

**RPCs and Legal Malpractice Claims:
How Lack of Attention to One Can Lead to the Other**

Baxt v. Liloia, 155 N.J. 190 (1998) (Ethics Violations and Legal Malpractice). Ethical violations not a cause of action but can be used to see whether a duty obstructed the discovery process in foreclosure action.

RPC 1.1 Competence

In re Yetman, 113 N.J. 556, 562 (1989). Discipline (ignored estate matter for 3 years – duty to decline and terminate).

LaFage v. Jani, 166 N.J. 412, 418 (2001). Missing one SOL not ethics violation, but legal malpractice.

Luiz v. Sanjurjo, 335 N.J. Super. 279, 282 (App. Div. 2000). (Attorney duty to monitor whether complaint received was malpractice). But S/J affirmed because of extenuating circumstances (commencement of a holiday period).

Vastano v. Algeier, 178, N.J. 230 (2003). SOL case (vocational expert trial testimony precluded because of no medical experts. Attorney had reports but failed to disclose). SOL bar upheld. (and failure to communicate settlement offer).

Michels, New Jersey Attorney Ethics (Gann 2011), Ch. 14:2-1 b&c (see also Comments re: The Debevoise Committee Report p. 266)

RPC 1.2 Scope of Representation and Allocation of Authority

In re Palmieri, 76 N.J. 51 (1978)

*Lerner v. Laufer, 359 N.J. Super. 201, 217-218 (App. Div. 2003), certif. den. 177 N.J. 223 (2003). Attorney can limit scope of representation (S/J affirmed dismissal of malpractice claim where matrimonial attorney limited duty re: PSA to opine on it or recommend to client to sign). See letter on p. 205-206

Fitzgerald v. Linnus, 336 N.J. Super. 458, 470-471 (2001). (Attorney retained only as to Executrix/Estate and affirmed dismissal of Executrix claimer: failure to advise re: elective share).

Re settlement see:

Guido v. Duane Morris, 202 N.J. 79 (2010)

Puder v. Buechel, 183 N.J. 428 (2005)

Ziegelheim v. Apollo, 128 N.J. 250 (1992)

Gere v. Louis, 209 N.J. 486 (2012)

RPC 1.3 Diligence

Olds v. Donnelly, 150 N.J. 424 (1997). Failure to pursue claim (dismissal of medical malpractice claim and duty to advise of malpractice/conflict).

Davin L.L.C. v. Daham, 329 N.J. Super. 54, 71-72 (App. Div. 2000). Tenant's attorney's failure to do title search to learn of Landlord's bankruptcy.

RPC 1.6 Confidentiality of Information

Davin L.L.C. v. Daham, 329 N.J. Super. 54 (2000). Failure to disclose foreclosure and obtain lease extension or to withdraw. Attorney fees to tenant from landlord's attorney.

Banking Cases -- Third party liability.

Reardon v. Marlayne, Inc., 83 N.J. 460, 470 (1980). NOTE: Legal malpractice exposure for disclosure. (Plaintiff's attorney in product's case disqualified because of disclosure of communications with defendant while representing defendant in similar suits).

Michels, supra, Ch.15:1, (Overview); 15:2-2(b) (Relationship to the attorney-client privilege); 15:3-2 (Reasonable belief standard); 15:3-3(b) (Disclosure to proper authorities or the threatened person); and 15:3-3(d) (Prevention of crimes, frauds, and other illegal acts having substantial consequences).

RPC 1.7 Conflict of Interest: General Rule

Michels, supra, Ch. 19:1-1, p. 392

DeBolt v. Parker, 234 N.J. Super. 471, 479 (Law Div. 1988). Auto case, conflict between passenger and driver require separate counsel (fees forfeited).

Compare Wolpaw v. General Acc. Ins. Co., 272 N.J. Super. 41, 45 (App. Div. 1994), certif. den. 137 N.J. 316 (1994). Insured co-defendants had conflict re: percentage of fault requiring separate counsel.

Baldassarre v. Butler, 132 N.J. 278, 295-296 (1993). Prohibited dual representation in complex real estate transaction even where two consents.

RPC 1.8 Conflict of Interest: Current Client; specific Rules

RPC 1.9 Duties to Former Clients

Lawler v. Isaac, 249 N.J. Super. 11, 17-18 (App. Div. 1991). Disqualification (associate filed medical malpractice complaints then worked at defense firm on same case.)

