New Jersey Law Journal

VOL. CLXIX – NO. 10 – INDEX 927 SEPTEMBER 2, 2002 ESTABLISHED 1878

N.J. SUPREME COURT YEAR IN REVIEW LEGAL EHTICS & MALPRACTICE

# Third-Party Escrow Funds Entitled to Same Protection as Client Trust Funds

## Disbarment is the appropriate penalty for misappropriation, even if the subjective intent to steal is lacking

**By Bennett J. Wasserman and Raphael M. Rosenblatt**

*In the Matter of Jack N. Frost*, 171 N.J. 308 (2002), serves as a continuing reminder that conflicts of interest, dishonesty, fraud, deceit, misrepresentation and the knowing misappropriation of clients' or third parties' funds are the ingredients that spell the end of a lawyer's career.

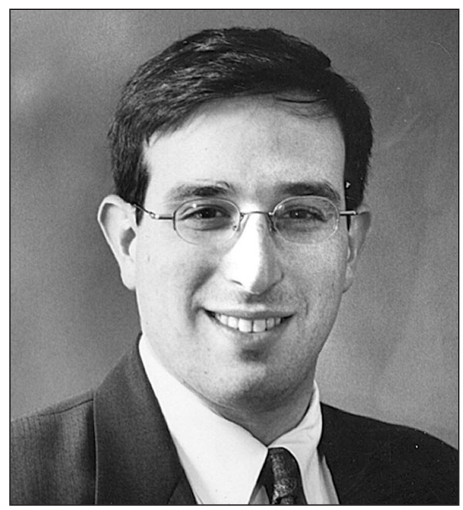
Jack Frost was no stranger to the attorney disciplinary process. He was admitted to the New Jersey bar in 1971 and in 1988 he received two private reprimands — for conflict of interest in a criminal matter and for failing to safeguard client funds in another matter. He was again privately reprimanded in 1992 for endorsing a client's name on a settlement check without client authorization.

In 1997, he was suspended for three months for five separate instances of misconduct. Again in 1997 he received a six-month suspension, consecutive with the earlier three-month suspension, for yet other ethical infractions. Then, in 1998 he received a two-year suspension for failing to safeguard escrow funds and other conduct involving dishonesty, fraud, deceit or misrepresentation.

The present case arose out of a workers' compensation proceeding where testimony at a hearing suggested that Frost may have misused client funds. The judge contacted the Office of Attorney Ethics which then conducted an audit of Frost's books and records. Following that, the OAE filed a complaint against Frost alleging violations of RPC 1.8 (conflict of interest/prohibited business transaction with a client); RPC 1.15(a) (knowing misappropriation of escrow funds and failure to safeguard the funds of a third party); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Frost had represented a client who suffered serious injuries in an on-the-job accident. He filed a third-party product liability action against the manufacturer of the equipment that the client was using at the time he was injured. Frost settled the claim for the sum of $500,000 and he deposited the check in his attorney's trust account. Shortly therafter he made disbursements to the client and to himself.

Before consummating the settlement with the third-party defendant, Frost's co-counsel, Rubino, who filed the workers' compensation petition, believed that he had compromised the carrier's lien to $79,000. Rubino sent a letter to CNA confirming that understanding and Frost sent CNA a trust account check in that amount. CNA, however, refused to accept the check, denied that it had compromised its lien, and notified Rubino that it was returning the unegotiated check to Frost. Frost claimed that as a result of CNA's rejection of the tender of funds, he believed those funds legally reverted



Wasserman is counsel to Stryker, Tams & Dill of Newark and Rosenblatt is associated with Hellring, Lindeman, Goldstein & Siegel of Newark.

back to his client.

Frost asked the client to loan him the $79,000. Frost's co-counsel advised the client against lending the funds to Frost, but Frost persisted in his request. The client ultimately agreed to make the loan after Frost agreed to pay him 15 percent annual interest and offered other seemingly enticing terms that would protect the client in the event CNA ever claimed the right to be repaid their workers' compensation lien.

As a further inducement, Frost told the client that he had owned six acres of unencumbered land and one-half interest in a house in North Carolina and that, if requested, he would give the client a first mortgage on those properties to secure the loan. It comes as no surprise that CNA sued for payment of its entire workers' compensation lien, and after four years of litigation, the CNA action was settled in 1996.

