Garden State CLE Presents:

Ethical Issues in NJ DWI Prosecution & Defense

Lesson Plan

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Fact Pattern #1

The defendant hires you on a DWI case for an offense that occurred on October 18, 2011. The evidence of guilt is unassailable A review of the discovery reveals that the defendant had a BAC of only .01 % but showed significant indicia of being under the influence of marijuana. The defendant reveals to you in your office that he had a previous DWI conviction in New Jersey in 1996 and an arrest for DWI in Pennsylvania in 2003. The defendant is unclear as to the disposition of the Pennsylvania case.

At a later court date, the defendant provides a guilty plea to driving under the influence of marijuana under NJSA 39:4-50(a)(1), supported by an adequate factual basis. The New Jersey driver's abstract reflects only the 1996 DWI conviction. The judge treats the defendant as a first offender and imposes a 90-day license suspension.

1. What are the legal and ethical issues associated with this case?

2. What advice would you provide your client?

1. RPC 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
  - (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

2. Confidentiality of Information

RPC 1.6. Confidentiality of Information

- **(a)** A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
- **(b)** A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
  - **(1)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
  - **(2)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- **(c)** If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

4. Professional Misconduct

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

- **(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- **(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- **(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- **(d) engage in conduct that is prejudicial to the administration of justice;**

4. Failure to Disclose Information

In re Seelig, 180 NJ 234, 250 (2004)

Thus, although *RPC* 3.3(a)(5) is not a new rule of law, it does represent an alteration of the balance in respect of lawyers' responsibilities. Both the *ABA Model Rules* and the *New Jersey Rules* dismiss misrepresentation as a permissible litigation tactic, even when carried out in the name of zealous representation. *ABA Model Rule* 3.3(a)(1) prohibits a lawyer from making "false statements of fact or law to a tribunal," as does our rule. Moreover, the comments to the *ABA Model Rule* expressly state that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." *Model Rules of Prof'l Conduct R.* 3.3 cmt. 3 (2003). Our *RPC* 3.3(a)(5) codifies the ABA comment, thereby establishing a "more stringent requirement of disclosure than the standard set forth by the Model Rules," with the result that attorneys in New Jersey have been found to violate *RPC* 3.3(a)(5) when a failure to disclose material information misleads the court.

4. Failure to Disclose Information

In re Seelig, 180 NJ 234, 254 (2004)

Most important, respondent claims that his zealous advocacy was compelled by his client's Sixth Amendment right to counsel guaranteed by the United States Constitution. *U.S. Const.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."). He argues that, even if he has violated our *New Jersey Rules,* his client's right superseded any professional duty owed by respondent to the judicial system.

First, we observe that the recent amendment to *RPC* 3.3(a)(5) states "that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law." The new language expressly conveys exceptions implicit in the version of the rule that is operative in this case and that are, in part, explicitly described in the Debevoise Committee Report. *See* Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, *N.J.L.J.*, July 28, 1983, *R.* 4.1, cmt. (explaining that "the constitutional rights of defendants in criminal cases must take precedence over any Rule permitting or mandating disclosure."). Consideration of the disclosure requirement under *RPC* 3.3(a)(5) clearly must take into account any competing constitutional right that delimits the scope of the rule.

5. Constitutional Rights – Fifth Amendment – Right to Silence at Sentencing

Mitchell v. United States, 526 US 314, 326-327 (1999)

Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'

The Fifth Amendment by its terms prevents a person from being "compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the law and to common sense. As to common sense, it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important.

6. Constitutional Rights – Fifth Amendment – No adverse infrence based upon silence at sentencing

Mitchell v. United States, 526 US 314, 330 (1999)

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.

Note:

Requirements of Directive 10-04

NJSA 2B:12-17.2

Fact Pattern #2

Husband, a painting contractor and wife are returning from a late-night birthday party in their SUV which is titled in the name of the wife. Husband is driving while wife is asleep in the front passenger seat. About a mile from their home, the couple is stopped by a state police trooper. Following a brief roadside investigation, he arrests both of them. Based upon a BAC of .09%, the husband is charged with a violation of NJSA 39:4-50. The wife is charged with the same offense for allowing intoxicated operation of a motor vehicle.

