THE REDEFINING OF PROFESSIONAL ETHICS IN NEW JERSEY UNDER CHIEF JUSTICE ROBERT WILENTZ: A LEGACY OF REFORM

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I. INTRODUCTION

In April 1979, when he nominated Robert Wilentz to be Chief Justice of the New Jersey Supreme Court, former Governor Brendan Byrne made a decision that would change the course of the justice system in New Jersey.[1] Under the constitutional structure of government in New Jersey, the Supreme Court and the Chief Justice possess tremendous power in regulating and administering all aspects of our judicial system. Specifically, the New Jersey Constitution of 1947 expressly vests all supervisory judicial power in the Supreme Court. As

[1]Former Governor Byrne nominated Chief Justice Wilentz on April 5, 1979. Chief Justice Wilentz was thereafter confirmed by the New Jersey Senate and was sworn in as Chief Justice on August 2, 1979 and assumed his office on Aug. 10, 1979. MANUAL OF THE LEGISLATURE OF NEW JERSEY 500 (1996).

stated in Article 6, Section 2, Paragraph 3: "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts."[2]

This constitutional grant of power is expressed in mandatory terms, i.e. "[t]he Supreme Court *shall* make rules . . . ", thereby resolving any doubt as to the positive and active rule-making responsibility of the New Jersey Supreme Court. Moreover, in 1950, the nature of this power was firmly settled in the landmark case of *Winberry v. Salisbury*,[3] in which Chief Justice Vanderbilt held that the Supreme Court's rule-making powers were not subject to overriding legislation.[4] The court's decision in *Winberry* thus established the constitutional preeminence of the Supreme Court's rule-making power, a principle which has stood as the bedrock of our judicial system.

Consistent with the recognized role of lawyers as officers of the court and as integral components of the system of justice,[5] that same constitutional provision granted similar supervisory power to the Supreme Court over the legal profession. Article 6, Section 2, Paragraph 3 provides that "[t]he Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."[6] As with the Supreme Court's supervisory power over the judicial system, the court's power over the discipline of attorneys has been repeatedly held to be exclusive. As Chief Justice Wilentz reaffirmed in *In re Hearing on the Immunity for Ethics Complainants*,[7] "[t]his Court simply cannot in the least abdicate its responsibility to exercise *exclusive*

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[2]N.J. CONST. art. VI, § 2, ¶3.

[3]5 N.J. 240, 74 A.2d 406 (1950).

[4]*Id.* at 255, 74 A.2d at 413-14 ("Our Constitution is one of the first to incorporate the rule-making power expressly along with the principles of efficient judicial management. Very wisely, too, the Constitution reposed the rule-making power for all of the courts in one court . . . . We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such.").

[5]*See, e.g.*, *Supreme Court of New Jersey Administrative Determinations Relating to the 1993 Report of the New Jersey Ethics Commission July 14, 1994, reprinted in* NEW JERSEY LAW JOURNAL, July 18, 1994, at 51 [hereinafter *1994 Administrative Determinations*] ("[T]he discipline of the bar is very much a part of the justice system, for its purpose is to assure the integrity of the most important participants in that system, all of whom are officers of the Court."); *In re* Daniels, 118 N.J. 51, 72, 1570 A.2d 416, 427 (1990) ("Lawyers are officers of the court and ministers of justice, no less than the judge.").

[6]N.J. CONST. art. VI, § 2, ¶3.

[7]96 N.J. 669, 477 A.2d 339 (1984).

power over the disciplining of attorneys. . . . This is a matter committed solely to us by the Constitution."[8]

Within this framework of Supreme Court supervision sits the Chief Justice, constitutionally empowered as the administrative head of all of the courts in the state.[9] The Chief Justice thus becomes, in our constitutional structure, not only the chief administrator of our judicial system, but the guardian of that system, and of the judges and lawyers who administer it, in preserving and maintaining public confidence in the fair and efficient administration of our laws.

It was in this context that former Governor Byrne, in reflecting upon his appointment of Chief Justice Wilentz seventeen years earlier, remarked that "I wanted somebody who had the administrative ability of a [Chief Justice] Vanderbilt, the brilliance of a [Chief Justice] Weintraub, and the compassion of a [Chief Justice] Hughes. I think he had the qualities of all three."[10]

Chief Justice Wilentz was acutely aware of the broad power of the Supreme Court and his special stature as Chief Justice. In words that would foreshadow the active role that he and his court would play in the administration of justice over the next seventeen years, Chief Justice Wilentz remarked at his swearing-in ceremony:

> The powers of the Court go far beyond deciding what the law of New Jersey is. The Supreme Court commands the entire resources of the judicial system, from business machines to courthouses, from study committees to judicial conferences; it has command over the practice of law, over lawyers, over the delivery of legal services; it has command and complete control over the practice and procedure in every court in this state; it commands a very substantial administrative organization;

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[8]*Id* at 678, 477 A.2d at 343 (emphasis added). For a discussion of this case, which invalidated legislation permitting attorneys to sue ethics complainants for malicious prosecution, see *infra* notes 98-101, 241-44 and accompanying text. *See also In re* LiVolsi, 85 N.J. 576, 583, 428 A.2d 1268, 1271 (1981). In *Livolsi*, Chief Justice Wilentz stated that Article 6, Section 2, Para. 3 "is the source of our exclusive power over the practice of law." *Id.* For a discussion of the *LiVolsi* case, see *infra* notes 245-49 and accompanying text. *Accord In re* Matthews, 94 N.J. 59, 73-75, 462 A.2d 165, 172 (1983); *In re* Loring, 73 N.J. 282, 289, 374 A.2d 466 (1977); *In re* Cipriano, 68 N.J. 398, 402, 346 A.2d 393, 395 (1975); State v. Rush, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966) (all recognizing the exclusive authority of the Supreme Court over the discipline of attorneys).

[9]N.J. CONST. art. VI, § 7, ¶ 1 ("The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State.").

[10]Rocco Cammarere, et al., *Robert N. Wilentz, 1927-1996: Remembering a Chief*, NEW JERSEY LAWYER, July 29, 1996, at 35 [hereinafter *Remembering a Chief*].

and finally, it commands, to an extent greater than any other state, all judicial personnel.[11]

More so than any of his predecessors, Chief Justice Wilentz, as overseer of the justice system, directly influenced and effectuated numerous and substantial changes in the administration of justice and the regulation of lawyers.[12] Through his leadership, New Jersey's place among the most prominent jurisdictions in the nation was also solidified.[13] On July 1, 1996, seven months before his scheduled retirement at age 70, Robert Wilentz resigned as Chief Justice after being diagnosed with terminal cancer. On July 23, 1996, he died. His seventeen years as Chief Justice were the longest of any Chief Justice un-

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[11]*Remarks by Chief Justice Wilentz at His Swearing-In*, NEW JERSEY LAW JOURNAL, Aug. 30, 1979, at 1,3.

[12]*See* Rocco Cammarere & Harvey C. Fisher, *Entering a New Era*, NEW JERSEY LAWYER, July 1, 1996, at 1 ("The Wilentz era—nearly 17 years of some of the most sweeping decisions and high-impact administrative overhauls in the history of the New Jersey courts—today came to an unequivocal end.").

[13]As reported in the National Law Journal on the occasion of his death, "Justice Wilentz . . . led what legal scholars said was one of the nation's best state courts." *News of the Profession*, NAT'L LAW J., Aug. 5, 1996, (Side Bar), at A4; *see also* Editorial, *The Chief Justice*, NEW JERSEY LAWYER, June 24, 1996, at 6 ("Because [Chief Justice Wilentz's] decisions and those of the court he has led are often cited authoritatively by courts throughout the United States, he has been a guidepost and a landmark beyond the borders of our state."); Ronald Grayzel, *Once More into the Black Hole, Supplement - Tort Law*, NEW JERSEY LAW JOURNAL, Sept. 2, 1996, at S4. Grayzel states:

> The sudden and tragic resignation and death of Chief Justice Robert Wilentz marks the end of a historic era for our state supreme court. Under the leadership of this Chief Justice, our high court continued a tradition of leadership in the field of tort law. This court issued a number of pioneering decisions in the field of product liability, medical malpractice, negligence and toxic torts which forged new pathways in the law and were cited across the country by other courts who followed our court's lead.

Id. Hanan M. Isaacs, *Wilentz Championed ADR, CDR*, NEW JERSEY LAWYER, Aug. 12, 1996, (The Open Forum), at 6 ("Chief Justice Wilentz steered the New Jersey Supreme Court into the modern era of private arbitration law and procedure. New Jersey now stands at the forefront of decisional law in sanctifying private arbitration awards, due in large measure to his persistent encouragement."); *Remembering a Chief*, *supra* note 10, at 1 ("Robert N. Wilentz is being remembered not only as a great jurist who gave New Jersey courts a national reputation, but as a man with a sharp wit and a sense of humor.").

der our present court system.[14]

Among the numerous systemic reforms instituted during his tenure, the attorney disciplinary system was completely revamped and opened to the public,[15] new Rules of Professional Conduct for attorneys were adopted,[16] new disciplinary committees were established,[17] public participation in the disciplinary process was mandated and expanded,[18] a code of conduct for judiciary employees was promulgated,[19] cameras were introduced into the courtrooms at all levels of judicial proceedings,[20] judicial performance reviews were instituted,[21] task forces were established to study and eliminate gender and racial

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[14]The Supreme Court and the Superior Courts came into existence in their present forms on Sept. 15, 1948. MANUAL OF THE LEGISLATURE OF NEW JERSEY 508 (1996). The Chief Justices who preceded Chief Justice Wilentz and their terms are: Arthur T. Vanderbilt, 1948 to June 16, 1957; Joseph Weintraub, Aug. 20, 1957 to Aug. 31, 1973; Pierre P. Garven, Sept. 1, 1973 to Oct. 19, 1973; and Richard J. Hughes, Dec. 18, 1973 to Aug. 9, 1979. *Id.*

[15]For a discussion of the reforms to the disciplinary system under Chief Justice Wilentz, see *infra* notes 51-193 and accompanying text.

[16]For a discussion of the Rules of Professional Conduct adopted by the Wilentz Court, see *infra* notes 194-238 and accompanying text.

[17]Among the standing disciplinary committees created by the Wilentz Court are the: Advisory Committee on Outside Activities of Judiciary Employees, N.J. CT. R. 1:17A; Advisory Committee on Extrajudicial Activities, N.J. CT. R. 1:18A; Committee on Attorney Advertising, N.J. CT. R. 1:19A; Disciplinary Oversight Committee, N.J. CT. R. 1:20B; Advisory Committee on Bar Admissions, N.J. Ct. R. 1:27A; and Bar Admissions Financial Committee, N.J. Ct. R. 1:27B. In addition, Chief Justice Wilentz appointed special committees to study the disciplinary system and the rules of professional conduct and to make recommendations for reform. For a discussion of the three major study committees created by Chief Justice Wilentz, the Sullivan Committee, the Debevoise Committee, and the Michels Commission, see *infra* notes 48-50 and accompanying text.

[18]*See infra* notes 153-56 and accompanying text.

[19]PRESSLER, CURRENT N.J. COURT RULES, Appendix to Part I, Code of Conduct for Judiciary Employees. (Gann 1996) (adopted Dec. 7, 1993).

[20]*See Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey*, NEW JERSEY RULES OF COURT: STATE AND FEDERAL 1997, Appendix to Part I (West 1996); *see also*, Ronald J. Fleury, et al., *How Wilentz Changed the Courts*, 7 SETON HALL CONST. L.J. 411, 417-18 (discussing Chief Justice Wilentz's efforts to encourage visual media coverage of court proceedings) [hereinafter *How Wilentz Changed the Courts*].

[21]N.J. CT. R. 1:35A (Judicial Performance Program). The judicial performance pro-

bias in the courts,[22] and innovative case management, mediation, and arbitration programs were instituted.[23]

In addition to these procedural reforms, Chief Justice Wilentz authored a number of major opinions in substantive law fields, among them, *In re Baby M.*, invalidating surrogate parenting contracts;[24] *Abbott v. Burke II*, holding the state's school funding formula unconstitutional for failing to provide sufficient funding for the state's poorest school districts;[25] *State v. Ramseur*, upholding the constitutionality of New Jersey's death penalty law;[26] *Southern Burlington County NAACP v. Mount Laurel Township*, holding that developing towns must provide a "fair share" of affordable housing for the poor;[27] *Kelly v. Gwinnell*, holding that social hosts who serve alcoholic beverages to guests may be liable for injuries caused by the intoxicated guest;[28] and *Doe v. Poritz*, upholding Megan's Law, which imposed notice requirements on convicted sex offenders, as constitutional.[29]

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gram includes "the regular evaluation of the performance of judges and educational programs to enable judges to improve their performance." N.J. CT. R. 1:35A-2. The rule was adopted effective June 2, 1988 and formalized the judicial evaluation program which had been instituted in 1983 on an experimental basis. *See Judicial Performance Pilot Program Announced*, NEW JERSEY LAW JOURNAL, July 28, 1983, at 1.

[22]*How Wilentz Changed the Courts, supra* note 20, at 421, 427.

[23]*See, e.g.* N.J. CT. R. 1:40 (Complementary Dispute Resolution Programs); N.J. CT. R. 4:21A (Arbitration of Certain Personal Injury Actions). For a discussion of Chief Justice Wilentz's contribution to this area of the law, see Hon. Marie L. Garibaldi, *Chief Justice Robert N. Wilentz's Role in the Development of Complementary Dispute Resolution*, 7 SETON HALL CONST. L.J. 335, 339 (1997) ("Chief Justice Wilentz worked for more than a decade to develop a comprehensive complementary dispute resolution program for New Jersey courts. . . . And through [his] efforts . . . , New Jersey has and continues to lead in this field."); *Wilentz Championed ADR, CDR*, supra note 13, at 6 ("Chief Justice Wilentz steered the New Jersey Supreme Court into the modern era of private arbitration law and procedure.").

[24]109 N.J. 396, 425-26, 537 A.2d 1227, 1242 (1988).

[25]119 N.J. 287, 383, 575 A.2d 359, 407 (1990).

[26]106 N.J. 123, 154, 524 A.2d 188, 202 (1987).

[27]92 N.J. 158, 208-09, 456 A.2d 390, 415 (1983).

[28]96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984).

[29]142 N.J. 1, 12, 662 A.2d 367, 372 (1995).

Although many of Chief Justice Wilentz's innovations, rulings, and judicial decisions proved to be controversial and generated sharp opposition,[30] he was nevertheless heralded by many as one of the finest Chief Justices in New Jersey history and a stalwart in the administration of justice.[31]

Chief Justice Wilentz presided over the New Jersey Supreme Court during a period of dramatic change in the legal profession. During his seventeen-year tenure, the number of lawyers admitted to practice in New Jersey increased threefold, from 20,535 as of January 1980[32] to approximately 61,300 attorneys as of July 1996,[33] making the lawyer population in New Jersey among the fastest growing in the nation.[34]

The purpose of this article is to reflect upon and analyze the major reforms instituted by Chief Justice Wilentz and his court with respect to the regulation

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[30]*See* Rocco Cammarere et al., *Ailing Wilentz Ends Era; Poritz Named Successor*, NEW JERSEY LAWYER, June 17, 1996, at 24 [hereinafter *Ailing Wilentz Ends Era*] ("[E]ven though Wilentz has been deeply criticized for his administrative policies that affect how lawyers practice law and how judges do their work, lawyers noted that is the mark of an active judicial leader who moves the court forward rather than letting it stagnate."); *Remembering A Chief*, *supra* note 10, at 35 ("Known as a social activist and a man who stood by his convictions, Wilentz was a jurist revered by some and detested by others. He presided over some of the most controversial decisions in the state's history.").

