THE UNAVAILING DEFENSE: PSYCHOLOGICAL DISABILITY AND ATTORNEY MISAPPROPRIATION IN NEW JERSEY

I. INTRODUCTION

In 1979, the New Jersey Supreme Court issued an opinion disbarring an attorney in *In re Wilson*.[1] On one level *Wilson* was a routine case in which there was nothing to mitigate against disbarment.[2] But instead of simply disbarring the lawyer, the court announced a general rule that cases of misappropriation should "almost invariabl[y]" result in disbarment.[3] After *Wilson* it was unclear whether any defense could be asserted or any fact could be raised that would mitigate against disbarment. Seven years passed before, the court was faced with the question of whether disbarment must be the inevitable result where an attorney claimed the defense of alcoholism or drug dependency as a factor in the misappropriation.[4] In *In re Hein* the court decided that alcoholism would not excuse misappropriation unless the lawyer was so intoxicated that he was unaware of what he was doing.[5] That same day the court, applying its decision in *Hein*, ordered the disbarment of a lawyer, who had misappropriated money while addicted to cocaine.[6] Since then, the court has issued a series of decisions that have followed or expanded the ruling in *Hein*.[7]

This comment will examine how the New Jersey Supreme Court disciplines lawyers who misappropriate from clients and raise a disability defense—alcoholism, drug addiction or compulsive gambling—in order to avoid disbarment. First, this com-

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1 81 N.J. 451, 409 A.2d 1153 (1979).

2 *Id.* at 453-54, 409 A.2d at 1154. Wilson had misappropriated money from clients, lied to clients, advised clients to commit fraud, disregarded their interests and refused to cooperate in ethics proceedings. *Id.*

3 *Id.* at 453, 409 A.2d at 1154. The court asserted: "[G]enerally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable." *Id.*

4 *See In re* Hein, 104 N.J. 297, 516 A.2d 1105 (1986).

5 *See id.* at 303, 516 A.2d at 1108.

6 *In re* Romano, 104 N.J. 306, 516 A.2d 1109 (1986).

7 *In re* Nitti, 110 N.J. 321, 541 A.2d 217 (1988); *In re* Lobbe, 110 N.J. 59, 539 A.2d 729 (1988); *In re* Goldberg, 109 N.J. 163, 536 A.2d 224 (1988); *In re* Devlin, 109 N.J. 135, 536 A.2d 209 (1988); *In re* Gilliam, 106 N.J. 537, 524 A.2d 810 (1987); *In re* Crowley, 105 N.J. 89, 519 A.2d 361 (1987); *In re* Ryle, 105 N.J. 10, 518 A.2d 1103 (1987); *In re* Canfield, 104 N.J. 314, 516 A.2d 1114 (1986); *In re* Monaghan, 104 N.J. 312, 516 A.2d 1113 (1986).

ment will review the supreme court's decisions regarding discipline for misappropriation and the development of the *Wilson* rule. Next, it will analyze how the *Wilson* rule was applied in *Hein* and subsequent cases. The author will then discuss the viability of alcohol and drug dependency and compulsive gambling as a defense. Finally, this comment will examine other states' decisions in similar cases and compare those alternative approaches with New Jersey's approach.

II. THE DEVELOPMENT OF THE *WILSON* RULE

A. *Discipline for Misappropriation before* Wilson

Two considerations underlie any discussion of discipline of lawyers for misappropriation. The first is the special relationship between lawyer and client, which puts the lawyer, unlike members of most other professions, in a position to hold money on behalf of clients.[8] The second is the Anglo-American legal system's practice of self-regulation in which courts address the question of whether a lawyer who has stolen is fit to practice law as separate and distinct from the issue of criminal liability.[9]

American courts initially followed the English rule that attorneys were subject to judicial discipline.[10] After independence

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[8] *See Wilson*, 81 N.J. at 454-55, 409 A.2d at 1154. The *Wilson* court noted:

> Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction—including the handling of the client's funds. Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is commonplace that the work of lawyers involves possession of their clients' funds. That possession is sometimes expedient, occasionally simply customary, but usually essential. Whatever the need may be for the lawyer's handling of the clients' money, the client permits it because he trusts the lawyer.

Id.

[9] *See Ex Parte* Brounsall, 98 Eng. Rep. 1385 (1778). As early as 1778, Lord Mansfield in *Brounsall* disbarred a lawyer who had been convicted of theft of money. The fact that the attorney had been branded and spent nine months in prison did not prevent the court from disbarring him. *Id.* at 1385. Specifically, Lord Mansfield held:

> [T]he defendant's having been burnt in the hand, is no objection to his being struck off the roll. And it is on this principle; that he is an unfit person to practise as an attorney. It is not by way of punishment; but the Court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.

Id.

[10] *See* Anonymous, 7 N.J.L. 162, 163 (1824) (accepting without discussion the court's authority to disbar attorneys). In *Anonymous*, a lawyer, acting on behalf of

from Great Britain, the governor of New Jersey, acting with the advice of the supreme court, controlled admission to the bar and the supreme court handled discipline of attorneys.[11] It was not until 1899 that the court disbarred a lawyer for misappropriation from a client.[12] The State Constitution of 1947, however, changed the common law rules, which divided control of admissions and discipline between the governor and the supreme court, and gave the supreme court control over both.[13] The court, under its rulemaking authority, adopted explicit rules to guide lawyers in holding client's property.[14]

In the twenty-one years from the seating of the Supreme Court in 1948 until the *Wilson* decision, the court was not consis-

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the bar asked the court to disbar an attorney who allegedly stole books. *Id.* at 162-63. The court refused to disbar the attorney because he had not been convicted for theft. *Id.* at 164.

11 *See In re* Branch, 70 N.J.L. 537, 57 A. 431 (Sup. Ct. 1904). The supreme court, describing the process of admission to the bar before the 1947 constitution, stated:

> [A]ttorneys-at-law in New Jersey are not appointed, licensed or admitted to practice by the Supreme Court or by any branch of the judicial department of the state. They are invested with that privilege by letters-patent, issued under the great seal of the state by its chief executive. . . .
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> . . .The patent itself is based upon an assurance by the executive that the licensee is possessed of certain qualifications. This assurance, historically speaking, refers to a certification by the Supreme Court as to the qualifications of the licensee and its recommendation to the executive for his appointment, which recommendation is likewise, as a matter of history, based upon an examination made by the Supreme Court or under its supervision.
>
> This executive act rests upon no statutory authority . . . .
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> . . . .
>
> Similarly, the examination and recommendation by the Supreme Court upon which such action is based have no legislative antecedents, ancient or modern.

Id. at 570-71, 57 A. at 435-36.

12 *See In re* McDermit, 63 N.J.L. 476, 43 A. 685 (Sup. Ct. 1899). McDermit was hired by the mother and the sister of Patrick Dowd, who was charged first with civil bastardy and later with criminal seduction for getting a woman pregnant. *Id.* at 480-81, 43 A. at 686-87. McDermit presented no defense at trial in the civil case, and was held liable. *Id.* at 482, 43 A. at 687. While the criminal action was still pending, Dowd, acting on McDermit's advice, married the woman and pleaded *non vult* in the criminal case. *Id.* Dowd's mother was outraged that her son had followed McDermit's advice and questioned McDermit's fees. *Id.* The court found that McDermit had taken advantage of the Dowds and had improperly retained money that had been given to him to pay Dowd's bail. *Id.* at 488, 43 A. at 689. The court ordered McDermit's name be struck from the roll of attorneys for the court. *Id.* at 493, 43 A. at 691.

13 N.J. CONST. art. VI, § II, para. 3 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.").

14 The court initially adopted the American Bar Association's Canons of Professional Ethics. Canon 11 provided:

tent in its application of the disciplinary rules regarding misap-

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> The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.
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> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

CANONS OF PROFESSIONAL ETHICS Canon 11 (1908).

In 1971, the court replaced the Canons with the American Bar Association's Model Code of Professional Responsibility. S. PRESSLER, CURRENT N.J. COURT RULES, R. 1:14 comment. DR 9-102(A) of the Model Code of Professional Responsibility required attorneys to keep separate bank accounts for clients' money. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(A) (1971) [hereinafter MODEL CODE]. DR 9-102(B) of the Model Code provided in part:

> A lawyer shall:
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> (1) Promptly notify a client of the receipt of his funds, securities or other properties. . . .
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> . . . . (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
>
> (4) Promptly pay or deliver to the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Id. DR 9-102(B).

In 1984, the court adopted the American Bar Association's Model Rules of Professional Conduct with some modifications to make them conform to New Jersey court rules. S. PRESSLER, *supra*, R. 1:14 comment. N.J. Rule of Professional Conduct, 1.15, which deals with safekeeping of property, provides:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.
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> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.
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> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
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> (d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.15.

propriation.[15] When Arthur T. Vanderbilt became the first chief justice of the modern supreme court, he brought with him a reputation as a leader of the bar, a legal educator and a reformer.[16] During his nine years on the court, there was "significant harmony" in strictly disciplining lawyers who stole.[17] Moral character was the single theme in all the disciplinary cases during the Vanderbilt period.[18] Still there was disagreement in misappropriation cases and that disagreement was sharp.

Chief Justice Vanderbilt's first dissent came in the misappropriation case, *In re Wittreich*.[19] Faced with five justices, who gave no reasons for imposing a two-year suspension, Chief Justice Vanderbilt wrote in his dissent that "the sentence imposed by the majority [was] entirely inadequate in view of the proven facts and out of line with the decisions of this court in previous disciplinary proceedings."[20] The charges against Wittreich were serious. He had advised a client to antedate a check in a joint account to avoid having the funds tied up during probate proceedings.[21] He misappropriated funds from one client, then misappropriated money from a second client to reimburse the first client.[22] Wittreich admitted he had used his client's funds for personal pur-

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15 *See generally* Johnson, *Lawyer, Thou Shall Not Steal*, 36 RUTGERS L. REV. 454, 460-75 (1984).

16 *See generally* E. GERHART, ARTHUR T. VANDERBILT: THE COMPLEAT COUNSELLOR 63-89, 125-39 (1980); A. VANDERBILT II, CHANGING LAW 32-109 (1976).

17 Johnson, *supra* note 15, at 463. Generally, discipline under the Vanderbilt court was strict. *Id.* In disciplinary cases involving any financial violations, including misappropriation, 77% of the lawyers were disbarred:

SANCTIONING OF FINANCIAL VIOLATORS: 1948-1957

Disbarment	=	77%	(33)
Resignation with Prejudice	=	0%	(0)
Suspension	=	21%	(9)
Public Reprimand	=	2%	(1)
Total		100%	(43)

Id. (footnotes omitted).

18 *Id.* at 461. As Chief Justice Vanderbilt wrote:

> It must be realized by lawyer and layman alike that honesty and integrity are both conditions precedent and conditions subsequent to the practice of law. It must always be borne in mind that the public has its first contact with the law through the lawyers. Only an attorney whose conduct and character is impeccable is a proper person to guide the layman who seeks him out as an advocate and counsellor.

In re Wittreich, 5 N.J. 79, 91, 74 A.2d 258, 264-65 (1950) (Vanderbilt, C.J., dissenting).

19 5 N.J. 79, 74 A.2d 258 (1950).

20 *Id.* at 80, 74 A.2d at 259 (Vanderbilt, C.J., dissenting).

21 *Id.* at 81, 74 A.2d at 259 (Vanderbilt, C.J., dissenting). Wittreich was a prominent attorney with political connections. E. GERHART, *supra* note 16, at 217.

