

Garden State CLE Presents:

12 Angry Credits



**Introduction to New Jersey Attorney
Discipline**



Lesson Plan

Instructor

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New Jersey Attorney Discipline (Thomson-Reuters)

Introduction: N.J. Attorney Cohort

- 1.) According to the Office of Attorney Ethics 2018 Annual Report, as of July 1, 2018, there were some 2,128,763 licensed attorneys in the United States.**
- 2.) In New Jersey, the attorney population in 2018 was 98,657 (44% admitted since 2001) of which 75,000 were in active practice.**
- 3.) Only 37,000 attorneys are engaged in the private practice of law.**
- 4.) 76% of the licensed attorneys in New Jersey are also admitted in one or more other jurisdictions, primarily Pennsylvania and New York. Although 5 are admitted in Guam, none are admitted in Wyoming!**
- 5.) This attorney cohort served a state population in 2018 of 8,908,520 people, or roughly one lawyer for every 91 residents of New Jersey.**
- 6.) In terms of county distribution, Essex had the most law firms (4311) and Salem the fewest (45).**

This represents the disparate attorney population that is subject to the disciplinary authority of the Supreme Court.

Part I – Supreme Court and Disciplinary Agencies

1.) The authority to impose any level of discipline upon attorneys in New Jersey has been vested exclusively in the Supreme Court by virtue of the 1947 Constitution. Specifically, Article VI, section II, paragraph 3:

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The Supreme Court has adopted the Rules of Professional Conduct (RPC) as promulgated by the American Bar Association in Chicago. All New Jersey attorneys must abide by the RPC's as per Rule 1:14. These Rules must be enforced without exception by judges under Rule 1:18. The Court has also promulgated a series of Rules to manage the attorney disciplinary system. See Rule 1:20-1 through 1:20-23.

2.) Purpose – The attorney disciplinary system is not intended to punish attorneys. Punishment is the province of the criminal law. The sole purpose and goal of the attorney disciplinary system is to protect the public from attorneys who cannot conform their conduct to the requirements of law. In re Rigolosi, 107 N.J. 192, 206 (1987). It is also intended to deter the respondent attorney from future acts of professional misconduct.

3.) Administrative disciplinary agencies – Under Rule 1:20-2, the Supreme Court created the Office of Attorney Ethics (OAE). It is headed by a Director and a First Assistant. The Director is the chief disciplinary officer in the State and oversees all investigations and prosecutions of disciplinary matters involving attorneys.

4.) The Supreme Court has also authorized the creation of regional District Ethics Committees (DEC), made up of volunteer attorneys and lay members who conduct local investigations, prosecutions and hearings. In 2018 there were 540 attorneys and 122 lay people assigned to these committees.

5.) A disciplinary determination made by either the OAE or the DEC is subject to de novo review by the Disciplinary Review Board (DRB) in Trenton. Under Rule 1:20-15, the DRB serves as an intermediate appellate agency that reviews determinations of fact and law and makes independent, detailed, written recommendations to the Supreme Court as to the appropriate level of discipline for every case. Although the Supreme Court is the only administrative body that can impose discipline, the recommendation of the DRB is accepted by the Court in the vast majority of cases. In 2018, a total of 207 attorneys were subject to either final or temporary discipline by the Court.

Part II – The Disciplinary Process

1.) Grievances - The attorney disciplinary process usually begins with the filing of a grievance against an attorney. Grievances come from various sources, including clients, other attorneys, judges and the OAE itself. On receipt of a grievance, a determination is made as to whether the facts alleged, if true, would constitute unethical conduct. If the facts alleged in the grievance would not constitute unethical conduct (for example, where the lawyer did not pay a personal bill), the case will not be docketed. If, on the other hand, a determination is made that the facts alleged in the grievance, if true, would constitute unethical conduct, and if the grievance is not otherwise properly declined, the grievance is docketed.