You have been hired by the couple to represent them. They desire that the wife's allowing charge be dismissed in exchange for a guilty plea to the husband's DWI charge. This outcome is critical to them because it will permit her to drive him to his job sites each day during his suspension term.

1. What are the legal and ethical issues associated with this case that confront defense counsel?

2. What are the legal and ethical issues associated with this case that confront the prosecutor?

3. What advice would you provide your client?

1. Plea Bargaining – In General

d) Plea Agreements. Plea agreements may be entered into only pursuant to the Guidelines and accompanying Comment issued by the Supreme Court.

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GUIDELINE 2. DEFINITIONS

For the purpose of these Guidelines, a plea agreement occurs in a Municipal Court matter whenever the prosecutor and the defense agree as to the offense or offenses to which a defendant will plead guilty on condition that any or all of the following occur:

(a) the prosecutor will recommend to the court that another offense or offenses be dismissed[.]

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GUIDELINE 4. LIMITATION.

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50)

2. Plea Bargaining Allowing Cases

State v. Hessen, 145 NJ 441, 458-59 (1996)

This Court has a commitment to eliminating intoxicated drivers from our highways and has supported that commitment with a ban on plea bargaining in drunk-driving cases. The aims of this broad policy can be accomplished only through consistent, uniform, and vigorous enforcement of the ban. To carve out from that ban an exception in cases of "permitting an intoxicated person to drive" undermines the important policy behind the prohibition. The person who allows an intoxicated person to drive may be as, or even more, culpable than the driver.

Moreover, the Legislature clearly viewed a person who allows an intoxicated person to drive as one who contributes to the awful *459 consequences of drunk driving and, therefore, shares the responsibility for those consequences. That person is as blameworthy as the drunk driver-her conduct is included in the drunk-driving statute, *N.J.S.A.* 39:4-50; it is an offense of equal magnitude to drunk driving; and it is subject to the same punishment that is applicable to an intoxicated driver. The act of unleashing a drunk driver onto the highways creates the very risk to the safety of other drivers and the public that is posed by the intoxicated driver. The Legislature has seen fit to define the offense as one of the same gravity as drunk driving itself and to prescribe identical punishments for both offenses. Those considerations impelled this Court to treat these two types of offenders consistently, subjecting them to identical restrictions in plea bargaining.

The policies behind our prohibition on plea agreements are as readily applicable to those who allow an intoxicated person to drive as they are to the driver. Both are responsible for the "senseless havoc" of drunk driving. In the eyes of the law there is no distinction in culpability or punishment between drunk drivers and those who allow the drunk to drive. The Guideline that prohibits plea bargaining in all drunk-driving cases recognizes no distinction between the two offenders.

12.

3. Ethical Duties of the Municipal Prosecutor

RPC 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
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- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
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- (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;
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- (d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

3. Ethical Duties of the Municipal Prosecutor under the Guidelines

GUIDELINE 3. PROSECUTOR'S RESPONSIBILITIES

Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion.

The prosecutor shall also appear in person to set forth any proposed plea agreement on the record.

Supreme Court Comment to Guidelines

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases.

In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.
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4. Conflcits & Joint Representation

7:7-10. Joint Representation

No attorney or law firm shall enter an appearance for or represent more than one defendant in a multi-defendant trial or enter a plea for any defendant without first securing the court's permission by motion made in the presence of the defendants who seek joint representation. The motion shall be made as early as practicable in the proceedings in order to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

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4. Conflcits & Joint Representation

RPC 1.7. Conflict of Interest: General Rule

- **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - **(1)** the representation of one client will be directly adverse to another client; or
  - **(2)** there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- **(b)** Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - **(1)** each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
  - **(2)** the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - **(3)** the representation is not prohibited by law; and
  - **(4)** the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Fact Pattern #3

A police officer who has charged the defendant with drunk driving approaches the prosecutor on the night the case is set for trial and requests that the case be dismissed. He indicates that the defendant has provided important information during the previous week to a neighboring police department in an important, drug distribution case as a confidential informant and that the deal he had made with the defendant's attorney calls for a dismissal of the DWI case. Given, these facts, the municipal prosecutor places on the record his desire to see the case dismissed at the "request of the arresting officer." The judge grants the motion.

