

Garden State CLE presents:

Ethical Challenges for Busy New Jersey Lawyers (Parts I & 2)



Lesson Plan

Part I

Fact pattern 1 – Alex the *per diem* painter

Alex is 28 years old and lives with his Mom and step-father. His step-father, a New Jersey lawyer has represented Alex in the past on a variety of traffic tickets. Although he is an exceptionally talented house painter, Alex has had trouble remaining employed. His step father proposes that the two of them begin a business where the step-father will promote Alex's painting services in exchange for a 25% commission of the contract price. After agreeing on a handshake, the step-father forms an LLC with both of them listed as principals.

What ethical issues are implicated under these facts?



RPC 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

In re Wolk, 82 NJ 326, 333-334 (1980) (disbarment)

Lawyers have a duty to explain carefully, clearly and cogently why independent legal advice is required. When a lawyer has a personal economic stake in a business deal, he must see to it that his client understands that his objectivity and his ability to give his client his undivided loyalty may be affected.

“[T]his Court will no more tolerate the hoodwinking of helpless clients out of funds in a business venture that is essentially for the benefit of the lawyer than it will outright misappropriation of funds.” (at 335)



In re Frost, 171 NJ 308, 320-321 (2002).(Disbarment)

RPC 1.8(a) prohibits an attorney from entering into a business transaction with a client unless, among other things, the transaction and the terms are fair and reasonable to the client. Indeed, “[a] lawyer is required to maintain the highest professional and ethical standards in his dealings with his [or her] clients.

Furthermore, all transactions of an attorney with his client are subject to close scrutiny and the burden of establishing fairness and equity of the transaction rests upon the attorney. If the burden is not satisfied, equity has regarded such transactions tainted so as to constitute a constructive fraud....

In sum, respondent took advantage of an unsophisticated client whose trust he gained through the attorney-client relationship.



Fact pattern 2 – Zealous advocacy

Larry the Lawyer has been retained to represent Joyce on charges of drunk driving and the disorderly persons' offense of resisting arrest. Joyce is also a New Jersey attorney. The case is now 4 months old and has been adjourned twice, once at the request of the prosecutor and once because of Joyce's unavailability. Joyce has demanded that Larry file a motion to suppress evidence and a motion to dismiss the case for want of a speedy trial. Larry has declined to file these motions in the exercise of his professional judgment. Joyce has accused him of laziness and cowardice for not representing her zealously.

What ethical issues are implicated under these facts?



RPC 3.1 Meritorious claims and contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[See also NJSA 2A:15-59.1]



RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

- **(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.**



RPC 1.4(d)

When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.



Fact pattern 3 – B.F.F.

Moe and Joe had been best friends since 5th grade. As adults, they remained best friends and, along with their wives, socialized and took vacations together. When Moe and Joe began their professional careers, Joe became a lawyer and Moe construction contractor. Naturally, Joe represented Moe's company in all its dealings. After a number of years, Moe acquired a valuable plot of land and invited Joe to purchase half of it from him. Under the plan, Moe would build two dream houses and the two couples could be next door neighbors. The two friends agreed on a single price for everything, shook hands and began their new adventure, with Joe making periodic payments to Moe. Unfortunately, after about 18 months, construction delays, substandard work, environmental contamination and a question about the title to the property have now turned the two friends into bitter enemies and adversaries in Superior Court.

What ethical issues are implicated under these facts?



RPC 1.7. Conflict of Interest: General Rule

- **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
 - **(1) the representation of one client will be directly adverse to another client; or**
 - **(2) 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.**
- **(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:**
 - **(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;**
 - **(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**
 - **(3) the representation is not prohibited by law; and**
 - **(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.**

In re Guidone, 139 NJ 272, 277 (1994)

We have generally found that in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline. Of course, when an attorney's conflict of interest causes serious economic injury to clients, we have not hesitated to impose a period of suspension.

