**Garden State CLE Presents:**

# Ethical Issues in DWI Trials

**Instructors**

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## Lesson Plan

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# Part I
# Plea Agreements

In general - The overwhelming majority of DWI and Refusal cases in New Jersey will ultimately be resolved by way of a plea agreement. Although DWI and refusal plea bargaining is now permitted by statute in these types of cases, certain procedural restrictions still apply. These include the following:

a) Assuming the court has both territorial and subject-matter jurisdiction, the agreement must call for both a legal sentence and be in the interests of justice.

Rule 7:6-2(d)(5)

> [T]he sentence recommendations [in the agreement], if any, do not circumvent minimum sentences required by law for the offense.
>
> Pursuant to paragraph (a)(1) of this rule, when a plea agreement is reached, its terms and the factual basis that supports the charge(s) shall be fully set forth on the record personally by the prosecutor, except as provided in Guideline 3 for Operation of Plea Agreements. If the judge determines that the interests of justice would not be served by accepting the agreement, the judge shall so state and the defendant shall be informed of the right to withdraw the plea if already entered.

Commentary - Plea agreements as to DWI, traffic and d/p matters should not involve amendments to municipal ordinance violations as these are generally preempted by virtue of N.J.S.A. 2C:1-5. See State vs. Felder, 329 N.J.Super 471, 748(App.Div.2000); State (Tp. of West Orange) vs. Paserchia, 356 N.J.Super 461(App.Div.2003).

A plea agreement that involves the pre-plea, voluntary payment of restitution to a victim should be placed on the record with the judge and prosecutor making a finding that the amount was reasonable and the payment in the interests of justice. In re Friedland, 59 N.J. 209(1971).

b)Negotiating Process - No involvement by the Judge

Although the Part VII Rules are silent on this issue, it is settled law that the attorneys should not involve the trial judge in their plea discussions.

Rule 3:9-3(a):

> The prosecutor and defense attorney may engage in discussions relating to pleas and sentences and shall engage in discussions about such matters as will promote a fair and expeditious disposition of the case, but except as hereinafter authorized the judge shall take no part in such discussions.

Commentary - The plea and sentence agreement is an all or nothing proposition. The defendant and State are entitled to strict enforcement of the terms of the agreement. A deviation from the sentence agreement by the judge permits the defendant to withdraw. The defendant may argue and receive a sentence that is less than recommended under a plea bargain sentence cap. By contrast, the State may not withdraw from an agreement where the judge sentences under the recommended cap. See State vs. Warren, 115 N.J. 433(1989).

c) Negotiating Process - No Involvement by the Police
State v. Marsh, 290 N.J.Super 663, 666(App.Div.1996)

> What is clear from this all-inclusive scheme is that there is no room to allow a municipal police officer to make deals with offenders against the laws. Since the officer has no authority to bargain, it follows that he or she has no power to promise

> dismissal of a pending charge. His or her mission is to act in good faith and with reasonable diligence in bringing criminals to justice. Recognition of such unfettered power in police officers would undermine the prosecutor's and municipal judge's primary control over case disposition in the municipal court[.]

c) No Stipulations as to Probable Cause

ACPE 661 (May 18, 1992)

Even if probable cause is present in the subjective opinion of the prosecutor, it is improper for the prosecutor to insist upon a defendant's acknowledgment of the existence of probable cause. A defendant's acknowledgment of the existence of probable cause is irrelevant to both the purpose and the propriety of a plea bargain. The true purpose for such a question can only be to enhance law enforcement's position unfairly or to relieve the prosecutor improperly of the obligation to ascertain the existence of probable cause. Requiring an affirmative answer to this first question is thus improper.

Commentary - Note that an opinion from the ACPE has the force and effect of law. It is mandatory unless or until it has been withdrawn or modified by the Supreme Court.

## Part II
## Trial issues

a) Raising novel, irrelevant, prohibited or ridiculous defenses to a DWI or refusal charge.

i) R.P.C. 3.1 Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ii) Parallel Rule 1:4-8(a):

The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

> 2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

Commentary - The Supreme Court has expressed a view that, at least in the PCR process, novel, rejected or marginal defenses should be raised at the request of the defendant and advocated by defense counsel, letting the court decide the merits of the issue. See State vs. Rue, 175 N.J. 1, 19(2002).

b) Participation by the defendant – Advocacy under R.P.C. 1.2 vests three decisions in the sole discretion of a client:

> In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

In the context of a DWI defense, apart from the plea to be entered and the decision as to whether to testify, every other decision on the defense of the case is based upon the attorney's best judgment.

