

# **GARDEN STATE CLE LESSON PLAN**

**A 1.5 credit course**

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## **BI-STATE (NY V. NJ) DWI DEFENSE TACTICS**

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**With**

**Rachel Kugel, Esq.  
Criminal Trial Attorney**

**And featuring**

**Robert Ramsey, Senior Instructor**

### **Program description**

When your client walks in to your office and says, “Can you help me? I got this DWI in New York.” Be able to answer, “Yes, I can.” After viewing this 1.5 credit CLE you will have a very good understanding of NY v. NJ DWI laws.

## **I. Introduction**

- **Rachel Kugel, Esq., admitted in NY and NJ**
- **FOX News commentator**
- **For attorneys from NY and NJ – help attorneys to advise their clients**

## **II. NJ driver who gets stopped/arrested in NY for DWI/DUI**

- **Results of out of state case are out of attorney's control, but you can advise how it will effect your NJ license**
- **NY conviction/suspension will be the same as you will get in NJ – NJ will suspend your license for the same time amount of time, but not necessarily retroactive to the time that your suspension in NY started – administrative NJ suspension**
- **To insure that your NJ suspension starts immediately, recommend your client should turn in license to NJ DMV immediately**
- **Typically DMV suspension by state to state compact – they can either take the other state's conviction/sentence/suspension or apply what conviction/sentence/suspension would have been in NJ**
  - **In NJ – NJ DMV applies NJ conviction/suspension/sentence as if you were convicted for that offense in NJ**
  - **Be sure to communicate with DMV depending on out of state readings, etc.**
- **NJ DMV will impose administrative suspension based on your NJ driving record – so possible enhanced sentence if not first DWI**
- **In NY DWI is a criminal offense – NY has a conditional privilege that does not apply to NJ licensed drivers – NJ driver will not be able to have a conditional privilege on their driving – no hardship driving in NJ – even if that is available in NY**
- **NJ driver will receive a surcharge \$1000 for 3 years –even with out of state conviction**
- **NY requires interlock device now (.08 or more BAC) – so how does that effect NJ drivers??**
- **NJ is requiring certificate when you get reinstated that you had the interlock device [??]**

- **For NY drivers that have a NJ DWI, then recommend that they get interlock device when they go to reinstate license**
- **NY conviction will count against you if you were to get a NJ DWI in the future**
- **NY DWAI – Driving while abilities impaired (.08 or less can result in a DWI) – “AI” – traffic ticket version of DWI – possible to be convicted if less than .08 reading; possible to be impaired without a reading and get a DWAI result**
  - **State v. Zeikel, 423 NJ Super 34 (App. Div. 2011) – a DWAI from NY will count as a prior DWI offense in NJ, the DWAI law is similar to the observation case statute in NJ – NJ will treat like any other drunk driving**
  - **There are some proactive moves you can make in order to work with client to less blow of NY conviction**

### **III. What is a DWI in NY**

- **DWI is considered a crime**
- **At the very least, a DWI is a misdemeanor – permanent criminal record**
- **Misdemeanor – sentencing liability is up to 1 year in jail**
- **Since punishment authorized in NY is equivalent to a DP in NJ, then NY conviction would be considered a DP offense**
- **In NY – since it is considered a crime – eligible for jury trial**
- **Tried in criminal court**
- **DWAI – lowest enforcement, no criminal record, similar to traffic ticket**
  - **Similar to common law DWI – “observation” case in NJ – faculties impaired or based on reading of less than .08 BAC**
  - **0.13 or less BAC in NY – you will be offered DWAI**
  - **Strategically – you can make a record at the time of the plea in NY that the plea is exclusively based on a reading of less than .08 BAC – this could assist client in trying to mitigate suspension and “priors” for NJ license/DMV**
- **NJ - 10 year step down rule (NJSA 39:4-50(a)(3)) – statute contains possibility of step downs for out of state convictions: 1) statute under which you were convicted out of state is not substantially similar to NJ statute to be considered a prior; or 2) if you can demonstrate to the court as a defendant by clear and convincing evidence that your out of state conviction was**

