

# PRESIDENT'S PERSPECTIVE

DOMENICK CARMAGNOLA

## NJSBA Advocates for More Nuanced Analysis, Variety of Sanctions for *Wilson* Rule



Tracking and analyzing the issues that affect lawyers' ability to practice is an essential role the New Jersey State Bar Association plays as the state's largest organization of legal professionals.

That is one of the reasons why the Association, as the voice of New Jersey attorneys, sought amicus involvement this fall in a pair of attorney disciplinary cases that rose to the state Supreme Court. The cases each involved recommendations for disbarment from ethics committees and attorney disciplinary agencies in cases that don't fit the traditional interpretation of knowing misappropriation.

New Jersey has one of—if not the—strictest disbarment rules for attorneys in the nation. In some states attorneys can be readmitted once they've proven rehabilitation; in the Garden State disbarment is forever. It comes from *In re Wilson*, a case decided in 1979 that held disbarment is the only appropriate discipline for knowing misappropriation when there is clear and convincing evidence of an intent to steal money or defraud a client. While that is an important policy for the sanctity of the entire legal system, the NJSBA saw these cases as an important opportunity to ask the Court to clarify the *Wilson* Rule given how it was being applied by those involved in the disciplinary process.

The NJSBA appeared as amicus in *Office of Attorney Ethics v. Wade*. In that case, the OAE recommended disbarring an attorney under Rule of Professional Conduct 1.15 for knowing misappropriation of client and escrow funds from her attorney trust account. The NJSBA argued the *Wilson* Rule is meant to be applied where an attorney's intent was to steal a client's money or to defraud a client. That is not what occurred in *Wade*. The NJSBA asked the Court to clarify the *Wilson* Rule and the distinction between knowing misappropriation in circumstances where trust accounting errors or insufficiencies are alleged, rather than outright theft.

"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 consid-

eration of alternative appropriate sanctions, if any, short of disbarment," it said in briefs. The outcome of that is case pending.

The Association was also granted friend-of-the-court status in *In re Lucid*. The NJSBA again asked the Court to examine the balance of maintaining public trust and a disciplinary system that is not overly punitive. The NJSBA further argued that all facts should be considered in analyzing a disciplinary matter where the *Wilson* Rule may apply, including motive and intent, to determine if they are consistent with a finding of conduct tantamount to theft or fraud.

"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," the Association argued in its brief.

Indeed, not long after those arguments were held, the Court granted Karina Pia Lucid a censure, seemingly agreeing there is an alternate path for other cases where it is clear an attorney did not plan to steal from or defraud a client.

The NJSBA is honored to be a part of the amicus process, but as we know, a court case can take years to make its way through the system and for an opinion to have a tangible impact on policies and rulemaking. In addition to amicus advocacy, the NJSBA offers several avenues to help attorneys who are struggling with practice-related issues, such as trust accounting, that can be put into use immediately.

For instance, members of the Association have access to PracticeHQ, a suite of resources to help attorneys address practice management issues, including trust accounting. Some of the resources include a checklist on bank reconciliations and whitepapers on basic accounting information that lawyers need to know and client trust funds.

The New Jersey Institute for Continuing Legal Education regularly presents programs aimed at addressing a random audit, keeping accurate trust records and generally steering clear of ethics issues.

In addition, the Association administers the Ethics Diversionary Program that provides a series of educational sessions

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out on social media, and attorneys should pay attention to the wealth of information that it sometimes contains. The article addresses the discoverability, preservation, collection, and production of social media content and the privacy rights that some courts consider when deciding whether to order the production of social media evidence.

Our third article brings us into the thick of electronic discovery and the process of developing and sharing suggested search terms for ESI. The authors outline how rules and case law require attorneys to carefully construct search terms because the failure to do so could have severe consequences, including

sanctions. The concepts of cooperation and transparency are paramount in these situations.

Next, we examine the impact of key rule changes regarding e-discovery. Significant amendments to Federal Rule of Civil Procedure 37(e) in 2015 took a tiered approach to help curtail spoliation of electronic evidence without being too harsh with sanctions for instances where ESI loss was unintentional and inconsequential. Six years later, there remains a similar volume of motions and penalties, but there are some lessons to be learned from federal court decisions.

Finally, we look at e-discovery through the lens of products liability lit-

igation, which can involve thousands of plaintiffs, and how to manage the sheer volume of ESI from diverse sources, and the host of trade secrets, confidentiality issues, and international regulations that come with it. Attorneys should be well-trained in e-discovery in order to manage large-scale ESI obligations, including crafting appropriate protocols that will satisfy the court.

Whether your client is a sophisticated company with thousands of employees and piles of ESI, or a small shop with few employees and a less sophisticated IT set up, ESI is often meaningful in the prosecution or defense of the matter, regardless of the issue at hand. ☺

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for attorneys who have been recommended for rehabilitation as the result of an ethics infraction that does not rise to the level of a formal complaint being filed. Dedicated volunteers work closely with the participants of the program to

teach them the best practices to use at work.

And all attorneys, judges and law students in the state have access to the services of New Jersey Lawyers Assistance Program. NJLAP is a free, confidential program that can help attorneys with their practice issues, as well as those who are confronting issues like

depression, anxiety, or substance abuse that may have long-term implications on the day-to-day operations of their law office.

The NJSBA is here to advocate for our members, speak up for the profession, and to assist attorneys with their everyday challenges. Simply put, we are here for you. ☺

**NJSBA**

Organized by the Immigration Law Section in collaboration with the Young Lawyers Division, Pro Bono Committee, Child Welfare Law Section and the Military Law and Veterans Affairs Section

Thousands of Afghan evacuees are living at New Jersey's Joint Base McGuire-Dix-Lakehurst, including approximately 1,000 children under the age of four, and about 300 pregnant women. With the cold weather upon us, the families need culturally appropriate clothing and other goods, including hygiene products, educational supplies, and baby products.

See a detailed list of needed items at [njsba.com](https://www.njsba.com). Clothing may be new or very gently used. Other items should be new and sealed in original packaging. PLEASE DO NOT DONATE COATS OR DIAPERS.

• **Starts Nov. 29**  
during normal business  
hours and special events

• **Donation**  
**Drop-Off Bin**  
located in front of  
New Jersey Law Center  
One Constitution Square  
New Brunswick

For questions or additional  
information, contact  
Gabrielle Ribeiro at  
[gribeiro@njsba.com](mailto:gribeiro@njsba.com) or Brian  
Doyle at [bdoyle@njsba.com](mailto:bdoyle@njsba.com).

# Afghan Allies and Friends Winter Drive