

PRACTICE TIPS

ETHICS AND PROFESSIONAL RESPONSIBILITY

Is Permanent Disbarment Gaining Some 'Gray'?

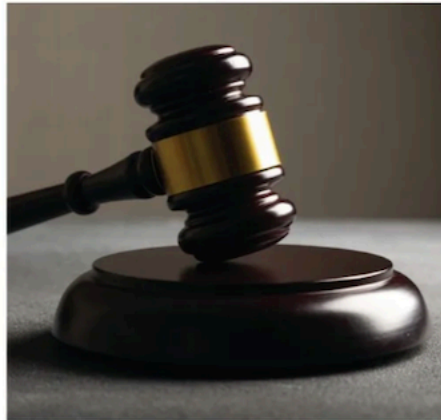
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Once a black-and-white determination, permanent disbarment may be headed for some gray. Serious rethinking of how to apply the penalty began in June 2022, when the New Jersey Supreme Court appointed a committee to report on whether New Jersey should maintain the rule that disbarment, once ordered, is permanent. That committee has recommended that it should not and that, instead, disbarred attorneys should be able to apply for readmission after five years. The Court has yet to make a final determination.

New Jersey is one of nine states where disbarment is permanent, and the subject has been frequently discussed in legal circles over the past two years. For instance, in *In re Lucid*, 248 N.J. 514 (2021) and *In re Wade*, 250 N.J. 581 (2022), the State Bar advocated for a clarification that automatic permanent disbarment should apply only in situations where there is clear and convincing evidence of actual intent to steal from or defraud a client. Absent such evidence, the NJSBA advocated that the facts and circumstances of the particular situation should be weighed and consideration given to alternative appropriate sanctions short of permanent disbarment. When the Court appointed its committee to examine the issue, the State Bar wholeheartedly endorsed the undertaking. And when it issued its final recommendation for potential readmission after five years, the State Bar urged the Court to adopt it.

To say that facts are everything in a discipline case is an understatement. In these two cases, the facts drove the ultimate discipline. In *Lucid*, the Court censured an attorney who misused trust account funds once. In *Wade*, the Court disbarred an attorney who misused trust account funds over 15 years.

Also, in *Lucid*, the attorney disbursed trust money to pay a client debt because of a looming deadline for payment of a judgment. The case settled on Jan. 21; the client told her he would send her the money for his debt; a blizzard ensued; and, on Jan. 26, the creditor sent a letter advising the deal was off unless he had the money by a date certain. The lawyer wrote the check from her trust account without having first received the client's check. She argued that she was not borrowing money from one



client to pay another client and that she had no intent to take any client's money, and wanted to pay her client's obligation on time. The attorney argued there was no self-dealing and the sole issue was the postal service's lack of timely delivery of the check. She claimed that the disbursement was a "premature disbursement" against uncollected funds, representing a "momentary lapse in appreciating that she should have delayed sending a check until she had the funds in hand from her client," and she argued that it was a negligent misappropriation of trust account funds, citing *In re Ambrosio*, 200 N.J. 434 (2009).

After the Office of Attorney Ethics (OAE) notified *Lucid* that she had a \$389 overdraft in her trust account, she took immediate measures to replenish her trust account, educated herself on recordkeeping requirements, corrected all record keeping deficiencies and retained a bookkeeper. In the process of reconstructing her records, she realized she had advanced an unrelated client's trust funds to pay another client's debt. The attorney immediately reported herself to the OAE. A majority of the Disciplinary Review Board (DRB) found she faced disbarment, but because of her honesty and integrity, she posed no danger to the public. They found that she was far from unsalvageable. Nonetheless, the DRB recommended disbarment based on the language from *In re Noonan*, 102 N.J. 157 (1986), and *In re Wilson*, 81 N.J. 451 (1979).

Four members wrote a dissent, noting that she showed no premeditation or corrupt intent; her conduct was solely to pro-

tect a client; she believed the funds would arrive; the risk to other client's funds was theoretical and brief; there was no harm to any client; this was a single isolated incident; and, "most importantly," she self-reported the incident to the OAE. They believed that disbarment would be "too harsh a sanction" for a "fleeting, isolated oversight." The Court agreed with the dissent. The attorney was censured.

In *Wilson*, the New Jersey Supreme Court stated that "[g]enerally, all [knowing misappropriation cases] shall result in disbarment. We foresee no significant exception to this rule and expect the result to be almost invariable." 81 N.J. at 453. "Mitigating factors will rarely override the requirement of disbarment." *Id.* at 461. In the case of *In re Hollendanner*, 102 N.J. 21, (1985) the Court extended the holding in *Wilson* to include disbarment if a lawyer knowingly misappropriates escrow moneys as escrow moneys have a "near identity to trust funds."

The *Noonan* case clarified the *Wilson* rule, providing that "knowing is taking a client's money and knowing that 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, not does it matter that the pressures on the lawyer to take the money were great or minimal...the presence of 'good character and fitness,' the absence of "dishonesty, venality or immorality" are all irrelevant." *Id.* at 159-60.

Coming on the heels of *Lucid*, in *In re Wade*, the attorney used her trust account as a credit line, believing this was excusable as long as she made the client whole. The attorney never borrowed more than \$12,000 from the trust account (which she always paid back) because she knew she could never pay back more. The attorney admitted to OAE that she borrowed money from her trust account and that she juggled funds between her personal, business and trust accounts, actions that belied her claimed lack of knowledge that her trust account was overdrawn. This practice continued for 15 years. The DRB and the New Jersey Supreme Court agreed that the attorney was a pillar of her community and that she had a stellar reputation among friends and other attorneys, noting that she worked out of her home and represented underprivileged clients in Paterson. No client complained about her using their money and no client was financially harmed by her actions. Nonetheless, because the attorney admitted that she used client money as a "line of credit" for her own purposes for 15 years, she was disbarred.

Lucid and *Wade* were decided by the DRB almost at the same point in time with recommendations for disbarment. They presented startlingly different facts and sympathetic respondents, which led the Court to agree with *amicus* that the time was ripe to reconsider permanent disbarment.

