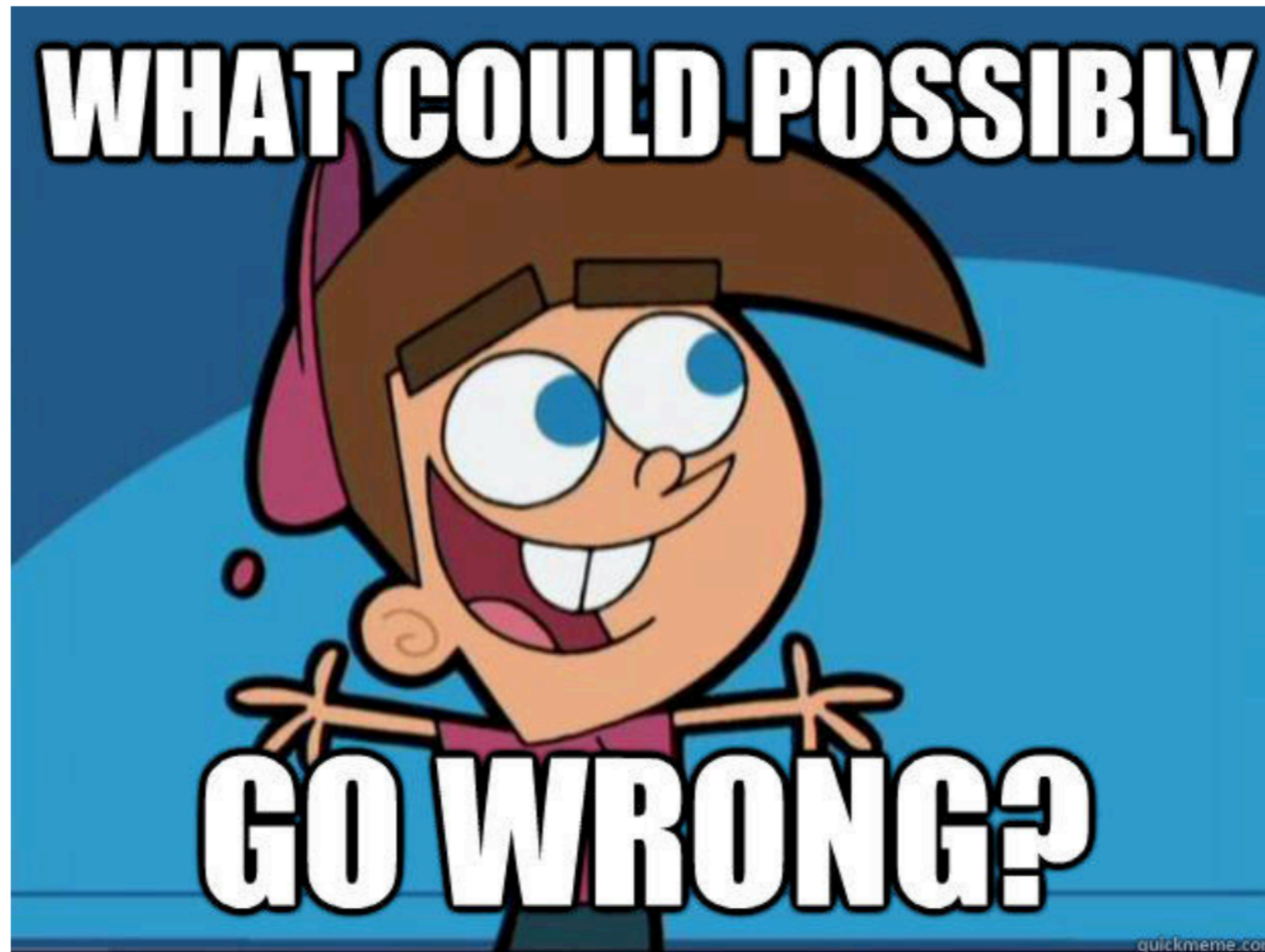


Garden State CLE presents:

