**Garden State CLE presents:**

# Drug Use and Attorney Discipline

## Lesson Plan

# I. New Jersey Attorney Discipline.

## a.) In general:

**The unlawful possession, use and distribution of controlled dangerous substances by members of the New Jersey bar is viewed by the Supreme Court as a serious problem. Over the years, disciplinary matters concerning the use and abuse of illegal drugs have involved a wide spectrum of legal professionals, ranging from a Judge of the Superior Court (In re Pepe, 140 N.J. 561, 659 A.2d 1379 (1995)), to law clerks. (In re McLaughlin, 105 N.J. 457, 522 A.2d 999 (1987)). The lawyers involved in these types of disciplinary cases have included the professionally experienced and novices, the young and the old, male and female. In response to this ongoing problem, the New Jersey Supreme Court has firmly adopted the position that our society unequivocally condemns the abuse of drugs. Discipline is essential in drug cases because to withhold public discipline from members of the bar who violate the State's drug laws could cause the public to believe that the legal profession is not concerned about illicit drug usage.**

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**In imposing discipline, the Court does not, as a matter of policy, seem to differentiate among the types of illegal substances involved. For example, the Court does not reserve one level of discipline for cocaine cases and another for those involving marijuana. Rather, the measure of discipline is based largely on conduct as opposed to the nature of the substance. Thus, the sanction of disbarment has been reserved for the attorneys who used their privilege to practice law as a tool to distribute illegal drugs. On the other hand, attorneys who have been involved in drug distribution schemes unrelated to the practice of law are not always disbarred, although the discipline imposed in these cases tends to include a suspension lasting years as opposed to months. The vast majority of the disciplinary cases involve simple illegal possession of controlled dangerous substances for personal use.**

## b.) Authorized levels of discipline:

**1. Diversion (See R. 1:20-3(i)(2)).**

**2. Admonition**

**3. Reprimand**

**4. Censure**

**5. Suspension [three-months appears is the minimum term following a drug conviction.]**

**6. Indeterminate suspension**

**7. Disbarment**

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## c.) The disciplinary process:

**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).**

## d.) Fundamental to every disciplinary case is a six-question evaluation process:

**1. What are the facts? Generally this is limited to violations of the NJ Rules of Professional Conduct as proved by clear and convincing evidence. Note that proof of certain types of misconduct invariably will result in disbarment in every case without regard to any other factors. (See In re Wilson, 81 NJ 451 (1979)).**

**2. What range of discipline has been imposed in the past through Supreme Court precedent or recommended through Disciplinary Review Board for similar cases?**

**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? [Note that in drug cases, drug addiction is not regarded as a mitigating factor. In re Zauber, 122 NJ 87, 94 (1991). However, substantial efforts at drug rehabilitation are critical in these cases.]**

**6. Weighing and evaluating all of the foregoing factors, what level of discipline will fairly serve the joint policy goals of deterrence and protecting the public?**

# II. Discipline following a drug arrest or conviction

**a.) Self-reporting. Despite the limiting language in Rule 1:20-13, self-reporting should be done for both criminal as well as petty drug offenses. It does not include traffic tickets like NJSA 39:4-49.1 or NJSA 39:4-50(a).**

> **Rule 1:20-13. Attorneys charged with or convicted of crimes (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.**


## b.) <u>RPC 8.4 Misconduct</u>

**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) <u>commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;</u> [A violation of this RPC does not require a conviction. Even an arrest will satisfy RPC 8.4(b). See In re McEnroe, 172 N.J.324 (2002).]**

**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**

**(d) engage in conduct that is prejudicial to the administration of justice;**

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## c.) <u>Public policy</u> - "We continue to believe that an attorney who breaks the criminal laws relating to the possession of controlled dangerous substances thereby commits ethical infractions that demonstrate a disrespect for law, denigrate the entire profession and destroy public confidence in the practicing bar. Those offenses cannot be countenanced. We thus reaffirm the reasons that have prompted us to impose suspensions on attorneys for violating our laws relating to controlled dangerous substances." In re Schaffer, 140 NJ 148, 159 (1995).

