Garden State CLE Presents:

Defending Our Own: Domestic Violence Charges Against Judges, Lawyers & Law Students

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Lesson Plan

Introduction

There are special legal issues that arise when a judge, attorney or law student has been charged with an offense that constitutes an act of domestic violence. Certainly, these cases should be defended zealously. However, there are critically important collateral consequences from a judicial and attorney ethics standpoint. The following sections will address these issues so you can alert your client and plan a defense to the ethics component that will flow from the domestic violence allegations, regardless of the outcome of the criminal or quasi-criminal case.

The issue before the disciplinary committees and the Supreme Court will be a violation of R.P.C. 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;

No conviction is required to support this allegation.

Part I
Judges

SUPREME COURT OF NEW JERSEY
Directive 04-09 – May 29, 2009

Domestic Violence Disqualifications

The Supreme Court has adopted a policy for assigning cases to judges when a judge is a party to a domestic violence matter. This policy applies to all judges sitting in Municipal and Superior Courts, including temporary assignments.

A judge who is a party in a domestic violence matter shall not hear any domestic violence cases while the matter is pending and for a period of one year from the entry of the trial court's disposition. If the disposition is a final restraining order against the judge, the judge shall be disqualified from hearing any domestic violence case during the period such restraint is in place or for one year from the date of the order, whichever is longer.

If, at the time a domestic violence complaint is filed, the judge has reserved decision in any domestic violence case, that case shall be transferred by the Assignment Judge to another judge. The matter shall be determined on the papers unless a party objects. If a party 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 domestic violence 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 domestic violence cases will not preclude a judge from exercising his or her power of recusal in any particular domestic violence case or in any category of such cases. A judge disqualified under this policy may not automatically resume hearing domestic violence matters if a temporary order of restraint is vacated, or if the matter in which the judge is involved is concluded without the entry of relief in favor of the complainant. Once disqualified under this policy, a judge must obtain the approval of the Supreme Court prior to hearing any domestic violence cases.

Discussion & Analysis

Note that this memo is directed to the civil aspect of domestic violence cases only. Regardless of whether there is a companion criminal charge, the involvement by the judge in litigation mandates he immediately notify the assignment judge.

The judge must also report that he has been charged with a crime or d/p offense to the Office of Attorney Ethics (Rule 1:20-13(a)(1)).

A plea or finding of guilty will constitute conclusive proof of the ethics violation, leaving only the amount of discipline to be imposed as the contested issue.

Judges who have been subject to judicial discipline must also report that fact to the Office of Attorney Ethics for the potential imposition of reciprocal discipline affecting the judge's law license.

Part II
Attorneys – In General

It should come as no surprise that incidents of the domestic violence sometimes touch the personal lives of New Jersey attorneys. When an attorney is a victim of domestic violence, he or she has immediate access to the police and courts for protection and help, just as any other person in the State covered under the Act. However, when the attorney is the perpetrator of an act of domestic violence, he or she will face sanctions in addition to those meted out by the criminal and family courts. Such an attorney will be subject to discipline by the Supreme Court.

Of course, most acts of domestic violence occur in private and are not usually related to an attorney's professional life. However, this fact is of no moment to the Supreme Court. It has long been the rule in New Jersey that attorneys may be subject to discipline for acts of misconduct in both their professional and private lives. Private misconduct and professional misconduct differ only in the intensity with which they reflect upon the fitness to practice law.

Since 1995, the Supreme Court has imposed discipline in a number of cases involving New Jersey attorneys who perpetrated acts of domestic violence. The discipline imposed was based upon the Court's belief that in order to be admitted to the bar of this State, an attorney must have a certain set of character traits. They include honesty and truthfulness, trustworthiness and reliability. He or she must also have a professional commitment to the judicial process and the administration of justice. These traits are the fundamental norms that control the professional and personal behavior of attorneys. Acts of domestic violence violate these fundamental norms.

1) Disciplinary Outcomes – Automatic Suspension From Practice

The first time the Supreme Court had the opportunity to address the appropriate measure of discipline in a domestic violence case came with the publication of the companion cases of In re Magid, 139 N.J. 449(1995) and In re Principato, 139 N.J. 456(1995). The Court used the occasion to announce a new rule of disciplinary law. The Justices announced that they would, in future cases, ordinarily suspend from practice an attorney who is convicted of an act of domestic violence. Since the respondent attorneys in these two disciplinary actions were not on notice as to the probable disciplinary consequences for acts of the domestic violence, the Supreme Court imposed a public reprimand in each of their cases. However, almost all subsequent domestic violence disciplinary cases have resulted in suspensions from practice. The rule announced in Magid and Principato is the foundation for attorney discipline in domestic violence cases.

In re Magid, 139 N.J. 449(1995)

The Magid matter was a high profile, widely reported and notorious incident involving a county First Assistant Prosecutor. His misconduct involved a simple assault on a subordinate employee with whom he was having a dating relationship. The assault included punching the victim in the head and face, knocking her to the ground and kicking her in the neck, head and lower back. The victim's injuries included a black eye and bruising. As a result of this conduct, the respondent attorney was fired from his job with the Office of the County Prosecutor. He also entered a plea of guilty in municipal court, was fined by the judge and placed on probation.

