

Garden State CLE Presents:

Confronting Judicial Bias



Instructor:

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Lesson Plan

INTRODUCTION

FOUNDATIONAL LAW

Article I, Paragraph 5 of the New Jersey Constitution

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

New Jersey Law against Discrimination – N.J.S.A. 10:5-1 et seq.
New Jersey Civil Rights Act – N.J.S.A. 10:6-1 et seq.

The New Jersey Code of Judicial Conduct

CANON 3

A judge shall perform the duties of judicial office impartially and diligently.

RULE 3.6 Bias and Prejudice

(A) A judge shall be impartial and shall not discriminate because of race, creed, color, sex, gender identity or expression, religion/religious practices or observances, national origin/nationality, ancestry, language, ethnicity, disability or perceived disability, atypical hereditary cellular or blood trait, genetic information, status as a veteran or disabled veteran of, or liability for service in, the Armed Forces of the United States, age, affectional or sexual orientation, marital status, civil union status, domestic partnership status, socioeconomic status or political affiliation.

(B) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice on the bases specified in Rule 3.6(A), against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when the listed bases are issues in or relevant to the proceeding.

(C) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6(A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so. This section does not preclude reference to the listed bases when they are issues in or relevant to the proceeding.

Comment to Rule 3.6

[1] The prohibited bases in this rule are primarily drawn from the Law Against Discrimination, N.J.S.A. 10:5-1, et seq.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating, or hostile acts, suggestions of connections between race, ethnicity, or nationality and crime and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on prohibited bases listed in Rule 3.6(A).

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that is unwelcome.

PART I
APPLICATIONS FOR RECUSAL BASED UPON
BIAS OR PREJUDICE

a) Rule 1:12-2 - Any party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification.

b) Rule 1:12-1(d) - The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge has given an opinion upon a matter in question in the action.

However, this Rule does not prevent a judge from sitting because of having given an opinion in another action in which the same matter in controversy came in question or given an opinion on any question in controversy in the pending action in the course of previous proceedings therein[.]

[E]xposure to inadmissible evidence in the course of pretrial proceedings generally does not require disqualification of the judge even where the judge is to serve as the fact-finder. A judge sitting as the fact-finder is certainly capable of sorting through admissible and inadmissible evidence without resultant detriment to the decision-making process. Trained judges have the ability to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention. Having said this, a judge should be sensitive to the perception of the litigants, counsel, or the informed public that his exposure to inflammatory material might irredeemably preclude him from serving as a neutral and impartial arbiter of the facts. State vs. Medina, 349 N.J.Super 108, 130(App.Div.2002).

c) Rule 1:12-1(g) - The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

In State vs. Marshall, 148 N.J. 89, 279(1997), New Jersey Supreme Court construed this rule as follows:

We acknowledge that it is not necessary to prove actual prejudice on the part of the court, and that the mere appearance of bias may require disqualification. Rule 1:12-1(g). However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable.

Thus, a pretrial motion to disqualify a judge on the basis of bias or prejudice must be supported by objectively reasonable evidence that the judge has engaged in conduct that raises the appearance of bias. Such evidence will circumstantially come in the form of inferences that can be found in the record of the case or from past comments by the judge. On the other hand, conduct that demonstrates actual bias need not be supported by objectively reasonable evidence. Direct evidence in the form of comments in the record from the judge will usually be sufficient to prove this type of allegation.

PART II **BIAS & PREJUDICE RESULTING** **IN JUDICIAL DISCIPLINE**

In General - Discussion

1) References to clothing of counsel or witnesses

i) Witnesses - Ryslik vs. Krass, 279 N.J.Super 293(App.Div.1995) - A trial judge has the ultimate responsibility to control the trial in the courtroom and is given wide discretion to do so. But this responsibility must be exercised reasonably and within constitutional bounds.

