



Defending a Sexual Harassment Attorney Ethics Case



Instructor

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Lesson Plan

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Introduction

In a sexual harassment case, certain R.P.C. violations are usually alleged. These include the following:

R.P.C. 1.7. Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. 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.

R.P.C. 3.2. Expediting Litigation

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.

R.P.C. 8.4. Misconduct

It is professional misconduct for a lawyer to:

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) 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.

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

Part I

Establishment of Foundational Law

The key cases establishing the Court policy toward acts of sexual harassment are set forth under:

a) Public Policy - In re Seaman, 135 N.J. 67(1993) (60-day suspension) and In re Subryan, 187 N.J. 139(2006) (60-day suspension). In the modern era, instances of sexual harassment by judges will now result in removal from office. In re Hoffman, 260 N.J. 130, 144(2025).

All judges know there is no place for sexual misconduct or harassment in the judicial system. Today we make clear that egregious violations of that rule will result in removal from office and not a period of suspension.

b) Rules of Professional Conduct - There is no specific prohibition in the Rules of Professional Conduct against lawyers engaging in sexual relations with a client. However, the Court has adopted one narrow exception:

In re Leibowitz, 104 N.J. 175(1985) (Reprimand). Although an attorney's sexual relationship with a client is not per se unethical, the relative positions of the parties must be scrutinized to ascertain whether the relationship was prohibited. An attorney assigned to represent a client pro bono in a matrimonial matter attempted to engage in a sexual relationship with the client. The attorney received a reprimand. The victim was emotionally involved in a custody fight relating to her children. Not unreasonably she relied on appropriate professional treatment by an attorney

assigned to her as an indigent by the Family Court to represent her on a pro bono basis. Her perspective as to the attorney's role and position must be considered. He was obviously in a superior position as her assigned attorney and at least to her or someone in her position there was an inherent element of coercion in his conduct towards her. Thus, she cannot be said to have truly consented to [Respondent's] sexual advances. That such inherent coercion was present is clear from the evidence, including her resistance to such advances.

Resulting rules of law from the Leibowitz decision:

- 1) 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.
- 2) The standard of conduct demanded of a member of the Bar must be objective. A respondent's conduct must be examined from the viewpoint of an informed and concerned private citizen and be judged by whether the reputation of the Bar would be lowered if the conduct were permitted.

The five-step disciplinary process - In re Witherspoon, 203 N.J. 343(2010) (1-year suspension).

The Witherspoon case involved the misconduct of a bankruptcy attorney who made inappropriate and highly sexual comments (which he regarded as “jokes”) to four of his female clients. Final vote by the Supreme Court was 5-2 with two justices seeking automatic disbarment in misconduct cases based upon sexual harassment.

Two significant holdings can be understood from Witherspoon:

- 1) Unlike the holding in In re Wilson, 81 N.J. 451(1979), the Court's majority ruled that the Justices will not regard sexual harassment of clients by a lawyer as a per se disbarment violation; and
- 2) There is a five-step process that will be followed in every disciplinary case, except for those involving knowing misappropriation of entrusted funds which has only a one-step procedure.

The Five Question Evaluation Process

- 1) What are the facts? (Generally limited to violations of the New Jersey Rules of Professional Conduct as proved by clear and convincing evidence – (See In re Seaman, 133 N.J. 67, 74(1993)).
- 2) Controlling precedent - How have these types of cases been adjudicated in the past through Supreme Court precedent or through Disciplinary Review Board?
- 3) Disciplinary record - What has been the attorney's individual prior disciplinary history?
- 4) Harm - What was the extent of harm to clients, members of the public or the administration of justice?
- 5) Mitigation - Are there issues of attorney rehabilitation, payment of restitution or general mitigation of discipline?

There is a one-question evaluation process in a knowing misappropriation case:

- 1) Did the respondent knowingly misappropriate entrusted funds without his client's knowledge or permission? In re Wilson, 81 N.J. 451(1979).

Non-ethics consequences - Sexual harassment occurring in the workplace can result in civil consequences following from allegations of of the New Jersey Law against Discrimination, N.J.S.A. 10:5-1 thru 42. Sexual harassment in the workplace generally involves either quid pro quo harassment or creation of a hostile workplace environment harassment. Lehmann vs. Toys 'R US, 132 N.J. 587(1993).

Consensual dating relationships in government:

Judiciary's policy of EEO - Consensual dating relationships between Judiciary employees are generally not the Judiciary's business. However, when the two people currently or previously involved in such relationships work as supervisor and subordinate, the supervisor must promptly inform his or her immediate superior of the personal relationship so that the Judiciary may take action to change the reporting relationship between the individuals. This is necessary in order to eliminate any appearance of or actual impropriety in the workplace. All Judiciary employees, including justices and judges, are subject to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq. Accordingly, failure to give proper notice to the supervisor's immediate superior may result in the denial of legal representation and indemnification by the State in the event that a discrimination or sexual harassment lawsuit is filed in connection with the relationship.

Note that most local political subdivisions of the State of New Jersey have similar employee reporting requirements enacted by ordinance, resolution or regulation.

Part II

Defense Strategy & Tactics

Be sensitive and knowledgeable about the law and avoid getting caught up in the circumstances in the first place.

Maintain professional relationship with client and among employees.

Separate yourself from client representation or subordinate employees in the event of a romantic relationship.

Every case can be defended on the merits. The burden of proof is by clear and convincing evidence. However, the testimony of the victim by itself may be sufficient to sustain the R.P.C. violations.

Discipline will be based upon numerous factors such as:

Length of relationship;

Number of incidents;

Vulnerability of the victim;

Power dynamic between the parties;

Emotional or physical harm to the client;

Adverse consequences to the case outcome;

Prior disciplinary history; and

Steps that were taken to make the victim whole.