In deciding upon the appropriate measure of discipline, the Supreme Court noted that this case was the first of its kind. Apart from the details of the assault, there were many other significant aggravating factors in the case. Perhaps the most significant was that this violation was committed by one of the chief law enforcement officers of the county. As a prosecutor, the respondent attorney was required to combat acts of domestic violence, not commit them. The incident called into question his ability to zealously prosecute or effectively work with victims of domestic violence. According to the Justices, the attorneys who hold public office are vested with a public trust and are thereby more visible to the public. Such attorneys are held to the highest standards. The respondent attorney's conduct must be judged from the perspective of an informed and concerned private citizen and in the context of how the image of the bar would be diminished if his conduct were not subject to public disapproval.

In re Principato, 139 N.J. 456(1995)

In the Principato case, the respondent attorney was convicted after a trial in municipal court of a domestic violence-related simple assault. The victim in this case was his client in a matrimonial action. Over time, the respondent attorney had developed an intimate relationship with her. The domestic violence incident involved an argument during which the respondent attorney used profanity, yelled at the victim and ultimately pinned her body against a mattress while pummeling the mattress forcefully at least 10 to 15 times.

The improper intimate relationship the respondent attorney carried on with his client was not the subject of discipline before the Supreme Court, although the Justices did take note of it and were highly critical of this element of the respondent attorney's conduct. It is probably a good thing for the respondent attorney that this aspect of his conduct was not before the Court. It might have resulted in even harsher discipline. The facts of this case presented the Court with numerous aggravating factors. Apart from the assault itself, the Justices found the

victim to have been a particularly vulnerable person, one who had been referred to the respondent attorney by a battered women's shelter.

The mitigating factors included:

1) No prior history of misconduct;

2) No serious harm to the victim;

3) The character of the respondent attorney was such that the likelihood of future violations of the law was remote;

4) No evidence that the respondent attorney's professional representation of his client suffered in any way due to their personal relationship.

2) Implementing the New Rule – Toronto and Margrabia

In re Toronto, 150 N.J. 191(1997)

The Toronto case involved an attorney who had a prior history of disciplinary infractions that had resulted in a reprimand. The particular act of domestic violence that culminated in a negotiated plea of guilty to simple assault actually occurred before the Supreme Court's decisions in Magid and Principato. The criminal aspect of the domestic violence case began as a four-count indictment that charged the respondent attorney with, among other crimes, a second-degree aggravated assault and weapons offenses. The indictment was largely based upon the victim's (his ex-wife's) assertion that the respondent attorney had attempted to strangle her with a telephone cord. However, at his plea hearing on the simple assault charge, the respondent attorney only admitted to being involved in an argument with the victim "during the course of which he pushed her away from him." The sentencing Court ordered him to serve a probationary term, perform community service and engage in domestic violence counseling. He was also ordered to have no further contact with the victim.

Finding the respondent attorney's conduct to be a violation of R.P.C. 8.4(b), the Supreme Court implied some measure of skepticism in the respondent attorney's version of what had occurred between him and the victim. Nonetheless, the Justices found that, but for his prior disciplinary history, they might have considered imposing only a reprimand. However, despite the fact that the conduct occurred before the rule announced in Magid and Principato, the prior disciplinary history served as an aggravating factor that required a three-month suspension from the practice of law.

In re Margrabia

The incident of domestic violence in the Margrabia case occurred after the decision in Magid and Principato and thus placed the respondent attorney in a position to receive a suspension from practice under the rule announced in those cases. The facts of the case involved a simple assault. The respondent attorney struck his wife in the face with a half-loaf of bread, and then punched her in the arm. He also reportedly struck their three-year-old child. Upon conviction after trial, he was sentenced to a 30-day suspended jail term, community service as well as costs and penalties. He was also required to attend Alcoholics Anonymous and a domestic violence abuse program. The trial court also issued an order restraining him from contacting the victim.

Apart from the fact that the respondent attorney was presumptively on notice as to the minimum level of discipline to be imposed in domestic violence cases after Magid and Principato, the suspension in his case was further justified by certain aggravating factors. There was evidence before the Justices of past incidents of violence and of domestic abuse. Moreover, the Court was concerned that in addition to striking his wife, the respondent attorney had also struck their child. Accordingly, the Court ordered a three-month suspension from the practice of law.