[31]*See Ailing Wilentz Ends Era*, *supra* note 30, at 24 ("Lawyers, fellow justices and State Bar Association officials rank Wilentz as one of the state's premier court leaders, who has not been afraid to experiment with novel ideas that streamline court operations and management."); *The Chief Justice*, supra note 13 at 6 ("Robert N. Wilentz . . . has been a guidepost and a landmark in the administration of justice in New Jersey. . . . It is because of that leadership role, his capacity and willingness to address controversial issues without fear or favor, the fervor with which he has protected the independence of the judiciary and demanded integrity of the bar and the total commitment and unqualified devotion to the institution of the Supreme Court which has characterized his tenure that Robert N. Wilentz has been a great chief justice.").

[32]OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF NEW JERSEY, 1989 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 8 (1990) (reporting 20,535 attorneys as of January 1980).

[33]OFFICE OF ATTORNEY ETHICS OF THE SUPREME COURT OF NEW JERSEY, 1995 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 7 (1996) [hereinafter 1995 OAE REPORT] (reporting 60,648 attorneys through December, 1995). Together with the number of new attorneys eligible for admission after the February 1996 bar examination, the total attorney population as of July 1996 was approximately 61,300. There were 689 successful candidates from the February 1996 New Jersey Bar Examination. *Successful Bar Candidates February 1996 Bar Examination*, NEW JERSEY LAW JOURNAL, May 20, 1996, at Supp. 2.

[34]1995 OAE REPORT, supra note 33, at 7.

and discipline of the legal profession.

II. HISTORICAL OVERVIEW OF CHIEF JUSTICE WILENTZ'S REFORMS

In assessing the efforts of Chief Justice Wilentz in reforming the attorney disciplinary system, it is essential to understand the historical climate of the country immediately preceding his appointment as Chief Justice. At the time of his appointment in 1979, the country was ending a decade in which the very foundations of government had been severely tested. The impeachment of President Nixon and the subsequent convictions of the United States Attorney General and other top administration lawyers as a result of the Watergate scandal shook public confidence in our system of government and justice to the core.[35]

As these national events unfolded, the legal profession was also under fire concerning the adequacy of its system for disciplining attorneys. At the start of the decade, the American Bar Association had released its shocking report on the status of disciplinary enforcement against lawyers. The report recommended that immediate and massive reform in state disciplinary procedures was necessary to eliminate widespread abuses.[36] As reported by the ABA Committee:

> After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors. . . .

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[35]As a result of the Watergate scandal and related matters, 29 lawyers were the subject of disciplinary action. *See N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-Nine Lawyers*, 62 A.B.A. J. 1337 (1976). After his resignation, President Nixon, an attorney, was disbarred by the state of New York. *In re* Nixon, 53 A.D. 2d 178, 385 N.Y.S.2d 305 (A.D.1 1976). In an unrelated matter, President Nixon's Vice President, Spiro Agnew, also an attorney, was convicted of corruption related to his prior political activities in Maryland. Maryland State Bar Association v. Agnew, 271 Md. 543, 318 A.2d 811 (1974). He resigned the vice presidency, and was later disbarred by the state of Maryland. *Id.*

[36]*Report of the Special Committee on Evaluation on Disciplinary Enforcement*, 95 REPORTS OF THE AMERICAN BAR ASSOCIATION 783 (1970) [hereinafter 1970 ABA REPORT].

> The Committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession. The supreme court of one state recently withdrew disciplinary jurisdiction from the bar and placed it in a statewide disciplinary board of seven members, two of whom are laymen. This should be a lesson to the profession that unless public dissatisfaction with existing disciplinary procedures is heeded and concrete action taken to remedy the defects, the public soon will insist on taking matters into its own hands.[37]

Given this historical context, it is hardly surprising that upon Chief Justice Wilentz's appointment to the Supreme Court in 1979, one of his first priorities was to establish strict standards for attorney disciplinary enforcement in order to reinforce public confidence in the system of justice and the legal profession. Just four months after his appointment, Chief Justice Wilentz set the tone for disciplinary enforcement during his tenure in the now famous *In re Wilson* case.[38] In holding that the knowing misappropriation of client funds would rarely warrant discipline other than disbarment,[39] Chief Justice Wilentz focused on the overriding necessity to preserve public confidence in the legal profession, a theme that would permeate all of his disciplinary opinions over the next seventeen years.[40] As Chief Justice Wilentz stated in *Wilson*:

> Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys . . . . It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution. . . . It is therefore important that we reemphasize that the principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general. . . . Public confidence is the only foundation that

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[37]*Id.* at 797-98.

[38]81 N.J. 451, 409 A.2d 1153 (1979).

[39]*Id.* at 460-61, 409 A.2d at 1157-58. "[M]aintenance 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." *Id.* at 461, 409 A.2d at 1157-58.

[40]For a discussion of some of Chief Justice Wilentz's major disciplinary opinions, see *infra* notes 239-280 and accompanying text.

> will support constructive reform in the public interest while preserving the finest traditions of the profession.[41]

This recurring theme of preserving public confidence in the legal profession would also form the foundation for all of Chief Justice Wilentz's subsequent efforts to reform the disciplinary system and revise the disciplinary rules. This commitment to preserving public confidence is aptly demonstrated by the Wilentz Court's decision in July 1994 to open attorney disciplinary proceedings to the public.[42] This particular reform was strongly opposed by the organized bar.[43] Nevertheless, in announcing these revisions to the disciplinary system, the Wilentz Court reiterated its guiding and bedrock principle that the public interest must always be paramount. As the Wilentz Court emphasized:

> Over and above all of this, is a very simple point: the public is entitled to this information, entitled to know of charges against attorneys, entitled to know who is the subject of those charges, and, most of all, entitled to know how the system is working. It is their system, not ours, not the attorneys'; it is their system just as is the rest of the justice system.[44]

Throughout his tenure, Chief Justice Wilentz also remained resolute in his commitment to improving and enhancing the image of lawyers and the legal profession. He recognized the importance of maintaining a strong image for the profession because of the many criticisms often made against attorneys. As he stated in 1994 at the Law Day ceremonies at the New Jersey Law Center:

> The bar is not loved; it is not appreciated or understood, and one message therefore on today's rededication of the Law Center risks being lost on some minds that are closed. It is a message of the importance of at-

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[41] *In* re Wilson, 81 N.J. at 454-56, 409 A.2d at 1154-55.

[42] *1994 Administrative Determinations*, *supra* note 5, at 51; For a further discussion of the court's decision to open disciplinary proceedings to the public, see *supra* notes 77-92 and accompanying text.

[43] Rocco Cammarere, *Open Discipline System is The Law*, NEW JERSEY LAWYER, Feb. 27, 1995, at 1 (decision to open disciplinary proceedings to the public "had been bitterly opposed by most attorneys and lawyer organization[s]"); *see also supra* notes 79-80 and accompanying text.

[44] *1994 Administrative Determinations*, *supra* note 5, at 51. For a further discussion of the current disciplinary system, see *infra* notes 114-146 and accompanying text.

> torneys, their importance to our system of justice and to society. And it is a message of their dedication and their honesty. I'd like to help deliver that message since practicing law was once my life.[45]

Consistent with his goal of improving the image of the profession, Chief Justice Wilentz, together with the New Jersey State Bar Association and the three New Jersey law schools, created the New Jersey Commission on Professionalism in the Law in April 1995.[46] This commission is unique in the nation and is one of the few joint bar-bench-law school ventures attempted.[47]

During his tenure, Chief Justice Wilentz also appointed two blue ribbon Supreme Court committees to study the attorney disciplinary system and make recommendations for reform. In September 1981, he appointed the Supreme Court Committee on Attorney Disciplinary Structure, chaired by retired Supreme Court Justice Mark Sullivan ("Sullivan Committee").[48] Thereafter, in May 1991, Chief Justice Wilentz created the New Jersey Ethics Commission, chaired by the Honorable Herman D. Michels, presiding judge of the Appellate Division ("Michels Commission") to again study the disciplinary system.[49]

In addition, in October 1982, Chief Justice Wilentz appointed another blue ribbon Supreme Court committee to study the newly proposed Model Rules of Professional Conduct of the American Bar Association. The Supreme Court Committee on the Model Rules of Professional Conduct, chaired by U.S. District Judge Dickinson Debevoise ("Debevoise Committee"), issued its recommendations on June 24, 1983, and the court thereafter adopted the Rules of Professional Conduct, with modifications, effective September 10, 1984.[50]

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[45] *Ailing Wilentz Ends Era*, *supra* note 30, at 24.

[46] Charles J. Hollenbeck, *Looking in the Mirror: Professionalism Within the Legal Community*, NEW JERSEY LAWYER, December, 1996, (Magazine), at 23. This commission, initially chaired by Chief Justice Wilentz, includes 13 members of the judiciary and the bar, the deans of the three New Jersey law schools, and one public member. The commission was originally proposed by the bar association to "suggest ways to better the profession and enhance public confidence in the legal system." *Id.* at 22. The commission has already successfully sponsored educational programs, courses and symposia on professionalism issues. *Id.* at 23.

[47] *Id* at 23.

[48] For a discussion of the Sullivan Committee and the reforms emanating from its recommendations, see *infra* notes 58-68 and accompanying text.

[49] For a discussion of the Michels Commission and its major recommendations for reform, see *infra* notes 77-110 and accompanying text.

[50] For a discussion of the Wilentz Court's adoption of the Rules of Professional Conduct,

Although the Wilentz Court made periodic amendments to the disciplinary and ethical rules during the Chief Justice's seventeen-year tenure, the rule changes that the court promulgated following the reports of these three major Supreme Court committees comprise the bulk of the disciplinary and ethical reforms enacted under Chief Justice Wilentz.

III. REFORMS TO THE DISCIPLINARY SYSTEM

A. DISCIPLINARY SYSTEM REFORMS PRIOR TO 1979

During the 1970s, after the issuance of the ABA Report on Disciplinary Enforcement,[51] various disciplinary system reforms were instituted by the New Jersey Supreme Court. In February 1971, Chief Justice Weintraub appointed the Committee on Enforcement of Ethical Standards, chaired by William L. Kirchner, Jr., to recommend reforms to the then existing disciplinary system. The Kirchner Committee issued its report in March 1972.[52] Following the committee's recommendation for greater centralization in disciplinary matters, the Supreme Court created the Office of Central Ethics under the auspices of the Administrative Office of the Courts.[53]

Later in 1978, the Supreme Court, under Chief Justice Hughes, reorganized the disciplinary system into the general structural format utilized today. As part of these 1978 revisions, the Supreme Court created the Disciplinary Review Board (DRB) and the District Fee Arbitration Committees and replaced the County Ethics Committees with the District Ethics Committees (DECs).[54] The DECs remain the initial level in the disciplinary process and conduct the investigation, prosecution, and hearing in most disciplinary cases.[55] The District

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see *infra* notes 194-238 and accompanying text.

[51]*See supra* notes 36-37 and accompanying text.

[52]*Report of the Supreme Court's Committee on Enforcement of Ethical Standards, reprinted in* NEW JERSEY LAW JOURNAL, Mar. 23, 1972, at 253.

[53]For a discussion of the revisions to disciplinary system prior to 1979, see Dominic J. Aprile, *An Overview of Attorney Disciplinary Proceedings in New Jersey: Is the System Fair to the Accused?*, 18 SETON HALL L. REV. 554, 555-57 (1988).

[54]*Id.* at 556-57.

[55]N.J. CT. R. 1:20-3 to 6 (former N.J. CT. R. 1:20-2, adopted Feb. 23, 1978 to be effective Apr. 1, 1978). For a full discussion of the current procedures of the DECs, see *infra* notes 116-137 and accompanying text.

Fee Arbitration Committees have jurisdiction to arbitrate fee disputes between clients and attorneys.[56] The Disciplinary Review Board is the intermediate level in the disciplinary process, with statewide appellate jurisdiction directly beneath the Supreme Court.[57]

B. DISCIPLINARY SYSTEM REFORMS UNDER CHIEF JUSTICE WILENTZ

1. THE SULLIVAN COMMITTEE

As previously noted, in September 1981, Chief Justice Wilentz ordered a complete re-evaluation of the disciplinary system and created the Supreme Court Committee on Attorney Disciplinary Structure, chaired by retired Supreme Court Justice Mark Sullivan.[58] In addition, Chief Justice Wilentz requested an independent evaluation of the New Jersey disciplinary system by the American Bar Association. The ABA issued its report, *Evaluation of the Lawyer Disciplinary System in New Jersey*, in March 1982, and later that year in October 1982, the Sullivan Committee issued its report.[59] The Wilentz Court approved nearly all of the recommendations of the Sullivan Committee, most of which became effective with the comprehensive disciplinary rule revisions adopted Jan. 31, 1984.[60]

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[56]N.J. CT. R. 1:20A-1 to 6. For an analysis of the fee arbitration process under these rules, see 1995 OAE REPORT, *supra* note 33, at 67-74.

[57]N.J. CT. R. 1:20-15 (former N.J. CT. R. 1:20-3, adopted Feb. 23, 1978 to be effective Apr. 1, 1978).

[58]*Attorney Disciplinary Structure Committee Report on Attorney Disciplinary Structure*, *reprinted in* NEW JERSEY LAW JOURNAL, Oct. 21, 1982 at 12-a . In creating this Committee, Chief Justice Wilentz stated:

> The Supreme Court is intensely interested and committed to the proper functioning of all aspects of our judicial system, and one of the most important court functions is the supervision of the state's practicing lawyers. This task has become more complex and difficult with the recent increase in the number of lawyers admitted to the Bar. Therefore, we have determined that now is the time for both the Court and the organized Bar to reassess the functioning of the ethics and fee dispute process.

Id.

[59]*Id.*

[60]*Supreme Court of New Jersey, Disciplinary Rule Amendments*, NEW JERSEY LAW

In announcing these rule revisions, Chief Justice Wilentz reemphasized the court's firm commitment to disciplinary reform, stating that "New Jersey's disciplinary rules are among the toughest in the country and we are determined to have the most effective system for enforcing them."[61] The 1984 rule revisions effectuated major disciplinary system reforms and, among other things, established procedures for the automatic temporary suspension of an attorney upon conviction of a crime;[62] extended absolute immunity from suit to all ethics grievants, clients, and witnesses for communications to disciplinary authorities;[63] extended absolute immunity from suit to all disciplinary authorities for any conduct in the performance of their official duties;[64] required attorneys to report promptly any disciplinary action taken against them in another jurisdiction and established procedures for the imposition of reciprocal discipline based upon a finding of misconduct in another jurisdiction;[65] expanded and strengthened the procedures for dealing with attorneys suffering disability or incapacity;[66] and created the Ethics Financial Committee to assist the court in administering the financial aspects of the disciplinary system.[67]

JOURNAL, Feb. 9, 1984, § 2, at 1-5 (rules adopted Jan. 31, 1984 to be effective Feb. 15, 1984); *Supreme Court Adopts New Rules for Attorney Disciplinary System*, NEW JERSEY LAW JOURNAL, Feb. 2, 1984, at 3 [hereinafter *Supreme Court Adopts New Rules*].

[61] *Supreme Court Adopts New Rules*, *supra* note 60, at 3.

[62] Former N.J. CT. R. 1:20-6 (Attorneys Convicted of Crimes), now N.J. CT. R. 1:20-13. For a discussion of the current provisions for temporary suspension, see *infra* notes 169-175 and accompanying text.

[63] Former N.J. CT. R. 1:20-11(b), now N.J. CT. R. 1:20-7(f). For a discussion of the issue of absolute immunity for ethics grievants, see *infra* notes 93-101 and accompanying text.