**based on a reading of less than .08 the judge cannot use it for sentencing**

- **What would a NJ driver with a NY DWI/DWAI conviction need in order to be able to prove by clear and convincing evidence the issue of the readings for the out of state conviction?**
- **Get police reports – hopefully show reading of less than .08 BAC**
- **Ideal evidence would be to make a record in court – make it part of the offer that you want to make a record during the plea allocution that the plea is exclusively based on a reading of less than .08 BAC and read into the record the part of the impaired statute that relies on the less than .08 reading – order record immediately**
- **Take record to DMV to preserve NJ license**
- **Be sure to communicate with NY attorney to insure that resolution of case in NY will be to the client’s benefit in NJ, as stated above – be sure that NY attorney understands the NJ implications**
- **NJSA 39:4-50(a)(3) – before this statute passed (2004), if you had an out of state conviction of a reading of .10 or less, than NJ judge could discard that during a subsequent NJ DWI offense; if the client has an out of state conviction prior to 2004, then possible that it was based on .08 BAC (less than .10 BAC) and therefore cannot be used to enhance penalties in NJ**
  - **Look to date of offense**
- **In NJ the judge is required to read a warning notice for subsequent offenses and subsequent sentencing liabilities; no such warning requirement in NY – can this be an argument to minimize sentencing liability in NJ?**
  - **NY plea process is different from NJ – no factual basis, etc.**
  - **Laurick<sup>1</sup> application – Rule 7:10-2(g) – allows judge not to consider for purposes of enhancing jail component if person was not represented in prior convictions**
    - **Not likely in NY because DWI is a criminal offense so unlikely that person would not be represented by counsel**

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<sup>1</sup> State v. Laurick, 120 NJ 1 (1990).

- **HOWEVER – some “justice courts” in upstate NY – may not have public defender present**
- **No warning in NY courts – could this be a basis for a Laurick-type application?? – due process matter as a matter of advocacy to minimize jail term**
- **Hypothetical:**
  - **Client has 2 DWIs out of NY and now comes to Mahwah and gets stopped by Mahwah police for DWI – judges sees prior NY DWI convictions**
  - **NJ judge, on paper, the person will be treated as a 3<sup>rd</sup> offender**
  - **Advocacy is about the sentencing – get all NY information/transcripts and make argument for lesser sentence**
- **DWAI – range of punishment – suspension as opposed to revocation (time, administrative v. procedural, no interlock requirement, range of fines, no probation because not criminal, no community service) – 90 days v. 6 months**
  - **Prove that person had operated a vehicle while their ability was impaired by alcohol (generally)**
  - **No BAC required – can get by observation; but can get based on less than .08 BAC**
  - **DWAI by drugs is a misdemeanor**
  - **DWAI for alcohol – common outcome if someone has low BAC (less than 0.13 – unwritten, practice policy), no accident, no aggravating factors**
  - **Anti-plea bargaining statute - NY DWI Law – VTL 1192 – if you are charged with any of the misdemeanor versions (sections 2 and 3) the only plea bargain that can be offered is to section 1 (DWAI)**
  - **More rural areas have justice courts – still handled by county prosecutors; generally speaking less than 0.13 is a strong possibility of DWAI offer**
- **Refusal charge – not likely to make a deal so fast on this type of charge; refusal is separate proceeding from DWI case**
  - **DMV has a safety hearings board and there will be a hearing if client refused test**
  - **No prosecutor in DMV hearing, rules are different**
  - **Outcome of refusal hearing could impact DWI case**

- **Totally separate hearings and outcomes complete separate**
- **NY Law VTL 1192.2 equivalent to NJ “per se” statute – charge based on reading**
- **NY Law VTL 1192.3 equivalent to NJ observation statute – no reading – police may charge this on a refusal case**
- **NY Law VTL 1192.1 – police can use this for charging for refusal as well – probable cause that you were above limit or driving impaired**
- **Leandra’s Law – new NY law that makes it a felony if you are charged with DWI with a child under 15 in the car**
- **Aggravated DWI – if you are .18 or higher BAC**
- **With regard to a reading, less than 0.13 is relatively minor offense – likely result in DWAI offer**
- **If client has 0.17 – how would you address this issue?**
  - **Review discovery, readings, etc.**
  - **Most prosecutors are unlikely to reduce because client just missed being charged with aggravated DWI and the consequences of that charge**
  - **Criminal offense – hearings and other proceedings for advocacy options**
- **Are there similar challenges to NY breath test devices as NJ had with State v. Chun<sup>2</sup>?**
  - **More procedural issues in NY**
  - **With refusal – whether have to be asked to take the test within 2 hours**
  - **Suspension pending prosecution statute – if you are .08 or higher your NY license is suspended at arraignment – what kind of hearing are you entitled to?**
  - **Scientific defenses, i.e. experts, are rare occurrences and can get you pretty far**
  - **Focus is usually on procedural issues, i.e. probable cause to stop, speedy trial, etc.**
- **Some counties are tough on DWI – they have vehicular crimes units at prosecutor’s offices, prosecutors are well trained in these areas**

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<sup>2</sup> State v. Chun, 194 NJ 54 (2008)

