Garden State CLE Presents:

Defending Our Own: DWI Charges Against Judges, Lawyers & Law Students

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Lesson Plan
Part I
Judges

The judges of New Jersey are not immune to the havoc that alcohol abuse can cause in their personal and professional lives. The vast majority of the resulting judicial disciplinary case law generally involves judges that have been prosecuted for the traffic offense of drunk-driving under N.J.S.A. 39:4-50(a). There is also a small body of case law related to the activities of judges who engaged in professional misconduct adjudication of drunk-driving case before them.

The drunk-driving case itself should be zealously defended like any other case. What is special about judge cases are the extraordinary collateral and long-lasting consequences implicated in the charges that defense counsel must know of and for which he must provide guidance.

a) Public Policy

With respect of drunk driving, the Court stated in In re Connor, 124 N.J. 18(1991) that they do not view offenses arising from the driving of an automobile while intoxicated with benign indulgence. They are serious and deeply affect the safety and welfare of the public. They are not victimless offenses. Accordingly, the Justices firmly endorsed the governmental commitment to the eradication of drunk driving as one of the judiciary's own highest priorities. In re Collester, 126 N.J. 468, 472-473(1992).

b) Purpose of judicial discipline

Our primary concern in determining discipline is therefore not the punishment of the judge, but rather to restore and maintain the dignity and honor of the position and to protect the public from future excesses. Judges engaging in misconduct must be disciplined to instruct the public and all judges, ourselves included, of the importance of the function performed by the judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the public that the judiciary of this state is dedicated to the principle that ours is a government of laws and not of men. In re Williams, 169 N.J. 264, 275(2001).

c) Issues of Immediate Concern to avoid aggravating factors in subsequent judicial discipline.

1) Do not mention you are a judge or a public employee in any manner to the police;

2) Cooperate fully and take the breath test (refusal is an aggravating factor)

3) The following day, report your arrest and issuance of tickets to your assignment judge and vicinage PJ. See Directive 07-11, "All judges must immediately report their involvement in any type of litigation in any court."

4) Follow the Guidelines in Directive 04-09.

d) <u>In re Connor</u>, 124 <u>N.J.</u> 18(1991)

The examination in this case discloses aggravating circumstances that bear on appropriate discipline. Those aggravating factors affect our consideration of each of the offenses. The drunk-driving offense resulted in an accident with another vehicle. The offenses of leaving the scene and careless driving were particularly egregious. The former, itself a serious offense, bespeaks a denial of responsibility and a disregard for the proper enforcement of the laws. The careless driving entailed not only an accident with another vehicle, endangering its occupants, but a high-speed chase, presenting significant risks to other innocent persons. As serious are the circumstances that followed those offenses. Rather than simply refusing to discuss the incident with the investigating officers following the commission of these offenses-which respondent had the legal right to do, aside from whether it was morally and ethically proper for him to do so-respondent lied about being involved in any accident and, worse, tried to cast blame on the victim.

e) Judicial and disciplinary procedures

Plea or finding of guilt conclusively establishes the Judicial Ethics Violation. Case will be tried before a judge of the Superior Court (sitting as a municipal court judge) with appeal directly to the Appellate Division. See State vs. Cerefice, 335 N.J.Super 374(App.Div.2000).

SUPREME COURT OF NEW JERSEY
Directive 04-09

On June 17, 1999, this Court issued Directive #7-99, which consolidated and restated procedures previously adopted by the Supreme Court regarding judicial disqualifications as a result of DWI or domestic violence matters. After almost ten years under that Directive, the Supreme Court has decided that substantive modifications to the policy are required. The revisions are consistent with the Legislature's imposition of enhanced penalties for DWI violations since Directive #7-99 was issued. In particular, in 2004 the Legislature lowered the blood alcohol level required for DWI offenses from 0.10% to 0.08% and lengthened the period of license suspension for first-time offenders. L. 2003, c. 314 (mandating three-month suspension when violation involves blood alcohol level below 0.10% and lengthening suspension from six months to seven when level above 0.10%); see also L. 2003, c. 315 (imposing mandatory jail time for third drunk driving offense); L. 2002, c. 34, § 17 (increasing fines for DWI offenses); L. 2000, c. 83 (permitting the installation of ignition interlock devices after any DWI violation). The revised policy language follows.

Driving While Intoxicated (DWI) Disqualifications

The Supreme Court has modified its administrative policy for judges who have been charged with or convicted of driving while intoxicated (DWI) or related offenses.

The policy applies to all judges sitting in Municipal Court and Superior Court, including temporary assignments.

