**Garden State CLE presents:**

# Ethical Considerations in New Jersey Drunk Driving Defense

## Lesson Plan

# Part I - Candor before the Tribunal


**RPC 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.**

**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**

**Rule 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.**

## RPC 3.3

**(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.**

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**RPC 3.4. Fairness to Opposing Party and Counsel**
**A lawyer shall not:**

**(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.**

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**RPC 4.1. Truthfulness in Statements to Others**

**(a) In representing a client a lawyer shall not knowingly:**

**(1) make a false statement of material fact or law to a third person; or**

**(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.**

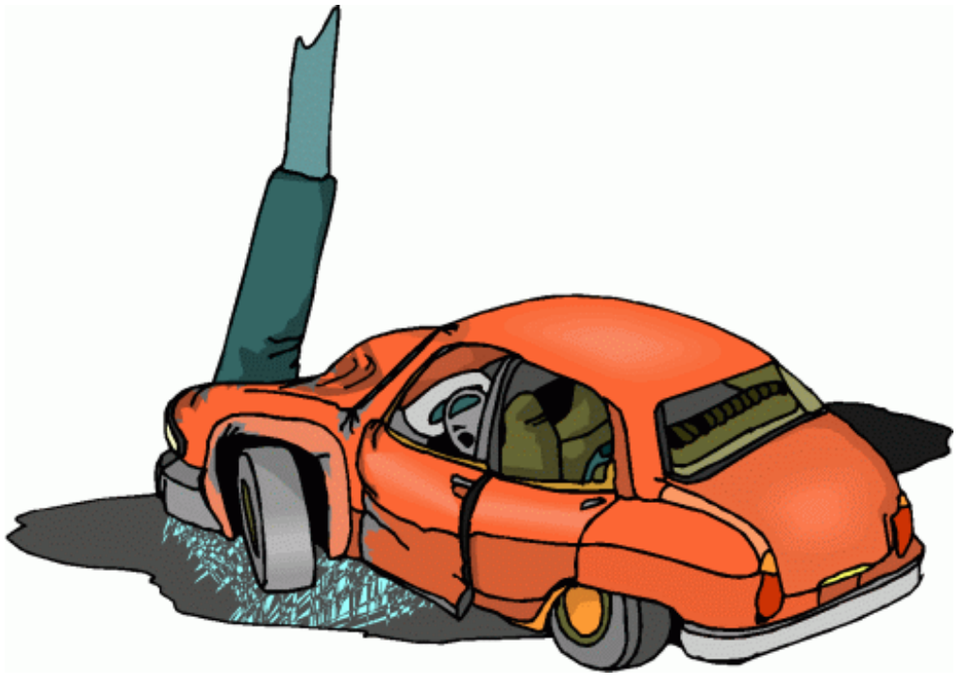
**(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.**

# a.) Sample Fact pattern

**In putting thru a first tier guilty plea, the defense attorney does not read the entire police report. As a result, he is unaware of injuries that occurred to a person in a second vehicle involved in the accident with his client. Neither the defense attorney nor the prosecutor informs the judge of the injury. After the defendant has finished his sentence, the State files an indictable charge of assault by auto and an ethics complaint against the defense attorney. What are the legal and ethical issues implicated here.**

**See NJSA 39:5-52 and**

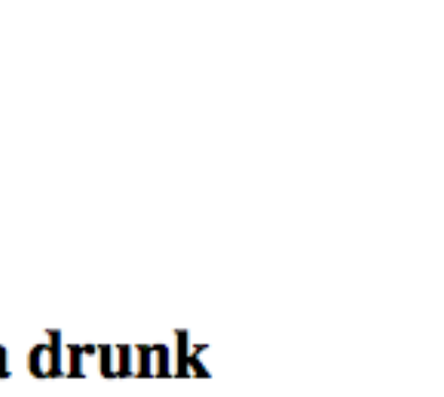
**NJSA 2B:12-17.2**



## b.) Sample Fact pattern

**The defense attorney is able to negotiate a first tier disposition on a drunk driving case based upon the prosecutor's misunderstanding of the law related to the 10-year step-down provision of NJSA 39:4-50(a)(3). The prosecutor believes that the statute requires the 10-years to run from the date of conviction. The case law says otherwise. What ethical issues are implicated here?**

