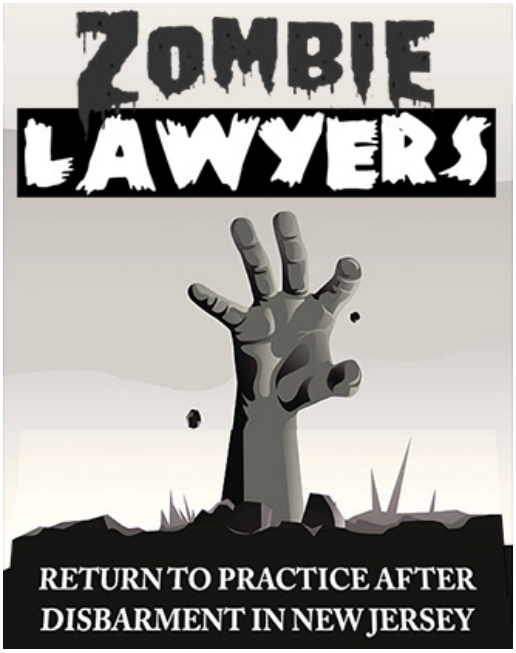
Garden State CLE Presents:

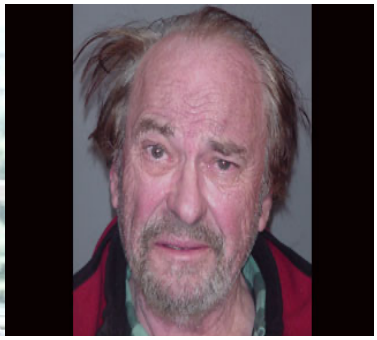


Zombie Lawyers

Return to Practice Following Disbarment

Instructors

Joseph P. Rem, Jr.



Robert Ramsey

Part I
Foundational Disciplinary Issues

a) In General - The essential purpose of our system of attorney discipline is to protect the public, not to punish the attorney. The purpose of a disciplinary proceeding, as distinguished from a criminal prosecution, is not so much to punish a wrongdoer as it is to protect the public from an untrustworthy lawyer. Maintenance of public confidence in the integrity of the bar is the paramount element behind the imposition of all attorney discipline.

With this in mind, the Supreme Court has developed an analytical process in order to determine the appropriate quantum of discipline in attorney misconduct cases.

b) The Five Questions - There are five questions that need to be answered in New Jersey disciplinary cases under New Jersey law. (In re Witherspoon, 203 N.J. 343, 358-59(2010)). They include the following:

> 1) What are the facts? (Generally limited to violations of the NJ Rules of Professional Conduct as proved by clear and convincing evidence – (In re Seaman, 133 N.J. 67, 74(1993))
>
> 2) How have these types of cases been adjudicated in the past through Supreme Court precedent or through Disciplinary Review Board?
>
> 3) What has been the attorney's individual prior disciplinary history?
>
> 4) What was the extent of harm to clients, members of the public or the administration of justice?
>
> 5) Are there issues of attorney rehabilitation, payment of restitution or general mitigation of discipline?

c) Predetermined Discipline - For certain discrete ethical violations, there is only one question, not five. What are the facts? If the facts demonstrate by clear and convincing evidence any of the following, the case is over because the quantum of discipline in the form of mandatory disbarment has been predetermined in the case law.

This limited "one-step" analysis is reserved for the following violations:

> 1) Knowing misappropriation of funds – In re Wilson, 81 N.J. 451(1979);
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> 2) Knowing misappropriation of escrow funds – In re Hollendonnner, 102 N.J. 21(1985);
>
> 3) Bribery of a public official - In re Cammarano, 219 N.J. 415(2014);
>
> 4) Child pornography – In re Cohen, 220 N.J. 7(2014).

d) Wilson Defenses - There are defenses to a Wilson violation. For example, since Wilson violations require proof of knowing misconduct, is a complete defense in a Wilson case for the respondent to demonstrate that the misappropriation was caused by negligent or reckless accounting practices. Moreover, under the defense of diminished capacity, at least in theory, an attorney can defend himself by presenting competent medical proofs that he suffered a loss of competency, comprehension, or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional, and purposeful." In re Jacob, 95 N.J. 132, 137(1984). To avoid disbarment in such a case, a respondent must establish a "causal connection" between the alleged medical condition and the act of misappropriation. To date, no attorney has ever successfully raised the diminished capacity defense in a Wilson case.

e) Impact of Disbarment - At this point, the Rules of Court do not provide any procedure that would permit a disbarred attorney from seeking readmission to the New Jersey bar. As a practical matter, this means that disbarment in New Jersey constitutes a lifetime ban on practice in our state. Moreover, there is no likelihood of a disbarred attorney gaining admission in a new jurisdiction. Finally, attorneys who have been admitted in multiple jurisdictions will be subject to reciprocal discipline following a New Jersey order of disbarment.

Part II
Evolution of Disbarment Under the Wilson Rule

a) In General - The original, public policy justifications for automatic disbarment in knowing misappropriation cases was explained by the Court in Wilson:

> [The] maintenance 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. (Wilson, supra at 461.)

Accordingly, since 1979, both the public and offending attorneys are on notice that every knowing misappropriation of client funds will result in disbarment.