Judges charged with or convicted of DWI or related offenses shall not hear any DWI cases while the charges are pending and, if convicted, until (a) one year from the date of the imposition of sentence (as extended by any stay), or (b) all conditions imposed as a result of the DWI conviction are satisfied in full, including suspension of the judge's driver's license and completion of the prescribed program requirements of the Intoxicated Driver Resource Centers, whichever is longer.

If, at the time the charges are brought, the judge has reserved decision in any DWI case, that case shall be transferred by the Assignment Judge to another judge. The matter shall be determined on the papers unless the defendant objects. If the defendant interposes an objection, a mistrial shall be declared and the case will be retried before the judge to whom the matter was transferred.

The Court has further determined that a judge who has been disqualified from hearing DWI matters under this policy shall not thereafter hear such cases without the prior approval of the Supreme Court on the application of the judge. Supreme Court approval of an application to resume hearing DWI cases will not preclude a judge from exercising his or her power of recusal in any particular DWI case or in any category of such cases.

f) Range of Disciplinary Outcomes

Examples of Reprimand cases (No aggravating circumstances)

In re Jones, 199 N.J. 118(2009)
In re D'Ambrosio, 157 N.J. 186(1999)
In re Richardson, 153 N.J. 355(1998)
In re Lawson, 124 N.J. 280(1991)

Examples of Censure Cases

In re Sasso, 199 N.J. 119(2009) [Disqualification – intoxicated while on the bench]
In re Tourison, 199 N.J. 121(2009) [Penny in mouth]
In re Williams, 188 N.J. 476(2006) (Failed to cooperate & prior discipline)
In re Annich, 130 N.J. 538(1993) [Resisted arrest]
In re Connor, 124 N.J. 18(1991) [Accident & high-speed pursuit]

Two-month Suspension from Judicial office 2nd offense

In re Collester, 126 N.J. 468, 473-474(1992)

Without doubt the most egregious aspect of respondent's ethical dereliction is the fact that he has repeated the offense of drunk driving. However, in addition to that circumstance, there were other aggravating circumstances surrounding his motor vehicle infractions. Respondent, on his arrest, immediately informed the arresting officer that he was a Judge of the Superior Court. He also stated that he was responding to an emergency at the courthouse. That statement was false. There was no emergency. Although respondent was, in fact, proceeding to the courthouse, it was to obtain a file to review that night in preparation for the next day's trial. Moreover, he repeated that false statement to the arresting trooper. He thus seemingly attempted to divert, if not obstruct, justice. Further, as observed by the Committee, "respondent's several references to his judicial status gave the impression that he was entitled to some special preference." He thus clearly used the prestige and weight of his judicial office to try to gain some personal advantage.

g) Other Alcohol-Related Cases

Matter of Jones, 211 N.J. 116(2012) (Suspension 4 months) [While at a holiday Christmas party, judge engaged in a pattern of inappropriately touching of female probation officers and a restaurant employee as well as inappropriate, suggestive remarks to them while intoxicated.]

In re Williams, 169 N.J. 264, 275(2001) (Three-month suspension – drunken brawling)
In re Williams, 188 N.J. 476(2006) (Driving while intoxicated - Censure)

Part II
Attorneys

a) In General - As a general rule, New Jersey attorneys are not subject to formal, professional discipline following a conviction for drunk-driving under N.J.S.A. 39:4-50(a). Even the most serious, third offense drunk-driving case in not deemed to be criminal in nature, but merely a traffic violation. As a result, the intoxicated operation of a motor vehicle by an attorney does not fall within the purview of Rule 8.4(b) of the New Jersey Rules of Professional Conduct (RPC). This Rule provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Simply stated, a drunk-driving ticket is not a criminal act.

Despite the foregoing, the intoxicated operation of a motor vehicle by an attorney will trigger discipline under R.P.C. 8.4(b) when it is accompanied by criminal or disorderly persons' level offenses, such as assault, homicide, child endangerment and the like. In these cases, the discipline is technically imposed for the crime as opposed to the underlying drunk-driving.

A second line of disciplinary cases involving attorneys and drunk-driving relates to the ways and means New Jersey lawyers prosecute or defendant these matters in court. As will be seen in the following sections, the prosecution and defense cases implicate a wide range of R.P.C. violations and have resulted in discipline ranging from admonitions to disbarment.

b) Drunk-Driving With Companion Criminal Offenses

R.P.C. 8.4(b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. In the context of this R.P.C., "criminal" includes both disorderly and petty disorderly persons' offenses as well as crimes. By way of example, a drunk-driving ticket may also trigger complaints by the police charging assault by auto as either a disorderly persons' offense or as a crime.

