

# NEW JERSEY DISCIPLINARY REVIEW BOARD

Comments, Explanations and Annotations  
by Kenneth F. Irek

“Mr. Gaughran, thank you very much. I  
appreciate your efforts on behalf of the  
system. Thank you”

Transcript of Board Hearing,  
Wednesday, November 18, 1992,  
page 3, lines 22 through 24.

This page is for information  
only and is Not part of the  
attached document(s). It was  
created by Kenneth F. Irek for  
clarification and indexing.

## Comments, Explanations and Annotations

### Quote from the record:

“Mr. Gaughran, thank you very much. I appreciate your efforts on behalf of the system. Thank You.”

Legal Question: Does Rule 1:20. Discipline of Members of the Bar, comply with at least the minimum standards of due process protection, guaranteed under the New Jersey and Federal Constitutions?

### Discussion:

What is the “system”? Rule 1:20 is the set of Rules that govern attorney discipline:

Rule 1:20-1. Disciplinary Jurisdiction; Annual Fee and Registration (a) Generally. Every attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3. Attorneys who have resigned without prejudice pursuant to Rule 1:20-22 shall also be subject to such jurisdiction in respect of conduct undertaken prior to the acceptance of the resignation by the Court. To assist in the administration of its disciplinary function, the Supreme Court shall establish, in accordance with these Rules, district ethics committees (hereinafter referred to as the Ethics Committees or the Ethics Committee), district fee arbitration committees (hereinafter referred to as the Fee Committee or the Fee Committees), a Disciplinary Review Board (hereinafter referred to as the Board or Disciplinary Review Board), a Disciplinary Oversight Committee (hereinafter referred to as the Oversight Committee), and an Office of Attorney Ethics and a Director thereof (hereinafter referred to as the Director).

Lawyers who commit unethical conduct in New Jersey are subject to discipline by the Supreme Court. Such discipline can range from an admonition, the least serious discipline, to a reprimand, censure, suspension from practice, or permanent disbarment. The attorney disciplinary process is usually begun by the filing of an Attorney Grievance Form with the secretary of one of the Supreme Court's 18 district ethics committees.

#### The Office of Attorney Ethics

In October 1983, the Supreme Court of New Jersey established the Office of Attorney Ethics (OAE) to manage all district ethics and fee arbitration committees throughout the state. In addition to broad-ranging administrative and managerial powers, the OAE also has jurisdiction to investigate and prosecute complex and certain other ethics matters. It handles exclusively all ethics cases in which the lawyer is also a defendant in any criminal proceeding. Additionally, the OAE takes any emergent action that may be necessary to protect the public by applying to the Supreme Court for immediate temporary suspensions. This may occur, for example, when a lawyer has been convicted of a serious criminal violation, or where there is substantial proof that client trust money has been stolen. Likewise, the OAE manages statewide all district fee arbitration committees, which hear client disputes over lawyers' bills for services. The OAE also administers the Supreme Court's Random Audit Compliance Program, which conducts audits of attorneys' trust and business accounts to see that proper records of clients' funds and attorneys' fees are maintained by all lawyers. Finally, the OAE manages the Trust Overdraft Notification Program, which provides for the active review of overdrafts of attorney trust accounts as reported by New Jersey financial institutions.

By Supreme Court rule, all grievances must be in writing and filed with the secretary of the district ethics committee for the district in which the lawyer has his or her main law office. In the event the committee determines that an actual conflict of interest exists in any case, either the member who has the conflict may be disqualified from participating in the case or, in appropriate cases, the matter may be transferred to another district. Ethical conduct is a personal obligation of a lawyer and therefore a grievance must be filed against a specific lawyer and not against a law firm. An Attorney Grievance Form is used to provide the facts of the grievance, such as names and addresses of all witnesses, dates, and pertinent documentation to serve as a basis for further investigation.

#### Investigation

After receiving an Attorney Grievance Form, the secretary will review it to determine whether the grievance should be docketed. If the secretary determines that the grievance involves a substantial fee dispute, involves pending civil or criminal litigation, or meets other specific

criteria outlined in the court rules, the secretary will decline to docket the case. If the facts alleged in the grievance would not constitute unethical conduct even if proven (for example, where the lawyer is simply alleged to have been rude or used bad language, or where the lawyer did not pay a bill), after consultation with a designated public member of the Committee, the secretary will decline to docket the case. There is no right of appeal from these determinations. In such event, the secretary will notify the grievant of the reason that the case was declined and will provide them with a copy of the specific court rule or other authority mandating declination.

