Garden State CLE presents:

New Jersey Attorney Ethics and Drunk Driving

Lesson Plan

Part 1. When Attorneys Drive Drunk - Introduction

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;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Criminal Conviction is conclusive evidence of RPC Violation

"It is well-settled that, in disciplinary proceedings against an attorney, a criminal conviction is conclusive evidence of guilt." R. 1:20-13(c); In re Lunetta, 118 N.J. 443, 445 (1989).

At a minimum, every criminal conviction will support a violation of RPC 8.4(b)

Quantum of Discipline

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as the attorney's reputation, his prior trustworthy conduct, and general good conduct." In re Lunetta, 118 N.J. 443, 445-446 (1989).

Attorney Drunk Driving - In general

In our view, precedent clearly calls for the imposition of a suspension only in cases where the accidents result in death or when the totality of the accident, the injuries, and the attorney's conduct before, during, and after the accident are so egregious that nothing less than a suspension will address the severity of all the circumstances. In re Murphy, DBA slip opinion - pp 20-21.

Misconduct unrelated to practice of law

"It is well-established that the private conduct of attorneys may be the subject of public discipline." In re Magid, 139 N.J. 449, 452 (1995).

Homicide - Suspensions from Practice

In re Howard, 143 N.J. 526 (1996) (Three-month Suspension)

Indicted as murder - Verdict - Death by Auto (3rd degree)

Killed husband in MV accident (both attorneys)

There was no alcohol involvement, however the Court warned,

"Longer suspensions will be called for when alcohol plays an aggravating role in a vehicular homicide case" Howard, *supra* at 533

In re Barber, 148 N.J. 74 (1987) (Six-month Suspension)

No DWI charge, but had been drinking earlier

Prosecuted for death by auto (Third degree)

In re Guzzino, 165 N.J. 24 (2000) (Two-year Suspension)

Manslaughter (2nd degree) and DWI - Killed passenger in the vehicle he struck.

Serious bodily injuries - Suspensions from Practice

In re Saidel, 180 N.J. 132 (2004) (six-month suspension)

Aggravated assault in Arizona - injured 2 passengers in his vehicle. 0.06 BAC 2 hours after accident.

Reciprocal discipline under R. 1:20-14(a)(5) - six-month suspension in Arizona as well.

In re Toland, ___ N.J. ___ (2007) (One-year suspension)

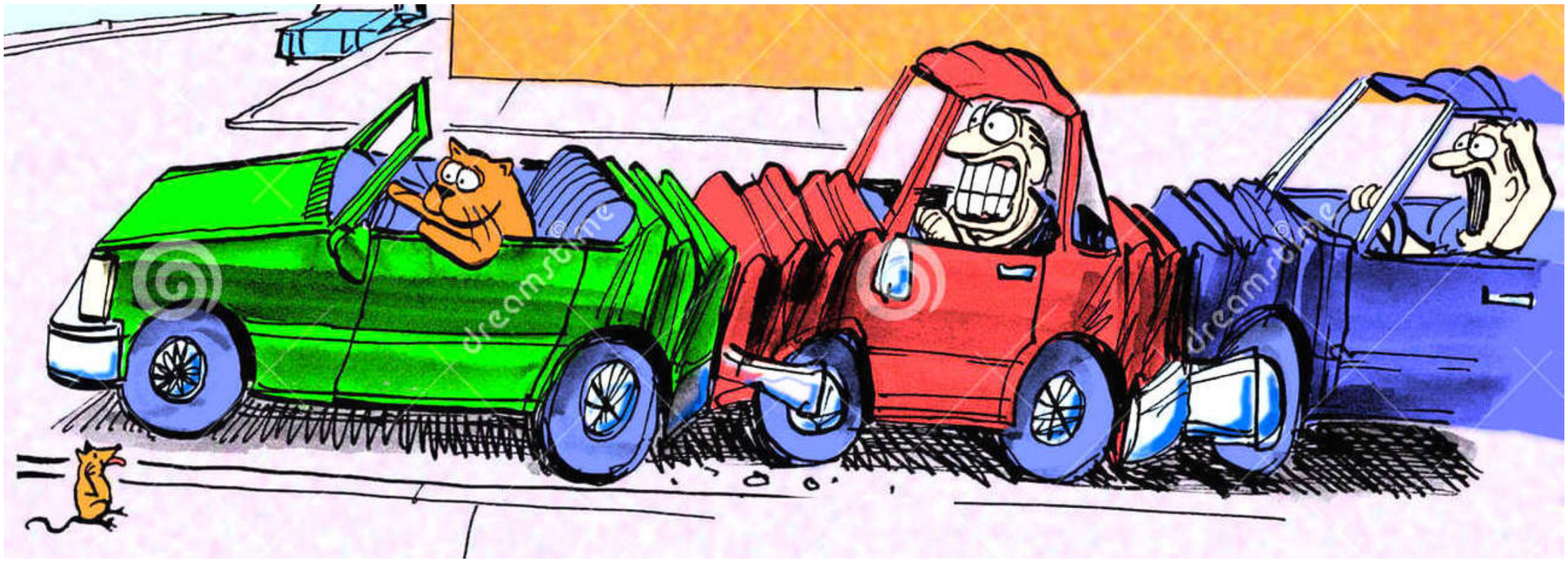
Assault by auto 3rd degree in NJ, DWI and driving without insurance. Respondent had a 27 BAC and accident caused serious injuries to four people, one of whom was a child. Received 5-years probation in Superior Court.