**It is just an Ethics Complaint!**



**Lesson Plan**

# Introduction

**Eventually, every lawyer will make a professional mistake at some point. Many times, the mistake, when viewed in context, is extremely minor. However, the reaction of the offending lawyer can often result in a tiny error growing exponentially and out of control to the point where there will be significant disciplinary consequences.**

**This 2.0 Ethics CLE will provide you with information related to common professional errors and how to properly address them without making things much worse.**



# **Question #1. I just got served by mail with an ethics complaint. What can I do to make things worse?**



**Under Rule 1:20-4(e), a respondent has 21 days to file a verified answer to a complaint.**

**If you do not file an answer, two things happen to make things worse: The contents of the complaint will be deemed to be true and the case will go to the Disciplinary Review Board for a hearing without hearing your side of the story.**

**Rule 1:20-4(f) Failure to Answer. (1) Admission. The failure of a respondent to file a verified answer within the prescribed time shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. No further proof hearing shall be required.**

**(2) Certification to Disciplinary Review Board. If a respondent has been duly served with a complaint, but has failed to file a verified answer within the prescribed time, a certification detailing that failure may be filed with the Director by the secretary or special ethics master, or, in cases prosecuted by the Director, by ethics counsel. The Director may thereafter file that certification with the Board, which shall treat the matter as a default. A copy of the certification shall be mailed to the respondent.**

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**To make a bad situation worse, in a default matter, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor.**

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**In order to succeed in a motion to vacate a default, a respondent must satisfy a two-prong test: to offer a reasonable explanation for the failure to file an answer to the complaint and to present meritorious defenses to the charges.**



## **Question #2. Should I have a lawyer represent me on my ethics complaint?**

**Lack of knowledge, experience in disciplinary cases and objectivity will all serve to make things much worse when you choose to represent yourself. Simply put, get a lawyer to represent you! If you cannot afford an attorney, you can have one appointed for you at no cost. See Rule 1:20-4(g)(2)**

**Respondent's Counsel; Assignment for Indigents. A respondent may be represented by counsel admitted to practice law in New Jersey or admitted pro hac vice by the Board, or may appear pro se. A respondent desiring representation but claiming inability to retain counsel by reason of indigency, shall promptly so notify the vice chair and special ethics master, if one is appointed, and shall, within 14 days after service of the complaint, make written application to the Assignment Judge of the vicinage in which respondent practices or formerly practiced, simultaneously serving the application on the vice chair and special ethics master, if one has been assigned, and on the presenter. The application shall be supported by a certification complying with R. 1:4-4(b), which shall contain a current statement of all assets and liabilities, any bankruptcy petition and orders, and copies of the respondent's state and federal income and business tax returns for the prior three-year period. For good cause shown, the Assignment Judge shall assign an attorney to represent the respondent without compensation, so notifying the respondent, the secretary, the vice chair and special ethics master, if one has been assigned, and the Office of Attorney Ethics of any decision.**



## **Question #3. If I am planning on filing an answer to the nonsense and lies in the complaint, can I just deny everything?**

**Both the Rules of court and the case law prohibit blank denials. (See In re Gavel, 22 N.J. 248, 263 (1956)) (concluding that due to the nature of the allegations, an answer should contain a “full, candid and complete disclosure of all facts reasonably within the scope of the transactions set forth in the charges against him”).**

**Accordingly, the answer to a disciplinary complaint must affirmatively respond to the allegations with facts and law. Rule 1:20-4(e) sets forth the specifics of what must appear in your verified answer:**

**Rule 1:20-4(e) - The respondent's answer shall set forth (1) a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint; (2) all affirmative defenses, including any claim of mental or physical disability and whether it is alleged to be causally related to the offenses charged; (3) any mitigating circumstances; (4) a request for a hearing either on the charges or in mitigation, and (5) any constitutional challenges to the proceedings. All constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board. Interlocutory relief may be sought only in accordance with R. 1:20-16(f)(1). Failure to request a hearing shall be deemed a waiver thereof. A respondent is required to file an answer even if the respondent does not wish to contest the complaint.**