Best practice is to engage in a *voir dire* of the defendant when the time comes for the defendant to choose whether to testify.

c) Knowingly advocating or submitting false evidence – In re Edson, 108 N.J. 464, 472-73(1987) (Disbarment)

> One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We

have travelled different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers—most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated *473 by this record. There could hardly be a plainer case of dishonesty touching the administration of justice and arising out of the practice of law. [T]he bond of trust so essential to the legal profession is built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution.

Commentary – This case was responsible for the Court's banning of the defense of retrograde extrapolation as expressed in State vs. Tischio, 107 N.J. 504(1987).

d) Candor Before the Tribunal – R.P.C. 3.3(a)(5)

i) A lawyer shall not knowingly fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

ii) In re Seelig, 180 N.J. 234(2004) (no discipline) (See N.J.S.A. 2B:12-17.2)

The United States Supreme Court has held that a criminal defendant's right to assistance of counsel does not include the right to cooperation in the commission of perjury in violation of the ethical standards established by states to govern

attorney conduct. Because an attorney does not function merely as an advocate but also as an officer of the court, the attorney's ethical duty to advance the interests of his [or her] client is limited by an equally solemn duty to comply with the law and standards of professional conduct.

iii) In re Lipari, 256 N.J. 354(2024) (Three-month suspension based upon improper dismissal of driving under the influence of drugs case.)

iv) In re Norton and Kress, 128 N.J. 520, 537–41(1992) (Three-month suspensions as discipline both defense attorney and prosecutor in drunk driving action for not disclosing that charges were dropped without good cause);

v) In re Whitmore, 117 N.J. 472, 475–80(1990) (Reprimand in a case where finding municipal prosecutor was in violation of R.P.C. 3.3(a)(5) when he failed to inform court that police officer was intentionally unavailable due to "corrupt agreement" and court dismissed drunk driving charge).

vi) In re Bradley, ___ N.J. ___(2022) (Censure) Respondent represented a client in one municipal court on a driving while intoxicated offense, to which the client pleaded guilty and was sentenced as a first-time offender. On the very same day, respondent appeared with the same client in another municipal court on another driving while intoxicated offense, to which the client pleaded guilty and was sentenced again as a first-time offender. When asked by the second court if the client was a first-time offender, respondent failed to disclose his client's conviction from earlier that day. Instead, respondent affirmatively noted his client's driving abstract,

which had yet to be updated, indicated his first time status, thereby misleading the court as to the client's true status.

vii) In re Mott, 231 N.J. 22(2017) (six-month suspension and five-year ban on prosecuting; the municipal prosecutor improperly dismissed a speeding ticket for an employee of her family farm, failed to disclose her conflict of interest to the court, and misrepresented to the court that the dismissal was due to a problem with discovery

viii) Ticket-Fixing – In re Weishoff, 75 N.J. 326(1978) (one year suspension), a municipal prosecutor had a court administrator pretend to be the absent defendant in support of a motion to dismiss for lack of prosecution, an application that was granted by the judge who was fully aware of the fraud.

e) Prosecutors - Trial discovery and preparation

i) In General - State vs. Prickett, 240 N.J.Super 139, 145-46(App.Div.1990).

> Preparation of the State's case is clearly a prosecutorial function and is a responsibility that cannot be shifted to others. Any attempt by the prosecutor to place this function upon the clerk, who is an impartial judicial officer, is improper. The prosecutor, contrary to an ordinary advocate, has a duty to see that justice be done. He is not to prosecute, for example, when the evidence does not support the State's charges. Consequently, the prosecutor has an obligation to defendants as well as the State and the public. Our discovery rules

> implicate that obligation, an obligation which can be discharged by no one else. Thus, it is the municipal prosecutor who selects the State's witnesses, requests postponements for the State, complies with discovery rules, requests dismissal if the State cannot make out a case, and does all else necessary to prepare and present the State's cases in the municipal court.

