

# **GARDEN STATE CLE LESSON PLAN**

**A 1.5 credit course**

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LESSON PLAN AND EVALUATION**

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## **ATTORNEY DISCIPLINE: ALCOHOL, DRUGS AND PSYCHIATRIC**

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**With**

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**And**

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### **Program description**

One of the most stressful professions in the world is that of an attorney, especially for solo practitioners. Unfortunately, some attorneys turn to alcohol, drugs, or gambling to cope with the stress. This 1.5 ethics credit CLE will teach you the telling signs of a colleague or friend who might be heading down the wrong path, and what remedies are available to attorneys in trouble.

## **I. Introduction**

- **Lee Gronikowski – retired from Office of Attorney Ethics, now representing attorneys who are charged with ethics violations**
- **Attorney disciplinary matters related to psychiatric, psychological, or where there is drug and alcohol abuse – where one is driving the other**
- **Bipolar disorder, depression**
- **Lee’s experience with OAE:**
  - **50%+ where was a contributing factor of misconduct**
  - **Attorneys more susceptible to these types of problems – studies show that attorneys run 30% higher than the rest of the population from mental illness**
  - **Rarely saw same issues in military – when discipline very little alcohol and drug abuse – many people who abused alcohol but military if you disclose you have a problem then they will get you help – however if military catches you then punishment – minimum administrative discharge and maximum court martial**
  - **“Air force is one mistake service” – one mistake and you are gone [PRP program – monitors/maintains nuclear missiles]**
  - **Zero tolerance in the Army**
  - **DWI – letter of reprimand, non-judicial punishment, effects promotion**
- **NJ Supreme Court is extremely lenient with drug and alcohol issues**
- **NJ Supreme Court is very sympathetic – want to try to get people better**
- **In re Schaffer, 140 NJ 148 (1995) – “accelerated suspension” – if you commit a crime such as possession of cocaine, if you consent to be suspended immediately then they will count all the time in rehab toward a disciplinary suspension – gets person into rehab and is disciplinary in nature – immediate need for rehab and recovery; speeds up process for getting back into practice**
- **R. 1:20-20 – future activities of attorney who has been disciplined or transferred to disability – inactive status – in order for this Rule to work – you must have OAE involved**
- **In re Wilson, 81 NJ 451 (1979)**
  - **Gambling, addiction and alcohol would be used as a defense to these types of cases (See In re Jacob, 95 NJ 132 (1984)).**

- **Theoretically propose a defense of diminished capacity so you would not be able to form the knowing mens rea for In re Wilson – however has not been successful**
- **If you can prove the attorney meant to deprive someone permanently of their money then should be disbarment – but if take it and put it back, borrow for a short time with intention to put it back, then should be indeterminate suspension – 5 years and then can make application for reappointment but no guarantee and this has never been applied**
- **Only 4 states in US where disbarment is permanent – NJ, OH, IN, OR (only other state where cannot pump your own gas!)**
- **All other states provide some mechanism to be readmitted to the bar – typically 5 years**
- **Indeterminate sentence was under Justice Portiz through efforts of the Bar Association but not particularly popular with the court and never in a Wilson case**
  - **Appropriate for cases “on the cusp” of disbarment**

## **II. Why does the practice of law cause all these problems?**

- **Law practice is now a business**
- **It is a “cut throat” practice – small firms are hustling**
- **All kinds of audits have disclosed this information**
- **It is difficult to earn a living and this is one of the major factors**
- **Sole practioner must have certain skill set: organizational, attention to detail, organize to cover conflicts, communicate with your clients, meet client needs, handle cash flow and marketing, and all other issues for doing business**
- **Every other aspect of practice is good but book keeping is a problem (R. 1:21-6(a) Recordkeeping).**
- **Requirements are detailed and not impossible – do contemporaneously with the transaction and then you should be ok**
- **Selection of attorneys for random audits is done by telephone number**
- **More problems with solo practioner as opposed to large firms – why then should random selection be done as opposed to “going where the action is”**
- **99% of the disciplinary system is based on solo practioners**

