Garden State CLE presents:

#YOUTOO: SEXUAL HARASSMENT AND THE PRACTICE OF LAW

Lesson Plan

Robert Ramsey, Instructor

Part I – Judicial Discipline

a.) Proofs and public policy

In re Seaman, 133 NJ 67 (1993).

a.) Statement of facts: Complainant testified that respondent, in October 1988, began directing various remarks of a sexual nature at her. Those remarks, according to complainant, continued throughout her clerkship. For example, complainant claimed that respondent had a conversation with complainant, sometime in the spring of 1989, in which he expressed the wish that a pen complainant was holding were actually respondent's penis. Respondent, according to complainant, boasted of his sexual prowess, asked her to repeat a vulgar sexual remark to him, and assured complainant that, were they to have sexual relations on his desk, he would be sure to avoid a crack on the desk that might scratch her. Complainant stated that although she had disregarded those sorts of comments by respondent, he continued to subject her to such remarks. In addition to her claims of verbal harassment, complainant testified to improper physical contact by respondent.

Complainant herself stated that respondent's behavior had embarrassed and troubled her. Complainant's mother, C.D., testified that although complainant seemed quite happy for about the first month of her clerkship, in October 1988 complainant underwent a marked personality change. C.D. noted of complainant that "[s]he became very quiet, stayed in her room a lot. Cried a lot." That change continued throughout the year. C.D. also testified that complainant had told her of respondent's salacious remarks about the pen, about his sexual prowess, and about respondent's attempt to place complainant's hand on his crotch. Complainant related those incidents to her mother during the fall of 1988, roughly contemporaneous with the events of which she complained.

b.) Public policy - This State and its judiciary are committed to ending gender discrimination—and one of its most egregious expressions, sexual harassment,

c.) Nature of the misconduct - This form of conduct is personally offensive, highly invasive, psychologically hurtful, and often deeply embarrassing to the victim. This form of misconduct violates public policy as well as the Law against Discrimination, N.J.S.A. 10:5–1 to –42 and several sections of the Criminal Code. Aggravating factors from a disciplinary standpoint involve the following:

1. What were the specific acts; physical, oral, psychological?
2. Was the harassment isolated or an on-going course of conduct?
3. The power dynamic between the victim and victimizer;
4. The vulnerability of the victim;
5. The impact on the victim in terms of physical, emotional or psychological harm;
6. Does the victimizer have a history of similar misconduct?
7. Violations of laws against discrimination, harassment and offensive touching

d.) Clear and convincing evidence defined: Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. It is evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue.

<u>e.) Proof based upon victim's uncorroborated testimony</u>: One of respondent's major arguments is that the evidence, consisting primarily of complainant's own testimony, falls far short of satisfying the clear-and-convincing standard of proof necessary to support the charges of sexual harassment as the basis of judicial misconduct, and, indeed, the evidence is so wanting that the presentment should have been dismissed. Respondent thus stresses that virtually all of the evidence in support of the complaint is uncorroborated; it consists only of complainant's assertions concerning the occurrence of the incidents and is not bolstered even indirectly by the testimony of other witnesses. Respondent claims that uncorroborated victim testimony cannot meet the clear-and-convincing standard. As a matter of principle, and as a practical matter in this case, we reject that contention. True, the majority of incidents recounted by complainant [was] not witnessed by others and, in general, [was] not directly corroborated. It does not follow from that, however, that the evidence presented at the hearings below could not meet the clear-and-convincing standard of proof.

We recognize that the most serious forms of sexual harassment are also the least likely to occur in public and, therefore, the least likely to be witnessed by third parties. One study has reported that although 53.1% of women surveyed had experienced sexual harassment at work, only 22.5% of the total survey respondents reported ever having discussed the general subject matter with a co-worker. Fewer than one in five women who had experienced sexual harassment at work ever reported it to any authority. Silence may well signal the shame, humiliation, fear, and dependence of the victim. The extent to which a woman may react to insults, propositions, and even physical abuse may have less to do with the severity of the harassment than with the woman's need to keep her job.

