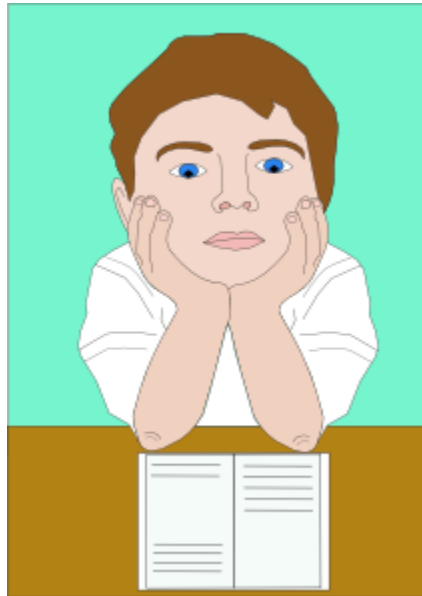


Garden State CLE Presents:

New Jersey Municipal Court Trial Certification Exam Training:

Rules of Professional Conduct



Lesson Plan

Reg. 301.6(E)(19)

1. Enforcement

RULE 1:14. Codes of Ethics

The Rules of Professional Conduct and the Code of Judicial Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these Rules, and the Code of Conduct for Judiciary Employees, also included as an Appendix to Part I of these Rules, shall govern the conduct of the members of the bar and the judges and employees of all courts of this State.

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RULE 1:18. Duty of Judges

It shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17.

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RPC 8.3. Reporting Professional Misconduct

- **(a)** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
 - **(b)** A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
 - **(c)** This Rule does not require disclosure of information otherwise protected by RPC 1.6.
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Disciplinary Cases – In general

1. Knowing taking of entrusted funds without client permission will result in disbarment in every instance. In re Wilson, 81 NJ 451 (1979); In re Hollendonner, 102 NJ 21 (1985); In re Siegel, 133 NJ 162 (1993).
2. Bribery of a public official will result in disbarment in every instance. In re Hughes, 90 NJ 32 (1982)
3. All other cases will be decided on their individual facts, prior disciplinary history and relevant law. In re Witherspoon, 203 NJ 343 (2010).

2. Knowledge of NJ RPCs

In re Berkowitz, 136 N.J. 134, 147 (1994)

Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct.

In re Eisenberg, 75 N.J. 454, 456-47 (1978)

We view with increasing concern the practice of attorneys facing discipline by this Court to treat the applicable disciplinary rules as *terra incognita*. Although this astonishing lack of familiarity with the rules is sometimes characterized as a "defense," ignorance of our ethical rules and case law cannot be permitted to diminish responsibility for conduct in violation of these rules.

3. Competence

RPC 1.1

A lawyer shall not:

- **(a)** Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

In re Segal, 130 NJ 468 (1992)

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. 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.

A prosecutor whose only preparation for the trial of an important case occurs after he arrives in court on the date fixed for trial cannot expect lenient treatment when he discovers that he is not ready for trial.

We conclude that a public reprimand is the appropriate discipline to impose on respondent. It adequately will sanction respondent for the breach of his prosecutorial duties and emphasize to the bar that lawyers serving public bodies, as well as the private bar, cannot fail to be diligent in the performance of their professional duties.

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- **(b)** Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

In re Goldstein, 97 NJ 545, 548 (1984) (Disbarment)

These improprieties standing alone are extremely serious and would require at the least suspension for a lengthy term. But the pattern is disturbing. The incidents demonstrate an unwillingness or inability to cope with the manifest requirements of a competent practice. We have excused such neglect in the case of young or inexperienced practitioners.... But respondent was neither young nor inexperienced. His deficiencies were chronic, persistent, not clearly attributable to identifiable events that overwhelmed his will or comprehension....

4. Scope of Representation

RPC 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

- **(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 RPC 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.
- **(b)** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- **(c)** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- **(d)** A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

[RPC 1.2(a) Note client has only three areas in criminal cases where his decision is final.]

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In re Edson, 108 NJ 464, 472-73 (1987) (Disbarment) [RPC 1.2(d)]

One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We have travelled different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers-most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated by this record. There could hardly be a plainer case of dishonesty touching the administration of justice and arising out of the practice of law.

