

OFFICE OF ATTORNEY ETHICS,

Complainant,

v.

DIONNE LARREL WADE,

Respondent.

SUPREME COURT OF NEW JERSEY
Docket No. 085931

On Review From:
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 2C-274
District No. XIV-2017-0494E

DISCIPLINARY ACTION

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PROCEDURAL HISTORY

On June 29, 2021, the New Jersey Supreme Court issued an Order for Respondent Dionne Laurel Wade, Esq. to appear before this Court on this matter and show cause why she should not be disbarred. The last day for briefing is August 30, 2021 and argument is scheduled for September 27, 2021.

As New Jersey's largest legal professionals' association, the New Jersey State Bar Association seeks permission to appear Amicus Curiae to urge clarification of the term "knowing misappropriation" of client funds for application of disbarment under the Wilson Rule.

The NJSBA also seeks clarification of Rule 1:20-6(c)(2)(B) and applying the preponderance standard to all defenses other than affirmative medical defenses.

STATEMENT OF FACTS

The Office of Attorney Ethics (OAE) seeks disbarment of the Respondent for a violation of RPC 1.15(a) (knowing misappropriation of client and escrow funds from her attorney trust account) under In re Wilson, 81 N.J. 451 (1979) (the Wilson rule of mandatory and permanent disbarment for knowing misappropriation of client trust funds) and In re Hollendonner, 102 N.J. 21 (1985) (applying the Wilson rule to the knowing misappropriation of escrow funds). The OAE claims Respondent admitted to them that she knowingly took client funds without her clients' knowledge and authorization. The OAE also claims that Respondent's trust accounting compliance with professional requirements was intentionally non-existent to cloak her personal use of her clients' funds.

The Respondent essentially contends that the misappropriation alleged was caused by her total financial ignorance and not an intent to steal. She attributes that ignorance to deficiencies in her personal history and professional training. Those deficiencies together with her assumptions as to what funds were hers led to the allegations of misappropriation of client funds. She denies the OAE's characterizations of her statements to them that she "borrowed" client funds as admissions. Instead, she claims she used that terminology retrospectively and did not view her

withdrawal of funds as those belonging to clients or that she was borrowing them at the time.

The New Jersey State Bar Association (NJSBA) does not take a position as to the facts advanced by the parties or the findings rendered in that regard. Instead, the NJSBA's urges clarification to what should constitute knowing misappropriation in circumstances where trust accounting errors or insufficiencies are alleged in connection with a recommendation for disbarment under the Wilson Rule.

The NJSBA seeks greater clarity and a clear delineation that eliminates an aggressive application of the Wilson Rule beyond the situations of thievery and fraud to which it has justifiably been applied and limited. The NJSBA also seeks confirmation that the burden to demonstrate ethical violations remains on the OAE, and only medical defenses are subject to the clear and convincing evidence standard; all other affirmative and ordinary defenses require only a preponderance of the evidence.

LEGAL ARGUMENT

POINT I

THE DEFINITION OF KNOWING MISAPPROPRIATION UNDER THE WILSON RULE SHOULD BE CLARIFIED AS LIMITED TO CIRCUMSTANCES WHERE THE EVIDENCE DEMONSTRATES THAT THE KNOWING ELEMENT OF MISAPPROPRIATION IS TANTAMOUNT TO AN INTENT TO STEAL OR DEFRAUD THE PERSON FROM WHOM THE FUNDS ARE TAKEN

What has become known as the Wilson rule was set forth in In re Wilson, 81 N.J. 451 (1979). There the Court established that an attorney's knowing misappropriation will almost "invariably" result in disbarment. What "invariably" means has not been defined nor have exceptions been identified.

Wilson was later extended to include the knowing misappropriation of escrow funds under In re Hollendonner, 102 N.J. 21 (1985) and to law firm funds under In re Siegel, 133 N.J. 162 (1993) and in the Matter of Greenberg, 155 N.J. 138 (1998).

Unlike some other states, disbarment is permanent in New Jersey, with no opportunity to apply for readmission. The underlying premise for this extremely harsh treatment is this Court's conviction that a lawyer's knowing misappropriation of client trust funds has a devastating effect on the public's confidence in the bar and the Court. Greenberg, 155 N.J. at 149 (citing In re Roth, 140 N.J. 430, 444 (1995)).

The NJSBA agrees that public confidence is maintained with a bright-line rule requiring disbarment where there is clear and convincing evidence of an intent to steal a client's money or to defraud a client. The NJSBA asserts this is what has historically been understood as "knowing misappropriation" under Wilson. However, the NJSBA believes that, absent clear and convincing evidence of theft or fraud, notions of justice and fairness based on the merits of the particular facts presented require consideration of alternative appropriate sanctions, if any, short of disbarment.