7:7-10. Joint Representation

No attorney or law firm shall enter an appearance for or represent more than one defendant in a multi-defendant trial or enter a plea for any defendant without first securing the court's permission by motion made in the presence of the defendants who seek joint representation. The motion shall be made as early as practicable in the proceedings in order to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

See also State v. Land, 73 NJ 24 (1977)



Fact pattern 4 – The DV complaint

Larry the lawyer has come to you to represent him on a domestic violence case. He is facing a petty disorderly persons offense in municipal court as well as a TRO pending in Family Court.

What ethical issues are implicated in this case?



In re Magid, 139 NJ 449, 455 (1995)

Respondent's conduct was a serious violation of [RPC 8.4\(b\)](#). But for the fact that we have not previously addressed the appropriate discipline to be imposed on an attorney who is convicted of an act of domestic violence, and that respondent did not engage in a pattern of abusive behavior, respondent's discipline would be greater than the public reprimand we hereby impose. We caution members of the bar, however, that the Court in the future will ordinarily suspend an attorney who is convicted of an act of domestic violence.

See also In re Principato, 139 NJ 456 (1995)



RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

- **(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- **(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- **(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- **(d) engage in conduct that is prejudicial to the administration of justice;**



Rule 1:20-13

(a) Reporting Criminal Matters.

- (1) ***Duty of Attorney Charged.*** An attorney who has been charged with an indictable offense in this state or with an equivalent offense in any other state, territory, commonwealth, or possession of the United States or in any federal court of the United States or the District of Columbia shall promptly inform the Director of the Office of Attorney Ethics in writing of the charge. The attorney shall thereafter promptly inform the Director of the disposition of the matter.

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“When you say ‘ethical’ do you mean marginally ethical, semi-ethical, or appearing to be ethical?”

c) Final Discipline.

(1) *Conclusive Evidence.* In any disciplinary proceeding instituted against an attorney based on criminal or quasi-criminal conduct, the conduct shall be deemed to be conclusively established by any of the following: a certified copy of a judgment of conviction, the transcript of a plea of guilty to a crime or disorderly persons offense, whether the plea results either in a judgment of conviction or admission to a diversionary program, a plea of no contest, or nolo contendere, or the transcript of the plea.

(2) *Procedure.* At the conclusion of all criminal matters, including disorderly persons offenses, involving findings or admissions of guilt that are not the subject of a direct appeal, or at the conclusion of all direct appeals from all such matters, the Director may file directly with the Board and serve on the respondent or counsel, if any, a motion for final discipline based on a criminal conviction or admission of guilt specifying the sanction requested. Within 21 days after service of such motion the respondent shall file with the Board and serve on the Director a brief together with any other permissible filings. The Director may within 21 days thereafter file and serve any responding brief. If the respondent either fails to file a timely brief or timely files a brief which does not disagree with the sanction requested, no oral argument is required and the Board may decide the matter on the record. In all other cases the Board shall notify the parties of a date for oral argument. Following oral argument, the Board shall issue its decision and recommendation for final discipline to the Supreme Court.

The sole issue to be determined shall be the extent of final discipline to be imposed. The Board and Court may consider any relevant evidence in mitigation that is not inconsistent with the essential elements of the criminal matter for which the attorney was convicted or has admitted guilt as determined by the statute defining the criminal matter. No witnesses shall be allowed and no oral testimony shall be taken; however, both the Board and the Court may consider written materials otherwise allowed by this rule that are submitted to it.



Fact pattern 5 – The Very Bad Driver

Ari Advocate, Esq. is representing a client for driving on the revoked list in municipal court. In reviewing his client's driving history, he notes that although this appears to be a first offense for driving on the revoked list, the driving conduct is related to a second offense drunk driving. This means the police could have charged his client with a 4th degree crime. Ari also knows that by pleading guilty to the revoked list offense immediately, he will insulate his client from indictment on double jeopardy grounds. Accordingly, Ari informs the municipal prosecutor that he will be pleading guilty to the ticket and proceeds to enter that plea in open court.

What ethical issues are implicated in this case?