## c.) Sample Fact pattern



**An attorney enters his appearance on behalf of a drunk driver and a companion defendant who has been charged with allowing the operator to drive while intoxicated. The attorney seeks a plea agreement calling for the dismissal of the allowing offense in exchange for a plea by the drunk driver. What are the ethical implications of this situation?**

## d.) Sample Fact pattern

**A sentence agreement between the defense and prosecution on a first offense DWI called for a 9 month suspension. At sentencing (with the prosecutor not in the room) the judge imposes a 7-month suspension._What are the ethical implications of this situation?**

**See State v. Warren, 115 NJ 433 (1989)**


## e.) Sample Fact pattern

**During first offense sentencing of a defendant with a .17 BAC the judge does not impose an ignition interlock device requirement as part of the sentence. What are the ethical implications of this situation?**

## f.) Sample Fact pattern

**An attorney has advised his client to not install an ignition interlock device on his vehicle during the two-year license suspension term imposed by the Court. Rather, the attorney urges his client to wait until the suspension term is over and then install the device. What are the ethical implications of this situation?**

**NJSA 39:4-50.18 and 19.**

## g.) RPC 3.3(a)(5) - Failing to disclose information.

# In re Seelig, 180 NJ 234, 256-57 (2004) (No discipline)

**We conclude, therefore, that an attorney in the circumstances here presented is not prohibited by a client's Sixth Amendment rights, or any other duty owed the client, from informing the municipal court about pending indictable offenses and should do so to prevent the court from being misled by the attorney's silence.**

**Notwithstanding that conclusion, we do not find that respondent should be disciplined. In his testimony before the District Ethics Committee, respondent repeatedly stated that he believed his duty to his client, and his client's Sixth Amendment right to counsel, required him to withhold information about the indictable offenses from the municipal court. Respondent took *Dively* and Directive No. 10–82 to confirm his understanding that the obligation to identify and coordinate his client's charges belonged to the County Prosecutor and the municipal court, and not defense counsel. Indeed, the municipal court's failure to ask about the victim(s) injuries, to pursue the reasons for Poje's imprisonment, or to put on the record a factual basis for Poje's plea, is inexplicable. If the court had carried out its responsibilities properly, we likely would not have this case before us today.**

# See - NJSA 2B:12-17.2

# h.) RPC 3.3(a)(4) - Why the extrapolation defense was banned.

## Chronology

**State v. Tischio – argued 11/5/86**

**In re Edson – argued 5/4/87**

**State v. Tischio, 107 NJ 504 (1987) – Decided 6/30/87**

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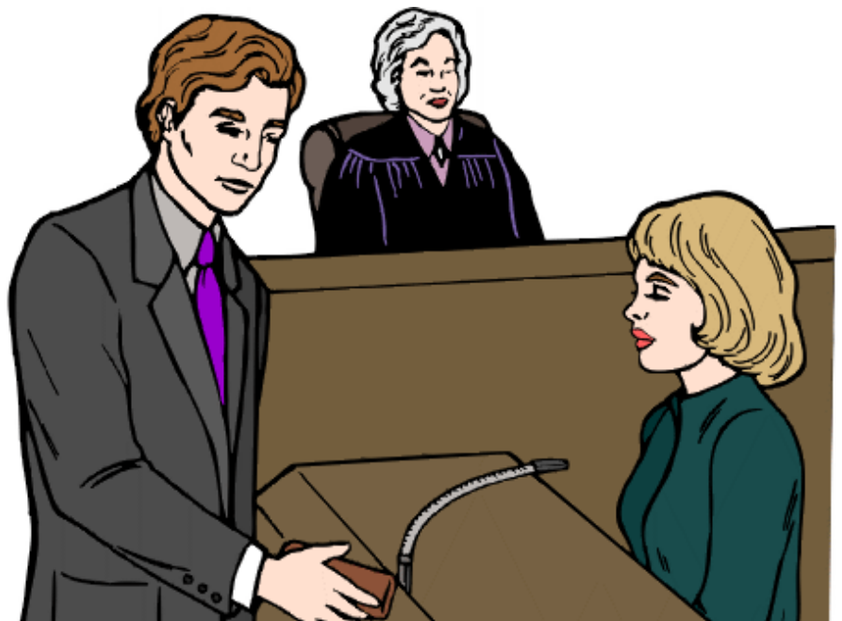