Part III

Disciplinary Outcomes

a) Reprimand Cases

In re Pinto, 168 N.J. 111(2001) - R.P.C. 8.4(g))

According to the filed police report from the statement of the victim, the respondent had engaged in numerous acts of sexual harassment. These included questioning the victim (his matrimonial client) about her physical appearance, making extremely crude remarks about what he would like to do with her during sex, massaging her shoulders, kissing her on the neck, telling her she should "show yourself off, show whatever you have" and telling her that he had "slept with other clients." Additional evidence came from surreptitious recordings made by the victim.

Our decision as to the appropriate sanction is also a recognition that society's attitude toward sexual harassment has changed and that "much conduct that would have 15 been considered acceptable twenty or thirty years ago would be considered sexual harassment today. As community standards evolve, the standard of what a reasonable woman would consider harassment will also evolve." Lehman v. Toys 'R' US, Inc., 132 N.J. 587, 612(1993). See also In re Hoffman, 260 N.J. 130 (2025).

Other Reprimand cases include:

In re Pearson, 139 N.J. 230(1995). Attorney reprimanded, on a motion for reciprocal discipline, for his sexual advances toward two legal-aid clients);

In re Resnick, 219 N.J. 620(2014) Respondent engaged in a romantic and sexual relationship with his client which soured during the course of the representation leading respondent to seek ex parte advice from the Presiding Family-Part Judge in the county where the client's divorce action was pending. Respondent had been subject to prior discipline.

In re Carroll, 232 N.J. 111(2018) (Engaging in a sexual relationship with a [public defender client whom he had been appointed to represent, a relationship that should have triggered the appointment of new counsel.

In re Hyderally, 162 N.J. 95(1999) the attorney reprimanded, on a motion for reciprocal discipline, for his sexual advances toward two legal-aid clients

In re Rea, 128 N.J. 544(1992) (Sexual relationship with a client who, because of her past history and mental health, lacked the capacity to freely consent to the relationship)

b) Censure Cases

In re Vazquez, 253 N.J. 555(2023)

Stipulated violations of R.P.C. 1.7(a)(2), 4.2 and 8.4(g)

As a senior assistant prosecutor, Respondent accosted a female defendant on multiple occasions outside the court room following her drug court appearances. He also made multiple visits to her place of employment where she worked as a waitress and attempted to establish a dating relationship with her.

[The victim] described respondent's behavior as "intimidating" and "uncomfortable." She added that it "creeps [her] out" that respondent called her place of employment to see if she would be there and, subsequently, visited her place of employment, alone, and requested to sit in her assigned section. A.E. expressed fear for her safety, generally stating that she had reported the incident to her probation officer in case something happened to her. A.E. had no romantic interest in respondent. However, she did not tell respondent that she did not desire to have personal conversations with him, because, as a drug court participant, she felt obligated to speak with him, as a drug court prosecutor. Specifically, she stated "I just don't know what

to do, because like he is part of the court. So like I don't know if he is asking for court or if he is just asking me for himself.”

Although the record contained no allegation that the respondent had requested sexual relations with the victim, he nonetheless abused his position of power over her by engaging in harassing conduct toward her, fully aware of her vulnerable state. Censure based upon weighing the conduct against no prior disciplinary record in 17 years of practice.

In re Regan, 249 N.J. 17(2021)

Respondent sent a sexually explicit and graphic email to his client two days after her final judgment of divorce had been granted. (See Rule 1:11-3 - the responsibility of an attorney of record in a trial court terminates on the expiration of the time for appeal from the final judgment). The email left the victim shocked, scared and disgusted because she had never signaled to him that she desired a personal relationship with him, a man who was many decades older than she. In mitigation, the violation involved only one text message and the respondent had practiced law for 19 years with any R.P.C. violations. In aggravation, the respondent attempted to persuade the victim to drop the grievance prior to the hearing.

c) Suspension Cases

In re Warren, 256 N.J. 363(2024) (six-month suspension)

Respondent had a prior imposition of discipline for sexual harassment. For four months he sent a client with whom he was in a romantic relationship lewd and demeaning. He resisted efforts by his client to end the relationship.

In re Garofalo, 229 N.J. 245(2017) (six-month suspension for attorney who sexually harassed two female employees of the law firm where he worked through hundreds of e-mails containing misogynistic language and crude invitations to drink, dine, vacation and engage in sex with

him; none of the attorney's overtures or e-mails were welcomed and, in regard to one victim, continued for years following a brief relationship; the attorney's e-mail campaign continued despite one victim's explicit instruction that he stop communicating with her; further, the attorney disregarded his law firm's contemporaneous directive that he stop communicating with her; during an OAE demand interview, the attorney misrepresented that he had no contact with one of the victims after she had reported his conduct to the law firm; the attorney further lied to the OAE by emphatically denying having sent one of the harassing e-mails to his victim; the attorney later admitted, during the same demand interview, that he had sent the e-mail only after the OAE had informed him that it would issue a subpoena for his e-mail records; in aggravation, we considered the prolonged nature of the harassment and the attorney's failure to heed warnings from the victim, the police, and his law firm; no prior discipline; the DRB had recommended a censure, however, the Court imposed a six-month suspension);

In re Becker, ___ N.J. __ (2022) (one-year suspension by consent for attorney who made sexually explicit statements to his minor, court-appointed client during a meeting, in violation of R.P.C. 1.14(a) (when a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client- lawyer relationship with the client) and R.P.C. 8.4(g); no prior discipline).

In re Gernert, 147 N.J. 289(1997), (one-year suspension) sexual harassment (offensive touching) of a minor client).