Compare Reardon, *supra* at 474-475 and p.510 Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 214 (1988). Reardon (prior status of a firm not necessarily a disqualifier and represent party adverse to prior firm's client). R.J. Reynolds (contrary result here).

Michels, Ch. 21 (Former Clients), Ch. 25 (Screening) and Ch. 26 (Client Consent to a Conflict of Interest)

In re Dolan, 76 N.J. 1, 13 (1978). Consent to conflict requires adequate time to consider.

Circle Chevrolet v. Giordano Halberan and Ciesla, 142 N.J. 280, 291 (1995) (regarding attorneys duty to advise client of his negligence and right to obtain new counsel and sue attorney)

RPC 1.16 Declining or Terminating Representation

In re Palmieri, 76 N.J. 51, 58, 60 (1978) (when arises). (Reliance by non-lawyer on skills of lawyer, lawyer conscious of reliance and manifests acceptance of responsibility for it.

Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 147 (App. Div. 1988), certif. den. 113 N.J. 357 (1988) (declining). No reason need be given to decline representation, but if a reason given, then it must be a reasonable explanation. Judgment call and no duty to anticipate what a court will do.

Kriegsman v. Kreigsman, 150 N.J. Super. 474, 479 (App. Div. 1977) (terminating). Refusal to relieve matrimonial counsel where client in arrears, citing prejudice to client.

Gilles v. Wiley, Malehorn & Sirota, 345 N.J. Super. 119, 124 (App. Div. 2001), certif. den. 171 N.J. 340 (2002) (terminating). Malpractice case re: improper withdrawal. That client owed \$125 in expenses was not a good enough reason when major portion of expenses paid. SOL expired after withdrawal without protection for client. (Medical malpractice case/perforated colon/colonoscopy).

Smith v. R.J. Reynolds Tobacco Co., 267 N.J. Super. 62, 80 (App. Div. 1993) compare with opposite result for same firm in similar circumstances in Haines v. Liggett Group, Inc., 814 F. Supp. 414, 423-424 (D.N.J. 1993). R.J.Reynolds - unreasonable financial burden; counsel should not be expected to continue where no return anticipated in tobacco litigation. Haines - same law firm's withdrawal/denied in related but different case. Contingent agreement assumed risk.

Michels, Ch. 16:3-4 and Ch. 16:3-5

RPC 1.18 Prospective Client

Dixon-Ticonderoga v. Estate of O'Connor, 248 F.3d 151, 169-171 (3d Cir. 2001). Issue of fact in legal malpractice case whether preliminary conversations about potential claim sufficient to create attorney/client relationship (real estate litigation, client asked about suing real estate lawyer and claim never brought. Client claimed led to believe they would have "another in firm will review".

Michels, Ch. 13:6 (Preliminary Consultations with Prospective Clients)

Compare In re Palmieri, supra

RPC 4.1 Truthfulness in Statements to Others (Unlike RPC 3.3, not limited to matters before a tribunal)

Banco Popular No. America v. Gandi, 184 N.J. 161, 185 (2005). Favorable opinion letter to lender not withstanding knowledge of client misrepresentations potentially liable.

See, also Davin L.L.C., supra

Brunswick v. Route 18 Shopping Center, 182 N.J. 210, 230-231, n.5 (2005). Duty to act in good faith with transactional adversary and deal fairly.

Compare with RPC 1.6. See, also Michels, Ch. 30:3-1

RPC 5.1 Responsibilities of Partners, Supervisory Lawyers and Law Firms (Required supervision and imputed liability for (1) ordering or ratifying conduct and (2) knowledge with failure to act. Negligence, liability broader vicarious liability)

In re Yacavino, 100 N.J. 50, 55 (1985) Michels Ch. 41:2-3(b)(1) (Responsibilities of the supervising lawyer). Young lawyer in satellite office virtually alone and unsupervised re: status of matters pending in that office.

RPC 5.2 Responsibilities of a Subordinate Lawyer

In re Kasson, 141 N.J. 83 (1995). Associate's reliance on employer to comply with bona fide office rule not a defense to ethics.

Michels, Ch. 41:2-3(b)(2) (Responsibilities of the subordinate lawyer)

RPC 5.3 Responsibilities Regarding Non-Lawyer Assistants

Smith-Bozarth v. CARA, 329 N.J. Super. 238, 247 n.2 (App. Div. 2000). Supervise confidentiality obligations and compliance.

Michels, Ch. 41:2-3(c) (Responsibilities as to non-lawyer assistants).