When a New Jersey attorney has been charged with a criminal offense that is companion to a drunk-driving ticket, he has certain affirmative responsibilities he must take immediately. The first is to report to the Office of Attorney Ethics (OAE) in Trenton that he has been charged with the criminal offenses. Typically, unless the underlying conduct is extremely serious, such as vehicular homicide, the Office of Attorney Ethics will withhold action on the case until the criminal and motor vehicle components have been resolved in court. In serious cases, the OAE may petition the Supreme Court to suspend the attorney from practice pending the resolution of the criminal case and any related disciplinary charges that may be filed.

After the criminal case has been concluded, the Office of Attorney Ethics should be informed by the attorney of the outcome and the details of any sentences imposed. At this point, the OAE will move immediately for the imposition of discipline because the conviction itself constitutes conclusive proof of an R.P.C. 8,4(b) violation. The only mode of defense permitted following a conviction is the introduction of evidence by way of mitigation of discipline. In criminal cases involving drunk-driving, evidence of substantial alcohol rehabilitation and restitution to any victims are critical mitigating factors.

c) Drunk-Driving Disciplinary Defenses

A criminal conviction is not required for discipline to be imposed under R.P.C. 8.4(b). The lack of a criminal charge or even an acquittal on the merits can still result in the imposition of discipline following a disciplinary plenary hearing where the burden of proof will be by clear and convincing evidence.

d) Drunk-Driving Disciplinary Outcomes

When faced with an attorney disciplinary matter, the Supreme Court has a range of sanctions that can be imposed in those instances where the court is satisfied by clear and convincing evidence[1] that a violation has occurred. In order of severity, the sanctions are as follows:

- Admonition;
- Public Reprimand;
- Censure;
- Suspension for a determinate term;
- Indeterminate suspension (minimum five years);
- Disbarment.

In all disciplinary cases, the Supreme Court will consider a conviction for drunk driving or any violation of the criminal law as conclusive proof of the respondent's misconduct. However, in order to determine the quantum of discipline to be imposed, the Court will carefully scrutinize the facts and analyze the existing aggravating and mitigating factors. The quantum of discipline to be imposed will comport with the seriousness of the ethical infractions in light of all the circumstances. Moreover, in imposing a measure of discipline on an offending attorney, the Court's stated purpose is to protect the public from attorneys who do not live up to their professional responsibilities and to preserve the public's confidence in the bar.

Lesser levels discipline are sometimes imposed following third-and fourth-degree assault by auto convictions, with a reprimand the normal level of discipline. In cases involving serious bodily injury or death, long suspension terms are usually imposed by the Supreme Court. The following cases all had drunk-driving components and provide examples of the range of discipline in these cases:

- In re Cardullo, 175 N.J. 107, 813 A.2d 546(2003) (reprimand following fourth-degree assault by auto conviction where attorney caused only minor bodily injury and took serious measures to combat her alcohol addiction);

- In re Fedderly, 189 N.J. 127, 913 A.2d 802(2007) (reprimand following third-degree assault by auto and driving while intoxicated convictions where the bodily injury was minor and "substantial mitigation" justified sanction less than a censure);

- In re Terrell, 203 N.J. 428, 3 A.3d 1221(2010) (admonition following fourth-degree assault by auto, driving while intoxicated and leaving the scene of an accident where attorney had no prior discipline in a legal career spanning 40 years; injury to other party was minor and he cooperated with the OAE's investigation);

• Matter of Barber, 148 N.J. 74, 689 A.2d 722(1997) (attorney received a six-month suspension after having been found guilty of vehicular homicide; intoxicated, the attorney drove at a high rate of speed, causing a one-car accident that killed his passenger, a fellow attorney with whom he had been drinking in two Pennsylvania bars);

• In re Murphy, 200 N.J. 427, 982 A.2d 453(2009) (attorney received a six-month for driving in the wrong direction on the Pennsylvania Turnpike, causing a head-on collision with another vehicle; one occupant of the other vehicle suffered a broken femur, which required surgery to repair);

• In re Saidel, 180 N.J. 359, 852 A.2d 132(2004), reinstatement granted, 193 N.J. 20, 935 A.2d 756(2007) (attorney received a six-month suspension for flipping his vehicle while intoxicated and driving 30 miles per hour over the speed limit in Arizona; his two passengers were seriously injured);

