

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

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LESSON PLAN AND EVALUATION**

ETHICAL ISSUES FOR MUNICIPAL PROSECUTORS

With

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And featuring

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Program description

Despite the high-pressure, high-volume nature of the responsibility, the municipal prosecutor must still accomplish individual justice in individual cases and do so in an ethical manner. This 1.5 ETHICS credit CLE will explore the ethical challenges that municipal prosecutors confront in accomplishing this responsibility.

I. Introduction

- **Russ Cherkos, Esq.**
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- **Municipal Prosecutor 20-25 years; Hamilton Township (Mercer County), Bordentown Township, Bass River (Washington Township, Burlington County)**
- **Different types of people and different cases depending on jurisdiction**
- **Bass River has no local police department**
- **Hamilton Township – largest in Mercer County, turnpike runs through, NJSP and aggressive local police department**
- **Practicing law for 32 years**

II. Ethical Issues for Municipal Prosecutors

- **Originally no legal authority for municipal prosecutors – not until 1990 that there was a rule for plea bargaining and commentary by Supreme Court devoted to addressing position of municipal prosecutor**
- **Prosecutor is not ordinary advocate – to do justice, not seek convictions – do individual justice in individual cases – must have discretion to accomplish this task**
- **Prosecutors have ability to do what is right in the individual cases – must look at proofs beyond a reasonable doubt – if element of proof missing then resolve case by plea or dismissal as opposed to trial**
- **Some prosecutors may get people to plead guilty to things that the prosecutor knows cannot get conviction at trial – violation of RPC 3.8 (do individual justice, obligation to disclose defense to defendant no matter if aware or not)**
- **Analyze each case to see if proof beyond a reasonable doubt**

III. Advice to young attorneys

- **In re Segal (130 NJ 468 (1992)) – clearly indicates that prosecutor is responsible for representing state of NJ and making it adequate to represent State's interests – prosecutors must be prepared**
- **Preparing for calendar:**
 - **Feel for what typical calendar will be with experience**

- **You should know through communicating with court staff that there is significant matter coming up and need time to prepare**
- **Should communicate with court staff and police to prepare in advance**
- **Know what is coming in the future**
- **Average calendar will have the usual violations that you see on a daily basis – without advance preparation – talk to witnesses on that day and read police report**
- **Any given ticket statistical likelihood of trial is extremely low – a factor of the volume of cases as well as the most effective way to resolve cases – individual justice for individual cases**
- **Prosecutors must have a “toolbox” of information**
 - **Traffic cases:**
 - **Police report (if accident) – injuries? Serious injuries which would require the county prosecutor to review??**
 - **May rely on conversations with defendant and police if don’t have report – based on level of experience**
 - **Ask every witness if there were injuries – don’t rely strictly on the police report and officer indicating on the report that there were injuries**
 - **Some jurisdictions complete a particular sheet when there is an accident with injuries and this is a separate document from the accident report**
 - **Legislature gives responsibility to inform the court of injuries – but prosecutors rely on police for accurate information**
 - **Accident with death or serious bodily injury – municipal court is statutorily divested of jurisdiction – must go to superior court until such time as superior court remands it back to municipal court**
 - **Driver’s abstract – need when dealing with serious MV violation or as needed**
 - **Need abstract for unsafe operation (NJSA 39:4-97.2) – to see when person had last unsafe operation to determine penalties and points**

- **When there is someone who has a really bad driver's record, must fashion an appropriate plea – individual justice in individual case**
- **There are standard plea offers that are made but must determine someone's driving history**
- **Must use driving history to determine where the driver is coming from who is asking for a particular plea or in fashioning an appropriate plea offer – ethical duty**
- **Police Officers – no standing to effect outcome of case, input of police varies from each town/municipality – each prosecutor deals with police differently**
 - **Experience will dictate whether you need to reach out to police officer, i.e. minor offense but many tickets means there may be an issue and police should be contacted**
 - **Police receive notice of case scheduling and therefore can contact the prosecutor if need be**
 - **Prosecutor is not an advocate for police, but need police to accomplish the job and work with them in every case**
 - **Office input – give chance to tell prosecutor what he feels needs to be done, if officer takes that time to participate, then prosecutor will listen – but that doesn't mean that prosecutor will follow their recommendations**
 - **State v. Marsh, 290 N.J. Super. 663 (App. Div. 1996) – police have no role to play in plea bargaining process – executive branch function within purview of prosecutor**
 - **Police are not final arbiters of what happens in the case – prosecutor cannot give up discretion to police – must be sensitive to officer's input**
 - **Prosecutor makes final decision, but if officer doesn't agree prosecutor should explain why – don't discount officer's feelings**
 - **Prosecutors should educate police officers about the law especially the Constitution – adopted to protect people from government and police are the**