In the disciplinary proceedings, Frost was found guilty of negligent rather than knowing misappropriation of the $79,000 of escrow funds, as well as other violations. The Disciplinary Review Board agreed that Frost owed a fiduciary duty to CNA — a nonclient third party — which he breached because he never obtained CNA's consent to disburse the $79,000 (in violation of RPC 1.15(a)).

The DRB also determined that the loan that Frost induced the client to make to him was unfair and unreasonable to the client because it was Frost's wife that actually owned the real estate that he promised to use as collateral. He therefore misrepresented his ownership of that collateral to the client. The DRB recommended that Frost be suspended. The two public members of the DRB, however, voted to impose disbarment.

The Court reviewed each of the three Frost violations, and differed with the DRB's conclusion that Frost had committed negligent rather than knowing misappropriation. The Court found that even though the client authorized the loan, the consent of the third party who claimed a right to those funds, CNA, was also required.

Frost's argument that the law of tender would absolve him was simply inapplicable. Citing *In Re Hollendonner*, 102 N.J. 21 (1985), which dealt with the rights of third parties to funds held in an attorney trust account, the Court reiterated that the parallel between escrow funds of a third party and client trust funds is obvious that "an attorney found to have knowingly misused escrow funds will confront … disbarment."

The fact that the client consented to the use of the funds was irrelevant in the Court's mind. As the escrow agent, Frost required the consent of CNA before he used the funds for his own benefit. By entering into the loan arrangement with the client, he therefore knowingly misappropriated the funds that belonged to CNA. Even though Frost did not have the subjective intent to steal money, he knowingly misappropriated the funds and, therefore, the Court found that disbarment was the only appropriate penalty.

The court also emphasized that it was deeply troubled by Frost's primary concern with his own self interest in getting the loan from his client in violation of RPC 1.8. He knew that his co-counsel in the worker's compensation case had advised the client against entering the loan transaction. He also knew that the client was hesitant about giving him the loan. His misrepresentation of the extent of his assets that could have been used to collateralize the loan evidently induced the client to enter the prohibited transaction.

What is very clear is the Court's emphasis of the importance of the attorney's fiduciary duty to clients and third parties. Whenever the lawyer puts his personal interest before that of the client or an appropriate third party, the lawyer does so at his peril.

In light of the spate of recent corporate accountability cases in the news, Frost serves as a timely reminder to us that we must always be vigilant about the importance of good ethics as the foundation of good legal practice.

**The Rewards of Good Ethics**

In two of the Court's ethics decisions, the Court found a way to protect counsel fees where the law may have previously been unclear. One case, *Starkey*, involved very specific facts from which future extrapolation of the Court's holding may become difficult. The other, *Musikoff*, interpreted the procedures required by the Attorneys' Lien Act, something applicable to a wide variety of factual settings. Common to both, however, and a guide to the practicing bar, was that the attorneys whose fees were ultimately protected and upheld had acted honestly and always with the intent to benefit their clients.

*Starkey, Kelly, et al v. Estate of Nicolaysen et al.,* 172 N.J. 60 (2002), emphasizes that the attorney-client relationship must begin with a written retainer agreement that complies with the requirements of RPC 1.5.

The primary issue in *Starkey* was whether a law firm that enters into an oral contingent-fee agreement that is later held to be unenforceable because it was not reduced to writing within a reasonable time after the commencement of the representation, can, nonetheless, recover a fee based on the principal of quantum meruit — the reasonable value of the services rendered.

The clients had entered into a contract to sell their 113-acre farm for $7,700 per acre ($870,000) to a buyer who had intended to develop the property. The sale was contingent upon the buyer's getting preliminary subdivision approval and utilities access within one year of the contract. Eight months later, the buyer assigned the contract to another developer who wanted an extension of time to get the various approvals. The sellers were not happy with that arrangement and contacted Starkey to represent them for the purpose of terminating the contract.

At the outset of the engagement, the clients told the attorney that they could not afford to pay an hourly fee. The attorney replied that he would handle the matter on a contingency basis, modeled after a typical condemnation action fee arrangement, in which the fee would be one-third of the excess received over the original condemnation offer. In other words, the oral retainer agreement that was reached would provide Starkey with a contingent fee equal to one-third of the difference between the contract price of $870,000 and any future sales price received for the property.