**d.) <u>Relation to private conduct</u> - Discipline for ethics transgressions is not obviated or lessened because an attorney's conduct did not involve the practice of law or arise from a lawyer/client relationship. Offenses that evidence ethical shortcomings, though not committed in the attorney's professional capacity, may, nevertheless, warrant discipline. Misconduct, whether private or professional in nature, that evidences a want of the good character and integrity that are essential for a person to engage in the practice of law constitutes a basis for discipline. The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect his or her clients. The Court's central concern in the administration of attorney discipline is not to punish the attorney, but, more broadly, to promote public confidence in the integrity of the bar. In re Schaffer, 140 NJ 148, 156 (1995).**

## e. Other RPC violations that will likely occur with the legalization of marijuana:

**i.) RPC 1.3 – Diligence - A lawyer shall act with reasonable diligence and promptness in representing a client.**

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**ii.) 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.**

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**iii.) 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.**

**(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.**

# III. Range of discipline in drug cases

## a.) Conviction for offenses attributable to drug addiction may warrant strong disciplinary measures. By way of example:

**In re McKeon, 185 N.J. 247 (2005) (three-month suspension – personal use cocaine);**

**In re Avrigian, 175 N.J. 452 (2003); (three-month suspension – personal use cocaine);**

**In re Foushee, 156 N.J. 553 (1999); (three-month suspension – personal use cocaine);**

**In re Karwell, 131 N.J. 396 (1993); (three-month suspension – personal use cocaine);**

**In re Benjamin, 135 N.J. 461, 640 A.2d 845 (1994) (three-month suspension for unlawful possession of 0.26 grams of cocaine and under 50 grams of marijuana);**

**In re Sheppard, 126 N.J. 210, 594 A.2d 1333 (1991) (three-month suspension for possession of under 50 grams of marijuana and for failure to deliver a controlled dangerous substance (cocaine) to a law enforcement officer);**

**In re Nixon, 122 N.J. 290, 585 A.2d 322 (three month suspension for possession of less than 50 grams of marijuana and 126 grams of cocaine);**

**In re Hasbrouck, 140 N.J. 162, 657 A.2d 878 (imposing one year suspension on attorney for pleading guilty to criminal charges involving false prescriptions for CDS);**

**In re Kaufman, 104 N.J. 509, 518 A.2d 185 (imposing six month suspension on attorney for pleading guilty to two criminal indictments for possession of controlled dangerous substances);**

**In re Orlando, 104 N.J. 344, 517 A.2d 139 (1986) (suspending attorney who pleaded guilty to one count indictment for possession of cocaine until such time as could demonstrate fitness);**

**In re Goldberg, 105 N.J. 278, 520 A.2d 1147 (disbarring attorney for participation in criminal narcotics conspiracy notwithstanding drug addiction);**

**In re Romano, 104 N.J. 306, 516 A.2d 1109 (1986) (disbarring attorney for misappropriating client's funds to support drug habit).**

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## b.) Drug distribution will typically result in disbarment.

**"In most cases an attorney convicted of distribution of controlled dangerous substances would be disbarred. Disbarment would certainly be appropriate if the distribution were done for gain or profit." In re Kinnear, 105 NJ 391, 396 (1987).**

**In re Goldberg, 105 N.J. 278, 520 A.2d 1147 (1987) (Disbarment).**

**In re McCann, 110 N.J. 496, 541 A.2d 1361 (1988) (Disbarment).**

## c.) However, extraordinary efforts at rehabilitation can result in lengthy suspensions:

**In re Banks, 155 N.J. 597, 716 A.2d 531 (1998) (two-year suspension for possession with intent to distribute marijuana, third degree);**

**In re Morris, 153 N.J. 36, 707 A.2d 145 (1998) (three-year suspension for conspiracy to obtain cocaine); In re Musto, 152 N.J. 165, 177, 704 A.2d 6 (1997).**

**In re McCarthy, 119 N.J. 437, 575 A.2d 434 (1990).distribution case where the court imposed a time served suspension, coupled with proof of rehabilitation as a condition of re-instatement to practice.)**

**In re Kinnear, 105 NJ 391 (1987) (One year suspension and re-instatement to practice based upon proof of rehabilitation)**

