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In the Matter of Karina Pia
Lucid

An Attorney at Law

(Attorney No. 026102002)

SUPREME COURT OF NEW JERSEY
Supreme Court No. 086007

Disciplinary Action
D-141-20

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

This matter represents a more than 40-year struggle over how to interpret and apply the automatic disbarment rule for knowing misappropriation of a client's trust funds first established in In re Wilson, 81 N.J. 451 (1979). The harshness of that rule has challenged the Court, its disciplinary system and the bar, which is underscored by the fact that this case presents several opinions from the Disciplinary Review Board (DRB) calling for the Court's guidance. The majority opinion feels constrained to recommend disbarment. One concurring opinion would prefer the existence of an applicable exception to the rule to avoid the harsh result of disbarment. Another concurring opinion does not see a need to retreat from the harshness of Wilson yet refers the Court to an article advocating a minimum five-year suspension only in the exceptional case.

A dissent by four members of the DRB recommends a lesser sanction than disbarment. The dissent claims that there should be room for reasoned exceptions and that the unique circumstances of the case would support one without impacting the central concern in Wilson of preserving the public's confidence in the Court and its oversight of the legal profession.

Wilson was founded on a situation where an attorney had stolen a client's money. Borrowing was equated with stealing and the purpose of the theft was irrelevant. The Court viewed the act of

theft directed against a client so destructive of the public's trust as to warrant disbarment. Considerations of lack of venality and mitigation were no longer available for consideration unlike all other violations. While dismissing the purpose of the theft or borrowing as irrelevant, Wilson focused on a purposeful wrongful act against a client.

Indeed, while couched in terms of knowing misappropriation, those cases where Wilson has been applied invariably involved knowing conduct intentionally directed against a specific client or clients that was tantamount to stealing or fraud. By contrast, negligent misappropriation recognizes there are situations where the act which led to the misappropriation was knowing, but it was not intended. Otherwise, any conscious act relating to a trust account that resulted in a negative impact to any client would compel disbarment. Clearly that has not been the Court's approach in its struggle to apply Wilson fairly. Such a distorted or overreaching interpretation of the term "knowing" poses a real risk of over-zealous application. It also presents the challenge reflected here for the DRB in trying to apply the term when deciding whether to recommend a sanction that essentially will end a professional career.

To avoid this struggle and provide definitive guidance, the New Jersey State Bar Association (NJSBA) urges the Court to clarify that the "knowing" action addressed in Wilson only encompasses

purposeful conduct that results in actual theft or fraud committed against a client in connection with property held in trust for that client.

PROCEDURAL HISTORY

On July 21, 2021 the New Jersey Supreme Court issued an Order for Respondent Karina Pia Lucid, Esq. to appear before this Court on this matter and show cause why she should not be disbarred. The last day for briefing is September 22, 2021 and argument is scheduled for October 13, 2021.

As New Jersey's largest legal professionals' association, the New Jersey State Bar Association (NJSBA) 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.

On August 30, 2021, the NJSBA also filed an application and brief in the matter of Office of Attorney Ethics v. Dionne Larrel Wade, Esq., Supreme Court Docket No. 085931. That matter presented similar issues for the Court's consideration.

STATEMENT OF FACTS

This is a disciplinary case where Respondent is facing disbarment for writing a settlement check from her trust account to ensure the check was received in a timely manner so as not to jeopardize her client's settlement. At the time the settlement was negotiated, Respondent had directed her client to furnish the settlement funds. Respondent assumed that her long-time client would provide the appropriate funds to cover the check. The client did provide the funds but not before the settlement check was cashed. The result was that other client funds in Respondent's trust account were drawn upon in the interim before the settling client's funds were deposited and cleared. No check bounced, and no client was shorted any funds. The discrepancy was discovered after Respondent reported a shortfall in her trust account due to bank fees that caused a shortfall and triggered a subsequent audit.

The District Ethics Committee (DEC) panel found no clear and convincing evidence that Respondent took client monies knowing that she had no authority to do so. DEC July 13, 2020 report at 15. Further, it found Respondent's issuance of a trust check against uncollected funds did not require a contrary finding. Id. Relying on In re Moras, 131 N.J. 164 (1993), the DEC determined the matter did not involve an instance where the attorney knew her client would be unable to make good on a check or an amount due.