We conclude that uncorroborated evidence may satisfy a burden of proof based on the standard of clear-and-convincing evidence.

b.) Cases following *Seaman*.

a.) In re Subryan, 187 N.J. 139 (2006) (two-month suspension – sexual harassment of law clerk). [Generally follows Seaman.]

b.) In re Williams, 169 NJ 264 (2001) (Three-month suspension - Confronted her former boyfriend, and his female companion, at restaurant and when she gave false and misleading information to police and identified herself as representative of police department in telephone call to saloon, where she had had another confrontation with her former boyfriend; judge's conduct did not involve the misuse of judicial office.)

c.) In re Jones, 211 NJ 116 (2012) (four-month suspension for offensive touching and sexual remarks in public while highly intoxicated.)

c.) Judicial Discipline Imposed in Consensual, non-Harassment Cases.)

a.) In re Campbell, 205 NJ 2 (2011) (Reprimand – three-month consensual, sexual relationship with his court room bailiff, ending in her suicide attempt. Discipline based upon failure to report the relationship to his supervisory as required by EEO policy for the judiciary.)

b.) In re Hyland, 101 NJ 631 (1985) (Reprimand - Consensual sexual relationship outside the office did not constitute sexual harassment, but is intolerable due to appearance that judicial office was subject to undue influence or otherwise compromised.)

c.) In re Brennan, 147 NJ 314 (1997) (Reprimand – imposed for consensual hugging and kissing subordinate violations clerk in judge's office.)

Part II – Hostile Work Environment

Lehmann v. Toys 'R' Us, 132 *N.J.* 587 (1993).

a.) Sexual harassment in the workplace: Sexual harassment jurisprudence generally divides sexual harassment cases into two categories. *Quid pro quo* sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences. Hostile work environment sexual harassment, by contrast, occurs when an employer or fellow employees harass an employee because of his or her sex to the point at which the working environment becomes hostile.

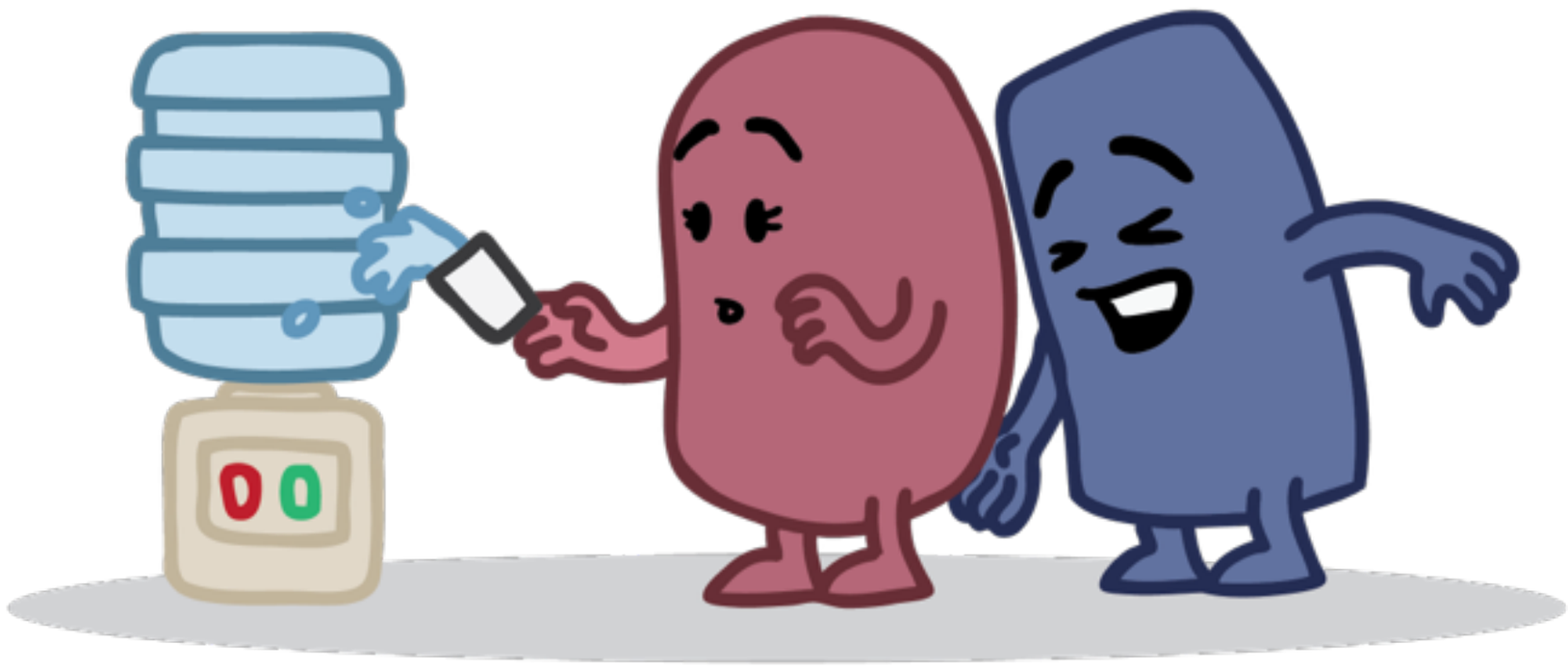
b.) Ruling in the case: This appeal presents this Court with two questions concerning hostile work environment sexual harassment claims under the New Jersey Law Against Discrimination, First, what are the standards for stating a cause of action for hostile work environment sex discrimination claims? Second, what is the scope of an employer's liability for a supervisor's sexual harassment that results in creating a hostile work environment? We hold that a plaintiff states a cause of action for hostile work environment sexual harassment when he or she alleges discriminatory conduct that a reasonable person of the same sex in the plaintiff's position would consider sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment.

