NJ Supreme Court to Reconsider Permanency of Disbarment for Attorneys; Greenbaum Partner Robert B. Hille Argues the Cause for NJ State Bar as Amicus Curiae

Client Alert

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What You Need to Know

- For over 40 years, the New Jersey Supreme Court has mandated permanent disbarment in all cases where a lawyer has knowingly misappropriated a client's property.
- New Jersey is one of only eight states that do not currently allow a disbarred attorney to apply for readmission in certain instances.
- In a major shift, the Court will now seek recommendations from a committee of attorneys and other members of the public as to whether mandating disbarment for the knowing misappropriation of client property is unduly harsh.

By: Robert B. Hille

For decades, attorney disbarment has been presumed to be permanent under the rules governing New Jersey state courts. On June 7, 2022, however, the New Jersey Supreme Court, in a major shift, found it was time to revisit the permanency of disbarment in situations where it was mandated, and in other instances as well.

Background

Since its 1979 *In re Wilson* opinion, the New Jersey Supreme Court has mandated disbarment in all cases where a lawyer has knowingly misappropriated a client's property. This mandate, known as the Wilson Rule, was later extended to escrow funds in *Hollendonner*. While knowing misappropriation of law firm funds can result in disbarment (see *Siegel* and *Greenberg*), disbarment is not required as decided in *Sigman*. Nevertheless, where mandatory disbarment is required, the Court has rejected requests for exceptions and would not consider

mitigating factors viewed in other scenarios. The Court's reasoning for this distinction has been that only permanent disbarment will preserve the public's confidence in the judiciary and the legal profession where knowing misappropriation has occurred.

A Major Shift

In the *Matter of Dionne Larrel Wade*, the Court was confronted with a situation where the lawyer admitted to knowingly misappropriating client and escrow funds. While declining to depart from established precedent regarding mandated disbarment in such circumstances, it noted two aspects of the *Wade* matter that brought into serious question the fairness of permanent disbarment.

The first aspect was the circumstances of Ms. Wade's case. Her previous unblemished record, her cooperation with ethics authorities, her ready admission to misappropriation, her exemplary service to her clients and the profession, and the advocacy of her clients against her disbarment were all factors suggesting the possibility of rehabilitation and future restoration of the public confidence in the judiciary and profession. Consequently, while the Court deemed those factors insufficient to be a defense to mandatory disbarment for her admission of knowing misappropriation, it was troubled by whether disbarment should be permanent in all Wilson Rule cases.

The second aspect is the fact that only eight states, including New Jersey, make disbarment permanent. Forty-one states and the District of Columbia do not have permanent disbarment. In addition, the American Bar Association's long-standing recommendation for reinstatement consideration after disbarment is embodied in its Model Rule 25A, which allows a disbarred attorney to apply for readmission after five years.

Accordingly, the Court decided to address the issue of permanent disbarment.

NJSBA As Amicus Curiae

Before reaching its *Wade* decision, the Court considered the position of the New Jersey State Bar Association (NJSBA). The Court granted the NJSBA Amicus Curiae status, considered its brief and permitted it to participate in the September 27, 2021 argument. In *Wade*, the NJSBA sought not an exception to the Wilson Rule, but clarification of the knowing misappropriation standard.

In its argument, the NJSBA supported the Court's historical application of the Wilson Rule, which was applied to situations where the lawyer evidenced an intent to take client property that he or she knew they were not authorized to take. The NJSBA also supported the Court's distinction between negligent misappropriation and knowing misappropriation.

However, the NJSBA sought participation because of the concern that those charged with overseeing the ethics disciplinary process might stretch the concept of knowing misappropriation to any conscious act that resulted in an invasion of client property. That would be inconsistent with the concept of negligent misappropriation. Therefore, the NJSBA asked the Court to clarify the knowing misappropriation standard and limit its application to those circumstances where the conduct was tantamount to a theft or intent to defraud.

The NJSBA premised its argument on the severity of permanent disbarment mandated by the Wilson Rule, which amounts to a professional death sentence and leaves no room for consideration of rehabilitative factors justifying reinstatement, with no exceptions. The Court made this clear to the NJSBA in *Greenberg*. Because of that fact, the

NJSBA advocated for avoidance of unnecessary complaints and presentments in the disciplinary process against lawyers for knowing misappropriation where circumstances justifying negligent misappropriation existed. This threat was (and is) real, as evidenced by the number of disbarment recommendations to the Court that ultimately led to findings of negligent misappropriation.

Ultimately, the *Wade* Court declined to clarify the knowing misappropriation standard advocated by the NJSBA, leaving in place the language from its prior decisions. Also, because the Court was faced with Wade's admissions to knowing misappropriation, it did not address negligent misappropriation nor alter precedent in that regard.

While not referenced by the Court in *Wade*, a closely related case requires consideration. On October 5, 2021, the Court permitted the NJSBA's participation through its Amicus brief in the *Matter of Lucid*, in which the NJSBA made arguments similar to those it made earlier in *Wade*. Following the arguments of the Office of Attorney Ethics (OAE) and *Lucid*'s counsel on October 13, 2021, the Court found negligent misappropriation and issued a censure that same day.

In *Lucid*, the Supreme Court's Disciplinary Review Board (DRB) recommended disbarment, however it was clearly troubled by the facts of the case. While it believed the facts established knowing misappropriation, a number of members saw mandatory permanent disbarment as unduly harsh. This was evidenced by the separate opinions by several DRB members to the Court voicing the unfairness of the Wilson Rule and the belief that, at least in the *Lucid* matter, there should be an exception. In *Wade*, the Court rejected this last point, instead focusing on the underlying issue of permanent disbarment.

What Comes Next

The Supreme Court has directed the Director of the Administrative Office of the Courts (AOC) to assemble a committee of lawyers and members of the public who are not lawyers. The committee will be charged with examining all relevant considerations and will make recommendations to the Court on whether disbarment for knowing misappropriation should be permanent. The committee will also recommend standards for reinstatement. The committee's charge will further include studying disbarment orders pre-*Sigman* (law firm funds) and any other serious matters in which the Court exercised its discretion and permanently disbarred an attorney. The benefits of whatever the Court adopts will be applied retroactively and will include *Wade*. The committee's report will be made available for public comment before the Court proceeds further.

Whether *Lucid* had any influence on *Wade* is uncertain. Still, when confronted with a misappropriation situation, individuals would be well-advised to closely examine the record, briefings, DRB recommendations to the Court and the Court's decisions in both cases.

Robert B. Hille, the author of this Alert, is a former President of the New Jersey State Bar Association and a member of its Amicus Committee. Mr. Hille participated in drafting the NJSBA's Amicus Curiae briefs in *Lucid* and *Wade* and argued on behalf of the NJSBA in the *Wade* matter.

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