22 *Wittreich*, 5 N.J. at 88, 74 A.2d at 263 (Vanderbilt, C.J., dissenting).

poses, but claimed ignorance of the ethical rule against misappropriation as his defense.[23] Restitution and lack of harm to clients were raised in mitigation.[24] The chief justice downplayed the importance of restitution, saying that while it was a consideration in disciplinary proceedings, it was not of controlling importance.[25] Rather, the primary concern was with respect to the moral character the lawyer's actions revealed.[26]

After Chief Justice Vanderbilt's death in 1957, the court, under Chief Justice Joseph Weintraub, took a new approach in considering what the appropriate punishment should be in disciplinary cases.[27] "Each disciplinary matter must be determined on its own facts and circumstances, and the difficulty constantly present is as to what the final disciplinary measure should be. The ultimate objective is the protection of the public, the purification of the bar and the prevention of a reoccurrence."[28] Patterns emerged in the Weintraub court's decisions in misappropriation cases. Where there was misappropriation coupled with a criminal conviction, disbarment was almost always the punishment.[29] A lawyer who made restitution, however, most likely would be suspended, instead of disbarred.[30] When restitu-

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23 *Id.* at 86, 74 A.2d at 262 (Vanderbilt, C.J., dissenting). Wittreich used part of the money to buy a Cadillac to impress the people he was negotiating with in an unconnected, private business deal, and to buy a new car. *Id.* at 82, 74 A.2d at 260 (Vanderbilt, C.J., dissenting). Wittreich asserted that while he acted improperly, he did not know his conduct was violative of Canon 11 of the Canons of Professional Ethics. *Id.* at 86, 74 A.2d at 262 (Vanderbilt, C.J., dissenting). *See supra* note 14 for the text of Canon 11.

24 *Wittreich*, 5 N.J. at 88, 74 A.2d at 263 (Vanderbilt, C.J., dissenting).

25 *Id.*

26 *Id.*

27 *See In re* Baron, 25 N.J. 445, 136 A.2d 873 (1957).

28 *Id.* at 449, 136 A.2d at 875.

29 Disbarments after criminal convictions for embezzlement from clients occurred in ten cases: *In re* Spielman, 62 N.J. 432, 302 A.2d 529 (1973); *In re* McGinnis, 61 N.J. 459, 295 A.2d 201 (1972); *In re* Ryan, 60 N.J. 378, 290 A.2d 140 (1972); *In re* Brown, 58 N.J. 352, 277 A.2d 535 (1971); *In re* Bivona, 55 N.J. 158, 259 A.2d 911 (1969); *In re* Turesky, 52 N.J. 100, 243 A.2d 823 (1968); *In re* Kraemer, 49 N.J. 400, 230 A.2d 503 (1967); *In re* Emmel, 48 N.J. 412, 226 A.2d 169 (1967); *In re* Daly, 39 N.J. 112, 187 A.2d 717 (1963); *In re* Vivers, 36 N.J. 531, 178 A.2d 194 (1962). *But cf. In re* Murray, 27 N.J. 141, 141 A.2d 780 (1958) (suspending a lawyer convicted of embezzling money from clients without stating if there were any mitigating factors).

30 *See, e.g., In re* Rubenstein, 63 N.J. 400, 307 A.2d 597 (1973); *In re* Londa, 59 N.J. 378, 283 A.2d 328 (1971); *In re* Hutchinson, 59 N.J. 327, 282 A.2d 745 (1971); *In re* Shamy, 59 N.J. 321, 282 A.2d 402 (1971); *In re* Brown, 57 N.J. 322, 272 A.2d 757 (1971); *In re* Kisciras, 54 N.J. 496, 257 A.2d 98 (1969); *In re* Ferraro, 53 N.J. 183, 249 A.2d 577 (1969); *In re* George, 53 N.J. 56, 247 A.2d 882 (1968); *In re* Cantabene, 48 N.J. 571, 227 A.2d 131 (1967); *In re* Weinblatt, 48 N.J. 559, 226

tion was enough to prevent disbarment, the existence and nature of additional mitigating factors often determined the length of the suspension.[31] In cases where restitution might have prevented disbarment, aggravating factors sometimes tilted the balance toward disbarment.[32]

In re Baron,[33] the first case in which the Weintraub court considered punishment for misappropriation, provided examples of mitigating factors which a lawyer could raise to avoid disbarment. Baron was "frank and forthright" about the misappropriation with his clients, who still continued to trust him after he admitted using their money without permission.[34] Although he had large debts from an unsuccessful business venture, he did not declare bankruptcy, but instead paid off his creditors.[35] Further, Baron's fees to his clients were reasonable despite his acute need for money.[36] After considering these factors and restitution, the court imposed only a six-month suspension.[37]

When made by a lawyer not yet facing disciplinary charges, restitution was considered favorably by the Weintraub court in

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A.2d 835 (1967); *In re* Sadloch, 48 N.J. 92, 222 A.2d 761 (1966); *In re* Boyle, 47 N.J. 58, 219 A.2d 329 (1966); *In re* Malanga, 45 N.J. 580, 214 A.2d 23 (1965); *In re* Lederman, 45 N.J. 524, 213 A.2d 513 (1965); *In re* Lanza, 41 N.J. 330, 196 A.2d 779 (1964); *In re* Dolan, 38 N.J. 119, 183 A.2d 54 (1962); *In re* Johnson, 36 N.J. 535, 178 A.2d 194 (1962); *In re* Stoldt, 34 N.J. 355, 169 A.2d 138 (1961); *In re* Gelzer, 31 N.J. 542, 158 A.2d 331 (1960); *In re* Banner, 31 N.J. 24, 155 A.2d 81 (1959); *In re* Murray, 27 N.J. 141, 141 A.2d 780 (1958); *In re* Baron, 25 N.J. 445, 136 A.2d 873 (1957).

31 *See supra* note 30.

32 *See, e.g.*, *In re* Duckworth, 47 N.J. 235, 220 A.2d 110 (1966); *In re* Belluscio, 38 N.J. 355, 184 A.2d 864 (1962); *In re* Rich, 33 N.J. 74, 161 A.2d 488 (1960). In *Duckworth*, a lawyer who completed restitution after an ethics complaint charging misappropriation was filed, offered unsubstantiated excuses for his actions, which were later proven false. *Duckworth*, 47 N.J. at 236-37, 220 A.2d at 110-11. In *Belluscio*, a lawyer, faced with charges of misappropriation, failed to present a defense before the Union County Ethics Committee, but later claimed to have one before the supreme court. *Belluscio*, 38 N.J. at 357, 184 A.2d at 865. After getting an adjournment from the court, the attorney failed to present a defense by affidavit within the time given and later presented an affidavit which, in essence, admitted the truth of charges. *Id.*, 184 A.2d at 865-66. Despite having made restitution, he was disbarred. *Id.* at 358, 184 A.2d at 866. In *Rich*, a lawyer faced several charges, including misappropriation, made restitution for misappropriations only after the Ethics and Grievance Committee filed its findings and presentment with the supreme court. *Rich*, 33 N.J. at 74-75, 77, 161 A.2d at 489-90. The court held that "[r]estitution, although generally a mitigating factor, under such circumstances [was] not of substantial significance." *Id.*

33 25 N.J. 445, 136 A.2d 873 (1957).

34 *Id.* at 449, 136 A.2d at 875.

35 *Id.* at 448-49, 136 A.2d at 875.

36 *Id.* at 449, 136 A.2d at 875.

37 *Id.*

determining punishment.[38] As time passed, the court considered partial restitution and restitution made after the filing of disciplinary charges as a mitigating factor when imposing discipline short of disbarment.[39] "The basic policy shift emphasized by the Weintraub court predictably resulted overall in the imposition of less stringent discipline" than the discipline imposed by the Vanderbilt court.[40]

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[38] *See, e.g., In re* Johnson, 36 N.J. 535, 178 A.2d 194 (1962); *In re* Stoldt, 34 N.J. 355, 169 A.2d 138 (1961). In *Johnson*, a lawyer facing severe financial difficulties misappropriated money from clients, but made restitution before the ethics complaint was filed. *Johnson*, 36 N.J. at 536, 178 A.2d at 195. To make restitution Johnson borrowed from friends and liquidated personal assets and his law office. *Id.* at 537, 178 A.2d at 195. Based on his cooperation and candor with the ethics committee and his relatively early restitution, the court suspended Johnson for a year. *Id.* at 536, 537, 178 A.2d at 195, 196.

In *Stoldt*, an attorney, anticipating large fees from other cases, misappropriated money from a savings and loan association and repaid the money before charges were filed against him. *Stoldt*, 34 N.J. at 356-37, 169 A.2d 138-39. Based on restitution, Stoldt's candor in admitting the misappropriations and an otherwise unblemished 30-year record as a lawyer, the court suspended Stoldt for six months. *Id.* at 357-58, 169 A.2d 139-40.

[39] *See In re* DeMarco, 60 N.J. 380, 290 A.2d 141 (1972) (three-year suspension conditioned on full restitution); *In re* Cantabene, 51 N.J. 381, 241 A.2d 3 (1968) (suspension until restitution is paid, and then final determination of punishment); *In re* Cantabene, 48 N.J. 571, 227 A.2d 131 (1967) (one-year suspension where restitution was made under pressure). One commentator noted:

> In the earliest days of the Weintraub court, mere restitution was not sufficient to stave off disbarment if it came too late in the proceedings. This timeliness doctrine was first stated in 1960 in *In re Rich*. . . . Within seven years, however, the importance of restitution itself had apparently overridden the doctrine of timeliness.

Johnson, *supra* note 15, at 466 (footnote omitted).

David E. Johnson, Jr., Director of the Office of Attorney Ethics of the New Jersey Supreme Court, suggested that *In re* Brown, 57 N.J. 322, 272 A.2d 757 (1971), evidenced "the extraordinary lengths to which [the Weintraub court] was willing to go in order to secure restitution." Johnson, *supra* note 15, at 466. After the first disciplinary charges of misappropriation were filed, Brown was suspended and made restitution under the supervision of the Monmouth County Ethics Committee. *Brown*, 57 N.J. at 323, 272 A.2d at 757. After Brown completed restitution, the court imposed a one-year suspension measured from the date of his initial suspension. *Id.* at 323-24, 272 A.2d at 757-58.

[40] Johnson, *supra* note 15, at 467. Johnson graphed the imposition of discipline under the Weintraub court as follows:

SANCTIONING OF FINANCIAL VIOLATORS: 1957-1973

Disbarment	=	38%	(31)
Resignation with Prejudice	=	23%	(19)
Suspension	=	35%	(28)
Public Reprimand	=	4%	(3)
Total	=	100%	(81)

Id. at 467-68 (footnotes omitted). He commented that: "Although 61% of the respondents in the Weintraub court received either disbarment or its equivalent (res-

After Richard J. Hughes became chief justice in 1973,[41] the court became even more lenient in misappropriation cases.[42] The Hughes court continued to view restitution as a significant mitigating factor.[43] It often cited, however, a range of other factors in determining the extent of discipline, such as: lack of prior disciplinary charges;[44] cooperation with the ethics investigation;[45] a record of public service and a good reputation as a lawyer;[46] no loss to clients;[47] inexperience in the practice of law;[48] the incident arose from an isolated transaction;[49] giving up the practice of law;[50] and willingness to work under the supervision of another lawyer.[51]

In *In re Stout*,[52] a combination of mitigating factors led the court to suspend for one year a lawyer who misappropriated money and failed to maintain accurate trust account records.[53] There were, however, circumstances in *Stout* which the court had considered aggravating in other cases.[54] The lawyer had lied repeatedly to his client when she attempted to get the money owed her.[55] When the client wrote to the Monmouth County Ethics Committee to complain about Stout's failure to pay her more than three years after the settlement, he paid the money due plus

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ignation with prejudice), that percentage fell short of the 77% who were treated similarly by the Vanderbilt court." *Id.* at 468.

41 After the retirement of Chief Justice Weintraub, Pierre Garvin served as chief justice from September 1, 1973, until his death on October 19, 1973. *Id.* at 4607.14. No disciplinary decisions were issued while he was chief justice. *Id.*

42 *Id.* at 473.

43 *Id.* at 469.

44 *See, e.g., In re* Ritger, 80 N.J. 1, 4, 401 A.2d 1094, 1095 (1979); *In re* Stout, 75 N.J. 321, 325, 382 A.2d 630, 632 (1978); *In re* Power, 72 N.J. 452, 454, 371 A.2d 58, 59 (1977); *In re* Lewis, 69 N.J. 64, 66, 350 A.2d 480, 481 (1976); *In re* Barnett, 69 N.J. 41, 43, 350 A.2d 232, 233 (1976); *In re* Strickland, 68 N.J. 440, 442, 347 A.2d 358, 359 (1975).

45 *See, e.g., In re* Stout, 75 N.J. 321, 325, 382 A.2d 630, 632 (1978).