• In re Guzzino, 165 N.J. 24, 754 A.2d 1149(2000), reinstatement granted, 185 N.J. 601, 889 A.2d 1056(2006) (attorney received a two-year suspension after plowing his automobile into two automobiles on Route 287; a passenger in one of them was ejected from his vehicle, resulting in fatal head injuries);

• Matter of Howard, 143 N.J. 526, 673 A.2d 800(1996) (attorney received a three-month suspension, having been found guilty of death by auto after running her husband down with an automobile during a domestic quarrel; alcohol was not a factor).

e) Discipline of Municipal Prosecutors in Drunk-Driving Cases

As with any trial attorney, a municipal prosecutor has the duty to adequately prepare for trial. He or she must select the State's witnesses and prepare to present the State's evidence in court. Because the State of New Jersey is the municipal prosecutor's client, a failure to discharge the obligations of office is a violation of the prosecutor's professional responsibility to represent his or her client diligently.[3] Such a failure may constitute a violation of R.P.C. 1.1(a)[4] or R.P.C. 1.3.

Poor preparation and lack of candor with the tribunal[6] in violation of the Rules of Professional Conduct are the common reasons for the discipline of prosecutors in drunk driving cases. Under R.P.C 3.3(a)(5) a lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by the failure. A similar rule, R.P.C. 3.3(a)(2), mandates that a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in an illegal, criminal or fraudulent act by a client.

A violation of these latter two rules led to the imposition of a public reprimand for a municipal prosecutor in the 1990 case of In re Whitmore, 117 N.J. 472(1990). In that case, the municipal prosecutor permitted a key witness, a police officer, to leave the courthouse prior to trial. The purpose of the police officer in leaving court was to sabotage a drunk-driving prosecution. The prosecutor knew of the officer's reason but did not report it to the court and did not adequately resist defense counsel's application for the dismissal that was granted. The Supreme Court ruled that when a municipal prosecutor becomes aware of an improper motive directly affecting the administration of justice on the part of a police officer in a case before the municipal court, which if undisclosed, could mislead the court or contribute to an improper or illegal result, the failure to disclose such information constitutes a violation of the Rules of Professional Conduct.

A three-month suspension from the practice of law was imposed on the municipal prosecutor in the 1992 case of In re Kress, 128 N.J. 520(1992) (*sub nom*. In re Norton). As in the Whitmore case, the police desired to see a drunk driving prosecution aborted. Although he recognized that he had a strong case, supported by proper and admissible evidence of the defendant's guilt, the prosecutor reported to the municipal court that the complaining police officer did not want to go forward with the case. He subsequently moved for the dismissal of the drunk-driving charge, an application that was granted by the court. The Supreme Court found the case to be similar on its facts to In re Whitmore and found that the prosecutor's lack of candor with the court violated R.P.C. 3.3(a)(5) and led to the improper dismissal of a drunk driving case. However, despite the similarities between the two cases, the Supreme Court gave no reason why a three-month suspension was called for in the Kress case as opposed to the public reprimand meted out in the Whitmore matter.

f) Discipline of Defense Attorneys in Drunk-Driving Cases

Rather than negligence as a result of poor preparation, the disciplinary cases involving defense attorneys in drunk-driving cases deal with improper preparation. Defense attorneys are provided wide latitude to prepare an adequate defense for their clients in a drunk-driving case. This can even involve speaking to arresting police officers with the consent of the prosecutor. However, the Supreme Court relies on the integrity of counsel to limit these discussions to the facts surrounding the arrest and not to use the session as an opportunity to suggest to the police that they "dump" the case, either by changing their testimony or by refusing to testify. Thus, in In re Norton, the defense attorney, along with the prosecutor, stood mute as the police requested that the State dismiss a drunk driving case for an improper purpose. As a result both he and the prosecutor were subject to a three-month suspension from the practice of law.

Perhaps the most egregious case of attorney misconduct in a drunk driving case was reported in the 1987 case of In re Edson, 108 N.J. 464(1987). The case involved two instances of an attorney urging clients to lie and manufacture facts in order to create a defense to drunk driving cases. The specific defense involved the use of extrapolation, a defense that has since been banned by the Supreme Court. In one of the cases, investigators from the county prosecutor's office taped a conversation between the attorney and a putative client. The content of the legal advice offered by the attorney shocked the Supreme Court.[6] Essentially, the attorney sought to have his clients represent that their drinking occurred at certain times and in certain amounts which would help an expert conclude that the defendant's blood alcohol concentration was less than 0.10% at the time of operation of the motor vehicle. Of course, none of this had anything to do with the truth. The attorney's violations of R.P.C. 1.2(d), R.P.C. 3.3(a)(4), and R.P.C. 3.4(b) resulted in his disbarment.