- **In re Mark, 132 NJ 168 (1993)** – mostly products liability defense, young associate at firm and senior partner quits, associate has marital problems then substance problems, increased pressure from additional work load, tried a case and won but the plaintiff moved for new trial and could not find letter transmitting discovery so in panic created letter – got caught because letter head was different – received 3 month suspension
- **In re Mark**-type activities are pretty common for new attorneys – they get in a jamb and forge things and create documents - Supreme Court is pretty lenient because Court is frustrated with partners who are not supervising – there is an affirmative duty to supervise your associates and mentor them through the system
- **6-8 year learning curve** with young attorneys – when you get out of law school you have few practical skills/people skills
- **Must treat adversaries with respect**
- **In re Vincenti, 114 NJ 470 (1989)** – disbarment of attorney, first time disciplined suspended for a year, second time punched someone and suspended for 3 months

### **III. Depression**

- **Medical condition**
- **Identifiable causes and sometimes not identifiable**
- **May be biological and sometimes based on circumstances**
- **Diligence issues, communications issues, competence issues – most are inter-related (RPC 1.1 and 1.3)**
- **When depressed you are conscious of nothing but your own pain – not getting out of bed**
- **RPC 1.1 and 1.3 violation – depression is a mitigating factor**
- **RPC 1.1 and 1.3 violations – strict liability offenses – no mens rea except for the neglect/negligence**
  - **Neglect attributed to depression, gambling addiction, or alcoholism – these are not things to raise as an affirmative defense but powerful mitigating factors**
- **Depression, alcoholism, bi-polar disorder are all mitigating factors except in a Wilson case**
- **In a Wilson case, if OAE can demonstrate that there was money entrusted to you and you take the money and you do it without the permission without the client(s) and you do it knowingly, your case is over – impossible to defend**

- **Diminished capacity defense will not work as a mitigating factor**
- **Only good defense is a fact based defense – hire forensic accountant to determine taking was reckless or negligent**
- **In re Tsai, 203 NJ 581 (2010) – client paying personal bills out of his trust account but repaying the same day, no one lost money, if knowingly took money without client approval – then hands are tied – In re Wilson is institutionalized – it is part of the Supreme Court and it is their way of looking at these situations – the rule is not going to change**
- **Most heart-wrenching issues will not excuse conduct under Wilson – public confidence and the integrity of the bar are more important**

#### **IV. How to put defenses together (in a non-Wilson case)**

- **Letter from psychologist/psychiatrist**
- **Hospital records**
- **Character letters**
- **Witnesses – “he is a great guy except when....”**
- **Liberal at letting in medical records**
- **Not much creativity – just straight medical approach**
- **Supreme Court does not want to hear that you committed a particular offense while under the influence of a drug or alcohol – they want to hear what you are doing about it to make yourself better – some indicia that you are not going to do this again in the future**
- **Mitigating factor is what are you doing to treat yourself – AA, Gambler’s Anonymous, NA, treating therapist – what are you doing to support mitigating factor**
- **Alcoholism, gambling, bipolar are mitigating factors – the only non-mitigating factor is use of drugs**
- **If you are neglectful and your defense is depression that is fine**
- **If you are neglectful and you are using cocaine or even legal drugs then that is not ok – must make argument that person is better now because of taking steps to improve**
- **Client must cooperate with these defenses**
  - **Addiction is not something people want to admit**
  - **Must get client to sign a release to get medical records**
  - **Client must admit to something that no one wants to admit to**

- **Physical addiction – spend every minute thinking about where going to get next drink/fix**
- **There is a lack of logic associated with this addiction**
- **Client must make a decision to change by themselves – cannot be shamed into recovery/rehabilitation – not a logical issue**
- **New Jersey Lawyers Assistance Program – [www.NJLAP.org](http://www.NJLAP.org)**
  - **Has resources that people don't think of**
  - **Will get an attorney into rehab**
  - **Some clients must be forced into this**
  - **You cannot “will it” away**
- **AA requires that you admit that your life has been messed up by alcohol – requires a mentor to help you through the first weeks of the program – sponsor talks to every day – meetings every day – drugs that can be taken so the body reacts to alcohol intake**
- **Attorneys have to force someone to do something they don't want to do – because physiologically and mentally the person cannot do it**
- **Alcohol – in active treatment, track record to establish unlikely to use alcohol in the future, need to clean up the mess (make clients whole again, correct whatever you have done, eliminate any harm that has come to a client, consider hiring another attorney to clean up the mess)**
- **The client has more work to do then stop drinking – they need to correct the harm that has been done – create mitigating factors**
- **An apology can go a long way – offer to fix the problem – to avoid the grievance going any further**

