

Garden State CLE presents:



**Five Questions:**  
**Fundamentals of New**  
**Jersey Attorney Discipline**

**Lesson Plan**

# Part I

## The Three Foundational Principles of Attorney Discipline in New Jersey

### Principle 1 – Purpose and goals of New Jersey Attorney Discipline

**The New Jersey attorney disciplinary system has one purpose – protecting the public. Its goals are to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general while preventing a re-occurrence of unethical behavior in the offending attorney.**

**[In re Makowski, 73 N.J. 265, 271, 374 A.2d 458 \(1977\).](#)**

**[In re Baron, 25 N.J. 445, 449, 136 A.2d 873 \(1957\).](#)**

## **Principle 2 – Punishment**

**Attorney discipline is not about punishing anyone.**

**[In re Rigolosi, 107 N.J. 192, 206, 526 A.2d 670 \(1987\)](#)**

**In disciplinary advocacy, always reference the quantum of discipline, measure of discipline, amount of discipline, level of discipline, etc. Never speak in terms of punishment.**

## **Principle 3 – Disciplinary outcomes**

**“We have rarely established bright line rules that will govern disciplinary infractions, including serious matters involving criminal offenses.” In re Witherspoon, 203 NJ 343, 356 (2008). As a result, all disciplinary decisions are deemed to be fact-sensitive.**

**Exceptions to this rule include:**

### **Mandatory Disbarment**

**Knowing misappropriation of funds – In re Wilson, 81 NJ 451 (1979);  
Knowing misappropriation of escrow funds – In re Hollendonner, 102 NJ 21 (1985);  
Knowing misappropriation of law firm fees/expenses - In re Siegel, 133 NJ 162 (1993);  
Bribery of a public official - In re Cammarano, 219 NJ 315 (2014);  
Child pornography – In re Cohen, 220 NJ 7 (2014).**

### **Domestic Violence – Mandatory - Three-month suspension**

**In re Principato, 139 NJ 456 (1995)  
In re Magid, 139 NJ 449 (1995)  
In re Margrabia, 150 NJ 198, 200-01 (1997)**

## Part II

# The disciplinary process

### a.) In general

**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 re Witherspoon, 203 NJ 343, 358-59 (2008).**

## **b.) The Five-question evaluation process:**

- 1. What are the facts? (Generally limited to violations of the NJ Rules of Professional conduct as proved by clear and convincing evidence – (See In re Seaman, 133 NJ 67, 74 (1993))**
- 2. How have these types of cases been adjudicated in the past through Supreme Court precedent or through Disciplinary Review Board?**
- 3. What has been the attorney's individual prior disciplinary history?**
- 4. What was the extent of harm to clients, members of the public or the administration of justice?**
- 5. Are there issues of attorney rehabilitation, payment of restitution or general mitigation of discipline?**

**You cannot adequately defend an attorney disciplinary case without a complete evaluation of each of these five questions.**

**Review each of these elements in In re Falkenstein, \_\_\_ NJ \_\_\_ (2014)**

**You can search decisions of the DRB at**

**<http://njlaw.rutgers.edu/collections/drb/search.php>**

# Part III

## Administrative agencies & procedures

### Supreme Court – Article 6 – Section II – paragraph 3

The 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. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

All disciplinary procedures are set forth in Rule 1:20-1 *et seq.* The Rules of Professional Conduct were adopted in 1984.

#### Disciplinary Review Board

Decides & recommends discipline

#### Office of Attorney Ethics

Manages the investigation & prosecution of all disciplinary matters

#### District Ethics Committees

Screen & docket grievances  
Investigates  
Conduct hearings & Issue reports

## **a.) 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 proven, 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 proven, would constitute unethical conduct, and if the grievance is not otherwise properly declined, the grievance is docketed.**

## **b.) INVESTIGATIONS**

**Clear and Convincing Evidence 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.**

## **c.) 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.**

**Disciplinary officials have a duty to maintain the confidentiality of the system and of all non-public documents. R. 1:20-9(i). However grievants are free to speak about all aspects of the investigation process.**

**Nevertheless, documents gathered during the investigation may not be released publicly by anyone, except as may be permitted by R.1:20-9(a)(1). Once a formal complaint or other charging document is filed, the case becomes public with minor limitations and subject to protective orders in rare situations.**

## **d.) Time Goals**

**The Supreme Court has established time frames in which investigations and hearings should be concluded. R. 1:20-8.**

**These time goals call for standard investigations to be completed within six months and complex investigations within nine months from the date a grievance is docketed (until an investigative report is filed and the case is dismissed, diverted or a charging document is filed). Most cases handled by the Ethics Committees are classified as standard while almost all OAE cases are classified as complex. The actual time involved necessarily depends on a number of factors, including staffing, the cooperation of the grievant, the respondent and any other witnesses, and the complexity of the matter itself.**

## **e.) 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 has 21 days to file an answer.**

**[The answer must be serious, professional, relevant and timely.]**

## **f.) HEARINGS (Hearing Panels or Special Ethics Masters.)**

**Once an answer is filed, a 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.**

**[Note – no hearings will be held in instances involving either reciprocal discipline or convictions for criminal or quasi-criminal violations of the law. RPC 8.4(b) is conclusively established by the conviction. Only documentary evidence by way of mitigation may be considered by the DRB and Supreme Court.]**

## **g.) Procedure**

**In disciplinary hearings, the procedure followed is similar to that 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 lawyer has not committed unethical conduct, or finding the lawyer guilty of unethical conduct for which discipline is required.**

## **h.) Public Hearings**

**All hearings are open to the public except in rare circumstances where comprehensive protective orders have been entered.**

## **i.) Final Discipline**

**Final discipline is imposed by the Supreme Court. The Supreme Court imposes final discipline after the attorney is first afforded an opportunity for a disciplinary hearing either at the trial level and/or after the Disciplinary Review Board (DRB) concludes appellate review(or original review in the case of motions and stipulations). The Supreme Court automatically schedules oral argument in all cases in which the DRB has recommended disbarment. Other matters are argued only if the Supreme Court grants a party's petition for review or on the Supreme Court's own motion**

## **j.) Disciplinary measures:**

**Disbarment**

**License revocation**

**Suspension for a term**

**Indeterminate suspension (Rule 1:20-15A(a)(4)).**

**Censure**

**Reprimand**

**Admonition**

**Discipline may also involve a number of rehabilitative or regulatory components, all of which are usually monitored by the Office of Attorney Ethics.**

**On average, 135 attorneys are subject to final discipline each year.**

## **k.) Diversion**

**The diversionary program allows attorneys who have committed “minor unethical conduct” to be diverted from the disciplinary system. “Minor unethical conduct” is behavior that would likely warrant no more than an admonition (the least serious sanction) if the matter proceeded to a hearing. Determinations to divert matters of minor unethical conduct are made only by the Director, OAE. A grievant is given ten days’ notice to comment prior to the OAE Director’s final decision to divert the case, but a grievant cannot appeal the Director’s diversion.**

**Diversion may take place only if the attorney acknowledges a mistake 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 2013, a total of 92 requests for diversion were received by the OAE: none was declined.**

**The most popular condition imposed in diversion cases Required the attorney to complete the New Jersey State Bar Association’s Ethics Diversionary Education Course (84). Other required conditions included: completion of a course in New Jersey Trust and Business Accounting (24); recordkeeping compliance reporting (14); letters of apology (6); prompt completion of underlying case responsibilities (4); and continuing legal education (3). Last year, attendance at the Bar Association’s Diversionary Course was also the primary remedial condition (43).**

