

# **GARDEN STATE CLE LESSON PLAN**

A 2.5 CLE CREDIT COURSE

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LESSON PLAN AND EVALUATION

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## **BRIDGING THE GAP: PREPARING FOR A CRIMINAL TRIAL**

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WITH

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AND FEATURING

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### **Program Description**

This 2.5 credit Bridging the Gap course will provide the newly admitted attorney with practical, nuts and bolts strategies and tactics that can be used to successfully prepare for a criminal trial in the Superior Court.

## I. INTRODUCTION

## II. THE REALITY OF CRIMINAL PRACTICE TODAY

- a. Philosophy: Trials represent a failure of the system, pleas and mutual agreement are the order of the day
- b. Mandatory sentencing laws suggest that trials are more likely these days, but often the Prosecutor will offer a sentencing or charge “discount” to the defendant and encourage a plea
- c. Risk/benefit analysis
- d. Judges are involved in the process as mediator judicial officer
- e. The vast majority of cases plead, the process is collaborative in many cases, only about 10% of cases go to trial
- f. Defense counsel needs a trial strategy early on in representation since Prosecutor’ s strive to make early plea offers with early deadlines for acceptance
- g. Negotiations are a minefield, do your investigation early, bring together all of the information the Prosecutor needs to make a good offer to the Defendant

### **III. CRIMINAL TRIAL PREP AND KNOWLEDGE OF SENTENCING**

- a. Know the end game: what is the sentencing exposure
- b. Research alternative charges too
- c. What are the collateral consequences of a conviction, civil, immigration, licensing, etc.

### **IV. INITIATION OF THE PROCESS**

- a. Indictment is a constitutionally required for formal charging of serious offenses by the Grand Jury as required by the State and Federal Constitutions and N.J.S.A. 2C:1-6. An Accusation can be used instead under certain circumstances
- b. Disorderly persons and petty disorderly persons offenses commence by way of a Summons or Warrant
- c. Ordinance violations and motor vehicle offenses are commenced by a local ticket, usually issued by the local police

## V. GRAND JURY PRESENTATIONS

- a. Rules of Evidence aren't followed, leading witnesses is accepted practice, a *prima facie* case needs to be established so that the Grand Jurors can vote on "probable cause to believe a crime was committed"
- b. Usually only one police witness testifies
- c. Grand Jurors are charged with the law applicable to the offense and the basic law of the grand jury
- d. Request the Grand Jury transcript to look for grand jury misconduct and proper pre trial motion practice, you may parlay that information into a plea for your client at the time you move for dismissal of the indictment
- e. Defendants have no right to appear in the grand jury in New Jersey
- f. If the option is requested or offered, the evaluation needs to be made whether your client is a good enough witness to appear in the Grand Jury
- g. Is the Prosecutor trustworthy and fair with Defendants?

## VI. AN ACCUSATION

- a. Whether before or after Indictment, an agreed Accusation with waiver of the right to indictment can be used to charge the Defendant, provided the Judge reviews the rights with the Defendant on the record
- b. If the plea fails for some reason, it is sufficient to advance charges against a defendant all the way to trial

## VII. SUMMONSES AND WARRANTS AS INITIAL PROCESS

- a. A Summons is an “invitation to the dance” and commences the process against Defendants. It is the preferred mechanism
- b. Warrants need to be justified, primarily, the ‘crimes exception’ applies
- c. Practice tip: Warrants issued on failure to appear and related criteria, the problem becomes that the officers and court clerks are friendly and the “t” s” are not crossed. Time for motion practice.
- d. Warrants for arrest are prepared on probable cause and a Warrant is requested for issuance by a jurist.
- e. After a Defendant’ s common law arrest, Warrants are also requested by the Police. Why? For the setting of bail. A Summons is not a custody situation, a Warrant is.
- f. A Warrant on Indictment is to obtain the body of the Defendant to bring him to court for the purpose of charging him formally.
- g. Bench Warrants are issued for failure to appear in court.

## VIII. INITIAL CLIENT CONTACT

- a. Fees and a written fee agreement (ethical requirement)
- b. A contingent fee in criminal cases is prohibited by RPC 1.5(d)(2)
- c. Empathy for the client's situation
- d. Establish rapport and trust
- e. Get information in order to assess the case:
  - Prior criminal history
  - Alibi, if any
  - Avoid self serving fact collection at the early stage
  - Find out: What do the police know?
  - Avoid too many facts that may later place you in a terrible ethical position over testimony of the client at odds with the initial contact

## IX. JAIL

- a. Downsides
- b. Upsides
  - i. Jail Credit at sentencing
  - ii. The State does not afford good time and work time commutation credits (about 3 days to each 1 day served) while held for pre trial time at the County Jail
  - iii. Plea offers usually improve after long periods of pretrial detention, the view of justice changes on both sides

