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NJ Midyear Report: Disbarment Rethink, Record Access Wins

By **Bill Wichert**

Law360 (June 24, 2022, 4:37 PM EDT) -- The New Jersey Supreme Court in recent months opened the door to reinstating disbarred attorneys and ensured public access to law enforcement records, while lower appellate courts blessed nondisparagement clauses in employment-related settlement agreements and put the burden on personal injury litigants to justify conditions for defense medical examinations.

Those Supreme Court decisions called for examining whether disbarment should remain permanent in knowing misappropriation cases, and for releasing records about law enforcement personnel who were accused of misconduct. In a separate ruling, the justices created a new rule for taxpayers looking to challenge processes to award public contracts.

The state's Appellate Division also issued published opinions finding that a state law barred nondisclosure agreements but not nondisparagement provisions, and holding that it's up to plaintiffs to make the case for recording examinations by medical professionals retained by defendants or having third parties accompany them to the sessions.

Here is a look at some of the major rulings handed down by Garden State courts this year.

Attorney Disbarment

The Supreme Court pondered giving a **"second chance"** to disbarred lawyers as part of its June 7 opinion in the ethics case against attorney Dionne Larrel Wade. A disciplinary panel had recommended that Wade be disbarred under the state's so-called Wilson rule for using client and escrow funds in her attorney trust account for improper purposes.

In accepting that recommendation, the justices refused to disturb the rule — based on the court's 1979 In re: Wilson decision — which provides for automatically disbarring attorneys who knowingly misappropriate client or escrow funds. A lawyer "who knowingly takes a client's funds without permission will be disbarred," the court said.

But the justices said they would establish a committee to study whether disbarment should continue to be permanent in all knowing misappropriation cases or whether New Jersey should have a system where disbarred attorneys in such matters could later seek reinstatement, similar to the opportunities afforded in the vast majority of states and Washington, D.C.

On Thursday, the court **announced** the 28 members who will serve on the committee.

Kim D. Ringler of The Ringler Law Firm, a committee member who represents lawyers in ethics cases, praised the court's initiative and said disbarred attorneys who can later demonstrate rehabilitation and fitness should have a path to reinstatement.

Giving lawyers the possibility of resuming their careers is "compassionate and consistent with the goals of attorney discipline," Ringler said.

The Supreme Court "can retain the rigidity of the Wilson rule and, at the same time, hold out some hope for a lawyer to resume practice with the proper showing down the road, and that puts us in line with most other jurisdictions on the permanency aspect," she added.

The case is In the Matter of Dionne Larrel Wade, An Attorney At Law, case number 085931, in the New Jersey Supreme Court.

Public Records Access

In cases decided a week apart, the Supreme Court in March ordered the release of records about a former corrections officer accused of sexual misconduct on the job and an ex-municipal police director who allegedly made racist and sexist remarks.

The court's initial ruling reversed an appellate decision that a settlement agreement between the officer and a county was a personnel record exempt from disclosure under the state's Open Public Records Act.

In response to an OPRA request, the county cited that exemption in withholding the document and misrepresented the nature of the officer's departure, the court said. The county had said he was terminated, but he was allowed to retire in good standing and receive a reduced pension, the court said.

At the trial court level, the county also pointed to the officer's "reasonable expectation of privacy" with respect to the internal disciplinary procedure leading to the agreement, saying OPRA "constrains" the county from disclosing the document and "breaching its ongoing duty of confidentiality" to the officer.

The justices found that certain information in the settlement agreement is publicly accessible and ordered it released in redacted form. "Without access to actual documents in cases like this, the public can be left with incomplete or incorrect information," the March 7 opinion said.

The second decision, on March 14, overturned an appellate opinion that internal affairs records about the police director could not be released under either the common law or OPRA.

In that matter, the county prosecutor's office that conducted the internal affairs probe had cited the need to keep such records confidential and claimed that releasing them could impede future police misconduct investigations, court documents state.

The Supreme Court found that the records were shielded under OPRA, but they **could be disclosed** with redactions under the common law.

CJ Griffin of Pashman Stein Walder Hayden PC, who represented the different parties seeking records in the two cases, said the decisions will be "two powerful tools to learn about police misconduct and the way in which internal affairs units function and hold officers accountable and the terms by which officers depart from employment."

"I also think they both get at this concept that we don't have to rely upon government press releases or statements to reporters about what occurred, that we get to see actual documents and find out what's there," Griffin said.

The cases are Libertarians for Transparent Government v. Cumberland County and Rivera v. Union County Prosecutor's Office et al., case numbers 084956 and 084867, in the New Jersey Supreme Court.

Construction Challenges

More than a month after those records-related decisions were released, a split Supreme Court on April 28 upheld an appellate decision regarding lawsuits challenging the lack of public bidding to hire a redeveloper for a courthouse project.

Based on the Supreme Court's 1981 opinion in Autotote Ltd. v. New Jersey Sports & Exposition Authority, a five-judge majority said a construction company's suit was barred since it had participated in the selection process and its proposal was rejected. Autotote, however, did not prohibit an action from a company executive in his capacity as a taxpayer, the majority said.