RPC 1.5 requires that when a lawyer has not regularly represented the client, the basis or rate of the fee must be communicated in writing to the client either before representation or within a reasonable time after the start of the representation.

Starkey began to furnish otherwise flawless services to the clients. He was not only successful in terminating the first contract between the clients and the contract buyer and his assignee, but he also successfully defended against lawsuits for specific performance of that contract and an appeal from the trial court's judgment dismissing the contract-buyer's suit.

During the pendency of the appeal, the clients entered into a second contract with a different buyer to sell the farm for $3,996,000, contingent on the success of the appeal arising from the termination of the first contract. Under the second contract, the clients also received a non-refundable $200,000 deposit. After receipt of that deposit, which was 33 months after the start of his representation, Starkey and the clients finally reduced their oral contingent-fee agreement to writing. In that written agreement, Starkey reduced his fee under the original oral agreement from one-third to 20 percent of the sales price differential, that is, the difference between the first contract and "any other contract which is ultimately closed."

Eventually, the second contract buyer, like the first, also wanted to extend the time to secure its approvals, but the client/sellers refused and chose to terminate the contract instead. The second buyers sued for specific performance and for return of the $200,000 nonrefundable deposit. After a trial and appeal, both successfully defended by Starkey, the contract was terminated and the clients were permitted to retain the deposit. The client offered to pay a portion of the $200,000 that they kept toward Starkey's legal fee, however, Starkey declined the offer.

Starkey also assisted the clients in seeking offers from other prospective buyers, including one for as much as $4.3 million. That offer, however, was withdrawn when the potential purchaser refused to make a non-refundable installment deposit. During the course of representation the client/husband died, but Starkey continued to represent the widow in connection with a contract to sell to yet a fourth prospective purchaser. That sale never materialized. Then, the widow died.

Starkey thereafter made several unsuccessful attempts to confirm the contingent-fee agreement with the two surviving children (co-executors) of the clients. He felt he had been left with no alternative but to file an action against the estate. The complaint sought "reasonable compensation for legal services rendered pursuant to the written fee agreement, or in the alternative, based on quantum meruit and a lien against the property for the amount awarded." By the time Starkey's law suit against the estate ended in final judgment, the property still had not been sold, nor had the contract contingency (the closing of a sales contract) ever materialized.

In a decision that actually was designed to protect Starkey's right to payment, the trial court held that the contingent-fee agreement that Starkey had with the client was unenforceable because it had not been reduced to writing within a reasonable time in violation of the RPC 1.5. The trial court ruled, however, that Starkey "may be entitled to a *quantum meruit* recovery, but not at the present moment," because "the contingency which triggers the plaintiff's right to recovery, had not occurred."

The quantum meruit issue was eventually tried and the trial court awarded Starkey a fee of $115,712.50, which was calculated by multiplying Starkey's hourly rate by the number of hours worked.

The Court reasoned that given the "uncertainty of the sale of the property … (and the fact that the heirs) plainly benefited from Mr. Starkey's efforts … the amount will be awarded as a lien solely against the property." Judgment was then entered against the estate. The estate appealed and the Appellate Division affirmed.

The Supreme Court granted certification and modified and affirmed, but it may have done so at the cost of clouding the heretofore clear distinctions between a contingency-fee arrangement and a quantum meruit award. Traditionally, and by definition, before an attorney could collect a contingent fee, the contingency must have occurred. In the most common example, a plaintiff's attorney would not be entitled to his fee in a personal-injury action unless there was a recovery.

By the same token, in condemnation cases (after which Starkey modeled his retainer agreement) there would typically be a fee of one-third of the excess amount received over the original condemnation offer. Had Starkey been successful in terminating the first contract and in securing a higher offer for the property which then closed title, then the contingency provided for in the agreement would have come about and he would have earned a fee of $625,200. Unfortunately, the closing never took place. Thus, the contingency never materialized and there was no fund or *res* produced as a result of his efforts.

So, the Supreme Court reasoned that even though the contingent fee agreement was unenforceable because of Starkey's failure to comply with RPC 1.5, he was, nonetheless, entitled to an award in quantum meruit. What seemingly justified the blurring of the distinction between contingent fee and quantum meruit in this case was that notwithstanding the failure of the contingency to come about, "courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust."