[Note – this case resulted in holding in State v. Tischio, 107 NJ 504 (1987)]

5. Diligence

RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

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In re Harris, 182 NJ 594, 604 (2005) (Disbarment)

In November 1997, respondent began representing Richard Hillenbrand on a disorderly persons' offense in municipal court. After he was found guilty, Hillenbrand retained respondent to file an appeal *de novo* in the Superior Court. Hillenbrand gave respondent \$500 in payment for the cost of the trial transcript. The municipal court warned respondent on four separate occasions that the transcript payment was due; nonetheless, respondent failed to remit payment. As a result of respondent's inexplicable conduct, the appeal was dismissed. After reinstatement of the appeal, respondent was given an extension of time in which to file a brief, and yet she still failed to do so in a timely fashion, resulting in a second dismissal.

The DRB found that “[a]t every turn, despite numerous chances to correct her own deficient representation, respondent continuously ‘dropped the ball,’ ” in this straightforward municipal court appeal. The DRB determined that respondent violated [RPC 1.3](#) (lack of diligence).

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State v. Holup, 253 NJ Super, 320, 326 (App. Div. 1992).

Lastly, we are constrained to comment on the effect of *R. 7:4-2(e)*, which permits motions in the municipal courts to be made “orally and informally.” As our municipal courts mature and become responsible for the disposition of more complex, more serious in terms of penal consequence and more communally important cases, more formal practices become essential. We understand that much of the subject matter in controversy in the municipal courts is minor and, in such cases, informal practices should continue, but in the more significant cases, a more careful, thorough procedure is warranted. There is a recognizable difference in the analysis of the discovery in a drunk driving case as compared to one involving a stop light violation. The mere fact that the Court Rule allows informality does not give broad license to counsel. Motions and supporting documents assist the municipal court judge in making a fair and considered decision. A motion limiting the time for completion of discovery in this case would have ensured notice to the prosecutor and avoided the waste of time by defendant, the expert witness and defense counsel.

6. Communication & Conflicts

RPC 1.4. Communication

- **(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.

Note advantage of e-mail to communicate with clients and prospective clients

Note under (a) and (c) pre-attorney/client requirements

Problems with joint representation under rule 7:7-10

7:7-10. Joint Representation

No attorney or law firm shall enter an appearance for or represent more than one defendant in a multi-defendant trial or enter a plea for any defendant without first securing the court's permission by motion made in the presence of the defendants who seek joint representation. The motion shall be made as early as practicable in the proceedings in order to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

RPC 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.
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7. Legal Fees

RPC 1.5. Fees

- **(a)** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
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 - **(1)** the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - **(2)** the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - **(3)** the fee customarily charged in the locality for similar legal services;
 - **(4)** the amount involved and the results obtained;
 - **(5)** the time limitations imposed by the client or by the circumstances;
 - **(6)** the nature and length of the professional relationship with the client;
 - **(7)** the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - **(8)** whether the fee is fixed or contingent.
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 - **(b)** When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.
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 - **(c)** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
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[Fees/Expenses and bookkeeping issues – Trust Accounting/Business Accounting]

8. Confidentiality & Candor

RPC 1.6. Confidentiality of Information

- **(a)** A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except 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;
 - **(2)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
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RPC 3.3. Candor toward the Tribunal

- **(a)** A lawyer shall not knowingly:
 - **(1)** make a false statement of material fact or law to a tribunal;
 - **(2)** fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
 - **(3)** fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
 - **(4)** offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
 - **(5)** fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.
- **(b)** The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.
- **(c)** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- **(d)** In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

In re Whitmore, 117 NJ 472 (1990)

In re Norton, 128 NJ 520 (1992)

In re Seelig, 180 NJ 234, 250 (2004)

Thus, although [RPC 3.3\(a\)\(5\)](#) is not a new rule of law, it does represent an alteration of the balance in respect of lawyers' responsibilities. Both the *ABA Model Rules* and the *New Jersey Rules* dismiss misrepresentation as a permissible litigation tactic, even when carried out in the name of zealous representation. *ABA Model Rule 3.3(a)(1)* prohibits a lawyer from making “false statements of fact or law to a tribunal,” as does our rule. Moreover, the comments to the *ABA Model Rule* expressly state that “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” *Model Rules of Prof'l Conduct R. 3.3 cmt. 3* (2003). Our [RPC 3.3\(a\)\(5\)](#) codifies the ABA comment, thereby establishing a “more stringent requirement of disclosure than the standard set forth by the Model Rules,” with the result that attorneys in New Jersey have been found to violate [RPC 3.3\(a\)\(5\)](#) when a failure to disclose material information misleads the court.

