatment for the issues set forth in his letter. He also included a February 27, 2013 letter from his doctor, Stephen C. Garbarini, Psy.D. According to the doctor, respondent has been "involved in episodic psychotherapy" since 2011. The doctor maintained that respondent presented with major depression, binge alcohol abuse, and pathological gambling. He added that the treatment of those problems was "significantly impacted by the death of his mother in the summer of 2012 and the protracted and complicated grief reaction that has resulted." He recommended that respondent admit himself into an inpatient treatment program.

We now turn to the specific allegations of the complaint.

Count One – The Bishop and McArdle Matter

On December 4, 2008, Britni Bishop and Jillian McArdle retained respondent to pursue a workplace discrimination and/or sexual harassment/hostile work environment matter (Bishop and McArdle v. The Melting Pot, et al.). On February 20, 2009, respondent filed a complaint on their behalf in Superior Court, Middlesex County. In October 2010, respondent settled the plaintiffs' lawsuit against the Melting Pot and various individuals, including Kathleen Garmise. Hartford, the Melting Pot's insurer, paid $60,000 of its share and Garmise agreed to pay $5,000 in monthly $100 installments. Presumably, respondent deposited the $60,000 settlement proceeds into his trust account. Each plaintiff was to receive a net amount of $21,104.17. Respondent took his twenty-five percent fee of the $65,000 settlement from the $60,000 paid by Hartford. He withdrew his fee over time, thereby commingling his funds with his client funds.

Garmise failed to timely make the monthly payments. Therefore, on June 26, 2011,[1] respondent wrote to her attorney seeking payment of the installments, to no avail. Afterwards, on January 18, 2012, respondent sent a settlement enforcement letter directly to Garmise.

[1] The complaint mistakenly recorded the date as June 26, 2012.

On January 23, 2012, Garmise made the first $100 installment payment, which respondent deposited into his trust account on February 7, 2012. Because respondent had already taken his entire contingent fee, he was not entitled to any portion of the deposit. Bishop and McArdle each should have received $50 from Garmise's check. Instead of disbursing the funds to his clients, on March 12, 2012, respondent disbursed check #1116 for $100 to himself. Neither Bishop nor McArdle authorized respondent to use their settlement for any purpose. After the check cleared, respondent's trust account balance was only $0.67. Respondent, thus, invaded Bishop's and McArdle's funds.

On March 21, 2012, respondent deposited the second $100 Garmise installment into his trust account, increasing the balance to $ 100.67. Once again, respondent invaded Bishop's and McArdle's funds, without their authorization, when, on March 27, 2012, he issued to himself a $100 check and cashed it the same day, again leaving a $0.67 balance in his trust account.

On March 29, 2012, respondent replenished Bishop's and McArdle's funds by depositing a $200 check from his mother into his trust account, bringing the balance up to $200.67. Rather than distributing the funds to Bishop and McArdle, and without their authorization, he wrote three checks: two on April 3, 2012 – one payable to cash for $100, the other payable to Graham's Tavern for

$60; and the third check, on April 5, 2012, payable to himself, leaving a trust account balance of $5.57.

On April 11, 2012, respondent deposited $155 of personal funds into his trust account bringing the balance to $160.67. On April 12, 2012, a $54 trust account debit from UNI again invaded Bishop's and McArdle's funds, leaving a balance of $106.67.

On April 16, 2012, respondent deposited $230 of personal funds into his trust account. The deposit brought the trust account balance up to $336.67. Two hundred dollars of that amount represented Bishop's and McArdle's funds. On April 12, 13, and 18, 2012, respondent wrote trust account checks, each for $75, to Graham's Tavern. Respondent informed the OAE that the bartender at Graham's Tavern cashed his checks to enable him to purchase alcohol.

Respondent identified himself as an alcoholic, who engages in episodes of binge drinking, and as a compulsive gambler, limited to horse racing and simulcast events of other tracks at the Meadowlands Race Track (Meadowlands). On April 26, 2012, respondent wrote a $350 check to Stuart Berman at the Meadowlands. Berman cashed the check to enable respondent to place bets.

From April 11 to April 30, 2012, respondent's trust account transactions routinely invaded Bishop's and McArdle's funds.