[64] Former N.J. CT. R. 1:20-11(a), now N.J. CT. R. 1:20-7(e).

[65] Former N.J. CT. R. 1:20-7, now N.J. CT. R. 1:20-14. For a discussion of the current provisions for reciprocal discipline and reporting, see *infra* notes 187-193 and accompanying text.

[66] Former N.J. CT. R. 1:20-9, now N.J. CT. R. 1:20-12. For a discussion of the current provisions for "disability inactive status" for attorneys suffering disability or incapacity, see *infra* notes 176-186 and accompanying text.

[67] Former N.J. CT. R. 1:20B. As part of the March 1, 1995 disciplinary rule amendments, the Ethics Financial Committee was replaced by the newly created Disciplinary Oversight Committee. Current N.J. CT. R. 1:20B. For a discussion of the Disciplinary Oversight Committee, see *infra* notes 147-153 and accompanying text.

2. CREATION OF THE OFFICE OF ATTORNEY ETHICS

In October 1983, prior to the adoption of the above disciplinary rule reforms, the court created, as recommended by the Sullivan Committee, the professionally staffed Office of Attorney Ethics (OAE).[68] More than any other reform, the creation of the OAE as the primary investigatory and prosecutorial arm of the Supreme Court marked the beginning of the centralization of the New Jersey disciplinary system.

Chief Justice Wilentz viewed the creation of the OAE as a critical and necessary step in the improvement of the disciplinary system. As he remarked in announcing its creation:

> [T]he Supreme Court remains absolutely determined to have the very best attorney disciplinary system in the nation. . . . We expect the new structure approved today to result in substantial improvement in the very near future and ultimately to result in the achievement of that goal.[69]

The OAE reports directly to the Supreme Court and has broad powers to, among other things, administer the programs of the DECs and the District Fee Arbitration Committees,[70] exercise exclusive jurisdiction over the investigation and prosecution of complex and certain other ethics cases,[71] prosecute ethics proceedings before the DRB and the Supreme Court,[72] secure emergent suspensions,[73] administer the Random Audit Compliance Program,[74] prepare an-

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[68]1995 OAE REPORT, *supra* note 33, at 8.

[69]*Supreme Court Announces New Office of Attorney Ethics*, NEW JERSEY LAW JOURNAL, July 28, 1983, at 1, 6.

[70]N.J. CT. R. 1:20-2(b)(8).

[71]N.J. CT. R. 1:20-2(b)(1)(A)-(E). Specifically, the OAE has exclusive jurisdiction over cases which involve "serious or complex issues that must be immediately addressed" or that require "emergent action"; and over cases "in which an attorney is a defendant in any criminal proceedings"; or "in which the Ethics Committee requests intervention"; or "in which an Ethics Committee has not resolved a matter within one year"; or which the DRB or the Supreme Court determines should be assigned to the OAE. *Id.*

[72]N.J. CT. R. 1:20-2(b)(3),(4).

[73]N.J. CT. R. 1:20-(2)(b)(1)(A).

[74]N.J. CT. R. 1:20-(2)(b)(9). For a discussion of the Random Audit Compliance Program, see *infra* notes 161-167 and accompanying text.

nually, together with counsel for the DRB, a proposed budget for the state disciplinary system,[75] and maintain all records of ethics and fee arbitration matters.[76]

3. THE MICHELS COMMISSION AND PUBLIC PROCEEDINGS

In May 1991, Chief Justice Wilentz appointed the New Jersey Ethics Commission, the "Michels Commission," to conduct a further review of the attorney disciplinary system. In March 1993, the Michels Commission issued its controversial report recommending, among other things, the opening of disciplinary proceedings to the public after the filing and service of a formal disciplinary complaint.[77] This recommendation followed the recommendation for open disciplinary proceedings issued in 1991 by the ABA Commission on Evaluation of Disciplinary Enforcement, the "McKay Commission."[78]

Fearing harm to the reputation of innocent lawyers by public proceedings, the organized bar voiced strong opposition to opening the system to the public when it was initially recommended by the ABA,[79] and again when it was recommended by the Michels Commission.[80] Although recognizing the concerns

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[75]N.J. CT. R. 1:20-2(b)(10).

[76]N.J. CT. R. 1:20-2(b)(7); *see* Rule 1:20-2(b)(1)-(17) for a complete itemization of the authority of the OAE; *see also* 1995 OAE REPORT, *supra* note 33, at 8-9 (describing the duties and powers of the OAE).

[77]*Report of the New Jersey Ethics Commission of the Supreme Court of New Jersey, reprinted in* NEW JERSEY LAW JOURNAL, Mar. 15, 1993, at Supp. 8-9 [hereinafter *Michels Commission Report*].

[78]*Michels Commission Report, supra* note 77, at Supp. 4, 8-9.

[79]Philip J. Gimson and Robert C. Jaichner, *ABA Committee Report Triggers Lawyer Outrage*, N.J. STATE B. ASS'N. ADVOC., July, 1991, at 1, 6 ("The major objection voiced to the ABA Commission on Evaluation of Disciplinary Enforcement's report relates to the study panel's recommendation that all disciplinary complaints filed against attorneys be open to public scrutiny at all stages of the ethics investigatory process. ... 'To open up the process at the point a complaint is filed is unnecessary and destructive' said NJSBA Trustee Ann R. Bartlett.").

[80]The New Jersey State Bar Association's Task Force on the Disciplinary System September 1993, *Response to the Report of the New Jersey Ethics Commission and Analysis of the Attorney Disciplinary System*, NEW JERSEY LAWYER, Oct. 4, 1993, Supp. 10 [hereinafter *NJSBA Task Force Report*]. "The Task Force recommends that ethics matters be publicized following a determination by a district ethics committee that public discipline should be imposed." *Id.* at 10. "The Task Force is unanimous in its rejection of the [Michels] Commission's proposal to disclose ethics matters to the public after what the Commission describes

of the bar, the Wilentz Court nevertheless concluded that an open disciplinary system was essential to maintaining public confidence in the integrity of the disciplinary process. In adopting an open disciplinary system, New Jersey joined the majority of other state jurisdictions which have previously opted for an open disciplinary system.[81]

In announcing the removal of secrecy from the disciplinary process, the Wilentz Court, in its *Administrative Determinations* of July 14, 1994, stated:

> Although the disciplinary system is controlled by this Court, and although all of its significant proceedings in cases are public, the confidential nature of initial complaints and initial determinations generate the risk of public distrust. . . . Public scrutiny is essential in every aspect of the justice system, and the discipline of the bar is very much a part of the justice system, for its purpose is to assure the integrity of the most important participants in that system, all of whom are officers of the Court. Public scrutiny assures the system's excellence, for no flawed system of justice will survive in a democracy when subjected to public scrutiny; and to the extent that the system is excellent, public scrutiny assures public confidence.[82]

The new procedures for opening the disciplinary process to the public, however, provide a measure of protection for wrongly accused attorneys. With certain limited exceptions, disciplinary matters remain completely confidential during the investigatory stage of a grievance and only become public after the filing and service of a formal disciplinary complaint or motion.[83]

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as a determination of 'probable cause." *Id.* at 15 n.155.

[81] *Michels Commission Report*, *supra* note 77, at Supp. 9 (noting that open disciplinary systems were in effect in 28 jurisdictions nationwide).

[82] *1994 Administrative Determinations*, *supra* note 5 at 50-51.

[83] N.J. CT. R. 1:20-9(a) provides:

> Prior to the filing and service of a complaint in a disciplinary matter, or a motion for final or reciprocal discipline, or the approval of a motion for discipline by consent, the disciplinary matter and all written records received and made pursuant to these rules shall be confidential, except that the pendency, subject matter, and status of a grievance may be disclosed by the Director if: (1) the respondent has waived confidentiality; or (2) the proceeding is based on allegations of reciprocal discipline or a guilty plea or conviction of a crime, either before or after sentencing; or (3) there is a need to notify another person or organization, including the Lawyer's Fund for Client Protection, in order to protect the public, the administration of justice, or the legal profession; or (4) the Supreme Court has

Furthermore, a disciplinary complaint may not issue under the rules unless the Chair of the particular DEC or the Director of the OAE "determines that there is a reasonable prospect of a finding of misconduct by clear and convincing evidence."[84]

Under the prior disciplinary system, all proceedings before the DECs and the DRB were confidential and closed.[85] Proceedings for final discipline before the Supreme Court, however, were open to the public, and upon the conclusion of a disciplinary case and the entry of a final order by the Supreme Court, the disciplinary record of the proceedings became public.[86]

As part of its decision to open disciplinary proceedings to the public, the Supreme Court also abolished the private reprimand, formerly used in instances of minor infractions.[87] As the Wilentz Court noted in its *1994 Administrative Determinations*, "[w]hile private reprimands appear to have served the worthy purpose of shielding attorneys from damaging publicity for minor infractions, the Court has concluded that even such minor discipline be made public."[88] The new rules for open discipline specifically provide that "[t]here shall be no private discipline."[89]

To replace the abolished private reprimand, the court created a new sanction, the public admonition.[90] As the court stated, "[we] believe that in due time the public will understand that an 'admonition' represents a determination that the ethical misconduct was indeed minor and will judge the attorney accordingly."[91] The other principal forms of public discipline, i.e. public repri-

> granted an emergent disciplinary application for relief; or (5) the matter has become common knowledge to the public.

N.J. CT. R. 1:20-9(a).

[84]N.J. CT. R. 1:20-4(a).

[85]Former N.J. CT. R. 1:20-10(a).

[86]*Id.*

[87]*1994 Administrative Determinations, supra* note 5, at 59.

[88]*Id.*

[89]N.J. CT. R. 1:20-9(c)(3). For those attorneys who were issued private reprimands in the past, the rule expressly provides that these private reprimands "shall remain confidential." *Id.*

[90]*1994 Administrative Determinations, supra* note 5, at 59.

[91]*Id.*

mand, suspension, and disbarment, remain unchanged.[92]

4. IMMUNITY FOR ETHICS GRIEVANTS

In view of its ruling to open disciplinary proceedings to the public, the court's decision to continue the existing rule granting absolute immunity from suit to grievants and other witnesses for all communications to disciplinary authorities[93] was of further concern to the bar.[94] In continuing the rule of absolute immunity, the court accepted the recommendation of the Michels Commission, which had argued for continuation of the rule because to do otherwise "would have a chilling effect on a grievant's willingness to file and prosecute a grievance and would further undermine the disciplinary system and the public's perception of that system."[95]

Wrongly accused attorneys, however, will be protected from the disclosure of false or malicious grievances because under the new rules, disciplinary matters are not made public until they are determined to be sufficiently meritorious to warrant the issuance of a formal disciplinary complaint or motion.[96] In addition, the court amended the immunity rule to make clear that immunity extends only to statements made to disciplinary authorities and in the context of a disciplinary proceeding and, thus, does not extend to communications to persons outside the disciplinary process, including the news media.[97]

Ironically, even when the disciplinary process was closed and confidential, this rule of absolute immunity generated sharp opposition and controversy when it was originally enacted. The provision for absolute immunity was one of the recommendations of the Sullivan Committee and was adopted by the

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[92] *Id.* For a discussion of the forms of public discipline, see 1995 OAE REPORT, *supra* note 33, at 18-20.

[93] N.J. CT. R. 1:20-7(f) (Immunity of Grievants, Witnesses, and Others); former N.J. Ct. R. 1:20-11(b).

[94] *NJSBA Task Force Report*, *supra* note 80, at Supp. 10 ("If ethics proceedings are to be open at an earlier stage than is now permitted, then the question of immunity has no place in a system that allows public and press access prior to final determination . . . Once a matter becomes public . . . absolute immunity from suit should be lost.").

[95] *Michels Commission Report*, *supra* note 77, at Supp. 9.

[96] *See supra* notes 83-84 and accompanying text.

[97] PRESSLER, CURRENT N.J. COURT RULES, R. 1:20-7(f) official cmt. [1995 Revision] (Gann 1996).

Wilentz Court in 1984.[98] The court, however, was divided 4-3 on the adoption of the rule, and instead of an official commentary, the court issued a majority and dissenting opinion on the rule.

Chief Justice Wilentz, writing the majority opinion, upheld the necessity of the rule "as a matter of principle."[99] As Chief Justice Wilentz stated:

> [w]e should not tolerate the possibility within our disciplinary system that a potential ethics complainant may be intimidated by an attorney into not filing a complaint. The need for public confidence in the integrity of that system is much too important.[100]

The court's adoption of this rule also had the effect of invalidating N.J.S.A. 2(A): 47A-1, an enactment by the legislature in 1956 that expressly allowed a malicious prosecution action to be brought against an ethics complainant by an attorney who is the subject of an ethics complaint.[101]

5. PROFESSIONAL AND CENTRAL STAFFING

In addition to its recommendation for public disciplinary proceedings, the Michels Commission also recommended the transfer of all investigatory and prosecutorial duties in disciplinary cases to full-time, professional staff centrally located within the OAE.[102] Under the existing system, all investigatory

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[98]Former N.J. CT. R. 1:20-11 (b) (adopted Jan. 31, 1984 to be effective Feb. 15, 1984). *See supra* note 63 and accompanying text.

[99]*In re* Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 678, 477 A.2d 339, 344 (1984).

[100]*Id.* at 676, 477 A.2d at 342.

[101]For a further discussion of the Chief Justice Wilentz's opinion in *In re* Hearing on Immunity for Ethics Complainants, see *infra* notes 241-44 and accompanying text.

[102]*Michels Commission Report, supra* note 77, at Supp. 10-15. Specifically, the Michels Commission recommended that:

> The disciplinary system should be restructured so that all investigations and prosecutions are undertaken by full-time, professional Office of Attorney Ethics employees. Adjudication of disciplinary hearings should be undertaken by attorney and non-attorney volunteers as members of regional ethics hearing panels or by Special Masters.

Id. at Supp. 10.

and prosecutorial duties, except in certain complex and other special cases,[103] are handled by volunteer attorneys within each DEC.[104] The bar strongly opposed the proposed shift of investigatory and prosecutorial responsibility to professional OAE staff and argued for continued use of the current system of volunteer attorneys on a local basis.[105]

The court refused to adopt the full recommendation of the Michels Commission at the present time because of the court's uncertainty about various aspects of the proposal, most especially its impact upon the bar.[106] As the court noted:

> We are not certain, however, that the total professional substitute will function better, nor that the hoped-for improvement would justify the very substantial costs. Furthermore, we are also concerned that such professionalization, centralized in the OAE, may dilute the pride of the bar in the disciplinary system and their determination to use it and other procedures to maintain and improve the standards of the profession. We give credence to this bar's dedication to their profession and to its improvement.[107]

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[103]Under Rule 1:20-2(b)(1), certain complex and other special disciplinary cases are investigated and prosecuted by the OAE. N.J. Ct. R. 1:20-2(b)(1)(A)-(E). *See supra* note 77 for a complete itemization of the disciplinary cases handled by the OAE.

[104]N.J. CT. R. 1:20-3(g)(1) (attorney investigator); 1:20-4(g)(1) (attorney presenter).

[105]Richard Pliskin, *'Offended' Bar Berates Panel's Discipline Ideas*, NEW JERSEY LAW JOURNAL, Oct. 4, 1993, at 4 ("In its formal response to [the Michels Commission] reform proposals, the State Bar argues angrily, even defensively, against efforts to dismantle the state's largely self-regulating system of lawyer discipline and replace it with a professional attorney-ethics bureaucracy housed within the Supreme Court's Office of Attorney Ethics in Trenton. 'Insulted,' 'saddened,' 'offended' - that's how Bar leaders describe their reaction to the reform measures [of the Michels Commission]".).