If a party is a member of the armed services, a firefighter, or a priest, when appearing in court he or she should be entitled to dress in a manner ordinary to him or her. The judge should appropriately charge, as the judge did here, that no undue

weight should be given to the testimony of the particular witness by reason of a profession. But a witness should not be artificially dressed by direction of the court.

ii) Attorneys - The closest New Jersey case deals with a trial judge's restriction of an attorney's attire in the courtroom. In Matter of De Carlo, 141 N.J.Super 42(App.Div.1976), defendant, a female attorney, was held in contempt of court for disobeying the trial court's order that she dress as he directed. The judge objected to the fact that she wore a sweater and slacks in court. This court reversed the conviction, concluding that the record did not support a contempt finding. We did not determine whether the judge was within his power to restrict defendant's manner of dress, but we did state that defendant's attire was not the type to be fairly labeled disruptive, distracting or depreciative of the solemnity of the judicial process.

2) Overly familiar with counsel

Epithets, Slurs, Demeaning Nicknames

1) In re Council, 223 N.J. 395(2015) (30-day suspension)

The evidence in the record establishes, clearly and convincingly, that Respondent touched A.J. on two occasions—once on her upper back/neck area and again by grasping her ear—and that he did so on each occasion to remove her from a room where her colleagues and others were gathered. Multiple witnesses attested to these facts, each of whose account was substantially consistent with that of their prior statements to the Judiciary's EEO/AA Unit and, as between each other, was consistent as to the fundamental facts at issue.

Irrespective of its asexual nature, that touching was nonetheless offensive, publicly humiliating and highly inappropriate particularly for one holding the title of jurist. To suggest, as Respondent does, that touching of an asexual nature cannot violate the canons of the Code of Judicial Conduct is to ignore the longstanding principle first enunciated by our Supreme Court more than two decades ago, namely that there are

many forms of offensive interpersonal behavior that would violate the Code of Judicial Conduct” though not meet the legal definition of sexual harassment. The touching at issue here and the harm it inflicted on A.J. fits squarely within those boundaries.

Remarks From the Bench Evidencing Bias and Prejudice **In General**

The seminal case dealing with bias and prejudice from the bench is In re Yengo, 72 N.J. 425(1977) (Removal). This landmark decision, written by Chief Justice Hughes, details the shocking, bizarre and pervasively abusive, long-term pattern of misconduct by a municipal court judge. Among ther many holdings in the case, the Chief Justice included this statement of New Jersey public policy:

Respondent seems unable to understand the relationship between justice and the defendant. The poorest, weakest, most hapless or illiterate defendant, standing before an American court, is entitled to exactly he same respect, rights and hearing as would be the Chief Justice of the United States standing before the court and similarly accused. This is part of what our Constitution means by ‘equal protection of the laws.’

Subsequent judicial disciplinary cases involving bias and prejudice have (for the most part) fallen far short of the egregious misconduct in Yengo. But the devastating impact upon the litigants and lawyers who were subjected to judicial bias and prejudice cannot be overstated. The following are examples of judicial bias from the bench that has been subject to either judicial discipline or appellate review.

1) In re Gaeta (ACJC 2002-171)- The Gaeta presentment presents a close case, one that raises the conflicting issues of judicial independence to speak without fear of retaliatory disciplinary action against the necessity of judges to avoid even the appearance of bias or prejudice. In Gaeta, a Superior Court judge was called upon to impose sentence on an adult female teacher who had engaged in unlawful sexual relations with one of her male students. The student was 13 years old at the time of the sexual assault. Although a 13-year-old child does not have the legal

capacity to consent to such sexual activity, the sexual relations between the student and the teacher apparently continued for a period of time and were mutually voluntary. The plea agreement in the case called for the imposition of a custodial term. However, the judge declined to impose a jail term and based his decision on what were arguably stereotypical views regarding the sexual nature of young boys.

The members of the Advisory Committee on Judicial Conduct noted that judges make mistakes. “Judicial errors, if honestly made, are open to correction and, therefore, tolerated in the administration of justice.” However, the remarks of this judge went beyond an honest mistake or legal error. The remarks implied a bias about the sexuality of minors that could impugn the impartiality and open-mindedness necessary to make sound determinations of law. Such misconduct violates both [Canon 3] of the Code of Judicial Conduct and Rule 2:15-8(a)(6) in that it tends to bring the administration of justice into disrepute.