On July 2, 2012, respondent issued a $250 trust account check to McArdle with the notation on the memo line "Melting Pot/Garmise 1st 5 installments." At the time, "he was not safeguarding sufficient funds received from Garmise to cover the check." Instead, he used a combination of personal funds and funds received in connection with an unrelated matter involving client Sandra Broad to cover the check to McArdle.[2]

Thereafter, on October 12, 2012, respondent deposited $300 that he received from Garmise and was to disburse equally to Bishop and McArdle, in accordance with the settlement agreement. Respondent, however, failed to disburse the funds to them.

Also on October 12, 2012, respondent commingled in his trust account a $13,147.45 IRA distribution and client funds.

From October 12 to October 24, 2012, respondent's trust account transactions routinely invaded the $300 he was required to safeguard and distribute to Bishop and McArdle. He replenished the trust account with personal funds. On November 14, 2012, he deposited a $10,000 IRA distribution from his late mother's account. However, by November 19, 2012, he had again invaded the $300 he was obligated to disburse to Bishop and McArdle. On November 20, 2012, respondent took an $8,000 IRA distribution from

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[2] That matter is discussed in connection with count three below.

his late mother's account, which he deposited into the trust account.

During a recorded OAE interview, respondent stated that he had gambled away over $100,000 of his "[late mother's] inheritance," thereby also gambling funds he was required to hold for Bishop and McArdle. He also used their funds for the UNI calls.

Respondent's trust account records for January 1 to December 31, 2012 show that he disbursed only $250 to McArdle against the $600 he received from Garmise and that, during the same period, he had not disbursed any funds to Bishop.

On a number of occasions, Bishop and McArdle tried to telephone respondent about the status of the Garmise settlement, to no avail. He neither returned their calls nor kept them adequately informed about his receipt of the Garmise settlement funds.

After the OAE docketed its investigation, but prior to giving respondent notice of the issue with Bishop's and McArdle's funds, respondent issued checks to them for $550 and $300, respectively. Respondent funded the payments with monies from client William Taylor (See Count Four).

The complaint alleged that respondent knowingly misappropriated Bishop's and McArdle's funds for personal

purposes, including to purchase alcohol and to engage in phone sex and gambling. Respondent knew that his use of trust account funds for these purposes would invade McArdle's and Bishop's funds.

Count Two – The Harkes Matter

Francine Harkes retained respondent to pursue a breach of contract/wrongful termination case against her employer, Hanger Headquarters/The Accessory Company or TAC (Hanger). In early 2011, respondent settled the matter for $50,000, to be paid in five equal installments. Respondent agreed to reduce his fee from one-third to one-fifth of the settlement. From February to June 2011, Hanger paid the five installments. Respondent knowingly misappropriated the fourth and fifth installments.

Between February 14 and April 4, 2011, respondent received the first three $10,000 installment payments, deposited the funds into his trust account, and disbursed the appropriate amounts from each installment - $2,000 to himself and $8,000 to Harkes.

On May 10, 2011, when respondent received the fourth $10,000 installment, his trust account balance was only $5.67. On May 11, 2011, he issued a $2,000 trust account check to himself, with a reference in the memo line "Harkes v. TAC, et al Atty's Fees 4th installment." On May 12, 2011, he issued another $2,000 trust account check to himself, referencing no client matter on the

check. This check invaded Harkes' portion ($8,000) of the installment payment and left a $6,005.67 balance in his trust account. Harkes did not authorize respondent to issue the $2,000 check to himself against her portion of the installment.

On May 13, 2011, respondent issued a trust account check for $1,000 to himself, which further invaded Harkes' funds, leaving a trust account balance of $5,005.67. Harkes did not authorize respondent to issue the check against her installment.

On May 18, 2011, respondent deposited $2,500 of personal funds into his trust account, which brought the balance up to $7,505.67. The account was still short $494.33 of the $8,000 he should have been holding for Harkes. On May 19, 2011, respondent issued an $800 trust account check to himself, referencing no client matter on the memo line. Harkes did not authorize this disbursement from her funds, which reduced respondent's trust account balance to $6,705.67. On May 20, 2011, respondent issued another $200 trust account check to himself, again, not referencing any client matter. The disbursement reduced respondent's trust account balance to $6,505.67. Harkes, likewise, did not authorize this disbursement.

