OPINION AND COMMENTARY

The Fallacy of *In re Wilson*

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The uncompromising bright-line rule of *In re Wilson*, 81 N.J. 451 (1979), requiring disbarment in all cases of knowing attorney misappropriation, is inappropriate, unrealistic and should be abandoned. The inflexibility of the rule is justified by superficially appealing, yet fictional rhetoric. Automatic disbarment under *In re Wilson* neither serves the public nor protects the positive reputation of the profession.

For nearly two decades, a majority of the New Jersey Supreme Court has held firm to the rule that an attorney who has knowingly misappropriated a client's funds should be automatically disbarred from the practice of law. Unlike in most states, disbarment in New Jersey is permanent.

This rule, applied without exception and consistently reaffirmed, was extended to the knowing misappropriation of escrow account funds in *In re Hollendonner*, 102 N.J. 21 (1985), and most recently has been applied to the knowing misappropriation of law firm funds in *In re Greenberg*, 155 N.J. 138 (1998); *see In re Siegel*, 133 N.J. 162, 627 A.2d 156 (holding misappropriation of law firm funds generally warrants disbarment in absence of mitigating factors); *see also In re Obringer*, 152 N.J. 76 (1997) (applying *In re Wilson* to theft from court registry).

Marking the Court's opinions is an unrealistically strict requirement that any type of physical or mental impairment that the attorney suffered must be shown to be the actual cause of the misappropriation — a standard that has been "unattainable by lawyers whose misappropriation of funds has occurred during periods of alcohol or drug impairment or in the course of personal or family tragedy." *In re Bell*, 126 N.J. 261 (1991) (Stein, J., concurring in part and dissenting in part); *see In re Jacob*, 95 N.J. 132, 137 (1984).

Once misappropriation is found to be "knowing," the court has steadfastly refused to consider any mitigating circumstances before imposing the ultimate sanction of disbarment. The source of this uncompromising fiat is the misunderstanding of both the pragmatics of the practice of law and the interests of the consuming public.

It is undisputed that the misappropriation of a client's funds is entirely reprehensible, does tremendous damage to the reputation of the legal profession and should result in disbarment in most cases. Nonetheless, disbarment — the most severe punishment available — is not appropriate in every instance.

Even the Court itself acknowledges that the consistent and strict application of the *Wilson* standard and its failure to consider surrounding circumstances has generated some drastically harsh results.

Public Interest Damaged

Nevertheless, it has found that the protection of "the public interest and maintenance of the confidence of the public and the integrity of the bar" outweighs all other considerations. *In re Hein*, 104 N.J. 297 (1986). Given the realities of the practice of law and the relative impact of this rule, the New Jersey Supreme Court has actually damaged the public interest and done a disservice to the integrity of the bar.

The lawyers most subject to the strict liability rule of *Wilson* are solo practitioners and attorneys in small firms. At present, 35.04 percent of the attorneys engaged in private practice in New Jersey are solo practitioners, and 62.74 percent of private attorneys work in firms of five lawyers or fewer, according to the 1997 State of the Attorney Disciplinary System Report published by the Office of Attorney Ethics.

These are the lawyers who have the most direct contact with the majority of the general public who the Supreme Court purports to protect, and it is these lawyers that have the most ability to affect, positively or negatively, the public's perceptions of the legal profession.

Small law firms generally do not have the financial support and administrative infrastructure of the large firms that service lucrative corporate clients. Consequently, small firm practitioners are subject to personal and professional pressures foreign to large firm attorneys. Equipment failures, roof leaks, personnel conflicts and cash flow problems create significant pressure for a small firm attorney who may already be overworked and have responsibilities outside the profession.

In larger firms, attorneys often have no control over or access to firm finances, but in smaller firms, economic realities dictate that there can be no complex system of requesting disbursements. It is the attorney who, along with the myriad of other responsibilities involved in running a business, must keep track of, and be responsible for, each and every payment and expenditure.

Obviously, there should not be different ethical standards for attorneys in small firms compared with those in large firms, but there should be an effort made to understand the pressures and economic considerations that are totally unrelated to whether the lawyer is an honorable, ethical person. In certain circumstances, these small firm attorneys and solo practitioners who engage in isolated or aberrant violations of the rules of conduct should be punished but not forever barred from the practice of law because of the overall good service they provide for people in their legal, business or personal matters.

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Sophistry of Court's Words

The Court's opinion in *Greenberg*, where it likened the harm caused by the misappropriation of a client's funds to the misappropriation of a law firm's funds, illustrates the sophistry of the Court's words of public protection. As Justice Gary Stein correctly pointed out in his well-reasoned dissent, the "unique and specific" public interest justifications of disbarment under *Wilson* do not apply to misappropriation of law firm funds.

Where the victim of the defalcation is a large law firm that does not demand or support disbarment of a mentally impaired transgressor, the public interest argument becomes weak and confusing. Even if the public was aware of the Court's decisions, which is unlikely, it is unrealistic to believe that the Court has impacted the perceptions of the legal profession.

A recent poll found that the general public continues to view the entire legal profession negatively. When asked how they would rate the honesty and ethical standards of various professions, 41 percent of the respondents ranked attorneys either "low" or "very low," beating out only car salespeople (59 percent, and following closely behind labor union leaders (38 percent), according to *The Gallup Poll Monthly*, No. 387 (Princeton, N.J.: The Gallup Poll, December 1997).

Indeed, there are many different things that contribute to the public's negative perception of lawyers, some of which include exponentially increasing legal fees, the explosion of unnecessary litigation and the intensifying contentiousness of lawyers. Small firm lawyers are not solely to blame for these trends in the practice.

Just as politicians declare that they are "tough on crime" in election year campaign speeches, the New Jersey Supreme Court has used *Wilson* to support a misdirected moral diatribe.

In reality, this shortsighted policy can eliminate otherwise upstanding individuals from the profession for one-time transgressions or aberrations that can be unrelated to their fitness to practice law or their positive effect on the reputation of the bar.

These are often the lawyers who have had the most positive impact on the reputation of the bar through their direct contact with the community. The notion that protection of the public interest and integrity of the profession demands automatic disbarment without the thoughtful consideration of the surrounding circumstances is a fallacy.

Clearly, any act of misappropriation should be deterred. The purpose behind attorney discipline is to protect the public and this should be done in a way that best serves this goal. While the sanction of disbarment, which is nothing short of a death sentence to that attorney's occupation, is a fitting result in most cases, automatic disbarment ignores the realities of the practice of law for the majority of the lawyers in New Jersey. The rule should not be so inflexible as to permanently sacrifice good attorneys for false rhetoric. ■

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