[106]*1994 Administrative Determinations*, *supra* note 5, at 51

[107]*Id.* In its rulings on the Michels Commission Report, the Wilentz Court further lauded the bar for their efforts in maintaining the integrity of the disciplinary system. As the court noted:

> Lawyers have been responsible for their own discipline for centuries, often exclusively responsible. In New Jersey, their continuing involvement is a most significant factor in the excellence of our disciplinary system, regarded throughout the nation as one of the best and beyond question the strictest, the most severe. The bar's desire to retain the present system is the product of professional

On an experimental basis, however, the Supreme Court assigned to the OAE, effective as of March 1, 1995, the investigation of all cases in Districts IV (Camden and Gloucester Counties) and District VA (Essex-Newark), in addition to part of the caseload in District IIIA (Ocean County).[108] After studying the results of this experiment, the court will decide whether the professionalization of investigations should be extended to other districts and whether the future professionalization of other disciplinary functions is advisable.[109]

The controversy between the organized bar and the OAE on the issue of volunteer attorneys versus paid professionals continues,[110] and it is unclear which system of disciplinary enforcement will be eventually adopted by the court.

6. Disciplinary Enforcement Reforms

In addition to the major reforms discussed above, many other disciplinary reforms and rules were adopted by the Wilentz Court as a result of the recommendations of the Sullivan Committee and the Michels Commission. The majority of the rule amendments stemming from the Sullivan Committee recommendations became effective February 15, 1984.[111] The vast majority of the disciplinary rule amendments stemming from the Michels Commission recommendations became effective March 1, 1995.[112] With these amendments,

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> pride, pride in the work they have done, the difficult work of disciplining their own members. They have consistently demonstrated concern for the integrity and ethics of the bar of this State, and for the excellence of the disciplinary system.

Id. at 50.

[108] 1995 OAE Report, *supra* note 33, at 8; *1994 Administrative Determinations*, *supra* note 5, at 53.

[109] *1994 Administrative Determinations*, *supra* note 5, at 53.

[110] Rocco Cammarere, *Lawyer Disciplinary System: Turf War on Hold*, New Jersey Lawyer, Dec. 23, 1996, at 1, 14 (describing the ongoing debate between the New Jersey Bar Association and the OAE over the use of local volunteer attorneys to investigate complaints and noting that the Disciplinary Oversight Committee of the Supreme Court agreed with the bar association that the OAE must make effective use of the list of nearly 200 volunteer lawyers recruited by the association to investigate ethics complaints).

[111] *See supra* notes 58-67 and accompanying text.

[112] For publication of the all of the revised attorney disciplinary rules adopted Jan. 31, 1995 to be effective Mar. 1, 1995, see *Attorney Disciplinary Rules*, New Jersey Law

the disciplinary rules promulgated by the Supreme Court during Chief Justice Wilentz's seventeen-year tenure now provide a comprehensive system for the handling of all disciplinary matters. In addition, New Jersey stands at the forefront in addressing every concern of the original ABA report on the status of disciplinary enforcement in state jurisdictions.[113]

Although the disciplinary rule amendments enacted by the Wilentz Court substantially revamped the disciplinary system, the existing general structure of the three-tiered disciplinary system remained intact during Chief Justice Wilentz's tenure. The disciplinary system consists of three levels - the District Ethics Committees (DECs), the Disciplinary Review Board (DRB),[114] and the Supreme Court, with the OAE having various responsibilities at all three levels.[115]

a. District Ethics Committees

The DECs form the foundation of the disciplinary system and constitute the initial tier in the disciplinary process.[116] Currently, there are seventeen DECs that are formulated generally along county lines.[117]

The DECs are comprised of volunteer attorneys and public members, who serve *pro bono* and are appointed by the Supreme Court for a term of four years.[118] Each DEC must consist of at least eight members, four of whom must be attorneys and two of whom must be public members.[119] DEC hearing panels must consist of three members, one of whom must be a public mem-

JOURNAL, Feb. 27, 1995, § 3, at Supp. 1-23.

[113]1970 ABA REPORT, *supra* note 36.

[114]The DECs and DRB were originally created by the Supreme Court in the 1978 reorganization of the disciplinary system. *See supra* notes 54-57 and accompanying text.

[115]For discussion of the OAE, see *supra* notes 68-76 and accompanying text.

[116]N.J. CT. R. 1:20-3.

[117]1995 OAE REPORT, *supra* note 33, at 1. Because of its large attorney population, Essex Co. is divided into three district committees, District VA, VB and VC. *Id.* Conversely, counties with smaller attorney populations are combined to form a single district committee. For example, Atlantic, Cumberland, Cape May, and Salem Counties combine to form District I. *Id.*

[118]N.J. CT. R. 1:20-3(b).

[119]N.J. CT. R. 1:20-3(a).

ber.[120]

With certain exceptions, the DECs are responsible for the initial investigation of all disciplinary grievances, the issuance and service of formal complaints upon respondent attorneys, and the prosecution of all disciplinary matters at a plenary hearing held before a DEC hearing panel.[121] If the DEC Chair concludes after investigation of the grievance that there is "no reasonable prospect of proving misconduct or incapacity by clear and convincing evidence," the matter must be dismissed.[122] If, however, the Chair concludes that there is "a reasonable prospect of a finding of misconduct by clear and convincing evidence" and the case has not been diverted as one involving minor misconduct, a formal complaint is issued and served upon the respondent attorney.[123] Upon completion of discovery,[124] the matter is set for plenary hearing before the DEC hearing panel.[125]

After the conclusion of the hearing, which in the absence of a protective

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[120]N.J. CT. R. 1:20-6(a)(1). The requirement that one member of every hearing panel must be a member of the public was part of the 1994 Administrative Determinations of the Wilentz Court and further demonstrated the commitment of the Wilentz Court to expand and strengthen public participation in the disciplinary process. *1994 Administrative Determinations*, *supra* note 5, at 52.

[121]N.J. CT. R. 1:20-3 to 6. There are certain exceptions to this general format. The OAE is given exclusive jurisdiction of the investigation and prosecution of certain disciplinary matters including any matter which "involves serious or complex issues that must be immediately addressed or one that requires emergent action." N.J. CT. R.1:20-2(b)(1). For a complete itemization the cases handled by the OAE under this rule, see *supra* note 71 and accompanying text. As previously mentioned, the OAE is also handling, on an experimental basis, the investigation of disciplinary matters in certain designated districts. *See supra* notes 108-09 and accompanying text.

In complex cases, a special ethics master may also be appointed by the Supreme Court to decide the matter. N.J. CT. R. 1:20-6(b)(3). Under the rule, retired judges, former DRB members, former DEC officers, and former hearing panel chairs are eligible for appointment as special ethics masters. N.J. CT. R. 1:20-6(b)(1). In addition, under Rule 1:20-3(e)(2), the secretary of a DEC is directed to decline jurisdiction in matters involving advertising or fee dispute grievances for respective handling by the Committee on Attorney Advertising under Rule 1:19A-2(a), or the appropriate District Fee Arbitration Committee under Rule 1:20A-2.

[122]N.J. CT. R. 1:20-3(h).

[123]N.J. CT. R. 1:20-4(a),(d).

[124]N.J. CT. R. 1:20-5(a)(1)-(7) (setting forth the scope and procedures for discovery).

[125]N.J. Ct. R. 1:20-6 (setting forth procedures for disciplinary hearings).

order is now open to the public in accordance with Rule 1:20-9(b), the hearing panel must prepare written findings of fact and conclusions of law.[126] If the panel finds that the respondent attorney has not committed misconduct, a letter of dismissal is issued.[127] If the panel determines that the respondent attorney is guilty of misconduct, a recommendation for discipline in the form of public admonition, public reprimand, suspension, or disbarment is submitted to the Director of the OAE for transmittal to the DRB.[128]

i. Minor Misconduct

The rule amendments of March 1, 1995 implement several new procedures in the disciplinary process at the DEC level. The most significant of these changes is the new provision for disciplinary diversion of "minor misconduct" cases. Under this new procedure, if both the Chair of the DEC and the Director of the OAE agree that the respondent attorney is guilty of "minor misconduct," defined as "misconduct which if proved, would not warrant a sanction greater than a public admonition," the case may be diverted from the normal disciplinary process through the execution of an "agreement in lieu of discipline."[129]

In addition to expediting the disciplinary process, this new procedure affords an attorney the benefit of correcting a problem through remedial action, while avoiding the stigma of a disciplinary determination. Upon satisfactory fulfillment of all of the terms of the agreement, the disciplinary matter is then dismissed.[130]

ii. Early Screening of Grievances

The new amendments also provide for early screening of disciplinary cases through a process of joint review by the DEC secretary and a public member of the DEC. If the secretary and the public member concur, the secretary

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[126]N.J. CT. R. 1:20-6(c)(2)(E).

[127]N.J. CT. R. 1:20-6(c)(2)(E)(i).

[128]N.J. CT. R. 1:20-6(c)(2)(E)(ii),(iii).

[129]N.J. CT. R. 1:20-3(i)(2)(A),(B).

[130]N.J. CT. R. 1:20-3(i)(2)(B)(iii). The respondent attorney must consent to the disciplinary diversion. N.J. CT. R. 1:20-3(i)(2)(B)(i). Although the grievant is notified and given an opportunity to offer any comment on the diversion, consent of the grievant is not required under the rule. *Id.*

"shall decline jurisdiction if the facts stated in the inquiry or grievance, if true, would not constitute misconduct or incapacity."[131]

With the opening of disciplinary matters to the public upon the filing of a formal complaint, the early screening of disciplinary cases provides another layer of protection for innocent attorneys by establishing a procedure for the prompt elimination of unmeritorious cases. Moreover, this new procedure for early screening, together with the above procedures for diversion of minor misconduct cases, will not only expedite the disciplinary process, but will allow disciplinary authorities to concentrate their resources on more serious cases of misconduct.

iii. Other Significant Reforms

Numerous other procedural amendments were also passed in order to expedite the procedures for the handling of disciplinary matters and to improve the fairness and effectiveness of the process. These new amendments, among other things, clarify the respondent attorney's mandatory duty to cooperate in the disciplinary investigation;[132] provide that if a respondent attorney fails to cooperate with a request for information by not producing the attorney's records for inspection and review, the OAE may apply for temporary suspension of the attorney;[133] provide similarly for the temporary suspension of a respondent attorney who fails to file an answer within the prescribed time to a disciplinary complaint;[134] provide for discovery as of right for both ethics counsel

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[131]N.J. CT. R. 1:20-3(e)(3).

[132]N.J. CT. R. 1:20-3(g)(3) ("Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information.")

[133]N.J. CT. R. 1:20-3(g)(4).

[134]N.J. CT. R. 1:20-4(f)(2). As noted in the official comment to the rule revision:

> The filing of a formal written answer is expressly mandatory. It cannot be waived or excused. . . . The specter of an attorney, sworn to uphold the law, flouting his or her disregard for the disciplinary system by failing to cooperate and answer a complaint cannot be countenanced. Two remedies are established. The first . . . calls for the factual charges to be deemed admitted. The second authorizes the Supreme Court to immediately temporarily suspend the attorney from practice. . . .

PRESSLER, CURRENT N.J. COURT RULES, R. 1:20-4 official cmt. [1995 Revision] (Gann 1996).

and the respondent attorney;[135] formalize the existing procedures for disbarment by consent;[136] and establish procedures for discipline by consent in instances other than disbarment.[137]

b. Disciplinary Review Board (DRB)

The DRB is the intermediate appellate tier in the disciplinary process and has statewide jurisdiction. The DRB is comprised of nine members who are appointed by the Supreme Court for three-year terms.[138] At least five of the members of the DRB must be attorneys and at least three must be public members, all of whom serve *pro bono*.[139]

If an appeal is taken, the DRB reviews *de novo* any docketed grievance that has been dismissed after investigation or hearing by a DEC.[140] The DRB may affirm, modify, or reverse the action of the DEC and remand for further proceedings.[141] In addition, the DRB reviews all recommendations for the imposition of discipline from the DECs, whether in the form of an admonition, reprimand, suspension, or disbarment.[142] If the DRB finds that discipline should be imposed, the DRB issues a formal determination specifying the appropriate discipline.[143]

c. Supreme Court

The Supreme Court is the final tier in the disciplinary process and reviews

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[135] N.J. CT. R. 1:20-5(a).

[136] N.J. CT. R. 1:20-10(a)(1),(2),(3).

[137] N.J. CT. R. 1:20- 0(b)(1),(2),(3).

[138] N.J. CT. R. 1:20-15(a).

[139] *Id.*

[140] N.J. CT. R. 1:20-15(e).

[141] N.J. CT. R. 1:20-15(e)(3).

[142] N.J. CT. R. 1:20-15(f). The DRB also reviews final actions in cases heard by a special ethics master, see *supra* note 121, as well as final actions of the Committee on Attorney Advertising. N.J. CT. R. 1:20 -15(e)(1). The DRB also has limited appellate jurisdiction over determinations of a District Fee Arbitration Committee. N.J. CT. R. 1:20A-3(c).

[143] N.J. CT. R. 1:20-15(f)(3).

de novo the disciplinary determinations of the DRB. The March 1, 1995 rule amendments, however, implement a substantial change in the prior practice of Supreme Court review. Under the new amendments, all decisions of the DRB not recommending disbarment, i.e. admonition, reprimand, suspension, or disability inactive status,[144] become final upon a confirmatory order by the Supreme Court, unless the Supreme Court, either *sua sponte* or on motion by the respondent attorney or the OAE, grants review in the matter.[145] The Supreme Court will continue to review *de novo* all DRB recommendations for disbarment.[146]

d. Disciplinary Oversight Committee

The Wilentz Court's strong commitment to the effective functioning and continued improvement of the disciplinary system is further demonstrated by the court's creation of the Disciplinary Oversight Committee (DOC).[147] The DOC was established in August 1994 following the issuance of the court's *Administrative Determinations* of July, 14, 1994.[148] The DOC replaced the former Ethics Financial Committee, which had been established by the Wilentz Court as part of the 1984 rule revisions "to assist [the court] in administering the financial aspects of the attorney disciplinary and fee arbitration systems."[149]

The DOC succeeded to all of the financial duties and functions of the Ethics Financial Committee, but in addition, was given special evaluative responsibility for the entire disciplinary system. Specifically, the DOC is empowered "to evaluate the efficiency and effectiveness of the attorney disciplinary system and to report to the Supreme Court quarterly and at such other times as the Supreme Court and the Oversight Committee deem appropriate, making whatever recommendations it believes would improve the quality and efficiency of the

[144]For a discussion of the procedures for the transfer of attorneys to disability inactive status, see *infra* notes 176-186 and accompanying text.

[145]N.J. CT. R. 1:20-16(b).

[146]N.J. CT. R. 1:20-16(a).

[147]N.J. CT. R. 1:20B.

[148]*Disciplinary Oversight Committee Established*, NEW JERSEY LAW JOURNAL, Aug. 15, 1994, (Notices to the Bar), at 2. For the Wilentz Court's description of the duties and functions of the DOC, see *1994 Administrative Determinations*, *supra* note 5, at 52.