Reciprocal discipline under R. 1:20-14(a)(5) - one year suspension in Pennsylvania which also had an additional, unrelated count of misconduct.

In re Murphy, 200 N.J. 427 (2009) (suspended six-month suspension) Extensive rehab efforts.

Aggravated assault in Pennsylvania with DWI - Crash on PATPK with 3 injured, one badly. 0.20% BAC
Received jail, probation and community service.

Reciprocal discipline under R. 1:20-14(a)(5) - suspended six-month suspension in Pennsylvania as well.



Other companion indictable offenses - Suspensions from Practice

In re Korpita, 197 N.J. 496 (2009) (three-month suspension)

DRB proposed a censure

Passed out behind wheel, highly intoxicated. Threatened the arresting cops. Pled to NJSA 2C:27-3(a)(3), threatening to harm a public official.

Was a municipal court judge at the time.

In re Rowek, 220 N.J. 348 (2015) (one-year suspension)

Upper-court possession and use drug offenses and driving under the influence of drugs. Admitted to PTI and later attempted to defraud the drug testing process. Five years probation

Addiction stemmed from back operation and painful recovery.

Bodily injuries - Reprimands

In re Cardullo, 175 N.J. 107 (2003) (Reprimand)

Extensive rehab efforts. (In-patient, recovery counseling, NJ Lawyers' Assistance Program)

Rear-end accident - Assault by auto - 4th degree and leaving the scene - injuries not serious - 0.17 (third offense) - 180 county jail credited against in-patient program.

In re Fedderly, 189 N.J. 127 (2003) (Reprimand)

Extensive rehab efforts. (Out-patient, weekly AA and NJ Lawyers' Assistance Program)

Assault by auto - 3rd degree - 0.24% BAC and DWI - victim suffered broken ankle. - three years probation and 180 hours community service.

In re Magee, 181 N.J. 472 (2005) (Reprimand)

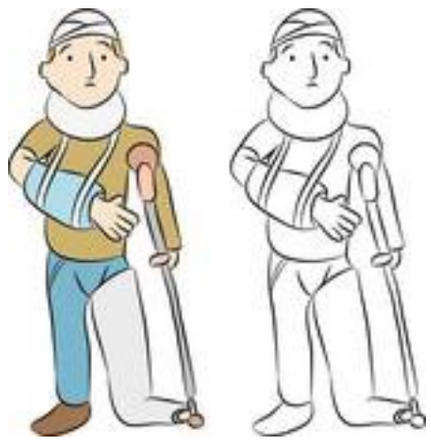
Eluding and DWI - also resisted efforts to be arrested by police.

Bodily injuries - Admonition

In re Terrell, ___ N.J. ___ (2010) (Admonition)

(Deemed less serious than *Cardullo*)

Rear-end accident - Neck pain to one victim - Assault by auto - 4th degree and leaving the scene & DWI- injuries not serious - Admitted to PTI



2. When Judges Drive Drunk

Section a. Code of Judicial Conduct

Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

- A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge should not allow family, social, political, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence. A judge shall not testify as a character witness.
- C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny.

