

Garden State CLE Presents:



Sexual Heeling

**Professional Discipline for Sexual Harassment
and Discrimination in the Practice of Law**

Instructor

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Lesson Plan

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Part I

Public Policy

a) The commitment of this State and its judiciary to end gender discrimination - and one of its most egregious expressions, sexual harassment - clearly [will weigh] heavily in our determination of the discipline to be imposed[.] In the context of sexual harassment case, that Legislature has declared that discrimination is a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State. The Commissioner of Personnel for the State of New Jersey has described sexual harassment as a serious problem in our state and our nation. It is behavior that we cannot tolerate. See In re Seaman, 133 N.J. 67, 98(1993).

b) One of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients. The attorney - client relationship is grounded in the fundamental understanding that an attorney will give complete and undivided loyalty to the client' so that the attorney should be able to advise the client in such a way as to protect the client's interests, utilizing his [or her] professional training, ability and judgment to the utmost. In criminal matters, in which the trust between attorney and client has enhanced importance, special vigilance is required because an attorney's divided loyalty can undermine a defendant's Sixth Amendment right to effective assistance of counsel. Thus, an attorney should not represent a client if there is a significant risk that the representation will be materially affected by some duty of loyalty or responsibility to himself or to a third person. State vs. Lasane, 371 N.J.Super 151, 161-62(App.Div.2004).

Part II

Applicable Ethics Rules

The disciplinary case law related to respondents charged with sexual harassment in the practice of law can be divided into two general categories: those involving attorneys and those involving judges. This type of misconduct implicates serious violations of the Rules of Professional Conduct (RPC) for attorneys and the New Jersey Code of Judicial Conduct (Code) for judges.

Attorneys

Applicable R.P.C. Sections

R.P.C. 8.4(b) It is professional misconduct for a lawyer to: commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

R.P.C. 8.4(g) It is professional misconduct for a lawyer to: 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. The Supreme Court's official comment (May 3, 1994) to that Rule provides:

"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.

R.P.C. 1.7(a)(2) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent

conflict of interest exists if 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. 4.2 Communication with person represented by counsel. 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, including members of an organization's litigation control group as defined by R.P.C. 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order 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. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Judges **Applicable Code Provisions**

Canon 1, Rule 1.1: “A judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved.”

Canon 2, Rule 2.1: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

Canon 2, Rule 2.3: “A judge shall not lend the prestige of judicial office to advance the personal ... interests of the judge”

Canon 3, Rule 3.5: “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity”

Canon 3, Rule 3.8: “[A] judge shall not initiate or consider [unauthorized] ex parte ... communications concerning a pending ... proceeding.”

Canon 3, Rule 3.17(B): “Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned”

Canon 5, Rule 5 .1 (A): "Judges shall conduct their extra-judicial activities in a manner that would not demean the judicial office.

Part III

Landmark Decisions Involving Attorneys

a) In re Witherspoon, 203 N.J. 343(2010) (One-year suspension and sensitivity training) (R.P.C. 1.7(a)(2) and 8.4(g)).

Rejection of automatic disbarment for cases involving sexual misconduct. 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. (pp. 358-359).

Establishes the five-step disciplinary procedure:

- 1) What R.P.C. violations have been proved by clear and convincing evidence?
- 2) Based upon the Court's disciplinary precedents, how have attorneys been disciplined for the violations in the past?
- 3) What aggravating circumstances exist in this case? (e.g prior disciplinary history, harm to victim, harm to the general public)
- 4) What mitigating factors exist? (Lack of prior record, restitution, apology, admission of wrongdoing)
- 5) What level of discipline will best serve to protect the public and deter future acts of misconduct by this attorney?

In cases involving the knowing misappropriation of entrusted funds, there is only one step: upon proof of the violation, the discipline will be disbarment in every case.

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.

b) 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.

Part IV

Other Disciplinary Decisions for Attorneys

a) In re Vazquez, 253 N.J. 555(2023) (Censure – communicating with a represented person) (R.P.C. 4.2 and R.P.C. 1.7)

As of December 17, 2018, A.E. had been enrolled in drug court for two years, and respondent, an assistant prosecutor, had been assigned to the program for six months. On that date, A.E. met with probation officers, to whom she reported her concerns about respondent. Specifically, A.E. reported that, on three separate occasions, beginning on October 31, 2018, respondent (1) left the courtroom during her mandatory, weekly drug court appearance, (2) waited for her in the courthouse hallway, and (3) after the conclusion of her court appearance, engaged her in a conversation outside of the courtroom. More concerning, A.E. also reported that respondent twice visited the diner where she worked. On his first visit, respondent provided A.E. with his telephone number along with a tip. Prior to his second visit, respondent called A.E.'s place of employment to confirm that she would be working before visiting.