In 1983, the New Jersey State Bar Association's Select Committee to Review Standards for Safeguarding Clients' Property expressed:

"We wish to state without equivocation that it is the sense that a lawyer who steals a client's property has committed the gravest breach of trust and committed an assault on the reputation of every lawyer of our State. We recommend that such conduct, without exception, warrants immediate and permanent disbarment, criminal prosecution and punishment which is swift, sure, and severe. The Committee unreservedly endorses the holding of In re Wilson and urges its strict and uniform application to all cases of lawyer theft of a client's property." New Jersey State Bar Association, Report of Select Committee to Review Standards for Safeguarding Clients' Property 1-2, 6 (1983) as quoted in Matter of Konopka, 126 N.J. 225, 237 (1991) (proof of shoddy bookkeeping and out of trust transactions alone, not enough to establish a knowing misappropriation).

Clearly then, the NJSBA and its Committee endorsed Wilson based on the belief that Wilson required the knowing element to be

tantamount to criminal intent to steal or commit fraud against a client's trust funds.

Wilson lays the foundation for this belief: "In this case, respondent knowingly used his client's money as if it were his own. We hold that disbarment is the only appropriate discipline. We also use this occasion to state that generally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable." Wilson, 81 N.J. 451, 453 (1979).

Wilson also held that misappropriation is both a crime and violation of the RPCs. Id. at 454. Explaining the need to preserve the public's trust where client funds that are held by that lawyer are taken, the Court noted: "What are the merits in these cases? The attorney has stolen his client's money." Id. at 456. In rejecting restitution as a mitigating factor, Wilson emphasized again the criminal intent aspect to the knowing requirement: "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. The act is no less a crime." Id. at 458. Thus, these excerpts demonstrate that the state of mind accompanying the lawyer's actions as contemplated by Wilson was tantamount to an intent to steal client funds.

This was reinforced in Matter of Konopka, 126 N.J. 225 (1991). There, this Court stated "... if all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof." Id. at 234.

Support for this heightened standard was again reiterated in Greenberg in applying the Wilson rule to theft of law firm funds. Greenberg, 155 N.J. at 153 ("... the Court has recognized no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same purpose defrauds his or her partners ... [o]ur perception that such acts of theft are morally equivalent ... ").

Because disbarment is mandated for knowing misappropriation and is permanent, the Court has recognized that the Wilson rule is harsh. Greenberg, 155 N.J. at 149 (citing In re Barlow, 140 N.J. 191, 195 (1995)). As Justice Stein expressed in his Dissent:

"Disbarment is the most unforgiving discipline, and it condemns every lawyer on whom it is imposed to a life sentence of professional disgrace. In New Jersey, unlike most other states, disbarment is permanent and its stigma ineradicable. As Justice Schreiber observed in In re Hughes, 'we must not forget that disbarment is a punishment and its effect can be devastating. In deciding whether to disbar, the Court should consider the whole person.'" Greenberg, 155 N.J. at 164 (Stein, J., dissenting) (citations omitted).

In Greenberg, 155 N.J. 138, the NJSBA as *Amicus Curiae* urged the Court to permit an exception to the Wilson rule where the lawyer suffered from a mental condition that impaired judgment and his understanding that he was committing a knowing misappropriation. In rejecting the NJSBA's proposal, the Court determined it represented a substantial retreat from the Wilson standard. Greenberg, 155 N.J. at 151. The Court also noted that it repeatedly rejected opportunities to create exceptions and adhered to Wilson's bright-line standard as the only perceived means to preserve public confidence in the profession and the Court. Id. at 149.

Because of the harshness from this adherence, Greenberg reiterated that the Court has imposed a high threshold of proof and narrow standard to establish what a knowing misappropriation is. Id. at 149. It emphasized that proof of misappropriation by itself is insufficient to trigger the harsh penalty of disbarment. Id. Instead, it must be shown by clear and convincing proof that the lawyer misappropriated knowingly. Id. This burden requires that in each case careful consideration must be given to the particular complex facts to determine whether the lawyer intended to misappropriate, knew he or she was misappropriating and that they, in fact, did misappropriate trust funds. Id.

Accordingly, even flagrant recording keeping violations that do not rise to the level of intentional violations have been

subject to discipline but are not subject to the Wilson rule. Greenberg, 155 N.J. at 150.

Thus, a finding of "knowing" misappropriation has been carefully weighed against other factors in prior cases. See In re Noonan, 102 N.J. 157 (1986); In re Chidiac, 120 N.J. 32 (1990); In re LaVigne, 146 N.J. 590 (1996). Even in the Disciplinary Review Board's (DRB's) decision in this case, the DRB pointed to the Special Master's struggle with and commentary on the "semantical inconsistencies" over the past forty years involving the application of Wilson. DRB Decision dated June 28, 2021 at p. 32. The NJSBA asserts, though, that at the heart of the standard enunciated in Wilson is an intention by a lawyer to actually steal a client's money. Wilson, 81 N.J. at 456.