Part III
Law students

a) In general - Defense attorneys must be vigilant when representing law students and college students who express a desire to go to law school. Unless their cases are properly handled, the Supreme Court's Committee on Character will delay their admission to the bar for months, if not years. This collateral consequence should be explained to the client in painstaking detail. Essentially, the time start repairing the damage from a drunk-driving ticket begins immediately upon the defense attorney being retained. The process of building a solid and persuasive record of reform and rehabilitation must begin forthwith so as to provide a well-grounded and substantial track-record of success to show to the Committee on Character in the future after having passed the bar exam.

b) Qualifications For Bar Admission

Rule 1:27-1 sets forth the specific qualifications an applicant must satisfy as conditions to admission to the New Jersey bar. Essentially there are three conditions. They include:

1) Passage of the bar examination;

2) Certification of good character by the Committee on Character pursuant to Rule 1:25; and

3) Attainment of a qualifying score on the Multi-State Professional Responsibility Examination or passage of an approved course on professional ethics given by an American Bar Association-accredited law school.

To date, all of the case law dealing with admission to practice has involved character issues. That is to say that the character of the applicant, as determined by the Committee on Character, has been found to be lacking the traits that are deemed necessary for a New Jersey attorney.

c) Triggering Events

RG 302:1 Conduct Requiring Investigation. The appropriate Part of the Committee, or such member or members thereof so assigned, shall review the Statement of Candidate and related documents. If, on such review, further information is deemed desirable, a request therefore may be made of the candidate or any other appropriate source. The request may be made in person or by telephone or mail. Conduct requiring additional action may include, but is not limited, to the following:

a) Nondisclosure of information;

b) Academic dishonesty;

c) Unlawful conduct, including arrests, whether resulting in conviction, dismissal, or expungement;

d) Failure to file required federal, state, or local tax returns or to pay tax obligations;

e) Financial misrepresentation, mismanagement, irresponsibility, or neglect;

f) Default or arrearages in the payment of student loans;

g) Allegations of fraud, perjury, or false swearing;

h) Misconduct in employment;

i) Evidence of moral turpitude;

j) Having been disciplined as a member of a profession, trade or occupation, including but not limited to the practice of law;

k) Failure to comply with Court orders, such as support and alimony orders;

l) Domestic violence;

m) Abuse of legal process or history of vexatious lawsuits;

n) Current substance abuse; or

o) Evidence of current psychotic disorders including paranoia, bi-polar disorder, or schizophrenia.

d) Motor Vehicle Violations. The regulations do not apply either to motor vehicle violations under Title 39, including driving while intoxicated, or to a conviction in another jurisdiction for a criminal offense that would constitute a motor vehicle violation under Title 39 in New Jersey. It is the alcohol abuse component which is always the critical issue.

e) Reform and Rehabilitation

A candidate who seeks to prove reform and rehabilitation bears the burden of proof. He or she must first show by clear and convincing evidence that his or her attitude and behavior after the disqualifying misconduct is such that admission to the bar is proper. The more serious the offense, the greater will be the need for a showing of genuine rehabilitation. In certain cases, evidence of a positive kind, including affirmative acts demonstrating personal reform and improvement will be required in order to establish the requisite degree of rehabilitation. In all instances, the applicant must display complete candor in all filings and proceedings required by the Committee on Character. The applicant's attitude before this committee will be of great importance. So, too, will be the applicant's voluntary renunciation of past misconduct. The absence of misconduct over a period of intervening years is also an important factor. During the intervening years, the candidate should be prepared to show a particularly productive use of his or her time. And finally, the Court will consider affirmative recommendations from people who are aware of the candidate's past misconduct and consider him or her to be currently fit to practice law despite the misconduct. Later cases have reduced evidence of reform and rehabilitation to a five-part list.

1) Complete candor in all filings and proceedings conducted by the Committee;
2) Renunciation of past misconduct;
3) Complete absence of misconduct in the intervening years;
4) A productive use of time subsequent to the misconduct; and
5) Affirmative recommendations from people who are aware of the past misconduct who specifically consider the applicant's fitness in light of that behavior.

The affirmative evidence may include the following:

1) Positive social conduct and community service;
2) Absence of recent misconduct;
3) Reputation testimony;
4) Demonstration of the candidate's understanding of responsibility to the administration of justice and the practice of law.

Substance abuse or mental illness may not be considered a defense or justification for misconduct, but evidence of treatment and recovery may be offered to support a claim of rehabilitation.