

**Garden State CLE Presents:**

**Advanced Municipal Court**  
**Trial Advocacy**



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**Lesson Plan**

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## **Introduction**

### **Why Are We Doing This?**

The overwhelming majority of criminal and traffic cases in municipal and Superior Court is resolved by way of a negotiated outcome. However, a small minority of cases winds up being tried. The reasons why a case will have to be tried are varied. A few, among many examples, include:

- Prosecutor is unreasonable.
- Defendant has nothing to lose by trying the case.
- Defendant insists on a trial.
- Defendant is factually innocent.
- State has a potentially fatal weakness in the evidence.
- Defendant can assert a complete, affirmative defense.
- Objections from victims/police force a trial.

As a result of this practice reality, the first step in structuring an effective trial strategy in municipal court is to determine why the case is being tried and then focus the defense to align with the strategic and tactical reasons for the trial.

## Part I

### Important Court Rules –Motions and Trial

a) Rule 7:7-2 - Pretrial motions. Except as otherwise provided by Rule 7:5-2 (motion to suppress), motions in the municipal court and answers to motions, if any, shall be made orally, unless the court directs that the motion and answer be in writing. Oral testimony or affidavits in support of or in opposition to the motion may be required by the court in its discretion.

Instructor Comment: Motions for post-conviction relief under Rule 7:10-2 must also be in writing. All other motions that are important should be treated formally with written notices and a companion brief. This procedure is authorized (if not mandated) by the Appellate Division in State vs. Holup, 253 N.J.Super 320(App.Div.1992). Accordingly, a formal motion should also include an application to relax the requirements of Rule 7:7-2 under Rule 1:1-2.

b) Motions – Rule 7:7-1. Pleadings in municipal court actions shall consist only of the complaint. A defense or objection capable of determination without trial of the general issue shall be raised before trial by motion to dismiss or for other appropriate relief, except that a motion to dismiss based upon lack of jurisdiction or the unconstitutionality of a municipal ordinance may be made at any time.

Instructor Comment: When jurisdiction is in doubt, the better procedure is to delay making the motion to dismiss until after jeopardy has attached - *i.e.*, after the first witness has been sworn. State vs. Lynch, 79 N.J. 327, 341(1979). The most effective procedure is to raise the issue after all the proofs in the trial have been submitted.

c) Consolidation – Rule 7:8-4. Complaints originating in two or more municipalities may be consolidated for trial only with the approval of the appropriate Assignment Judge, who shall designate the municipal court in which trial is to proceed. A party seeking consolidation of complaints

originating in different municipalities shall file a written motion for that relief directly with the Assignment Judge.”

Instructor Comment: Granted or denied in the sound discretion of the Court.

d) Suppression – Rule 7:5-7.

(a) The municipal court shall entertain motions to suppress evidence seized with a warrant issued by a municipal court judge or without a warrant in matters within its trial jurisdiction on notice to [the municipal prosecutor and county prosecutor]. In matters beyond the trial jurisdiction of the municipal court, and in matters where a search warrant was issued by a Superior Court judge, a motion to suppress evidence shall be made and heard in the Superior Court.

(b) If the search was made with a warrant, a brief stating the facts and arguments in support of the motion shall be submitted with the notice of motion. The State shall submit a brief stating the facts and arguments in support of the search, within a time as determined by the judge, but no less than 10 days after submission of the motion.

If the search was made without a warrant, written briefs in support of and in opposition to the motion to suppress shall be filed either voluntarily or in the discretion of the judge, who shall determine the briefing schedule.

All motions to suppress shall be heard before the start of the trial.

Instructor Comment: Determination of questions concerning the validity of a stop and seizure are "highly fact sensitive and, therefore, not readily, or even usefully, reduced to a neat set of legal rules...." State vs. Golotta, 178 N.J. 205, 213 (2003); State vs. Nishina, 175 N.J. 502, 511(2003). “To this end, the Fourth Amendment requires that a seizure

must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual....” Brown vs. Texas, 443 U.S. 47, 51(1979).

Suppression hearings can serve as the functional equivalent of a deposition and can help the defense attorney to have more control over the actual date on which the case is resolved.

e) Ancillary Services – N.J.S.A. 2B:24-6. “All necessary services and facilities of representation, including both expert and lay investigation and testimony as well as other preparations, shall be provided in every case. The municipality shall be responsible for the payment for services pursuant to this section. The factors of need and real value to a defendant may be weighted against the financial constraints of the municipality in determining the necessary services and facilities of representation. The final determination as to necessity for services required pursuant to this section shall be made by the court.”