1. What are the legal and ethical issues associated with this case?

2. To what extent should defense attorneys communicate with police officers in a DWI case?

3. How can such this situation be handled to avoid any potential ethical violations?

1. Improper Dismissals – Case Law

State v. Marsh, 290 NJ Super. 663, 666-67 (App. Div. 1996)

What is clear from this all-inclusive scheme is that there is no room to allow a municipal police officer to make deals with "offenders against the laws.". Since the officer has no authority to bargain, it follows that he or she has no power to promise dismissal of a pending charge. "[A] police officer is not invested with discretion to decide whether the law should be enforced. Recognition of such unfettered power in police officers would undermine the prosecutor's and municipal judge's primary control over case disposition in the municipal court, and would nullify the Supreme Court's absolute prohibition against plea bargaining in drunken driving cases. It also may invite corruption.

Not only was the detective's promise here beyond his authority to make, it ultimately could not legally have been carried out by the municipal prosecutor when defendant's drunken driving charge ultimately reached the municipal court. The promise clearly violated Guideline 4, and undermined its purpose of preserving public confidence that a meritorious DWI offense will not be bargained away. A prosecutor **606 cannot offer a "plea bargain which may not be legally implemented."

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In re Norton and Kress, 128 NJ 520, 539 (1992) (Three-month suspensions)

Respondents, both experienced municipal-court attorneys, knew that the DWI charge had been improperly dismissed. As the OAE properly noted, respondents stood silent as the miscarriage of justice occurred before [their] eyes. Both lawyers knew that the judge had been misled or that he was making a colossal mistake due to his lack of accurate information about the case. Even though his client was the beneficiary of this miscarriage, Norton must have known that he could not ethically accept a victory won by these means.

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In re Whitmore, 117 NJ 472, 478 (1990) (Reprimand)

We thus determine that when a municipal prosecutor becomes aware of an improper motive directly affecting the administration of justice on the part of a police officer in a case before the municipal court, which, if undisclosed, could mislead the court, *RPC* 3.3(a)(5), or could contribute to an improper or illegal result that benefits the witness, *RPC* 3.3(a)(2), the failure to disclose such information constitutes a violation of the Rules of Professional Conduct.

19.

2. Bulletin Letter of October 22, 1985

DISMISSALS FOR LACK OF PROSECUTION

It has come to our attention that in some instances, municipal court judges may be dismissing drunk-driving cases because of the failure of the police officer to appear.

Please be advised that if the complaining witness fails to appear, the judge should not automatically dismiss the complaint, especially if the complainant is a police officer. If the defendant is in court and ready to proceed the judges should question the court clerk or municipal prosecutor as to any notice given to the complainant and an attempt to contact the complainant should be made immediately. In most instances there should be no difficulty in contacting local officers and having them come immediately to the court. Before dismissing a complaint for lack of prosecution, the judge should consider all factors, including the seriousness of the charge, so there is no miscarriage of justice. In appropriate cases, the judge may postpone the hearing and fix a new trial date.

If an officer did not appear and the case is dismissed for lack of prosecution, the judge should, in writing, so notify the Chief of Police or officer in charge of the State Police Barracks, or the person in charge of the particular enforcement agency and request a written explanation. If there are any problems of communication between the court and enforcement agencies regarding appearances by officers, the judge should see that they are corrected. When warranted, the judge may refer the matter to the County Prosecutor or the Attorney General for an investigation.

3. Questions posed by a judge prior to dismissal or amendment application by prosecution

TO: MUNICIPAL COURT JUDGES

FROM: PHILIP S. CARCHMAN, J.A.D.

