Garden State CLE

Legal Malpractice In Criminal Law

Instructor
Robert Ramsey, Ed.D.

Lesson Plan

INTRODUCTION

Allegations of legal malpractice in the context of a criminal case can taker two separate pathways: civil damages and attorney discipline. As a practical matter, every allegation of malpractice in a criminal case (either as prosecutor or defense) will implicate one or more RPC violations.

PART I
CIVIL SUIT FOR DAMAGES

a) AOMA - New Jersey criminal defense attorneys are among the class of professionals expressly covered by the Affidavit of Merit Act (AOMA) under N.J.S.A. 2A:53A–26c. The Legislature adopted AOMA to weed out frivolous claims against licensed professionals early in the litigation process. In the world of attorney malpractice, the submission of an appropriate affidavit of merit is considered an element of the claim.

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.

b) Elements of Proof

To establish legal malpractice, a plaintiff must prove the following elements:

> 1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney;
>
> 2) the breach of the duty owed by the defendant;
>
> 3) proximate causation of the damages claimed by the plaintiff; and
>
> 4) actual damages were incurred by the plaintiff.

[See Albright vs. Burns, 206 N.J.Super 625, 632(App.Div.1986).]

c) Statute of limitations – Under the TCA, there is a two-year statute for legal malpractice claims involving government-employed defense attorneys. N.J.S.A. 59:8-8. I n general, a legal-malpractice action accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages .... At that point, the plaintiff has a right to sue and the statute of limitations begins to run. Grunwald vs. Bronkesh, 131 N.J. 483, 492(1993). In the criminal malpractice context, the statute usually begins to run when the criminal defendant receives relief in the form of exoneration.

For non-governmental attorneys, under N.J.S.A. 2A:14-1, there is a 6-year statute which begins to run when the client suffers damage and discovers, or through reasonable diligence should discover, that that damage is attributable to the attorney's negligent advice.

d) Exoneration - If the basis of the complaint is grounded in a wrongful conviction, proof of exoneration is a required element. (McKnight vs. OPD, 197 N.J. 180(2008)). Exoneration may be deemed to have occurred as a result of a subsequent dismissal of the indictment, an order vacating the conviction, reversal on appeal, a grant of PCR, an amendment to a lesser offense after having spent substantial time in custody following conviction or any disposition more beneficial to the criminal defendant than the original judgment. However, such proofs would not be required in cases where the conviction is not contested, but rather an allegation of sub-standard (negligent) efforts that went into the plea bargaining process. (Cortez vs. Gindhart, 435 N.J.Super 589(App.Div.2014))

e) Notice - When a PCR petition alleging ineffectiveness of counsel is filed, a copy of that petition should also be forwarded to the attorney whose performance has been placed in question. In cases in which the attorney is employed by the Public Defender's Office or a law firm, those entities should receive notice as well because they too may be subject to suit. That approach will not only place the attorneys and the appropriate entities on notice of a potential lawsuit but also allow for the retention of files related to the case. McKnight vs. OPD, 197 N.J. 180, 183(2008).

PART II
ATTORNEY DISCIPLINE - PROSECUTORS

Introduction – In New Jersey, prosecutors are subject to all the Rules of Professional Conduct (R.P.C.), including Rule 3:8. This R.P.C. provides in part:

The prosecutor in a criminal case shall:

> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;
>
> (d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

From a professional discipline standpoint, there is a clear distinction between prosecutors who appear in Superior as opposed to municipal court.

a) Prosecutors in Superior Court

The case law is replete with examples of assistant prosecutors and deputy attorneys general engaging in all manner of unethical conduct in the Superior Court. Incidents of criminal conduct by county prosecutors will trigger suspensions from practice.

See for example:

In re Farr, 115 N.J. 231(1989) (Six-month suspension)
In re Asbell, 135 N.J. 446(1994) (Two-year suspension)
In re Hoerst, 135 N.J. 98(1994) (Six-month suspension)
In re Magid, 139 N.J. 449(1995) (Reprimand) (Domestic Violence)

Outside the criminal conviction sphere, ethical misconduct by prosecutors in Superior Court typically result in clear threats and posturing from the Supreme Court and Appellate Division, (e.g., Possible violations of special ethical rules governing prosecutors may be referred to appropriate district ethics committee for disciplinary action, State vs. Watson, 224 N.J.Super 354, 362-63(App.Div.1988)). It is extremely rare for such prosecutors to be subject to professional discipline. Rather, the sanction is almost always a reversal of the underlying conviction based upon the misconduct.

b) Examples of Ethical Violations by Prosecutors in Superior Court

> i) Pattern of Misconduct – State vs. Frost, 158 N.J. 76(1999) (During trial, made factually false representations to the jury; disparaged defense advocacy and urged jurors to ignore it; suggested cops don't lie; attempted to provoke prejudice against the defendant.) (Sanction for misconduct: "The Attorney General wrote the assistant prosecutor a letter of reprimand. Because this was the young assistant

prosecutor's first jury trial, and because he had left the Essex County Prosecutor's Office, that letter was a sufficient personal sanction in this case.”).

ii) Vouching for the credibility of witnesses (especially police) – State vs. Goode, 278 N.J.Super 85, 90(App.Div.1994); State vs. Jones, 104 N.J.Super 57, 65(App.Div.1968).

iii) Name-calling – State vs. Pennington, 119 N.J. 547, 576-77(1990) (“a cancer, parasite upon society, animal, butcher-boy, young punk, hood, bum.”) See also State vs. Long, 119 N.J. 439, 484(1990) (racially-based names).

iv) Angelic character of the victim – State vs. Williams, 113 N.J. 393, 456(1988).