**Question #4. I forgot to pay my client security fund assessment and was declared "ineligible to practice." During that time, I appeared in court on behalf of multiple clients. What should I do?**

**This conduct constitutes a violation of RPC 5.5(a). [See also Rule 1:28-2(a) and Rule 1:20-1(d).] Obviously, the first step is to get off the "ineligible list" immediately. You can do this by paying your annual assessment. Upon payment, you will be restored to practice right away.**

**The second step is to report yourself in writing to the Office of Attorney Ethics. In your letter to the Director, detail when you became ineligible, the steps you took to pay your assessment, and the clients and courts in which you appeared while ineligible.**

**Discipline for practicing law while ineligible generally results in an admonition. Frequently, the offending attorney will qualify for a diversion from the disciplinary system under R. 1:20-3(i)(2).**



## **Question #5. I practice law as an LLC and my malpractice insurance expired and left me without coverage for about six months. What should I do?**

**Rule 1:21-1A(3) requires that a professional corporation shall obtain and maintain in good standing one or more policies of lawyers' professional liability insurance which shall insure the corporation against liability imposed upon it by law for damages resulting from any claim made against the corporation by its clients arising out of the performance of professional services by attorneys employed by the corporation in their capacities as attorneys. The insurance shall be in an amount for each claim of at least \$100,000 multiplied by the number of attorneys employed by the corporation, provided that the maximum coverage shall not be required to exceed \$5,000,000 for each claim, and further provided that the deductible portion to such insurance shall not exceed \$10,000 multiplied by the number of attorneys employed by the corporation or \$500,000, whichever is less.**

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**The failure to maintain professional liability insurance by a corporation violates RPC 1.15(d) and RPC 5.5(a)(1) (A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction)**

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**Typically, these cases will result in an admonition and often a diversion from the disciplinary system. [See In re Fitzpatrick, DRB 99-046. (April 21, 1999) admonition; No malpractice coverage for 6 years.] There is no urgent need for self-reporting in these cases. Rather, the key is to get insurance immediately and document both the time period you were without coverage and whether any claims were made or paid during the lapsed period. This issue of liability coverage will be a part of every random audit and any lapse in coverage should be revealed at that time.**

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# **Question #6. I inadvertently made a misrepresentation to a judge. What should I do?**

**There is no ethics issue related to a misrepresentation unless the statement is knowingly false or inaccurate. Negligent misrepresentations may constitute a violations of RPC 1.3 (Diligence) or RPC 1.1 (pattern of negligence (Three infractions constitute a pattern. See In re Zeitler, 182 NJ 389, 396 (2005)) or gross negligence)).**

**There are two RPC provisions that apply to knowing misrepresentations, one where the target is a judge and the other where the target is a third party.**

**The prohibition on misrepresentations to a third party is set forth under RPC 4.1(a)(1). It states, " In representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person. Third party in the context of RPC 4.1 has a broad range of people and can include adversaries, victims, witnesses and business associates of the client. Note that the misrepresentation must be made in the course of representing a client. In the absence of significant harm or a serious ethics history, typically, a violation of RPC 4.1(a)(1) will result in a reprimand. See In re Lowenstein, 190 NJ 59 (2007).**

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**RPC 3.3(a)(1) covers knowing misrepresentations to members of the judiciary. The provision states:**

**(a) A lawyer shall not knowingly:**

**(1) make a false statement of material fact or law to a tribunal;**

**Apart from judges, this RPC has also been applied to misrepresentations made to Office of Attorney Ethics staff and investigators. Historically, discipline for this violation has ranged from an admonition to a three-year suspension, once again depending upon the nature of the misrepresentation.**

