

**Gann Law Books**  
**New Jersey Attorney Ethics On-Demand Webinar Outline**  
**With Kevin H. Michels**

Video 1 • The New Jersey Rules of Professional Conduct  
**Overview of Ethics System**

Video 2 • The Role of the New Jersey Supreme Court  
• The New Jersey Rules of Professional Conduct

- Background at 1:2-1
- 1983 Report of the Debevoise Committee Recommending Adoption of the RPCs in New Jersey
- 1984 New Jersey Supreme Court Adoption of the Rules of Professional Conduct with Court Comments
- New Jersey Supreme Court Adoption of 2004 RPC Changes in Response to Report of Pollock Commission

Video 3 • Sources of Ethics Law Beyond the RPCs

- NJ State Court Decisions
- Ethics Committee Opinions
- Court Rules
- Notices to the Bar
- Federal Courts

Video 4 • The Disciplinary System

- Office of Attorney Ethics
- District Ethics Committees
- Disciplinary Review Board
- New Jersey Supreme Court

**The Reach, Significance, and Value of the Ethics Rules.**

Video 5 • Operating System for practice -- litigation, counseling and transactional setting.

- Disciplinary
- Civil Liability to Clients
- Civil Liability to Third Parties
- Kevin H. Michels article in the Georgetown Journal of Legal Ethics, Third Party Negligence Claims Against Counsel: A proposed Unified Liability Standard
- RPC 4.1 - Truthfulness in Statements to Others
- How to use the ethics rules for planning.

**The Retention -- Structure, Critical Concerns and the Agreement.**

Video 6 • **Hypo 1.** Managing the Client Relationship -- How ethics can help establish and maintain a successful attorney/client relationship.

- Not-so-easy question: Who is and is not the client?
- Conflict of Interest tensions
- Multiple Representation Problems
- Disclosure of Confidential Information Concerns
- Confusion in the Organizational Representation

Video 7 • Better practice: Confirm precise representation in writing.

- Limiting the Scope of Representation
- "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." RPC 1.2(c)

- To Avoid Disputes: Confirm in Writing

## Conflicts of Interest

- Video 8
- Rationales.
    - Can't serve two masters who have conflicting interests.
    - Confidentiality
- Video 9
- Overview of Conflicts Rules
    - Conflict of Interest: General Rule -- RPC 1.7
    - Concurrent Client Conflicts
    - Conflicts between attorney and client - RPC 1.8
    - Conflict re prior clients – RPC 1.9
    - Imputation of conflicts - RPC 1.10
    - Conflicts re prior government employment - RPC 1.11
    - Conflicts re prior judicial service, etc. - RPC 1.12
  - Direct adversity of interests and material limits on attorney responsibilities
  - RPC 1.7
- Video 10
- Waiver/Consent - RPC 1.7(b)
    - First question: Is this the kind of matter that you're comfortable handling for more than one party?
    - Informed parties must consent in writing
- Video 11
- Requires consultation and advice on risks
- Video 12
- Clients give Informed Consent - RPC 1.7(b)
  - Informed consent defined - RPC 1.0 (e)
  - The lawyer reasonably believes that matter can be handled competently for both parties
  - Public entity cannot provide consent
  - Waivers precluded in other contexts
- Video 13
- Miscellaneous Conflicts Situations
    - Prior preliminary consultations with prospective clients
    - RPC - 1.18
- Video 14
- RPC 1.10(a) - Generally Conflict of Single Attorney Imputed to the Firm
  - Screening generally not a solution
  - Prior government work
  - In re S.Ct. Adv. Comm. on Prof. Ethics Opin. No. 697, 188 N.J. 549 (2006)
  - Prior involvement with affiliate corporate entities

## Fees, Billing, and Collection

- Video 15
- Fees -- RPC 1.5
  - Requirements as to all fee arrangements
    - Basis or Rate must be set forth.
    - In writing
    - Client signature not required in hourly retainers, except in family matters.
    - Fee must be reasonable
  - Contingent fee arrangements
    - Prohibited in family & criminal matters -- RPC 1.5(d)
    - Court Rule (non-business torts): R. 1:21-7
    - RPC 1.5(c) -- "shall be in writing and shall state the method by which the fee is to be determined" and as to expenses, "whether such expenses are to be deducted before or after the contingent fee is calculated"
    - As to expenses, Court Rule is more specific R. 1:21-7(c) ("permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting

- disbursements in connection with the institution and prosecution of the claim")
- R. 1:21-7(b) - Offer Hourly Alternative
- Court Rule caps -- R. 1:21-7(c)
  - Attorney and client must sign agreement - R. 1:21-7(g)
  - Failure to have required writing may jeopardize ability to recover the contingent fee
  - May apply to court for enhanced fee where the capped fee is deemed inadequate
  - R. 1:21-7(f)
  - Taking Fee in Stock of Client is Fraught with Dangers - RPC 1.8
- Video 16 • Fee Sharing
  - Cannot share fee with non-attorney
  - Sharing fees with other lawyers outside the firm
    - RPC 1.5(e)
    - Fees in proportion to effort
    - Where firms agree to share responsibility
    - Client consent required in either event
    - Referral fees paid by certified attorneys in non-matrimonial matters
    - Court Rule: R. 1:39-6(d)
- Video 17 • Payment of Attorney Fees by Third Party
  - Informed consent of client
  - No interference with attorney/client relationship
  - No disclosure of confidential information
  - In the Matter of the State Grand Jury Investigation
  - Statute of Frauds requires a writing
- Video 18 • Billing
  - Retainers
    - A retainer need not be deposited into trust account, unless there is an explicit agreement to do so.
    - In re Stern, 92 N.J. 611, 619 (1983)
    - Better practice is to deposit it into the attorney business account, bill against it monthly and avoid trust account issues
    - Non-refundable retainers may be permissible
    - Court Rule 5:3-5(b)
- Video 19 • Importance of invoicing regularly
  - As matter progresses more and more difficult to get out of a case
  - Clients who fall into arrears are more likely to resist payment and perhaps file malpractice claim defending action for fee
  - Withdrawal for non-payment of fees allowed by RPCs
  - RPC 1.16(b)(5)
- Video 20 • Collection of fees
  - Retaining Lien
  - Opinion 554 RETENTION OF CLIENT'S FILE AFTER TERMINATION OF EMPLOYMENT RELATIONSHIP
  - Fee arbitration system
  - Fee arbitration notice
  - Statutory lien (N.J.S. 2A:13-5)
  - Musikoff v. Jay Parrino's The Mint, L.L.C., 172 N.J. 133 (2002)
- Video 21 • Trust and Business Accounting
  - Must have separate trust and business accounts
  - Perhaps at different banks, to avoid confusion
  - Business account -- receipts from practice of law, including retainers, where permitted
  - Trust account -- deposit amounts held for client and escrowed funds

- Must be held inviolate
- "Borrowing" such funds is a violation of the Wilson rule and will result in disbarment.
- Any transfers must be pursuant to express authorization of owner of funds
- When authorized to disburse fee from trust, must go into business account first

Video 22      ◦      Trust Account Recordkeeping

- Receipts
- Disbursements
- Client journals
- R/D controls
- Monthly reconciliations

- Be careful, bounced checks can trigger investigations; also, there are random audits
- Attorney "death penalty" for intentional invasion of trust funds for personal purposes
- In re Wilson, 81 N.J. 451 (1979)

Video 23      ◦      Escrowed funds

- disbursements require authorization from all interested parties
- when authorization unavailable, consider depositing funds in court

**Confidentiality and Disclosure**

- Video 24      • Confidentiality (and Disclosure)
- Principles underlying client confidentiality
  - Distinguished from attorney/client privilege
  - What information must be protected
  - RPC 1.6

Video 25      • Exceptions, requiring or permitting disclosure

- Implied authorization
- Client consent
- To prevent crime, fraud, etc.
- To prevent fraud on tribunal
- Optional disclosure situations
  - Past criminal, illegal, or fraudulent act involving the lawyer's services
  - Claim or defense of the lawyer in a controversy with the client
  - Compliance with other law

Video 26      • Candor Requirements

- Toward tribunals
- RPC 3.3(a) prohibits five kinds of activities
  - a false statement of material fact or law
  - a failure to disclose a material fact when disclosure is necessary to avoid assisting an illegal, criminal, or fraudulent act by a client
  - a failure to disclose legal authority in the controlling jurisdiction if the lawyer knows that it is directly adverse to the client's position and it has not been disclosed by opposing counsel
  - an offer of evidence that the lawyer knows to be false
  - a failure to disclose a material fact when the lawyer knows that the omission is reasonably certain to mislead a tribunal
    - Unless the substance of the disclosure is protected by a recognized privilege or is otherwise prohibited by law
    - New Jersey's emphasis is on creativity in arguing disclosed facts and law rather than in "hiding the ball"

Video 27      ◦      Duties to Nonclients

- RPC 4.1 Truthfulness in Statements to Others

- Video 28
  - Hypo 2
  - Liability to Nonclients? Understanding the Problem and some Powerful Solutions
  - Davin, L.L.C. v. Daham, 329 N.J. Super. 54(App. Div. 2000)
  - Remonstrating with your client
- Video 29
  - Communications with Represented Parties
    - RPC 3.5
    - Generally you may not contact a party represented by counsel except with the consent of the party's attorney
    - Corporate adversaries
      - Hypo 3
      - "Litigation control group" test
      - Application to hypo examples
      - Planning and prevention check list
      - Contacts to make status determination
      - RPC 1.13(a)

### **Why Clients Become Grievants and Claimants: A Theory and its Application**

- Video 30
  - Failure to Communicate
  - RPC 1.4
  - Ethical obligation to keep the client informed
  - Disproportionate Emphasis on Outcome
  - Most clients value effort, not just results
  - Attorney can make client a "partner" by consistent communications
  - Without such communication, the outcome becomes the only viable measure of the attorney work
- Video 31
  - Wrap Up
  - Evaluation Form