

Garden State CLE presents:

Ethical Obligations of Defense Attorneys toward Victims in DWI Cases



Lesson Plan

I. Introduction & Overview:

a.) Question Presented:

In drunk driving cases involving personal injury or property damage to a third person, what are the ethical obligations of a New Jersey defense attorney toward the trial court and the victim?

Case law background as expressed in *In re Seelig*, 180 NJ 234 (2004).



b.) Dual ethical responsibilities of New Jersey attorneys:

The Supreme Court has determined that a New Jersey attorney has a dual obligation to both his client and the fair administration of justice. In re Seelig, 180 NJ 234 (2004).

During the years prior to *Seelig*, these concurrent obligations were described by our Supreme Court as follows:

[An attorney] owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. In re Turner, 83 NJ 536, 539 (1980).



c.) Failure to disclose material facts to the tribunal:

The Appellate Division condemned one lawyer's conduct, stating that a lawyer's responsibility to act with candor and honesty necessarily requires disclosure of significant facts, even though the disclosure might not be in the interests of the client. *Kingsdorf v. Kingsdorf*, 351 N.J.Super. 144 (App.Div.2002)

The Supreme Court found that “[r]espondent's non-disclosure ... deceived both his adversary and the arbitrator about a fact that was crucial to fair and proper resolution of the litigation. *In re Forrest*, 158 N.J. 428, 434 (1999).

Analysis - In *In re Forrest* and *Kingsdorf*, the attorneys neither affirmatively misrepresented material information to the tribunal, nor evaded a direct question from the tribunal; rather, the attorneys held back the information in order to advance their clients' interests. The lesson of those cases is that “the proper administration of justice” requires attorneys in such situations to speak out so as to avoid misleading the court. *In re Seelig*, 180 NJ 234, 252 (2004).



d.) Applicable Rules of Professional Conduct

RPC 3.3 (a)(5) Candor Toward the Tribunal - A lawyer shall not knowingly:

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. (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

RPC 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.



RPC 4.4 Respect for Rights of Third Persons (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.



II. New Jersey Drunk Driver Victim's Bill of Rights (NJSA 39:4-50.9) (1985)

Victim defined (NJSA 39:4-50.10)

As used in this act, “victim” means, unless otherwise indicated, a person who suffers personal physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a motor vehicle accident involving another person's driving while under the influence of drugs or alcohol. In the event of a death, “victim” means the surviving spouse, a child or the next of kin.



NJSA 39:4-50.11 [1985]



Victims shall have the right to:

- a. Make statements to law enforcement officers regarding the facts of the motor vehicle accident and to reasonable use of a telephone;**
- b. Receive medical assistance for injuries resulting from the accident;**
- c. Contact the investigating officer and see copies of the accident reports and, in the case of a surviving spouse, child or next of kin, the autopsy reports;**



d. Be provided by the court adjudicating the offense, upon the request of the victim in writing, with:

(1) Information about their role in the court process;

(2) Timely advance notice of the date, time and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;

(3) Timely notification of the case disposition, including the trial and sentencing;

(4) Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and

(5) Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant;

e. Receive, when requested from any law enforcement agency involved with the offense, assistance in obtaining employer cooperation in minimizing loss of pay and other benefits resulting from their participation in the court process;

f. A secure waiting area, after the motor vehicle accident, during investigations, and prior to a court appearance;

g. Submit to the court adjudicating the offense a written or oral statement to be considered in deciding upon sentencing and probation terms. This statement may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss of earnings or ability to work suffered by the victim and the effect of the offense upon the victim's family.

When a need is demonstrated, the information in this section shall be provided in the Spanish as well as the English language.



III. N.J.S.A. 39:5-52 (1987) [Rights of victims of traffic accidents]

39:5-52. Information available to victim; request; “victim” defined; consultation with prosecutor

a. A victim of a motor vehicle accident as defined in this section shall, upon his request, be provided in writing by the court adjudicating any offense committed during that motor vehicle accident with the following information:

(1) Information about the victim's role in the court process;

(2) Timely advance notice of the date, time, and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;

(3) Timely notification of the case disposition, including the trial and sentencing;



(4) Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and

(5) Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant.

As used in this section, “victim” means, unless otherwise indicated, a person who suffers death, or any personal, physical, or psychological injury as a result of a motor vehicle accident. In the case of death, “victim” means a surviving spouse, child, or the next of kin. [Note - definition does not include property damage!]

When a need is demonstrated, the information in this section shall be provided in the Spanish as well as the English language.

b. A victim shall be provided with an opportunity to consult with the prosecutor prior to a dismissal of a case or the filing of a proposed plea negotiation with the court if a victim suffered death or sustained bodily injury or serious bodily injury as defined in [N.J.S. 2C:11-1](#).