For this reason, the NJSBA urges the Court to reaffirm the original application of the Wilson automatic disbarment rule to those situations where the evidence demonstrates there is an actual fraudulent intent or purpose to commit a theft of a client's funds. Otherwise, almost any situation or conscious act related to the alleged misuse of a client's property held in trust could arguably fall under the umbrella of a "knowing" act and be subject to the harsh Wilson sanctions, a result that was clearly never intended.

- A. Evidence of motive, while irrelevant to a finding of knowing misappropriation, is relevant to whether there is an intent to steal or defraud, and should be considered.

While Greenberg discussed that motive is irrelevant to determining appropriate discipline for knowing misappropriation, the NJSBA urges that it is relevant where such motive is inconsistent with an alleged design by Respondent to misappropriate client funds intentionally and knowingly. Greenberg, 155 N.J. at 156-157. For example, while Greenberg discussed that misappropriation does not depend on whether an attorney derived any gain, the purpose for which the money was disbursed, or whether the money was used for the benefit of others, (Id.) the NJSBA asserts that such circumstances should be considered to determine whether they are inconsistent with a knowing misappropriation based on theft or fraud, and should be factors that are weighed in the ultimate determination.

- B. The relevant Rules of Professional Conduct support a clarification of knowing misappropriation as conduct involving theft and fraud.

The DRB rests its recommendation of disbarment under the Wilson rule for the following violations: RPC 1.15(a) and (b) (Safekeeping Property), 8.4(b) (Misconduct/commission of a criminal act) and 8.4(c) (Misconduct/ engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Although silent as to proof elements, RPC 8.4(b) by its reference to commission of

a criminal act requires criminal intent in the underlying conduct. The second element that must be proven is that the criminal act "adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects". RPC 8.4(c) requires in its first instance that the respondent has committed dishonesty, fraud, deceit or misrepresentation. These acts require specific intent. However, RPC 1.15 requires only that lawyers keep their client's property separate from theirs and appropriately safeguard same. It does not require a knowing violation. However, for the Wilson rule to apply, it must. The standard for proving a knowing violation under these RPCs and thereby invoking the Wilson rule, require that they be consonant.

Effective in 2004, RPC 1.0 Terminology was included in the RPCs and provided definitions of terminology. While RPC 1.0 does not say so, it is inferred that those definitions govern when the specific term is included in a specific RPC.

But neither "knowingly, known or knows" is stated in the Rules relied on by the DRB in its recommendation of disbarment. RPC 1.0(f)'s requirement of actual knowledge suggests a subjective test that may be inferred from circumstantial evidence.

RPC 1.0(f) defines the term "fraud" that is used in RPC 8.4(c). The definition adopts by reference New Jersey's substantive or procedural law's definition for the term and adds that there must be a purpose to deceive. This element of purposeful

deceit is more in line with the criminal nature of the acts envisioned by Wilson and its progeny.

Therefore, to the extent a knowing misappropriation remains the standard for invoking the Wilson rule, the NJSBA urges that the Court clarify that term to include a fraudulent intent or purpose to commit a theft of a client's funds.

POINT II


RULE 1:20-6(c) (2) (B) REQUIRES ONLY THAT FORMAL
CHARGES OF UNETHICAL CONDUCT, MEDICAL
DEFENSES, AND REINSTATEMENT PROCEEDINGS SHALL
BE ESTABLISHED BY CLEAR AND CONVINCING
EVIDENCE

In its written summation to the Special Master, the OAE incorrectly extended Rule 1:20-6(c) (2) (B) requirement of clear and convincing proof to all defenses when it noted that, "Defenses must be established by clear and convincing evidence." OAE Post Hearing Summation, Jan. 7, 2020, at p. 35. The Rule only requires that heightened burden of proof be applied to medical defenses and in reinstatement proceedings. Since the burden to demonstrate ethical violations remains on the OAE or District Ethics Committee (DEC) Presenter as the case may be, ordinary defenses such as failure to state a claim should not be subject to the heightened standard. As to affirmative defenses, the Rule only references medical defenses as subject to the heightened standard. Therefore, the NJSBA urges the Court to clarify that all other affirmative defenses are subject to the preponderance standard.

CONCLUSION

Based on the foregoing the NJSBA urges the Court to clarify that (1) automatic disbarment under In re Wilson is applicable only where there is clear and convincing evidence of misappropriation premised upon theft or fraud, (2) all facts should be considered in analyzing a disciplinary matter where the Wilson rule may have applicability, including motive and intent, not for purposes of exceptions, but to determine if they are consistent with a finding of theft or fraud; and (3) the burden to demonstrate ethical violations remains on the OAE or DEC Presenter, and only medical defenses are subject to the clear and convincing evidence standard; all other affirmative and ordinary defenses require only a preponderance of the evidence.

Respectfully submitted,


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Dated: 8/30/2021