3) Domestic Violence Cases Over the Past 30 Years

In re Predham, 136 N.J. 276(1993) (Aggravated assault – 6-month suspension)

In re Jacoby, 188 N.J. 384(2006) (Simple assault - DRB recommended 3-month suspension – final discipline was censure)

In re Edley, 196 N.J. 443(2008) (3d degree criminal restraint - 3-month suspension)

In re Jacoby, 206 N.J. 105(2011) (Reciprocal from Virginia (unlawful wounding) - 1 year suspension – 2nd DV offense)

In re Park, 225 N.J. 609(2016) (Agg assault – 3-month suspension)

In re Paragano, 227 N.J. 136(2016) (simple assault – 3-month suspension)

In re Salami, 228 N.J. 277(2017) (Simple assault –Censure based upon time)

In re Hyderally, 233 N.J. 596(2018) (simple assault – 3-month suspension)

In re Bhatia, 235 N.J. 366(2018) (Reciprocal discipline – 6-month suspension)

In re Pagliara, 232 N.J. 327 (2018) (Agg assault – 3-month suspension)

Discussion & Analysis

All of the cases that have implicated the rule of Magid and Principato involved assault-type conduct. Moreover, each stemmed from a conviction. The open issues are what about DV cases where the predicate offense does not involve any violence or a conviction. To be sure, these cases will generally result in some level of discipline. The open question is whether it should ordinarily be a suspension from practice.

Part III
Law students

1) In general - Defense attorneys must be vigilant when representing law students and college students who express a desire to go to law school. Unless their cases are properly handled, the Supreme Court's Committee on Character will delay their admission to the bar for months, if not years. This collateral consequence should be explained to the client in painstaking detail. Essentially, the time start repairing the damage from a domestic violence incident begins immediately upon the defense attorney being retained. The process of building a solid and persuasive record of reform and rehabilitation must begin forthwith so as to provide a well-grounded and substantial track-record of success to show to the Committee on Character in the future after having passed the bar exam.

2) Qualifications For Bar Admission

Rule 1:27-1 sets forth the specific qualifications an applicant must satisfy as conditions to admission to the New Jersey bar. Essentially there are three conditions. They include:

> 1) Passage of the bar examination;
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> 2) Certification of good character by the Committee on Character pursuant to Rule 1:25; and
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> 3) Attainment of a qualifying score on the Multi-State Professional Responsibility Examination or passage of an approved course on professional ethics given by an American Bar Association-accredited law school.

To date, all of the case law dealing with admission to practice has involved character issues. That is to say that the character of the applicant, as determined by the Committee on Character, has been found to be lacking the traits that are deemed necessary for a New Jersey attorney.

3) Triggering Events

RG 302:1 Conduct Requiring Investigation. The appropriate Part of the Committee, or such member or members thereof so assigned, shall review the Statement of Candidate and related documents. If, on such review, further information is deemed desirable, a request therefore may be made of the candidate or any other appropriate source. The request may be made in person or by telephone or mail. Conduct requiring additional action may include, but is not limited, to the following:

a) Nondisclosure of information;

b) Academic dishonesty;

c) Unlawful conduct, including arrests, whether resulting in conviction, dismissal, or expungement;

d) Failure to file required federal, state, or local tax returns or to pay tax obligations;

e) Financial misrepresentation, mismanagement, irresponsibility, or neglect;

f) Default or arrearages in the payment of student loans;

g) Allegations of fraud, perjury, or false swearing;

h) Misconduct in employment;

i) Evidence of moral turpitude;

j) Having been disciplined as a member of a profession, trade or occupation, including but not limited to the practice of law;

k) Failure to comply with Court orders, such as support and alimony orders;

l) Domestic violence;

m) Abuse of legal process or history of vexatious lawsuits;

n) Current substance abuse; or

o) Evidence of current psychotic disorders including paranoia, bi-polar disorder, or schizophrenia.

4) Reform and Rehabilitation

A candidate who seeks to prove reform and rehabilitation bears the burden of proof. He or she must first show by clear and convincing evidence that his or her attitude and behavior after the disqualifying misconduct is such that admission to the bar is proper. The more serious the offense, the greater will be the need for a showing of genuine rehabilitation. In certain cases, evidence of a positive kind, including affirmative acts demonstrating personal reform and improvement will be required in order to establish the requisite degree of rehabilitation. In all instances,

the applicant must display complete candor in all filings and proceedings required by the Committee on Character. The applicant's attitude before this committee will be of great importance. So, too, will be the applicant's voluntary renunciation of past misconduct. The absence of misconduct over a period of intervening years is also an important factor. During the intervening years, the candidate should be prepared to show a particularly productive use of his or her time. And finally, the Court will consider affirmative recommendations from people who are aware of the candidate's past misconduct and consider him or her to be currently fit to practice law despite the misconduct. Later cases have reduced evidence of reform and rehabilitation to a five-part list.

1) Complete candor in all filings and proceedings conducted by the Committee;

2) Renunciation of past misconduct;

3) Complete absence of misconduct in the intervening years;

4) A productive use of time subsequent to the misconduct; and

5) Affirmative recommendations from people who are aware of the past misconduct who specifically consider the applicant's fitness in light of that behavior.

The affirmative evidence may include the following:

1) Positive social conduct and community service;

2) Absence of recent misconduct;

3) Reputation testimony;

4) Demonstration of the candidate's understanding of responsibility to the administration of justice and the practice of law.

Substance abuse or mental illness may not be considered a defense or justification for misconduct, but evidence of treatment and recovery may be offered to support a claim of rehabilitation.