IV - New Jersey Constitution of 1947 - Article I, paragraph 22: (December 5, 1991)

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

[Note: In the criminal context, the rights of victims are codified at NJSA 52:4B-36.]



V. Municipal Prosecutor's Responsibility for informing the Court about injuries:

39:5-51. Case involving violation of law on motor vehicles and traffic regulation or motor vehicle accident; prosecutor's responsibility to inform court of death of or injury to victim

In a municipal court case which involves a violation of the motor vehicle and traffic laws as set forth in Title 39 of the Revised Statutes or in any other case which involves directly or indirectly a motor vehicle accident, the municipal prosecutor shall inform the municipal court judge in writing during the initial appearance of a defendant before the court of the death of any person or the extent of any personal injury sustained by a person as a result of the violation of the motor vehicle or traffic laws by the defendant or as a result of a motor vehicle accident which occurred during the violation of any other law by the defendant.



VI. Legal and Factual Issues

By failing to inform the court about the existence of victims, the defense attorney may violate a number of RPC requirements.

a.) "I didn't know."

Discussion:

Although the lack of knowledge about victims may excuse a violation of RPC 3.3(3) (5) due to the lack of knowledge, it would likely contravene RPC 1.1 (Competence) and RPC 1.3 (Negligence). A lack of knowledge indicates that the attorney has not properly prepared to defend the case nor inform his client about possible criminal and civil ramifications.



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.



b.) "That's not my job"



Discussion

Although by statute the prosecutor has the primary responsibility to inform the court about victims, knowingly failing to disclose to the court this material fact by a defense attorney would certainly mislead the tribunal and would violate RPC 3.3(a) (5). Simply put, the prosecutor's gross negligence does not immunize the defense attorney from violating the RPC.

It also demonstrates a lack of concern for treating people involved in the criminal justice system with consideration [RPC 3.2], and constitutes conduct that is prejudicial to the administration of justice (RPC 8.4(d)).



c.) "Nobody informed the judge"



Discussion

In those instances where the Court has no knowledge of the existence of victims, the victims will not be notified of their right to participate in the judicial process and cannot exercise their constitutional and statutory rights. Specifically:

Be provided by the court adjudicating the offense, upon the request of the victim in writing, with:

(1) Information about their role in the court process;



(2) Timely advance notice of the date, time and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;

(3) Timely notification of the case disposition, including the trial and sentencing;

(4) Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and

(5) Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant;

e. Receive, when requested from any law enforcement agency involved with the offense, assistance in obtaining employer cooperation in minimizing loss of pay and other benefits resulting from their participation in the court process;

f. A secure waiting area, after the motor vehicle accident, during investigations, and prior to a court appearance;

g. Submit to the court adjudicating the offense a written or oral statement to be considered in deciding upon sentencing and probation terms. This statement may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss of earnings or ability to work suffered by the victim and the effect of the offense upon the victim's family.



d.) Plea may be void *ab initio*- NJSA 2B:12-17.2(a)

In any matter concerning Title 39 of the Revised Statutes where death or serious bodily injury has occurred, regardless of whether the death or serious bodily injury is an element of the offense or violation, the Superior Court shall have exclusive jurisdiction over the offense or violation until such time that the Superior Court transfers the matter to the municipal court. For the purposes of this section, the term “serious bodily injury” shall have the meaning set forth in subsection b. of [N.J.S.2C:11-1](#).

[This statute was enacted in direct response to In re Seelig, 180 NJ 234 (2004).]

See also Supreme Court Directive 10-82:

Where a complaint has been filed in municipal court with respect to a Title 39 violation involving a motor vehicle accident resulting in death or serious personal injury, the municipal court judge or municipal court administrator should notify the County Prosecutor. This will afford the County Prosecutor an opportunity to determine whether the accident involved an indictable offense. If the County Prosecutor determines not to proceed in the case, he or she should advise the municipal court, which should then dispose of the non-indictable charges.

e.) "Your Honor, there were victims in this case. My client and I want them to have their day in court."

1. Affords your client the opportunity to apologize, privately or publicly. [Note a sympathetic, forgiving victim can be critical in sentence considerations.]

2. Allows for voluntary restitution to be paid. Restitution should only be paid in conformity with *In re Friedland*, 59 NJ 209 (1971). This means an open hearing before the Court and prosecutor where restitution to be quantified and justified such that the judge and prosecutor determine that payment is in the interests of justice.

3. Allows for court-ordered, liquidated restitution as a condition of probation NJS 39:5-7 [term 6-months to 1-year].



4. Allows for entry of a civil reservation. Rule 7:6-2(a)(1) [See generally *Maida v. Kuskin*, 221 NJ 112 (2015).]

5. Most important, it avoids ethics complaints related to RPC 3.3(a)(5), *et al.*

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