#### **V. RPC 8.3 Reporting Professional Conduct**

- **As a member of the bar and you know someone with a problem who is not doing good by his/her clients because of alcohol or other personal issues – at what point do you as a member of the bar have an obligation to disclose the other attorney's issues**
- **Very high standard to meet – are you aware of conduct that will affect the individual's ability to act as an attorney in a trustworthy, honest, professional way?**
- **A glass of wine at lunch vs. staggering into court**
- **Under most circumstances the judge would be the complainant to the ethics board, not the other attorneys**

- **R. 1:18 duty of judges – it shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct, and the provisions of R. 1:15 and R. 1:16.**
- **This is different from another attorney**
- **A judge must report an RPC violation immediately – regardless**
- **In re Tomar, et al., 196 NJ 352 (2008) – a number of partners were the subject of the investigation, 8.3 violations**
- **Grievants have immunity – so if you report, you are protected**

## **VI. Gambling**

- **Psychiatric/psychological issue**
- **OAE recognizes as legitimate illness – In re Romano, 104 NJ 306 (1986); In re Goldberg, 109 NJ 163 (1988) – NOT for Wilson cases**
- **Going to see this in RPC 1.1, 1.3 and 1.4 cases – not responding to clients, not communicating, etc.**
- **Gambling case is handled the same as an alcohol defense case**
- **An attorney how gambles usually uses trust money, not his/her own money to gamble**
- **Client needs psychiatric treatment and making good on any harm that is done to clients**
- **RPC 8.3 – “lapping” – attorney takes \$\$ from real estate closing B to pay off closing A that occurred a month ago that the attorney had already gambled – if there are shenanigans at the closing table then obligation to report as an attorney – “anomalies” that occur in a closing should be a concern**
  - **Attorney gets caught by writing a bounced check or random audit – where attorney has not paid off mortgage but continues to make mortgage payments him/herself**
- **As the defense attorney – stop the madness as soon as possible – the longer the problems continue the more likely a Wilson violation or some other basis for disbarment (theft, fraud, disciplinary history)**
- **Must look at the case from the perspective of the Supreme Court when they are thinking about discipline – the need to protect the public**
- **Need to have an attorney trustee system to watch over an attorney who is getting into trouble to assist in fixing things**

- **Defense attorney or someone who shares office space with the client or another attorney should stop in and keep an eye on the client and his/her practice – look at the books, look at the calendar – show that someone is watching**
- **Defense attorney should not be a “proctor” for your own client – need someone who can come in and testify**
- **Defense attorneys must be aggressive and early intervention and put on an aggressive defense before Wilson violation has occurred so that can make reckless or negligence argument – once egregiousness gets so bad there is no return**

**VII. How can you draw the line with clients that there is no help for them**

- **There comes a time when you have to tell your client there is nothing that can be done and they should move on to the next phase in his/her life**
- **Under RPC you owe your client a duty of care – you must be honest**
- **From a moral perspective you owe it to your client whether that person wants to pay you if they are going to lose**
- **If this is related to alcoholism/psychiatric issues – don’t surrender fight against alcoholism just because you may not keep your license**
- **It is important to have an aggressive advocate – recognizing the threat of suicide, further disciplinary violations, disbarment, etc.**
- **If you can intervene quickly as a defense attorney early on the case, then you can mitigate damages and have client accept a reasonable amount of discipline**
- **Education is a big part of these types of issues**
- **Sometimes no money for experts or medical attention/insurance**

