

National Client Protection Organization 2019 Workshop



“Reasons or Excuses – A Respondent’s Point of View” –
What brings an attorney to the point of theft?

CASE STUDIES ON REASONS FOR LAWYER THEFT AND MISAPPROPRIATION.

- *Greed*
- *Need*
- *Lapping*
- *Gambling*
- *Drug Dependency*
- *Alcohol*
- *Heath Issues*



GREED

- Robert Novy was a respected attorney in the area of trusts, estates, and elder law licensed to practice in New Jersey in 1976.
- Known for his legal acumen in elder law, he was involved in community affairs and civic matters, and received many awards and honors in the business community.



GREED

- In 2016 Respondent was charged with the knowing misappropriation of client funds by the OAE following a grievance from a client.
- Respondent stole funds from elderly and infirm clients whose funds he was required to safeguard. He created false invoices and billings to support the thefts.
- Following a referral to law enforcement from the OAE, Respondent was indicted in 2018.

FILED
APR 30 2018
State Grand Jury Judge

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL

State Grand Jury
Number SGJ716-18-5
Superior Court
Docket Number 18-04-00067-S

STATE OF NEW JERSEY)
 v.)
ROBERT C. NOVY)

INDICTMENT

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that:

COUNT ONE
(Theft By Unlawful Taking - Second Degree)
ROBERT C. NOVY

Getting to Know Robert Novy



RESPONDENT'S PERSPECTIVE

- **Self-Deceptive Rationalization:**
Respondent maintained throughout the disciplinary process that he was entitled to the client's funds as earned fees.
- The Judge who sentenced Novy to 10 years in prison stated, "It was nothing other than greed".



NEED



- Richard Zuvich was an attorney in Middlesex County who practiced in real estate and litigation in New Jersey in 1976.
- Following a grievance from a client, Respondent was charged by the OAE with the theft of \$200k+ in client funds which represented the insurance settlement following a residential fire.

RESPONDENT'S PERSPECTIVE

- Respondent offered the OAE no explanation for his conduct and was suspended for noncooperation.
- However, the OAE investigation determined that his use of the funds was driven by his personal need for the funds.



LAPPING



- Paul Grzenda was an attorney licensed to practice law since 1985.
- Significantly, he was a Certified Public Accountant.
- In June of 2012, he was selected for a Random Audit.
- The random audit revealed the knowing misappropriation of client funds by way of lapping.

Lapping: Robbing Peter to Pay Paul

Disciplinary Review Board
Opinion

In the Matter of Paul
Grzenda, DRB 17-133
(October 26, 2017).

The random audit revealed respondent's knowing misappropriation of both client and escrow funds between June 2012 and August 2013. Respondent routinely withdrew funds from his attorney trust account for personal or business use, invading client and escrow funds and creating shortages in the trust account. Moreover, the audit revealed that respondent had engaged in "lapping," that is, taking one client's funds to pay trust obligations owed to another client – in a nutshell, "robbing Peter to pay Paul," but always making certain that "Peter's funds" were replenished when it was time to repay "Peter." See In re Brown, 102 N.J. 512, 515 (1986). Respondent admittedly

RESPONDENT'S PERSPECTIVE

Indeed, respondent admitted doing so, claiming only that his conduct was "inadvertent," versus knowing. His affirmative defenses to the allegations of knowing misappropriation are of no moment, and constitute nothing more than obfuscation of the truth - that he had blatantly used his attorney trust account as he saw fit, with no regard to the interests of his clients,

- Its a mistake....
- Many Respondent's argue or rationalize their conduct as mistaken or negligent in character.
- Given Respondent's background as a CPA it was difficult for him to rationalize his conduct as negligent.

ALCOHOLISM

- James Madden licensed in 1990 was an employment lawyer in North Jersey with a practice limited to employment litigation.
- In January of 2013, he overdrafted his trust account.
- The investigation, resulting in disbarment, revealed that he suffered from dependency on alcohol and gambling.



James Madden



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Report to New Jersey Office of Attorney Ethics Of Attorney Trust Account Overdraft

Name of Attorney: James Patrick Madden

Account #: [REDACTED] 0050

Date of presentation for payment: January 18, 2013

Date paid: January 22, 2013

Amount of overdraft: \$ \$96.63

STATE OF
NEW JERSEY
JAN 24 10 30 AM '13

The item was presented against insufficient funds but was honored. The Attorney involved covered the funds the next day.