[149]Former N.J. CT. R. 1:20B-1 (adopted Jan. 31,1984 to be effective Feb. 15, 1984).

disciplinary system and strengthen adherence to high ethical standards."[150] The DOC members are appointed by the Supreme Court and must include five lawyers or judges, either sitting or retired; one designee of the New Jersey State Bar Association; and five public members.[151]

The court's creation of the DOC is a significant reform because this committee will not only be able to provide an independent evaluation of the disciplinary system, but will also be able to help coordinate the sometimes disparate positions of the OAE and the organized bar. In fact, the DOC has already exerted its influence in attempting to resolve the dispute between the bar and the OAE on the issue of the professionalization and centralization of investigatory and prosecutorial duties in disciplinary cases.[152]

7. OTHER SIGNIFICANT DISCIPLINARY REFORMS

In addition to the above modifications in the disciplinary enforcement process, numerous other disciplinary reforms were instituted under Chief Justice Wilentz to strengthen the disciplinary system and increase public confidence in its effective administration. Some of the major reforms instituted by Chief Justice Wilentz and his court during his tenure are as follows.

a. Public Participation in the Disciplinary Process

Although in the 1978 and 1979 disciplinary rule revisions, public members had been added respectively to the DRB[153] and the DEC,[154] Chief Justice Wilentz made the issue of public participation in the entire disciplinary process a top priority when he was appointed Chief Justice. Through his efforts, public participation was expanded to nearly every facet of the disciplinary sys-

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[150]N.J. CT. R. 1:20B-4(a)(1).

[151]N.J. CT. R. 1:20B-2.

[152]*Lawyer Disciplinary System: Turf War on Hold*, *supra* note 110, at 1, 14. "After more than two years of bickering between the New Jersey State Bar Association and the Office of Attorney Ethics over the workings of the attorney disciplinary system, a Supreme Court panel [the DOC] has stepped into the fray and effectively told the two to cool it and work together." *Id.* at 1. For a further discussion of the issue of professionalization and centralization in disciplinary cases, see *supra* notes 102-110 and accompanying text.

[153]Former N.J. CT. R. 1:20-3 (adopted Feb. 23, 1978 to be effective Apr. 1, 1978 and requiring that 3 of the 9 members of the DRB be public members).

[154]N.J. CT. R. 1:20-2 (originally adopted Feb. 23, 1978, but amended Jan. 17, 1979 to require appointment of at least 2 public members).

tem.[155]

The expansion of public participation in the disciplinary process by the Wilentz Court has been extremely significant in reinforcing public confidence in the disciplinary system. As the Wilentz Court noted in its 1994 *Administrative Determinations*:

> We increase public participation despite the obvious specialized nature of these matters that often require legal training for full understanding; we do so because of our belief that the public has something valuable to contribute to the process and to increase the confidence of the public in this important aspect of our system of justice.[156]

b. Legal Ethics Telephone Research Service

Another positive innovation of the Wilentz Court was the creation of a 900 telephone number, under the authority of the Advisory Committee on Professional Ethics, to provide general legal ethics information and research assistance to New Jersey lawyers.[157] Although the Advisory Committee on Professional Ethics is empowered as part of its normal duties to issue written opinions in response to formal ethical inquiries,[158] practitioners often need prompt assistance when confronted with an ethical dilemma in daily practice. This new service is designed to provide research assistance and general ethics

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[155]In addition to the public members who sit on the DEC, N.J. CT. R. 1:20-3(a) (two public members for each DEC), and the DRB, N.J. CT. R. 1:20-15(a) (three public members), public members now sit by court rule on the following Supreme Court Committees: Advisory Committee on Outside Activities of Judiciary Employees, N.J. CT. R. 1:17A-1 (three public members); Advisory Committee on Extrajudicial Activities, N.J. CT. R. 1:18A-1 (one public member); Advisory Committee on Professional Ethics, N.J. CT. R. 1:19-1 (three public members); Committee on Attorney Advertising, N.J. CT. R. 1:19A-1(a) (two public members); District Fee Arbitration Committees, N.J. Ct. R. 1:20A-1(a) (two public members); Disciplinary Oversight Committee, N.J. CT. R. 1:20B-2 (five public members); Committee on the Unauthorized Practice of Law, N.J. CT. R. 1:22-1(a) (four public members); New Jersey Lawyer's Fund for Client Protection, N.J. CT. R. 1:28-1(b) (two public members); Judicial Performance Committee, N.J. CT. R. 1:35A-1 (two public members).

[156]*1994 Administrative Determinations*, *supra* note 5, at 50.

[157]N.J. CT. R. 1:19-9. This provision was added as part of the rule amendments effective March 1, 1995 and was a recommendation of the Michels Commission. *1994 Administrative Determinations*, *supra* note 5, at 59-60.

[158]N.J. CT. R. 1:19-2 to 1:19-6.

information in order to allow the inquiring attorney to resolve the question himself/herself.[159]

This research assistance service is not only an extremely valuable aid for practicing attorneys, but, moreover, this program represents a recognition by the Wilentz Court that the disciplining of attorneys is not the only function of the disciplinary system. As stated in the official comment to this rule revision:

> It has been said that the primary purpose of discipline is to ensure public confidence in the attorney disciplinary system. Yet if that system is to achieve its purpose, it must also ensure the confidence of the Bar in the professional regulatory effort. An attorney disciplinary system that is one dimensional, that is, one that centers solely on disciplining errant attorneys, can never truly achieve that goal. Rather, the concept of ethics must be broader than discipline. The professional regulatory effort must seek to help the thousands of honest attorneys who seek to be ethical by assisting them to answer for themselves the many difficult ethical dilemmas that occur in daily practice.[160]

c. Random Audit Program For Attorney Trust and Business Accounts

Originally approved as part of the Supreme Court's reorganization of the disciplinary system in 1978, the Random Audit Program for attorney trust and business accounts became operational under Chief Justice Wilentz and has been in continuous and successful operation since July 1981.[161] The program is administered by full time staff within the OAE.[162]

Rule 1:21-6, together with Rule of Professional Conduct (RPC) 1.15, sets forth detailed trust and business account requirements for practicing attorneys

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[159]N.J. CT. R. 1:19-9(a),(b),(c). The goal of this service is to provide speedy research assistance to inquiring attorneys and not to render a legal opinion on the matter. Consequently, the rule provides that "[n]either the fact that an inquiry has been made nor the results thereof, shall be admissible in any legal proceeding, including an attorney or judicial discipline proceeding." N.J. CT. R. 1:19-9(d). In addition, the rule provides that all records of the ethics research assistance service are confidential and "immune from subpoena in any civil, disciplinary or administrative matter." N.J. CT. R. 1:19-9(e).

[160]PRESSLER, CURRENT N.J. COURT RULES, R. 1:19-9 official cmt. [1995 Revision] (Gann 1996).

[161]1995 OAE REPORT, *supra* note 33, at 79.

[162]*Id.* at 84-85.

in New Jersey.[163] Knowing the importance that the Wilentz Court has placed on the proper handling of client funds,[164] the Random Audit Program has been extremely successful in educating New Jersey lawyers on the proper procedures for handling client and business funds, maintaining trust and business account records, and fulfilling fiduciary obligations under Rule 1:21-6 and RPC 1.15.[165] The program has been most helpful to sole practitioners, who often lack the extensive office support of the larger firms.[166]

In addition to the program's benefit of educating the bar as to proper financial responsibility, the program has also been successful in uncovering cases of misappropriation of client funds. This is not the primary purpose of the program, however, and out of 4,905 audits through December 31, 1995, only 60 cases of attorney disciplinary misconduct were detected and prosecuted.[167] The existence of the program, though, does serve as an added deterrent to attorney misappropriation.

Another related reform initiated by the Wilentz Court in 1985 was the Trust Overdraft Notification Program. This program requires all financial institutions to report any overdraft on an attorney trust account to the OAE. This program has also been successful in uncovering cases of attorney misappropriation of client funds.[168]

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[163] *Id.* at 80. According to the OAE, "the New Jersey Trust and Accounting scheme is one of the most detailed in the country." *Id.*

[164] For discussion of the *In re* Wilson case that mandated disbarment for knowing misappropriation of client funds, see *supra* notes 38-41 and accompanying text.

[165] 1995 OAE REPORT, *supra* note 33, at 79 (describing the educational purpose of the program and the "overwhelming support the program has experienced from practitioners and the organized bar").

[166] As noted by one sole practitioner:

> Like many other attorneys in the state, I had expected a monster to visit my office and then be put through hell. Instead the audit was conducted by a very intelligent young auditor who conducted herself in a very professional manner during the stay. During the final interview she explained the problems with my books and/or ledgers, and gave me some guidance on how to take corrective steps to help myself.

Id. at 80.

[167] *Id.* at 79, 85.

[168] *Id.* at 20. The OAE reported that in 1995, six attorneys were detected and disciplined as a result of this program. *Id.*

These two programs demonstrate the commitment of the Wilentz Court to ensure that all attorneys comply with the fiduciary and financial responsibilities imposed upon them in order to maintain and preserve public confidence in the legal profession and the disciplinary system.

d. Procedures for Temporary Suspension

One of the most serious concerns raised in the 1970 ABA report on its national evaluation of disciplinary enforcement was the widespread lack of procedures for the temporary suspension of attorneys pending final discipline, especially with respect to attorneys convicted of crimes.[169] The ABA report detailed the public's incredulity at the ability of attorneys to continue practicing law after being convicted of serious crimes, while their criminal appeals were processed.[170]

The Wilentz Court not only addressed this specific problem of the attorney convicted of a crime but also created clear procedures for immediate temporary suspension in other disciplinary cases as well. Under Rule 1:20-13, any attorney determined to be guilty of a serious crime[171] shall be immediately temporarily suspended from the practice of law by the Supreme Court pending final disposition of the disciplinary proceeding. This provision for immediate temporary suspension applies irrespective of whether the determination of guilt results from "a plea of guilty, no contest, or nolo contendere, or from a verdict after trial or otherwise, and regardless of the pendency of any appeal."[172]

In addition, under Rule 1:20-11(a), the Supreme Court may issue an order of immediate temporary suspension of any attorney if "by reason of a violation of the Rules of Professional Conduct, case law or other authority, or a disability as defined by R.1:20-12, [incapacity and disability] the attorney poses a substantial threat of serious harm to an attorney, a client or the public."[173]

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[169]1970 ABA REPORT, *supra* note 36, at 799-800, 918-926.

[170]*Id.*

[171]Under the rule, serious crime includes any crime of the first or second degree in New Jersey, any felony under federal or state law, or any other crime involving "interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft; or any attempt or conspiracy or solicitation of another to commit a 'serious crime', violations involving criminal drug offenses, excluding solely minor possessory offenses." N.J. CT. R. 1:20-13(b)(2).

[172]N.J. CT. R. 1:20-13(b)(1).

[173]N.J. Ct. R. 1:20-11(a).

The newly amended rules also make specific provision for temporary suspension in other situations, including Rule 1:20-3(g)(4), when a respondent attorney fails to cooperate during the investigation of a disciplinary matter; Rule 1:20-4(f)(2), when a respondent attorney fails to file an answer to a formal disciplinary complaint; Rule 1:20-15(k), when a respondent attorney fails to pay a refund as the result of a fee arbitration determination or settlement; and Rule 1:20-17(e)(1), when a respondent attorney fails to pay disciplinary costs imposed in a final order of discipline. Rule 1:20-15(i) also provides for the temporary suspension of an attorney on application of the DRB to the Supreme Court "where necessary to protect the interest of an attorney, a client or the public."[174]

Effective as of March 15, 1996, new rule 1:20-11A now provides for the suspension of an attorney from the practice of law for failure to meet child support obligations. This rule amendment is a companion to Family Part Court Rule 5:7-5(e), which was also adopted on March 1, 1996, and provides for the suspension of a New Jersey license, including the license to practice law, possessed by an obligor who has failed to comply with child support obligations.[175]

e. Attorneys Suffering Disability and Incapacity

In its 1970 evaluative report, the ABA also expressed serious concern that many states had no procedure for dealing with the problem of an attorney who is disabled by reason of mental illness or drug or alcohol addiction, but whose disability has not yet resulted in misconduct.[176] As noted by the ABA in its report, "[t]he absence of such a procedure exposes the public to serious dan-

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[174]N.J. Ct. R. 1:20(15)(i)..

[175]N.J. CT. R. 5:1:7-5(e). Under the Family Part Rule, a request for license suspension may be made whenever:

> a child support arrearage equals or exceeds the amount of child support payable for six months, or court-ordered health insurance for a child is not provided within 6 months of the date that it is ordered, or a warrant for the obligor's arrest has been issued by the court due to the failure to pay child support as ordered, failure to appear at a hearing to establish paternity or child support, or failure to appear at a child support hearing to enforce a child support order and said warrant remains outstanding . . .

N.J. CT. R. 5:7-5(e)(1).

[176]1970 ABA REPORT, *supra* note 41, at 802, 906-911.

ger, for it prohibits any action against the lawyer known to be disabled before his disability has led to harm to his clients."[177]

The Wilentz Court addressed this problem with comprehensive procedures for the transfer of attorneys to "disability inactive status."[178] Under the current rule, an attorney may be transferred to disability inactive status by the Supreme Court if it is established by clear and convincing evidence that the attorney lacks the capacity to practice law by reason of a mental or physical infirmity or illness or because of addiction to drugs or intoxicants.[179] An attorney transferred to disability inactive status is ineligible to practice law and must comply with the restrictive provisions governing suspended attorneys.[180]

The period of ineligibility, however, only lasts for the duration of the disability, and an attorney may be transferred back to active status if the attorney establishes, by clear and convincing evidence, the attorney's capacity to practice law.[181] In addition, the rule provides for the immediate transfer to disability inactive status by the Supreme Court of any attorney who "has been judicially declared incompetent or involuntarily committed to a mental hospital."[182] All proceedings for the transfer of an attorney to or from disability inactive status are confidential, but all orders transferring an attorney to or from disability inactive status are public.[183]

In the event an attorney who is transferred to disability inactive status has no law partner or other attorney to assume responsibility for his/her law practice, provision is made in Rule 1:20-19 for the appointment of an attorney trustee or trustees to take possession of the attorney's law practice to protect the interest of the attorney's clients and then to protect the interest of the attorney.[184]

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[177]*Id.* at 802.

[178]Former N.J. CT. R. 1:20-9, adopted Jan. 31, 1984 to be effective Feb. 15, 1984, redesignated as N.J. CT. R. 1:20-12 effective Mar. 1, 1995. An earlier version of this rule was first adopted in 1971, for N.J. CT. R. 1:20-11, but this rule did not contain the comprehensive and detailed provisions of the rules enacted by the Wilentz Court.

[179]N.J. CT. R. 1:20-12(b)-(g).

[180]N.J. CT. R. 1:20-12(f); *see* N.J. CT. R. 1:20-20 (setting forth the restrictions on attorneys who have been disciplined or transferred to disability inactive status).

[181]N.J CT. R. 1:20-12(f),(g).

[182]N.J. CT. R. 1:20-12(a).

[183]N.J. CT. R. 1:20-9(f).

[184]N.J. CT. R. 1:20-19(a). The provisions of this rule also apply to situations in which

As with the other professions, the legal profession has not been exempt from the serious problem of drug and alcohol addiction by some members of the profession. The Wilentz Court has been especially aware of this problem and, working in conjunction with the New Jersey State Bar Association, created in 1993 the New Jersey Lawyers' Assistance Program as a primary resource and support program for lawyers experiencing problems with alcohol or drug abuse.[185] The program has been highly successful and currently receives inquiries from an average of 80 attorneys a month.[186]

f. Reciprocal Discipline and Reporting

The 1970 ABA report also criticized the laxity of disciplinary authorities across the country in failing to exchange disciplinary information about attorneys admitted to practice in more than one state.[187] As noted in the ABA report, "[a] lawyer who is admitted to practice in several states and is disbarred in one for serious misconduct is often able to continue to practice in the other states in which he is admitted simply because they are unaware of his disbarment."[188]

The Wilentz Court addressed this serious concern by strengthening and expanding the procedures for the handling of reciprocal discipline. Rule 1:20-14 requires all attorneys who are transferred to disability inactive status or disciplined in another jurisdiction, state or federal, to report this fact promptly and in writing to the OAE Director.[189] Proceedings are then commenced before the DRB for the imposition of identical discipline or action in New Jersey,

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an attorney is unable to maintain his/her law practice because the attorney "has been suspended or disbarred . . . , has abandoned the law practice, or has died and no partner, shareholder, executor, administrator, or other responsible party capable of conducting the respondent's affairs is known to exist." *Id.*

[185]William J. Kane and Cheryl Baisden, *Use and Abuse: Are You Controlling the Substance, or Is the Substance Controlling You?*, NEW JERSEY LAWYER, Dec. 1996, (Magazine), at 12-14 (providing a detailed discussion of the support and recovery services offered through the New Jersey Lawyers' Assistance Program).

