

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

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LESSON PLAN AND EVALUATION**

CONDITIONAL DISCHARGES

With

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Program description

NJ law provides a way to avoid prosecution for a minor drug offense. However, the question remains as to whether this is a good choice, especially for a young defendant. Find out all the options with this important online CLE.

I. Introduction

- **Career prosecutor (15 years) and defense attorney**
- **12 years as a municipal court judge**
- **NJSA 24:21-27 – “old” conditional discharge, repealed when Comprehensive Drug Reform Act of 1987 went into effect, late 1980s**
- **NJSA 2B:12-23.1**
- **Conditional discharge, formerly called “Section 27”**

II. Legislative Policy in NJ to limit diversion programs to one per person

- **Policy by our legislature – people in NJ are only to be afforded one diversion from CJ system**
- **NJ has 3 diversions:**
 - **PTI – NJSA 2C:43-12, *et seq.***
 - **Conditional Discharge – NJSA 2C:36A-1**
 - **Conditional Dismissal Program (eff. January 2014) – NJSA 2C:43-13, *et seq.***
- **Once you are in one diversion program – you do not receive any more in your lifetime**
- **May not want to hold the one free bite at the apple for the future because may not need it in the future**
- **Generally recommend when you have the “get out of jail free” card in your hand you should use it**
- **Have yet to see conditional dismissal used in court – there are other means by which to accomplish the same goals**
- **Some people who may get into more trouble in the future based on their lifestyle may want to consider not using diversion in municipal court**
- **Must determine what the possible resolutions are for each case based on a person’s background and case – how to promote justice**

III. Conditional discharge process

- **NJSA 2C:36A-1**
- **Expansion of “section 27”**

- **Reserved for people with no previous diversion in the criminal justice system – no prior conditional discharge or PTI**
- **Ask client if has had previous diversion at any time**
- **Need to run criminal case history to determine if client is eligible – difficult for defense counsel to do**
- **If client received conditional discharge and then granted expungement and does not need to disclose prior conditional discharge (State v. O'Brien, 418 NJS 428 (App. Div. 2011)) – how does this affect ability to apply for conditional discharge again**
- **Must reveal expungement under certain circumstances – not necessarily in application for conditional discharge**
- **Whose burden to reveal or disclose prior conditional discharge? Isn't this the state's burden? (Mitchell v. United States, 526 US 314 (1999))**
- **After determine whether client has prior conditional discharge – must determine if client has prior drug charges anywhere else**
- **Client cannot have any prior drug convictions – not as easy for state to obtain this information**
- **“prior drug offenses” – Chapters 35 and 36 – not necessarily a prior for 2C:33-2.1 Loitering – must be under Chapters 35 and 36**
- **Client cannot be considered a danger to society or menace to society – 2C:36A-1(c)(1)**
- **Must determine client will benefit from conditional discharge – 2C:36A-1(c)(2) – must benefit as a result of a dependency on drugs – not as significant a factor now**
- **Don't have to lose driver's license if accepted to conditional discharge if can demonstrate a need**
- **State v. Bendix, 396 NJS 91 (App. Div. 2007)**
- **Terms of conditional discharge should be adequate to protect the public and benefit the defendant by serving to correct dependency**
- **Some courts require urine testing to come back negative in order to continue and successfully complete program**

- **Policies as to drug testing differs by county – some require and some do not – dependent on number of cases in the jurisdiction**
- **2C:36A-1(c)(3) – recently amended to include conditional dismissal program as one of disqualifying prior diversions for eligibility**
- **State v. Gray, 215 NJS 286 (App. Div. 1987) – if 2 unrelated, open drug offenses in the same court and close in time, possible consolidation to allow for conditional discharge to cover both cases**
- **If charges in separate jurisdictions, need to go to assignment judge for consolidation**
- **A strong advocate can convince assignment judge that consolidation is appropriate – statutory and caselaw support the argument**
- **DEDR penalty is mandatory to pay (few exceptions – if paid for own inpatient program)**
- **\$833 mandatory penalties/fees – not fines**
- **Chapter 35 plea – lab fee required; Chapter 36 plea – no lab fee required – HOWEVER – always a lab fee when entering conditional discharge**
- **Break down of fees:**
 - **\$50 lab fee**
 - **\$500 DEDR penalty**
 - **\$75 juror fee**
 - **\$50 DARE**
 - **\$75 Safe Neighborhood**
 - **\$50 VCCA – victims of crime compensation**
 - **\$33 court costs**
- **DEDR – State v. Bulu, 234 NJS 331 (App. Div. 1989); State v. Blow, 123 NJ 472 (1991) – DEDR is not to punish but it is rehabilitative**
- **Must pay DEDR penalties in order to get the dismissal at the end of the program**
- **DEDR is a condition of the program**
- **If client wants conditional discharge (school, military, etc) – judge going to put on conditional discharge for a year, may be able to ask for less time later on, but must pay all fines and penalties**