# In re Edson, 108 NJ 464, 470-71 (1987) (Disbarment)

**[T]he record is clear that respondent advised two clients to manufacture evidence in the defense of their drunk driving cases, contrary to RPC 1.2(d). Respondent also knowingly permitted a client to offer false evidence in a trial, contrary to RPC 3.3(a)(4), and counseled and assisted a witness to testify falsely in a trial, contrary to RPC 3.4(b). Respondent also participated in a fraud by giving false information to his expert witness for the purpose of having him testify under oath in reliance upon those facts, and he gave false information to a municipal prosecutor, contrary to RPC 8.4(a), (b), (c), and (d).**

# In re Edson, 108 NJ 464, 472-73 (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 traveled 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.**

# i. RPC 3.3(a)(5) - Prior convictions of defendant: 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.**

**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

## j. RPC 3.3(a)(5) - Uncharged offenses NJSA 39:3-40 and NJSA 2C:40-26.

**There is insufficient evidence in the record to establish that defendant's original guilty plea was procured by fraud or unethical behavior on the part of defense counsel. Defendant's driving abstract was available to the municipal judge and the municipal prosecutor, and was apparently consulted by the court at or prior to the March 22, 2012 plea hearing. The abstract should have readily revealed that defendant was on the revoked list because of a second or subsequent DWI conviction and thus her current driving record posed a violation of *N.J.S.A.* 2C:40–26(b).**

**To be sure, *N.J.S.A.* 2C:40–26(b) was a relatively new statute as of March 2012, and it is conceivable that the court and the municipal prosecutor may not have been well-attuned to its potential application in DWI cases. Nevertheless, we reject the State's claim that defense counsel was obligated under *R.P.C.* 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests.**

**The situation here is markedly distinguishable from *In re Seelig*, 180 N.J. 234 (2004), in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died.**

**As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the *Title* 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no "fraud" or unethical behavior by the defense here. Instead, as Judge Wild aptly found, defendant's first attorney was deficient in advising her to withdraw the plea to her detriment without explaining to her the consequences of that course of action. Even giving all due respect to the court and cooperating with its request to have the case re-listed, a proper advocate for defendant would have politely resisted the efforts to have the plea withdrawn. In addition, as Judge Wild found, the first attorney, as counsel of record, failed to provide proper guidance to the second attorney and ensure that defendant's rights at the March 27, 2012 hearing were not sacrificed.**

**— — — — — — — — — — — — — — — —**

**State v. Kane, UNPUBLISHED 2015 WL 657667 [Refer to Rule 1:36-3]**

# Part II - Payment of Restitution - "Friedland Hearings"

## In re Friedland, 59 NJ 209 (1971)

**In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected. Obviously, a consent could never be given in a case such as the present one involving a vicious loan shark scheme enforced through threats and violence. Rather, the nature of the charges cried out for further public investigation and exposure.**

**Since this type of conduct has not previously been before us in a disciplinary proceeding, we feel that the fulfillment of our duty and the interests of the profession and the public will best be served by a lesser penalty than shall be meted out in future cases of this kind.**