The Court found that "even if the children [of the deceased clients] do not sell the property, and thereby satisfy the contingency, (they nonetheless) continue to benefit from Starkey's services by receiving enjoyment and use of the property, as well as, the right to sell it at what is likely to be a price higher than the $7,700.00 per acre price," provided for under the first contract.

While that may be true, some may wonder whether the Court, in effect, redefined the contingency that had been expressly and unambiguously defined by the parties in their written agreement. The difficulty, however, is this: How do we apply such a precedent to other cases where a contingency has not come about as provided for in a written contingent-fee agreement?

Assuming, for example, that in a personal injury case, there is a nonsuit; it follows that there ought to be no attorneys' fees. But, even though the liability case was lost, the clients might still have secured other benefits from the attorney's services, such as the collection of no-fault or other insurance benefits that were paid only as a result of the attorney's services. Would the attorney be permitted to claim a fee in quantum meruit based on those benefits secured for the client?

Another example might be a personal injury case where the first lawyer takes the case from its inception, through discovery and to trial which results in a nonsuit. Then, a subsequent attorney appeals the case, wins a reversal, and proceeds to settle the case. Although it could be argued that the first attorney did all the discovery, which was a benefit to the client as well as to the subsequent attorney in resolving the matter after the appeal, given the *Starkey* decision, the question arises: Would the first attorney be entitled to any part of the contingent fee earned by the second lawyer for services before the nonsuit that might have helped the subsequent attorney to successfully resolve the case?

Those of us who try to comprehend the differences that define the guidelines for attorney compensation are left a bit confused by the Court's acknowledgment in this case that while the contingency that would trigger the client's duty to pay the attorney's fee never occurred, some intangible benefit was nonetheless derived by the client, which would entitle the attorney to receive a fee based on quantum meruit.

The Court also had the opportunity to discuss the attorney's right to be paid for legal services rendered when the client decides retain new counsel and to terminate the lawyer's services during the course of the engagement. In *Musikoff v. Jay Parrino's The Mint, LLC,* 172 N.J. 133 (2002), the plaintiff Musikoff brought an action in the U.S. District Court alleging that the defendant had defrauded him in a commercial transaction.

He first had retained one attorney and then replaced him with Stark & Stark, the appellant in this case. The plaintiff and Stark & Stark had a written-fee agreement that included a $10,000 retainer. About a year and a half after the retention, plaintiff elected to hire a third attorney and to replace Stark & Stark. The third attorney informed Stark that he was being substituted in their place. Within a month, Stark informed him that it claimed a lien for unpaid legal services and expenses stemming from its representation of the client.

Less than three months after the substitution, the underlying litigation was settled and the district court dismissed the action. Not knowing about the settlement, Stark & Stark sent a second letter to the third attorney inquiring about the status of the case. A week later, Stark & Stark received a response from a fourth attorney, who did not disclose that the case had been settled. Instead, he stated that the client had terminated the third attorney's services and had authorized him "to direct the litigation forward." The fourth attorney also stated that the case was still pending, and that a May trial date had been adjourned.

After that contact, Stark & Stark learned that the matter had in fact been settled, and that the defendant had paid the clients an undisclosed amount. Stark & Stark and the fourth attorney exchanged correspondence, but ultimately the client rejected Stark & Stark's attorney's lien and refused to pay.

In compliance with Rule 1:20A-6, Stark & Stark wrote to the client informing him of his right to arbitrate their fee dispute. The letter also advised the client that if he failed to pursue fee arbitration, Stark & Stark would bring an action against him and his attorney to recover the disputed fees. The client chose not to pursue arbitration. Stark & Stark then moved before the district court, where the underlying action had been pending, seeking an acknowledgement of an attorney's lien pursuant to the Attorney's Lien Act. N.J.S.A. 2A:13-5.

The court ruled, however, that Stark & Stark did not have a valid lien, because it had failed to file its petition prior to the date the action had been dismissed. Stark & Stark sought relief before the Third Circuit Court of Appeals, which in turn certified the question to our Supreme Court: "Whether under New Jersey Law, in order to enforce a lien under [the Attorney's Lien Act] N.J.S.A. 2A:13-5, an attorney must file a petition to acknowledge and enforce the lien to any settlement or final judgment in the underlying matter in which the attorney provided services giving rise to the lien?"