2.) INVESTIGATIONS - Docketed grievances are assigned for investigation to determine whether unethical conduct may have occurred and, if so, whether there is sufficient evidence to prove the charges to a clear and convincing evidence standard. Investigations include communicating with the respondent-attorney, the grievant and any necessary witnesses, as well as securing necessary records and documents. Every New Jersey attorney is required to fully cooperate in a disciplinary investigation. Rule 1:20-3(g)(3). During 2018, 1224 new grievances were added to the inventory of active disciplinary cases.

3.) Confidentiality - Pursuant to R.1:20-9(b), all disciplinary investigations are confidential until and unless a formal complaint or other charging document has been filed and served upon the attorney-respondent. Thereafter, the pleadings and hearings are public, but other documents and records will nonetheless remain confidential. Disciplinary officials have a duty to maintain the confidentiality of the system and of all non-public documents. R. 1:20-9(i). Once a formal complaint or other charging document is filed, the complaint and any other document filed thereafter become

public (with minor limitations) but subject to protective orders in rare situations.

4.) **Ethics Complaints** - At the conclusion of the investigative process, a determination is made as to whether there is adequate proof of unethical conduct. If there is no reasonable prospect of proving unethical conduct to the requisite standard, the matter is dismissed. If, however, there is a reasonable prospect of proving unethical conduct by clear and convincing evidence, and the matter is not diverted, a formal complaint is filed and served on the respondent-attorney who then has 21 days to file a verified answer. In 2018, a total of 291 new disciplinary complaints were issued.

5.) **Hearings** - Once a verified answer has been filed, a public, disciplinary hearing is scheduled and held. In both standard and complex cases, the matter is tried before a hearing panel consisting of three members, composed of two lawyers and one public member. In some complex cases, however, a special ethics master may be appointed by the Supreme Court to hear and decide the matter. The procedures in disciplinary hearings are similar to the procedures followed in court trials. A verbatim record of the entire proceeding is made. Testimony is taken under oath. Attendance of witnesses and the production of records may be compelled by subpoena. After the conclusion of the hearing, the panel or special ethics master deliberates and prepares a hearing report either dismissing the complaint, if it determines that the attorney has not committed unethical conduct; or finding the lawyer to have committed unethical conduct with the recommendation of the level of discipline. This determination is then forwarded to the DRB for *de novo* review. In 2018, it took the OAE an average of 487 days to bring a disciplinary case to hearing. Hearings done by the local DEC took an average of 352 days to come to trial.

Part III – The Five-Step and Single-Step Cases

In *In re Witherspoon*, 203 N.J. 343, 358-59 (2010), the Supreme Court stated:

Our system of discipline, as a result, includes few bright line rules, because few indeed are the acts for which one sanction will be invariably appropriate. Considering how best to protect the public from a particular attorney ordinarily involves considering the ethical lapses both in comparison to our relevant disciplinary precedents and in the context of that attorney's history rather than merely identifying the attorney's specific unethical act. Our evaluation of the appropriate quantum of discipline, therefore, is necessarily fact sensitive.

In conformity with this statement, the vast majority of contested, New Jersey attorney disciplinary cases go through a five-step process. You will note that the structure of the DRB decisions address each of the five steps. The end result is to arrive at a level of discipline that will protect the public and deter future acts of misconduct by the respondent.

a.) The Five Step Cases

Step 1 – What happened? The determination of the facts of a disciplinary case involves deciding whether clear and convincing evidence supports the violation of an RPC. The misconduct may occur in the context of either professional or private activities by the attorney.

Step 2 – How has the Supreme Court and the DRB imposed discipline in prior cases for an RPC violation based upon similar facts? A disciplinary system based upon unpredictable or wildly random outcomes would be both intolerable and a violation of fundamental due process. Our Supreme Court has adopted a system where disciplinary precedent plays a key role in determining the level of discipline required to protect the public.

Step 3 – What is the respondent attorney's personal disciplinary history? A disciplinary history may be a significant aggravating or mitigating factor in deciding upon the level of final discipline. An attorney who has been subject to frequent and ineffective discipline can expect enhanced discipline when compared to a long-time practitioner who has never had any disciplinary issues.