On May 21, 2011, respondent received a $5,000 fee from client John Cistaro, which he deposited into his trust account, bringing

its balance to $11,505.67.[3] He issued five checks, which included two $1,200 disbursements to himself, a $1,000 and a $100 disbursement to himself, and an $8,000 disbursement (check #1080) to Harkes, representing her fourth settlement installment payment. Respondent used the fees from Cistaro, in part, to fund the $8,000 disbursement to Harkes. After the five disbursements, on May 31, 2011, respondent's trust account balance was $5.67, which continued to June 1, 2011.

On June 13, 2011, respondent received the fifth and final $10,000 installment, which he deposited into his trust account. On June 13, 2011, he issued a $2,000 check to himself, representing the twenty percent portion of his fee for the last installment. On June 16, 2011, without Harkes' authorization, respondent issued a $1,600 check to himself, with a blank memo line. That disbursement invaded Harkes' funds and resulted in a trust account balance of $6,405.67 - $1,594.33 less than respondent should have been holding for Harkes. The following day, on June 17, 2011, respondent deposited $1,600 of personal funds into his trust account. On June 20, 2011, he issued $1,000 to himself, leaving the memo portion of the check blank. Respondent, again, invaded Harkes' funds without receiving her authorization to do so.

[3] The complaint listed the balance as $10,305.67.

Respondent's trust account balance was only $7,005.67. On June 24, 2011, respondent deposited $1,000 into the trust account. On June 24, 2011, respondent issued an $8,000 check to Harkes, representing payment of the fifth and final settlement installment.

Respondent knew that payments from his trust account for the purchase of alcohol, phone sex, gambling, and other personal expenses would invade Harkes' funds. He, therefore, failed to safeguard and knowingly misappropriated Harkes' funds, in violation of RPC 1.15(a) and the principles of In re Wilson and In re Hollendonner, and failed to promptly disburse funds belonging to Harkes, in violation of RPC 1.15(b).

Count Three – The Broad Matter

Respondent represented Sandra Broad in an employment litigation matter against the North Bergen Board of Education. Prior to June 28, 2012, respondent settled the matter for $17,500.

On June 27, 2012, respondent's trust account balance was $7.08. On June 28, 2012, he received $10,265, representing a portion of the Broad settlement. He received the remainder of the settlement, $7,235, on July 16, 2012. Respondent was entitled to one-third of the $17,500 settlement, approximately $5,833.

From June 28 to July 16, 2012, respondent issued eight trust account checks, totaling $6,055, from the $10,265 he received for Broad. Seven of the disbursements were to himself; one disbursement, on July 2, 2012, in the amount of $250, was to McArdle in connection with the Bishop/McArdle matter. Respondent, thus, disbursed more than the amount of the fees to which he was entitled from the Broad settlement. Broad did not authorize respondent's use of her settlement funds.

Respondent knew that payments for the purchase of alcohol, phone sex, gambling, and other personal expenses would invade funds being held for Broad. He, thus, failed to safeguard and knowingly misappropriated her funds, in violation of RPC 1.15(a) and the principles of In re Wilson and In re Hollendonner, and failed to promptly disburse Broad's funds, in violation of RPC 1.15(b).

Count Four – The Taylor Matter

Respondent represented William Taylor, a disabled United States Armed Forces veteran in several civil matters, including a Jersey City tax matter. The tax matter settled, resulting in the issuance of a check dated January 25, 2013 for $18,054.67, payable to the "Trust account of James Madden, Esq. for Taylor." Respondent was entitled to a $3,500 "flat fee" from the

settlement. On January 28, 2013, he deposited the check into his trust account, which, at the time, had a $60.37 balance.

From January 28 to February 12, 2013, respondent wrote seven checks to himself totaling $6,860; a February 6, 2013 check to Britni Bishop for $550; a February 6, 2013 check to Jillian McArdle for $300; and a February 12, 2013, $9,000 check to William Taylor. During the same period, he authorized twenty direct check disbursements to UNI totaling approximately $1,326.36.