DEC July 13, 2020 report at 15. Respondent was dealing with a good client who always paid the bills on time. Id. It found no nefarious intent. Id. at 16. It could not determine what Respondent's intent was at the time but observed that she was seemingly unaware rather than purposefully acting to take monies of a client without authorization. Id. It accepted as credible Respondent's account that she never believed or understood herself to be taking the funds of one client for the benefit of another or any other knowing purpose. Id. Of note in the DEC's examination of controlling authorities are the portions of that decisional law that focused on the intentional nature of the conduct reviewed when deciding to apply Wilson. Based on the DEC's findings, it determined there was no knowing misappropriation and unanimously recommended a censure.

On review, a sharply divided Disciplinary Review Board (DRB) found knowing misappropriation and recommended disbarment. However, the majority opinion believed the Lucid circumstances merited an exception to Wilson and stated, "We believe that this case provides an important opportunity for the Court to re-examine the holding in Wilson." DRB Decision of July 9, 2021 at 36.

Two concurring opinions and the dissent also recommend a re-examination of Wilson albeit for different reasons. See July 9, 2021 Concurrence of Maurice J. Gallipoli, A.J.S.C. (ret.), Vice Chair, Regina Waynes Joseph, Esq. and Rober C. Zmirch; July 9, 2021 Concurrence of Peter J. Boyer, Esq.; and July 9, 2021 Dissent.

Because the majority of the DRB determined that Respondent issued the settlement check without receiving corresponding funds from the client, they further concluded that knowing act invaded the funds of other clients and constrained them to apply Wilson and recommend automatic disbarment. DRB July 9, 2021 decision at 35.

Significantly, the majority opinion "discerned no basis for concluding that, in this instance, considering the unique facts of this case, public confidence will be destroyed if respondent is permitted to continue practicing law. ... New Jersey's disciplinary precedent is clear. Disbarment is almost invariable in order to maintain the public confidence in the integrity of the bench and bar. Yet, in this case, respondent faces disbarment because of her honesty and integrity. In our view, she faces disbarment even though she poses no danger to the public and is far from unsalvageable." Id. at 36-37.

The dissent believed the conduct was the most technical violation of Wilson it had seen and was closer to negligent misappropriation than knowing misappropriation. They focused on the fact that Respondent was not conscious of any meaningful risk in writing the settlement check such that it would jeopardize the funds of other clients and subsequently there was no real-world risk to other clients. DRB July 9, 2021 dissent at 2. The dissent believed the automatic application of Wilson contradicted the

Court's instruction to examine the totality of the circumstances and give due consideration to all interests. Id. at 6. In the end, the dissent believed the central tenet of Wilson was not applicable to this case since the public's confidence would not be lessened if disbarment were not imposed. Id. at 9.

While the NJSBA takes no position on the facts or findings in this matter, it believes the facts and findings illustrate the critical need for clarity sought by the NJSBA. It is time to eliminate the attractive incentive to push the limits of what knowing misappropriation is beyond Wilson's focus, addressing thievery and fraud against clients, to any conscious act by a lawyer that results in an adverse impact to a trust account.

LEGAL ARGUMENT

THE DEFINITION OF KNOWING MISAPPROPRIATION UNDER THE WILSON RULE SHOULD BE CLARIFIED AND LIMITED TO CIRCUMSTANCES WHERE THE EVIDENCE DEMONSTRATES BY CLEAR AND CONVINCING EVIDENCE THAT THE KNOWING ELEMENT OF MISAPPROPRIATION IS TANTAMOUNT TO AN INTENT TO STEAL FROM 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). 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 has two basic premises. The first is that a lawyer purposely and improperly takes a client's money. The second is that such an act so undermines the public's confidence in the judicial system and the profession that only permanent disbarment will restore that shaken confidence.

This is reflected in the language of the opinion: "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).

The Court itself zeroed in on the application of the rule solely in situations where outright theft is involved when, in explaining the need to preserve the public's trust where client funds that are held by that lawyer are taken, it 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.

These excerpts demonstrate that the state of mind accompanying the lawyer's actions as contemplated by Wilson was important and tantamount to an intent to steal client funds.

