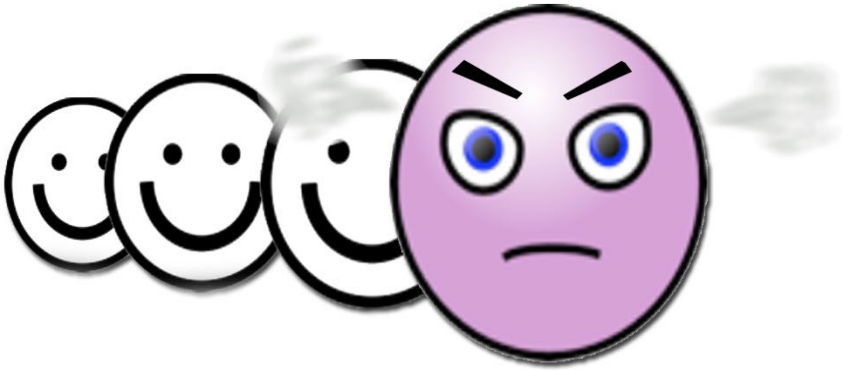
Garden State CLE presents:

“Almost Invariable”- In re Wilson (and friends)



Lesson Plan

Part I – Attorney Discipline – In General

1. In re Witherspoon, 203 NJ 343, 357-59 (2010)

As these precedents demonstrate, we have rarely established bright line rules that will govern disciplinary infractions, including serious matters involving criminal offenses. The most notable exception, of course, is our unfaltering view about the severity of the punishment to be meted out to attorneys who engage in knowing misappropriation. Save for that clear directive, all discipline is highly fact-sensitive. To be sure, crimes involving theft, because of their relationship to the principles that lie behind the *Wilson* rule and their threat to the trust that must be reposed in attorneys, usually lead to disbarment. But even when the attorney has been convicted of a theft, and even if it involved a particularly vulnerable victim, disbarment has not been inevitable.

We have not adopted a bright line disbarment rule even in the context of crimes involving violence.

[But see In re Hughes, 90 NJ 32, 38 (1982) ("However, bribery of a public official has invariably resulted in disbarment.")]

As we have often observed, the essential purpose of our system of attorney discipline is to protect the public, not to punish the attorney.

In re Witherspoon, 203 NJ 343, 357-59 (2010)

2. The Disciplinary Process:

Our system of discipline, as a result, includes few bright line rules, because few indeed are the acts for which one sanction will be invariably appropriate. Considering how best to protect the public from a particular attorney ordinarily involves considering the ethical lapses both in comparison to our relevant disciplinary precedents and in the context of that attorney's history rather than merely identifying the attorney's specific unethical act. Our evaluation of the appropriate quantum of discipline, therefore, is necessarily fact sensitive.

Part II - In re Wilson, 81 NJ 451 (1979) – Introduction

1. The "Wilentz" Court – In general

2. Prior treatment of "misappropriation" cases:

a.) "[M]isappropriation" as used in [*Wilson*] means 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[.] (at 456)

b.) [Discipline] in misappropriation cases have varied because of circumstances which the Court has regarded as mitigating: the economic and emotional pressures on the attorney which caused and explained his misdeed; his subsequent compliance with client trust account requirements; his candor and cooperation with the ethics committee; his contrition; and, most of all, restitution. The presence of a combination of these has occasionally resulted in suspension, ranging from six months to three years, rather than disbarment. (at 455-56)

In re Wilson, 81 NJ 451 (1979) – Introduction

3. The *Wilson* Rule

a.) In this case, respondent knowingly used his clients' 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.
(at 453)

b.) No mitigating factors are relevant

[M]aintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions. Functioning properly, however, in the best traditions of each and with full public confidence, they are the very institutions most likely to develop required reform in the public interest. (at 461)

c. Burden of proof is Clear & Convincing Evidence (see generally In re Seaman, 13 NJ 67, 74 (1993).

4. Public Policy supporting *Wilson*.

Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys. 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 clients' money, the client permits it because he trusts the lawyer.

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 always been recognized as particularly reprehensible:

(T)here are few more egregious acts of professional misconduct of which an attorney can be guilty than misappropriation of a client's funds held in trust. (at 454-455)

What are the merits in these cases? The attorney has stolen his clients' money. No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. The public is entitled, not as a matter of satisfying unjustifiable expectations, but as a simple matter of maintaining confidence, to know that never again will that person be a lawyer. That the moral quality of other forms of misbehavior by lawyers may be no less reprehensible than misappropriation is beside the point. Those often occur in a complex factual setting where the applicability or meaning of ethical standards is uncertain to the bench and bar, and especially to the public, which may not even recognize the wrong. There is nothing clearer to the public, however, than stealing a client's money and nothing worse. Nor is there anything that affects public confidence more much more than the offense itself than this Court's treatment of such offenses. Arguments for lenient discipline overlook this effect as well as the overriding importance of maintaining that confidence. (at 456-457)

Part III –

In re Noonan, 102 NJ 157 (1986) (per curiam)

The misappropriation that will trigger automatic disbarment under [*Wilson*], disbarment that is "almost invariable," consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal.