On receipt of a grievance alleging facts about the conduct by a lawyer which, if true, would be unethical, the secretary of the committee docket the case and assigns the matter to a lawyer-member for investigation necessary to determine the validity of the allegations. The Committee's goal is to complete standard investigations within six months and complex ones within nine months of the date assigned. A written report of investigation is then submitted to the Chair of the committee, who determines whether there is adequate proof of unethical conduct. If the Chair finds that there is no reasonable prospect of proving unethical conduct by clear and convincing evidence, the Chair directs the secretary to dismiss the matter and to provide the grievant with a copy of the report of investigation. In such event, the investigative stage of the matter is at an end. The grievant has the right, however, to appeal the dismissal to the statewide Disciplinary Review Board. If, however, the Chair determines that there is a reasonable prospect of proving unethical conduct by clear and convincing evidence, a formal complaint is prepared. The complaint is served on the lawyer, who is required to file an answer within 21 days of service. This step begins what is known as the hearing stage.

Additionally, in cases where both the Committee and the OAE agree that the attorney is guilty of "minor misconduct," and the attorney admits to the unethical conduct, the case may be diverted, i.e., treated as a non-disciplinary matter, in order to correct or remedy the cause of the "minor misconduct." There is no appeal from the OAE's decision to divert a case.

#### Hearing

Complaint cases are generally tried before a hearing panel consisting of three members, composed of two lawyers and one public member. The procedure in disciplinary hearings is similar to that in court trials. A court reporter makes a record of the entire proceeding. Testimony is given under oath. Attendance of witnesses and the production of records may be compelled by subpoena. The hearing is open to the public.

After the hearing is concluded, the panel deliberates and takes one of the following actions:

1. dismisses the complaint, if it finds that the lawyer has not committed misconduct; or

2. determines that the lawyer has been guilty of unethical conduct for which discipline, i.e., admonition, reprimand, censure, suspension or disbarment, is required.

In the event that a docketed grievance has been dismissed by a committee after the investigative or hearing stage, the grievant has the right to appeal to the statewide Disciplinary Review Board ("Board") The Board is composed of nine volunteer members (both lawyers and members of the public). The Board may uphold the action of the local committee, reverse the decision and impose discipline or return the matter for further proceedings.

When a hearing panel finds misconduct warranting discipline, the panel's report and recommendation are forwarded to and considered by the Board. If after reviewing a matter in which an admonition has been recommended, the Board determines that an admonition is adequate discipline, it issues an appropriate letter of admonition. When a hearing panel has filed a report recommending stronger discipline, oral argument is routinely scheduled before the Board. The lawyer may appear in person and may be represented by counsel. A representative of the committee appears in support of the hearing panel report. No witnesses are permitted at this oral argument and no testimony is taken. However, the argument is open to the public. If the Board determines that an admonition, reprimand, censure, suspension, or disbarment should be imposed, its written decision must be reviewed by the Supreme Court of New Jersey.

#### Supreme Court Review

Disbarment can be decided only by the Supreme Court of New Jersey. In all other matters, the recommendation of the Board becomes final on entry of an Order by the Supreme Court, unless the Supreme Court has granted one of the parties leave to appeal. In cases where the Supreme Court grants oral argument, the Office of Attorney Ethics represents the public interest before the Court, which issues a final order disciplining the attorney or determining that no discipline is required.

#### NJLFCP

Occasionally, a grievance against a lawyer involves dishonest conduct. A person who believes that money or other property belonging to them has been taken by a lawyer, in addition to filing a grievance, they may also file a claim with the Lawyers' Fund for Client Protection (the "Fund") after also notifying the appropriate county prosecutor of the incident.

The Fund is a separate committee of the Supreme Court with its own distinct purpose, jurisdiction, and procedures. The claimant must prove a loss suffered through the dishonest conduct of an attorney with whom they had an attorney-client or fiduciary relationship. The attorney against whom the claim is made must be either suspended or disbarred, unless deceased or otherwise unavailable, for the Fund to have jurisdiction.

The Fund is administered by six Trustees (five attorneys and one public member) all of whom are volunteers. The Fund pays its claims through money collected through mandatory fees paid by New Jersey attorneys, who can be suspended from the practice of law by non-payment.

#### Conclusion:

The New Jersey attorney disciplinary system consists of volunteer attorneys and non-attorneys, appointed by the Supreme Court. There is no referral or appeal to the Superior Court, or the Appellate Division. There is a mandatory Supreme Court de novo review, on the record, of all recommendations for disbarment made by the Disciplinary Review Board. But, as in most appellate cases, the standard of review is abuse of discretion, or no credible evidence to sustain the conclusion, and the reviewing court usually gives deference to the trial tribunal, since they were in direct contact with the testifying witness and the original evidence. But here, the trial tribunal was two attorney volunteers, one layperson volunteer and an attorney "presenter" which is a soft word for the prosecutor. None of these volunteers were trained in the procedures and substantive laws involved in a Committee Hearing, because no such training exists.

#### Suggested Revisions to Existing Procedure(s):

An experienced, specifically trained, Attorney Disciplinary Hearing Administrative Law Judge, should decide all disbarment cases, with an automatic right to appeal to the Appellate Division, and finally a review de novo by the Supreme Court, with a written Facts and Conclusions of law incorporated into the final Order. Additionally, permanent disbarment should be eliminated, since it cancels an important property right without the procedural safeguards, and the standards of proof needed to meet the Federal and State due process requirements.