- **Other counties put their youngest attorneys (ADAs) on the cases because in the general scheme of things, it is a much lesser offense even though it is a crime**
- **Much rarer in NY to try a DWI**
  - **NJ DWI trial is usually one afternoon**
  - **NY DWI is jury trial – a significant expense, days if not weeks of testimony and work; 12 jurors with felony and 6 jurors for misdemeanor – must be unanimous**
- **In NJ the BAC only counts for so much in sentencing, etc. – not really relevant to punishment – in NY they look at BAC for punishment purposes (by statute and by culture – no codified statute in plea bargaining)**

#### **IV. Advice to NY licensed driver who gets stopped in NJ**

- **NJ driver is in unfortunate position because gets the worst of both states – for NY drivers the converse is better – no criminal record, NY licensee can get conditional license**
- **License suspension in NJ – you cannot drive in NJ but you can get conditional/work license in NY if first offense, or if not 1<sup>st</sup> offense and you have not had condition license in 5 years**
- **Cannot drive in NJ if NJ DWI conviction with NY license even if you get a NY conditional license because NJ does not recognize conditional license – privileges are suspended in NJ**
- **NJ IDRC requirement – if you live more than 30 miles from an IDRC center, you can take it from your home state – put this on the record during plea that client is out of state and intends to take program in their home state**
- **DDP program – drinking driver program – NY program similar to IDRC program**
  - **DDP is part of every plea in NY**
  - **To get conditional NY license, then you must take DDP**
  - **If get sentenced to IDRC and they are NY resident, then need to take DDP anyway to get conditional license**
  - **IDRC and DDP take each other's certifications**
- **Under NJ law, they could surcharge you \$1000 per year for 3 years; experience has been though that if you are just casual person in NJ, don't live here, out of state address, no contacts with NJ, no car registered here, no NJ license – may be able to get out of surcharges in NJ – but DMV has become stricter – no guarantees - NJ DMV enforcement for surcharges??**

- **Judges in NJ cannot take NY license but your privilege to drive in NJ is suspended; in NJ – suspension goes on indefinitely until you affirmative go to restore your license and if you don't you can find yourself suspended years in the future – restoration charges**
- **NJ drivers should insure if they get a NY driving suspension that they contact NY DMV to insure that there are no further steps to get NY privileges restored**
- **No jury trial in NJ, fees to restore, surcharges should be contested as long as no contacts with NJ**
- **Be careful of who you select as NJ counsel – experience and expertise in NJ – Certification of Municipal Court Trial Attorneys in NJ – exam geared to DWI defense**
- **No NY municipal court trial attorney certification – DWI is a criminal defense so criminal attorneys will handle DWIs are part of their practice – look for those with expertise in that area**

**V. NJ attorney with client who gets DWI in NY and wants NJ attorney *pro hac vice***

- **Realize this is a criminal case with all those related issues: bail, probable cause; misdemeanors on information and felonies on indictment**
- **Problems with information/indictment – procedurally and administratively**
- **Political culture in NY – stricter**
- **Speedy trial laws in NY are codified and serious – 90 days misdemeanor is dismissed**
- **Elected officials as District Attorneys – have run on ticket as being tough on DWI**
- **Need a NY attorney to provide collegial advice or in court with you as the NJ attorney**
- **Even basic issue spotting is different between NY and NJ**
- **Legal fees:**
  - **Depends on where the case is – lower fee in justice court v. city court**
  - **Criminal case and jury trial**
  - **Complexity of case, distance to court**
  - **Preference for flat fee but can do hourly fee**

- **Since it is a criminal case, the case can go on a long time – less likely that case is going to move as quickly as in NJ**
- **0.17 BAC with no accident – in NYC court – no criminal record - \$2500 – 10K – middle of the range is where the client should look**
  - **Staten Island – more suburban, small court – same range of \$2500-10K**
  - **Suffolk and Nassau Counties – difficult to get there but difficult to defend a DWI – a lot of work for the attorney – higher fees**
  - **Dutchess County – justice courts, smaller courts, lesser range of fees**
  - **Westchester County – justice court, similar to Rockland and Orange county, same cultural rules as 0.13 BAC as cut off place – lesser fees**
- **In NY – since DWI is a criminal matter, you want to find someone that does DWIs because unlike NJ where DWI is heard in the same court as traffic cases, it is not the same thing in NY – different court – in NY looking for criminal defense attorney**
- **Police have little impact on what prosecutor does with the case – police are rarely involved**
- **Victims rights are considered but not the same requirements as in NJ – victim impact statement are not as significant but restitution is still ordered, etc.**
- **No civil reservations in NY – often have the opportunity to work along side the civil attorney because DWI cases last longer**
- **In NJ – ability to seal the plea so the plea cannot be used against client in civil litigation**