46 *See, e.g., id.*

47 *See, e.g., In re* Rabb, 73 N.J. 272, 280, 374 A.2d 461, 465 (1977).

48 *See, e.g., In re* Mahoney, 78 N.J. 248, 251, 394 A.2d 89, 90 (1978).

49 *See, e.g., In re* Power, 72 N.J. 452, 454, 371 A.2d 58, 59 (1977).

50 *See, e.g., In re* Hickey, 69 N.J. 69, 71, 350 A.2d 483, 484 (1976); *In re* Strickland, 68 N.J. 440, 442, 347 A.2d 358, 359-60 (1975).

51 *See, e.g., In re* Lewis, 69 N.J. 64, 66, 350 A.2d 480, 481 (1976); *In re* Ritger, 80 N.J. 1, 4, 401 A.2d 1094, 1095 (1979).

52 75 N.J. 321, 382 A.2d 630 (1978).

53 *Id.* at 322, 325, 382 A.2d at 630, 632.

54 *See, e.g., In re* Bierman, 62 N.J. 91, 299 A.2d 89 (1973) (disbarment of lawyer who paid mortgagee with worthless check and repeatedly made misrepresentations to parties including clients).

55 *Stout*, 75 N.J. at 322-23, 382 A.2d at 630-31.

interest by check, but his check was dishonored.[56] The client then filed a complaint with the ethics committee and Stout repaid her in full.[57] Balanced against these aggravating factors were mitigating factors including forthrightness, honesty and cooperation during the ethics investigation, a thirty-eight year unblemished legal career, twenty-two years of service in the state legislature, numerous civic activities and a good reputation among the bar.[58]

In re Beckmann[59] exemplifies the extent to which the Hughes court would consider mitigating factors in a disciplinary proceeding.[60] Beckmann was convicted for embezzling money from clients and served fifty-seven days of a 360-day jail sentence.[61] Despite the fact Beckmann was convicted and served time in jail, the court declined to disbar him.[62] Instead, the court suspended Beckmann indefinitely until he made full restitution to the Clients' Security Fund.[63]

From the beginning of Chief Justice Vanderbilt's term to the end of Chief Justice Hughes' term, the court had moved from a policy of strict punishment for violations of the lawyer's ethical obligation to safeguard clients' property to a more relaxed disciplinary policy.[64] Following the appointment of Robert N. Wi-

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56 *Id.* at 323, 382 A.2d at 631.

57 *Id.*

58 *Id.* 325, 382 A.2d at 632.

59 79 N.J. 402, 400 A.2d 792 (1979).

60 *Id.* at 405, 400 A.2d at 793. The court stated that while disbarment, as a general rule, might be the appropriate remedy for serious offenses, the court had "not invariably meted out that ultimate discipline in every instance of misappropriation, given persuasive evidence of mitigating circumstances." *Id.*

61 *Id.* at 402-03, 400 A.2d at 792.

62 *Id.* at 405, 400 A.2d at 793. The court observed:

> In the matter before us we are not unimpressed with respondent's unvarnished perception of his misdeed and his efforts at rehabilitation. His predicament was brought on not by greed or riotous living or scandalous personal habits but rather by singularly inept handling of a family business venture. . . . He has, by loss of his family and by the disgrace of conviction and incarceration, paid a heavy price for his misconduct. His contrition is apparent.

Id.

63 *Id.* The Clients' Security Fund paid $19,038.99 to Beckmann's clients and restitution by a court-appointed receiver amounted to $5,013.50. *Id.* at 403, 400 A.2d at 792.

The Clients' Security Fund was created as an insurance fund to reimburse clients for "losses caused by dishonest conduct of members of the bar of this State." N.J. CT. R. 1:28-1(a). Practicing lawyers are required to pay into the fund an amount set annually by the supreme court. N.J. CT. R. 1:28-2.

64 Johnson, *supra* note 15, at 474. Johnson charted the decreasing severity of discipline for attorneys who stole as:

lentz as chief justice in 1979, the court took a sharp turn back to the Vanderbilt court's approach in misappropriation cases.

B. *The* Wilson *Rule*

In re Wilson was the first misappropriation case decided by the New Jersey Supreme Court after Chief Justice Wilentz joined the court.[65] Eight ethics complaints, two of which involved charges of misappropriation, had been filed against Wilson with the District Ethics Committee for Middlesex County.[66] The disciplinary review board had reviewed the charges and recommended disbarment.[67] One misappropriation charge alleged that Wilson withheld money from a client for two years, re-

COMPARATIVE TABLE OF SANCTIONING: 1948-79

Sanctions Imposed	Vanderbilt Court	Weintraub Court	Hughes Court
Disbarment	77%	38%	26%
Resignation with Prejudice	0%	23%	23%
	77%	61%	49%
Suspension	21%	35%	51%
Other	2%	4%	0%
Total	100%	100%	100%

Id.

[65] 81 N.J. at 451, 409 A.2d at 1153. Wilson was decided on December 19, 1979. *Id.*

[66] *Id.* at 453, 409 A.2d at 1154.

The District Ethics Committee (DEC) is the first level in a three tier disciplinary system. Regionalized committees receive and preliminarily investigate all allegations of unethical conduct by a New Jersey lawyer. OFFICE OF ATTORNEY ETHICS, THE NEW JERSEY SUPREME COURT, 1986 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 4-5 (hereinafter DISCIPLINARY SYSTEM REPORT).

When an ethics complaint is filed with a committee, a DEC member, who is an attorney, conducts a preliminary investigation. N.J. CT. R. 1:20-3(f). Several options are available to the DEC chair after the initial investigation. The chair may conclude that there is no unethical conduct, that further investigation is necessary, or that there was unethical behavior. *Id.* If there is an ethical violation, the chair can recommend a private reprimand from the director of the Office of Attorney Ethics, N.J. CT. R. 1:20-3(g), or the issuance of a formal complaint. N.J. CT. R. 1:20-3(h). If a formal complaint is issued, the DEC holds a hearing on the charge. N.J. CT. R. 1:20-3(l). At the end of the hearing, the DEC can dismiss the charge, recommend a private reprimand or issue a presentment if it feels public discipline is warranted. N.J. CT. R. 1:20-3(n).

[67] *Wilson*, 81 N.J. at 454, 409 A.2d at 1154.

The disciplinary review board (DRB) is the second tier of the system of professional discipline for lawyers. DISCIPLINARY SYSTEM REPORT, *supra* note 66, at 8. The DRB reviews the action taken by the committees and promulgates procedural rules for prosecuting disciplinary matters. N.J. CT. R. 1:20-4. The DRB hears appeals from the DEC's and reviews its recommendations for discipline. N.J. COURT R. 1:20-4(e)(1); 1:20-4(e)(3). Final disciplinary recommendations by the DRB are reviewed by the New Jersey Supreme Court. N.J. CT. R. 1:20-5(a).

turning it without an explanation only after the ethics complaint was filed.[68] The other misappropriation charge alleged that Wilson cashed a client's check by forging the endorsement and depositing the check in his own account.[69] The other complaints involved allegations that Wilson had lied to clients, disregarded their interests, and counselled them to commit fraud.[70]

What has become known as the *Wilson* rule is stated in the first two sentences of the opinion: "In this case, respondent knowingly used his clients' money as if it were his own. We hold that disbarment is the only appropriate discipline."[71] In these two sentences *Wilson* replaced the flexible policy of discipline with a new and apparently inflexible rule.

Two basic themes run through *Wilson*—the critical need for public confidence in the legal system and the grave criminality of misappropriation by lawyers.[72] The extensive involvement of lawyers as participants in the Watergate scandal during the Nixon administration drew wide public attention to the issue of legal ethics in the 1970's.[73] Without referring to any evidence of con-

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68 *Wilson*, 81 N.J. at 453, 409 A.2d at 1154.

69 *Id.*

70 *Id.* at 454, 409 A.2d at 1154.

71 *Id.* at 453, 409 A.2d at 1154. *Wilson* was a signed opinion authored by Chief Justice Wilentz. *Id.* at 453, 409 A.2d at 1154. This is unusual because generally only dissents in ethics opinions are signed. There are, however, other exceptions. For example, the decision in *In re Sears*, 71 N.J. 175, 364 A.2d 777 (1976), was signed by Justice Morris Pashman.

72 *See Wilson*, 81 N.J. at 455, 409 A.2d at 1154-55. Chief Justice Wilentz observed:

> It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution. No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers.
>
> Abuse of this trust has been recognized as particularly reprehensible . . . .

Id.

73 *See* Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 249 (1975).

> [E]ach new revelation in the national scandal known as Watergate seemed to give the legal profession another mark of shame, for the majority of those who had participated in the cover-up had been trained as attorneys.
>
> As a result, the news media concluded that these events constituted tangible proof of the sad state of ethics in our profession. Indeed, one editorial writer sardonically noted that the journalist's pet phrase, "so-and-so engineered the break-in," should be changed to read, "so-and-so lawyered the break-in," on the grounds that the engineering profession was being unjustly slandered, while the real culprit was passing unnoticed.

tinuing lack of public confidence in the legal profession and judicial system, Chief Justice Wilentz noted: "Mistrust may provoke destructive change. Public confidence is the only foundation that will support constructive reform in the public interest while preserving the finest traditions of the profession."[74]

The court defined misappropriation broadly for purposes of ethics violations as a lawyer's temporary or permanent unauthorized use of clients' funds for his own purpose, regardless of whether he derives any personal benefit.[75] Chief Justice Wilentz used strong language to describe misappropriation. "No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. . . . There is nothing clearer to the public . . . than stealing a client's money and nothing worse."[76] Twice the chief justice called misappropriation a crime.[77] Other courts, he noted, had recognized misappropriation as morally

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Id. See also Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 262 (1975) (noting that the Watergate scandal was "a particularly embarrassing tragedy for the legal profession"). *Id.* (footnotes omitted).

74 *Wilson*, 81 N.J. at 456, 409 A.2d at 1155.

75 *Id.* at 455 n.1, 409 A.2d at 1155 n.1. The court defined misappropriation as "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." *Id.*

76 *Id.* at 456-57, 409 A.2d at 1155.

77 *Id.* at 454, 458, 409 A.2d at 1154, 1156. The applicable statute at the time Wilson took clients' money provided:

> Any employee, agent, consignee, factor, bailee, lodger or tenant who embezzles or, with intent to defraud, takes money or receives, retains or appropriates to his own use or the use of another, any property or the proceeds of the sale of the same, or any part thereof, belonging to his employer, principal, consignor, bailor or landlord, is guilty of a misdemeanor.

N.J. STAT. ANN. § 2A:102-5 (West 1969), *repealed by* L. 1978, c.95, § 2C:98-2C (current version at N.J. STAT. ANN. § 2C:20-9 (West 1982)). The present statute sets forth:

> A person who purposely obtains or retains property upon agreement or subject to a known legal obligation to make specified payment or other disposition, whether from such property or its proceeds or form his own property to be reserved in equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition. An officer or employee of the government or of a financial institution is presumed: (a) to know any legal obligation relevant to his criminal liability under this section, and (b) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

N.J. STAT. ANN. § 2C:20-9 (West 1982).

reprehensible.[78]

The chief justice observed that discipline for misappropriation had been inconsistent because the court's prior willingness to consider mitigating factors in each case.[79] The time had come, the chief justice explained, to reemphasize that the primary justification for discipline is to preserve the public confidence in the honesty and integrity of attorneys in general.[80] The need to preserve public confidence, he said, was now to be viewed as the controlling principle in disciplinary cases.[81]

Chief Justice Wilentz stated that mitigating factors would no longer be considered in misappropriation cases,[82] because of universal agreement that "the moral reprehensibility of this kind of behavior justifies disbarment."[83] The chief justice, noting that restitution was often raised in misappropriation cases, rejected it as a mitigating factors.[84] First, the decision to make restitution is not necessarily voluntary as the threat of disbarment is a compelling reason to repay a client.[85] Second, since the ability to make restitution depends on the attorney's financial capabilities, a "significant possibility of unjust discrimination" exists.[86] Third, the act of restitution is not indicative of the moral character of the

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78 *Wilson*, 81 N.J. at 455, 409 A.2d at 1155 (citations omitted). The court cited six decisions in support of the proposition that misappropriation was "particularly reprehensible." *Id.* In two of the cases, the punishment for misappropriation was suspension. *In re* Beckmann, 79 N.J. 402, 400 A.2d 792 (1979) (indefinite suspension); *In re* Malanga, 45 N.J. 580, 214 A.2d 23 (1965) (three-year suspension). In the four other cases cited, the punishment was disbarment. *In re* Miller, 65 N.J. 580, 326 A.2d 65 (1974); *In re* Spielman, 62 N.J. 432, 302 A.2d 529 (1973); *In re* Ryan, 60 N.J. 378, 290 A.2d 140 (1972); *In re* Gavel, 22 N.J. 248, 125 A.2d 696 (1956).