SUBJECT: SAMPLE QUESTIONS FOR USE IN DRUNK DRIVING

DATE: DECEMBER 2, 2004

Attached is a series of sample questions that a judge should ask on the record when a prosecutor has moved to dismiss or amend a drunk driving charge (N.J.S.A. 39:4-50, driving while intoxicated). The Conference of Presiding Judges-Municipal Courts developed these questions, which are designed to establish a record and thereby prevent an improper dismissal or amendment of a N.J.S.A. 39:4-50 charge. These questions are intended as a guide, so you need not ask the prosecutor the questions exactly as written. You are expected, however, to ask these or similar questions and any additional questions necessary to establish, on the record, the prosecutor's detailed reasons for requesting a dismissal or amendment.

If you have any questions about this memorandum, please contact your Vicinage Municipal Court Presiding Judge of Municipal Division Manager.

SAMPLE QUESTIONS ON MOTIONS BY PROSECUTOR TO DISMISS OR AMEND A DRUNK DRIVING CASE

The following are sample questions that Municipal Court Judges should consider in questioning the municipal prosecutor when the prosecutor seeks to dismiss or amend a drunk driving offense.

1) Why do you wish to dismiss or amend the charges?

A general statement by the prosecutor that asserts only a conclusion that the State cannot prove the charge beyond a reasonable doubt is insufficient. The prosecutor must state on the record the specific reasons why the case cannot be proven beyond a reasonable doubt. The prosecutor should provide the Court with a detailed explanation of the reasons the case cannot be proven. For example, the prosecutor saying, “I cannot prove operation,” is insufficient. The prosecutor needs to set forth, on the record, specific reasons why operation cannot be proven. The Court should be prepared to question the prosecutor in detail on any assertion made by the prosecutor.

2) Did you review the police reports and any videotape and discuss the case with the arresting police officer?

If the prosecutor indicates that the police reports were not reviewed or that the police officer had not been consulted, the Court should refuse to entertain the motion to dismiss or amend, until the prosecutor has indicated, on the record, that the police report was reviewed and the arresting officer was consulted.

3) The Court should be provided with specific facts to support the prosecutor's position that the charges cannot be established beyond a reasonable doubt. In exploring these facts, the Court should consider asking the following questions:

a) If the operation cannot be proven, why not? Did the officer observe operation? Are there any witnesses who observed operation? Did the defendant make any admissions as to operation? Can the State seek to prove operation through any circumstantial evidence?

b) Is there a blood alcohol reading? If yes, why does the prosecutor believe it cannot be introduced in evidence? The prosecutor should place on the place on the record the specific facts as to why the reading cannot be introduced into evidence. For example, a conclusion by the prosecutor that the machine is defective or there was a problem with the before or after test is insufficient. The prosecutor must state specific facts as to why the test is defective.

c) If the prosecutor indicates that the reading is defective, then the Court should closely examine the prosecutor as to whether the charges can be proven without a blood alcohol reading. In examining the prosecutor in this regard, the Court should ask about the facts of the stop (i.e. the observations of operation observed by the officer, the defendant's conduct on the stop, [i.e. physical appearance and demeanor], the defendant's ability to perform psychophysical tests at the scene and at the police department, the defendant's admissions as to consumption of alcohol).

4) If the prosecutor seeks to dismiss or amend based on a defense expert's report, the Court should closely question the prosecutor as to whether the State will be able to produce an expert to counter the defense expert. The Court should also be informed of the conclusions reached in the defense expert's report.

5) Is the application to dismiss or amend the case the result of a plea bargain where the defendant has agreed to plea to some other charge in return for the prosecutor dismissing or amending the charges?

Pursuant to Rule 7:6-2, any plea agreement must be in accordance with Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey. These Guidelines specifically prohibit a plea agreement in cases under N.J.S.A. 39:4-50.

Fact Pattern #4

The trial of your client's DWI is one week away. In your discovery package, you note that the prosecutor has not given you the Alcotest cards of either the trooper who performed the most recent calibration test, or the officer who last did a solution change. The trial judge is demanding that you sign a pre-trial order indicating what discovery from the state, if any, you are still missing.

1. Should you sign the order?

1. RPC 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

- **(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;**
- **(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**
- **(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;**
- **(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;**

2. Discovery

State v. Holup, 253 NJ Super. 320,325 (App. Div. 1992)

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R.* 1:6-2, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed.