Very truly yours,

Jennifer Trushack

JAMES P. MADDEN, ESQUIRE ATTORNEY TRUST ACCOUNT		35-1064-2212	1122
DATE <u>4/13/12</u>		100.00	
PAY TO THE ORDER OF <u>Graham's Tavern</u>		\$ <u>100.00</u>	
AND <u>ONE Hundred and 00/100</u>		DOLLARS	
MEMO <u>[REDACTED]</u>		1122	
1122 127065 [REDACTED] 0050		100000 100000	

RESPONDENT'S PERSPECTIVE

Alcohol Dependency

- During the investigation, the Respondent offered to the OAE that his misappropriation of client funds was driven by his dependency on alcohol and that he operated in the fog of this intoxication.

In the Matter of James Madden,
DRB 16-010 (September 30, 2016).

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.

DRUG DEPENDENCY



- Nicole Devaney was a New Jersey attorney licensed to practice in 1997.
- She struggled with opioid addiction stemming from an athletic injury.
- This addiction resulted in a conviction in the criminal justice system.

NICOLE DEVANEY

Q And Dr. Weckstein, he was a doctor that you saw for a legitimate purpose in Freehold?

A Yes.

Q And you had legitimate prescriptions with him?

A Yes.

Q And while you were in his office, you took prescription pads from him also, correct?

A Yes.

Q How do you plead to the charge of theft of the prescription pads from both Dr. Commentucci and Dr. Weckstein?

A Plead guilty.

Q Guilty. The other charge is count five that alleges that between those same dates, January 6th, 2001 and January 13th, 2003 (sic), that you used those prescription pads from both Dr. Commentucci and Dr. Weckstein to obtain Percocet, is that correct?

A Yes.

Q And did you go to a few pharmacies in and around Monmouth County?

A Yes.

NICOLE DEVANEY

- In 2006, Respondent was selected for a Random Audit.
- The audit revealed the trust account held \$22.00 at a time when a reconstruction of the trust account demonstrated there should have been in excess of \$10,000.00.
- Following a consultation with counsel, Respondent executed a disbarment by consent form and was disbarred by the Supreme Court.

NICOLE DEVANEY

- In 2016, Respondent filed a motion to vacate the order of disbarment, in part arguing that Respondent, now sober, was intoxicated before the audit and through the time of the disbarment by consent.
- Respondent sought to vacate the prior order of disbarment based upon the evidence of intoxication at the time she executed the disbarment by consent forms and the failure of prior counsel to advise her that the disbarment was permanent.

RESPONDENT'S PERSPECTIVE

Opioid Dependency

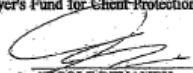
- Ms. Devaney was not interviewed during the investigation as she executed the disbarment by consent forms.
- Her post-disbarment filings, however, reveal that she attributed her defalcation of client funds to her opioid dependency issues.

Nicole Devaney Disbarment by Consent

**DISBARMENT BY CONSENT
FROM THE BAR OF
THE STATE OF NEW JERSEY
[R. 1:20-10(a)]**

To The Honorable Chief Justice and
Associate Justices of the Supreme Court

1. I, Nicole Devaney, presently residing at 51 Galloping Circle, Belford, New Jersey 07718, state that I was admitted to the Bar of the state of New Jersey in 1997 and am not admitted to the Bar of any other state.
2. I have consulted with counsel prior to completing this form.
3. I hereby submit to the Supreme Court of New Jersey my consent to disbarment from the Bar of the state of New Jersey. This consent is freely and voluntarily given by me and I represent that no person in the disciplinary structure has subjected me to coercion or duress. The implications of submitting to disbarment are fully known to me.
4. I am not under any disability, mental or physical, nor under the influence of any medication, intoxicants or other substances that would impair my ability to knowingly and voluntarily execute this form.
5. I am aware that there is presently pending against me under Docket No. XIV-2007-0146B, an investigation in which it is alleged that I knowingly misappropriated trust funds.
I acknowledge that these allegations are true and if I went to a hearing on this matter, I could not successfully defend myself against those charges.
6. I consent to disbarment with full knowledge that it is an absolute barrier to my ever seeking reinstatement to the Bar of the state of New Jersey, and that the Supreme Court may enter an Order accepting this Disbarment by Consent, which order will include the assessment of disciplinary costs pursuant to R.1:20-17.
7. I am consenting to disbarment with the understanding that, although this document will become a matter of public record if accepted by the Court, it may not be entered into evidence in any legal proceeding as an admission or as giving rise to an inference of wrongdoing, other than in a disciplinary or Lawyer's Fund for Client Protection proceeding in this or any other jurisdiction.


NICOLE DEVANEY

GAMBLING

- Frank Tobolsky was an attorney in the Philadelphia area licensed to practice in 1987.
- In 2014, the OAE charged Respondent with knowing misappropriation of client and escrow funds.



