

Garden State CLE Presents:

Ethical Challenges in New Jersey DWI Cases



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Lesson Plan

Part I

Defense Attorneys

The ethics case law related to attorney misconduct in DWI cases generally relates to purposeful misrepresentations to the municipal court judge. This issue is a common in sentencing issues, although the newly published case of *State vs. Zingis*, ___ N.J. ___ (2024) requiring pretrial information about prior convictions may eliminate this issue in the future.

Contrast: Mitchell vs. U.S., 526 U.S. 314(1999)

The reasoning behind the Court's ruling goes to the heart of the procedures used in our criminal justice system. Ours is an accusatorial and not an inquisitorial system. The government may not enlist the defendant as an instrument of his or her own condemnation. Such a practice would undermine the long tradition and vital principle that criminal proceedings rely on accusations proved by the State, and not on inquisitions conducted to enhance its own prosecutorial power.

The Court went on to hold that, as a general rule, where there can be no further incrimination, there is no basis for the assertion of the right to remain silent. This principle applies to cases in which the judgment of conviction has become final. If no adverse consequences can be visited upon the defendant by reason of further testimony, then there is no further incrimination to be feared. However, when sentence has not yet been imposed, a defendant may have a legitimate fear of adverse consequences from further testimony. In the municipal court context, this will almost always involve a revelation by the defendant to the court of a prior offense, unknown to the court and prosecutor that will result in mandatory enhanced punishment. This is especially likely in the context of motor vehicle sentencing although, as indicated above, sentencing for certain disorderly persons' offenses can also be enhanced based upon prior convictions.

The main R.P.C. implicated in these cases is 3.3(a) which reads as follows:

(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 R.P.C. 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.

Case Law

In re Seelig, 180 N.J. 234(2004) is the leading case related to R.P.C. 3.3(a)(5).

State vs. Kane, 2015 WL 657667 (unpublished) (See Rule 1:36-3)

In re Bradley, ___ N.J. ___ (2022) (censure) (“The Friends of Eddie Coyle” case) (Respondent made purposeful misrepresentations to two municipal courts representing his client on two unrelated DWI cases on the same day.)

In re Edson, 108 N.J. 464(1987) (disbarment)

In re Whitmore, 117 N.J. 472(1990) (reprimand)

In re Norton and Kress, 128 N.J. 520(1992) (three-month suspensions)

Part II

Prosecutors

Case Law

In re Weishoff, 75 N.J. 326 (1978) (One-year suspension from practice)

In re LiPari, 256 N.J. 362(2024) (Three-month suspension – lifetime public employment ban by consent)

In re Segal, 130 N.J. 468(1992) (reprimand – failure to adequately prepare for trial)

In re Vazquez, 253 N.J. 555(2023) (Reprimand – communicating with a represented person)

In re Mott, 231 N.J. 22(2017) (6-month suspension and 5-year ban on prosecuting)

Part III

Judges

Case Law

In re Spitalnick, 63 N.J. 429(1973) (Two-year suspension from practice)

In re Sgro, 63 N.J. 538(1973) (six-month suspension from practice)

In re Hardt, 72 N.J. 160(1977) (removal – speeding case) (See In re Weishoff)

Part IV

Drunken Lawyers – Criminal Prosecutions

In general, motor vehicle offenses do not implicate a violation of the RPC's. Criminal and disorderly persons' offenses do trigger the possibility of discipline and require self-reporting to the OAE.

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;

A criminal conviction is conclusive proof of the RPC violation

Case Law

In re Cardullo, 175 N.J. 107, 813 A.2d 546(2003) (reprimand following fourth-degree assault by auto conviction where attorney caused only minor bodily injury and took serious measures to combat her alcohol addiction);

In re Fedderly, 189 N.J. 127, 913 A.2d 802(2007) (reprimand following third-degree assault by auto and driving while intoxicated convictions where the bodily injury was minor and "substantial mitigation" justified sanction less than a censure);

In re Terrell, 203 N.J. 428, 3 A.3d 1221(2010) (admonition following fourth-degree assault by auto, driving while intoxicated and leaving the scene of an accident where attorney had no prior discipline in a legal career spanning 40 years; injury to other party was minor and he cooperated with the OAE's investigation);

Matter of Barber, 148 N.J. 74, 689 A.2d 722(1997) (attorney received a six-month suspension after having been found guilty of vehicular homicide; intoxicated, the attorney drove at a high rate of speed, causing a one-car accident that killed his passenger, a fellow attorney with whom he had been drinking in two Pennsylvania bars);

In re Murphy, 200 N.J. 427, 982 A.2d 453(2009) (attorney received a six-month for driving in the wrong direction on the Pennsylvania Turnpike, causing a head-on

collision with another vehicle; one occupant of the other vehicle suffered a broken femur, which required surgery to repair);

In re Saidel, 180 N.J. 359, 852 A.2d 132(2004), reinstatement granted, 193 N.J. 20, 935 A.2d 756 (2007) (attorney received a six-month suspension for flipping his vehicle while intoxicated and driving 30 miles per hour over the speed limit in Arizona; his two passengers were seriously injured);

In re Guzzino, 165 N.J. 24, 754 A.2d 1149(2000), reinstatement granted, 185 N.J. 601, 889 A.2d 1056 (2006) (attorney received a two-year suspension after plowing his automobile into two automobiles on Route 287; a passenger in one of them was ejected from his vehicle, resulting in fatal head injuries);

Matter of Howard, 143 N.J. 526, 673 A.2d 800(1996) (attorney received a three-month suspension, having been found guilty of death by auto after running her husband down with an automobile during a domestic quarrel; alcohol was not a factor).

Part V

Drunken Judges

The usual range of discipline extends from a reprimand (standard with lack of aggravating factors) to a suspension from judicial office)

Case Law

In re Frese, 170 N.J. 415(2002) (DWI and failure to self-report Directive 4-81–reprimand)

In re Parsons, 170 N.J. 416(2002) (DWI and failure to self-report Directive 4-81–reprimand)

In re D’Ambrosio, 157 N.J. 186(1999) (Reprimand)

In re Paragano, 189 N.J. 208(2007) (censure – DWI & domestic violence)

In re Williams, 188 N.J. 476 (2006) (censure – prior judicial discipline)

In re Tourison, 199 N.J. 121 (2009) (censure – penny case)

In re Annich, 130 N.J. 538 (1993) (Censure)

In re Jones, 199 N.J. 118 (2009) (Reprimand)

In re Lawson, 124 N.J. 280 (1991) (Reprimand)

In re Richardson, 153 N.J. 355 (1998) (Reprimand)

Matter of Clifford (Reprimand) (Statement of February 7, 1990)

In re Collester, 126 N.J. 468(1992) (Two-month suspension – 2nd offense)

In re Connor, 124 N.J. 18(1991) (Censure - DWI & Leaving the scene)