A.E. described respondent's efforts to start a conversation with her as awkward. A.E. would reply to respondent's questions, while continuing to walk, so that she could leave the courthouse. To avoid prolonged

conversations with respondent, she elected to take the stairs to exit the courthouse, instead of waiting for the elevator. A.E. referred to her actions as trying to "escape" and "avoid" respondent. She described feeling "uncomfortable and intimidated" by respondent's behavior. A.E. also observed that respondent did not leave the courtroom and wait in the courthouse hallway for any other defendants.

The drug court program required that A.E. provide personal information, such as her place of employment, her residence, and social contacts. A.E. stated that, during their courthouse conversations, respondent asked her whether she still worked at the diner, when she worked, and for the location of the diner.

Respondent first visited A.E.'s place of employment between October and November 2018, at which time he wore a suit. A.E. initially believed that respondent requested to sit in her assigned section at the diner, because he sat alone in a four-person booth, a placement the hostess would not ordinarily make absent an express request. At the diner, respondent engaged A.E. in a conversation about her tattoos. In particular, he complimented her hand tattoos, calling them "hot," and inquired whether she had others. Respondent also inquired regarding who A.E. spent time with and what she enjoyed doing in her free time, which she perceived as his indirect inquiry into whether she was in a relationship. A.E. briefly answered respondent's questions, but then walked away. Prior to leaving the diner, respondent left A.E. a \$10 tip, in addition to a piece of paper with his telephone number and the name "Joshua" written on it. A.E. threw out the piece of paper and did not call respondent.

<https://casetext.com/case/in-re-vazquez-39>

b) In re Regan, 249 N.J. 17 (2021) (Censure) (R.P.C. 3.2 and 8.4(g)) See also Rule 1:11-3 (End time for attorney-client obligations).

On October 26, 2018, respondent sent the grievant another e-mail from his law firm address, again with the subject line "Divorce Hearing." In

that correspondence, respondent thanked the grievant for her “nice review,” but also made an inappropriate offer to perform oral sex on her using extremely graphic language. Respondent admitted to the DEC investigator that he sent the grievance the October 26, 2018 e-mail, and that it was “clumsy” and “vulgar.” He testified that he regretted having sent the e-mail that he would never send such an e-mail again and admitted that it was inappropriate.

https://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document_id=1140232

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

On May 8, 1997, Grievant consulted with Carmen Caponegro, another Rockaway Borough police officer. According to the police incident report, Koliq told Caponegro that respondent had engaged in numerous acts of sexual harassment. These included questioning Koliq 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.

<https://njlaw.rutgers.edu/collections/drb/decisions/00-049.pdf>

d) In re Gallo, 178 N.J. 115(2003) (Remand for fact-finding) (R.P.C. 8.4(b)) (Consent to disbarment)

In Gallo, the justices expressed concern that an attorney, who entered a guilty plea to four separate fourth-degree crimes of criminal sexual contact with three clients and an adversary pro se litigant, should have had the quantum of discipline evaluated based on the full factual record rather than the few facts sufficient to support his guilty plea in Superior Court. Therefore, although the attorney admitted that he had “placed his hands on the breasts of his clients, D.W. and D.I. without their consent; that he placed the hand of his client, D.B., on his groin without her consent; and that he placed the hand of the pro se litigant, T.T., on his groin without her consent,” we concluded that the DRB should not have

relied on that limited record. We directed the DRB instead to look beyond the minimal factual circumstances that the attorney was required to admit on the record in order to have his plea deal accepted. We concluded that we could not be confident that the DRB's proposed retroactive three-year suspension was appropriate in light of the limited record and we remanded for further proceedings. Mr. Gallo subsequently consented to disbarment. In re Gallo, 181 N.J. 304(2004).

e) In re Carroll, 232 N.J. 111 (2018) (Reprimand) (R.P.C. 1.7(a)(2) and 8.4(d))

While employed as an Assistant Deputy Public Defender with the Office of Parental Representation, respondent was appointed to defend L.S. against allegations that she neglected her minor son. The Division of Child Protection and Permanency (DCPP) alleged that L.S. was an alcoholic, became intoxicated, and passed out while caring for her son. Due to L.S.'s struggles with alcoholism, DCPP removed her son from her care and placed him in the custody of his maternal grandmother.

Following the child's removal, DCPP sought to curtail L.S.'s parenting time and to implement supervised visitation. After representing L.S. at the Order to Show Cause hearing, respondent offered to drive her home due to bad weather. L.S. declined the offer. However, respondent and L.S. later began texting each other, including messages that were sexual in nature. On the day before Thanksgiving, respondent and L.S. consummated a sexual relationship.