Consistent with the object of the theft in Wilson, its application was later extended to escrow funds under In re Hollendonner, 102 N.J. 21 (1985). Wilson's objective in protecting client and third-party funds entrusted to a lawyer were then further extended to the theft of law firm funds by a firm's member under In re Siegel, 133 N.J. 162 (1993) and in the Matter of Greenberg, 155 N.J. 138 (1998).

Unlike many other states, disbarment is permanent in New Jersey, with no opportunity to apply for readmission. The underlying premise for this harsh treatment is this Court's conviction that a lawyer's knowing misappropriation of client trust funds has a devastating effect on public 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. That is because Wilson addressed the situation where the lawyer purposely took money from a specific client victim who was the focus of the lawyer's intent to misappropriate.

The NJSBA's belief as to the purposeful aspect of the Wilson holding 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 bolstered in Greenberg in reaffirming the application of 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 ... "). Thus, Greenberg underscores the singular target of the Wilson rule as situations where there is a morally reprehensible and purposeful theft.

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)).

Further as Justice Gary 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 understanding that the attorney 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 it had 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 harsh ramifications of the Wilson rule, Greenberg reiterated 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. In its effort to identify that standard, Greenberg said meeting the clear and convincing threshold requires careful consideration be given to the particular complex facts of each case to determine whether the lawyer intended to misappropriate, knew they were misappropriating and that they, in fact, did misappropriate trust funds. Id.

In response to arguments for a mechanical approach to Wilson seeking to convert *any* misappropriation into constructive knowing misappropriation warranting automatic disbarment, a number of negligent misappropriation cases have arisen where discipline was imposed, but application of the Wilson rule was precluded. In those cases, a finding of "knowing" misappropriation has been carefully weighed against other factors to make an appropriate determination for discipline short of disbarment. See In re Noonan, 102 N.J. 157

(1986) (temporary suspension served sufficient discipline and no knowing misappropriation found despite various trust account infractions including transferring funds from one client's account for the benefit of another); In re Chidiac, 120 N.J. 32 (1990) (three year suspension applied retroactively was sufficient discipline and no knowing misappropriation where respondent had a good faith belief he was authorized to take client rental income that he was collecting and no evidence that lawyer's poor accounting practices were designed to prevent himself from knowing whether he was using client funds); In re LaVigne, 146 N.J. 590 (1996) (lawyer's misappropriation of closing funds for benefit of another client in a series of integrated transactions was not a knowing misappropriation as the transfers were necessary to complete the transactions for both sets of client, but warranted a three year suspension).

These cases illustrate that if the term "knowing" was given the breadth some have argued, there could be no concept of negligent misappropriation. Clearly that is not the case.

The NJSBA asserts the sole focus of the harsh standard articulated in Wilson is a situation where a lawyer intentionally steals or defrauds a client of property entrusted to the lawyer on the client's behalf. 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 purposeful intent to wrongfully and knowingly take a client's money. Such behavior is tantamount to theft or fraud. Without that bright line, 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 held motive is irrelevant to determining appropriate discipline for knowing misappropriation, the NJSBA urges that it *is* relevant where such a 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 those circumstances should be considered to determine whether they are inconsistent with a knowing misappropriation based on theft or fraud, and should be factors to be weighed in the ultimate determination.

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

The DRB rests its recommendation of disbarment under the Wilson rule for a violation of RPC 1.15(a).

RPC 1.15 requires only that lawyers keep their client's property separate from theirs and appropriately safeguard it. 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. While RPC 1.0 does not say so, it is inferred that the definitions it contains govern when the term is included in a specific RPC.

But neither "knowingly, known or knows" are stated in the Rule 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(d) defines the term "fraud." The definition adopts by reference conduct that is fraudulent under New Jersey's substantive and procedural law 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 the term to include the subjective element of actual knowledge and a purposeful intent to wrongfully take the funds of a client who is the object of the lawyer's conduct.

CONCLUSION

Based on the foregoing the NJSBA urges the Court to clarify two precepts. First, that automatic disbarment under In re Wilson is applicable only where there is clear and convincing evidence of "knowing" action coupled with purposeful conduct that results in actual theft or fraud committed against a client in connection with property held in trust for that client. And second, that 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 conduct tantamount to theft or fraud.

Respectfully submitted,


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