As of February 12, 2013, respondent did not have sufficient amounts in his trust account to disburse all of the funds he owed Taylor.

"Due to the prior use of the funds for personal purposes Respondent was required to seek a loan from Taylor to justify disbursing less than the full proceeds of the settlement." He informed Taylor that he had already used Taylor's portion of the settlement for his own purposes. He, thus, required a loan from Taylor for the $5,554.67 he had already taken.

On February 12, 2013, Taylor purportedly "lent" respondent $5,554.67, which was for respondent's prior unauthorized use of Taylor's funds. The source of the loan was the Jersey City tax settlement. Respondent provided the OAE with a two-line promissory note for the Taylor loan, which stated simply, "On February 12, 2013, William Taylor lent the sum of $5,554.67 to James P. Madden.

The entire sum is to be repaid no later than March 3, 2013." Only respondent's signature appeared on the note.

According to the complaint, respondent repaid Taylor "outside" of the trust account. Respondent was aware of the OAE investigation at the time of the loan and, thus, offered the promissory note to "cover-up" his earlier knowing misappropriation of Taylor's funds.

Respondent also engaged in a conflict of interest by requesting the loan from Taylor without advising him of the desirability of seeking the advice of independent counsel.

Respondent failed to safeguard Taylor's funds by disbursing them prior to the effective date of the promissory note. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by "attempting to remedy an existing knowing misappropriation with a loan from the client and falsely offering to the OAE the loan as authorization for the invasion of client funds."

Respondent knew that payments for the purchase of alcohol, phone sex, gambling, repayment of other clients, and other personal expenses would invade Taylor's funds.

This count charged respondent with knowing misappropriation; failure to safeguard client funds; failure to promptly deliver funds to a client; improper business transaction with a client;

conduct involving dishonesty, fraud, deceit, or misrepresentation; and false statements to the OAE.

Count Five – The Cistaro Matter

Respondent represented John Cistaro in a civil matter. He sought and received a $2,000 loan from Cistaro, which was memorialized by a promissory note. The note stated, "On December 26, 2012, John Cistaro lent the sum of $2,000.00 (Two thousand dollars and no cents) to James P. Madden residing at ------ Kearny, New Jersey. The entire sum is to be repaid no later than February 28, 2013." Respondent repaid the loan "outside" of the trust account.

The complaint charged that respondent engaged in a conflict of interest by requesting a loan from a client without advising the client of the desirability of seeking the advice of independent counsel. The complaint, thus, charged respondent with having violated RPC 1.8(a).

Count Six – Commingling Personal and Client Funds

Respondent earned contingent fees from various civil lawsuits, which he failed to timely withdraw from his trust account for deposit into a business account, because he did not maintain a business account. He withdrew funds from his trust

account "on an as needed basis over a period of time." Respondent also deposited funds from his personal accounts into the trust account, thereby commingling personal and client funds. In so doing, respondent used his trust account for personal, business, and trust account purposes.

The complaint charged respondent with violating RPC 1.15(a) for commingling personal and client funds.

Count Seven – Failure to Cooperate and Failure to Abide by a Court Order

Over more than a two-year period, respondent failed to fully comply with the OAE's requests for documentation and failed to comply with the Court's Orders.

On January 28, 2013, the OAE sent a letter to respondent, requesting a written explanation and documentation for the overdraft in his trust account within ten days of his receipt of the letter. Respondent failed to reply within the allotted time. Respondent finally provided a written documented explanation of the overdraft on March 11, 2013, apologizing for his untimely response, noting that the OAE had given him two extensions to reply.

By letter dated April 11, 2013, the OAE informed respondent that it intended to schedule his interview. In an April 16, 2013

letter, respondent's colleague informed the OAE that respondent was "in a medical facility until at least May 1, 2013."

Thereafter, by letter dated May 17, 2013, the OAE requested a specific date when respondent would be available for an interview. Receiving no reply, on July 16, 2013, the OAE scheduled a demand audit for July 23, 2013, and requested the production of, among other R. 1:21-6 documentation, three-way reconciliations for the period from January 1, 2012 to the present. On July 19, 2013, respondent requested an adjournment of the audit. The OAE granted the request, rescheduling it to August 15, 2013 and then granted another adjournment, rescheduling the demand audit to August 28, 2013.