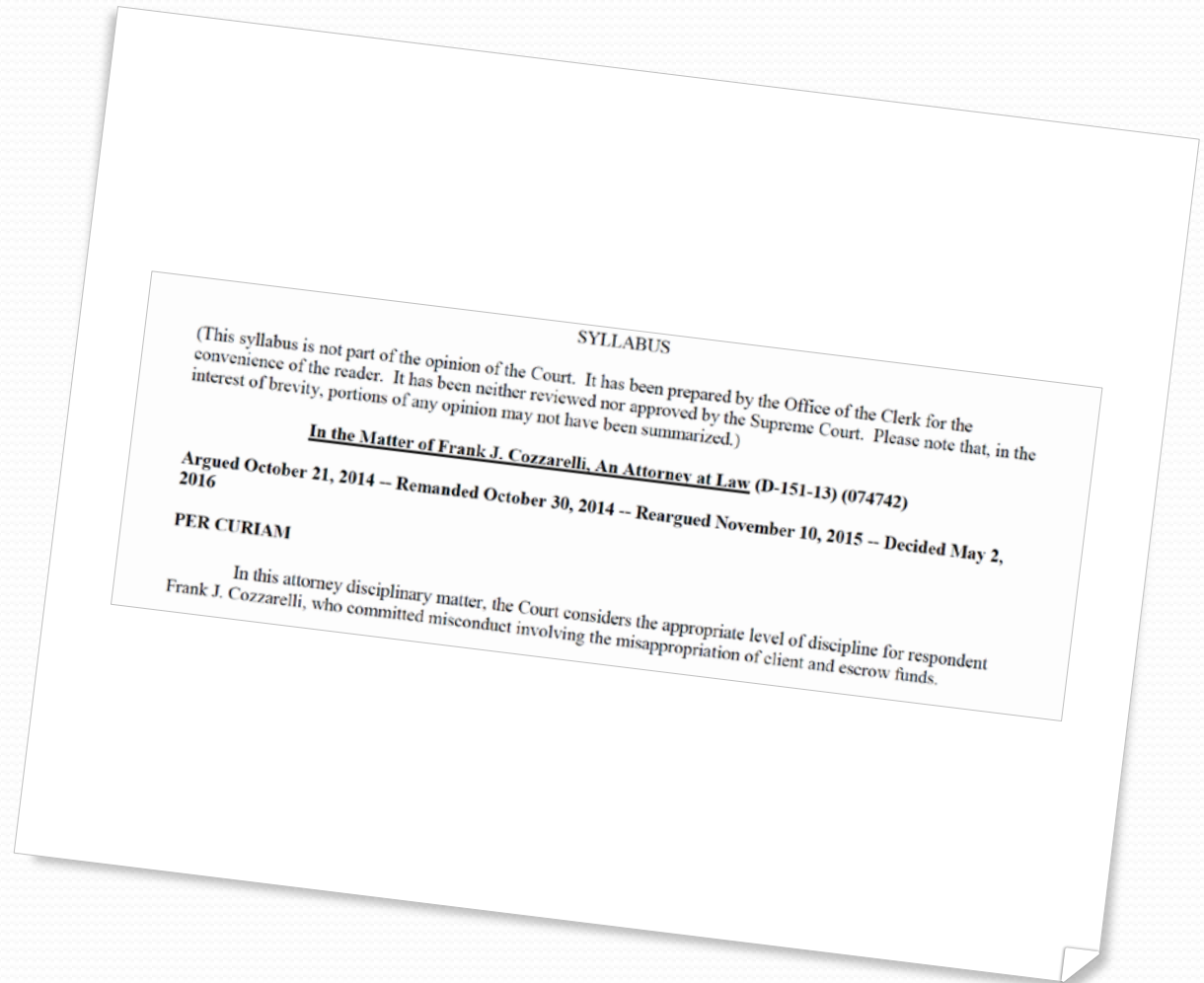
RESPONDENT'S PERSPECTIVE

In his answer, respondent asserted that he is a compulsive gambler, who also suffers from depression and anxiety, all causing him to be "literally . . . 'out of [his] mind.'" Consequently, he "often did not know or appreciate the consequences of [his] actions." He described his mental illness as "crippling" and "debilitating" and asserted that the allegations against him were "inextricably linked" to his "diminished capacity," stress, duress, and "mental defects and incapacities."

HEALTH ISSUES

Frank Cozzarelli was a NJ attorney licensed to practice in New Jersey in 1977.

Respondent was the subject of a Random Audit that led to his charges of knowing misappropriation.