Section b. Directive # 04-09

TO: SUPERIOR COURT JUDGES
TAX COURT JUDGES
MUNICIPAL COURT JUDGES
FROM: CHIEF JUSTICE STUART RABNER
SUBJ: DISQUALIFICATION OF JUDGES CHARGED WITH OR CONVICTED OF DWI OFFENSES OR DOMESTIC VIOLENCE OFFENSES
DATE: MAY 29, 2009

On June 17, 1999, this Court issued Directive #7-99, which consolidated and restated procedures previously adopted by the Supreme Court regarding judicial disqualifications as a result of DWI or domestic violence matters. After almost ten years under that Directive, the Supreme Court has decided that substantive modifications to the policy are required. The revisions are consistent with the Legislature's imposition of enhanced penalties for DWI violations since Directive #7-99 was issued. In particular, In 2004 the Legislature lowered the blood alcohol level required for DWI offenses from 0.10% to 0.08% and lengthened the period of license suspension for first-time offenders. L. 2003, c. 314 (mandating three-month suspension when violation involves blood alcohol level below 0.10% and lengthening suspension from six months to seven when level above 0.10%); see also L. 2003, c. 315 (imposing mandatory jail time for third drunk driving offense); L. 2002, c. 34, § 17 (increasing fines for DWI offenses); L. 2000, c. 83 (permitting the installation of ignition interlock devices after any DWI violation). The revised policy language follows. Driving While Intoxicated (DWI) Disqualifications. The Supreme Court has modified its administrative policy for judges who have been charged with or convicted of driving while intoxicated (DWI) or related offenses. The policy applies to all judges sitting in Municipal Court and Superior Court, including temporary assignments.

Judges charged with or convicted of DWI or related offenses shall not hear any DWI cases while the charges are pending and, if convicted, until (a) one year from the date of the imposition of sentence (as extended by any stay), or (b) all conditions imposed as a result of the DWI conviction are satisfied in full, including suspension of the judge's driver's license and completion of the prescribed program requirements of the Intoxicated Driver Resource Centers, whichever is longer. If, at the time the charges are brought, the judge has reserved decision in any DWI case, that case shall be transferred by the Assignment Judge to another judge. The matter shall be determined on the papers unless the defendant objects. If the defendant interposes an objection, a mistrial shall be declared and the case will be retried before the judge to whom the matter was transferred.

The Court has further determined that a judge who has been disqualified from hearing DWI matters under this policy shall not thereafter hear such cases without the prior approval of the Supreme Court on the application of the judge. Supreme Court approval of an application to resume hearing DWI cases will not preclude a judge from exercising his or her power of recusal in any particular DWI case or in any category of such cases.

Section c. Driving while intoxicated

1. Note – Requires immediate self-reporting (Directive 07-11) & prompt compliance with Directive 04-09.

2. Plea or finding of guilt conclusively establishes the Judicial Ethics Violation. Case will be tried before a judge of the Superior Court (sitting as a municipal court judge) with appeal directly to the Appellate Division. See State v. Cerefice, 335 NJ Super. 374 (App. Div. 2000).

3.) Public Policy: With respect of drunk driving, we said in *Connor:* 'We do not view offenses arising from the driving of an automobile while intoxicated with benign indulgence. They are serious and deeply affect the safety and welfare of the public. They are not victimless offenses.' We firmly endorse the governmental commitment to the eradication of drunk driving as one of the judiciary's own highest priorities. In re Collester, 126 NJ 468, 472-473 (1992).

4. Typical Discipline upon conviction will result in:

i. A Reprimand for routine cases

In re Jones, 199 N.J. 118 (2009)
In re D'Ambrosio, 157 N.J. 186 (1999)
In re Richardson, 153 N.J. 355 (1998)
In re Lawson, 124 N.J. 280 (1991)

ii. A Censure or disqualification for cases involving aggravating factors related to the driving, arrest or investigation

In re Sasso, 199 N.J. 119 (2009) [Disqualification – intoxicated while on the bench]
In re Tourison, 199 N.J. 121 (2009) [Penny in mouth]
In re Williams, 188 NJ 476 (2006) (Failed to cooperate & prior discipline)
In re Annich, 130 N.J. 538 (1993) [Resisted arrest]
In re Connor, 124 N.J. 18 (1991) [Accident & high-speed pursuit]