Step 4 – Aggravating factors. Depending upon the nature of the misconduct, the attorney's RPC violations may have caused significant financial, physical, emotional or psychiatric harm to a client or another person. In cases involving criminal conduct, the victim is the reputation of the bar and the loss of public confidence in its integrity and competence. Discipline in these cases is intended to provide a measure of reassurance to the public.

Step 5 – Mitigating factors – What steps has the respondent taken to make things right? These can include drug/alcohol/gambling rehab, psychiatric treatment, payment of restitution, apology, community service and other steps calculated to demonstrate both contrition and rehabilitation.

b.) The One Step Cases

Contrary to the analysis set forth in *Witherspoon*, there are certain categories of misconduct where the level of discipline in the form of disbarment has been pre-determined by the Court and will be imposed without exception. As a result, these are one-step cases. Once the underlying misconduct has been proved by clear and convincing evidence, the case is over. The misconduct automatically triggers the discipline by way of disbarment. No amount of skilled advocacy can change the outcome. There are no aggravating or mitigating factors for the Court to consider. Moreover, the attorney's prior disciplinary record is irrelevant. These cases invariably result in disbarment.

Examples of one-step cases include the following:

- 1.) Knowing misappropriation of client funds: If an attorney knowingly takes funds belonging to a client without the client's consent, the discipline is invariably disbarment. In re Wilson, 81 N.J. 451 (1979). RPC 1.15(a).**
- 2.) Knowing misappropriation of escrow funds: If an attorney knowingly takes funds from an escrow without the consent of all the stakeholders, the discipline is invariably disbarment. In re Hollendonner, 102 N.J. 21 (1985).**
- 3.) Knowing misappropriation of law firm fees or falsifying expenses: An attorney who misappropriates fees that belong to the law firm or submits false expense statements is subject to disbarment. In re Siegel, 133 N.J. 162 (1993); In re Greenberg, 155 N.J. 138 (1998) (dissent by Justices O'Hern or Stein). But see In re Sigman, 220 N.J. 141 (2014) (30-month suspension stemming from reciprocal discipline based upon defense of self-help in a financial dispute with the law firm).**

4.) Bribery of a public official – This rule of law is of long-standing and applies to either receiving or paying a bribe from or to a public official. In re Cammarano, 219 N.J. 415 (2014).

c.) Special Rules for Criminal Matters and Reciprocal Discipline

A criminal conviction or the imposition of discipline in another jurisdiction constitutes conclusive proof of the underlying RPC violation. While this can vary widely in reciprocal cases, it is invariably RPC 8.4(b) in criminal matters (commits a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). As a practical matter, this means that the only issue that is relevant (and admissible) in these types of disciplinary hearings relates to aggravating and mitigating factors only. The underlying reciprocal discipline or criminal conviction may not be collaterally attacked.

As a general rule, reciprocal discipline is normally the same as was imposed in the foreign jurisdiction. RPC 8.4(b) violations run the entire spectrum of possible disciplinary outcomes, based upon the nature of the offense, harm to victims, sentence imposed, prior disciplinary history, disciplinary case law precedent and other factors.

Simply stated, the defense of these cases requires enormous attention and consideration to the collateral consequences associated with a criminal conviction or reciprocal discipline.

Part IV – Levels of discipline

The Supreme Court has authorized escalating levels of discipline for wayward New Jersey attorneys. These include the follow:

1.) Diversion from the attorney disciplinary system: a non-disciplinary treatment by consent for attorneys who admit they have committed "minor" unethical conduct and who otherwise qualify for diversionary treatment. Minor unethical conduct is conduct, which, if proved, would not warrant a sanction greater than a public admonition. Diversion is accomplished through an "Agreement In Lieu of Discipline." See R. 1:20-3(i)(2)(A) and (B). A diversion may take place only if the attorney acknowledges the misconduct and agrees to take remedial steps (sometimes beneficial to the grievant) to assure future compliance with the Rules. The primary purpose of diversion is education and the productive resolution of disputes between clients and attorneys outside of the disciplinary process. It permits the disciplinary system to focus resources on more serious cases. Diversion conditions generally do not exceed a period of six months. If successfully completed, the underlying grievance is dismissed with no record of discipline. If diversion is unsuccessful, a disciplinary complaint is filed and prosecuted. During calendar year 2018, a total of 51 matters were approved for diversions.