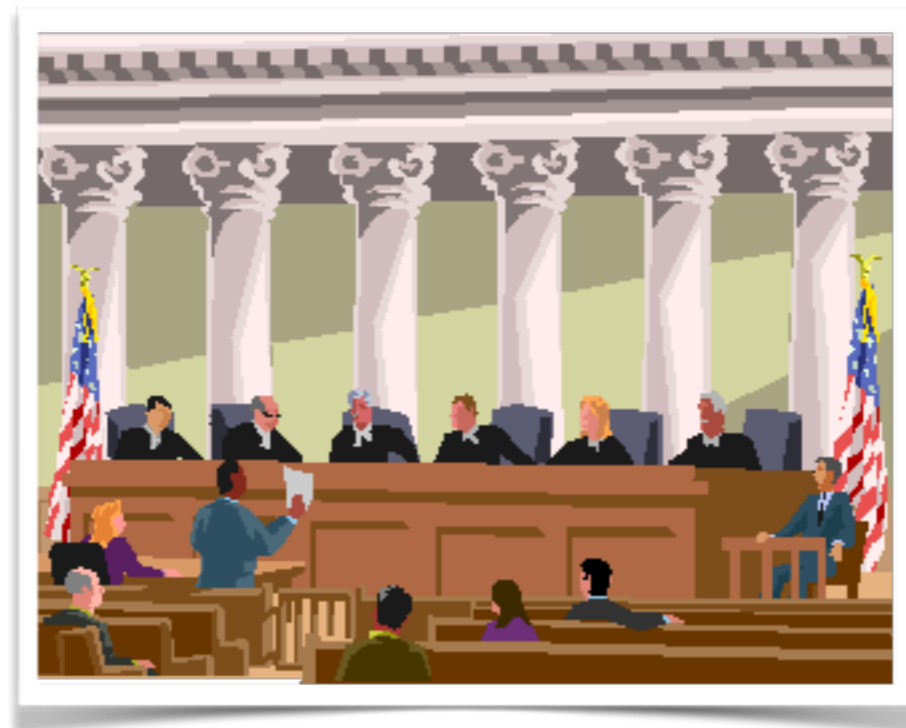
**Admonitions result when the attorney promptly notifies the Court about the misrepresentation. Reprimands and suspensions have been imposed in cases where the misrepresentation was used to gain an advantage in litigation. Suspensions are especially likely when the misrepresentation falsely implicates an innocent third party.**

**If a lawyer makes a knowing misrepresentation, the best course is to immediately notify the Court and any involved adversaries and apologize. The wayward attorney may even want to ask the Court to impose a monetary sanction under Rule 1:2-4. However, remember that New Jersey judges are required to report attorney misconduct to the disciplinary authorities. See Rule 1:18.**



## **Question #7. I have received an order to show cause before the Supreme Court. What should I do?**

**"An Order to Show Cause issued by this Court is neither a suggestion nor an invitation that an attorney is privileged to accept or reject as he or she wishes. Rather, it is an Order to appear with which a respondent's compliance is required. Absent some significant and compelling excuse for a failure to appear in response to our Order, we will consider such a failure to be a serious matter to be evaluated as a part of the record on which an appropriate penalty will be imposed; and we may, on that basis alone, as we have here, further enhance the resulting penalty accordingly." In re Kivler, 193 NJ 332, 343-44 (2008).**



## **Question #8. I just got a notice from my bank that a trust account check I wrote has been returned for insufficient funds. What should I do?**

**A bounced check draw on a trust account implicates RPC 1.15(a) (negligent misappropriation of entrusted funds) and RPC 1:21-6 (recordkeeping violations).**

**These banking transactions must be reported to the Office of Attorney Ethics (OAE) by your bank. The key is to immediately investigate the cause of the shortage, take the necessary steps to make the check good and document what occurred. Also important are the steps you will take to make sure this does not happen again.**

**Next, prepare a memorandum detailing what occurred and send it to the OAE immediately. Often, this will speed the audit process and may help you minimize or avoid any significant discipline.**

**Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See *In re Cameron*, 221 N.J. 238 (2015); *In re Wecht*, 217 N.J. 619 (2014) (attorney's inadequate records caused him to negligently misappropriate trust funds, violations of RPC 1.15(a) and RPC 1.15(d)); and *In re Gleason*, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client.)**



**Question #9. I represent a client who control a corporation that builds houses and commercial properties. He is also my dear friend. He has told me he owns two lots. He wants to sell one of them to me and my wife and build a new home for our family. Is this legal?**

**This is a common ethical issue that arises between attorneys and clients. A transaction like the one outlined here is rife with potential concurrent conflicts.**

**RPC 1.7 states that 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.**

**RPC 1.8 provides that 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.**

**In this fact pattern, a lawyer who would continue to represent his client's corporate interests would also have a personal interest based upon his ownership interest in the real property and construction of the home by his client.**



**Concurrent conflicts can be overcome by securing three writings from the client. First, the affected client must give informed consent, confirmed in writing, after full disclosure and consultation. RPC 1.7(b)(1). Specifically:**

**(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.**



**Since 1994, it has been a well-established principle that a reprimand is the ordinary measure of discipline when an attorney engages in a conflict of interest. In re Berkowitz, 136 N.J. 148 (1994). If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," discipline greater than a reprimand is warranted."**

**Question #10. I have been subject to a reprimand in Minnesota for a violation of RPC 1.4 (b) (A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. represent a client). What should I do about my New Jersey law license?**

**New Jersey attorneys have an affirmative obligation to report themselves to the OAE upon the imposition of discipline in another jurisdiction. See Rule 1:20-14(a)**

**Rule 1:20-14. Reciprocal discipline and disability proceedings (a) Reciprocal Attorney Discipline and Disability. (1) Reporting Duty. An attorney admitted to practice in this state, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall promptly inform the Director in writing on transfer to disability-inactive status or on imposition of discipline as an attorney or otherwise in connection with the practice of law in another jurisdiction, including any federal court of the United States or the District of Columbia, a state or federal administrative agency or other tribunal, a court of any state, territory, commonwealth or possession of the United States.**



**Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:**

**The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:**

- (A) the disciplinary or disability order of the foreign jurisdiction was not entered;**
- (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;**
- (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;**
- (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or**
- (E) the unethical conduct established warrants substantially different discipline.**



**"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state is guilty of unethical conduct in another jurisdiction shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Rule 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:2014(b)(3).**

**Typically, the quantum of New Jersey discipline will usually be the same as was imposed in the other jurisdiction or less if New Jersey case law provides for a lesser measure of discipline. *In re Kaufman*, 81 N.J. 300, 303 (1979); see also *In re Harris*, 115 N.J. 181, 187 (1989).**

# **Question #11. My fiancée and I got into an argument which resulted in my being found guilty of harassment, NJSA 2C: 33-4(b) (offensive touching). What are my obligations as a New Jersey attorney?**

**Step 1 is self-reporting. This should be done for both criminal as well as petty offenses. It does not include traffic tickets.**