[186]*Id.* at 13.

[187]1970 ABA REPORT, *supra* note 36, 800-01, 912-17.

[188]*Id.* at 800.

[189]N.J. CT. R. 1:20-14(a)(1). The procedures for reciprocal discipline and reporting for attorneys were formerly contained in N.J. CT. R. 1:20-7, adopted by the Wilentz Court on Jan. 31, 1984.

with the final adjudication in the foreign jurisdiction constituting conclusive evidence of the facts upon which the adjudication rests.[190] The rule provides that the imposition of identical action or discipline shall be recommended by the DRB, unless certain procedural defects in the foreign order are shown or "the misconduct established warrants substantially different discipline" under the law of New Jersey.[191]

As part of the March 1, 1995 rule amendments, the Wilentz Court also added a new provision in Rule 1:20-14 establishing similar requirements for the reporting and imposition of reciprocal discipline as to any attorney subjected to discipline as a judge in another jurisdiction.[192] The new rule provision also sets forth procedures for the imposition of attorney discipline based on a final determination of judicial misconduct by the New Jersey Supreme Court. Under the rule, the determination of judicial misconduct conclusively establishes the facts upon which it rests, and the sole issue to be determined in the attorney disciplinary proceeding is the nature of the final discipline to be imposed.[193]

With respect to the issue of the exchange of disciplinary information with other jurisdictions, the disciplinary rules specifically provide in Rule 1:20-9(k) that the Clerk of the Supreme Court shall transmit notice of "all discipline, whether temporary or final, imposed against an attorney, transfers to or from disability inactive status, and reinstatements to the National Discipline Data Bank maintained by the American Bar Association."

With these amendments and revisions, the Wilentz Court has effectively and comprehensively addressed and surpassed all of the recommendations of the original ABA evaluation report on the status of disciplinary enforcement in the United States. As a result of the efforts of Chief Justice Wilentz and his court, New Jersey's disciplinary system now stands as a national model for the fair, effective, and comprehensive enforcement of disciplinary rules governing the regulation of lawyers.

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[190] N.J. CT. R. 1:20-14(a)(2)-(5).

[191] N.J. CT. R. 1:20-14(a)(4)(E). The rule expressly recognizes that under New Jersey law the imposition of greater discipline may be warranted. *Id.*

[192] N.J. CT. R. 1:20-14(b)(1)(2).

[193] N.J. CT. R. 1:20-14(3).

IV. ADOPTION OF THE NEW JERSEY RULES OF PROFESSIONAL CONDUCT

In addition to its extensive revamping of the disciplinary enforcement system, the Wilentz Court also promulgated, effective September 10, 1984, new Rules of Professional Conduct for the legal profession. Consistent with Chief Justice Wilentz's repeated emphasis on the preservation of public confidence in the legal profession and the administration of justice, the Wilentz Court adopted Rules of Professional Conduct more stringent than the Model Rules proposed by the American Bar Association. New Jersey's disciplinary and ethical rules are now recognized as among the strictest in the nation. As the Wilentz Court recently stated, "our disciplinary system, [is] regarded throughout the nation as one of the best and beyond question the strictest, the most severe."[194]

A. BACKGROUND

In 1977, former ABA President Robert Meserve appointed Robert Kutak to Chair a commission to reevaluate the then existing ABA Code of Professional Responsibility. The Code of Professional Responsibility was adopted by the ABA in 1969 but was widely criticized in operation as an ineffective disciplinary standard.[195] Rather than amending the existing Code of Professional Responsibility, the Kutak Commission concluded that it was wiser to draft an entirely new set of ethical standards.[196] Between 1979 and 1982, the Kutak Commission produced four major drafts of its proposed Model Rules of Professional Conduct.[197] After significant amendments and heated debate, the ABA House of Delegates formally adopted the Model Rules of Professional

[194] *1994 Administrative Determinations*, *supra* note 5, at 50.

[195] Michael P. Ambrosio, *The "New" New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 SETON HALL LEGIS. J. 121, 128 (1987).

[196] *Report of the Commission on Evaluation of Professional Standards*, 104 REPORTS OF AMERICAN BAR ASSOCIATION 1010 (1979) ("After several months of painstaking research and discussion, the Commission has reached agreement that the Code [of Professional Responsibility], to be effective, requires complete reconstruction rather than piecemeal amendment.").

[197] The Kutak Commission produced the 1979 unofficial pre-circulation draft; the 1980 discussion draft; the 1981 draft and 1982 draft. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS, STATUTES AND STANDARDS 3 (1997).

Conduct in August 1983.[198]

Chief Justice Wilentz appointed an 18 member committee, chaired by U.S. District Judge Dickinson Debevoise, to study the proposed ABA Model Rules of Professional Conduct. The Debevoise Committee issued its recommendations on June 24, 1983, and thereafter, the Wilentz Court adopted the ABA Rules of Professional Conduct, effective September 10, 1984, but with significant revisions of key provisions, including confidentiality and conflict of interest.[199]

B. CONFIDENTIALITY OF INFORMATION

ABA Rule 1.6 is the principal rule governing a lawyer's duty of confidentiality with respect to information relating to the representation of a client. ABA Rule 1.6 underwent numerous and substantial revisions in the draft stages and, as finally adopted, contained only two provisions for disclosure of protected information, in the absence of client consent or authorization.[200]

Although New Jersey Rule 1.6(a) is identical to the ABA 1.6(a), the remainder of Rule 1.6 dealing with the prevention of future harm by a client and

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[198] MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]; ABA, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1983 ANNUAL MEETING, at 10-11 (1983).

[199] *Introduction* to NEW JERSEY RULES OF PROFESSIONAL CONDUCT, Appendix to Part I (1996) [hereinafter RPC].

[200] In its final version, ABA Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act hat the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES Rule 1.6.

the rectification of past wrongs by a client is significantly different.

1. PREVENTING FUTURE HARM BY A CLIENT

The New Jersey version of Rule 1.6(b)(1), by contrast to the ABA 1.6(b)(1), provides:

> (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client: (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; . . .

Unlike the ABA rule, the New Jersey rule mandates disclosure to prevent future harm by the client, as opposed to the ABA's provision for permissive disclosure. Moreover, the New Jersey rule mandates disclosure not only in the event of potential death or substantial bodily harm, but also to prevent substantial injury to the financial interest or property of another. Finally, the New Jersey rule requires disclosure to prevent the client from committing a criminal, illegal, or fraudulent act, whereas the ABA is limited to the prevention of criminal acts. The proposed drafts of ABA Model Rule 1.6 prepared by the Kutak Commission contained various provisions similar to New Jersey Rule 1.6(b)(1), but these ABA proposals were never adopted.

In addition, New Jersey Rule 1.6(b)(2) further mandates disclosure to prevent the client "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." The ABA Rule 1.6 has no counterpart to New Jersey Rule 1.6(b)(2).

Both the ABA and New Jersey Rule 3.3(a)(2) embrace the concept of disclosure to a tribunal to avoid assisting a criminal or fraudulent act by a client, but Rule 3.3(a)(2) requires actual knowledge by the attorney, i.e. "a lawyer shall not *knowingly* fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a[n illegal-(New Jersey only)] criminal or fraudulent act by a client." New Jersey Rule 1.6(b)(2), on the other hand, requires disclosure if the lawyer "*reasonably believes* [the client's act] is likely to perpetrate a fraud upon the tribunal."[201]

2. RECTIFICATION OF PAST WRONGS BY A CLIENT

New Jersey Rule 1.6(c)(1), known as the rectification rule, permits an at-

[201]RPC 1.6(b)(2) (emphasis added).

torney to disclose information "to the extent the lawyer reasonably believes necessary: (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used." Under this rule, disclosure is permissive only, not mandatory, and applies only to the rectification of past client wrongdoing if the lawyer services had been used in furtherance of this wrongdoing.

The ABA Rule 1.6 has no counterpart to New Jersey Rule 1.6(c)(1). The Kutak Commission had originally proposed a similar draft rule for the ABA, but this proposed rule was defeated by the ABA House of Delegates.[202] In 1991, the ABA again considered a proposal to enact a rectification rule, but this proposed rule amendment was similarly defeated.[203]

The adoption by the Wilentz Court of these disclosure provisions in Rule 1.6(b) and (c), despite their rejection by the ABA House of Delegates, demonstrates the firm commitment of the Wilentz Court to promulgate ethical standards for lawyers that render them more accountable to the public interest and more responsible for the administration of justice in the courts. As the Wilentz Court has noted, "[l]awyers are officers of the court and ministers of justice, no less than the judge,"[204] and despite the utmost importance of attorney-client confidentiality, there are times when that principle of confidentiality must yield to the higher demands of justice.[205]

3. DUTY OF CANDOR TOWARD THE TRIBUNAL AND THE ISSUE OF RULE 3.3(a)(5)

The New Jersey and ABA Rule 3.3(a) to (d), with the exception of New Jersey provision (a)(5), are virtually identical in defining the disclosure duties that an attorney owes to a tribunal. The provisions of New Jersey and ABA 3.3(a)(1) to (4) are clear in prohibiting affirmative misrepresentations and fraud upon the court, including perjury, and requiring the disclosure of adverse legal authority. Other than New Jersey's inclusion of illegal acts in the provisions of (a)(2), Rule 3.3(a)(1) to (4) is the same under the New Jersey and ABA rules. Rule 3.3(a) provides:

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[202] STEPHEN GILLERS & ROY D. SIMON, *supra* note 197, at 72.

[203] ABA, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1991 ANNUAL MEETING , at 11 (1991). The proposed amendment was defeated by a vote of 251-158. *Id.*

[204] *In re* Daniels, 118 N.J. 51, 72, 570 A.2d 416, 427 (1990).

[205] *In re* Nackson, 114 N.J. 527, 537, 555 A.2d 1101, 1106 (1989) ("As we noted in our discussion of Fellerman v. Bradley, 99 N.J. 493 (1985), the privilege is not absolute. Like other privileges, it must in some circumstances yield to the higher demands of order.").

(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a[n illegal-NJ only], criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Both New Jersey and ABA Rule 3.3(b) make clear that the above requirements apply "even if compliance requires disclosure of information otherwise protected by RPC 1.6."[206]

The rub comes with the New Jersey addition of 3.3(a)(5), which provides further that a lawyer shall not knowingly "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." The scope and breadth of 3.3(a)(5) pose serious questions because, unlike 3.3(a)(1), this provision is not linked to any affirmative misrepresentation by the attorney, and unlike 3.3(a)(2), it operates independently of any fraudulent, criminal, or illegal act by the client.

Upon its passage, practitioners were understandably concerned about the intended application of 3.3(a)(5). Was it meant to be an end to the traditional adversary system of civil litigation in which both sides may properly present the facts of their case in the light most favorable to their clients?[207] Because 3.3(a)(5) is not linked to any act of client misconduct, was it intended to impose upon an attorney in civil litigation, who had fully and completely complied with all discovery requests of the adversary, an affirmative ethical duty to disclose material facts to the court that should have otherwise been presented by the adversary, but were not so presented because of the adversary's incompetence or inadvertence?

The ethical dilemmas posed by a literal application of 3.3(a)(5) are indeed far-reaching. In fact, Raymond R. Trombadore, Esq., past president of the New Jersey Bar Association and Chair of the Disciplinary Review Board from 1988 to 1995[208] and a strong supporter of strict ethical standards, openly ques-

[206]RPC 3.3(b); MODEL RULES Rule 3.3(b).

[207]Certainly the application of RPC 3.3(a)(5) with respect to the duties of defense counsel in a criminal case is constitutionally curtailed by the defendant's 5th amendment privilege against self incrimination. *See* U.S. CONST. amend. V.

[208]*Disciplinary Review Board of the Supreme Court of New Jersey*, 1995 ANNUAL REPORT, at 5 (1996).

tioned the implications of this rule. As stated by Mr. Trombadore at a 1988 legal ethics symposium at Seton Hall Law School:

> The court, without the benefit of recommendation from the State Bar, and without the recommendation of its own Committee on these rules, drafted a new rule 3.3(a)(5) which essentially says, in the context of candor toward the tribunal, that a lawyer shall not withhold information from a tribunal, when the withholding of that information might tend to mislead the tribunal. That language is so broad and so sweeping that it essentially destroys whatever confidentiality exists between lawyer and client, because it is totally unlimited. . . . The profession has taken exception to rule 3.3(a)(5). We have asked the court to withhold its implementation. The court has promised once again to look at the rule. I don't know of any case that has come up which implicates rule 3.3(a)(5). However, I am satisfied, just from my knowledge of practice that the rule is violated, grossly violated, by every lawyer who does trial work, because no lawyer can represent a client and comply with that rule. Just think about the language. Failure to disclose to the tribunal information without which the tribunal might be mislead. Obviously, everything unfavorable to the client would have to be disclosed, because, without it the tribunal might be mislead.[209]

Fortunately, the fears of practitioners concerning the application of 3.3(a)(5) have not materialized. In the few disciplinary cases in which the court has applied 3.3(a)(5), the cases have also involved some form of misrepresentation, fraud, or deceit such that the actions of the attorneys would most likely have been unethical even without application of 3.3(a)(5).[210] From these

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[209]Raymond R. Trombadore, *The New Jersey Rules of Professional Conduct: A Recipe for Good Lawyering*, 18 SETON HALL L. REV. 606, 610 (1988); *see* Raymond R. Trombadore, *Ethically Speaking: Lawyers' Dilemma: Confidentiality v. Disclosure,* NEW JERSEY LAWYER, Oct. 16, 1995, at 7 ("No other jurisdiction has adopted a rule similar to RPC 3.3(a)(5). The rule is radical. It constitutes an attack on the adversary system and undercuts the lawyer-client relationship.").

The questioning of this rule by Mr. Trombadore is especially significant, because Mr. Trombadore could hardly be criticized for being "soft" on attorney ethics. As Chairman of the DRB, he was a staunch supporter of the In re Wilson disbarment rule for misappropriation of client funds. Moreover, as a result of his strong advocacy while chair of DRB in support of public disciplinary proceedings, the N.J. State Bar Association refused to reappoint Mr. Trombadore to his position as state delegate to the ABA. Henry Gottlieb, *Switching on Ethics*, NEW JERSEY LAW JOURNAL, Dec. 2, 1996, at 12.

[210]*See, e.g.*, *In re* Whitmore, 117 N.J. 472, 473, 569 A.2d 252, 253 (1990), in which the attorney, a municipal prosecutor, failed to reveal to the court the arresting officer's im-

opinions, it would appear that the Wilentz Court did not intend to ascribe to 3.3(a)(5) a reading as broad as a literal reading of the rule would suggest. It is unclear if the court's application of this rule will be different under new Chief Justice Poritz.