In re Seelig, 180 NJ 234, 254 (2004)

Most important, respondent claims that his zealous advocacy was compelled by his client's Sixth Amendment right to counsel guaranteed by the United States Constitution. [U.S. Const. amend. VI](#) (“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”). He argues that, even if he has violated our *New Jersey Rules*, his client's right superseded any professional duty owed by respondent to the judicial system.

First, we observe that the recent amendment to [RPC 3.3\(a\)\(5\)](#) states “that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.” The new language expressly conveys exceptions implicit in the version of the rule that is operative in this case and that are, in part, explicitly described in the Debevoise Committee Report. *See Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, N.J.L.J.*, July 28, 1983, *R. 4.1*, cmt. (explaining that “the constitutional rights of defendants in criminal cases must take precedence over any Rule permitting or mandating disclosure.”). Consideration of the disclosure requirement under [RPC 3.3\(a\)\(5\)](#) clearly must take into account any competing constitutional right that delimits the scope of the rule.

Constitutional Rights – Fifth Amendment – Right to Silence at Sentencing

Mitchell v. United States, 526 US 314, 326-327 (1999)

Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment “The essence of this basic constitutional principle is ‘the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.’

The Fifth Amendment by its terms prevents a person from being “compelled in any criminal case to be a witness against himself.” U.S. Const., Amdt. 5. To maintain that sentencing proceedings are not part of “any criminal case” is contrary to the law and to common sense. As to common sense, it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her

punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important.

Constitutional Rights – Fifth Amendment – No adverse inference based upon silence at sentencing

Mitchell v. United States, 526 US 314, 330 (1999)

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.

Note:

Requirements of Directive 10-04

NJSA 2B:12-17.2

9. Decorum

RPC 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- **(a)** seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- **(b)** communicate ex parte with such a person except as permitted by law; or
- **(c)** engage in conduct intended to disrupt a tribunal.

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1:10-1. Summary Contempt in Presence of Court

A judge conducting a judicial proceeding may adjudicate contempt summarily without an order to show cause if:

- **(a)** the conduct has obstructed, or if continued would obstruct, the proceeding;
- **(b)** the conduct occurred in the actual presence of the judge, and was actually seen or heard by the judge;
- **(c)** the character of the conduct or its continuation after an appropriate warning unmistakably demonstrates its willfulness;
- **(d)** immediate adjudication is necessary to permit the proceeding to continue in an orderly and proper manner; and
- **(e)** the judge has afforded the alleged contemnor an immediate opportunity to respond.

The order of contempt shall recite the facts and contain a certification by the judge that he or she saw or heard the conduct constituting the contempt and that the contemnor was willfully contumacious. Punishment may be determined forthwith or deferred. Execution of sentence shall be stayed for five days following imposition and, if an appeal is taken, during the pendency of the appeal, provided, however, that the judge may require bail if reasonably necessary to assure the contemnor's appearance.

10. Prosecutors

RPC 3.8. Special Responsibilities of a Prosecutor

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;
- **(e)** not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - **(1)** either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and
 - **(2)** there is no other feasible alternative to obtain the information;
 - **(f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial

statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

NJ Supreme Court's June 29, 1990 Comment to Plea Bargaining Guidelines:

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

[See appendix Rule VII]

11. Misconduct

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

- **(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- **(b)** commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- **(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- **(d)** engage in conduct that is prejudicial to the administration of justice;
- **(e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- **(f)** knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;
- **(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.

[Note – applies to attorney's conduct in both private and professional lives.]

[Note – criminal applies in context of D/P and PDP offenses – not DUI or tickets]

[Note – Special rules of domestic violence cases.]