Instructor Comment: To move for ancillary services, attorneys should prepare a certification:

- Identify yourself.
- Describe your experience defending DWI charges.
- Identify the issues requiring expert review.
- Identify the need for expert or investigative services.
- Identify the individuals who will perform the services.
- Describe the cost of these services.
- Include a statement about how poor the Defendant is with an Application for Public Defender (“Form 5A”).

See State vs. Lippincott, 124 N.J.Super 498, 500(Cty.Ct.1973); In re Cannady, 126 N.J. 486(1991).

f) Dismissal – Rule 7:8-5(b). A complaint may also be dismissed by the court for good cause at any time on its own motion, on the motion of the State, county or municipality or on defendant's motion. On dismissal, any warrant issued shall be recalled, and the matter shall not be reopened on the same complaint except to correct a manifest injustice.

Instructor Comment: This is the only Rule of Court that allows dismissal of cases in municipal court. As a result, it is the foundation of every application to dismiss a complaint. For example, a motion for a judgment of acquittal at the close of the State's case would be made under Rule 7:8-5.

“[T]he question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable [fact-finder] could find guilt of the charge beyond a reasonable doubt. State vs. Reyes, 50 N.J. 454, 458(1967).

Another common example includes Holup motions. State vs. Holup, 253 N.J.Super 320(App.Div.1992).

g) Opening statements – Rule 1:7-1(a). Opening Statement. Before any evidence is offered at trial, the State in a criminal action or the plaintiff in a civil action, unless otherwise provided in the pretrial order, shall make an opening statement. A defendant who chooses to make an opening statement shall do so immediately thereafter.

Instructor Comment: This decision is tactical and may provide the defense counsel with a unique opportunity to get his legal or factual message to the trial judge early in the trial.

h) Trial Court Findings – Rule 1:7-4. The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that [can be appealed] as of right, and also as required by Rule 3:29 (placing reasons for a dismissal on the

record). The court shall thereupon enter or direct the entry of the appropriate judgment.

**Instructor Comment:** Notice that an error in the Court Rules does not provide for a tolling of the required 20-day time limit for filing a municipal appeal under Rule 3:23-2, a time that may not be expanded. See Rule 1:3-4(c). This time limit also applies to Rule 1:7-4. To make matters worse, once the appeal has been filed, the municipal court loses jurisdiction over the case. As a result, defense counsel has a difficult decision to make.

i) Sentencing. If the defendant has been convicted of or pleaded guilty to a non-indictable offense, sentence shall be imposed immediately, unless the court postpones sentencing in order to obtain a pre-sentence report or for other good cause. Pending sentence, the court may commit the defendant, or establish, continue, or modify monetary bail, or continue or modify conditions of release as appropriate. Before imposing sentence, the court shall afford the defendant and defense counsel an opportunity to make a statement on defendant's behalf and to present any information in mitigation of punishment. Where a sentence has been opened and vacated, the defendant shall be re-sentenced immediately, except where a new trial is granted.

**Instructor Comment:** The case law now requires that proof of a prior conviction that will be used for enhancing a sentence be proved beyond a reasonable doubt. State vs. Zingis, 259 N.J. 1(2024); Erlinger vs. United States, 602 U.S. 821(2024). For a stay of sentence, see State vs. Robertson, 238 N.J. 138(2017).

j) Amendment of complaint during trial – Rule 7:14-2. The court may amend any process or pleading for any omission or defect therein or for any variance between the complaint and the evidence adduced at the trial, but no such amendment shall be permitted which charges a different substantive offense, other than a lesser included offense. If the defendant is surprised as a result of such amendment, the court shall

adjourn the hearing to a future date, upon such terms as the court deems appropriate.

Instructor Comment: This Rule can trigger enormous fights in court as the court seeks (at the prosecutor's request) to amend the complaint that was actually tried to conform to the proofs. The key argument from defense is to note the difference in offense elements, unless the amended charge constitutes a lesser-included offense - e.g., simple assault to harassment. State vs. Berka, 211 N.J.Super 717(LawDiv.1986).