The practical issue, as posed by the chronology of this case, was whether a lien could attach to any of the proceeds of the underlying action even though the case was no longer pending. If not, that would clearly be a harsh result for a law firm that was entirely blameless and which conducted itself in compliance with applicable rules.

The clients argued that the language of the statute was clear and unambiguous and should be interpreted to mean that the petition for an attorney's lien must be submitted while the underlying action is pending. If the Court accepted that position, then Stark's lien would be entirely unenforceable, because it had been filed after the district court dismissed the underlying action.

Stark & Stark argued in response that to adopt the client's interpretation would ignore the provision in the act that states that "the lien shall not be affected by any settlement between the parties before or after judgment or final order, nor by the entry of satisfaction or cancellation of a judgment on the record."

The critical language that the Court was called upon to interpret is in the last sentence of the Attorney Lien Act: "The Court in which the action or other proceeding is *pending*, upon the petition of the attorney or counselor at law, may determine and enforce the lien." N.J.S.A. 2A:13-5

The Court came down squarely on the side of the attorney, and against the hyper-technical reading of the New Jersey Lien Act adopted by the district court.

Tracing the history of the attorney's common-law retaining lien and the special or charging lien, the Court clearly distinguished between the two. The one involved here, the special or charging lien, which the attorney has for the services "attaches to the judgment in the cause for which the services were rendered." The charging lien may be actively enforced, but it does not rest upon possession, as does the retaining lien, which attaches to the client papers in the attorney's possession.

New Jersey's Attorney Lien Act, which is almost 100 years old, codifies the common law special or charging lien, and expands it beyond the judgment, which is the limit of scope of the common law's coverage. Under the law, the lien attaches to any "verdict, report, decision, award, judgment or final order in his [or her] client's favor, and the proceeds thereof in whosoever hands they may come."

The Court found that its first task was to interpret the statute sensibly. In doing that, the Court explained that the Attorney Lien Act not only codified, but also broadened, the common law charging lien "to protect attorneys who do not have actual possession of assets against clients who may not pay for services rendered." The lien, if found, is rooted in equitable considerations and its enforcement depends on the equitable jurisdiction of the Court. The Court noted:

> Consistent with such equities, Stark & Stark promptly notified the client's subsequent attorneys of its claimed lien and diligently sought updates on the progress of the underlying suit. Through no apparent fault of its own, Stark & Stark did not learn of [the client's] settlement until after it had occurred and did not file its petition prior to that resolution. We do not believe that the Legislature would have intended an attorney in those circumstances to fall outside the protections of the act.

So, the Court held that the act's last sentence controls the forum in which a lien petition is brought, not the timing of the petition. In other words, a petition could be brought even after the dismissal of the action in the forum where the underlying matter had been pending.

Although the Court clearly upheld the attorney's right to be paid for his services, any attorney finding himself in a similar situation should not let his guard down. The Court cautioned that it is nonetheless essential that all other applicable rules of court, including the Rules of Professional Conduct, be properly satisfied as a prerequisite to the enforcement of the lien petition.

Furthermore, an attorney must be vigilant regarding the time period in which the petition must be filed. Stark & Stark had filed its petition within thirty-five days after they first learned of the dismissal of the client's action. That time frame appeared reasonable to the Court. However, "to ensure the fair and prompt resolution of all disputes, attorneys should not delay in asserting their liens under the Act."

It would seem that the Court's decision here places the onus on the lawyer asserting the lien to keep track of the progress of the underlying matter in which the attorney claims a lien for services.

**Deferring to the Legislature**

Just as the attorney-client relationship must begin in accordance with the RPCs, so too it must end. In that regard, the client is the proverbial senior partner in the relationship and has the absolute right to terminate the attorney's engagement for any reason at any time. RPC 1.16 . But the Court clearly drew the limits of its rule in *Coyle v. Board of Chosen Freeholders of Warren County,* 170 N.J. 260 (2002).

John Coyle was appointed to the position of Warren County Counsel for a three-year term, beginning on Dec. 20, 2000. The board of chosen freeholders that appointed him consisted of two Democrats and one Republican. He was appointed in the last few weeks of that board's term. The election that was held just before Coyles' appointment changed the board's political complexion to a Republican majority.

When the new board took over on Jan. 1, 2001, it enacted a resolution rescinding Coyle's appointment and replacing him with Joseph Bell, the new Republican majority's preference. Before doing so, the Republicans asked Coyle to forego the appointment. Coyle rejected the incoming board's request and instead signed an employment agreement with Warren County pursuant to his appointment. Upon reorganizing, the Republican-controlled board rescinded the agreement with Coyle and appointed Bell as county counsel for a three-year term.