Rule 7:7-7(h)

- **(h) Continuing Duty to Disclose; Failure to Comply. If a party who has complied with this rule discovers, either before or during trial, additional material or names of witnesses previously requested or ordered subject to discovery or inspection, that party shall promptly notify the other party or that party's attorney of the existence of these additional materials and witnesses. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to permit the discovery, inspection, copying or photographing of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.**

Fact Pattern #5

A potential new client comes to your office for an initial consultation on a drunk-driving matter. After listening to his story, you determine that the defendant has been charged with a first offense school-zone violation with a BAC of .09%. You tell the potential client that he has an extremely serious case that could result in a long jail term and suspension of driving privileges. You then inform the client that you have a lot of experience in these types of cases and that if he will simply follow your advice and say what you tell him to say, his case will come out just fine. You then quote an initial, non-refundable retainer of $15,000. Your retainer agreement calls for billing at $500 per hour. The clients pays the fee which you then deposit in your in full in your attorney business account.

1. Is this legal fee reasonable?

2. Has the client been properly advised?

3. Was the disposition of the retainer proper?

1. Legal Fees & Retainer Agreements

RPC 1.5. Fees

- (a) **A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:**
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    - (1) **the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
    - (2) **the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
    - (3) **the fee customarily charged in the locality for similar legal services;**
    - (4) **the amount involved and the results obtained;**
    - (5) **the time limitations imposed by the client or by the circumstances;**
    - (6) **the nature and length of the professional relationship with the client;**
    - (7) **the experience, reputation, and ability of the lawyer or lawyers performing the services;**
    - (8) **whether the fee is fixed or contingent.**
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- (b) **When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.**

2. RPC 1.4. Communication

- (a) **A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.**
- (b) **A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.**
- (c) **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**
- (d) **When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.**

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3. RPC 1.15. Safekeeping Property

- (a) **A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.**

See also Rule 1:21-6

4. In re Edson, 108 NJ 464, 473-73 (1987)

One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We have travelled different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers-most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated by this record. There could hardly be a plainer case of dishonesty touching the administration of justice and arising out of the practice of law.

Fact Pattern #6

A friend of yours, who is also a part-time municipal court judge, comes to your office late on a Tuesday afternoon. He relates that in the early morning hours of the previous Saturday, he was stopped by police officers of the neighboring town, arrested and charged with drunk driving. He further relates that he begged the cops not to arrest him because he is a sitting judge and it will embarrass his family. His reported BAC was .21%. The police-ordered stop of his vehicle came about as a result of other motorists reporting via cell phone of his erratic driving. He has not told anyone of the incident yet, including his family. In addition, he has a first appearance set for Thursday in municipal court.

1. What legal and ethical issues are presented in this fact pattern?

2. What advice would you provide the client?

3. How would you go about defending the case?

1. Special Issues related to DWI and Judges

a. Notification (Assignment Judge & OAE)
b. Disqualification as per Directive 04-09
c. Disposition of case on the merits & appeal
d. Conclusive proof of ethical violation
e. Aggravating & Mitigating Factors
f. Quantum of discipline – range
g. Impact of law license
h. Future appearances before the judge

2. Matter of Connor, 124 NJ 18, 27-28 (1991)

We have felt in other cases involving judicial misconduct that a public reprimand is fitting disciplinary action with respect to drunk driving and possibly a derivative driving offense. In each of those cases, the judge had no prior record of personal, professional, or judicial misconduct, possessed a well-deserved judicial reputation of excellence, and most importantly, was sincerely contrite and genuinely determined to achieve sobriety and rehabilitation. Those factors redound as well to respondent.

That portrait, however, does not fully depict respondent. The regrettable post-accident circumstances that aggravated the situation were understandably, although not excusably, the result of common human failings: panic, confusion, and overwhelming mortification. They were not the by-product of an evil or antisocial mindset. Nevertheless, discipline in this case calls for more than the sanction found appropriate in other cases because the ethical transgressions in their totality are more serious. Respondent's offenses went beyond drunk driving, posing an actual serious risk to the safety of others, as well as to the proper and effective administration of important laws affecting public safety.