## Part II

### Important Rules of Evidence

a) N.J.R.E. 101(a)(3) – Relaxation. Except for testimonial privileges, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice - *e.g.*, sentencing and hearings to determine the admissibility of evidence under N.J.R.E. 104(a) - *e.g.*, qualifications of an expert or motions to suppress evidence.

But in a Miranda hearing under N.J.R.E. 104(c), the Rules of Evidence do apply and the burden of proof is beyond a reasonable doubt.

Instructor Comment: Defendant’s testimony during a N.J.R.E. 104 hearing. Under N.J.R.E. 104(d), by testifying on a preliminary matter, a defendant in a criminal proceeding does not become subject to cross-examination on other issues in the case. In fact, the motion testimony would never be admissible as substantive evidence at trial and is restricted to impeachment in the event the defendant testifies at trial and contradicts his motion testimony. Harris vs. New York, 401 U.S. 222(1971) (suppressed admissions as a result of Miranda violations).

b) N.J.R.E. 611 – Trial procedures. (a) Control by Court, Purposes. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting witness credibility. The court may allow

inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop witness testimony. Ordinarily, leading questions should be permitted on cross-examination.

When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

c) N.J.R.E. 401 – Relevance and the exclusion of relevant evidence.

1) Relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

2) N.J.R.E. 402 – All relevant evidence is admissible, except as otherwise provided in these rules or by law.

3) N.J.R.E. 403 – Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury, or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

d) N.J.R.E. 701 – Lay opinion evidence.

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

(a) is rationally based on the witness' perception; and

(b) will assist in understanding the witness' testimony or determining a fact in issue.

e) N.J.R.E. 702 Expert Opinion [SKEET].

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Instructor Comment: In general, an expert witness should not be subject to sequestration during a municipal court trial State vs. Popovich, 405 N.J.Super 324(App.Div.2009). Moreover, trial courts have the discretion to allow defense experts to testify remotely. State vs. Lansing, 479 N.J.Super 565(App.Div.2024).

### Part III

## Burdens of Persuasion – N.J.R.E. 101(b)(1)



This means the obligation of a party to meet the requirements of a rule of law that the fact be proved by a preponderance of the evidence, by clear and convincing evidence, beyond a reasonable doubt, or such other standard as required by law.

a) Proof beyond a reasonable doubt. A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have. State vs. Medina, 147 N.J. 43, 61(1996).

b) Clear and convincing evidence. Evidence that which ‘produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,’ evidence ‘so clear, direct, weighty, and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 N.J. 67, 74(1993).

c) Preponderance of the evidence. Proof which leads the fact-finder to conclude that the existence of the contested fact is more probable than its nonexistence - i.e., more than 50% of the credible evidence. Liberty Mutual vs. Land, 186 N.J. 163, 169(2006).

d) Probable cause. A well-grounded suspicion that a crime has been or is being committed or evidence of a crime can be found at a particular location. State vs. Nishina, 175 N.J. 502, 515(2003).

e) Reasonable suspicion. In determining whether an officer acts reasonably in circumstances where this level of proof is required, the court must give weight to specific, reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience. Terry vs. Ohio, 392 U.S. 1(1968).

Instructor Comment: See State vs. Bernokeits, 423 N.J.Super 365(App.Div.2011), for a discussion of the difference between reasonable suspicion and probable cause in a motor vehicle stop.

## **Part IV**

### **Common Mistakes By Prosecutors at Trial**

A few examples:

- ☑ Failure to adequately prepare for trial.
- ☑ Failure to secure the attendance of indispensable witnesses for trial.
- ☑ Failure to prepare witnesses to testify.
- ☑ Failure to disprove an affirmative defenses beyond a reasonable doubt. See, e.g., State vs. Romano, 355 N.J. 21, 35-36(App.Div.2002).
- ☑ Failure to prove a required element of an offense, typically a culpability state. N.J.S.A. 2C:2-2.
- ☑ Failure to establish sentencing enhancements at trial—e.g., bodily injury under N.J.S.A. 39:3-40(e). See State vs. Natale, 184 N.J. 458 (2005); Apprendi vs. New Jersey, 530 U.S. 466, 494(2000).
- ☑ Failure to prove a prior conviction beyond a reasonable doubt. State vs. Zingis, 259 N.J. 1(2024);
- ☑ Neglecting to introduce required foundational evidence. State vs. Campbell, 436 N.J.Super 264(App.Div.2014).