- government – certain standards must be met and police are not adequately trained and laws are constantly changing**
- **Experienced attorneys know what case is worth and should come to court with a close idea of what the plea would be**
 - **Relationship with victims – sensitive to feelings of victims, victims of traffic offenses as well as domestic violence or other criminal offense**
 - **Prosecutor has discretion even if victim does not agree**
 - **Should listen to victim but ultimately it is prosecutor's duty to decide how case should be resolved – victim has a right to object to the plea on the record**
 - **Prosecutor should outline basis for plea or not able to plea so that there is individual justice in individual cases, i.e. injuries, etc.**
 - **Pace of calendar dictates how much time a prosecutor can put into each case – nature of system**
 - **Cross complaints – prosecutor is still able to dismiss cases when there are cross complaints/5th amendment issues; people think prosecutor is their lawyer when there are cross complaints – people don't understand the ramifications of constitutional issues;**
 - **Theoretically can prosecute each person individually**
 - **Look at police report to get relevant facts – look at injuries**
 - **Prosecutor can dismiss complaint that is cross complaint filed after because frivolous**
 - **Judges – what happens when judge will not dismiss a case even with state's application to dismiss based on proof issue – can't plea bargain drunk driving cases (court rules)**
 - **Can prosecutor refuse to prosecute? – unlikely that situation would arise**
 - **Prosecutor calls witness such that jeopardy attaches but don't put on case? – not likely to**

- **Cannot rush these types of cases – best to carry cases to see if there are future issues – get counseling if needed and see where we are at after counseling**
- **Other cases may require that defendant be prosecuted because of defendant’s history**
- **Crawford v. Washington, 541 US 36 (2004) – has hampered the ability to prosecute DV cases because cannot use hearsay exceptions that were helpful; now need victim to testify**
- **Dealing with Imperfect Information and Adversaries**
- **Part time prosecutor – but must prepare cases to best of ability**
- **Do you expect that the defense attorney will bring in information that would help to resolve case with the best result? i.e. prior out of state DWI offenses – defense attorney knows but prosecutor does not know**
- **Defense attorneys should assume prosecutors know nothing about the case – hopefully you are mistaken but if not be prepared to educate prosecutor with information on case that can assist in bolstering your client’s case**
- **5th amendment protections exist through sentencing – when it comes to defense counsel telling the prosecutor of prior convictions, etc.**
- **Defense counsel can say “don’t ask me about priors it is your job as a prosecutor to find out”**
- **Prosecutor must get abstract or criminal history to insure accuracy at sentencing and in plea negotiations**
- **Attorneys cannot misrepresent to the court**
- **Ethically prosecutor must turn over Brady materials without hesitation – defense attorneys have no duty to turn over inculpatory evidence**
- **Priors are a matter of public record – no attorney-client privilege; and not related to case – can defense attorneys claim attorney client privilege for not telling prosecutor about prior offenses??**
- **Prosecutor is moving party at sentencing and must provide that information to the court**
- **Defendant has 5th amendment right not to tell**

- **In re Seelig, 180 NJ 234 (2004) – did not address this particular issue**
- **Drunk Driving Case**
- **Prosecutor knows that case will not be tried**
- **Time to prepare can be significant depending on facts of case, i.e. number of witness, amount of evidence, lab reports, arresting officers, experts; subpoenas, insure documents are turned over in a timely manner**
- **Fairly substantial period of time to prepare officer regarding documentary testimony, etc.**
- **Look to how long officer has been on the job and whether they have experience with testifying**
- **With young officer go through entire case from beginning to end to prepare**

IV. Discovery

- **State v. Prickett, 240 NJ Super 139 (App. Div. 1990) – made clear that providing discovery is strictly a prosecutorial function; court staff has no role in providing discovery**
- **Hamilton Township – police records department handles all discovery; prosecutor works with police records department to provide discovery**
- **Police records people will handle initially**
- **Ultimately prosecutor is responsible**
- **NJSP will not provide discovery to anyone except the prosecutor**
- **Will turn over anything that prosecutor can get in order to insure accurate discovery is provided**
- **State v. Maricic, 417 NJ Super. 280 (App. Div. 2010) – prosecutor’s obligation to turn over necessary documents, repair records in possession of the state – if AGs office has it, then in possession of the state; don’t need to go to Draeger (alcotest company) to get it, but if in possession of a state agency, prosecutor is required to turn over**

V. Plea bargaining

- **Individual justice in individual cases**
- **Must follow statutes and law – sentencing/plea that comports with statutes and law**
- **Sentence cannot violate rules of court**

- **Must have factual basis**
- **Amending to ordinance that is pre-empted and defense is asking for amendment to ordinance – then what?**
 - **Decision should be made by the judge**
 - **It must be raised as an issue in order for such a plea to be improper or illegal**
 - **If no one is complaining, then is there an issue??**
 - **Utilizing ordinance for a plea even when pre-emption – can assist in doing individual justice in individual cases**

VI. Words of advice to a new prosecutor

- **Best way to be an ethical prosecutor**
- **Emotionally must understand that you don't need to convict everyone in order for police to like and respect you**
- **You will lose credibility before the judge if you push a case that ethically you should not pursue**
- **Need to talk to police outside and discuss with police your decision on a particular case that the police disagree with**
- **There are difficult days when dealing with police**
- **Need to get respect of police officer – teach and explain what you are doing**
- **Be familiar with ethical caselaw, RPC 3.8 – get as much information about case and then try to do individual justice for individual cases**