

# Overview of investigations and hearings for misconduct

- Financial and complex cases are investigated and prosecuted by OAE
  - OAE can present cases before special ethics masters or district volunteer hearing panels, Disciplinary Review Board, and the Supreme Court
- Volunteer attorneys serve on District Ethics Committees, and they investigate non-complex cases for RPC violations
- Volunteer attorneys also serve as hearing panel members after gaining experience and they can issue decisions and recommendations to the Board
- Hearing panels and the Disciplinary Review Board both include non-attorney members!
- Then, *de novo* review occurs at the Disciplinary Review Board and then again at the Supreme Court, who issues the final order of discipline.
- Supreme Court can elect to have oral argument for any reason
- However, there is always oral argument before the Supreme Court when it comes to a disbarment recommendation

## *Random Audit Program*

- OAE conducts both Random Audit Program and financial misconduct investigations
- The Random Audit Compliance Program conducts periodic audits of law firms that engage in the private practice of law.
- The purpose of the program is to ensure that law firms maintain required records of clients' funds and attorneys' fees. It serves as an educational tool.
- If misconduct is suspected, it's referred for investigation. If none is found, you can correct recordkeeping errors and the case is closed.

## *Demand Audits*

- The OAE has the power to request all financial or relevant client or business documents in a misconduct investigation
- The OAE conducts recorded interviews of all respondents and can audit the attorney's books and records during an investigation
- Attorneys have the obligation to comply with the investigation under both the Rules and RPCs
- Investigations can lead to complaints.

# When Random Audits Go Bad!

- Purpose= Compliance, Education & Deterrence
  - Compliance & education to prevent misappropriation
  - 98% of random audits closed with no further action
  - Only 2% referred for investigation
- Random Audit Primary Focus= Attorney Trust Account (ATA)
  - During random audit OAE is performing procedures to confirm:
    - Proper records are maintained
    - The attorney trust account is in balance
      - Amount in bank = client ledger balance
      - No client ledger can be negative!

# Knowing Misappropriation

## Standard of Knowing Misappropriation

Wilson: 'Misappropriation' means **any** unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or **not** he derives any personal gain or benefit therefrom. [In re Wilson, 821 NJ 455 n.1.]

Noonan: ...consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose, or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures to take the money were great or minimal. The essence of **Wilson** is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment.... The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant. [In re Noonan, 102 NJ 157, 159-60 (1986).]



# Knowing Misappropriation

## Procedures to Prove Knowing Misappropriation

- Look for patterns
  - Early disbursement of fees
  - Payments to the attorney unrelated to a client matter
  - Payment related to personal or business account shortfall
  - Payments of business or personal expenses
  - Holding checks
  - Delay in writing checks
  - Movement of personal money in and out of the trust account

# Investigation: Demonstrating Knowing Misappropriation

The OAE will perform procedures to demonstrate knowing misappropriation.

- Reconstruct trust account activity and prepare three-way reconciliations
  - Show that there were insufficient funds in the account at any given point of time
  - Identify when, how often, and to what extent the account was deficient
- Attempt to identify patterns or other indicators
  - Moving personal funds in and out of trust to cover deficiencies
  - Early payment of attorney fees from trust

# Overview of the Disciplinary System and Related Committees

- Advisory Committee on Professional Ethics (ACPE)
- Rule 1:19-1 to -9
- Inquiries from lawyers concerning RPCs
- ACPE can decline to respond
- Inquirers must certify that response will not affect pending case
- Published response is binding on OAE and DEC's
- Opinions at [New Jersey Ethics Opinions \(rutgers.edu\)](http://www.rutgers.edu/~njcourts/ethics/) (hyperlink on Opinions page of njcourts.gov)



# Committee on Attorney Advertising

- Rule 1:19A- to -8
- Issues advisory opinions to lawyers, published opinions are binding on OAE and DEC's
- Discipline authority over violations of RPC 7.1 to 7.5
- Procedure: revise the advertising (cease and desist) or refer to OAE for issuance of complaint
- Who submits advertising grievances

# CAA Grievances

- Law firm websites
- Awards (home page, lawyer profiles)
  - Notice to Bar dated 5/5/21
- Testimonials
- Past results
- Comparative language
  - Solicitation letters
- Compliance with RPC 7.3(b)(5)

# Recent Topics of Importance

- Competence with Technology
- In re Robertelli, 248 N.J. 293 (2021)
- RPC 4.2 violation to request access to social media postings of adverse party
- Defense of ignorance won't work anymore
- Lawyers must educate themselves about social media to guide themselves and their staff
- Court referred to ACPE for further guidance

## Metadata – RPC 4.4(b) & RPC 1.6

- Working Group on Ethical Issues Involving Metadata in Electronic Documents (2015)
- Lawyers do not need to be experts in sophisticated technology to adequately represent their clients, but
- All lawyers should have at least a baseline familiarity with the risks and benefits of relevant technology to practice effectively.

## RPC 1.6(f) - Confidentiality

- Special Committee on Attorney Ethics and Admissions (2015)
- New paragraph in RPC 1.6:
- Lawyer's duty to prevent inadvertent or unauthorized disclosure of information relating to the representation of a client
- "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."