# Part III - Limitations on plea bargaining

**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;**

**(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;**

**(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;**

**(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;**

## 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. However, with the approval of the municipal court judge, in lieu of appearing on the record, the prosecutor may submit to the court a Request to Approve Plea Agreement, on a form approved by the Administrative Director of the Courts, signed by the prosecutor and by the defendant. Nothing in this Guideline shall be construed to limit the court's ability to order the prosecutor to appear at any time during the proceedings.**

**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) and**

**B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C: 35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).**

**No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).**

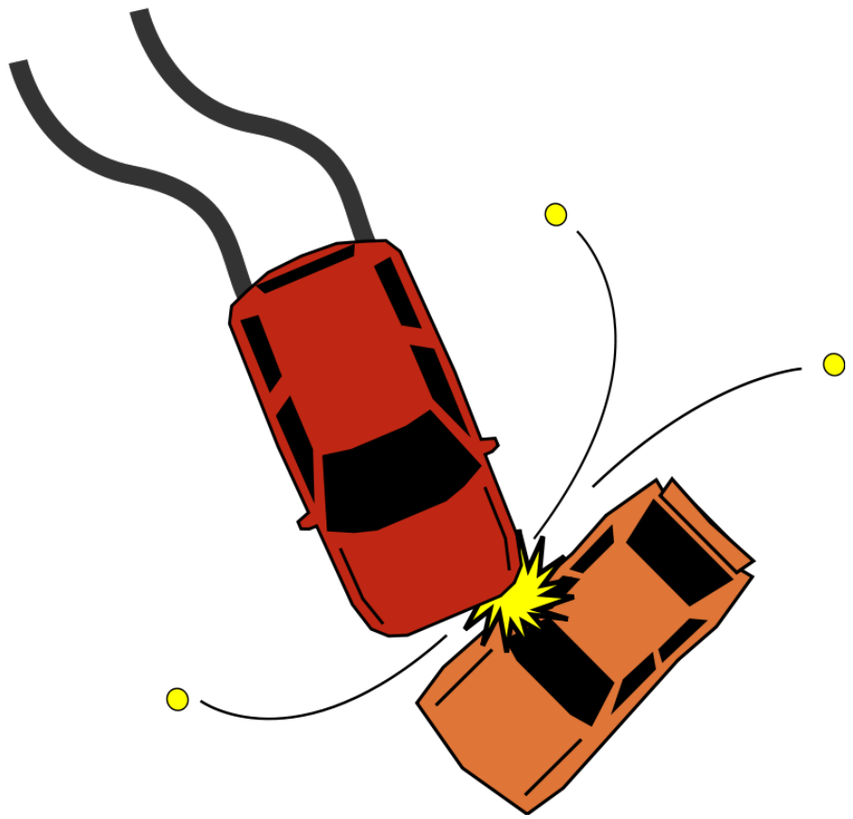
**If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.**

**Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.**

## Cases:

**State v. Hessen, 145 N.J. 441 (1996)**

**State v. Marsh, 290 N.J.Super. 663 (1996)**



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**Panel Members:**

**Chris Baxter, Esquire**
**Joseph P. Rem, Jr. Certified Criminal Trial Attorney**
**John Menzel, Esquire**
**Robert Ramsey, author**

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# Note:

# Requirements of Directive 10-04

## d. RPC 3.3(a)(5) - Uncharged offenses NJSA 39:3-40 and NJSA 2C:40-26.

**There is insufficient evidence in the record to establish that defendant's original guilty plea was procured by fraud or unethical behavior on the part of defense counsel. Defendant's driving abstract was available to the municipal judge and the municipal prosecutor, and was apparently consulted by the court at or prior to the March 22, 2012 plea hearing. The abstract should have readily revealed that defendant was on the revoked list because of a second or subsequent DWI conviction and thus her current driving record posed a violation of *N.J.S.A.* 2C:40–26(b).**