iii. Suspension from Judicial Office for subsequent offenses

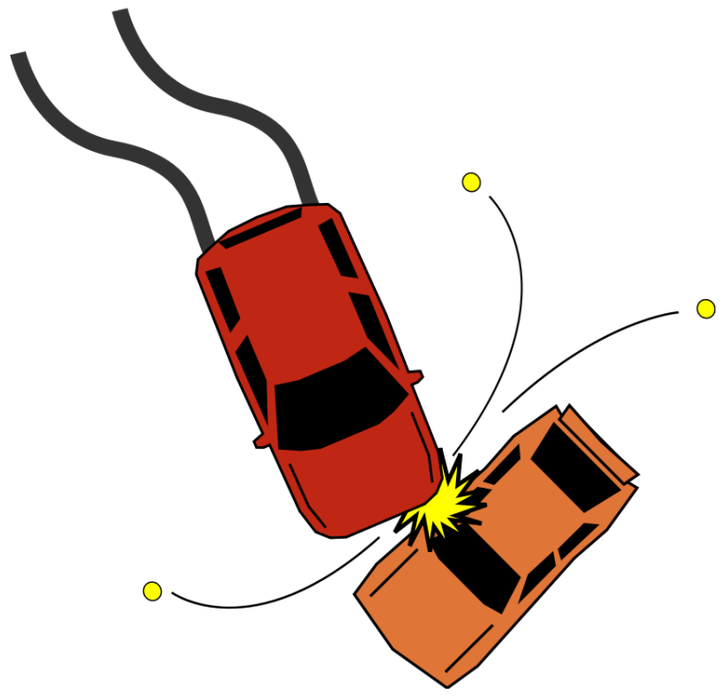
In re Collester, 126 N.J. 468, 473-474 (1992)

Without doubt the most egregious aspect of respondent's ethical dereliction is the fact that he has repeated the offense of drunk driving. However, in addition to that circumstance, there were other aggravating circumstances surrounding his motor vehicle infractions. Respondent, on his arrest, immediately informed the arresting officer that he was a Judge of the Superior Court. He also stated that he was responding to an emergency at the court house. That statement was false. There was no emergency. Although respondent was, in fact, proceeding to the court house, it was to obtain a file to review that night in preparation for the next day's trial. Moreover, he repeated that false statement to the arresting trooper. He thus seemingly attempted to divert, if not obstruct, justice. Further, as observed by the Committee, "respondent's several references to his judicial status gave the impression that he was entitled to some special preference." He thus clearly used the prestige and weight of his judicial office to try to gain some personal advantage.

In re Connor, 124 NJ 18 (1991)

Aggravating Factors:

That examination in this case discloses aggravating circumstances that bear on appropriate discipline. Those aggravating factors affect our consideration of each of the offenses. The drunk-driving offense resulted in an accident with another vehicle. The offenses of leaving the scene and careless driving were particularly egregious. The former, itself a serious offense, bespeaks a denial of responsibility and a disregard for the proper enforcement of the laws. The careless driving entailed not only an accident with another vehicle, endangering its occupants, but a high-speed chase, presenting significant risks to other innocent persons. As serious are the circumstances that followed those offenses. Rather than simply refusing to discuss the incident with the investigating officers following the commission of these offenses-which respondent had the legal right to do, aside from whether it was morally and ethically proper for him to do so-respondent lied about being involved in any accident and, worse, tried to cast blame on the victim.



Mitigating Factors:

On the day following the accidents and arrest, respondent called Ms. Bennett to inquire about her condition and that of the passengers in her vehicle. He apologized to Ms. Bennett for the accident and offered to pay for any damages that she had incurred. Next, he wrote a series of letters to Atlantic County judges explaining what he had been charged with, admitting guilt to all the charges, and apologizing for the incident. Respondent then called Seabrook House, a clinic specializing in the treatment of substance abuse, and scheduled an interview for that day. The respondent had an interview with a counsellor from Seabrook House who recommended an inpatient treatment program. Recognizing the extent of his drinking problem, respondent decided to enroll in a thirty-day residential treatment program. Later that day, respondent prepared and released to the press a written statement acknowledging responsibility for his actions and offering a general apology.

Immediately after the court hearing, respondent entered Seabrook House for a thirty-day residential treatment program. Following his release from Seabrook House, respondent enrolled in a prescribed outpatient program, consisting of weekly group-therapy sessions run by a counsellor and individual counselling sessions with a therapist. Additionally, respondent followed a recommended course of three meetings per week at Alcoholics Anonymous. He also has a sponsor, an attorney with whom he speaks at least once each week.