We further hold that in the determination of an employer's liability for damages when an employee raises a hostile work environment discrimination claim against a supervisor:

(1) An employer will be strictly liable for equitable damages and relief;

(2) An employer may be vicariously liable under agency principles for compensatory damages that exceed equitable relief; and

(3) An employer will not be liable for punitive damages unless the harassment was authorized, participated in, or ratified by the employer.



Part III – Attorney Discipline

In re Witherspoon, 203 NJ 343 (2010)

a.) Statement of Facts: Respondent offered discounted legal fees to one client in 2001, and on several occasions late in 2005 and early in 2006 to two clients and a family member of another client, in exchange for sexual favors of various kinds. According to the stipulated facts, respondent offered to forgive that part of the debt if he could "meet T.B. in a hotel room for three hours." Several months later, in January 2006, T.B.'s father was again behind in his payments, at which point he owed $200 that T.B. was not able to pay. Respondent told T.B. that she could "take care of the $200" if she would "come to his office in a bathing suit and dance for him."

During one of her visits to his office, when she was accompanied by a female friend, respondent commented that "many gay women 'come on' to" him. He then said that "he would like to see S.B. and her friend 'make out' ... [and that if they did so] he would file the bankruptcy free of charge." Some time later, when S.B. arrived to make a payment toward the agreed-upon fee and told him that there was another creditor to be added to the petition, respondent "stated that he would only add the creditor to S.B.'s bankruptcy if she lifted her skirt." In yet another incident thereafter, when S.B. arrived to pay a balance due for legal services, respondent told her that she "could satisfy her outstanding legal fees by either allowing him to watch her with her female friend or by allowing him to join in." S.B. refused each of these suggestions, understanding them to be offers to exchange legal services for sexual favors. She eventually retained alternate counsel to complete her bankruptcy matter.

b.) Rules of Professional Conduct Implicated:

i.) RPC 1.7(a)(2) Conflict of Interest: General Rule

(a). A concurrent conflict of interest exists if:

(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.

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ii.) RPC 4.4(a)

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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iii.) RPC 8.4 Misconduct
It is professional misconduct for a lawyer to:

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

g) engage, in a professional capacity, in conduct involving discrimination 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.

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iv.) Official Comment by Supreme Court

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

<u>c.) How the Supreme Court and DRB determine the proper level of discipline:</u> As we have often observed, the essential purpose of our system of attorney discipline is to protect the public, not to punish the attorney. 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.

To determine the level of discipline that will protect the public, deter future acts of misconduct and be gfair to respondentthe Court goes through a five-step process:

1. **What violations of the RPC's have been proved by clear and convincing evidence?**
2. **How has the Court disciplined attorneys for similar misconduct in the past?**
3. **What is the respondent's disciplinary history?**
4. **What was the level of harm to clients, the public or the administration of justice?**
5. **What mitigating factors are available to the respondent?**

<u>d.) No *In re Wilson* Rule for sexual harassment</u> - [A]s we have previously cautioned, preying on clients will be dealt with more harshly than other acts because it goes directly to the heart of the trust on which the attorney-client relationship is founded. But we cannot endorse the dissenters' automatic disbarment approach because of its broader implications. Carried to its logical conclusion, creating the "zero tolerance" rule that they advocate based on this record would demand that we automatically disbar attorneys involved in non-criminal, non-threatening, non-traumatizing, purely verbal, sexual improprieties directed at other adults, simply because they are clients. In light of our disciplinary precedents making plain that not every conviction for a sexual offense will result in disbarment, we conclude that it would be disproportionate punishment indeed if respondent's behavior, although boorish, insensitive and offensive, but well shy of criminal, found itself on the far side of that bright line.