79 *Wilson*, 81 N.J. at 455-56, 409 A.2d at 1155 (footnote omitted). The court asserted that "[d]espite . . . strong condemnation, results in misappropriation cases have varied because of circumstances which the Court has regarded as mitigating: the economic and emotional pressure on the attorney which caused the explained misdeed; his subsequent compliance with client trust account requirements; his candor and cooperation with the ethics committee; his contrition; and most of all restitution." *Id.*

80 *Id.* at 456, 409 A.2d at 1155.

81 *Id.* The chief justice asserted that while preservation of public confidence "may only rarely have been stressed in the past, we are now inclined to view it as controlling in these cases." *Id.*

82 *See id.* at 457, 461, 409 A.2d at 1155, 1158.

83 *Id.* at 457, 409 A.2d at 1155.

84 *Id.* at 457-58, 409 A.2d at 1155-56.

85 *Id.* at 457, 409 A.2d at 1156. The court stated: "In the context of professional discipline, restitution suggests an 'honesty of compulsion,' proving mostly that the lawyer is anxious to become a lawyer again and that he is able somehow to raise the money." *Id.*

86 *Id.* at 459, 409 A.2d at 1157.

attorney.[87] Finally, the chief justice observed that the rationale for encouraging restitution—making the client whole for his or her loss—was vitiated with the creation of the Clients' Security Fund.[88]

Moreover, Chief Justice Wilentz asserted that it was irrelevant in a misappropriation case whether or not the attorney returned the client's funds after his unauthorized use of them.[89] He stated that: "When restitution is used to support the contention that the lawyer intended to 'borrow' rather than steal, it simply cloaks the mistaken premise that the unauthorized use of clients' funds is excusable when accompanied by an intent to return them. The act is no less a crime."[90] Chief Justice Wilentz

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87 *Id.* at 457-58, 409 A.2d at 1156 (citing *In re* Harris, 88 N.J.L. 18, 95 A. 761 (Sup. Ct. 1915).

In *Harris*, the court observed:

> [O]f all the factors that enter into the question of moral fitness, the mere circumstance of restitution is the one most likely to be fortuitous and to depend upon conditions and circumstances that afford no reliable test of moral qualities. The money may have come from wealthy relatives, or from a lucky speculation, or from engaging in some alien business venture, or it may have been borrowed, in which case the old liability is apparently extinguished by the creation of a new one.

In re Harris, 88 N.J.L. 18, 22-23, 95 A. 761, 761-62 (Sup. Ct. 1915).

88 *Wilson*, 81 N.J. at 459 n.3, 409 A.2d at 1157 n.3. The chief justice asserted that "compensation of injured parties should not be deemed an appropriate function of our disciplinary process." *Id.* at 459, 409 A.2d at 1157.

89 *Id.* at 458, 409 A.2d at 1156.

90 *Id.* Even though the chief justice concluded that the unauthorized borrowing "is no less a crime," *id.*, a strict reading of the New Jersey misappropriation statute, does not necessitate this conclusion. N.J. STAT. ANN. § 2C:20-9 (West 1982); *see supra* note 77 (for text of this statute).

With the exception of the addition of the words "or retains" in the first sentence of the statute and the substitutions of (i) for (a) and (ii) for (b) in the third sentence, the statute mirrors the Model Penal Code section 223.8 (1980). *Compare* N.J. STAT. ANN. § 2C:20-9 (West 1982) *with* MODEL PENAL CODE § 223.8 (1980). Comment 2 of Section 223.8 of the Model Penal Code defines the offense as:

> (i) the obtaining of property upon an agreement or subject to a known legal obligation to make a specified payment or other disposition, whether from the property obtained or its proceeds or from one's own property to be reserved in an equivalent amount; and (ii) dealing with the property as one's own and failing to make the required payment or disposition.

MODEL PENAL CODE § 223.8 comment 2 (1980). The first element limits who can be charged with the offense to those persons who take property under agreement or obligation "to make specified payment or other disposition." N.J. STAT. ANN. § 2C:20-9 (West 1982). The second element deals with what those persons must do to be liable for a violation. The second element has two distinct parts: the dealing with the property of another as one's own *and* the failure to make the intended disposition of the property, *i.e.*, returning money when it is supposed to be returned. If the intended disposition of the money was for the lawyer to deposit it in

held that culpability is lower in the case where the money is merely borrowed, but the difference between borrowing and outright theft is "negligible."[91]

The chief justice similarly dismissed other factors advanced in the mitigation of the offense of misappropriation. The inexperience of a young lawyer or the lawyer's lack of a prior disciplinary record were not important in misappropriation cases, he wrote because "[t]his offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer."[92] The fact that a person charged with misappropriation would be unlikely to commit such an offense again and would become "a new person of true integrity" he stated was equally irrelevant.[93] He acknowledged, however, that the punishment of disbarment, from which there is no realistic hope of reinstatement, is a harsh punishment that requires "the most compelling reasons to justify it."[94]

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a trust account pending the ultimate disposition of the money, then unauthorized borrowing would be a violation of the statute. *See* N.J. STAT. ANN. § 2C:20-9 (West 1982). The lawyer would, in this case, have treated the money as his own and would have failed to make proper disposition. If, however, the intended disposition of the money was to be payment by the lawyer to someone and payment was in fact made, then there would have been no violation, because there would have been no failure "to make the required payment or disposition," even though the lawyer used the money temporarily for his own purposes. *See* N.J. STAT. ANN. § 2C:20-9 (West 1982).

91 *Wilson*, 81 N.J. at 458, 409 A.2d at 1156.

92 *Id.* at 460, 409 A.2d at 1157 (footnote omitted).

93 *Id.* at 460 & n.4, 409 A.2d at 1157 & n.4.

94 *Id.* at 460 & n.5, 409 A.2d at 1157 & n.5. The court observed that over the last 100 years, only three attorneys were reinstated after disbarment. *Id.* at 460 n.5, 409 A.2d at 1157 n.5 (citing *In re* Mink, 60 N.J. 609, 81 A.2d 460 (1972); *In re* Isserman, 35 N.J. 198, 172 A.2d 425 (1961); *In re* Wendell, 3 Misc. 312, 128 A. 249 (1925).

In *Mink*, neither the reasons for disbarment nor the reasons for reinstatement are provided. *See In re* Mink, 60 N.J. 609, 81 A.2d 460 (1973).

In *Isserman*, the attorney was sentenced to four months in jail for contempt of court for his conduct during his representation of a communist party official in a heated trial in federal court. United States v. Sacher, 9 F.R.D. 394 (1949), *aff'd*, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952). After the United States Supreme Court affirmed the lower court's finding, the New Jersey Supreme Court disbarred Isserman. *Isserman*, 9 N.J. 269, 87 A.2d 903 (1952), *reh'g denied*, 9 N.J. 316, 88 A.2d 199 (1952). Chief Justice Vanderbilt asserted that "[a] lawyer who has thus publicly demonstrated his utter contempt for one of the courts of this Nation, its judges, its rules and processes and, indeed, our entire judicial system, should not be permitted to continue to practice as an officer of the courts of this State." *Id.* at 275, 87 A.2d at 906. Isserman applied for reinstatement to the bar and the supreme court granted his application. *In re* Isserman, 35 N.J. 198, 172 A.2d 425 (1961). Chief Justice Weintraub stated that the court decided to reconsider Isserman's disbarment because other courts had refused to disbar him and because

The *Wilson* rule can be viewed for what the decision said it was—the need to maintain the integrity of the bar in face of grave misconduct that threatened public confidence in the legal profession. *Wilson* can also be seen, however, as a sharp reaction to the leniency in disciplinary cases that marked the Hughes court. At least insofar as determining the punishment for misappropriation, the *Wilson* rule rejected the holding of *In re Baron* that "[e]ach disciplinary matter must be determined on its own facts and circumstances."[95] The *Wilson* court enunciated a bright-line rule that did not consider the attorney's motivations for misappropriation nor his contrition. After *Wilson* lawyers guilty of misappropriation would be disbarred.[96] Although unstated in *Wilson*, the decision appeared to be a return to the view of Chief Justice Vanderbilt that an attorney's conduct and character must be impeccable.[97] The belief was that a lawyer who misappropriated money demonstrated his flawed character, and even if money were to be reimbursed could never reestablish a good reputation in the legal community.

Despite the strong language rejecting the use of mitigating factors in misappropriation cases, the court stopped short of saying that mitigating factors would never be considered. By holding that the application of the *Wilson* rule would be "almost invariable" and observing that "mitigating factors will rarely override the requirement of disbarment," the court left open the

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Isserman was the only lawyer in the case to be disbarred even though his misconduct was relatively minor when viewed in relation to other attorneys' behavior in the same case. *Id.* at 203, 172 A.2d at 427-28. The court observed that the trial judge who held Isserman and the other defense lawyers in contempt had noted that he would simply have reprimanded them if there had not been an agreement by the lawyers to be in contempt. *Id.* at 203-04, 172 A.2d at 428 (citing United States v. Sacher, 9 F.R.D. 394, 395 (1949)). The court pointed out that the court of appeals subsequently affirmed the trial judge's findings of contempt on all grounds but conspiracy. *Id.* at 204, 172 A.2d at 428; *see also Sacher*, 182 F.2d at 416. Chief Justice Weintraub said that once the finding of conspiracy was eliminated, the finding of contempt did not warrant disbarment. *Isserman*, 35 N.J. at 204, 172 A.2d at 428.

In *Wendel*, a lawyer was disbarred after he had been convicted for perjury. *Wendel*, 3 Misc. at 312, 128 A. at 249. After evidence showing Wendel's innocence was discovered, he was pardoned. *Id.* at 313, 128 A. at 250. Based on the foregoing, the court reinstated him as an attorney. *Id.* at 315, 128 A. 250.

95 *Baron*, 25 N.J. at 449, 136 A.2d at 875. *See supra* notes 33-37 and accompanying text (discussing *Baron*).

96 The court extended the *Wilson* rule to unauthorized taking of money from escrow accounts. *In re* Hollendonner, 102 N.J. 21, 504 A.2d 1174 (1985). The court also extended the *Wilson* rule to prohibit a lawyer, entitled to money held in a trust account, from taking it before he had authorization. *In re* Warhaftig, 106 N.J. 529, 524 A.2d 398 (1987).

97 *Wittreich*, 5 N.J. at 91, 74 A.2d at 264-65. *See supra* note 18.

possibility that some mitigating factors could still prevent disbarment for misappropriation.[98]

III. Alcoholism, Drug Dependency and Compulsive Gambling as a Defense or a Mitigating Factor

After *Wilson* rejected the consideration of mitigating factors in determining punishment in misappropriation cases, the question remained whether any defense could be presented. In some cases, lawyers preparing counter-arguments to charges of misappropriation looked to criminal law doctrines of responsibility and excuse.[99] Arguably, if an insane person is not legally responsible for a crime, an insane lawyer should not be legally responsible for violating an ethical rule.[100] Similarly, if intoxication in some

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[98] *Wilson*, 81 N.J. at 453, 461, 409 A.2d at 1154, 1158.

The court made the application of the Wilson rule prospective in *In re* Smock, 86 N.J. 426, 432 A.2d 34 (1981). The *Smock* court held:

> In view of the radical change effected by *Wilson*, with its strict result of disbarment in misappropriation cases as compared to this Court's treatment of such matters prior thereto, we believe it would be manifestly unfair to apply *Wilson* retroactively. A significant, although not paramount, element of the *Wilson* doctrine was its deterrent effect on the bar. Obviously, retroactive application does not in any way serve that deterrent purpose.