# d.) <u>On rare occasions, the Court will impose a level of discipline that does not include a suspension due to rehabilitation efforts.</u>


**In re Filomeno, 190 N.J.579 (2007) (censure for Attorney arrested for possession of cocaine a nd drug paraphernalia; numerous mitigating circumstances considered, including the attorney's quick action to achieve rehabilitation, his attendance at meetings in that process, his instrumental role in re-establishing the New Jersey Lawyers Concerned for Lawyers Program meetings in Bergen County, the fact that he acted as a "very distinctive and helpful role model," from which other participants in that program profited, his conclusion of the PTI program three months early because of his commitment and diligence in exceeding its terms, and his expression of deep regret for his conduct.)**

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**In re Zem, 142 N.J. 638 (1995) (reprimand for young attorney who used cocaine for a period of two months to attempt to cope with the death of her mother and her brother; during that period, one of the attorney's long-time friends encouraged her to try a little cocaine to "calm her down;" although the attorney initially declined the offers, she ultimately succumbed to the friend's assurances that the drug would make her feel better; a hospital evaluation following the attorney's arrest concluded that she did not need any further assistance, drug treatment, or rehabilitation; other mitigating factors were the attorney's genuine regret for her behavior, which was deemed aberrational, her embarrassment over the incidents, the resolution of her personal problems, and her successful endeavors to move forward with her life).**

# IV. Accelerated suspension in drug cases

**[In re Schaffer, 140 NJ 148, 159-161 (1995) (suspended three-month suspension for possession and u/i cocaine, possession drug paraphernalia.)]**

**We are not, however, unmindful of the special hardship that befalls an attorney who is suspended from the practice of law several years after the occurrence of the criminal and ethics offenses, and after he or she has confronted the underlying addiction that gave rise to the offenses, and has achieved recovery. However, the special hardship in imposing a suspension on such an attorney after successful rehabilitation is not that the suspension from the practice of law is disproportionate to the offense. It is not. Rather, it is the suspension from the practice of law that is imposed *after* rehabilitation has been achieved that can engender special hardship because it may itself jeopardize that recovery, undermine rehabilitation and incite relapse.**

**That concern, therefore, prompts us to fashion a disciplinary measure that may appropriately and fairly accommodate any attorney whose drug addiction has contributed to his or her commission of a possessory CDS offense, but who has conscientiously, promptly and successfully achieved rehabilitation, and has recognized the continuing need to remain drug-free and maintain sobriety. We, accordingly, determine that a suspension for a possessory CDS offense remains a proper measure of discipline but that, if at all possible, it should be imposed immediately following the commission of the offense so that it may coincide with any rehabilitation program and recovery efforts that are undertaken by the attorney following the commission of the underlying offense. In that way, the public confidence will be vindicated by the exaction of strict discipline commensurate with the commission of a criminal offense,**

**[In addition,] the attorney will not be confronted by a delayed suspension that may serve to undermine the rehabilitation that he or she has achieved. We, therefore, now authorize a form of discipline—an accelerated suspension—for this class of cases.**

**We do not authorize this form of discipline in cases involving controlled dangerous substances in which there are egregious and aggravating circumstances. This form of discipline can be imposed only on the initiative and with the agreement of the attorney charged with CDS possessory offenses, who determines to admit or plead guilty to the commission of those offenses and to seek a prompt suspension to coincide with entry into a rehabilitation program.**

**The attorney shall apply to the Office of Attorney Ethics for a Motion for Discipline by Consent under Rule 1:20-10(b) and for an immediate suspension pending the disposition of the Motion for Final Discipline by Consent. The consent to be suspended should be for a period of time that will not exceed the amount of time the attorney would be suspended were the matter processed in the normal course. Thus, if possession of cocaine usually warrants a six-month suspension, the attorney may consent to an immediate suspension for that period of time. In those cases, the standard appellate process shall be accelerated so that the DRB may review the Motion for Discipline by Consent and issue a decision to the Court within a period to coincide with the period of suspension.**