The remaining requirements of 3.3(b),(c), and (d) are the same in both New Jersey and the ABA, but for some minor language variations.[211]

4. TRUTHFULNESS IN STATEMENTS TO THIRD PARTIES

The Wilentz Court again diverged from the ABA Model Rules in the promulgation of Rule 4.1, dealing with truthfulness in statements to third parties. ABA Rule 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

With the inclusion of this final limiting language in 4.1(b), i.e. "unless disclosure is prohibited by Rule 1.6," the ABA rule essentially nullifies the otherwise affirmative disclosure requirement of 4.1(b) because, as reviewed previously, ABA Rule 1.6 has no provision for disclosure to prevent client fraud, only to prevent a criminal act likely to result in death or substantial bodily harm.[212]

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proper purpose in failing to appear to testify in the prosecution of a DWI charge; *see also In re* Norton and *In re* Kress, 128 N.J. 520, 608 A.2d 328 (1992) (disciplining both the municipal prosecutor and the defense counsel on facts similar to Whitmore).

[211]The full text of the remaining portions of ABA and New Jersey Rule 3.3 provides, with the New Jersey variation in brackets:

> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. (d) In an ex parte proceeding, a lawyer shall inform a tribunal of all relevant facts known to the lawyer which will enable [that should be disclosed to permit] the tribunal to make an informed decision, whether or not the facts are adverse.

MODEL RULES Rule 3.3(b),(c),(d); RPC 3.3(b),(c),(d).

[212]*See supra* notes 200-01 and accompanying text.

By contrast, New Jersey Rule 4.1 contains the same misrepresentation prohibition and disclosure requirement, but provides in 4.1(b) that "[t]he duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6." The New Jersey rule is significant because, in certain situations, it can impose a greater duty upon an attorney to disclose information than is normally required under New Jersey Rule 1.6.

As reviewed earlier, New Jersey Rule 1.6(b)(1) mandates disclosure of information to prevent the client from committing a criminal, illegal or fraudulent act, but only if the situation is "likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." The duty under New Jersey Rule 4.1(b), however, "to disclose a material fact to a third person . . . to avoid assisting a criminal or fraudulent act by a client" has no such limitation. Nevertheless, the comment to New Jersey Rule 4.1 indicates that, unlike Rule 1.6, Rule 4.1 does not impose an affirmative duty to disclose by seeking out the proper authorities, but rather is limited "to those situations in which the lawyer is being questioned by a third party."[213] Thus, in the event of actual questioning by a third party, New Jersey Rule 4.1 imposes greater disclosure requirements than would otherwise be mandated by Rule 1.6

C. CONFLICT OF INTEREST AND THE APPEARANCE OF IMPROPRIETY

Conflict of interest problems clearly present some of the most ethically challenging and legally perplexing areas of professional responsibility. In addition, an attorney must not only resolve the inherently difficult question of whether a potential conflict exists, but must do so knowing that the attorney's decision will be critically assessed in the 20/20 vision of hindsight.

Recognizing the difficulties in this area, the Kutak Commission recommended, and the ABA adopted, completely revamped and detailed Rules of Professional Conduct governing conflict of interest. With the major exception of the Wilentz Court's retention of the "appearance of impropriety" standard, the ABA and New Jersey Rules on conflict of interest, Rules 1.7 through 1.12, track similar language, with some variation under the New Jersey Rules.

The general conflict of interest rule under both the ABA and New Jersey is Rule 1.7. The ABA and New Jersey Rule 1.7(a) and (b) are virtually identical, with the principal exception that under New Jersey law a conflict cannot be cured by client consent when the client is a public entity.[214]

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[213]RPC 4.1 cmt, New Jersey RULES OF COURT: STATE AND FEDERAL 1997, Appendix to Part I (West 1996).

[214]ABA and New Jersey Rule 1.7(a) and (b) provide, with New Jersey variations in brackets:

Where the New Jersey Rules adopted by the Wilentz Court markedly diverge from the ABA Rules, however, is on the issue of the "appearance of impropriety." Canon 9 of the ABA Code of Professional Responsibility provided that "[a] lawyer should avoid even the appearance of professional impropriety." Many courts and ethics committees used this language of Canon 9 in defining conflict of interest law under the Code of Professional Responsibility.[215] The Kutak Commission, however, in adopting the conflict of interest requirements for the ABA Model Rules of Professional Conduct rejected the appearance of impropriety standard as inherently vague.[216]

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after [a full disclosure of the circumstances and] consultation [with the client, except that a public entity cannot consent to any such representation].
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after [a full disclosure of the circumstances and] consultation [with the client, except that a public entity cannot consent to any such representation]. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES Rule 1.6; RPC 1.6.

[215] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §7.1.2, at 315 (1986).

[216] As noted by the Kutak Commission:

> The "appearance of impropriety" test presents severe problems for both the public officeholder and the private practitioner. . . . In the context of private practice, the test has no apparent limits except what a particular tribunal might regard as an impropriety. . . . Canon 9's maxim was not made a part of DR 9-101 (B) because such a standard is too vague and could cause judgments about the propriety of conduct to be made on instinctive, ad hoc or ad hominem criteria . . . Vagueness inherent in the concept of impropriety spawns inconsistent results.

ABA Comm. on Evaluation of Professional Standards, MODEL RULES OF PROFESSIONAL CONDUCT, at 53 (Proposed Final Draft 1981) (citations omitted); *see also* MODEL RULE Rule 1.9 cmt. 5 (1996). Comment Five states:

Countered against this argument, however, is the issue of fostering and maintaining public confidence in the legal system. As expressed by legal ethics scholar Professor Robert H. Aronson:

> The admonition that "[a] lawyer should avoid even the appearance of impropriety" is particularly applicable to potential conflicts of interest. Fostering public confidence in the impartiality of the legal system and the integrity of the legal profession requires more of a lawyer than not being overtly influenced by interests other than those of his client. Because the appearance of impropriety can be just as damaging as actual impropriety to public respect for the law and clients' belief in their attorney's loyalty, attorneys must ensure that their conduct does not reasonably appear to have been influenced by conflicting interests.[217]

The Wilentz Court was obviously more persuaded by arguments such as those espoused by Professor Aronson and chose to retain the appearance of impropriety standard in determining conflicts of interest, contrary to the recommendation of the Debevoise Committee.[218]

New Jersey Rule 1.7, therefore, adds section (c) which provides:

> This rule shall not alter the effect of case law or ethics opinions to the effect that: (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, and (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple represen-

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> The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging.

Id.

[217]Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 810 (1977) (footnotes omitted).

[218]*Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct*, NEW JERSEY LAW JOURNAL, July 28, 1983, at Supp. 6 ("[T]he Committee recommends the elimination of the 'appearance of impropriety' test as a standard for discipline.").

tation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

The Wilentz Court also applied the appearance of impropriety standard to the other conflict of interest rules,[219] including those applying to the former government lawyer.[220]

In *Dewey v. R.J. Reynolds Tobacco Company*,[221] one of the Wilentz Court's leading cases on conflict of interest, the court reaffirmed the applicability and continued vitality of the appearance of impropriety standard in assessing conflicts of interest in New Jersey.[222] This case involved a motion for disqualification filed against the law firm of Wilentz, Goldman and Spitzer. The Wilentz firm was representing a plaintiff in her lawsuit against a defendant tobacco company. During the litigation, an attorney, who had been the law partner of the attorney representing the defendant tobacco company, joined the Wilentz firm. Although the new Wilentz attorney was found not to have actually represented the defendant tobacco company while at his former law firm, the court found that under the "appearance of impropriety" standard, an ordinary knowledgeable citizen acquainted with the facts could conclude that this attorney had represented the defendant, thus creating a conflict of interest.[223]

Undoubtedly, the appearance of impropriety standard makes the practice of law more difficult for New Jersey attorneys in that they must not only decide when an actual conflict of interest exists, but must also endeavor to determine

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[219]*See, e.g.*, RPC 1.8(k) and 1.9(b) (expressly providing, respectively, that "the provisions of RPC 1.7 (c) are applicable as well to situations covered by this rule").

[220]RPC 1.11(b) ("An appearance of impropriety may arise from a lawyer representing a private client in connection with a matter that relates to the lawyer's former employment as a public officer or employee even if the lawyer did not personally and substantially participate in it, have actual knowledge of it, or substantial responsibility for it.").

[221]109 N.J. 201, 536 A.2d 243 (1988).

[222]*Id.* at 214 ("[The appearance of impropriety] doctrine therefore has continuing vitality in this state in situations covered by RPC 1.7, and in those situations covered by other Rules that incorporate RPC 1.7. e.g. RPC 1.9. Thus it is apparent that the 'appearance of impropriety' doctrine is relevant to the determination of whether an attorney has 'represented' a client and is therefore prohibited from subsequently representing a different client with interests that are adverse to those of the first client.").

[223]*Id.* at 215-16, 536 A.2d at 250-51.

when an "appearance of a conflict" exists.

The retention of the "appearance of impropriety" standard, however, is consistent with the recurring theme of Chief Justice Wilentz and his court that the maintenance of a strong public perception of the legal profession is indispensable to the continued viability of the justice system and that, at times, difficult choices must be made by attorneys to preserve public confidence in the legal profession and the system of justice.

Because the *Dewey* case involved the former law firm of Chief Justice Wilentz, the Chief Justice did not participate in the decision.[224] Chief Justice Wilentz's approach to the "appearance of impropriety" standard, however, is expressed in his opinion in *In re Advisory Committee on Professional Ethics Opinion 621*.[225] In this case, Chief Justice Wilentz reaffirmed the importance of the appearance of impropriety doctrine in addressing the ethical restrictions on the private practice of lawyers who are part-time legislative aides. The opinion reconciles the "appearance of impropriety" standard in the New Jersey conflict of interest statute[226] applicable to all state employees and the New Jersey Rules of Professional Conduct ("RPCs"). An attorney who was offered a position as a part-time legislative aide sought review of an opinion of the Advisory Committee on Professional Ethics prohibiting him from representing private parties before any state agency or communicating with such agencies or clients.[227] Chief Justice Wilentz rejected the Advisory Committee's *per se* rule prohibiting an attorney/part-time legislative aide from appearing before any state agency.[228] The Chief Justice concluded that the ruling went beyond the restrictions of the state conflict of interest statute and that it applied the RPCs on facts not evident in the record of the committee's proceedings.[229] Although Chief Justice Wilentz rejected the Advisory Committee's *per se* rule in favor of a case by case analysis,[230] he emphasized that *per se* bright line rules have

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[224]The *Dewey* opinion was written by Justice Clifford with all of the other five justices joining the opinion. *Id.* at 204, 223.

[225]128 N.J. 577, 608 A.2d 880 (1992).

[226]N.J. STAT. ANN. § 52:13D-12 - 27 (West 1996).

[227]127 N.J. 577, 583-84, 608 A.2d 880, 882-83 (1992).

[228]*Id.* at 602, 608 A.2d at 892.

[229]*Id.* at 597, 608 A.2d at 890.

[230]*Id.* at 582, 608 A.2d at 882.

their place in the regulation of attorney conduct.[231]

While recognizing the salutary purposes of the state conflict of interest statute—to maintain the public's confidence in government and to insure that public servants do not, either in fact or in appearance, use their official positions at the expense of the public—Chief Justice Wilentz wisely construed the statute more narrowly than the Advisory Committee. To foster the public interest in preserving the availability of attorneys for part time public service either for the legislature or the executive branch, he again rejected a *per se* rule in favor of a case by case approach.[232] Applying both the state conflict of interest statute and the RPCs, he held, among other things, that attorney/part-time legislative aides "may not represent a private party in any way before any agency of State government in any of its branches if such representation would create an appearance of impropriety."[233] Drawing upon the language of RPC 1.7(c), he concluded that an appearance by an attorney/part-time legislative aide before any state agency would be improper when the attorney realizes or should realize that he or she has become so identified either with the legislator or with entities to which the legislator is connected that "a reasonable person with knowledge of the facts might clearly become concerned that the aide's impact on the agency might adversely affect the public interest."[234]

The cases dealing with the appearance of impropriety where the "member of the official family" doctrine has been applied were cited as analogous to attorney/part-time legislative aides. In those cases, attorneys who were public employees, mostly municipal officials, were disqualified from representing a private party before a public board or agency. Even though a public employee has no actual conflict of interest or divided loyalty, he or she may be so closely connected in fact or in the public's mind with other public employees, boards, agencies, or branches of government that restrictions beyond those called for in actual conflicts cases are required to avoid the appearance of impropriety.[235]

While recognizing that the state conflict of interest statute mirrors the principles and rules of attorney ethics, Chief Justice Wilentz was careful to point out that "[n]either the Legislature nor the Executive has any power to overrule

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[231] *Id.* at 602, 608 A.2d at 892.

[232] *Id.* at 602-603, 608 A.2d at 892-93.

[233] *Id.* at 582, 608 A.2d at 882 (emphasis omitted).

[234] *Id.* at 601, 608 A.2d at 892.

[235] *Id.* at 594-95, 608 A.2d at 888-89.

[or diminish] attorney ethical standards promulgated by [the Supreme] Court."[236] In language clearly overriding legislative authority, the Chief Justice affirmed the Supreme Court's final say in ethical matters involving attorneys:

> [I]f the relaxation or exemption of our ethical standards is granted on the basis of comity, on the basis of consideration of the interests of the other branches of government, on the basis, ultimately, of . . . the public interest, it will be granted only by this Court. . . . [W]e reject the contention that the establishment of ethical standards for a lawyer/government employee is uniquely a matter for the legislature. . . .[W]hen the employee or officeholder is a lawyer, the [l]egislature's ethical mandate becomes a floor, not a ceiling.[237]

V. CHIEF JUSTICE WILENTZ AND HIS FAITH IN THE COURTS AND THE LEGAL PROFESSION

Chief Justice Wilentz was an activist judge with a sense of pragmatic realism and a deep and abiding faith in the capacity of the bench and bar to meet the demands of justice. Ever mindful of the importance of maintaining the public's confidence in the courts and in lawyers, he painstakingly analyzed the facts of a case and carefully balanced competing interests, policies, and values. In the concluding paragraph of *In re Wilson*,[238] his very first opinion, Chief Justice Wilentz expressed his faith in the legal system and the legal profession.

> If public confidence is destroyed, the bench and the 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.[239]

Chief Justice Wilentz' zeal to reform the law and the legal profession is apparent throughout his opinions. They are often very lengthy because they were crafted with historical perspective and were aimed at finding new and

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[236] *Id.* at 590-91, 608 A.2d at 886-87.

[237] *Id.* at 590-91, 608 A.2d at 886-87.

[238] 81 N.J. 451, 409 A.2d 1153 (1981).

[239] *Id.* at 461, 409 A.2d at 1158.

better ways to reconcile individual rights with the common good. When deciding cases involving lawyers, he was never reluctant to subordinate their interests to the public interest or the common good when he thought it was necessary. Perhaps the best example of this is his opinion in *In re Hearing On Immunity For Ethics Complaints,*[240] in which he upheld the validity of a rule[241] providing "that any grievant in an ethics matter or client in a fee arbitration case shall be absolutely immune from suit . . . ."[242] In justifying the rule, Chief Justice Wilentz invoked the importance of maintaining public trust and confidence in the disciplinary system.

> Why jeopardize that trust in the very least by allowing even one citizen to be sued on account of a complaint made against a lawyer, by allowing even one citizen to be threatened with such suit, or by publicly asserting, through a statute, that such a threat can be made good? Is the damage, or the potential damage, to the bar so great that it cannot suffer the infrequent consequences of such a malicious complaint in order to assure even greater confidence in the system than now exists?[243]

Chief Justice Wilentz used similar reasoning in deciding *In re Livolsi,*[244] where he upheld the constitutionality of court Rule 1:20A establishing District Fee Arbitration Committees to arbitrate fee disputes between an attorney and a client. The fee arbitration rule requires binding fee arbitration upon a client's request or upon a lawyer's request if the client consents.[245] Chief Justice Wilentz rejected the argument that compulsory and binding fee arbitration with no right to appeal on the merits denies attorneys a right to trial by jury under the state and federal constitutions.[246] Reasoning that the fee arbitration rule is a means to foster public confidence in the legal system and the legal profes-

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[240]96 N.J. 669, 477 A.2d 339 (1984). For a further discussion of this case and the issue of Grievant Immunity, see *supra* notes 93-101 and accompanying text.