86 N.J. at 427-28, 432 A.2d at 35.

Before the *Smock* decision regarding the retroactivity of the *Wilson* doctrine, the court disbarred one lawyer for pre-*Wilson* misappropriation. *In re* Clark, 83 N.J. 458, 416 A.2d 851 (1980) (no mitigating circumstances found). After *Smock* the court continued the prior practice of considering mitigating factors in pre-*Wilson* misappropriation cases. *See In re* Stroger, 100 N.J. 545, 498 A.2d 362 (1985) (conviction for embezzlement); *In re* Cornish, 98 N.J. 500, 488 A.2d 551 (1985) (five-year suspension; mental illness, inexperience and public service raised in mitigation); *In re* Knox, 97 N.J. 64, 477 A.2d 1239 (1984) (three-year suspension; lack of harm to clients and lawyer's alcoholism raised in mitigation); *In re* Gallagher, 96 N.J. 54, 473 A.2d 535 (1984) (repeated misappropriation); *In re* Lehet, 95 N.J. 466, 472 A.2d 127 (1984) (misappropriation before and after *Wilson*); *In re* Franco, 93 N.J. 491, 461 A.2d 1124 (1983) (no mitigating factors); *In re* Achmetov, 89 N.J. 121, 445 A.2d 36 (1982) (misappropriation before and after *Wilson*); *In re* Witherington, 88 N.J. 241, 440 A.2d 1327 (1982) (no restitution after embezzlement); *In re* Quinn, 88 N.J. 10, 438 A.2d 121 (1981) (no mitigating factors); *In re* Lavine, 87 N.J. 595, 436 A.2d 1347 (1981) (three-year suspension; restitution and prior good record raised in mitigation); *In re* Strickland, 87 N.J. 575, 436 A.2d 1337 (1981) (indefinite suspension; lawyer's alcoholism raised in mitigation).

[99] *See, e.g.*, *In re* Jacob, 95 N.J. 132, 469 A.2d 498 (1984) (temporary irrationality and pathological intoxication raised as defenses to misappropriation).

[100] *See In re* Cornish, 98 N.J. 500, 511, 488 A.2d 551, 556 (1985) (depressive neurosis raised as defense to misappropriation).

Insanity is a defense to criminal conduct. N.J. Stat. Ann. § 2C:4-1 (West 1982). The New Jersey Code of Criminal Justice provides:

> A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from dis-

instances can excuse criminal responsibility, intoxication should excuse, in the proper case, a lawyer from responsibility for ethical violations.[101] In other cases, attorneys sought to defend against charges of misappropriation by raising alcoholism or drug addiction as a mitigating factor under the *Wilson* rule.[102]

A defense to misappropriation which combined intoxication with mental illness was raised but rejected in *In re Jacob*.[103] The attorney claimed that thyrotoxicosis[104] had "caused certain aberrational conduct on his part that manifested itself in hyperactivity, depression, irrationality, intoxication, extra-marital sexual gratification, and irresponsibility both in his personal and profes-

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ease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence.

Id.

101 *See Jacob*, 95 N.J. at 134, 469 A.2d at 499.

On the intoxication defense, the New Jersey Code of Criminal Justice provides:

a. Except as provided in subsection d. of this section, intoxication of the actor is not a defense unless it negatives an element of the offense.

b. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

c. Intoxication does not, in itself, constitute mental disease within the meaning of chapter 4.

d. Intoxication which (1) is not self-induced or (2) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial and adequate capacity either to appreciate its wrongfulness or to conform his conduct to the requirement of law.

e. Definitions. In this section unless a different meaning plainly is required:

(1) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(2) "Self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(3) "Pathological intoxication" means intoxication grossly excessive in degree given the amount of the intoxicant, to which the actor does not know he is susceptible.

N.J. STAT. ANN. § 2C:2-8 (West 1982).

102 *See, e.g., In re* Romano, 104 N.J. 306, 516 A.2d 1109 (1986); *In re* Hein, 104 N.J. 297, 516 A.2d 1105 (1986).

103 95 N.J. 132, 469 A.2d 498 (1984).

104 Thyrotoxicosis is "a state of intoxication due to excessive or abnormal activity of the thyroid gland." *Id.* at 134-35, 469 A.2d at 499.

sional pursuits."[105] The court asserted that for this type of defense to succeed, competent medical evidence must demonstrate 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."[106] Jacob did not meet that standard and was disbarred.[107]

Two years after the *Jacob* court rejected a defense based on a physiologically-induced state of intoxication, the court faced in *In re Hein* a defense of alcoholism as a general condition of the lawyer's life during a period of misconduct.[108] In *Hein*, the attorney was charged with neglect of his clients' legal matters, failure to perform pursuant to contracts of employment, misrepresentation to a client about the status of a case, assistance of a non-lawyer in the unauthorized practice of law and misappropriation.[109] However, of greatest concern to the court was the claim of misappropriation.[110] Hein admitted that he used the client's money without authorization, but claimed to have a serious drinking problem.[111] Hein urged that because his alcohol dependency

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105 *Id.* at 134, 469 A.2d at 499. Part of the theory of Jacob's defense was that he misappropriated the money not as a result of greed, but instead to finance his "dual life style" resulting from his disease. *Id.* at 137, 469 A.2d at 501.

106 *Id.*

107 *Id.* at 138, 469 A.2d at 501. In *Jacob*, there were two problems in asserting excuse as a defense. First, the factual setting in which the defense was raised—57 withdrawals from two different trust accounts during a 21 month period—made it appear to the court that the misappropriations were purposeful and persistent. *Id.* at 136, 469 A.2d at 500. Second, the medical testimony, which was not found to be persuasive, was given by a general practitioner—not a psychiatrist. *Id.* at 134, 137, 469 A.2d 498 at 499, 501. The district ethics committee accepted the doctor's report with reservations because it did not know whether he was board certified in a mental health discipline. *Id.* at 134, 469 A.2d at 499. A second medical report was considered by the court but dismissed as conclusory and as obscuring the explanation for the misappropriations. *Id.* at 137, 469 A.2d at 501.

108 104 N.J 297, 301, 516 A.2d 1105, 1106 (1986).

109 *Id.* at 299, 516 A.2d at 1105-06. Hein, a sole practitioner, had no complaints filed against him during his first three years of practice. *Id.* at 298, 516 A.2d at 1105. When Hein closed his office approximately five years after being admitted to the bar, he was faced with several ethics complaints. *Id.* The next year he was suspended from practice. *Id.*

110 *Id.* at 300, 516 A.2d at 1106.

111 *Id.* The significant impact of alcohol on Hein's life is demonstrated by a statement he made during the disbarment proceedings in federal court, which was accepted as true. *In re* Hein, Misc. No. 82-248, slip op. at 1-3 (D.N.J. Oct. 20, 1987). His testimony indicated that:

> Throughout his academic years Mr. Hein continued to drink up to one quart of hard liquor per day as well as several cases of beer on weekends.
>
> . . . .
>
> Shortly after Mr. Hein opened up his own law practice, his level of

caused his misconduct it should mitigate against application of the extreme sanction of the *Wilson* doctrine.[112]

With regard to the issue of culpability, the court reiterated the *Jacob* standard that "[t]here may be circumstances in which an attorney's loss of competency, comprehension, or will may be of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful."[113] The court carefully considered the testimony of Hein's expert on alcoholism who described the effect of alcohol dependency upon competency, comprehension and will.[114] The loss of competency, the expert asserted, increases as the alcoholism progresses which ultimately results in disruption of the normal thinking processes, and concern, perception and judgment exercised in daily living and performing accomplishment of professional skills.[115] Hein's expert testified to a direct causal connection between Hein's lack of care and judgment and the progression of his alcoholism.[116] Although the court was convinced that alcoholism had contributed to Hein's loss of care and judgment, the court held that it did not relieve him of legal responsibility for his actions.[117]

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drinking increased markedly . . . . After the death of his father in July 1979 until August 1981, Mr. Hein drank approximately one and one-half quarts of hard liquor per day. Ultimately, this led to blackouts and hallucinations. He became paranoid and suffered from delusions. He believed his work was being done when in fact it was not. He regularly postponed court appearances. He was unable to sleep and ultimately went into total seclusion.

During this period he was arrested and convicted of driving while intoxicated and saw his marriage fall apart. Additionally, the vast amount of money that he spent on alcohol, when coupled with his inability to earn money because of his disease, forced him to file for personal bankruptcy.

Id. at 2-3.

112 *Hein*, 104 N.J. at 301, 516 A.2d at 1106.

113 *Id.* at 302, 516 A.2d at 1107 (citing *In re* Jacob, 95 N.J. 132, 137, 469 A.2d 498, 501 (1984)).

114 *Id.* at 303, 516 A.2d at 1107. The court noted that it had "carefully tested against the *Jacob* standard the proofs submitted by the respondent consisting of his seeking treatment at a rehabilitation center, expert analysis and exert opinion with respect to his condition, and personal affidavits from himself, his wife, and an employee." *Id.*

115 *Id.*, 516 A.2d at 1107-08.

116 *Id.*, 516 A.2d at 1108. The expert concluded "that there [was] a direct causal relationship between the progressive disease of alcoholism and the loss of critical care and judgment affecting [respondent's] practice of law." *Id.*

117 *Id.* The court observed:

In this case the evidence falls short, however, of suggesting that at the time . . . [of the misappropriation], [Hein] was unable to comprehend the nature of his act or lacked the capacity to form the requisite

After the court concluded Hein legally responsible, the only question remaining was whether alcoholism would be a mitigating factor under the *Wilson* doctrine.[118] The court noted that the misconduct unrelated to the charge of misappropriation probably did not warrant disbarment because it occurred over a relatively short period of Hein's career and was partially influenced by Hein's alcohol dependency.[119] The court rejected, however, the use of alcoholism as a mitigating factor in a disbarment proceeding for misappropriation.[120] The court likened the impact of the pressures faced by an alcoholic lawyer to the pressures faced by a lawyer with severe financial problems.[121] The court determined that it would be hard to rationalize disbarring an attorney who steals to help his family and not disbarring the lawyer who steals because of alcoholism.[122]

The court stated that it recognized that alcoholism is not a character flaw, but a disease.[123] While the court was sympathetic to the plight of alcoholics, it refused to allow its sympathy to "extend to the point of lowering the barriers to the protection [it had] attempted to give to that portion of the public who are clients, especially clients who entrust their money to lawyers."[124] The court acknowledged that it was troubled by the decision to disbar a recovered alcoholic who would most likely never repeat the same course of conduct.[125] It justified its decision, however, by reiterating the *Wilson* principle regarding the overriding need to maintain public confidence in the bench and bar.[126]

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intent. In addition, it does not appear that he was in a dependent state, since he was able to attend to his practice.

Id.

118 *Id.* at 301, 516 A.2d at 1106.

119 *Id.* at 299-300, 516 A.2d at 1106.

120 *Id.* at 303-04, 516 A.2d at 1108.

121 *See id.* at 305, 516 A.2d at 1108. The court asserted that it found "it difficult to exonerate the conduct influenced by the compulsion of alcohol dependency as contrasted with the compulsion to preserve one's family or assist another in a time of extreme need." *Id.*

122 *See id.*

123 *Id.* at 302, 516 A.2d at 1107. The court stated: "We recognize, as respondent argues, that alcoholism is indeed not a defect in character. The public policy of the State of New Jersey recognizes alcoholism as a disease and an alcoholic as a sick person." *Id.*

124 *Id.* at 303-04, 516 A.2d at 1108.

125 *Id.* at 304, 516 A.2d at 1108.

126 *Id.* The court, with respect to disbarment of alcoholics, observed:

That individual harshness—and so it is in most cases—is justified only if we are right about the devastating effect misappropriation—unless so treated—has on the public's confidence in the Bar and in this Court.