3. Judicial Misconduct in DWI Cases

In re Spitalnick, 63 N.J. 429, 431 (1973) (Two-year suspension)

Respondent's activities, however, hold a deeper significance in that they expose the probity of the Bench and Bar to question. This Court cannot allow the integrity of the judicial process to be compromised in any way by a member of either Bench or Bar. This is especially so where, as here, the particulars demonstrate that the proper channels of justice have been diverted. We must guard not only *432 against the spectacle of justice corrupted in one instance, but against the subversion of confidence in the system itself. A community without certainty in the true administration of justice is a community without justice.

Nowhere can the community be more sensitive to the regularities-and irregularities-of judicial administration that at the local level. While on the grand scale of events a traffic violation may be of small significance, the corruption of judicial administration of a Municipal Court is of paramount importance. Such conduct, visible and apparent to the community, destroys the trust and confidence in our institutions upon which our entire governmental structure is predicated. We cannot and will not tolerate members of the profession subverting judicial integrity at any level, for the damage is irreparable.

See also companion case:

In re Sgro, 63 N.J. 538 (1973) (six-month suspension)

***Ex parte* communications and coaching of prosecutors**

In re Diamond, 214 N.J. 514 (2013) (Reprimand)
In re McCloskey, 211 N.J. 565 (2012) (Reprimand)

Other judicial misconduct traffic cases (non-DWI)

In re Hardt, 72 N.J. 160 (1977) (Removal)
In re Weishoff, 75 N.J. 326 (1978) (one-year suspension)
In re DeLucia, 76 N.J. 329 (1978) (one-year suspension)
In re Holder, 74 N.J. 581 (1977) (Reprimand)

4. Misconduct by the Prosecution

a. Case preparation - In re Segal, 130 N.J. 468, 480 (1992) (Reprimand)

As with any trial attorney, a municipal prosecutor has the duty adequately to prepare for trial. The prosecutor must select the State's witnesses and prepare and present the State's evidence in court. Because the State is the municipal prosecutor's client, a failure to discharge the obligations of his office is a violation of a prosecutor's professional responsibility to represent the client diligently. When a prosecutor has available relevant evidence bearing on a prosecution, and the prosecutor's failure to present that evidence in the course of trial results in acquittal, that prosecutor has not diligently discharged his or her duty to prepare and present the State's case. Furthermore, when the failure to prepare for trial and present relevant evidence prejudices the State's case, the prosecutor's deviation from that duty may be so severe as to constitute gross negligence.

b. Improper disposition of DWI - In re Whitmore, 117 N.J. 472, 478 (1990) (Reprimand)

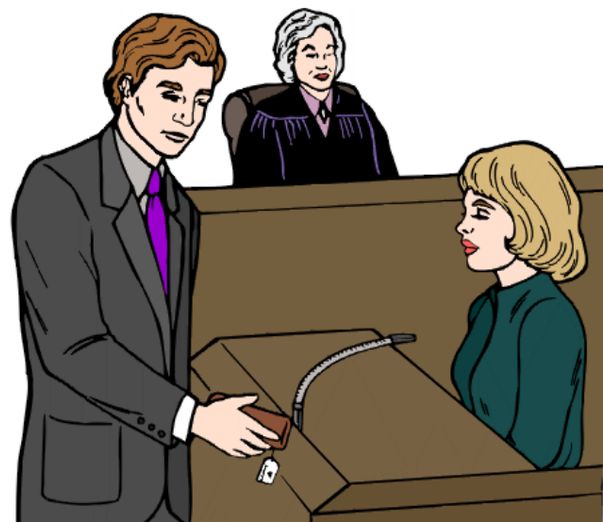
The record indicates that respondent did not actively participate in the scheme to abort this prosecution, and, in fact, he did attempt to prevent White's exit by asking him to stay. Nevertheless, *RPC* 3.3(a)(5) demands more. The Rule does not permit an attorney who directly represents a party in a matter before a court to choose to become only a spectator to an unlawful scheme. The Rule does not countenance an attorney's acquiescence or even passivity in the face of improper actions by parties,256 witnesses, or others who can subvert the proper administration of justice. The Rule requires an attorney to disclose all material facts to the court if he or she has reason to believe the court may be misled by a failure to come forward. As the DEC concluded in this case, "Absolute candor coupled with an absolute duty to disclose, no matter how painful, is required."**

We thus determine that when a municipal prosecutor becomes aware of an improper motive directly affecting the administration of justice on the part of a police officer in a case before the municipal court, which, if undisclosed, could mislead the court, *RPC* 3.3(a)(5), or could contribute to an improper or illegal result that benefits the witness, *RPC* 3.3(a)(2), the failure to disclose such information constitutes a violation of the Rules of Professional Conduct.