**To be sure, *N.J.S.A.* 2C:40–26(b) was a relatively new statute as of March 2012, and it is conceivable that the court and the municipal prosecutor may not have been well-attuned to its potential application in DWI cases. Nevertheless, we reject the State's claim that defense counsel was obligated under *R.P.C.* 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests.**

**The situation here is markedly distinguishable from *In re Seelig*, 180 *N.J.* 234 (2004), in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died.**

**As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the *Title* 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no "fraud" or unethical behavior by the defense here. Instead, as Judge Wild aptly found, defendant's first attorney was deficient in advising her to withdraw the plea to her detriment without explaining to her the consequences of that course of action. Even giving all due respect to the court and cooperating with its request to have the case re-listed, a proper advocate for defendant would have politely resisted the efforts to have the plea withdrawn. In addition, as Judge Wild found, the first attorney, as counsel of record, failed to provide proper guidance to the second attorney and ensure that defendant's rights at the March 27, 2012 hearing were not sacrificed.**

**State v. Kane, UNPUBLISHED 2015 WL 657667 [Refer to Rule 1:36-3]**

# e. RPC 3.4(c)- Disobeying an obligation under the rules of the tribunal

**A lawyer shall not:**

**(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;**

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**NJSA 39:4-50.17(a)(1) - In sentencing a first offender under section 2 of P.L.1981, c. 512 (C.39:4-50.4a), the court shall order, in addition to any other penalty imposed by that section, the installation of an ignition interlock device in the motor vehicle principally operated by the offender during and following the expiration of the period of license suspension imposed under that section. The device shall remain installed for not less than six months or more than one year, commencing immediately upon the return of the offender's driver's license after the required period of suspension has been served.**

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**NJSA 39:4-50-18 - The court shall notify the Director of the Division of Motor Vehicles when a person has been ordered to install an interlock device in a vehicle owned, leased or regularly operated by the person. The division shall require that the device be installed before reinstatement of the person' s driver's license that has been suspended pursuant to R.S.39:4-50. The division shall imprint a notation on the driver's license stating that the person shall not operate a motor vehicle unless it is equipped with an interlock device and shall enter this requirement in the person's driving record.**

**— — — — — — — — — — — — — — — — — — — — —**

**39:4-50.19(a). Failure to install interlock device; penalties**

**A person who fails to install an interlock device ordered by the court in a motor vehicle owned, leased or regularly operated by him shall have his driver's license suspended for one year, in addition to any other suspension or revocation imposed under R.S.39:4-50, unless the court determines a valid reason exists for the failure to comply. A person in whose vehicle an interlock device is installed pursuant to a court order who drives that vehicle after it has been started by any means other than his own blowing into the device or who drives a vehicle that is not equipped with such a device shall have his driver's license suspended for one year, in addition to any other penalty applicable by law**

# Part II - Payment of Restitution - "Friedland Hearings"

## In re Friedland, 59 NJ 209 (1971)

**In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected. Obviously, a consent could never be given in a case such as the present one involving a vicious loan shark scheme enforced through threats and violence. Rather, the nature of the charges cried out for further public investigation and exposure.**

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**The prosecutor in a criminal case shall:**

**(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;**

**(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;**

**(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;**

**(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;**

## 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. However, with the approval of the municipal court judge, in lieu of appearing on the record, the prosecutor may submit to the court a Request to Approve Plea Agreement, on a form approved by the Administrative Director of the Courts, signed by the prosecutor and by the defendant. Nothing in this Guideline shall be construed to limit the court's ability to order the prosecutor to appear at any time during the proceedings.**

**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) and**

**B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C: 35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).**

**No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).**

**If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.**

**Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.**

## Cases:

**State v. Hessen, 145 N.J. 441 (1996)**

**State v. Marsh, 290 N.J.Super. 663 (1996)**

**Garden State CLE presents:**

# Ethical Considerations in New Jersey Drunk Driving Defense

## Lesson Plan

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