RESPONDENT'S PERSPECTIVE

- Respondent argued during the course of his disciplinary proceeding that he suffered from mental health issues which prevented him from forming the *mens rea* required to commit the act of knowing misappropriation.
- The applicable standard in N.J. for such a defense was established by the Court in In re Jacob, 95 N.J. 132 (1984) ("a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful.")

The NJ Attorney Discipline System (Overview of an Ethics Case)

National Client Protection Organization Regional Workshop
September 24, 2019

Evaluation of Grievances

- Whether the facts alleged, if proven, would constitute unethical conduct.

Evaluation of Grievances (Cont.)

- Docket
- Decline
- Defer

Deferral of Grievances

- R. 1:20-3(f)
- Related pending litigation
- Generally, the ethics system takes no action on a grievance until the trial and all appeals have been exhausted

Investigations

- Clear and Convincing Evidence
- Confidential
- Investigative Report

Diversion – Like PTI (Agreement in Lieu of Discipline)

- Minor Misconduct
- Acknowledgement of Unethical Conduct
- Non-disciplinary
- Conditions

Diversion Disqualifiers

- Knowing misappropriation
- Substantial prejudice; no restitution
- Discipline in previous five years
- Title 2C Crimes
- Dishonesty, fraud, or deceit. RPC 8.4(c)

Complaint and Answer

- Service of Complaint
- Filing of Answer

Disciplinary Hearings

- Public Hearings
- Hearing Panel or Special Ethics Master
- Procedure

Disciplinary Review Board

- Intermediate Appellate Tribunal
- Reviews All Recommendations for Discipline
- Hears Appeals from Dismissals
- Reinstatement of Suspended Attorneys

Supreme Court of New Jersey

- Reviews All DRB Decisions
- Hears and Decides All Recommendations for Disbarment
- Decides Applications by the OAE for Emergent Temporary Suspensions

New Jersey Supreme Court Office of Attorney Ethics

RANDOM AUDIT PROGRAM

Random Audit Objectives

- Check compliance with the NJ Court Rules and Educate attorneys
as to proper recordkeeping methods
- Deterrence
- Detection of misappropriation

Funding

- Initial Funding - New Jersey Client Security Fund
- Current Funding - Annual Attorney Assessments



Commencement of Random Audits

- Began in July of 1981
- Two random auditors and one secretary
- Positive Results
- Acceptance by New Jersey State Bar Association



Expansion of Random Audit Program

- Expanded to Five Full-time Random Auditors in 1984

Random Audit Personnel

- Significant accounting experience
- Minimum Education – Accounting Degree
- Most random auditors have advance degrees or certifications
 - J.D.
 - CPA
 - Certified Fraud Examiner

Random Audit Selection

- Number one question – Is the selection really random?
- Computer Selection is made by main law office telephone number
- Theory
 - Solo practice – 1 main number
 - 200 person firm – 1 main number
- Conduct approximately 700 audits per year

Random Audit Process

- Audits scheduled and law firm notified approximately 2 weeks in advance
- No surprise audits
 - Less disruption for the attorney and staff
 - Sufficient time to gather requested records
 - Several attorneys confessed and turned themselves in after receiving contact letter

Random Audit Review

- Two years records for both the business and trust accounts
- Primary focus on the Trust Account
- Business Account reviewed for
 - Unusual transactions (Large deposits, payments to clients etc.
 - Verify that all fees are deposited
 - Not reviewed for profit, loss or payroll

Random Audit Procedure

- Initial conference with attorney – to obtain background information about law firm
 - Type of practice
 - Amount of activity
 - Type of records

Random Audit Procedure (Continued)

- Review of records
 - Bank statements
 - Cancelled checks
 - Client ledger cards
 - Checkbook stubs
 - Receipts and disbursements journals
 - Bank records
 - Client case files – as necessary

Common Problems

- Old Inactive Client Balances
- Old Outstanding Checks
- Failure To Reconcile Trust Account With Client Balances
- Unidentified Funds (Surplus) On Deposit In Trust Account
- Description on Client Ledgers, Journals, Checkbooks, Deposit Slips, etc.

Random Audit Post Conference with Attorney

- Discussion of Audit Findings
- Copy of Audit Deficiency Checklist provided – all deficiencies discussed
- Outline of Recordkeeping Requirements provided

Random Audit Follow - up

- 45-day letter - Attorney subsequently receives a letter identifying the deficiencies discussed and providing the attorney with 45 days to respond to the OAE that all problems were corrected
 - 98% of RAP audits are closed in this manner
- Final 10-day letter
- Disciplinary action

Program Success

- Acceptance and Praise by Attorneys Audited
 - Improve Recordkeeping

Program Success

- Serious Financial Improprieties Discovered

QUESTIONS?



**Office of Attorney
Ethics of the Supreme
Court of New Jersey**