The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality"-all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since *Wilson,* it has been invariable. (at 160)

Part IV - In re Hollendonner, 102 NJ 21 (1985) (per curiam)

As the DRB observed, absent some extraordinary provision in an escrow agreement, absent here, it is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties The parallel between escrow funds and client trust funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of . We do not apply that rule in these proceedings in view of the absence of clear and convincing evidence that Respondent invaded the escrow funds with knowledge that the use of those funds was improper. Moreover, this is the first occasion on which we have addressed the near identity of escrow funds and trust funds. (at 28-29)

Part V - In re Seigel, 133 NJ 162 (1993) (per curiam)

The Special Master found on the first count that respondent had submitted thirty-four false requests for disbursements from September 4, 1986, to November 21, 1989, and had received "$21,636.32 in either goods, services or cash to which he was not entitled." On count two, he determined that respondent had obtained $4,483.95 in false disbursements.

Count three involved a $53,450 gift to respondent from a client for respondent's diligent and successful efforts in handling one matter. The Special Master found that respondent had executed a check request for the $53,450 from M & E funds and had listed the reason as "for payment of closing proceeds." According to the Special Master, respondent did not reveal to M & E that this payment represented a gift from a client, and thus prevented the firm from considering whether it would prohibit the acceptance of the gift or whether the gift was the property of the partnership. The Special Master found that respondent's conduct constituted dishonesty, deceit, and misrepresentation in violation of *Rule 8.4(c)*. (at 163-64)

These opinions make clear that knowingly misappropriating funds-whether from a client or from one's partners-will generally result in disbarment. Although the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former. A plainly-wrong act is not immunized because the victims are one's partners. We are unpersuaded by respondent's argument that he lacked constructive notice that the misappropriation of partnership funds could result in disbarment. Respondent concedes that his conduct was clearly improper. (at 170)

Part VI - In re Greenberg, 133 NJ 162 (1993) (Chief Justice Poritz – Stein & O'Hern dissent)

We find that Joel A. Greenberg knowingly caused his firm to disburse monies to him that belonged to the firm without the consent of his law partners and that he knowingly misappropriated fees due the firm to his own use. We reaffirm the rule set forth in *In re Wilson, 81 N.J. 451, 409 A.2d 1153 (1979)*, and extended in *In re Siegel, 133 N.J. 162, 627 A.2d 156 (1993)*, that misappropriation of client or law firm funds will almost invariably result in disbarment. We hold that disbarment is warranted in this case.

The relationship of attorneys to one another is also subject to the Court's disciplinary oversight. Lawyers who join together to practice, as a partnership or professional corporation, convey a "message" to the public.

Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele.... The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the "kind and caliber of legal services rendered."

Lawyers who practice together are bound by those strictures generally applicable to individual lawyers and by rules specifically applicable to law firms.

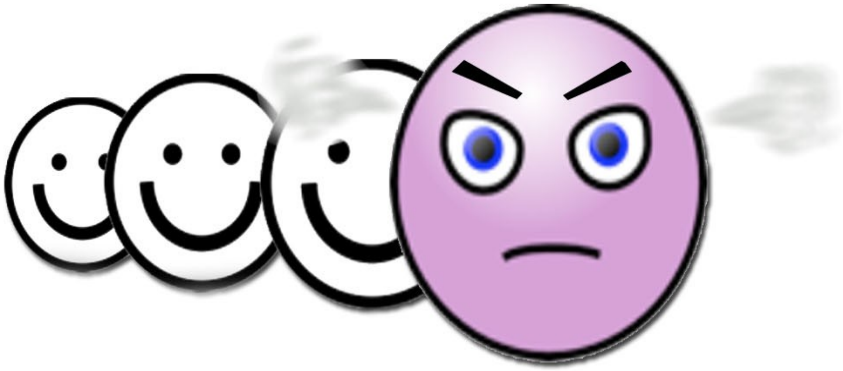
Underlying each of the Rules that affect law firm organization and the representation of clients by lawyers practicing together is the interest in protecting clients, past, present, and prospective, and concern about the public perception of the bar. The RPCs control, among other things, the ability of lawyers to form partnerships with non-lawyers, *RPC 5.4*, law firm advertising, including firm names, *RPC 7.1*-.5, and the disqualification of law firms based upon the conflicts of individual lawyers in the firm, *RPC* 1:10. The rules are designed to protect clients by insuring that non-lawyers are not practicing law, that clients and potential clients receive accurate information about law firms, and that confidentiality is maintained. Law firms are the vehicles through which clients retain individual attorneys and the cultures in which those individual attorneys function once retained. It is the firm's reputation-the sum of the reputations of the lawyers practicing together-that attracts clients and that suggests the lawyers in the firm can be trusted with the clients' most difficult problems and with the clients' assets. Lawyers who betray their partners betray that trust.

Most important, the Court has recognized "no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners." Our perception that such acts of theft are morally equivalent does not derive from the relationships between attorneys and their clients or attorneys and their partners but, rather, from our belief that "misappropriation from the latter is as wrong as from the former." Moreover, it is not clear that a distinction between client funds and firm funds is readily made by the average person. The general public is unlikely to know that attorneys are required to maintain separate accounts for client and firm funds, *RPC 1.15*, and may fear that the misappropriation of firm funds is synonymous with the misappropriation of client funds. It is this threat to public confidence in the integrity and trustworthiness of the bar that motivated the Court in *Wilson.*

[Coda: In re Greenberg, 564 Pa. 361 (2001) See also In re Wigenton, 210 NJ 95 (2012)]

Garden State CLE presents:

“Almost Invariable”- In re Wilson (and friends)



Lesson Plan