We found that respondent was aware, given his trusted status as L.S.'s appointed counsel that she was suffering from alcoholism so severe that she lost custody of her child. Despite his knowledge, respondent sought and commenced a sexual relationship with her, which he did not disclose to the New Jersey Office of the Public Defender (the OPD). Respondent also did not withdraw as L.S.'s counsel, despite questioning her mental status. Instead, he chose to continue the sexual relationship with his client.

We further found that, by engaging in a sexual relationship with L.S., while serving as her appointed counsel, respondent created a significant risk that his representation of L.S. would be materially limited by his own interests. Additionally, we concluded that respondent had wasted the resources of the Superior Court and the OPD by continuing his representation of L.S. while maintaining his sexual relationship, which necessitated the appointment of new counsel and an OPD investigation into his conduct.

https://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document_id=1087747

f) In re Resnick, 219 N.J. 620(2014) (Reprimand) (R.P.C. 1.7(a)(2))

Respondent received a reprimand for engaging in a conflict of interest by entering into a personal and sexual relationship with a client for whom he charged a reduced fee in a divorce proceeding and a municipal court matter. He had previously represented her pro bono in a domestic violence matter. After their relationship soured and ended, the client expected him to continue representing her. Respondent then engaged in an *ex parte* communication with a judge about the fact that his ability to represent the client had been compromised and the steps he needed to take to be relieved as counsel. Respondent forwarded the client's file to her and informed her that he had resigned as her counsel of record, and that she had been designated as acting pro se. Respondent was also guilty of to the client's representation.

g) In re Warren, 214 N.J. 1(2013) (Reprimand) (R.P.C. 1.7(a)(2) and 8.4(d))

Although Respondent was married, he and Casa developed an intimate relationship that lasted approximately six weeks. The relationship involved sexual contact, but not intercourse. In addition to in-person contact, they exchanged phone calls and numerous text messages, many of which were sexual in nature. Many of the messages described their personal feelings for each other. Respondent also gave Casa money for various personal expenses.

Casa did not think that respondent's representation and their sexual relationship were dependent on each other. She believed that he was "legally bound" to represent her.

The essential factor in the case before us is that the client was assigned. Casa and respondent were not on an equal playing field and she was not in a position to freely consent to the relationship. In addition, respondent became sexually involved with her, knowing that she had attempted suicide the prior year, was involved in a heated custody battle, and was going through treatment to end her drug dependence. He had to know that she was emotionally vulnerable to his advances.

<https://casetext.com/case/in-re-warren-86>

h) In re Rea, 128 N.J. 544(1992) (Reprimand – R.P.C. 8.4(d))

In Rea, the DRB was faced with a case of "he said/she said" with regard to whether there had been a sexual relationship between the attorney and an assigned client. The client testified that she refused Rea's sexual advances, even though he had threatened to "frustrate" her case, if she refused him. Rea, on the other hand, testified that he and the client developed a sexual relationship and that she had never refused his advances. He denied threatening to harm her case. Rea testified that he ended their relationship when he became aware that the client had psychological problems.

We found in Rea that, under the circumstances, the attorney "should have exercised more sound judgment, knowing that he was in a relationship with an assigned client who had a history of mental health problems, and who may well have felt that a failure to accede to his sexual advances would have an adverse effect on her legal matters." Although, in light of the diametrically opposed testimony, we were unable to determine with certainty whether a sexual relationship had existed, we found that, under either scenario, Rea's conduct was unethical. If the client's version of the facts was accurate, then Rea was guilty of unethical conduct, in that he threatened to jeopardize her case if

she did not agree to a sexual relationship with him. If Rea's version of the facts was accurate, then he was guilty of conduct of the sort that Liebowitz sought to prevent. His client was either not in a position to freely consent to a sexual relationship with him because of her position as an assigned client or, because of her past history and mental health, she lacked the capacity to consent.

<https://njlaw.rutgers.edu/collections/drb/decisions/91-395.pdf>

i) Other attorney significant cases include:

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

In re Pearson, 139 N.J. 230(1995) (attorney reprimanded, where he hugged his client, put his hands on her buttocks, and pushed his head into her chest and commented about the size of her breasts); ch

In re Garofalo, 229 N.J. 245(2017) (attorney received a six-month suspension for sexually harassing two employees at his law firm; in one instance, he sent repeated, unwanted communications of a sexual nature, over the course of ten years, and showed no remorse for his misconduct after the victim, the police, and the partners at his law firm warned him to stop)

In re Becker, DRB 21-199 (November 23, 2021), on a motion for discipline by consent, we imposed a one-year suspension on the attorney for making sexual explicit statements and hypotheticals, to his minor, appointed client, 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). Recipient asserted that the attorney's behavior caused her harm, as demonstrated by her prompt reporting of the inappropriate

behavior. The attorney in Becker held a position of trust and had no disciplinary history in New Jersey.

https://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document_id=1159374

Part V

Landmark Decisions Involving Judges

a) In re Seaman, 133 N.J. 67(1993) (60-day suspension from judicial office)

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; 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.