Coyle brought an action in lieu of prerogative writ seeking a judgment declaring him to be county counsel. The Republican board did not allege that Coyle's dismissal was for cause. The issue therefore was whether RPC 1.16, (which requires a lawyer to terminate his representation when he is discharged by the client), or, N.J.S.A. 40A:9-43, (which provides that the board "shall appoint a county counsel" whose "term of office … shall be 3 years"), applies to the dismissal of public attorneys.

The trial court ruled that the statutory term trumps RPC 1.16 and emphasized that the office of county counsel is public in nature and that the Legislature's intention that there be continuity in that office must prevail. The board appealed the trial court's decision. The Appellate Division reversed, holding that RPC 1.16 permitted the board to terminate Coyle without cause.

The Appellate Division held that since the case implicated the ethical obligations of attorneys, the legislative intent of continuity in the office of the public county counsel must give way to the court's interest in vindicating its own rules regulating the practice of law. The Appellate Division felt that there was no basis to distinguish between public and private counsel regarding the applicability of RPC 1.16. Indeed, the text of RPC 1.16 makes no such distinction.

Coyle claimed that the case is controlled by statute; the board claimed that the RPC's are determinative. The case posed a direct confrontation between the public policy expressed by the Legislature in creating a term of office for County Counsel and the Supreme Court's perogative to control the practice of law through its Rules of Professional Conduct.

The Supreme Court, however, in deference to the Legislature, unanimously reversed the Appellate Division.

With the assistance of the attorney general, the Court reached a middle ground that required a "realistic and fraternal" evaluation of the comparative judicial and legislative interest. The Court demonstrated through a review of the history of RPC 1.16, and its predecessor rules, that the lawyer-client relationship in the public sector is different from that in the private sector. "The Rule recognizing the client's absolute right to discharge a lawyer is inapplicable to government lawyers, including publicly elected officials, such as States' Attorneys. The terms of employment and grounds for discharge in such positions are controlled by statute. … RPC 1.16 (a)(3) was "never intended to apply to public counsel with statutory terms and we so hold."

**Bridging the Divide**

One of the hot topics being discussed in legal ethics circles today is under what circumstances a lawyer must disclose information, received from a client, that could result in attempted criminal conduct. *In the Matter of Breslin*, 171 N.J. 235 ( 2002), put squarely before the Court the appropriate sanction for a municipal court judge's failure to report a former client's attempt to bribe another public official.

James Breslin, the respondent, failed to report a bribe attempt to the appropriate law enforcement agency. Finding that the evidence did not rise to the level of "clear and convincing" that the Court requires for disbarment, Justice Gary Stein, writing for the four-justice majority, elected to censure Breslin, who was a municipal court judge (since 1978) and solo practitioner in Lyndhurst.

The disciplinary proceeding began before the Court's Advisory Committee on Judicial Conduct, which found that Breslin had failed to report a bribe attempt in violation of Canons 1 and 2A of the Code of Judicial Conduct, which require, respectively, that a judge should uphold the integrity and independence of the judiciary, and should comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The ACJC recommended removal of Breslin however, two members of the panel recommended a less strict censure. A three-judge panel then met and conducted its own evidentiary hearing, finding that "beyond a reasonable doubt ... Respondent's failure to promptly report the bribe attempt ... violated Canons 1 and 2A of the *Code of Judicial Conduct* as well as *Rule 2:15-8(a)(6)*." Based on these findings, the OAE instituted disbarment proceedings based on alleged violations of several RPCs, notwithstanding that none of these violations had been the basis of the ACJC or the three-judge panel decisions.

Because there are different standards in evaluating conduct pursuant to the RPC (which require a more specific allegation of wrongdoing) and the Canons of the Code of Judicial Conduct, the Court felt it imperative that before imposing disbarment, it must conduct a de novo review of the evidence. Most of the decision involves a painstaking recreation of the record from which the details of the offending bribe attempt emerge.

Breslin was in his law office in Lyndhurst when a former client entered with an envelope. In the envelope was the client's son's résumé and two envelopes filled with a total of $10,000 cash. The client wanted Breslin to hand the résumé (and, presumably the envelopes) to Paul Haggerty, a close friend of Breslin who, at the time, was Commissioner of Public Safety.