Addiction to cocaine was raised in mitigation in *In re Romano*,[127] decided the same day as *Hein*.[128] The court considered Romano's drug dependency in two ways. Initially, the court dealt with cocaine addiction as an excuse.[129] After finding Romano guilty with regard to the misappropriation charge, the court treated addiction as a mitigating factor.[130] Romano presented testimony showing that the cocaine addiction caused him to misappropriate the money.[131] The District Ethics Committee accepted Romano's claim that his mental and physical disability was causally related to his misappropriations of clients' funds.[132] The New Jersey Supreme Court, however, concluded that Romano had "failed to demonstrate that a disease of the mind rendered him unable to tell right from wrong or to understand the nature and quality of his acts."[133] Although the court recognized that this was a tragic situation, citing *Hein*, the court stated it was com-

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> Our primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar.

Id.

127 104 N.J. 306, 516 A.2d 1109 (1986).

128 *Id.* The court decided two other cases on November 12, 1986 involving misappropriation where alcoholism was raised. *In re* Canfield, 104 N.J. 314, 516 A.2d 1114 (1986), and *In re* Monaghan, 104 N.J. 312, 516 A.2d 1113 (1986), dealt with admitted misappropriations by lawyers who raised alcoholism to mitigate against disbarment. In brief opinions the court, relying on *Hein* did not permit alcoholism as a mitigating factor in either case and disbarred the attorneys. *Canfield*, 104 N.J. at 315, 516 A.2d at 1114; *Monaghan*, 104 N.J. at 313, 516 A.2d at 1114.

129 *See id.* at 307, 516 A.2d at 1109-10. The court stated that Romano "offers as mitigating circumstances, however, that he was a cocaine addict and that his addiction was a mental or physical disability that *caused* him to engage in inappropriate behavior." *Id.* (emphasis added). Although the opinion used the word "mitigating," it treated the addiction as an excuse. *See id.*

130 *Id.* at 308, 516 A.2d at 1111. The court noted that the disciplinary review board recommendation concluded "that to allow this [addiction] to be a mitigating factor to outweigh the seriousness of the crime of attorney theft 'would be a disservice to the bar, the judiciary and the public.' " *Id.* (quoting *In re* Wilson, 81 N.J. 451, 456, 409 A.2d 1153, 1155 (1979)).

131 *Id.* at 310, 516 A.2d at 1112. An expert testified that Romano's diversion of clients' money "was the direct result of his disease." *Id.* The facts of *Romano* indicated that he developed an addiction to cocaine in 1978. *Id.* at 309, 516 A.2d at 1111-12. He spent approximately $2,000 a week on his cocaine habit and owed drug dealers $30,000 by 1982. *Id.*, 516 A.2d at 1112. After an ethics complaint was filed against him, Romano started treatment for his addiction. *Id.*, 516 A.2d at 1111.

132 *Id.* at 308, 516 A.2d at 1110.

133 *Id.* at 311, 516 A.2d at 1112. The court expressed that "[t]he picture that emerges is one of a lawyer who could function successfully as a practitioner, who knew it was wrong to misappropriate clients' funds to pay for his own drug debts, but who proceeded to use clients' funds to pay for his own drug addiction." *Id.*

pelled to disbar Romano.[134]

The court next faced the issue of alcoholism as a defense to misappropriation in *In re Ryle*.[135] The defense was raised at oral argument, and the court then remanded the matter to a special master to consider that claim.[136] The master found Ryle's alcoholism to be insignificant.[137] The court adopted the master's findings and disbarred Ryle.[138]

In re Crowley,[139] another misappropriation case involving an alcoholic attorney, presented the court with an opportunity to make an exception to the Wilson rule. In *Crowley*, the Disciplinary Review Board recommended that the lawyer involved be suspended, rather than disbarred because the misappropriation was clearly caused by the respondent's alcoholism.[140] The review board found that Crowley's "judgment was severely impaired by alcoholism, which . . . impaired his moral reasoning to such an extent that he 'was incapable of knowing or realizing that he engaged in illegal or unethical conduct.' "[141] While the court acknowledged a "clear relationship" between Crowley's alcoholism and his misconduct, they disbarred him because the proofs did not meet the *Wilson* test.[142]

In *In re Devlin*[143] the New Jersey Supreme Court was again confronted with alcoholism as a defense to misappropriation of clients' funds.[144] In *Devlin*, an attorney unsuccessfully sought to

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134 *Id.* at 309, 311, 516 A.2d at 1111, 1113.

135 105 N.J. 10, 518 A.2d 1103 (1987).

136 *Id.* at 11, 518 A.2d at 1104. The case was remanded to a special master solely to determine the factual issues regarding Ryle's alcoholism and its relation to his wrongful conduct. *Id.*

137 *Id.* at 12, 518 A.2d at 1104. Specifically, the special master found:

> Although he was an alcoholic during these months, his alcoholism was so minimal in its nature and extent as to create no difference between his actions and those that would be performed by a nonalcoholic. Alcoholism did not affect his state of mind. . . . [H]is awareness of the moral quality of his acts was not materially impaired by his alcoholism, and . . . such alcoholism did not deprive him of the will to conform that conduct to common standards of acceptable behavior.

Id.

138 *Id.* at 13, 518 A.2d at 1105.

139 105 N.J. 89, 519 A.2d 361 (1987).

140 *Id.* at 90, 519 A.2d at 362.

141 *Id.* The Disciplinary Review Board's conclusion was based in part on a report it received from the Alcohol Advisory Committee, which had met with Crowley, his lawyer and his counselor-therapist. *Id.*

142 *Id.* at 93-94, 519 A.2d at 363-64.

143 109 N.J. 135, 536 A.2d 209 (1988).

144 *Id.* Devlin was to hold the proceeds of a real estate closing in escrow for a client. *Id.* at 136, 536 A.2d at 209. Instead of placing the money in an interest

introduce evidence of alcohol dependency as a mitigating factor in a disciplinary proceeding.[145] The court held that "[a]lcoholism is not a mitigating factor sufficient to overcome the presumption of disbarment in a misappropriation case."[146]

In 1988, the supreme court decided three cases in which compulsive gambling[147] was raised by lawyers attempting to avoid disbarment for misappropriation. *In re Goldberg*[148] involved an attorney who had been convicted of embezzlement when he misappropriated trust funds in order to gamble.[149] The supreme court applied the *Jacob* standard[150] and determined that there was no "loss of competency, comprehension, or will sufficient to ex-

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bearing account in trust for his client, Devlin placed the money in an account under his own name. *Id.* Devlin later withdrew a portion of the money and placed it in his trust account. *Id.* at 137, 536 A.2d at 210. The client, whom was represented by Devlin in a real estate transaction, was involved in divorce proceedings. *Id.* When the divorce was settled, the proceeds of the real estate transactions were to be released to the client and his former wife, but Devlin's trust account check was dishonored. *Id.* Devlin subsequently paid with a treasurer's check that was honored. *Id.* at 138, 536 A.2d at 210. The Office of Attorney Ethics was notified about the overdraft. *Id.*

145 *Id.* at 135-36, 536 A.2d at 209. The Disciplinary Review Board noted that a psychiatrist had found Devlin to have been under the influence of alcohol during part of the period when he misappropriated money, but asserted that Devlin was not suffering from alcoholism. *Id.* at 139, 536 A.2d 211.

146 *Id.* at 142, 536 A.2d at 213. The court concluded that Devlin's "reliance on general alcoholism defense [was] unavailing in these circumstances." *Id.* The court also stated that "[i]n any event, respondent was not so impaired that he did not know what he was doing. *Id.*

147 The American Psychiatric Association, describes "pathological gambling" as an "impulse control disorder." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31 (3d ed 1987) [hereinafter DSM III]. DSM III states:

> The essential features of this disorder are a chronic and progressive failure to resist impulses to gamble, and gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits. The gambling preoccupation, urge, and activity increase during periods of stress. Problems that arise as a result of the gambling lead to an intensification of the gambling behavior. Characteristic problems include extensive indebtedness and consequent default on debts and other financial responsibilities, disrupted family relationships, inattention to work, and financially motivated illegal activities to pay for gambling.

Id.

148 109 N.J. 163, 536 A.2d 224 (1988).

149 *Id.* at 165, 536 A.2d at 224. Goldberg was convicted on 11 counts of diversion of entrusted property and 11 counts of theft. *Id.* He was ordered to make restitution of $291,727.88, although the actual amount taken from clients was estimated at more than $600,000. *Id.* at 166, 172, 536 A.2d at 225, 228.

150 *Id.* at 169-71, 536 A.2d at 227. *See also supra* notes 103-107 and accompanying text (discussing *Jacob*).

cuse respondent's misconduct."[151] Based on the testimony of a psychiatric expert, the court concluded that the lawyer "was aware of both the nature and quality of his acts"[152] and that the compulsive gambling did not cause "an uncontrollable urge to misappropriate his clients' funds."[153]

In *In re Lobbe*[154] an attorney attempted to defend against charges of misappropriation by claiming he was not cognizant of what he was doing.[155] A psychiatric expert testified that "compulsive gamblers know 'in a very glib, shallow way [that they misappropriate client's funds] but they don't really know. [I]f they really, truly knew the consequences and comprehended the larger overall meaning of what they were doing, they wouldn't do it.' "[156] The supreme court rejected this defense strategy by noting that Lobbe's own testimony acknowledged that he knew what he was doing was wrong when he diverted clients' money.[157]

A defense that compulsive gambling was an irresistible impulse that could not be controlled was raised and rejected by the supreme court in *In re Nitti*.[158] There, the lawyer's psychiatrist testified that a compulsive gambler understands that what he is doing is wrong, but is unable to control himself.[159] The court questioned whether there had actually been a loss of control, however, and disbarred the attorney after finding that funds were misappropriated knowingly.[160]

The thread running through all these decisions after *Hein* and *Romano* is the lawyer's knowledge that the act of taking the client's money was wrong. The court's emphasis on the knowledge of the wrongfulness makes it unlikely that a defense based on a psychological disability can ever save a lawyer from disbarment. It is difficult to imagine a case where a lawyer could ever fail to be aware of the wrongfulness of taking money and still be able to function in any capacity as a lawyer.

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151 *Goldberg*, 109 N.J. at 171, 536 A.2d at 227.
152 *Id.* at 170, 536 A.2d at 227.
153 *Id.* at 171, 536 A.2d at 227.
154 110 N.J. 59, 539 A.2d 729 (1988).
155 *Id.* at 59-60, 539 A.2d at 729.
156 *Id.* at 64-65, 539 A.2d at 732.
157 *Id.* at 64, 539 A.2d at 731.
158 110 N.J. 321, 541 A.2d 217 (1988).
159 *Id.* at 324-25, 541 A.2d at 218-19.
160 *Id.* at 325-26, 541 A.2d at 219.

IV. ALTERNATE APPROACHES

When a defense, which can be characterized as a psychological disability,[161] such as alcoholism, drug dependency or compulsive gambling, is raised in a disciplinary proceeding for misappropriation, the initial question is whether it is being raised as a complete defense to excuse the lawyer from responsibility or to mitigate against punishment. Generally, alcoholism does not excuse criminal conduct.[162] Intoxication, however, is an effective excuse when it negatives an element of the offense, such as intent or knowledge.[163] Intoxication and alcoholism are not identical. Alcohol or drug-induced intoxication, unlike alcohol or drug dependency, are short-term conditions which last only as long as the chemicals remain in the body.[164] There is a dispute among

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161 In 1988, the New Jersey Supreme Court ruled in *Clowes v. Terminex Int'l, Inc.*, that alcoholism is a handicap within the meaning of N.J. STAT. ANN. § 10:5-4.1 (West 1982), which prohibits employment discrimination against the handicapped. 109 N.J. 575, 594, 538 A.2d 794, 804 (1988). A person, "handicapped" within the meaning of this statute, is one who:

> suffer[s] from any physical disability, infirmity, malformation or disfigurement . . . or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.

N.J. STAT. ANN. § 10:5-5(q) (West 1982).

162 *See In re* Kersey, 520 A.2d 321, 326 (D.C. 1987). The District of Columbia Court of Appeals held:

> In various contexts, the legal system implicitly recognizes something of the unique, dualistic nature of alcoholism. In some jurisdictions, including this one, chronic alcoholism is an absolute defense to charges of public intoxication. But rarely is alcoholism a defense to criminal liability. More commonly it is recognized as a mitigating factor in sentencing and in bar discipline.

Id. (footnotes omitted).

163 *See* N.J. STAT. ANN. § 2C:2-8 (West 1982). *See supra* note 101.