In re Norton and Kress, 128 N.J. 520, 538-39 (1992) (Three-month suspension)

Kress allowed the judge to dismiss the DWI charge merely because the police officers did not wish to pursue the case. Kress knew that the officers "dumped" the case for an improper reason. As municipal prosecutor, Kress, not the police officers, was in charge of prosecuting the case. At a minimum he should have emphasized that the case was a DWI case, informed the judge that he had a strong case, and had the officers testify about why they did not want to proceed.
Charges based on adequate evidence should not be dismissed without good cause. Regardless of the officers' testimony or the judge's inaction, the bottom line is that an allegedly-strong DWI case was dismissed for an improper reason. As a prosecutor, Kress bears some responsibility for that result.

Norton argues that his conduct is less egregious than Whitmore's because he did not lie to the court and all the actions he took were proper for a defense counsel. He admits that he initiated communication with Officer Gallagher, told him that his client was a "good guy" and a loyal supporter of the police, and asked Officer Gallagher to give Donnelly "a break." He also admits that he told Gallagher that he was friendly with police officers, among them Lieutenant Tracy.



Norton asserts that every defense counsel wants to "gain the edge." He points out that absent threats, improper pressure or bribes, none of which is present in this case, to ask the police to give the client a break is not improper. Nor is defense counsel's seeking the transfer of a case to another court improper. The officer did not have to give Donnelly a break; the judge did have to transfer the case or dismiss the DWI charge; the prosecutor did not have to accept passively the officers' refusal not to testify; and the clerk did not have to transfer the case to the wrong court.

Although Norton's assertions are true, he cannot escape responsibility for his actions, for they were instrumental in causing Donnelly's case to be dismissed. We have no objection to defense counsel in preparing a municipal court case for trial to ask the municipal prosecutor's consent to speak to the arresting police officers to learn the facts surrounding his client's arrest. However, we rely on the integrity of the counsel to limit the discussion to the facts surrounding the arrest and not to use the session as an opportunity to suggest to the police officers that they "dump" the case, either by changing their testimony or by refusing to testify. Norton's asking the police officers to give his client "a break" was purposely ambiguous. That ambiguity cannot obscure that the only "break" the officers could give Donnelly was to "dump" his case.

5. Misconduct by the Defense

Chronology

State v. Tischio – argued 11/5/86
In re Edson – argued 5/4/87
State v. Tischio – Decided 6/30/87

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a. In re Edson, 108 NJ 464, 470-71 (1987) (Disbarment)

[T]he record is clear that respondent advised two clients to manufacture evidence in the defense of their drunk driving cases, contrary to RPC 1.2(d). Respondent also knowingly permitted a client to offer false evidence in a trial, contrary to RPC 3.3(a)(4), and counseled and assisted a witness to testify falsely in a trial, contrary to RPC 3.4(b). Respondent also participated in a fraud by giving false information to his expert witness for the purpose of having him testify under oath in reliance upon those facts, and he gave false information to a municipal prosecutor, contrary to RPC 8.4(a), (b), (c), and (d).

In re Edson, 108 NJ 464, 472-73 (1987)

One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We have traveled different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers-most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated by this record. There could hardly be a plainer case of dishonesty touching the administration of justice and arising out of the practice of law.

b. In re Seelig, 180 NJ 234, 256-57 (2004) (No discipline)

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.

Notwithstanding that conclusion, we do not find that respondent should be disciplined. In his testimony before the District Ethics Committee, respondent repeatedly stated that he believed his duty to his client, and his client's Sixth Amendment right to counsel, required him to withhold information about the indictable offenses from the municipal court. Respondent took *Dively* and Directive No. 10–82 to confirm his understanding that the obligation to identify and coordinate his client's charges belonged to the County Prosecutor and the municipal court, and not defense counsel. Indeed, the municipal court's failure to ask about the victim(s) injuries, to pursue the reasons for Poje's imprisonment, or to put on the record a factual basis for Poje's plea, is inexplicable. If the court had carried out its responsibilities properly, we likely would not have this case before us today.

Garden State CLE presents:

New Jersey Attorney Ethics and Drunk Driving

Lesson Plan