RPC 3.3

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 an illegal, 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; or

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

In re Seelig, 180 NJ 234, 256 (2004)

In this case, the issue is not whether respondent's client obtained a fair trial, but whether, because of double jeopardy considerations, a trial on the indictable offenses would have been possible at all after the municipal court acted. In that context, certainly, the Sixth Amendment right to effective assistance of counsel should not be invoked to thwart the administration of justice. (describing lawyer as “an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice”) We conclude, therefore, that an attorney in the circumstances here presented is not prohibited by a client's Sixth Amendment rights, or any other duty owed the client, from informing the municipal court about pending indictable offenses and should do so to prevent the court from being misled by the attorney's silence.

RPC 4.1. Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a third person; or**
- (2) 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.**

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by [RPC 1.6](#).



Part II

Fact pattern 6 – The real estate closing

Lois is a real estate attorney who has come to a closing representing the sellers of a residence. At the closing, the attorney for the buyer shows up and appears to be visibly intoxicated. In addition, when it comes time to close title, he reveals that the buyers will satisfy the balance of the purchase price with a personal check that he will write. He then proceeds to prepare a personal check payable to the sellers in the full amount due.

What ethical issues are implicated in this case?



RPC 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by [RPC 1.6](#).



"Remember, for every two times we represent you for a felony charge we throw in a free misdemeanor defense."

In re Fusco, 197 NJ 428 (2009) (3 month suspension)

In re Macaluso, 197 NJ 427 (2009) (censure)

Here, respondents argued that, because they did not believe that the conduct was unethical, they had no reason to report it. The Court has long held that ignorance of the rules is not a defense to charges of unethical conduct. In re Berkowitz, 136 N.J.134, 147(1994) ("Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct") and In re Eisenberg, 75 N.J.454, 456-57 (1978):

We view with increasing concern the practice of attorneys facing discipline by this Court to treat the applicable disciplinary rules as *terra incognita*. Although this astonishing lack of familiarity with the rules is sometimes characterized as a "defense," ignorance of our ethical rules and case law cannot be permitted to diminish responsibility for conduct in violation of these rules.

See also:

In re Bonafield and Tedeschi, 75 N.J.490 (1978)

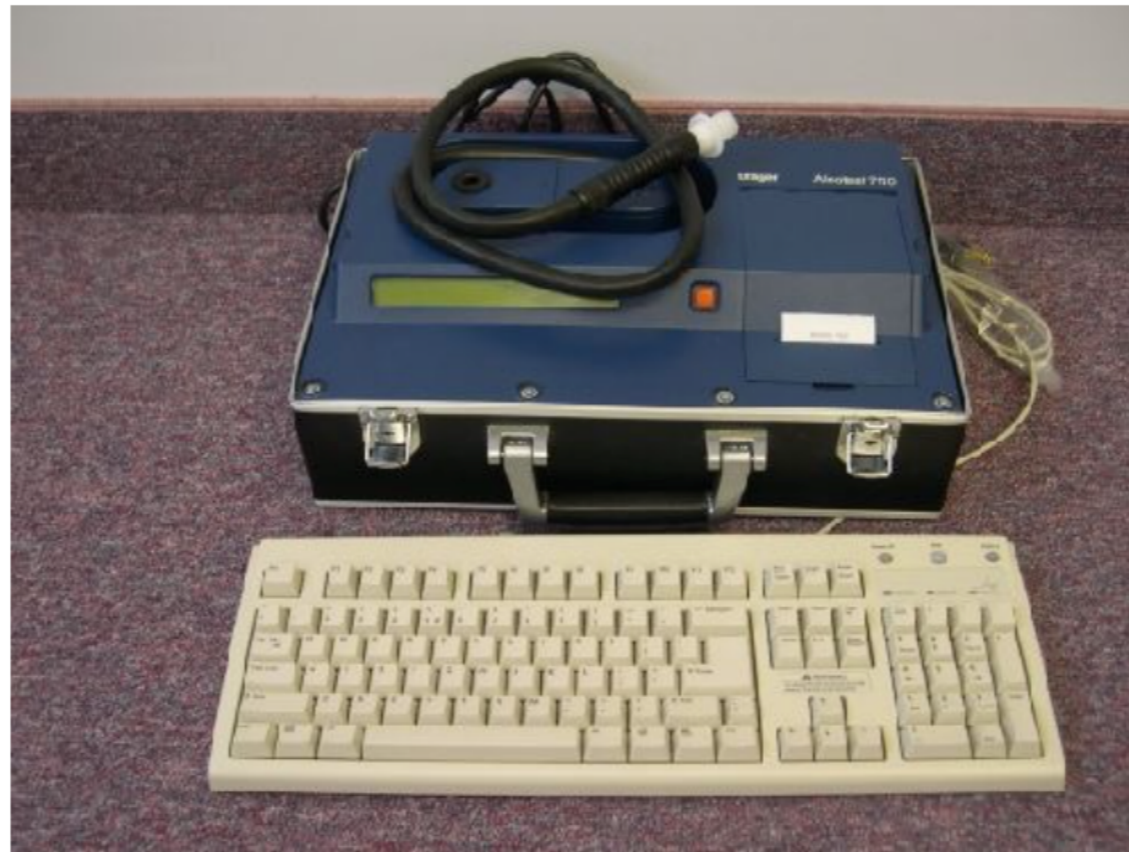
In re Gold, 115 NJ 239 (1989)