ii) Prosecutor's preparation for trial - In re Segal, 130 N.J. 468, 480(1992) (Reprimand)

As with any trial attorney, a municipal prosecutor has the duty adequately to prepare for trial. The prosecutor must select the State's witnesses and prepare and present the State's evidence in court. Because the State is the municipal prosecutor's client, a failure to discharge the obligations of his office is a violation of a prosecutor's professional responsibility to represent the client diligently. When a prosecutor has available relevant evidence bearing on a prosecution, and the prosecutor's failure to present that evidence in the course of trial results in acquittal, that prosecutor has not diligently discharged his or her duty to prepare and present the State's case. Furthermore, when the failure to prepare for trial and present relevant evidence prejudices the State's case, the prosecutor's deviation from that duty may be so severe as to constitute gross negligence.

f) Attorneys Who Drive While Intoxicated

i) In General - As a motor vehicle ticket, a violation of N.J.S.A. 39:4-50(a) does not usually trigger any level of

attorney discipline. However, when the DWI ticket is companion to criminal or disorderly persons' charges, the attorney will likely be subject to professional discipline after the case has been concluded.

ii) Disciplinary outcomes - Low 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);
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> 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).

# **Part III**
# **Judicial Misconduct**

a) Involvement in the Defense of the DWI Case

i) In re Spitalnick, 63 N.J. 429, 432(1973) (Two-year suspension from practice) (A municipal-court judge, acting as an attorney, made representations on behalf of a defendant to another municipal-court judge without regard to whether those representations were true in an effort to persuade that judge to find defendant not guilty.)

Nowhere can the community be more sensitive to the regularities—and irregularities—of judicial administration that at the local level. While on the grand scale of events a traffic violation may be of small significance, the corruption of judicial administration of a Municipal Court is of paramount importance. Such conduct, visible and apparent to the community, destroys the trust and confidence in our institutions upon which our entire governmental structure is predicated. We cannot and will not tolerate members of the profession subverting judicial integrity at any level, for the damage is irreparable.

ii) In re Sgro, 63 N.J. 538(1973) (Six-month suspension from practice). The judge's inexperience, youth and otherwise good reputation in the community were important factors. Moreover, it seemed to the Court that Sgro had been victimized by the older and more experienced judge, Spitalnick.

iii) In re DeLuca and Terkowitz, 76 N.J. 329(1978) (one-year suspensions from practice)

This 1978 case involved a ticket alleging passing a stopped school bus. The defendant was employed as a secretary to a former municipal court judge (Terkowitz). In order to help, the former judge called the then sitting judge (DeLucia) and explained that the reason for the defendant's passing of the school bus was due to an obstruction of her view. After consulting with the complainant police officer, the judge marked the complaint with a finding of not guilty. As in the Sgro case, the disposition of not guilty was entered in the absence of any court event or evidence. When the matter was ultimately investigated by the Office of the County Prosecutor, the offending judge (DeLuca) engaged in a cover-up that involved, among other misdeeds, the filing of a back-dated affidavit. The false *jurat* was acknowledged by the former judge (Terkowitz) in a joint effort to advance the cover-up. As a result of this misconduct, the Supreme Court ordered a one-year suspension from the practice of law for both Terkowitz and DeLucia.

iv) In re Hardt, 72 N.J. 160, 369 A.2d 5(1977). (Removal) Judge permitted a sham motion to dismiss with the cooperation of the prosecutor and a court administrator.

b) Judges Who Drive While Intoxicated

i) Public policy: We 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. We firmly endorse the governmental commitment to the eradication of drunk driving as one of the judiciary's own highest priorities. In re Connor, 124 N.J. 18 21(1991).

ii) The imposition of discipline for judges who plead guilty to drunk-driving is somewhat rigid and entirely predictable based upon the facts. Discipline is imposed as follows:

c) Routine DWI with No Aggravating Factors = Reprimand

i) Aggravating factors such as attempting to seek special treatment due to status (In re Baptista, 225 N.J. 9(2016)), tumultuous behavior (In re Annich, 130 N.J. 538(1993)) or attempting to subvert the process (In re Tourison, 199 N.J. 121(2009)) = censure.

ii) Subsequent DWI Convictions = 60-day suspension from practice. In re Collester, 126 N.J. 468(1992); In re Connor, 124 N.J. 18(1991).

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