Although the audit proceeded, respondent failed to produce various records. The parties, thus, agreed that respondent would produce the necessary documents no later than October 4, 2013. The OAE provided respondent with a booklet to assist him to produce the required records.

Respondent failed to produce the documents within the agreed upon time but, instead, on October 18, 2013 requested an extension, which the OAE granted to October 25, 2013, the date of the continuation of the demand audit.

On October 22, 2013, respondent provided: (a) a September 2013 trust account bank statement; (b) a three-paragraph letter

from Dr. Elizabeth Varas (respondent's psychiatrist); and (c) some documents from the Broad and Bishop/McArdle files. Because respondent failed to provide documentation previously requested, the OAE scheduled another continuation of the demand audit for November 15, 2013, and, again, requested various documents. It was the OAE's fourth demand for the production of R. 1:21-6 records.

Without providing the OAE an explanation, respondent neither appeared at the audit nor provided the OAE with the requested documentation.

Thereafter, in a November 17, 2013 fax, respondent stated that he would submit the remaining documents by November 22, 2013, but failed to do so. The OAE, subsequently, granted respondent two additional extensions to provide the documentation. The last extension was to January 10, 2014. Respondent failed to produce the documentation and failed to request another extension.

On February 10, 2014, the OAE requested specific client files and documentation by no later than February 21, 2014. Respondent requested and was given two additional extensions to provide the information. On March 14, 2014, respondent submitted some, but not all of the requested documentation. On that same day, he requested and was given yet another extension to April 4, 2014, but again failed to provide the outstanding information. The OAE, thus,

scheduled an April 21, 2014 demand audit at respondent's office. Respondent, nevertheless, failed to produce the R. 1:21-6 records.

On May 8, 2014, the OAE made its fifth demand for the production of R. 1:21-6 records and informed respondent that he had forty-five days to produce the required documentation or it would petition the Court for his immediate temporary suspension. On June 16, 2014, the OAE sent respondent a letter reiterating that the required documents were due on June 23, 2014, and cautioning that, if he failed to provide the documentation, the OAE would petition the Court for his immediate temporary suspension. On June 20, 2014, the OAE denied respondent's June 19, 2014 request for another extension. Respondent failed to provide the records.

On September 2, 2014, the OAE filed a petition with the Court seeking respondent's immediate temporary suspension. On October 1, 2014, the Court ordered respondent to comply with the OAE's outstanding requests for reconciliations and other documents, within ninety days. Because respondent failed to comply with the Order, on January 13, 2015, the OAE filed a certification with the Court. On January 30, 2015, the Court ordered respondent to "provide . . . all outstanding account reconciliations and other documents" within sixty days of the filing date of the Order. Although the OAE sent respondent a letter reminding him that the

records were due by April 1, 2015, respondent failed to provide them. Since the OAE's first request for R. 1:20-6 records, in the two years that followed, respondent "failed to produce a single ledger card, monthly reconciliations, or trust journal."

In addition to his failure to produce his financial records, respondent failed to comply with the "non-financial aspects" of the Court's Order – to submit a report of his psychological treatment plan, proof of attendance at Alcoholics Anonymous meetings, or other medical documentation.

On May 12, 2015, the Court temporarily suspended respondent and ordered him to file an affidavit of compliance in accordance with R. 1:20-20, within thirty days of the Order. Respondent failed to file the affidavit. On July 9, 2015, the OAE gave respondent until July 21, 2015 to file the required affidavit. As of the date of the complaint, August 21, 2015, respondent had not filed the affidavit.

The complaint, thus, charged respondent with violations of RPC 8.1(b), based on his failure to cooperate with the OAE's lawful demands for information over a two-year period, and RPC 8.4(d), for failing to comply with the Court's Orders and failing to file the R. 1:20-20 affidavit.

Count Eight – Recordkeeping Improprieties

The OAE's multiple demand audits revealed that, other than trust account statements, respondent did not maintain the following financial records required by R. 1:21-6: (1) a trust receipts journal; (2) a trust disbursements journal; (3) client ledger cards; (4) a client ledger card that identified attorney funds for bank charges; (5) monthly three-way reconciliations; (6) proper written authorization for electronic transfers; (7) a business account; (8) a business receipts journal; and (9) a business disbursements journal. Respondent also executed prohibited cash withdrawals from the trust account and maintained overdraft protection on that account.