Instructors’ Comment: For judicial errors implicating unethical conduct by the judge, see In re DiLeo, 216 N.J. 449(2014) (Reprimand) (Judicial conduct, including conduct in form of legal error, that has capacity to undermine public confidence in integrity and impartiality of judicial process can be basis for charges of judicial misconduct under Code of Judicial Conduct and can lead to imposition of discipline.)

2) In re Rodriguez, 248 N.J. 510(2021) (Reprimand)

In the instant matter, the evidence presented demonstrates, clearly and convincingly, that Respondent failed to conduct himself in a manner consistent with the above-mentioned high ethical standards. We find Respondent's statement—“[n]ot that you can do in front of all these people, no,” in response to the defendant's inquiry about whether she owed anything to the court in connection with a payment for bail, inappropriate. We reject as unpersuasive Respondent's asserted defense that his remark to the defendant concerned monetary bail and only meant to clarify to the defendant that she did not owe any payment to the court. The subject statement, on its face, suggests to its intended recipient that there was something she could do for Respondent in private, outside of the presence of those in the courtroom and unrelated to bail, that would satisfy her obligations in respect of the criminal charge. Given the

defendant's ROR release, we find Respondent's explanation incongruous and the witnesses' interpretation of his remark as a sexual innuendo and their subsequent offense reasonable. Regardless of his intent, Respondent's statement had the clear potential to suggest to the defendant, as it did to [the witnesses in the court room], that she could avoid the consequence of her criminal charge if she were to do for Respondent, in private, something of a sexual nature.

3) In re Russo, 242 N.J. 179(2020) (Removal) (removal from office for mistreating an alleged victim of sexual assault by inappropriately questioning her, among other reasons.)

No witness, alleged victim, or litigant should be treated that way in a court of law. As the ACJC found, the questions were “wholly unwarranted, discourteous and inappropriate,” and were irrelevant to decide whether the court should issue an FRO under the Prevention of Domestic Violence Act. The panel similarly observed that “Respondent's questions displayed impatience, discourtesy, and a lack of understanding of applicable law.” The questions also shamed the alleged victim by intolerably suggesting that she was to blame.

4) In re Citta, 201 N.J. 413(2010) (Reprimand)

THE COURT: Well, I think it's a miracle you haven't been sent back to Mexico as a result of being placed on probation and being charged with these crimes in the first place.

If it was [sic] up to me, I'd take you just as you're dressed and bound right now and have you escorted back to Mexico forthwith and forget the prison term, but it's not. All I can do is send you to prison and hope that the Department of Immigration and Naturalization will scoop you up when you're released and send you back to Mexico.

5) In re Rzemieniewski, 185 N.J. 598(2005) (Censure)

Respondent in two proceedings engaged in conduct in violation of the Code of Judicial Conduct and in violation of Rule 2:15-8(a)(6) by issuing a bench warrant for the arrest of a defendant who was one-half hour late for court and having him taken into custody without giving him the opportunity to explain why he was late, and by instructing his court officer to sniff the breath of a defendant to determine if she detected the odor of alcohol and subsequently taking that defendant's driving license [without any legal authority] before trial as a way of ensuring that the defendant would not seek further adjournments.

6) In re Giles, 196 N.J. 456(2008) (Reprimand)

Respondent asked if he was still on the record. After ascertaining that he was no longer on the record, Respondent stated to the Grievant:

I said get the ... [expletive] ... out of my courtroom, what the ... [expletive] ... don't you understand, shut the ... [expletive] ... up and get the ... [expletive] ... out of here, I have a meeting this afternoon.

The evidence fully demonstrates that in these several incidents, Respondent had made vulgar, offensive and insulting remarks to counsel and that he made inappropriate and disrespectful comments about the judiciary.

7) In re Convery, 201 N.J. 411(2010) (Reprimand)

Respondent made disrespectful and insulting comments to a litigant appearing before him and Respondent made an undignified and discourteous comment, which also created the appearance of ethnic bias, to an attorney appearing before him.