2.) Admonition - the least serious sanction is a written admonishment meted out either by letter of the Review Board or by Order of the Supreme Court. R. 1:20-15A(a)(6). This level of discipline is public although it will not be subject to publication in New Jersey Reports.

3.) Reprimand – This constitutes a public rebuke from the Court of the attorney's behavior. The order of discipline will be published in New Jersey Reports.

4.) Censure - is a public condemnation by the Court of the attorney's misconduct. R. 1:20-15A(a)(4). The order of discipline will be published in New Jersey Reports.

5.) Suspension from practice – A suspension precludes an attorney from practicing law for the period it is in effect. An attorney may not resume practicing at the end of the suspension until the Supreme Court orders reinstatement. There are two types of suspensions. Term suspensions prevent an attorney from practicing for a specific term between three months to three years (R. 1:20-15A(a)(3)) and indeterminate suspensions that last for a minimum of five years and until order of the Court (Rule 1:20-15(a)(2)). See *In re Cohen*, 220 N.J. 7 (2014) (Indeterminate suspension imposed following conviction for child pornography offenses).

6.) Disbarment – This level of discipline irrevocably removes the ability of the respondent to ever practice law in New Jersey and other jurisdictions. Only three other states make disbarment permanent in all cases. Disbarment may occur by order of the Court or by consent (an option that may hold advantages for the respondent). Given the finality of this judgment, extraordinary effort is required in defending these cases. Even “one-step” cases like a knowing misappropriation require a level of sensitivity and close effort in defense.

Emergent action - Whenever the OAE believes a serious violation of the Rules of Professional Conduct has occurred and that an attorney “poses a substantial threat of serious harm to an attorney, a client or the public” (R. 1:20-11), it may file an application seeking the attorney's immediate temporary suspension from practice, pending ongoing investigation. Examples include the arrest, indictment or conviction of an attorney for a serious, high profile crime (See Rule 1:20-13) or a failure to cooperate in an investigation, especially where trust account issues are in play. The Supreme Court may either suspend the attorney temporarily or impose a temporary license restriction, which permits the lawyer to continue to practice, but places conditions on that privilege. Conditions may include

oversight by a proctor of the attorney and/or trust account. In 2018, 33 attorneys were subject to temporary suspension based upon emergent applications from OAE.

Part V – Common Reasons for Discipline

The categories of attorney discipline each year follow a pattern and appear to be consistent over time. The common reasons for discipline involve the following:

- 1.) Knowing misappropriation of client funds (*Wilson* offenses) – This is the most common reason for attorney discipline in New Jersey. In 2018, 28 attorneys were subject to disbarment as a result of knowing misappropriations, 16% of the total number of final discipline by the Court. Often, these cases begin from a trust overdraft notice to the OAE from the respondent’s bank or as part of a random OAE audit.**
- 2.) Other money offenses – In second place for 2018 was the category of “Other Money Offenses” at 14.4% (25 of 174 cases). This category includes negligent or reckless misappropriation, serious trust account recordkeeping deficiencies, and failure to safeguard funds and escrow violations. These cases often result in reprimands although suspensions are normal for repeat offenders or those with significant disciplinary histories.**
- 3.) Dishonesty, Fraud, Deceit and Misrepresentation was the third most common reason why attorneys were disciplined in 2018. Twenty-one (21) of the 174 attorneys disciplined in 2018 (or 12%) engaged in some type of dishonesty, fraud, deceit or misrepresentation. These cases typically result in a reprimand, although egregious matters have frequently resulted in lengthy suspensions and occasional disbarments.**
- 4.) Criminal convictions – In the context of attorney discipline, criminal conduct subsumes both petty offenses and crimes, but not traffic tickets or ordinance violations. Criminal Convictions (excluding misappropriation, fraud and drug convictions) was the fourth most common reason why attorneys were disciplined in 2018. Close to 11% (19 of 174**

cases) of the attorneys disciplined in 2018 were convicted of criminal offenses. The range of discipline in these cases goes from reprimand to disbarment depending upon the nature of the crime and (significantly) the length of any jail sentence.