The importance of a judicial clerkship to the career of a young lawyer can be enormous. A judicial clerkship can be an auspicious beginning to a legal career. Judicial clerkships are marked by both strong dependence and a significant power imbalance between judge and clerk. The vulnerability of a clerk to a judge is even greater than that in most supervisor-employee relationships. By alienating his or her judge, a clerk risks great professional jeopardy.

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.

In this case, we are confronted with a prolonged course of judicial misbehavior that was especially harmful to its victim. We are convinced that respondent's misconduct must seriously shake public confidence in the judiciary, and, unless bolstered by a prompt and appropriate disciplinary response, that confidence is bound further to weaken and erode. Accordingly, we suspend respondent from judicial office for sixty days. A temporary removal from office will impress upon respondent the magnitude of the offense he has committed, reaffirm public confidence in the integrity of our courts, and provide a powerful deterrent to future misconduct, of this type, by respondent or others who hold judicial office.

b) In re Subryan, 187 N.J. 139(2006) (60-day suspension from judicial office)

Law clerk J.B. was a very credible witness, not only in terms of her demeanor while testifying but also with regard to the logical consistency of her actions. When Respondent and she were alone in chambers on May 30, she was initially unafraid. She had a comfortable relationship with Respondent and had engaged in friendly banter with him in the past; and she attempted to do so on that occasion as well. She was a mature woman who had traveled extensively before entering law school. When Respondent's attitude changed, she became first apprehensive and then relieved when she thought he was trying to hug her as a sign of conciliation. When she realized that he was serious in his approach toward her, she became frightened because she thought she was trapped and would soon be alone with him because it was almost quitting time. And when Respondent kept asking her if she were sure, J.B. took that as an indirect threat against her legal career.

This judge's conduct is unacceptable in any workplace setting, and that it is particularly troubling in the context of the judge-law clerk relationship because of the inequality inherent in that relationship. In our system, the judge is a teacher, a mentor, an advisor, a source of referrals and a source of recommendations for his or her clerks. When that authority is exercised responsibly, the clerkship year stands out as a highlight in an attorney's professional life; when that authority is abused, certainly the clerk and, also, the judiciary are harmed.

c) In re Russo, 242 N.J. 179(2020) (Removal from judicial office)

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 (PDVA), N.J.S.A. 2C:25-17 to 35. 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. When asked to explain his conduct before the panel, Respondent said he “was not trying to humiliate her”; he instead claimed he was trying to help a “demoralized” witness on cross-examination and “get her re-engaged in the hearing.” He added, “I was really struggling to find out is this a case where there really is something going on and a witness who's just not capable of expressing it or is there something else going on.”

d) Other significant cases include:

In re Falcone, 251 N.J. 476(2022) (Censure and permanent disqualification from judicial office) (Offensive touching resulting in criminal prosecution and witness tampering)

<https://www.njcourts.gov/sites/default/files/advisory-committee-on-judicial-conduct/temporary%3A/acjc/NinoFalconePresentment.pdf>

In re Jones, 211 N.J. 116 (2012) (Four-month suspension from judicial duties) (While highly intoxicated, respondent offensively touched multiple victims (at least 6) at a holiday party)

<https://www.njcourts.gov/sites/default/files/advisory-committee-on-judicial-conduct/temporary%3A/acjc/JonesMPresentment.pdf>

In re Council, 223 N.J. 395(2015) (One month suspension from judicial duties) (Inappropriate and unwanted touching of a court employee that belittled and publicly humiliated her)

<https://www.njcourts.gov/sites/default/files/advisory-committee-on-judicial-conduct/temporary%3A/acjc/CouncilPresentment.pdf>

Matter of Rodriguez, 248 N.J. 510(2021) (Inappropriate remark from the bench to a female defendant appearing before him.)

DEFENDANT: Is it – do I owe you anything or —

RESPONDENT: Not that you can do in front of all these people, no.

<https://www.njcourts.gov/sites/default/files/advisory-committee-on-judicial-conduct/temporary%3A/acjc/HectorRodriguezPresentment.pdf>

In re Campbell, 205 N.J. 2 (2011) (Reprimand) (Inappropriate, intimate (consensual) relationship with a subordinate court employee culminating in a suicide attempt by the employee)

<https://www.njcourts.gov/sites/default/files/advisory-committee-on-judicial-conduct/temporary%3A/acjc/CampbellPresentment.pdf>

In re Brenner, 147 N.J. 314(1997) (Reprimand) (hugging and kissing a subordinate court employee)