Part IV – Consensual Sexual Relations with Clients

Introduction - There is no general RPC provision prohibiting sexual relations between an attorney and his client. The New Jersey Supreme Court has declined to adopt proposed ABA Rule 1.8(j) which would prohibit sexual relations with a client unless the relationship predated the the start of the attorney-client relationship. A prohibition related to sexual relations between an attorney and his client probably exists in assigned counsel matters.The line of cases on this issue begins with the 1985 *Liebowitz* decision.

In re Liebowitz, 104 N.J. 175 (1985). (Reprimand – Following acquittal in municipal court, discipline was imposed for attempted sexual advances on an assigned, highly vulnerable matrimonial client. "[When a] client has been assigned by the Court, both she and the Court may reasonably expect and rely on the fact that she will be treated strictly on a professional basis by the assigned attorney and not be converted into or considered by the attorney as a social guest to whom sexual proposals may be made and with whom sexual conduct may take place. Respondent was in a position of superiority or dominance. An assigned client could reasonably infer that a failure to accede to Respondent's desires would adversely impact on her legal representation.)

In re Rea, 128 NJ 544 (1992) (Reprimand – Consensual sexual relations with an assigned public defender DWI client who lacked capacity to freely consent. Respondent did not terminate representation when the social relationship ended.)

<u>In re Hyderally</u>, 162 N.J.95 (1999) (Reprimand - sexual advances to two legal aid clients.)

<u>In re Warren</u>, 214 N.J. 1 (2013) (Reprimand for having a consensual sexual relationship with his client. This was a six-week relationship that began with respondent's offer to drive her home, after a first court appearance on the day the two met. The DRB considered the most important fact to be that the client was assigned, this time in a criminal case. So, the DRB said, the two "were not on an equal playing field and she was not in a position to freely consent to the relationship.)

<u>In re Resnick</u>, 219 NJ 620 (2014) (Reprimand imposed for consensual sexual relationship with a *pro bono* domestic violence client. Discipline imposed for continuing representation after relationship ended.)

In re Peter Ouda, 13-124 (October 25, 2013). (Admonition for not terminating representation after consensual sexual relationship with client ended. She was the complainant as in *Resnick* case!)

Part V. Sexual Harassment of Clients

This line of cases often involves criminal prosecution, but not always…

In re Sims, 185 NJ 276 (2005) (Censure – Petty disorderly persons conviction for pinching secretary)

In re Wolfson, 178 NJ 457 (2004) (Six-month suspension following his conviction of fourth degree criminal sexual contact for
touching the breast of a nurse during a medical examination. The attorney gave a statement to the county prosecutor's office, in which he admitted that, over a period of three to four years,
he had touched six female employees at his doctor's office

In re Gallo, 181 NJ 304 (2004) (Disbarment by consent following conviction on four counts of criminal sexual contact on three clients and a pro se litigant. Following an initial recommendation of a tghree-year suspension, the case was remanded by the Supreme Court to the DRB for a fact-finding hearing by the Supreme Court. In re Gallo, 178 NJ 115 (2003).)

In re Gernert, 147 N.J.289 (1997) (one-year suspension for attorney whopleaded guilty to the petty disorderly persons' offense of harassment by offensive touching; the victim was the attorney's teenage client.)

In re Tucker, 174 N.J.347 (2002) (Reprimand - attorney pulled aside a client's sweater slightly and asked for a "peek" of her breasts.)

In re Pinto, 168 N.J.111 (2001) (Reprimand - attorney made
inappropriate comments of a sexual nature to his client and improperly touched her.)

In re Pearson, 139 N.J.230 (1995) (Reprimand – where the attorney improperly touched his client's buttocks, placed his head on her chest, and made inappropriate comments to her.)

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