#### Fact Summary:

In May of 1990, Plaintiff, Kenneth Frank Irek (Irek) advertised the sale of a vacant construction lot in Jackson, New Jersey, owned by his solely owned New Jersey corporation, Kirex Development Company, Inc. Zontan Szatmary and his wife, Cathleen Szatmary, decided to purchase the lot and retained a licensed New Jersey attorney, Dennis D. Poane to represent them. A "Contract for Sale of Real Estate" was signed by both parties and Cathleen Szatmary made a \$5,000 check payable to "Kirex Dev. Co", dated May 29, 1990, as the initial deposit of the purchase price of \$35,000. Irek, acting in his official capacity as the President of Kirex Development Company, Inc., endorsed the check as "Kirex Development Co", and deposited it into the Kirex business bank account. Dennis D. Poane, Esq, proceeded to prepare for closing

with a series of correspondences back and forth with Fran Donahue, a Realtor friend of Irek, at the end of June and early July, 1990. The liens and judgments that Poane knew of would not have exceeded the total purchase price of the lot. On or about August, 1990, Irek became unavailable and the closing never took place and the \$5,000 deposit was not returned. On February 27, 1991, the Szatmarys ("Claimants") filed an Attorney Grievance with the District IX Ethics Committee. On April 12, 1991, Claimants filed a written "Statement of Claim" with the NJLFCP, stating that they lost Five Thousand dollars from Kenneth Irek, based on a Fiduciary Relationship (escrow agent). On July 29, 1992, Cathleen Szatmary testified before the District IX Ethics Committee. On May 11, 1993, Chief Justice Robert N. Wilentz signed an Order that permanently disbarred Kenneth F. Irek and restrained and enjoined him from practicing law in New Jersey. On November 26, 1993, the Trustees of the NJLFCP paid to Zontan and Cathleen D. Szatmary the sum of \$5,000, 'arising from the dishonest conduct of their attorney, Kenneth Irek ...', and received a signed 'Release, Assignment and Subrogation Agreement from the Szatmarys. On December 29, 1994, the New Jersey Lawyers' Fund for Client Protection, filed a Civil Complaint in the Superior Court of New Jersey, Law Division, Mercer County, demanding Kenneth Irek reimburse the NJLFCP for the Five Thousand Dollars (\$5,000), paid on his behalf to the Szatmarys, plus interests and costs of suit. Paragraph 4 of the NJLFCP Complaint states:

**"4. In or about August 1990, while representing Zontan and Cathleen Szatmary, defendant embezzled, misapplied and converted to his own use the sum of \$5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction."**

On March 22, 1995, the Superior Court of Mercer County, Law Division, entered a Five Thousand dollar (\$5,000) Default Judgment against Kenneth Frank Irek and in favor of the NJLFCP. Twenty-five years later, on November 9, 2020, Plaintiff filed a six-count Verified Complaint in the Superior Court of New Jersey, Mercer County, Law Division, claiming, inter alia, that Defendant, the New Jersey Lawyers' Fund for Client Protection, fraudulently obtained the above-described Default Judgment and to declare it void *ab initio*. On November 27, 2020, Plaintiff filed a Motion for Injunctive Relief Temporary Restraints, preliminarily enjoining and restraining Defendants from, inter alia, continuing to engage in conduct related to compelling Plaintiff to reimburse the NJLFCP for the \$5,000 claim they had paid to the claimants. On December 9, 2020, Defendants filed a Cross-Motion to Dismiss Plaintiff's Verified Complaint and deny injunctive relief, claiming, inter alia, lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; absolute immunity in law and equity; and no showing of irreparable harm or substantial hardship if injunction denied. On December 14, 2020, Plaintiff

filed a Reply to Defendants' Cross-Motion, opposing dismissal of his Verified Complaint and Injunctive Relief. On December 15, 2020, Defendants filed a request for leave of court to file a sur-reply. On December 15, 2020, Plaintiff filed a response to Defendants' request to file a sur-reply. On December 18, 2020, a telephonic oral argument was held for 34 minutes, before Judge Douglas H. Hurd, P. J. Cv. On December 21, 2020, Judge Hurd signed an Order granting Defendants' Cross-Claim to dismiss Plaintiff's Verified Complaint, with prejudice, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, and granting Defendants' objection to Plaintiff's Motion for Injunctive Relief. It is from this Order that Plaintiff appealed to the Superior Court, Appellate Division. On December 21, 2020, Judge Douglas H. Hurd put his motion decision on the record. On January 7, 2021, Plaintiff filed a Notice of Appeal of Judge Hurd's Order. On March 3, 2022, in-person oral argument was heard. On May 18, 2022, the Appellate Division's Per Curiam decision affirmed the Superior Court's dismissal of Irek's Verified Complaint and denial of injunctive relief. On May 18, 2022, Plaintiff filed a Notice of Petition for Certification with the Supreme Court of New Jersey. On June 15, 2022, Plaintiff filed a Petition for Certification with the Supreme Court of New Jersey.