## ACPE Opinion 685 Withdrawn (Peremptory Challenges)

- ACPE withdrew Opinion 685 (Notice to Bar 1/7/22)
- Opinion 685 found that use of race-based peremptory challenges was not prohibited by Rule of Professional Conduct 8.4(g)
- ACPE found that the Opinion is inconsistent with the plain meaning of the text of RPC 8.4(g)

# No Categorical Exclusion

- Not every use of peremptory challenge found to violate Batson or Gilmore is necessarily an ethical violation, but
- There is no longer a categorical exclusion from consideration under RPC 8.4(g)
- Whether there is an ethics violation will be determined by disciplinary authorities
- ACPE intends to issue opinion providing guidance
- Meanwhile, Judicial Conference is studying peremptory challenges

## NOTICE TO THE BAR

### **SUPREME COURT COMMITTEE ON ATTORNEY ADVERTISING REMINDER: ADVERTISING AWARDS, HONORS, AND ACCOLADES THAT COMPARE A LAWYER'S SERVICES TO OTHER LAWYERS' SERVICES**

The Supreme Court Committee on Attorney Advertising has received numerous grievances regarding attorney advertising of awards, honors, and accolades that compare a lawyer's services to other lawyers' services. Examples of such awards, honors, and accolades are: "AV Preeminent," "BV Distinguished," "Super Lawyers," "Rising Stars," "Best Lawyers," "Top Lawyer," "Top Law Firm," "Superior Attorney," "Leading Lawyer," "Top-Rated Counsel," numerical ratings, and the like. The Committee issues this Notice to the Bar to remind lawyers that they may refer to such awards, honors, and accolades only when the basis for the comparison can be verified and the organization has made adequate inquiry into the fitness of the individual lawyer. Further, whenever permissible references to comparative awards, honors, and accolades are made, Rule of Professional Conduct 7.1 requires that additional language be displayed to provide explanation and context.

As a preliminary matter, a lawyer who seeks to advertise the receipt of an award, honor, or accolade that compares the lawyer's services to other lawyers' services must first ascertain whether the organization conferring the award has made "inquiry into the attorney's fitness." Official Comment to Rule of Professional Conduct 7.1. "The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion." In re Opinion 39, 197 N.J. 66, 76 (2008); see also Committee on Attorney Advertising Opinion 42 (December 2010). This inquiry into the lawyer's fitness must be more rigorous than a survey or a simple tally of the lawyer's years of practice and lack of disciplinary history. Pursuant to Rule of Professional Conduct 7.1(a)(3)(ii), the basis for the comparison must be substantiated, bona fide, and verifiable.

The Committee has reviewed numerous awards, honors, and accolades that do not include a bona fide inquiry into the fitness of the lawyer. Some of these awards are the result of a cursory survey of lawyers in the area with no subsequent, independent vetting by the conferring organization. Several such awards are issued by regional magazines. Some are popularity contests – the lawyer "wins" the award when enough people email, telephone, or text their vote. Other awards are issued for a price or as a "reward" for joining an organization. Still others are generated based in large part on the participation of the lawyer with the conferring organization's website. For example, a lawyer can enhance his or her "rating" with the organization by endorsing other lawyers, becoming endorsed in return, responding to questions from the public about legal matters on the organization's website, and the like. Factors such as the payment of money for the issuance of the award; membership in the organization that will issue the award; and a

level of participation on the organization's Internet website render such awards suspect. Lawyers may not advertise receipt of such awards unless, as a threshold matter, the conferring organization made adequate and individualized inquiry into the professional fitness of the lawyer.

When an award, honor, or accolade meets this preliminary test, the lawyer must include additional information when referring to it in attorney advertising, whether that advertising be a website, law firm letterhead, lawyer email signature block, or other form of communication. First, the lawyer must provide a description of the standard or methodology on which the award, honor, or accolade is based, either in the advertising itself or by reference to a "convenient, publicly available source." Official Comment to RPC 7.1. Second, the lawyer must include the name of the comparing organization that issued the award (note that the name of the organization is often different from the name of the award or the name of the magazine in which the award results were published). RPC 7.1(a)(3)(i). Third, the lawyer must include the following disclaimer "in a readily discernible manner: 'No aspect of this advertisement has been approved by the Supreme Court of New Jersey.'" RPC 7.1(a)(3)(iii). All of this additional, accompanying language must be presented in proximity to the reference to the award, honor, or accolade.

Further, when the name of an award, honor, or accolade contains a superlative, such as "preeminent," "distinguished," "super," "best," "top," "superior," "leading," "top-rated," or the like, the advertising must state only that the lawyer was included in the list with that name, and not suggest that the lawyer has that attribute. Hence, a lawyer may state that he or she was included in the list called "Super Lawyers" or "The Best Lawyers in America," and must not describe the lawyer as being a "Super Lawyer" or the "Best Lawyer."

Lastly, the Committee has reviewed numerous law firm advertising (websites, email signature blocks, print material) that includes badges or logos of comparative awards, such as the yellow "Super Lawyers" badge, but does not include the required additional information in a discernible manner in proximity to the reference to the award. Every reference to such an award, honor, or accolade – even when it is in an abbreviated form such as the badge or logo – must include the required accompanying information: (1) a description of the standard or methodology; (2) the name of the comparing organization that issued the award; (3) the statement "No aspect of this advertisement has been approved by the Supreme Court of New Jersey." Only the description of the standard or methodology can be presented by reference (with the statement that the standard or methodology can be viewed at that website or hyperlinked page). The other required information must be stated on the face of the advertising, readily discernible and in proximity to the reference to the award. The accompanying information cannot be buried at the bottom of a page, or in tiny print, or placed outside the screen shot on a website.

For example, a reference to the Martindale-Hubbell AV Preeminent accolade should provide:

Jane Doe was selected to 2021 list of AV Preeminent lawyers. This award is conferred by Martindale-Hubbell. A description of the selection methodology can be found at [www.martindale.com/ratings-and-reviews/](http://www.martindale.com/ratings-and-reviews/) . No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

Lawyers who seek further assistance as to compliance with the rules governing attorney advertising may make inquiry of the Committee on Attorney Advertising. See Court Rules 1:19A-3 and 1:19A-8.

/s/ Jeffrey S. Apell

Jeffrey S. Apell

Chair, Committee on Attorney Advertising

Dated: May 5, 2021