Accordingly, we order that respondent be censured. We determine that this form of discipline denotes a harsher sanction than a reprimand and reflects the more egregious character of the underlying misconduct than that surrounding the misdeeds of other judges heretofore charged with comparable motor-vehicle violations. The censure that we here impose stands in order of severity between a reprimand and formal suspension of the exercise of judicial duties or removal from judicial office. We decline under the circumstances to impose on respondent a suspension from judicial service. That, we believe, is contraindicated because of his good record as a judge and because his transgressions do not directly affect the performance of his judicial duties. We further impose additional sanctions: respondent shall be required to continue to participate actively in rehabilitative programs, and shall be disqualified from presiding over any cases involving drunk driving until his rehabilitation becomes secure.

33.

Fact Pattern #7

An officer on patrol encounters two men in the roadway changing the tire on a vehicle. Both of the men appear to be intoxicated. Defendant is the owner of the vehicle. According to the officer, the defendant admits to operation and is placed under arrest. At trial, the officer testifies as to these facts. The defendant elects to testify and denies operation, claiming that his companion drove the car and ran of a curb which resulted in the flat tire.

In summation, defense counsel argues as follows:

"I'm sorry, it doesn't make sense. I think the officer's credibility is seriously in question. His actions belie some of the words that came out of his mouth during his testimony this afternoon."

In her summation, the prosecutor responded to those arguments without objection by stating:

I would submit all of [defendant's] nonsense about the blown tire just goes to show how unbelievable anything he had to say was. He was saying whatever he needed to do to get himself out of this mess. And it doesn't make any sense. And when Your Honor has to judge the credibility of the people involved here, use that to discount everything that [defendant] said. This officer is an Asbury Park police officer who has no outcome-or no stake in the outcome of this proceeding, whereas the defendant clearly does. The simple truth is, I believe this defendant was an absolute menace to society that night. He could have killed innocent people that night. The evidence has proved that either drove while intoxicated or allowed another intoxicated person to drive his car. No matter how you look at it, Judge, he's guilty of a violation of 39:4-50.

1. What ethical issues are presented by the prosecutor's argument?

34.

1. State v. Murphy, 12 NJ Super. 553 (App. Div. 2010).

Prosecutors are no longer permitted to contend in summation that the police had no motive to lie. Not harmless error.

2. Opening and Closing Argument

A. In General

It is well-established that prosecuting attorneys, within reasonable limitations, are afforded considerable leeway in making opening statements and summations. [Moreover, prosecuting] attorneys, as representatives of the State, are compelled to further the goals of our criminal justice system. This mission is accomplished by conscientiously and ethically undertaking the difficult task of maintaining the precarious balance between promoting justice and achieving a conviction. A prosecutor's remarks and actions must at all times be consistent with his or her duty to ensure that justice is achieved. State v. Williams, 113 NJ 393, 447-448 (1988).

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Prosecutors are afforded considerable leeway in their closing arguments as long as their comments are reasonably related to the scope of the evidence presented.. Although prosecutors may make vigorous and forceful closing arguments, their primary duty is not to convict but to see that justice is done. Prosecutorial misconduct constitutes grounds for reversal when it is so egregious as to deprive the defendant of a fair trial. State v. Neal, 361 NJ Super. 522, 535 (App. Div. 2003)

3. Name Calling

Animal - Darden v. Wainwright, 477 U.S. 168, 180 (1986)

Animals & Brutes – State v. 72 NJ Super. 247 (App. Div. 1962)

Butcher Boy - State v. Siciliano, 21 N.J. 249, 262 (1956)

Young Punk - State v. Stewart, 162 N.J.Super. 96, 102-03 (App.Div.1978)

Hood, Punk & Bum - State v. Von Atzinger, 81 N.J.Super. 509, 516 (App.Div.1963)

Cancer & Parasite on Society – State v. Williams, 113 NJ 393, 455 (1988)