# V. Mitigation: Drug Rehabilitation and Correction thru treatment

## a.) Foundational declarations of policy:

**We are concerned about not only protecting the public, but also helping the lawyer overcome his addiction and once again become a productive member of society. We therefore encourage the development of committees like the Alcoholism Advisory Committee in the drug abuse area. Such committees cannot be established overnight, and we realize that it is extremely difficult to help an addict who refuses help. Nevertheless, we believe that by being alert and acting in some sense like each other's keeper, lawyers will be able in at least a few cases to identify colleagues who, because of a drug or alcohol problem, are unable to function effectively as attorneys. Early detection may enable us to promote their rehabilitation and prevent injury to the public. In re Kinnear, 105 NJ 391, 387-98 (1987).**

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**[We have] always permitted accused attorneys in disciplinary actions to present evidence by way of defense or mitigation of punishment. That evidence may consist of proof that the attorney's ethical infractions were not rooted in venality, immorality, criminality, corruption or incompetence. And, it may also involve a showing that the determinative cause of the wrongdoing might have been some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment. Such an inquiry into the possible causes of ethical misconduct may culminate in the ultimate rehabilitation of the offending attorney, a result that will serve to protect the public interest without ruining an attorney's career and life. In re Templeton, 99 N.J. 365, 376 (1985).**

## b.) Correction through treatment:

**The concept of "correction through treatment" as expressed by the Supreme Court in *Templeton* should not be thought of as a technique for excusing or justifying an episode of attorney misconduct. Simply put, "correction through treatment" is not a defense in a disciplinary case nor was it so intended by the Court. "Correction through treatment" is a statement of public policy aimed at accomplishing three goals:**

- **1. To encourage efforts by attorneys to engage in therapy and aimed at eventual rehabilitation;**
- **2. To prevent the disbarment of attorneys who have demonstrated rehabilitation; and**
- **3. To protect the public.**

**"Correction through treatment" is best thought of as a method of obtaining a diminished measure of discipline. In contrast to [cases involving the defense of diminished capacity,] it relies less on attempting to prove a loss of volition or competence due to a mental disease or defect and concentrates much more on rehabilitation. In a sense, "correction through treatment" is the culmination of a diminished capacity defense that results in the complete cure and rehabilitation of the wayward attorney. In order to successfully argue a case involving "correction through treatment," one must establish the following:**

- **1. The misconduct was not of such a type as automatically leads to disbarment;**

- **2. The misconduct was not rooted in intractable venality, immorality, criminality, corruption or incompetence;**

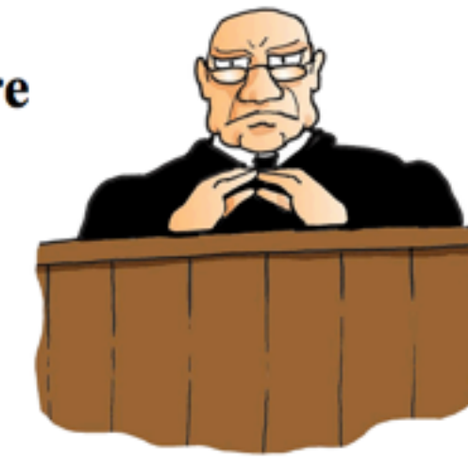
- **3. The misconduct in the case was probably caused by some mental, emotional, medical or psychological state that is not obvious;**

- **4. That state, if it exists, can be corrected through treatment;**

- **5. The respondent attorney has engaged in such treatment;**

- **6. By competent medical proofs and a record of accomplishment since the misconduct, the respondent attorney can demonstrate that he or she is now rehabilitated;**

- **7. The prospect of future incidents of unethical conduct by the attorney are extremely remote; and**



- **8. Readmission to practice does not constitute a threat to the public;**

**Large numbers of attorneys are automatically excluded from consideration of the "correction through treatment" technique. According to the Supreme Court, the public can never be adequately protected from an attorney who misappropriates a client's funds, deals illegal drugs for profit or bribes a public official. Nor can the public ever be properly protected from an attorney who directly poisons the well of justice or demonstrates intractable dishonesty, immorality, venality or incompetence. In short, such an attorney can never become rehabilitated to the extent that the Court would ever again perm**

**<u>c.) The key issue</u> is that the Supreme Court does not want to hear about what your client plans to do….The Justices want to know what he has already accomplished by way of drug rehabilitation.**

**Garden State CLE presents:**

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