164 "Intoxication" is described by the American Psychiatric Association as: "maladaptive behavioral changes due to recent ingestion of alcohol. These changes may include aggressiveness, impaired judgment, impaired attention, irritability, euphoria, depression, emotional lability, and other manifestations of impaired social or occupational functioning." *See* DSM III, *supra* note 147, at §§ 303, 305. The American Psychiatric Association states that the duration of alcohol intoxication varies according to the circumstances. *Id.* § 303.00. The pattern of alcohol dependence or abuse is described as:

> There are three main patterns of chronic Alcohol Abuse or Dependence. The first consists of regular daily intake of large amounts; the second, of regular heavy drinking limited to weekends; the third, of long periods of sobriety interspersed with binges of daily heavy drinking lasting for weeks or months. It is a mistake to associate one of these particular patterns exclusively with "alcoholism."
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> Some investigators divide alcoholism into "species" depending on

the scientific community as to whether alcoholism is a disease or a behavioral condition.[165] But whether an alcoholic is defined by a medical or behavioral model, an alcoholic is not always intoxicated. Beyond this, the importance of intoxication as an excuse in misappropriation cases is not significant for most alcoholic or drug dependent lawyers.[166]

Without explicitly stating that intoxication would operate in a disciplinary proceeding exactly as it does in a criminal matter, the supreme court indicated in *Hein* that intoxication would be considered as an excuse.[167] Although Hein's alcoholism was a long-term condition,[168] he experienced discrete periods of intoxication while actively suffering from alcoholism. In evaluating the availability of an excuse defense, the court looked at the short-term condition of intoxication, rather than Hein's long-term alcoholism, and held that the evidence did not indicate that Hein "was unable to comprehend the nature of his act or lacked the capacity to form the requisite intent."[169]

Before *Wilson*, the New Jersey Supreme Court usually was willing to accept alcoholism or drug addiction as mitigating fac-

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> the pattern of drinking. One species, so-called gamma alcoholism, is common in the United States and conforms to the stereotype of the alcoholism seen in people who are active in Alcoholics Anonymous. Gamma alcoholism involves problems with "control": once the person with gamma alcoholism begins to drink, he or she is unable to stop until poor health or depleted financial resources prevent further drinking. Once the "bender" is terminated, however, the person is able to abstain from alcohol for varying lengths of time.

Id. §§ 303.90, 305.00 at 173.

165 *See generally* G. VAILLANT, THE NATURAL HISTORY OF ALCOHOLISM 15-45 (1983).

166 The Supreme Court of Illinois observed in *In re* Driscoll, 85 Ill.2d 312, 316, 423 N.E.2d 873, 874 (1981):

> Perhaps in rare cases alcoholism might so change the character of the misconduct or so distort the attorney's state of mind as to provide a complete excuse. Usually, however, alcoholism is at most an extenuating circumstance, a mitigating fact, not an excuse. The attorney's impaired judgment diminishes the responsibility he must bear, but does not eliminate it.

Id. But cf. In re Holman, 297 Or. 36, 682 P.2d 243 (1984) (intoxication was successful defense to misappropriation charge where addiction to tranquilizers combined with excessive use of alcohol produced a situation where the lawyer was not aware that taking money from his trust account was wrong).

167 *See supra* notes 108-126 and accompanying text.

168 *In re* Hein, Misc. No. 82-248, slip op. at 2 (D.N.J. Oct. 20, 1987). The factual statement accepted in Hein's disbarment from federal court shows that Hein had been an alcoholic from the 1960's until the early 1980's. *Id.*

169 *Hein*, 104 N.J. at 303, 516 A.2d at 1108.

tors in disciplinary cases.[170] The court's unwillingness to accept alcoholism as a mitigating factor after *Wilson* is based upon two premises underlying the *Wilson* doctrine—the need to preserve the public confidence in the legal system and the criminality of misappropriation.[171] If the court's two premises that misappropriation is among the most serious of offenses and that confidence in the legal system is of paramount importance are accepted, then the conclusion that "disbarment is the only appropriate discipline"[172] for misappropriation follows logically. The Rhode Island Supreme Court accepted this theory, when it explicitly adopted the *Wilson* rule and disbarred an alcoholic lawyer who misappropriated money from an estate.[173] The Supreme Court of Oregon, which initially accepted alcoholism as a mitigating circumstance,[174] came full circle in 1985 and rejected alcohol dependency as a mitigating factor in misappropriation cases.[175]

Yet, not all courts are in accord with the New Jersey

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170 *See, e.g., In re* Stanton, 110 N.J. 356, 541 A.2d 678 (1988) (six-month suspension where lawyer with drug addiction was convicted of possession of cocaine); *In re* Barbour, 109 N.J. 143, 536 A.2d 214 (1988) (alcoholism considered in determining suspension for neglect, fee overreaching and improper bookkeeping of attorney who suffered from serious physical illness); *In re* Kinnear, 105 N.J. 391, 522 A.2d 414 (1987) (suspension where drug dependent attorney was convicted for distribution of cocaine); *In re* Strickland, 87 N.J. 575, 436 A.2d 1337 (1981) (alcoholism accepted as mitigating in pre-*Wilson* misappropriation). *But cf. In re* Mc Alesher, 93 N.J. 486, 461 A.2d 1122 (1983) (alcoholism not a mitigating factor in disbarment proceeding of lawyer who murdered his wife).

171 *Wilson*, 81 N.J. at 457, 409 A.2d at 1155. *See supra* note 72 and accompanying text.

172 *Wilson*, at 453, 409 A.2d at 1154.

173 Carter v. Ross, 461 A.2d 675 (R.I. 1983). The Rhode Island Supreme Court held:

> We, like our New Jersey colleagues, are convinced that continuing public confidence in the judicial system and the bar as a whole requires that the strictest discipline be imposed in misappropriation cases. Thus, even though we wish the respondent well in any effort he may make to rehabilitate himself, we believe that he has failed to show cause why he should not be disbarred. Alcoholism can create tragedy in all occupations and professions, but this court is charged with the responsibility of doing everything within reason to safeguard a client's funds from an unfit attorney, whatever the cause of his unfitness may be.

Id. at 676.

174 *See In re* Gregg, 252 Or. 174, 448 P.2d 547 (1968) (reinstatement after disbarment for misappropriation where alcoholic lawyer had remained sober for two and a half years); *In re* Lewelling, 244 Or. 282, 417 P.2d 1019 (1966) (two-year suspension and five years probation for several violations including improper use of clients' funds).

175 *In re* Laury, 300 Or. 65, 706 P.2d 935 (1985). *See also In re* Eads, 303 Or. 111, 734 P.2d 340 (1987) (alcoholism rejected in mitigation of disbarment, the standard penalty for misappropriation).

Supreme Court on this point. In 1986, the Supreme Judicial Court of Massachusetts did not view misappropriation as a crime or even a matter of grave concern, when it only censured a lawyer who used $177,000 of clients' funds without authorization.[176] Two justices disagreed with the majority, yet only recommended a two-year suspension.[177]

Two courts have stated that when alcoholism is raised as a mitigating factor they are compelled to consider it. In *In re Kersey*,[178] where alcoholism was raised as a mitigating factor in a misappropriation case, the District of Columbia Court of Appeals asserted that failure "to consider alcoholism as a mitigating factor would be to defy both scientific information and common sense."[179] The Supreme Court of Illinois stated in *In re Driscoll*[180] that "[a]lcoholics need not be treated just like other people; our duty to uphold the standards and reputation of the profession is not incompatible with sympathy and leniency for victims of alcoholism."[181] Courts in at least eight other jurisdictions are also inclined to consider alcoholism as a mitigating factor in misappropriation cases.[182] When courts in other states accept alcoholism as a mitigating factor in determining discipline, the question becomes when should it be considered. Courts usually consider two issues, causation and

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176 *See In re* Deragon, 398 Mass. 127, 495 N.E.2d 831 (1986).

177 *Id.* at 133, 495 N.E.2d at 834-35 (Wilkins, J., dissenting). In his dissent, Justice Wilkins said "[t]he modest discipline of public censure" threatened public confidence in the court's discipline of the bar. *Id.* at 133-34, 495 N.E.2d at 834 (Wilkins, J., dissenting). Despite his concern, however, he did not believe that more than a two-year suspension was warranted. *Id.* at 134, 495 N.E.2d at 835 (Wilkins, J., dissenting).

178 520 A.2d 321 (D.C. 1987).

179 *Id.* at 326. The court noted that excessive use of alcohol affects memory, thinking skills, emotions and self-image. *Id.*

180 85 Ill. 2d 312, 423 N.E.2d 873 (1981).

181 *Id.* at 316, 423 N.E.2d at 874-75. The court noted, however, that "their tragedy cannot be used as a license to exploit clients." *Id.*

182 Waysman v. State Bar of California, 41 Cal. 3d 452, 714 P.2d 1239, 224 Cal. Rptr. 101 (1986); Florida Bar v. Ullensvang, 400 So.2d 969 (Fla. 1981); Attorney Grievance Comm'n v. Reid, 308 Md. 646, 521 A.2d 743 (1987); Attorney Grievance Comm'n v. Miller, 301 Md. 592, 483 A.2d 1281 (1984); Attorney Grievance Comm'n v. Aler, 301 Md. 389, 483 A.2d 56 (1984); Attorney Grievance Comm'n v. Truette, 299 Md. 435, 474 A.2d 211 (1984); Attorney Grievance Comm'n v. Willemain, 297 Md. 386, 466 A.2d 1271 (1983); *In re* Wareham, 413 N.W.2d 820 (Minn. 1987); *In re* Johnson, 322 N.W.2d 616 (Minn. 1982); Nebraska State Bar Assoc. v. Miller, 255 Neb. 261, 404 N.W.2d 40 (1987); *In re* Winston, 137 A.D. 385, 528 N.Y.S.2d 843 (App. Div. 1988); *In re* Walker, 254 N.W.2d 452 (S.D. 1977); *In re* Peckham, 115 Wis. 2d 494, 340 N.W. 2d 198 (1983).

rehabilitation.[183]

Cause in this context means that alcoholism or drug dependency so profoundly affects either cognition, the ability to tell right from wrong, or volition, the will not to commit a wrongful act, or that the person should not be held legally responsible. In an extreme case determining whether a disability causes misconduct is simple. At one extreme is the case where there was evidence of use of alcohol or drugs, but not evidence of uncontrolled use reaching the level of addiction.[184] If the lawyer does not suffer from an addiction in the first instance, then the attorney's condition would not be deemed to have caused anything. At the other extreme would be the case where an alcoholic lawyer, who is not at the moment intoxicated, but has an overwhelming urge to drink and with no other source of money, takes clients' funds in order to fulfill his desire.[185] The lawyer then goes out on a binge and later requires hospitalization. In a case at this extreme, a court could reasonably find that alcoholism caused the misconduct because the lawyer's need to drink was such an irresistible impulse that it overcame either or both the understanding that misappropriation was wrong or the will to refrain from misconduct.

In cases not at the extremes of the spectrum, it is difficult to show that alcoholism, or any other disability, caused a lawyer to misappropriate clients' funds, in the sense of intended or purposeful causation in which a person intends that his acts cause or produce a result. In a typical case, a lawyer takes money from a trust account not to drink, but instead to pay ordinary expenses when other lawful alternatives are available, such as putting off creditors or borrowing money.[186] In such situations, it is difficult

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183 *See, e.g.*, Waysman, 41 Cal. 3d 452, 714 P.2d 1239, 224 Cal. Rptr. 101 (1986); Attorney Grievance Comm'n v. Aler, 301 Md. 389, 483 A.2d 56 (1984); *In re* Johnson, 322 N.W.2d 616 (Minn. 1982).

184 *See, e.g.*, *In re* Ryle, 105 N.J. 10, 518 A.2d 1103 (1987). *See supra* notes 135-138 and accompanying text.

185 This scenario is purely hypothetical, as no reported cases involve only one episode of misappropriation, which occurred after binge drinking.

186 In *In re* Hughes, the court observed that:

> Many misappropriation cases come before this Court. In most of those cases, the respondent is not a vicious person at all but rather one who is the victim of difficult circumstances. Attorneys steal from their clients, often not to become rich, but simply to make ends meet. Would it be farfetched to imagine that they do it for the sake of their families? Perhaps they seek to prevent their families from being evicted; perhaps the funds are necessary to care for their husbands or wives or children.