- 5.) Gross Negligence, Lack of Diligence - These cases implicate RPC 1.1 and 1.3. A pattern of negligence is typically supported by three independent acts of negligence. Attorneys who engage in grossly negligent conduct, who lack diligence or act incompetently are a clear danger to the public. In the absence of significant aggravating factors, these cases usually result in a reprimand. Nineteen (19) such cases resulted in final discipline in 2018.**

- 6.) Conflicts of interest – The general rule on conflicts is found in RPC 1.7, which states that a lawyer may not represent a client if the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. A waiver of a conflict generally requires three different writings by the client. See RPC 1.8. There were 8 such cases in 2018. In the absence of significant aggravating factors, these cases usually result in a reprimand. Suspensions have been imposed when the conflict results in significant harm to a client.**

- 7.) Unauthorized practice of law - The Unauthorized Practice of Law is defined by RPC 5.5 to include not only an attorney practicing New Jersey law after his license to practice here has been suspended or revoked, but also when an attorney admitted here assists a non-lawyer in the performance of activity that constitutes the unauthorized practice of law. There were 8 such cases in 2018. In the absence of significant**

aggravating factors, these cases usually result in a reprimand or an admonition.

- 8.) Failure to cooperate with ethics authorities - Attorneys have an ethical obligation under RPC 8.1(b) and R.1:20-3(g)(3) to cooperate during the investigation, hearing and processing of disciplinary matters. Some lawyers are disciplined for non-cooperation even though the grievance originally filed against them was ultimately dismissed because there was no proof of unethical conduct. The disciplinary system could not properly function and endeavor to meet its goals for timely disposition of cases without the attorney's cooperation. There were 8 such cases in 2018. In the absence of significant aggravating factors, these cases usually result in a reprimand. It is also a significant aggravating factor when coupled with other misconduct.**
- 9.) Candor before the tribunal - RPC 3.3 prohibits lawyers from knowingly making false statements of material fact or law to a tribunal, from failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client and failing 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. There were 7 such cases in 2018. (See *In re Seelig*, 180 N.J. 234 (2004)). In the absence of significant aggravating factors, these cases usually result in a reprimand.**
- 10.) Ineligible to practice law – Ineligibility can be based upon failure to timely pay attorney registration fees, provide IOLTA information or complete bi-annual CLE requirements. This category has been in the top ten grounds for discipline every year since 2011. In 2018, 5 attorneys were so disciplined. In the absence of significant aggravating factors, these cases usually result in an admonition.**

- 11.) Lack of Communication - Lawyers are ethically required by RPC 1.4 to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." They also must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In 2018, 5 attorneys were so disciplined. In the absence of significant aggravating factors, these cases usually result in a reprimand.**

- 12.) Administration of justice - This category relates to violations of RPC 8.4(d) and are rare due to the need for egregious conduct as a foundation. Only 3 attorneys were disciplined for this violation in 2018.**

- 13.) Legal Fees – Lawyers are required under RPC 1.5 to charge no more than a reasonable fee. When a fee becomes grossly excessive or violates other related rules, such as the requirement to have a fee agreement in writing, discipline is imposed. This includes overreaching and not having written retainer agreements. Three attorneys were subject to discipline for this violation. Typically, these cases result in a reprimand.**

- 14.) Improper withdrawal from representation – Three attorneys were disciplined for this violation in 2018. Upon withdrawing from or terminating a representation, an attorney is obligated to take certain measures to protect a client's interest. Those who do not are in violation of RPC 1.16(d).**