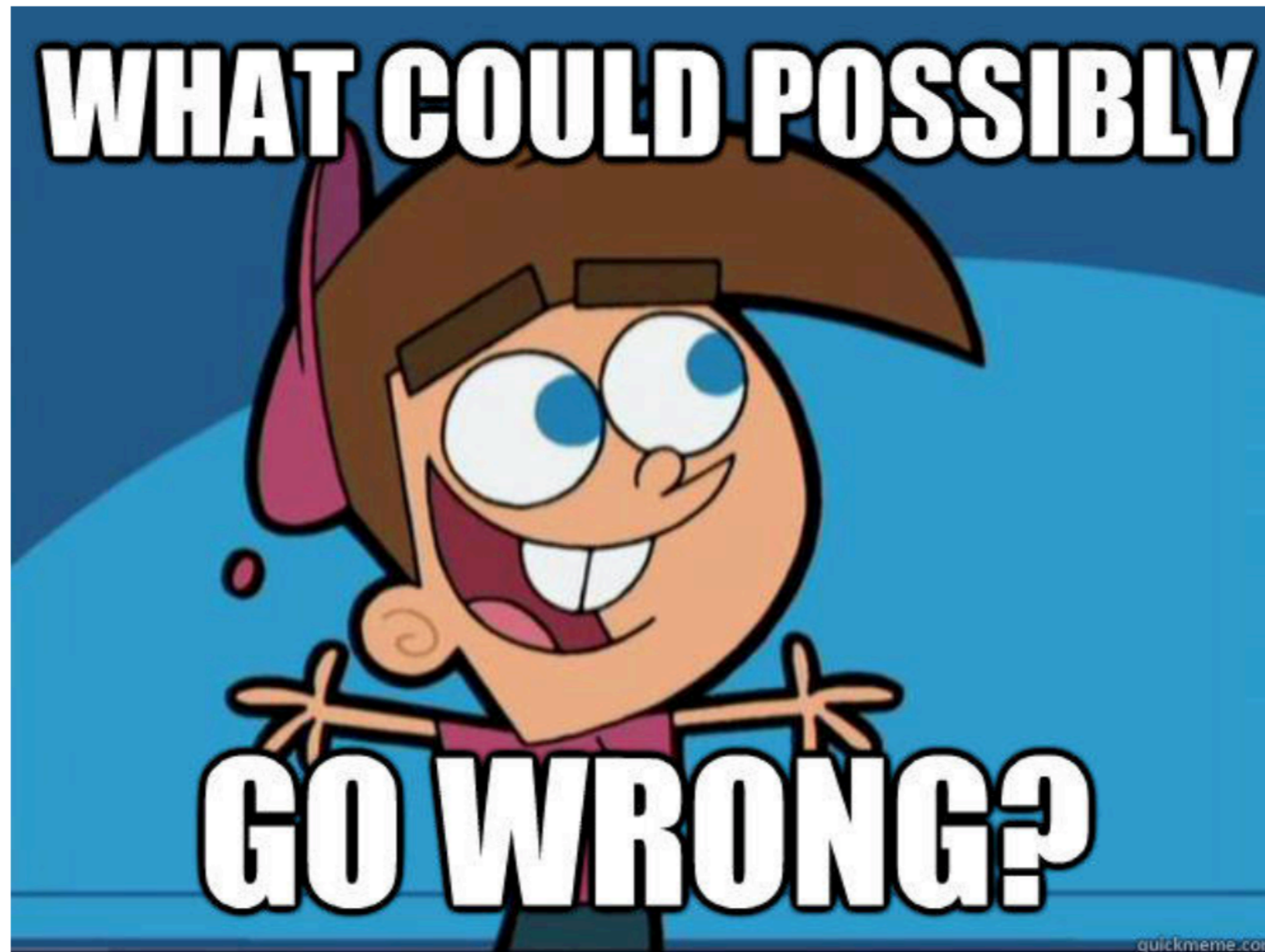
**Rule 1:20-13. Attorneys charged with or convicted of crimes (a) Reporting Criminal Matters. (1) Duty of Attorney Charged. An attorney who has been charged with an indictable offense in this state or with an equivalent offense in any other state, territory, commonwealth, or possession of the United 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.**

**Step 2 involves an analysis of the disciplinary outcomes that may result following a plea or finding of guilty. Every criminal conviction is a violation of RPC 8.4(b) (It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.) Certain violations will trigger harsh discipline, such as domestic violence (three-month suspension), bribery of a public official (disbarment). Thus, the plea bargaining process is a vital consideration in a criminal case.**

**Step 3 Remember that a criminal conviction conclusively establishes the RPC violation under RPC 8.4(b). The only issue that can be argued by the respondent is the extent of the discipline based upon aggravating and mitigating factors.**

Garden State CLE presents:

**It is just an Ethics Complaint!**



**Lesson Plan**