## X. BAIL

- a. Bail is a constitutional entitlement

- b. Prosecutors stress seriousness of the offense, danger to the community, likelihood of conviction, prior record, and flight risks
- c. Defense counsel argue ties to the community, property ownership, family relying on him, likelihood to appear for court, mitigate any issues with employer, family and community leader statements, reassure the Court of no serious risk of further involvement in crime, no contact with victim is acceptable to the defense
- d. The “Trentonian” factor: avoiding danger to the community
- e. Defense counsel makes much information available to the Prosecutor, candor works to the benefit of the defendant

## **XI. EARLY DISPOSITION OF CRIMINAL CHARGES**

- PIC: the Pre Indictment Conference

## XII. CHARGE UPGRADES AND DOWNGRADES

- a. Pre Trial Intervention (PTI) does NOT apply to disorderly persons and petty disorderly persons offenses. It may be in your client' s interest to request an upgrade from Municipal Court or to avoid a downgrade of the offense to Municipal Court. Crimes (first through fourth degree) are theoretically all eligible for PTI. You can even request that a case, already downgraded, be again upgraded to make it PTI eligible.
- b. Jury appeal: Trials were once a form of entertainment and now the jury has been entertained by legal tv show dramas and expect to be entertained. “Is that all there is?”
- c. At times, treatment in the Municipal Court is more harsh than in Superior Court. Example: Probation in Superior Court versus a Municipal Court Judge tired of seeing this same defendant time after time and wanting to give him or her some jail time
- d. Negotiate, negotiate, negotiate: plea bargains are part of a process. The “best” offer is not always the first offer that is described as the only offer and none will follow the plea cutoff date. Advocacy is important—this is not a take it or leave it proposition.
- e. Defense counsel can go over the head of the Assistant Prosecutor and speak with a superior, but do it right. Alert the AP and then call the supervisory person. The Prosecutor' s job is to make an arrangement for the most fitting penalty.
- f. “First to squeal gets the deal” ---- Cooperation: a path to lighter sentencing and a part of plea and charge negotiation.

## XIII. DISCOVERY



- a. Of course, the Prosecutor's file
- b. Be creative. Ask for things out of the ordinary. Examples: 911 call and transcript (time sensitive for as little as 30 days), Lab reports and notes that backup the report, exculpatory evidence of the defendant

#### **XIV. NOTICES REQUIRED UNDER RULE 3:12-1**

- a. Alibi: file a statement by the defendant and signed by the defendant and creating a duty of the Prosecutor to provide you the statements placing the Defendant at the scene of the incident
- b. Bills of Particulars: Not often used because discovery usually provides all of those answers
- c. Insanity

#### **XV. PROBABLE CAUSE HEARINGS**

- The Court provides notice to the Prosecutor and the case is typically indicted by the Grand Jury before that date, mooted the need for a finding of Probable Cause. Grand Jury indictment IS a finding of Probable Cause.

## XVI. MOTIONS

- a. Motion to Suppress: file in every case. Even a blind bird catches a worm once in awhile. The evidence may be lost or plea offers may result. The motion to suppress is in many ways the substitute for the trial.
- b. Rule 104C Motion to Suppress Confession. File it in every case
- c. *Wade* hearings (*United States v. Wade*, 388 U.S. 218 (1967)) and photo arrays.

## XVII. SENTENCING CONSIDERATIONS

- a. The gradation of offenses is sentence based for First through Fourth Degree offenses in New Jersey. No misdemeanors.
- b. Probation is rare for first and second degree criminal cases, very rare.
- c. Parole issues. The parole disqualifier is a minimum amount of time to be served before becoming eligible for parole. New Jersey has a number of offenses which are subject to mandatory minimum sentences: 85% service of sentence before parole eligibility per NERA (No Early Release Act)
- d. Split sentence: the body is in jail but it is serving a sentence of probation beginning with 365 days in jail.
- e. The Graves Act applies to gun possession cases and impose a minimum mandatory term of imprisonment of one-third to one-half of the sentence.
- f. Drug and other offenses within X feet of a school, park, community center etc. Mandatory—with a question mark
- g. Community supervision: Megan's Law, other statutes

- h. Sex offenses and sentencing at Avenel: Defendants may serve every day of the sentence and be civilly committed thereafter
- i. ISP: the Intensive Supervisory Program. It is available only AFTER the minimum mandatory term and is designed to require the Defendant to behave in a proper manner in society. Over time, the tethers are loosened and ISP bracelet is removed. High success rate.
- j. Money: fines, restitution, etc
- k. Collateral consequences of sentencing: losing public office, loss of private and public employment and pension rights, loss of driving privileges and immigration consequences

## **XVIII. PREPARATION**

- a. PTI application includes a demonstration of rehabilitative need and an acceptance of responsibility. Prepare your client to deal with the interview. You have a right to participate
- b. Presentencing interview: prepare your client for the questions that may be asked. You have a right to appear and participate at the interview
- c. Plea allocution: admitting the actions that make you guilty. Prep, prep, prep. If the crime requires an admission of intent, make sure your client does not say "It was an accident"
- d. At sentencing: prepare your client if he is to address the court
- e. File your own presentencing memorandum early