<https://www.youtube.com/watch?v=aJkcQgL2mAw>

8) In re Rivas, 241 N.J. 491(2020) (Censure)

Respondent, by his words and conduct as contained in the record of the J.V. vs. M.R. matter, demonstrated, unequivocally, his bias against these litigants, which was borne out of his stated belief that the plaintiff was manipulating the judicial system at the defendant's expense and his disapproval of the parties' ongoing involvement with each other. Examples of this bias include the following:

- “[F.T.] deserves to be locked up.”
- “[F.T.] doesn't care about his profession cause if he did, he wouldn't be doing this.”
- “[I] can't believe you two let this knucklehead do what he's done. And he needs to be brought down a notch.”
- “[F.T.], I wish you were up here because I'm gunning for you. Cause you are despicable.”
- “If you three have not figured out that I'm here just dying to whack one of you, come back, come back. Your mistake was coming into my courtroom.”
- “I'm not gonna call him a man cause he does not deserve the title. This homosapien.”

Respondent's remarks to these litigants and F.T., as detailed herein, may accurately be described as harassing and indicative of the type of conduct Canon 3, Rule 3.6(C), was intended to address and for which public discipline is warranted.

9) In re Baker, 206 N.J. 580(2011) (Reprimand)

Shouting at litigant as follows:

MS. P.: You don't need to yell at me, please.

THE COURT: Ma'am, don't talk. You've got a problem with your daughter seeing her father?

MS. P.: Yes, I do, yes, I do, Your Honor, yes, I do.

THE COURT: Well, ma'am, let me tell you something.

MS. P.: I do.

THE COURT: You need some serious help.

MS. P.: Okay.

THE COURT: Because you have no clue what it is to be a parent.

MS. P.: Okay. He has a severe mental illness.

THE COURT: Ma'am, keep your mouth quiet. When I talk, you listen. Don't you dare talk back to me. I don't know who you think you're talking to, but you do not dare talk back to me. You understand that?

MS. P.: Yes.

THE COURT: Then obey it. I'm not some friend of yours out on the street. I'm a Superior Court judge that demands the respect of my position, and you will give it to me. And you will not convince me that it's okay for your daughter to go spend time with strangers, but can't with her own father, because you know what you forgot? Let me remind you. There's only one reason why he's her father, that's the decision you made.

MS. P.: And it was a bad one.

THE COURT: Ma'am—so, what does that tell me about your judgment? If you made a bad decision choosing him as a father, why should I believe anything about your judgment today? Well, you just admitted, you've got bad judgment.

10) State vs. Roberts, 47 N.J. 286(1966) (New trial granted based upon purported racial epithet uttered by the judge during jury *voir dire*.)

11) State vs. Perez, 356 N.J.Super 527, 533(App.Div.2003)

New trial based upon municipal court judge's statements indicating bias and prejudice against the defendant based upon his ethnic background. The Court noted that group libel, which includes defamation of a class of persons based on those constitutional categories, mars civil discourse, and certainly is reprehensible in the halls of justice.

Offensive Touching and Sexual Harassment

- 1) In re Seaman, 133 N.J. 67(1993) (60-day suspension) (pervasive course of sexual harassment upon subordinate employee, female law clerk).
- 2) In re Brenner, 147 N.J. 314(1997) (Reprimand) (Consensual touching of a subordinate employee in chambers)
- 3) In re Subryan, 187 N.J. 139(2006) (60-day suspension) (pervasive course of sexual harassment upon subordinate employee, female law clerk).
- 4) In re Campbell, 205 N.J. 2(2011) (Reprimand) (Consensual sexual relationship with a subordinate court employee)
- 5) In re Jones, 211 N.J. 116(2012) (4-month suspension) (Groping multiple victims while intoxicated at a holiday party)
- 6) In re Falcone, 251 N.J. 476(2022) (Censure and lifetime bar from judicial office – resigned from the bench) (Offensive touching and pervasive dishonesty before the ACJC) (

Instructors' comment – Falcone would certainly have resulted in removal from the bench had the respondent not resigned prior to the case disposition. As a result, removal was moot.

- 7) In re Hoffman, 260 N.J. 130(2025) (Removal) (Purported offensive touching of a subordinate judicial employee)