The complaint charged respondent with having violated RPC 1.15(d) and R. 1:21-6 for failing to maintain appropriate attorney trust and business account records.

* * *

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

The alleged facts and documentation clearly and convincingly establish the charges in the complaint, the most serious of which

is the knowing misappropriation of client funds. The complaint noted that respondent used his trust account not only as a trust account but also as a business and personal account. He commingled fees and other personal funds with client funds in that account. He then removed his fees "on an as needed basis." However, when he removed funds from the trust account for personal uses he paid no heed to whether he was removing his fees, personal funds, or client funds. In the process, respondent misappropriated client funds.

The complaint clearly and convincingly demonstrates that respondent continuously invaded client funds to support his alcohol, gambling, and phone sex proclivities. After he invaded client funds, he supplemented one client's funds with either personal funds or engaged in "lapping" to satisfy the amounts he owed his clients. In other words, he used funds from one client to cover the amounts he owed another client. There is no question that respondent knew he was invading other client funds. This was no more evident than when, after he used Taylor's funds to repay Bishop and McArdle, he purportedly obtained a loan from Taylor, to justify the shortage in his trust account to the OAE.

Although respondent's alcoholism, his compulsive gambling, and his depression, exacerbated by his mother's illness and ultimate death evoke a sense of compassion, those circumstances do

not and cannot excuse his knowing misappropriation of client funds. The Court consistently has rejected alcoholism as a defense to knowing misappropriation.[4] In In re Hein, 104 N.J. 297, 302 (1986), the attorney blamed a serious drinking problem for his knowing misappropriation of clients' funds. Although the Court recognized that, in some situations, there might be a loss of competency, comprehension, or will that could excuse the misconduct, applying the Jacob standard, it found that the evidence in that case fell short of showing that, at the time of the conversions, the attorney was unable to comprehend the nature of his acts or that he lacked the capacity to form the requisite intent.

In another such case, we viewed, with some indulgence, a defense of alcoholism to a charge of knowing misappropriation. Finding a causal connection between the misappropriation and the attorney's alcoholism, we recommended against disbarment. In our

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[4] Since In re Wilson, 81 N.J. 451 (1979), attorneys have asserted an array of defenses to either excuse their misappropriation or to disprove the knowing element of the offense. In one such instance, the Court decided the landmark case of In re Jacob, 95 N.J. 132 (1984). There, the attorney admitted his misappropriations of clients' funds, but asserted a medical defense (thyrotoxicosis). The Court found that there was no "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." Id. at 137. That standard became known as "the Jacob standard."

view, the attorney's alcohol dependency so severely impaired his judgment and moral reasoning that he was incapable of knowing or realizing that he had engaged in illegal or unethical conduct. The Court disagreed. Although the Court did not dispute the connection between the attorney's alcoholism and his behavior, it found insufficient evidence that the attorney was unable to comprehend that he was misusing client's funds. In re Crowley, 105 N.J. 89 (1987). See also, In re Monaghan, 104 N.J. 312 (1986); In re Ryle, 105 N.J. 10 (1987); In re Hahm, 120 N.J. 691 (1990); In re Davis, 127 N.J. 118 (1992); and In re Kelly, 164 N.J. 173 (2000).

Gambling addiction, too, has not saved from disbarment attorneys who knowingly misappropriated clients' monies to fund their habit. In In re Goldberg, 109 N.J. 163 (1988), the attorney's criminal trial focused on his insanity defense (compulsive gambling) to charges of knowing misappropriation of over $600,000 in client funds (which the attorney admitted). The attorney had gambled and lost over $1 million. The jury found him not guilty of some of the charges, by reason of insanity.

Acknowledging that the American Psychiatric Association had classified compulsive gambling as a mental illness, the Court, nevertheless, found that the attorney had not satisfied the Jacob standard. The Court balanced one expert's testimony on the

"seemingly inexorable progression of respondent's compulsion to gamble" against another expert's testimony that the attorney was aware of the nature and quality of his acts. Id. at 170. Citing the degree of control that the attorney exercised over his personal and professional finances at the relevant times, the Court ordered his disbarment.