Rather than reporting the bribe attempt to the Bergen County prosecutor, Breslin proposed a hypothetical question to Haggerty about what would happen if someone attempted to bribe him. When Haggerty quickly shut down Breslin's line of questioning, Breslin waited several days before telling Haggerty specifically what had occurred. After Haggerty advised Breslin that he would handle the matter, Breslin did nothing until he was contacted by the prosecutor's office more than two months later.

The Court, discounting the prior findings of the panel, gave weight to Breslin's testimony (given during the disciplinary proceeding) that he was worried that some political faction in Lyndhurst was attempting to set up him and Haggerty, and that is why he went no further than Haggerty in reporting the incident.

Citing the panel, the Court noted three basic areas of problem conduct: (1) accepting the envelope with knowledge of the client's plan without promptly notifying law enforcement; (2) posing an initial hypothetical question to Haggerty; and (3) failing to take responsibility for reporting the bribe attempt himself.

In area (2), the Court found that reasonable inferences about whether or not Breslin was testing the bribery waters would not suffice to rise to the level of "clear and convincing evidence" of wrongdoing and that inferences are not enough to disbar an attorney. Public perception of judicial or attorney wrongdoing relate only to "the generalized standard of judicial behavior that transgresses the *Code of Judicial Conduct*, not the more specific standard implicated by an order of disbarment."

The majority chose to give the responding attorney the benefit of the doubt, noting that it was reasonable under the circumstances to conclude that Breslin had legitimate reasons for approaching Haggerty as he did, and for not reporting directly to the Prosecutor's Office. In fact, the Court determined that "none of the conditions triggering mandatory notification of proper authorities was present here," so Breslin had no independent duty to report the bribe attempt. Notwithstanding this, he should have reported the bribe attempt to the prosecutor.

Noting that the most serious violations that were proven by the required clear and convincing standard of proof were the violations of the Code of Judicial Conduct and Rule 2:15-8(a)(6), the Court found that a violation of RPC 1.2(e) had been proven by the appropriate standard of proof. However, the Court noted that Breslin's forced resignation from the bench after 30 years of service was sufficient and appropriate discipline, and elected censure rather than disbarment or even suspension.

In a lengthy dissent, Justice Jaynee LaVecchia adopted the three-judge panel's findings to determine that: (1) Breslin had a duty to report the bribe attempt to law enforcement immediately; (2) his hypothetical question to Haggerty was designed to test the waters of the bribe attempt; and (3) leaving Haggerty to report the bribe attempt to law enforcement was a dereliction of his judicial duties. As an attorney, Breslin would be subject to discipline if conduct while a judge so corrupts "the judicial process or evidences a lack of the character and integrity that are necessary in an attorney."

Because bribery is such a serious breach of the judicial system's integrity, LaVecchia felt that this case was akin to *In re Rigolosi*, 107 N.J. 192 (1987), in which an attorney acquitted of bribery was nonetheless disbarred for his role in a bribery scheme. Finding that Breslin's testimony was not subject to reasonable innocent interpretation, the dissent felt that Breslin had violated RPC 8.4(c) and (d) and that disbarment was the only appropriate remedy.

Looking at the same evidence, the Court came to two very different conclusions. With such a sharply divided Court, one wonders what the result might have been had *Breslin* come before the Court in the upcoming term.

Effective Sept. 3, 2002, a new category of discipline, short of permanent disbarment but more stringent than censure, will become available to the Court. The new Rule, (2) 1:20-15A, provides a form of disciplinary sanction called "indeterminate suspension."

This new category had been urged for some time by the New Jersey State Bar Association as well as Justice Daniel O'Hern and Lee Hymerling. One of the strongest reasons for the rule change is that New Jersey is one of the very few states where disbarment is permanent. That draconian sanction could present grossly unfair results for attorneys with ethical infractions not worthy of such "professional capital punishment."

In short, to have only one irrevocable remedy for a variety of offenses of varying seriousness limits the Court's options to tailor sanctions to custom fit the infraction. The new rule gives the Court flexibility to better deal with mitigating factors that may have been given insufficient weight in the past, and to keep New Jersey's legal ethics standards and disciplinary enforcement system as the model for other states to follow. ■