The majority said a taxpayer now has to **file a certification** with a suit challenging the process to award a public contract for goods or services. That certification must say the person is acting on his or her own and not being directed by any applicant that took part in the process, and that the individual is covering legal fees and expenses in pursuing the case, the majority said.

Steven Nudelman, a construction attorney with Greenbaum Rowe Smith & Davis LLP, said such taxpayer challenges from executives are fair and "the court, in coming up with what it came up with here by having this certification, is ensuring that it is as fair as could be, honoring the concept of taxpayer standing."

But the certification requirement makes it incredibly unlikely that an executive would bring a challenge, according to Stuart M. Lederman of Riker Danzig LLP. Establishing an executive's independence from the business may be difficult and the mandate to cover one's own legal tab could be problematic for executives and other taxpayers, Lederman said.

"You could argue they've disenfranchised someone from bringing that challenge — anyone associated with the company," said Lederman, whose practice includes construction matters.

Robert C. Epstein of Greenberg Traurig LLP, a construction attorney who represented the plaintiff in Autotote, echoed those points. He noted that public bidding laws are intended to protect taxpayers.

"Adding this new requirement of this total independence from any other competitors, in my opinion, is going to absolutely stymie any realistic possibility of getting these taxpayer challenges anymore," said Epstein, adding that the rule is negating decades of "taxpayer jurisprudence and ... disserving the public interest.

The case is Dobco Inc. v. Bergen County Improvement Authority, case number 086079, in the New Jersey Supreme Court.

Defense Medical Exams

In the first of the published opinions from the Appellate Division, a panel on May 3 outlined a framework for third-party observation and recording of defense medical examinations. The decision served as an update to the Appellate Division's 1998 B.D. v. Carley opinion.

Among the panel's holdings, trial judges may decide on a case-by-case basis whether to permit third-party observation or a recording "with no absolute prohibitions or entitlements." The panel also held that "despite contrary language in Carley, it shall be the plaintiff's burden" to **justify the conditions** going forward.

Maxine Neuhauser of Epstein Becker & Green PC, whose practice includes representing employers, said placing that burden on plaintiffs is appropriate. She noted how the appellate decision touched on concerns that the conditions would impact an examination.

"I think that it's fair to have the plaintiff [explain], in light of those concerns, why [their] need trump[s] those concerns," Neuhauser said.

However, Paul Castronovo of Castronovo & Mckinney LLC, who represents employees, argued that plaintiffs should be allowed to record the sessions "as a matter of right" since the physicians are not their doctors.

"To me, it seems odd that an examination that is not covered by the patient-physician privilege — an examination that is not by a doctor chosen by the plaintiff — can't be recorded as a matter of right," Castronovo said.

But Castronovo expressed skepticism about permitting third parties to attend the examinations, citing the risk that they might interfere with the tests.

While it would be proper for a third party to attend the examination of a child or a person with a severe cognitive limitation, their attendance generally opens the door for "a lot of mischief and can

really distort the record," Castronovo said.

The cases are Kathleen DiFiore v. Tomo Pezic et al., case number A-2826-20, Dore Deleon v. The Achilles Foot and Ankle Group et al., case number A-0367-21, and Jorge Remache-Robalino v. Nader Boulos M.D. et al., case number A-1331-21, all in the Superior Court of the State of New Jersey, Appellate Division.

Nondisparagement Clauses

A month after the opinion on defense medical examinations, a different appellate panel on May 31 held that settlement agreements in employment-related cases may include provisions requiring parties not to disparage one another.

The panel rejected a former police sergeant's argument that the nondisparagement clause at issue in her case was invalid under a 2019 state law that barred provisions "in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a 'non-disclosure provision')."

That law prohibited nondisclosure agreements and did not affect **nondisparagement provisions**, the panel said. Neither the language of the statute nor its legislative history "indicate an intent by the Legislature to prohibit the enforcement of non-disparagement provisions," the panel said.

Neuhauser said the panel correctly interpreted the statute, saying there's a difference between facts and "character assassination."

The law "was focused on not permitting defendants to bury the facts under the blanket of a confidentiality agreement," she said. Disparagement often rises to the level of defamation, and "I would imagine that the Legislature did not want to legalize defamation or to be seen as legalizing defamation or slander," she said.

But Andrew Dwyer of The Dwyer Law Firm LLC, who represents employees, argued the language in the statute prohibits what would be considered nondisparagement provisions. The law encompasses "any clause that has the purpose or effect of concealing the details of claims of discrimination," he said.

"Claims of discrimination are going to be disparaging," Dwyer said.

The effect of including such nondisparagement clauses in settlement agreements is that "people who experience discrimination will be reluctant to talk about it, and that's what allows this behavior to persist," he said.

The case is Christine Savage v. Township of Neptune et al., case number A-1415-20, in the Superior Court of the State of New Jersey, Appellate Division.

--Editing by Marygrace Anderson.