In re Tomar, et al., 196 NJ 352 (2008)

Fact pattern 7 – Oops!

During the course of a drunk-driving trial, the municipal prosecutor learns from a defense attorney that the Alcotest-license of the police officer who periodically changes the solution on the department's Alcotest machine had expired a year ago. This solution must be changed at least every 30-days. After a check of the department's records, the prosecutor calculates that the officer had changed the solution on the Alcotest 6 times during the one-year period. NJAC 13:51-1.8(d) renders the results of a test taken by an officer with an expired license inadmissible.

What ethical issues are implicated in this case?



RPC 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Comment – NJ Supreme Court – Appendix to Part VII - Guidelines

It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice [be] done and truth [be] revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.



Fact pattern 8 – The crazy client

Larry the Lawyer holds the unique distinction of being the only New Jersey lawyer in history to ever have a crazy client. He represents her in a personal injury case in Essex County. Due to the crowded civil docket in Superior Court, many months go by without any developments in his client's case. However, she is extremely demanding and calls the office almost daily demanding to speak to Larry or writing long, accusatory e-mails to which Larry has long ago given up responding or even reading. Larry would like to get rid of her as a client, but the value of the case would make that a bad business decision. The crazy client is now threatening to file an ethics complaint unless Larry communicates with her about the case.

What ethical issues are implicated in this case?



RPC 1.4 Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Fact pattern 9 – The referral

Lawyer Luke is a solo practitioner, operating as an LLC. He has a good deal of experience handling automobile personal injury cases. Because he has such a solid reputation, Lawyer Mark refers a plaintiff's case to him with lots of insurance coverage and good liability. Luke accepts the case. He has the client sign a fee agreement and begins to work up the file. Unfortunately, due to a clerical error, Luke does not file a lawsuit in time and the applicable statute runs. Moreover, Luke has no malpractice coverage.

What ethical issues are implicated in this case?



RPC 1.1 Competence

A lawyer shall not:

- (a) **Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.**
- (b) **Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.**

RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.



Fact pattern 10 – The legal fee

Sam practices law in Millville. A new client has stopped by for a consultation about a drunk-driving case in nearby Maurice River Township. The prospective client relates that this would be a second offense, although his prior conviction was more than 13 years ago. He thinks he BAC was .17. He also relates that he thinks the only reason the trooper stopped him was that he was seen pulling out of a bar on Route 47. He is concerned about losing his license for years and terrified of going to jail. Sam demands a \$10,000 retainer to represent him with an additional \$7500 fee if the matter has to be tried in municipal court.

What ethical issues are implicated in this case?



RPC 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
- (3) the fee customarily charged in the locality for similar legal services;**
- (4) the amount involved and the results obtained;**
- (5) the time limitations imposed by the client or by the circumstances;**
- (6) the nature and length of the professional relationship with the client;**
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;**
- (8) whether the fee is fixed or contingent.**

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

Fact pattern 11 – Bonus materials

Rule 1:21-6 and RPC 1:15

Rule 1:20-20

RPC 8.1 (Cooperation)

RPC 7.2 and RPC 7.3 and CAA



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