90 N.J. 32, 37, 446 A.2d 1208, 1211 (1982).

to discern how alcoholism directly causes a lawyer to misappropriate clients' funds, but not cause him to use lawful means to obtain money or commit crimes where discovery is less likely.

Courts outside New Jersey approach causation in a variety of ways. Some assume or accept, often without analysis or discussion, alcoholism as cause in fact of the misconduct.[187] The Supreme Court of Illinois held in *Driscoll* that a presumptive finding of causation can be made when an alcoholic lawyer with no prior history of disciplinary problems is charged with unethical conduct.[188] In *Kersey*, the District of Columbia Court of Appeals determined that a "but for test" should be applied, in which the lawyer has to show that but for his alcoholism there would have been no misconduct.[189] In *In re Johnson*[190] the Minnesota Supreme Court held, as part of a five-part test to determine the appropriate discipline for an alcoholic lawyer charged with misconduct, that the lawyer must prove by clear and convincing evidence that alcoholism caused the misconduct.[191] After *Johnson*,

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187 *See, e.g.*, Florida Bar v. Ullensvang, 400 So.2d 969, 973 (Fla. 1981) (court referee concluded without explanation that a dislike of the practice of law and alcoholism led to the attorney's misconduct); Attorney Grievance Comm'n v. Willemain, 297 Md. 386, 396, 466 A.2d 1271, 1275 (1983) (without discussion, the court simply said that the "misconduct here appears to have been triggered by [the attorney's] bout with the bottle."); *In re* Wareham, 413 N.W.2d 820, 822 (Minn. 1987) (referee's report, "while not entirely clear on the point, found the misappropriation . . . was caused by the alcoholism"); *In re* Peckham, 115 Wis. 2d 494, 497, 340 N.W.2d 198, 200 (1983) (without explanation, the court asserted that the attorney's misconduct "does appear to have been precipitated by the drinking problem).

188 *Driscoll*, 85 Ill. 2d at 315-16, 423 N.E.2d at 874.

189 *Kersey*, 520 A.2d at 327 (D.C. 1987).

190 322 N.W.2d 616 (Minn. 1982).

191 *Id.* at 618. The Minnesota Supreme Court's five-part test stated:

> 1. That the accused attorney is affected by alcoholism.
> 2. That the alcoholism caused the misconduct.
> 3. That the accused attorney is recovering from alcoholism and from any other disorders which caused or contributed to the misconduct.
> 4. That the recovery has arrested the misconduct and the misconduct is not apt to reoccur.
> 5. That the accused attorney must establish these criteria by clear and convincing evidence.

Id.

In dealing with causation, the court asserted:

> It is not sufficient that the accused lawyer states that alcoholism was the cause of his or her dereliction. The question then arises as to what type of other evidence must the accused lawyer present to satisfy the burden of proving causation by clear and convincing evidence. We are convinced that medical evidence should not be the sole evidence to be considered. We hesitate to formulate any specific evidentiary rule within the framework of an opinion. Past experience has shown that such evi-

the Minnesota Supreme Court held in *In re Simonson*[192] that cause could be analyzed by considering both the lawyer's behavior before the onset of alcoholism or after the start of sobriety to determine if he acted ethically.[193]

Underlying these cases is an indirect or attenuated view of causation. A disability, like alcoholism, drug addiction or compulsive gambling, does not directly cause misappropriation from trust accounts in the sense that the result of the disability must, of necessity, be misappropriation. Reported cases of disciplinary proceedings indicate that misappropriation from clients is not the only ethical violation ever committed by alcoholic or drug dependent lawyers.[194] Comparisons of the number of ethical complaints filed against lawyers with the percentage of the general population with alcohol-related problems indicates that many lawyers, with alcohol-related problems, practice law without committing any ethical violations.[195] These decisions are also premised on the assumption that the lawyer who wrongfully misappropriated clients' funds was an honest person before the misconduct. It would be unreasonable to permit a lawyer, who was a thief before he was an alcoholic, drug addict or compulsive gambler, to avoid responsibility because of a subsequent disability.

The New Jersey Supreme Court has yet to deal with the issue of causation. Once the supreme court finds there was knowing

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dentiary rule changes are best formulated by committee in a hearing structure of the court rather than in its opinion process.

Id. at 618-19.

192 420 N.W.2d 903 (Minn. 1988).

193 *Id.* at 907.

194 *See, e.g., In re* Barbour, 109 N.J. 143, 536 A.2d 214 (1988) (alcoholic lawyer failed to seek clients' objectives, neglected legal matters, overreached on fees and failed to keep accurate records); *In re* Wood, 122 Wis. 2d 610, 363 N.W.2d 220 (1985) (alcoholic lawyer had direct communication with adverse party represented by counsel and misrepresented facts to adverse party).

195 According to the DSM III, a study from 1981 to 1983 indicated that 13% of the adult population of the United States suffered from alcohol abuse or dependency during their lifetimes. DSM III, *supra* note 147, § 305.00.

In 1981, for example, less than one percent of the lawyers in New Jersey were found guilty of violations of ethical violations. In 1981, ethics grievances were filed against 1,002 lawyers in New Jersey. State Attorney Disciplinary System Report, 1985, at 46, figure 12. This amounted to 4.6% of lawyers active in New Jersey. *Id.* at 47, figure 13. In 1981, 23 lawyers were subject to public discipline for ethical violations, *id.* at 52, figure 16, and 32 were subject to private discipline. *Id.* at 58, figure 20. This means that in 1981, 55 lawyers out of approximately 21,800 lawyers in New Jersey, or 0.25% of the state's lawyers, were guilty of ethical violations. *See id.*

misappropriation, as it has in all cases thus far, then it is the end of the analysis under the *Wilson* doctrine.

Courts accepting alcoholism or drug addiction as a mitigating factor in ethics proceedings require, in addition to causation, that there be evidence of rehabilitation.[196] Where there is no evidence of rehabilitation, disbarment results.[197] The Supreme Court of Illinois determined that courts should play a role in the rehabilitation process by stating that, "[w]e must find ways to help them and induce them to rehabilitate themselves."[198] The District of Columbia Court of Appeals has facilitated rehabilitation of attorneys afflicted with alcohol or drug addiction by noting that despite "legitimate concerns about the appropriate message to be given to other alcoholic attorneys, we give recognition to the element of choice inherent in alcoholism by creating an incentive rather than imposing a penalty."[199] However, the issue of rehabilitation has not been addressed in the decisions of the New Jersey Supreme Court because disbarment has been the automatic result for knowing misappropriation.[200]

If alcoholism, drug dependency or compulsive gambling were to be considered a mitigating factor in disciplinary proceedings, the possibility that some lawyers may attempt to feign a dis-

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196 *See, e.g.*, Waysman v. State Bar of California, 41 Cal. 3d 452, 714 P.2d 1239, 224 Cal. Rptr. 101 (Cal. 1986); Tenner v. State Bar of California, 28 Cal. 3d 202, 617 P.2d 486, 168 Cal. Rptr. 333 (Cal. 1980); *In re* Kersey, 520 A.2d 321 (D.C. 1987); Florida Bar v. Larkin, 420 So.2d 1080 (1982); Florida Bar v. Ullensvang, 400 So.2d 969 (Fla. 1981); Attorney Grievance Comm'n v. Reid, 308 Md. 646, 521 A.2d 743 (1987); Attorney Grievance Comm'n v. Miller, 301 Md. 592, 483 A.2d 1281 (1984); Attorney Grievance Comm'n v. Aler, 301 Md. 389, 483 A.2d 56 (1984); Attorney Grievance Comm'n v. Willemain, 297 Md. 386, 466 A.2d 1271 (1983); *In re* Johnson, 322 N.W.2d 616 (Minn. 1982); *In re* Walker, 254 N.W.2d 452 (S.D. 1977); *In re* Peckham, 115 Wis. 2d 494, 340 N.W.2d 198 (1983). *Cf.* Rosenthal v. State Bar of California, 43 Cal. 3d 648, 738 P.2d 740, 238 Cal. Rptr. 394 (1987) (failure to demonstrate sustained period of recovery from alcoholism resulted in disbarment).

197 *See In re* Sawyer, 98 Wash. 2d 584, 656 P.2d 503 (1983). In *Sawyer*, the Supreme Court of Washington observed:

> There is some suggestion in the record that respondent has an alcohol problem. This can be a very significant mitigating factor when the attorney has successfully sought and received treatment for his or her problem. . . . In the present case, however, respondent has not even admitted the existence of a problem at the time of his transgressions, let alone sought treatment.

Id. at 588, 656 P.2d at 506 (footnote omitted).

198 *Driscoll*, 85 Ill. 2d at 315, 423 N.E.2d at 874.

199 *Kersey*, 520 A.2d at 327. The court concluded "that where there is significant evidence of rehabilitation, a period of actual suspension is not always mandated." *Id.*

200 *Wilson*, 81 N.J. at 455, 409 A.2d at 1154.

ability would have to be addressed.[201] When faced with a choice between the end of a legal career or public acknowledgment of alcoholism, drug addiction or compulsive gambling—none of which carry the social stigma they once had—the incentive to claim a disability is clearly strong. A realistic concern about this, however, should not be enough to rule out the possibility of considering disabilities as mitigating factors. The task of a court or a court-appointed disciplinary body confronted with a claim of alcoholism is not substantially different from the task of a jury considering a criminal case where intoxication is raised as a defense. Both must act as factfinders.

The New Jersey Supreme Court's decisions in *Hein*, *Romano* and *Goldberg* and its unwillingness to recognize alcoholism, drug dependency or compulsive gambling as mitigating factors in misappropriation cases should not be viewed as a choice between right or wrong in a legal or moral sense. Rather, the court was faced with a choice of values. On one side were the values and policies underlying the *Wilson* rule, the need to preserve the confidence of the public in the bench and bar and the need to protect they public from dishonest lawyers.[202] On the other side are values and policies focusing on the lawyer, who has committed the wrong, instead of the victim or the general public. From this perspective, many wrongs can be forgiven, or at least need not be severely punished, if the wrongdoers are alcoholics, drug addicts or compulsive gamblers, who have taken positive steps to regain control of their lives and are unlikely ever to misappropriate again. What can be lost by a rule of automatic disbarment is not just the faith of the public in the legal profession, but a potentially productive life in the law. How these concerns should be balanced depends on one's perspective. A lawyer, who is an alcoholic, a drug addict or a compulsive gambler and who has taken money from a client, may see *Hein*, *Romano* and *Goldberg*, as a draconian approach to dealing with the most obvious manifestation of a larger pattern of self-destructive behavior, and not a crime intended, planned or plotted to hurt the client or lessen the faith of the public in the legal profession. The view of the New Jersey Supreme Court is that disbarment is a regrettable necessity. As the court stated in *Hein*:

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201 *See* Note, *The Disability Defense: How It Serves to Mitigate Charges of Professional Misconduct by Attorneys*, 12 WM. MITCHELL L. REV. 119, 140 (1985) ("A final concern regarding Minnesota's disability defense is the temptation for respondents to mold their cases to fit the criteria.").

202 *Wilson*, at 457, 409 A.2d at 1155.

> We do not purport here to determine definitively the effect alcohol dependency can have upon the volitional state of an individual. We have only the legal standard to guide us. We wish that we knew more.
>
> Until we know more, perhaps until science and society know more, we shall continue to disbar in these cases.[203]

V. CONCLUSION

Before the New Jersey Supreme Court changes the *Wilson* rule, one of two things will have to happen. Either new and compelling evidence regarding the impact of alcoholism, drug addiction and compulsive gambling on the mind and the will will have to be brought to the court's attention or the court will have to modify or reject the principles underlying the Wilson doctrine. In view of the strong support the court has shown since 1979 for the values embodied in *Wilson*, change seems unlikely. Whether new psychiatric or psychological evidence can convince the court to change the *Wilson* rule remains to be seen. Until that time comes, if ever it does come, every lawyer has to know that taking money from a client without authorization is tantamount to professional suicide.

George Gerard Campion

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[203] *Hein*, 104 N.J. at 303, 516 A.2d at 1108.