- **Judges are receptive to those who are scheduled to join military and must resolve charges before proceeding – can ask for shortened period of time**
 - **For immigration – conditional discharge not considered the same as a drug charge – be sure to check with immigration attorney**
 - **If 30 grams of marijuana or less – not a removable offense but must have proof – need NJSP lab report**
 - **Get Lab report before you get expungement – keep the report in a safe place just in case (immigration, bar admission, etc)**
- **Drug penalties must be paid for discharge – advise client to pay as quickly as possible and keep up with payments**
- **Greatest reason for failure of conditional discharge is failure to pay fines**
- **Time period for program:**
 - **Usually 1 year**
 - **Can ask for less time**
- **Must wait 6 months after completion of conditional discharge to file for expungement – keep this in mind when advising client of need to pay off fines early**
- **Some may think that a drug charge amended to a borough ordinance with a guilty plea would disqualify from conditional discharge – not necessarily the case**
 - **Based on pre-emption – such a guilty plea is probably prevented by statute – no court rule that opposes this procedure**
 - **Not much to go back and correct the error because of double jeopardy issue – probably already done with sentence**
 - **This usually occurs when the county prosecutor downgrades case from an indictable offense**
- **State v. Dylag, 267 NJS 348 (Law Div. 1993) – “Dylag application” – client wants PTI but has prior conditional discharge; want to vacate conditional discharge; client can plead guilty to drug offense can receive credit for fines already paid; conditional**

discharge vacated; next day go to court and gets PTI because removed statutory bar.

- **State v. O'Brien, 418 NJS 428 (App. Div. 2011) – when you make a PTI or CD application that ends your ability to apply for PTI in the future – just making the application disqualifies you from further diversions...stopped the Dylag application process.**
- **Need to explain to client that application for CD will limit ability to PTI in the future**

IV. Supreme Court Guidelines on Plea Bargaining

- **Prohibit plea bargaining in certain cases: under the influence of drugs, possession of marijuana under 50 grams, and possession of paraphernalia**
- **Comprehensive Drug Reform Act amended to add NJSA 2C:35-10c – failure to make proper disposition of CDS – created to handle these offenses to give speedy justice – this section was never added to the prohibition against plea bargaining**
- **NJSA 2C:36-6 possession of a hypodermic needle – also was never added to the plea bargaining guidelines**
- **Guidelines never updated from 1989 even though several statutes have been added to Title 35 and 36**
- **Cannot plea bargain a drug case – especially those listed by guidelines**
- **Exceptions to the guidelines – if multiple drug offenses from 1 incident, can dismiss as part of guilty plea to another; if client has several CDS charges out of one incident, can select 1 charge for conditional discharge and remaining charges get dismissed**
 - **What happens if client gets kicked out of conditional discharge? What happens to dismissed charges?**
 - **Dismissed charges should stay dismissed**
 - **Preferred technique is conditional dismissal based on completion of program**
- **If client has multiple offenses, no need to get conditional discharge for every count – can pick one and then remaining get dismissed**

V. Ways for Defendant to receive conditional discharge

- **Most times these are pre-trial applications**
- **Plea of not guilty or no plea at all**
- **Guilty plea – sometimes prosecutor’s insist**
- **Trial**
- **License suspension is associated with every conditional discharge – with or without a plea**
- **If ask for CD without a plea, judge has discretion to suspend or not – minimum is 180 and maximum is 2 years – usually judges reserve suspension in extreme cases**
- **Judges usually don’t suspend because they want to encourage people to utilize the program; want person to continue working**
- **If plead guilty or convicted after trial, judge has no discretion but to impose license suspension**
- **Exception for license losses created by Legislature where there is a demonstrated hardship – judge can still forego suspension**
- **State v. Bendix, 396 NJS 91 (App. Div. 2007) – originally not approved for publication; leading case on license suspension issue; sets forth criteria to determine hardship: employment, is public transportation available, etc; not particularly a high hurdle**
- **Some courts state that if you go to trial and are not successful when you are eligible for conditional discharge then court will suspend the license**

VI. Motions to suppress evidence

- **Must file in every case where there is a possible issue**
- **If motion is denied after hearing, defendant only loses the 4th amendment issue- can still try the case or can file for conditional discharge**
- **Is a defendant who moves for suppression and loses able to take a conditional discharge with a condition that he be able to appeal the denial of the suppression motion?**
 - **Rule 3:23-1 “review of a judgment of conviction in a criminal action or proceeding in a court of limited criminal jurisdiction shall be by appeal as provided in R. 3:23”**
 - **Rule 3:23-2 appeal, how taken – defendant or defendant’s legal representative if aggrieved by a final**

post-judgment order entered by a court of limited jurisdiction shall appeal therefrom – no mechanism to get into law division for appeal when taking conditional discharge with suppression denied

- **Rule 7:6-2 pleas, plea agreements – conditional pleas – this applies to all motions except motions to suppress which have their own rule (7:5-2)**
- **Litigated motion to suppress is always preserved – no conditional plea is required**

VII. Alternatives to Conditional Discharge

- **Very young clients taking conditional discharge – must be careful because more serious offense won't have diversion available to you in the future**
- **If you have a client who is charged with possession of marijuana and is under the age of 22 – plead guilty - fines remain the same, likely no license suspension, 1 year to expunge under exception in the expungement statute for youthful drug offenders – may get expungement quicker than someone who takes a conditional discharge – preserves possibility of PTI in the future – but will prevent ability to enter conditional discharge in the future, not for PTI**