Defense Attorney's duty is to "obfuscate the facts" – State v. Watson, 224 NJ Super. 324, 362 (App. Div.1988)

Defendant conspired with his attorney to obscure the truth – State v. Neal, 361 NJ Super. 522, 536 (App. Div. 2003)

4. Threats of Disciplinary Action

1. Letter of Reprimand from Attorney General - State v. Frost, 158 NJ 76 (1999)

2. Henceforth, an expression of displeasure may not suffice. Further and more severe action may be necessary. State v. Spano, 64 NJ 566, 569 (1974)

3. Again, we caution prosecuting attorneys that derogatory name-calling will not be condoned. Mindful of the rhetorical excesses that invariably attend litigation, we nonetheless strongly admonish prosecutors to be circumspect in their zealous efforts to win convictions. Although our courts on numerous occasions have noted with displeasure prosecutorial excesses, it is evident that these expressions of dissatisfaction have failed to eliminate improper conduct that results in constitutional deprivation or violates established notions of fair play. As this Court cautioned in *State v. Spano,* we are prepared to take more severe action as required to ensure that capital trials are conducted without resort to improper remarks and questionable tactics by the State's prosecuting attorneys. State v. Williams, 113 NJ 393, 456 (1988)

4. Threat of Referral to District Ethics Committee – State Ramseur, 106 NJ 123, 323, 324 (1987) and State v. Watson, 224 NJ Super. 324, 363 (App. Div.1988)

5. Other Examples –

State v. Ruffin, 371 NJ Super. 371 (App. Div. 2004)

State v. Sosinski, 331 NJ Super. 11 (App. Div. 2000)

5. Vacating Conviction

State v. Neal, 361 NJ Super. 522, 536 (App. Div. 2003)

Fact Pattern #8

Following a serious one-car motor vehicle accident which results in significant damage to the property of an innocent victim, the defendant was charged with driving under the influence of marijuana based upon odor in the vehicle and the recovery of purported marijuana from the person of the defendant. The police also secured a urine sample and sent it for analysis.

On the day of trial, the prosecutor seeks to secure the conviction based upon the officer's opinion. No other witnesses or evidence is introduced to prove the State's case.

Following trial, the judge acquits defendant of NJSA 39:4-50 and possession of marijuana based upon the lack of any forensic proofs.

The victim, outraged by the failure of the prosecutor to secure a conviction, files an ethics complaint against the prosecutor.

1. **Has the prosecutor committed any ethics violations?**
2. **How could any such violations be defended in this case?**

1. Competence and Diligence

1.1 Competence

A lawyer shall not:

- **(a)** Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
- **(b)** Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

1. Matter of Segal, 130 NJ 468, 480 (1992)

As with any trial attorney, a municipal prosecutor has the duty adequately to prepare for trial. The prosecutor must select the State's witnesses and prepare and present the State's evidence in court.. Because the State is the municipal prosecutor's client, a failure to discharge the obligations of his office is a violation of a prosecutor's professional responsibility to represent the client diligently. When a prosecutor has available relevant evidence bearing on a prosecution, and the prosecutor's failure to present that evidence in the course of trial results in acquittal, that prosecutor has not diligently discharged his or her duty to prepare and present the State's case. Furthermore, when the failure to prepare for trial and present relevant evidence prejudices the State's case, the prosecutor's deviation from that duty may be so severe as to constitute gross negligence.

We note respondent's testimony that municipal prosecutors frequently prepare cases immediately preceding trial, typically in routine matters in which the State's witnesses are police officers who have been notified of the trial date by the municipal-court clerk. Without condoning that practice, we acknowledge the limited pretrial preparation routinely undertaken by some municipal prosecutors. "We understand that much of the subject matter in controversy in the municipal courts is minor and, in such cases, informal practices should continue, but in the more significant cases, a more careful, thorough procedure is warranted."

A prosecutor whose only preparation for the trial of an important case occurs after he arrives in court on the date fixed for trial cannot expect lenient treatment when he discovers that [ ] he is not ready for trial.

Appendix

Administrative Office of the Courts

Directive 04 – 09

Directive 10 - 04