Again, we caution prosecuting attorneys that derogatory name-calling will not be condoned. Mindful of the rhetorical excesses that invariably attend litigation, we nonetheless strongly admonish prosecutors to be circumspect in their zealous efforts to win convictions. Although our courts on numerous occasions have noted with displeasure prosecutorial excesses, it is evident that these expressions of dissatisfaction have failed to eliminate improper conduct that results in constitutional deprivation or violates established notions of fair play. [As this Court cautioned], we are prepared to take more severe action as required to ensure that capital trials are conducted without resort to improper remarks and questionable tactics by the State's prosecuting attorneys.

v) Comment on issues not in evidence – State vs. Atwater, 400 N.J.Super 319, 337(App.Div.2008) (“drunk, blotto, closing in for the kill, what does cold do to smell?”) .

vi) Knowingly advocating false evidence – State vs. Garcia, 245 N.J.Super 412(App.Div.2021) (Argued inferences from excluded evidence that the jury would have rejected had it seen the video).

c) Prosecutors in Municipal Court

Gross negligence – R.P.C. 1.1 - In re Segal, 134 N.J. 468(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. (Citation omitted.) 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."

The Segal decision was intended by the Court to communicate the message that prosecutors on both the county and municipal level have complete responsibility for the preparation of their cases in a comprehensive and thorough manner. Gross negligence has the clear capacity to deny the public of a just outcome to a case and thus will subject the offending prosecutor to public discipline.

In re Mott, 231 N.J. 22(2017) (Six-month suspension & five-year disqualification from prosecuting) (Conflict of interest – R.P.C. 1.7(a)(2)).

PART III
ATTORNEY DISCIPLINE - DEFENSE

a) In re Alcantara, 144 N.J. 257(1995) (Reprimand for R.P.C. 4.2)

R.P.C. 4.2 provides that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer, or is authorized by law to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel.

The attorney was involved in the representation of a defendant in a criminal trial. Two co-defendants were severed from the trial after their pleas of guilty. The guilty pleas were conditioned upon their promises to truthfully testify against the respondent attorney's client. The Supreme Court found as fact that the respondent attorney approached the co-defendants and, knowing they were represented, urged them to decline to testify against his client. This action by the respondent constituted violations of both R.P.C. 4.2 and R.P.C. 3.4(f).

b) In re Stanley, 102 N.J. 244(1986) (Reprimand for R.P.C. 3.2)

R.P.C. 3.2 - A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

The attorney in <u>Stanley</u> engaged in:

> 1) Constant interruption of the court when court was speaking;
>
> 2) Displayed flippant, insulting attitude by asking court if the court was finished speaking;
>
> 3) Displayed arrogance toward the court by stopping oral presentation, glaring at court with a rude grimace. This was done repeatedly in spite of court admonitions to cease;
>
> 4) Displayed a constant failure to respond to court's directions by frequently making discourses rather than asking questions of witnesses;
>
> 5) Displayed an insulting and rude manner in addressing the court by either laughing out loud or making such remarks as "Oh, Boy," under his breath while expressing displeasure with court's ruling;
>
> 6) Although instructed by the court not to present an affidavit as evidence of his financial circumstances, but to question the client, Respondent defied the court's instruction;
>
> 7) Instructed his client on how to respond while being examined by defense counsel after the court directed Respondent not to do so.

The <u>Disciplinary Review Board</u> found the respondent attorney's language, constant interruptions of the judge, arrogance, and retorts to rulings of the trial court to display a contumacious lack of respect. The fact that the trial court may have been wrong in its rulings did not excuse the misconduct.

c) Jones vs. Barnes, 463 U.S. 745(1983) (R.P.C. 1.2 - Decision whether to testify at trial)

R.P.C. 1.2 provides the parameters for the representation of clients generally. The Rule provides:

> (a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by R.P.C. 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation . A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

This Rule requires defense counsel to communicate all plea offers, no matter how ridiculous) to their clients to abide by their clients' decisions to testify, plead guilty and seek a trial by jury.

R.P.C. 1.4 provides:

> (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.

d) Legal Fees

In relevant part, R.P.C. 1.5(b) requires a lawyer to set forth, in writing, the basis or rate of the legal fee before or within a reasonable time after commencing the representation. The purpose of the Rule "is to have the client fully informed as to the terms of the hiring and know without question his or her financial responsibility, as well as to prevent an attorney from overcharging." DeGraaf vs. Fusco, 282 N.J.Super 315, 320(App.Div.1995).

e) Client Confidentiality – R.P.C. 1.6

Confidentiality under the RPC's also extends to prospective clients under R.P.C. 1.18(a).