In years past, the Court has rejected a relaxation of this automatic rule of attorney discipline. The only exception occurred during the tenure of Chief Justice Portiz (1996-2006) when the Court promulgated Rule 1:20-15A(a)(2) which authorized the imposition of an indeterminate suspension (minimum 5 years). This sanction has only been used once since it was created. (In re Cohen, 220 N.J. 7(2014)).

Since 1979, the Wilson rule has resulted in the disbarment of more than 500 attorneys since that time. The Court's prediction that this quantum of discipline would be almost invariable in knowing misappropriation cases has turned out to be entirely accurate.

As might be expected, the mandatory nature of disbarment in these cases has resulted in some sad, almost tragic consequences. Scores of long-term practitioners with otherwise unblemished records have been subject to disbarment in Wilson cases without regard to any mitigating factors. This is true in Wilson cases where a single, isolated mistake of judgment will invariably result in disbarment without regard to any mitigating factors.

The harsh impact of this invariable level of discipline has not been lost on the Justices. It can often be seen in their body language while entertaining oral argument during a Wilson hearing involving an otherwise stellar attorney.

There is some level of precedent for mitigating the impact of Wilson-type disbarment. For example, in In re Siegel, 133 N.J. 162(1993), the Court extended the holding in Wilson to include acts of misappropriation of law firm funds. The stability of this holding began to crumble in 1998 when two senior Justices, Stein and O'Hern filed a stinging dissent arguing that the Wilson rule was too harsh an outcome in cases involving law firm funds and expenses where there were significant mitigating factors that also constituted a defense. In re Greenberg, 155 N.J. 138(1998).

Ultimately, the Court backed down from the automatic disbarment discipline required for misappropriation of law firm resources in In re Sigman, 220 N.J. 141, 158(2014) claiming on the basis of a number of obscure, unpublished DRB decisions, that the Wilson rule "is not, and has never been, absolute."

Part III
A New Procedure in Wilson Cases

The Supreme Court has determined to address the conflict between its constitutional obligation to maintain public confidence in the integrity of the bar and the harsh, invariable consequences that Wilson disbarments impose on otherwise distinguished members of the bar.

It was this conflict that resulted in the Court's determination to explore a new disciplinary pathway in In re Wade, ___ N.J. ___ (2022) 2022 WL 2036105.

Wade Analysis

a) Certain disciplinary principles will not change as a result of Wade.

1) Wilson violations will continue to result in disbarment on an invariable basis

2) The Court will consider adopting a new rule that will provide a pathway for readmission to the bar following a period of time.

3) It is likely that this option will be limited to disbarments based upon Wilson and Hollendonner violations and Siegel/Greenberg disbarments that occurred prior to the 2014 publication of Sigman.

4) At this stage, the Court has not suggested that other disbarments unrelated to Wilson violations could be subject to readmission to the New Jersey bar.

b) Disbarment in Other Jurisdictions - All 50 states and the District of Columbia disbar attorneys who commit serious ethical violations. In a large majority of jurisdictions, however, disbarment is not permanent. Altogether, 41 states plus the District of Columbia allow attorneys to apply to be reinstated after they have been disbarred. Most jurisdictions permit attorneys to apply for readmission 5 years after disbarment.

c) Potential factors that would militate in favor of readmission in New Jersey could include the following which are relevant in South Dakota:

> 1) Present moral fitness;
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> 2) Acceptance of wrongdoing with sincerity and honesty;
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> 3) Extent of rehabilitation;
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> 4) Nature and seriousness of the original misconduct and the disrepute it brought on the legal profession;
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> 5) Conduct following the discipline, including whether there has been any unauthorized practice of law;
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> 6) Time elapsed since the original discipline;
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> 7) Character, maturity and experience at the time of discipline and now;
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> 8) Current competency and qualifications to practice law;
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> 9) Restitution;
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> 10) Proof that resumption of the practice of law within the state will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive of the public interest; and
>
> 11) Possible passage of the bar exam.

d) The Wilson/Wade Committee – In convening the Wade/Wilson Committee, the Court noted the following:

> Those and other considerations are relevant to any thoughtful evaluation of whether disbarment for knowing misappropriation should be permanent. To assess those and other factors, the Court will convene a committee comprised of attorneys as well as members of the public who are not lawyers.

We will ask the committee to study whether disbarment should continue to be permanent in all Wilson cases and to recommend standards that might apply if New Jersey were to adopt the majority approach. Among other issues to consider are the following: After what period of time might attorneys be readmitted? What factors and standard of proof should apply to that judgment? Should disbarred attorneys be required to retake the bar examination or other courses on ethics, recordkeeping, and related subjects? What process might be adopted for readmission? And what rule changes might be warranted?

To be clear, we ask the committee to recommend whether to modify the rule of permanent disbarment for matters in which disbarment has been mandatory -- that is, for knowing misappropriation of client funds under Wilson and of escrow funds under Hollendonner. The Court made clear in Sigman that disbarment was not required for knowing misappropriation of law firm funds. We ask the committee to consider whether any rule change should apply to orders of disbarment entered before Sigman. There are yet other serious matters in which the Court exercised its discretion and permanently disbarred an attorney. We invite the committee's comments on that issue as well.

We welcome input from attorneys and the public to promote the key interests at the heart of the Wilson rule: how best to protect the public and maintain confidence in the legal profession.