The Court did not foreclose the possibility of finding, in the appropriate case, that compulsive gambling was of such magnitude that it rendered an individual incapable of comprehending the nature and quality of the wrongful act:

> We do not hold here that compulsive gambling can *never* impair an individual's state of mind to such an extent that he or she is incapable of understanding the nature of his or her actions or lacks the capacity to form the intent requisite for a 'knowing misappropriation' of a client's funds.
>
> [Id. at 171.]

In In re Lobbe, 110 N.J. 59 (1988), the attorney employed a "lapping" practice to sustain his gambling addiction.[5] Recognizing that compulsive gambling was a "but for" cause of the misappropriation, the Court nevertheless ordered the attorney's disbarment under Wilson.

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[5] "Lapping" is defined as the continuous invasion of one client's funds to pay another client's needs. In re Brown, 102 N.J. 512, 514 (1986).

The same result obtained in In re Nitti, 110 N.J. 321 (1988). Despite expert testimony that a compulsive gambler does not intend to steal, but merely to borrow the funds and then return them, the Court found that the attorney's addiction did not render him incapable of controlling his wrongful conduct (once again, finding that the Jacob standard had not been satisfied):

> We continue to recognize, as we did in *Goldberg*, that 'there may be circumstances in which an attorney's loss of competency, comprehension, or will may be of such a magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful' [citation omitted]. This is not such a case, any more than was *Goldberg* or *Lobbe*.
>
> [Id. at 325.]

Mental illness, too, has been insufficient to override the disbarment penalty required in knowing misappropriation cases. The Court rejected a defense of manic-depressive illness and underlying bipolar disorder in a case involving one instance of knowing misappropriation and three instances of forgery. In re Tonzola, 162 N.J. 296 (2000). In that case, expert testimony revealed that the attorney was able to differentiate between right and wrong during the relevant periods and noted that he was able to handle other legal matters effectively and properly, despite his illness. The Court determined that the attorney's

medical condition did not satisfy the Jacob standard: "Respondent's mental illness, however severe, did not deprive him of the knowledge that he was taking [his client's] funds, that the funds belonged to his [client], or that his [client] had not authorized the taking . . . . 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.

In addition to knowingly misappropriating client funds, respondent: (1) failed to communicate with Bishop and McArdle, a violation of RPC 1.4(b); (2) failed to promptly disburse funds to clients, a violation of RPC 1.15(b); (3) engaged in conflicts of interests with Taylor and Cistaro by obtaining loans from them without disclosing the terms of the transactions in writing, or advising them in writing of the desirability of seeking the advice of independent counsel, and without obtaining their informed written consent to the transactions, a violation of RPC 1.8(a); (4) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(c); (5) made a false statement to the OAE by presenting it with a promissory note, purportedly as authorization for taking Taylor's money, a violation of RPC 8.1(a); (6) failed to keep records required by R. 1:21-6; a violation of RPC 1.15(d); (7) failed to cooperate with

the OAE, a violation of RPC 8.1(b); and (8) failed to comply with the Court's Orders and to file a R. 1:20-20 affidavit, violations of RPC 8.4(d) and RPC 8.1(b).

The OAE gave respondent every opportunity, over more than a two-year period, to cooperate and to prove that he was not guilty of the charges in the complaint. He was not able to do so. Not only did he fail to provide the OAE with any exculpatory evidence, but he also permitted this matter to proceed as a default.

The Court stated in In re Wilson:

> [M]isappropriation . . . means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
>
> [81 N.J. at 455 n.1.]

As the Court further explained in In re Noonan, 102 N.J. 157, 160-161 (1986):

> 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 is 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.

Thus, for respondent's knowing misappropriation of client funds, under In re Wilson and its progeny and the totality of the circumstances, we recommend respondent's disbarment.

Member Gallipoli did not participate.

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

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James P. Madden
Docket No. DRB 16-010

Decided: September 30, 2016

Disposition: Disbar

Members	Disbar	Recused	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli			X
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8		1

Ellen A. Brodsky
Chief Counsel