RPC 1.6 provides as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c) and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to R.P.C. 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or

disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to prevent the client from causing death or substantial bodily harm to himself or herself;

(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of R.P.C. 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

PART IV
INEFFECTIVE ASSISTANCE OF COUNSEL

a) For many decades, the test ineffective assistance of counsel tracked the common notion that the trial a mockery and a sham. (i.e., two mockeries of a travesty of a sham!)

Since 1987, New Jersey's seminal case related to the effective assistance of counsel in a criminal case is State vs. Fritz, 105 N.J. 42(1987) where the Court held that under Article I, paragraph 10 of the State Constitution a criminal defendant is entitled to the assistance of reasonably competent counsel, and that if counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violated.

This test for ineffective assistance in New Jersey adopts the United State Supreme Court decisions on this topic in Strickland vs. Washington, 466 U.S. 668(1984) and United States vs. Cronic, 466 U.S. 648(1984).

b) The Strickland Court announced a simple, two-part test for evaluating claims of "actual ineffectiveness" of counsel:

> i) First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> With respect to the performance prong of the test, the Court noted that client loyalty, adequate consultation, and legal proficiency are relevant in determining whether assistance was effective. It

eschewed, however, any more specific test: “[N]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. The Court endorsed extreme deference in evaluating the performance of counsel, requiring a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.”

ii) Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The Court there held that in some ineffective assistance cases, prejudice to the defendant may be presumed. It stated that when there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified” a presumption of ineffectiveness is warranted. Such circumstances involve the complete denial of the right to counsel altogether, actual or constructive.

Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

c) Typically, challenges based upon ineffective assistance must first be addressed by way of a hearing through an application for post-conviction relief. A hearing is almost always necessary because the underlying steps taken by the defense will not appear in the trial record. Typically, the trial defense counsel will be required to testify.

d) In the absence of an exoneration or proof that the petitioner could have received a better plea offer, claims of ineffective assistance of counsel do not necessarily implicate attorney malpractice. However, then evidence may implicate a wide variety of R.P.C. violations related to:

Gross negligence (1.1);
diligence (1.3);
communications (1.4(b));
confidentiality (1.6(a));
conflicts of interest (1.7);
meritorious claims (3.1); and
candor (3.5)

PART V
DISCIPLINARY OUTCOMES

Professional discipline in criminal malpractices cases will be dramatically enhanced in cases where the respondent engaged in similar misconduct in the past that had been subject to discipline or has a significant record of professional discipline.

a) Absent serious aggravating factors, such as harm to the client, conduct involving gross neglect, lack of diligence, and failure to communicate with a client ordinarily results in an admonition, even when accompanied by other non-serious ethics infractions, such as a violation of R.P.C. 1.5(b).

However, as noted above, the quantum of discipline is enhanced, however, when additional aggravating factors are present, such as a disciplinary history for neglecting client matters.

b) Standing alone, misrepresentations to clients require the imposition of a reprimand. <u>In re Kasdan</u>, 115 <u>N.J.</u> 472, 488(1989). A reprimand may be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions, such as gross neglect or failure to communicate.

c) Absent serious aggravation, the discipline imposed on attorneys who make misrepresentations to a court ranges from a reprimand to a short-term suspension, including if their conduct results in the filing of frivolous litigation or the prejudicial administration of justice. See, e.g.,

> i) <u>In re Vaccaro</u>, 245 <u>N.J.</u> 492(2021) (reprimand for an attorney, in a reciprocal discipline matter, who lied to a judge, during a juvenile delinquency hearing, that he had no knowledge of his client's other lawyer or his client's counseling in connection with his client's immigration matter; prior censure);
>
> ii) <u>In re Jaffe</u>, 230 <u>N.J.</u> 456(2017) (censure for an attorney for his combined misconduct in two consolidated matters; in the first matter, the attorney failed to file an expungement petition for his client, despite his client's numerous attempts to obtain information regarding his case; following the client's termination of the representation, the attorney immediately filed with the court a deficient expungement petition, without his client's knowledge, that misrepresented to the court that he still represented his client; in the second matter, the attorney failed to diligently defend his client in a criminal matter, ignored numerous requests for information regarding the case, and failed to provide his client or replacement counsel with the client file; in aggravation, the attorney failed to cooperate with disciplinary authorities in the first matter, repeatedly engaged in dismissive treatment

toward his clients, and previously was reprimanded twice – the first time for gross neglect, lack of diligence, failure to communicate, and failure to cooperate with disciplinary authorities, and the second time for lack of candor to the tribunal);

iii) In re Freeman, 235 N.J. 90(2018) (three-month suspension for a pool attorney with the OPD; the attorney failed to communicate with his client about an upcoming hearing on a PCR petition; the attorney appeared at the hearing without the client, took actions that were contrary to the client's wishes, and made misrepresentations to the court and the OPD; those statements would later negatively impact the client's ability to pursue an appeal; during the ethics investigation, the attorney lied to the investigator and, later, to the hearing panel; no prior discipline);