[241]N.J. CT. R. 1:20-11(b).

[242]*In re* Hearing On Immunity for Ethics Complaints, 96 N.J. at 670, 477 A.2d at 340.

[243]*Id.* at 678-79, 477 A.2d 339, 344.

[244]85 N.J. 576, 428 A.2d 1268 (1981).

[245]N.J. CT. R. 1:20A-3(a)(1).

[246]A limited right to appeal to the Disciplinary Review Board on procedural grounds was preserved. *In re* Livolsi, 85 N.J. at 603, 428 A.2d 1282; N.J. CT. R. 1:20A-3(c).

sion, he concluded that clients must be afforded an effective remedy in fee disputes with an attorney.[247] The primary concern behind the fee arbitration rule—that clients should not be forced to incur expenses on appeal—outweighed any concern for lawyers' rights. Thus, *Livolsi* reveals the same readiness to subordinate lawyers' interests to the public interest for the sake of maintaining confidence in the integrity of the bar and bench that Chief Justice Wilentz so often expressed. Equating public confidence in the attorney-client relationship with public confidence in the legal system, Chief Justice Wilentz wrote:

> The client perceives, correctly, that the lawyer is part of the system, and when added to his dissatisfaction with his experience with that lawyer, the system offers him a remedy that, to him, promises not to solve his problem, dissatisfaction turns into despair and resentment. The least we owe to the public is a swift, fair and inexpensive method of resolving fee disputes. This may not end the dissatisfaction of some with the bar and with the judicial system, but, at the very least, it will minimize the extent of [the] dissatisfaction. Further, it is important to assure the public that this Court, which has the ultimate power over the practice of law, will take an active role in making certain that clients are treated fairly in attorney-client disputes.[248]

Writing for the majority of the court in *In re Felmeister & Isaacs*,[249] Chief Justice Wilentz upheld the validity of restrictions on advertising and solicitation by lawyers that were challenged as violative of federal constitutional free speech guarantees.[250] In *Felmeister*, Chief Justice Wilentz writing for the court, rejected the dignity requirement for all advertising in revising RPC 7.2.[251] The rule was revised to include a requirement that all advertising be

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[247] *Id.* at 602-03.

[248] *Id.* at 601-02, 428 A.2d at 1280-81.

[249] 104 N.J. 515, 518 A.2d 188 (1986).

[250] Well before *Felmeister* was decided, however, Chief Justice Wilentz formed a Supreme Court Committee to study all the rules on attorney advertising. *Report of the Supreme Court Committee on Attorney* Advertising, *reprinted in* NEW JERSEY LAW JOURNAL, May 5, 1983, at 3. The committee's recommendation to repeal the ban on radio and television advertising was adopted by the court. *Felmeister*, 104 N.J. at 520, 518 A.2d. at 190. The court also accepted a report from the committee's minority recommending a dignity requirement for advertisements and specifically banning drawings, animations, dramatizations, music, or lyrics. *Id.* at 520-21, 518 A.2d at 190-91.

[251] *Id.* at 516-17, 518 A.2d at 189.

"predominantly informational."[252] The rule further limits the prohibition on the use of drawings, animations, dramatization, music, or lyrics to television advertising. Chief Justice Wilentz opined "that attorney advertising without any restrictions whatsoever might seriously damage important public interests but that excessive restriction might harm other equally important public interests."[253] His goal was to balance both interests, while effecting the greatest possible gain for the public.

While recognizing the absence of any clear proof of the effects of attorney advertising, Chief Justice Wilentz, nevertheless, indicated that a permanent agency was needed to implement the revised rule on attorney advertising.[254] He concluded that attorney advertising met two important goals—informing the public about the availability of legal services and making legal services affordable.

> The public would be well served by more information about the legal system in order to know its legal rights and to help it choose a lawyer to enforce those rights. In no small part because of the prior longstanding prohibition against attorney advertising, a substantial portion of the public is ill-informed about its rights, fearful about going to an attorney, and ignorant concerning how to choose one. Attorney advertising is perhaps the best way to meet these needs.[255]

Despite an activist inclination and the courage of his convictions about what was in the public interest, Chief Justice Wilentz was very aware of the uncertainties of the judicial process. In *Felmeister*, after noting that he was convinced that the "rational selection of counsel serves not only client interest, but the public interest," he recognized the absence of empirical data to demonstrate "just how substantial the adverse effects of non-rational selection of counsel would be."[256] While conceding the necessity to move slowly, he exercised what he believed to be his constitutional responsibility to foster "the

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[252] *Id.* at 517 n.1, 518 A.2d at 189 n.1.

[253] *Id.* at 517, 518 A.2d 199.

[254] *Id.* at 548-49, 518 A.2d at 205-06. The Supreme Court Committee on Attorney Advertising was established to implement and enforce the rule by "monitoring its impact, interpreting it, adopting rules and regulations, evaluating it and reporting to [the] Court." *Id.* at 548, 518 A.2d at 205.

[255] *Id.* at 523-24, 518 A.2d at 192 (citation omitted).

[256] *Id.* at 546, 518 A.2d at 204.

public's interest in the potential benefits of more robust commercial speech," while protecting consumers and preserving professional values.[257] Revealing a willingness to act in the face of uncertainty, he wrote:

> The essential method of achieving the best balance in uncharted waters such as these is the pilot project, the testing, the tentative probe, not a final dogmatic pronouncement and its accompanying rule proclaimed to strike, once and for all, the balance between free speech and whatever other interests may be involved. The Constitution requires no such heroics; it allows us to act with the humility appropriate to our ignorance.[258]

Chief Justice Wilentz's opinion in *Felmeister* also touches on what was a constant theme in his public statements and judicial opinions—the rights of the poor and those unable to afford legal services. Pointing to the need for affordable legal services to secure justice for all, he wrote:

> A legal system that leaves its citizens ignorant of their rights and how to enforce them, or that puts the price of legal services beyond the reach of a substantial portion of its citizens, fails in securing one of society's most fundamental values: the attainment of justice. All members of society, not just the direct recipients and users of the messages, benefit from attorney advertising.[259]

In *Madden v. Delran Township*,[260] Chief Justice Wilentz specifically addressed his concern for the poor by upholding the validity of the appointment of attorneys to represent indigents without pay.[261] In *Madden*, court Rule 1:12-9(e), requiring assignment of attorneys to indigent defendants by the Assignment Judge of each vicinage, was challenged as unconstitutional on equal protection grounds. The petitioner/attorney contended that the rule denied him equal protection of the law because the rule was invoked in some but not all municipalities and some lawyers in petitioner's vicinage were assigned cases

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[257] *Id.* at 546, 518 A.2d at 204.

[258] *In re* Felmeister, 104 N.J. at 546, 518 A.2d at 204.

[259] *Id.* at 524, 518 A.2d at 192-93.

[260] 126 N.J. 591, 601 A.2d 211 (1992).

[261] *Id.* at 594-95, 518 A.2d at 212-13.

and others were not.[262] While recognizing the unfair burden on some attorneys and criticizing the system of assigning attorneys, Chief Justice Wilentz declined to require municipalities to pay counsel who are assigned cases in the municipal court.[263] After noting the equal protection problem existing within vicinages, he held that future assignments of counsel in each vicinage had to be strictly in accordance with the rule.[264] The rule was revised to require all future *pro bono* assignments of attorneys in each vicinage from an alphabetical list (prepared by the assignment judge) of attorneys licensed to practice in New Jersey and whose primary office is in that vicinage.[265]

Chief Justice Wilentz had no illusion that the revised system was ideal.[266] He was reluctant, however, to exercise the power to institute what he thought was ideal, namely, a system in which every municipality would be required to provide a public defender for the municipal courts.[267] In urging the legislature to act, he wrote in *Madden*:

> We realize that this revised system falls far short of the ideal. A system of public defenders or paid counsel is clearly superior to what we order here. We do not order government to pay for counsel, putting aside the question of our power, only because we believe that the damage done to the judiciary and to the relationship among the branches of government would far exceed the damage done by this relatively inefficient system. Our current system is unworthy of the traditions of this state. We note that legislation proposed by the Law Reform Commission would require every municipality to provide a public defender. . . . We have no doubt that that is the ideal system, not ideal in the sense of unrealistic but ideal in the sense of the best system to meet the constitutional requirement. It is the most efficient, the fairest, the most likely to achieve equal and effective representation of indigent defendants at the least cost. It is a system that should be instituted by other branches of government. We urge them to act and trust they will. The victim of the present system is

[262] *Id.* at 599-600, 518 A.2d at 215 (stating that plaintiff claims that some courts most often appoint only those lawyers that regularly appear in municipal court).

[263] *Id.* at 606, 518 A.2d at 218.

[264] *Id.*

[265] *Id.* at 607, 518 A.2d at 219.

[266] *Id.* at 608, 518 A.2d at 219.

[267] *Id.*

not the bar, but the poor.[268]

While expressing reluctance to exercise the power to order payment of assigned counsel and deferring to the legislature, Chief Justice Wilentz implies that the court might act should the legislature fail to institute a public defender system for municipal courts. He adopted the same approach that former Chief Justice Weintraub took in *State v. Rush*,[269] where an attorney assigned to represent an indigent in a murder case sought payment for his legal services. Writing for the majority in *Rush*, Chief Justice Weintraub refused to order payment of assigned counsel. After noting that the court had the power to order such payment and implying that it may do so in the future, he urged the legislature to act to establish a public defender system.[270] Within a year after *Rush* was decided, the legislature created a statewide public defender system to provide representation to indigents in criminal cases in the upper courts.[271] The New Jersey legislature, however, has yet to respond to the urging of Chief Justice Wilentz in *Madden* to establish a public defender system for the municipal courts.[272]

Chief Justice Wilentz found no constitutional problem with mandatory *pro bono*. In *Madden*, he wrote:

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[268] *Id.* at 614-615, 601 A.2d at 222.

[269] 46 N.J. 399, 217 A.2d 441 (1966).

[270] *Id.* at 414-15; 217 A.2d at 448-49.

[271] In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to counsel under the Sixth Amendment of the United States Constitution was incorporated into the due process clause of the Fourteenth Amendment and applied to the states so as to require the appointment of counsel to indigents in felony cases. *Id.* at 342. In *Argersinger v. Hamlin*, 407 U.S. 25 (1971), right to counsel under the Sixth and Fourteenth Amendments was extended so that "absent a knowing, and intentional waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

[272] The Judiciary Committee of the New Jersey State Assembly recently voted unanimously to recommend passage of a bill drafted by the New Jersey Bar Association's Pro Bono Committee. Michael Booth, *Is an End to Mandatory Pro Bono in Sight?*, NEW JERSEY LAW JOURNAL, Feb. 17, 1997, at 4. The bill, A2720, would require all municipalities to hire public defenders. *Id.* The proposed legislation includes a provision that municipalities can require indigent defendants to pay an application fee of $100, which would be earmarked for public defender services. *Id.* This provision is designed to avoid constitutional problems presented by bills requiring local governments to spend money. *Id.* In 1995, New Jersey voters passed a referendum which bars the state from requiring local governments to perform a service without providing the funds to pay for it. *Id.*

> Every constitutional claim that [*Madden*] asserts was disposed of in *Rush*. The taking of private property for public use without just compensation, denial of due process, denial of equal protection, denial of the right to counsel, all were explicitly or implicitly rejected in that case.[273]

Chief Justice Wilentz was always ready to call upon lawyers to provide mandatory *pro bono* legal services. In one of the very last cases he decided, *John Doe v. Poritz*,[274] he upheld the constitutionality of Megan's Law, which requires registration by convicted sex offenders with local police and thereafter notification by the police of registrants' presence in the community. To insure procedural due process and fundamental fairness to those subject to Megan's Law, the Chief Justice required, among other things, that they be given notice of their right to a pre-notification hearing and the right to counsel.[275] He wrote:

> [t]he court shall immediately upon receipt of such objection set down a date for a summary hearing and decision on the issue. If the offender does not have counsel, the court shall assign same. We strongly suggest that legislation providing for that representation be adopted.[276]

Without waiting for the legislature to act, Chief Justice Wilentz exercised his broad constitutional power over the courts and the practice of law by ordering the assignment of attorneys to represent sex offenders in *Doe* hearings. He sent a memorandum to assignment judges directing them to assign lawyers from a list of the very best criminal lawyers.[277] This imposition on lawyers of compulsory *pro bono* representation was met with strong objection from the New Jersey State Bar Association.[278] Ultimately, the matter was resolved

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[273]126 N.J. at 597-98, 601 A.2d at 214.

[274]142 N.J. 1, 662 A.2d 367 (1995).

[275]*Id.* at 30-31, 662 A.2d at 382.

[276]*Id.* at 31, 662 A.2d at 382.

[277]Dana Coleman, *Pro Bono Constitutional Attack Brews*, NEW JERSEY LAWYER, Oct. 30, 1995, at 16.

[278]*See* Dana Coleman, *Megan's Law Furor and Fall out; Bar to State: No Free Lunch*, NEW JERSEY LAWYER, Oct. 23, 1995, at 1, 30; Dana Coleman, *Pro Bono Constitutional Attack* Brews, NEW JERSEY LAWYER, Oct. 30, 1995, at 1, 16; Maureen Casteallano, *Who Will Blink First? Bar Balks at Pro Bono; Wilentz Doesn't Budge*, NEW JERSEY LAW JOURNAL,

when the Governor's office allocated $250,000 in additional funds and directed the Office of the Public Defender to provide representation to indigent sex offenders in *Doe* hearings to contest their classification under Megan's Law.[279]

VI. CONCLUSION

Any assessment of the impact of the Wilentz Court on the legal profession must recognize the sweeping changes and the higher level of public accountability that the court imposed upon New Jersey lawyers. The Wilentz Court, more so than any other court in the United States, reordered the priority of interests promoted by lawyers' disciplinary and ethical rules so that the public interest and the interests of clients are paramount to the interests of lawyers. The zeal with which Chief Justice Wilentz sought to safeguard the public interest was exceeded only by his zeal to foster and preserve public confidence in the legal system and the legal profession.

The Wilentz Court's legacy of reform serves as a testament to Robert Wilentz, the man. As Chief Justice, Robert Wilentz set the tone, charted the direction, provided the leadership, and maintained to the very end an unswerving commitment to the noble traditions and high ethical values of the legal profession. Under his leadership, the New Jersey Supreme Court unhesitatingly invoked its power pursuant to Article 6, Section 2, Paragraph 3 of New Jersey Constitution to regulate the practice of law. The Wilentz Court exercised this power: by equating any knowing misappropriation of client trust funds with stealing, thus warranting disbarment; by preserving the appearance of impropriety as a standard of discipline and disqualification; by requiring disclosure of client confidential information when necessary to prevent harm to third parties or the judicial system; by regulating lawyer advertising and solicitation; by rendering the lawyer disciplinary system more efficient and more responsive to client complaints against lawyers; by mandating *pro bono* representation when necessary to protect the rights of the poor; and in myriad other ways.

Chief Justice Wilentz and the Wilentz Court have set very high standards for New Jersey lawyers. Through his leadership, Chief Justice Wilentz and his court established for the profession and the public a fair, effective, and comprehensive system of professional ethics that will serve as our guide as we embark on the next millennium.

Oct. 30, 1995, at 1, 8.

[279]Dana Coleman, *Attorneys Applauding Megan's Law Retreat*, NEW JERSEY LAWYER, Nov. 6, 1995, at 1.