

Garden State CLE Presents:

**Successful (and relatively ethical)
Plea Bargains in DWI Cases**



Instructor:

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Lesson Plan

I. Plea Agreements

a) In general - The overwhelming majority of cases charging DWI, Refusal and companion charges in New Jersey will ultimately be resolved by way of a plea agreement. This procedure is no longer prohibited by the plea-bargaining Guideline restrictions due to statutory amendments to N.J.S.A. 39:3-40(a)(3) and N.J.S.A. 39:4-50.4a(a)(3).

b) Remaining plea-bargaining limitations - 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.

c) A plea agreement is based on the “mutuality of advantage” it affords to both the State and defendant. It requires a meeting of the minds upon the negotiated pleas and is an executory agreement since it depends on the approval of the sentencing court. State vs. Smith, 306 N.J. Super 370, 383(App.Div.1997)). A successful agreement allows the State to conserve the time, resources and risk of a trial while allowing for some

measure of punishment for the defendant's violations. Conversely, the defendant limits his exposure and has a voice in the level of punishment he will receive.

d) Good faith and fair dealing - If plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either. State vs. Thomas, 61 N.J. 314, 321(1972). The primary goal for defense counsel is to obtain a resolution that will realistically meet his client's needs and expectations to the maximum extent possible. However, as a practical (as opposed to ethical) matter, in order to sell the agreement, the defense attorney should be sensitive to the needs of all the participants and propose a plea agreement that meets the needs of everyone, including victims, witnesses, the prosecutor and the sentencing court. By way of example, the prosecutor has a duty to do justice with consideration for needs of victims. Judges must impose sentences that are both legally authorized and in the interests of justice.

e) What should be revealed during the negotiating process? - In terms of fair dealing, it is important to remember that most of the time, the defense attorney will know far more about the case than the prosecutor. The ethical dilemma is what should be revealed as opposed to protecting privileged communications. Typical issues relate to prior DWI convictions, injured parties, other pending DWI cases, egregious facts surrounding the DWI case, etc.

f) What we are pretty sure of vs. What we are not sure of - The problem is that the Rules of Professional Conduct (RPC) that bind the attorneys and judges are not always clear, well-defined, or obvious in the DWI plea bargaining context. The following sections will detail the pitfalls and ethical challenges legal professionals face in the DWI plea bargaining process.

II. Ethical Restrictions About Which We Are Pretty Sure

- a) Amendment of tickets and quasi-criminal charges to ordinance violations.

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).

- b) Pre-plea agreements to pay voluntary restitution to a victim

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).

- c) 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.

d) Strict enforcement of the plea agreement terms and conditions

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).

e) No involvement by the police – State vs. 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[.]

f) 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. 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.

g) Justifying the agreement upon prohibited defenses to a DWI or refusal charge. State vs. Baverov, ___N.J. Super ___ (App.Div.2025) 2025 WL 2301219

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;

h) Civil reservations – A civil reservation application must be made in open court at the time of sentencing. Maida vs. Kuskin, 221 N.J. 112, 127-28(2015). However, when a civil reservation is included as a component of a plea agreement, an aggrieved victim has no standing to object. State vs. Lavrik, 472 N.J.Super 192, 210(App.Div.2022).

i) Dismissal of companion tickets – not merger – Pursuant to a plea agreement, tickets that are marked by the judge as dismissed by way of merger will trigger the imposition of penalty points by MVC. See State vs. Price, 2007 WL 3287844. The better option is to agree to an outright dismissal as a component of the agreement.

j) 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. Notwithstanding the limited nature of the defendant's involvement, every *bona fide* plea offer extended by the prosecutor to the defendant should be promptly communicated to the defendant and discussed.

Ethical standards provide guidance as to the level of care applicable to the representation of defendants in the plea negotiation process. Under R.P.C. 1.2, an attorney must abide by a client's decisions concerning the objectives of representation.

In this regard, as general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

Thus, a defense counsel's duty to provide representation in the plea negotiation process plainly includes the duty to explore the possibility of resolving the charges through a plea agreement when directed to do so by a client, to keep the client informed of a plea offer, and to follow the client's instructions in accepting or rejecting the plea offer. State vs. Pych, 213 N.J.Super 446, 459(App.Div.1986)).

k.) 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.

l) Agreement to not file an appeal - The Supreme Court has held that a defendant may appeal his sentence even if he had agreed to waive the right of appeal as part of a plea agreement. Also, the waiver should rarely be needed, given the presumption of reasonableness that attaches to criminal sentences imposed under a plea bargain. State vs. Gibson, 68 N.J. 499(1975).

m) Other DWI ethics disciplinary cases

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

ii) 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);

iii) 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).

iv) 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. 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.

v) 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

vi) 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.

n) Victims' Rights – Under N.J.S.A. 39:4-50.11(g), a victim in a DWI case has the right to submit to the court adjudicating the offense a written or oral statement to be considered in deciding upon sentencing and probation terms. This statement may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss of earnings or ability to work suffered by the victim and the effect of the offense upon the victim's family.

A victim is defined as a person who suffers personal physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a motor vehicle accident involving another person's driving while under the influence of drugs or alcohol. In the event of a death, "victim" means the surviving spouse, a child or the next

A municipal prosecutor cannot engage in good faith negotiations when there is a victim of which he is unaware. Moreover, a judge cannot determine if a plea agreement is in the interests of justice with giving the victim an opportunity to appear and be heard. In a worst case, the plea and sentence would be nullified as a result of N.J.S.A. 2B:12-17.2. Accordingly, the best practice is to alert the prosecutor as to the existence of victims.

III. Ethical Restrictions About Which We Are Not So Sure

In general – In the DWI plea bargaining context, this is constantly in play.

a) 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.

b) Instructor's commentary – As a result of the Court's decision in Seelig, the Legislature enacted N.J.S.A. 2B:12-17.2(a) which removes jurisdiction *ab initio* from the municipal court in any Title 39 case that involves death or serious bodily injury, pending review and approval from the county prosecutor and transfer of the case back to municipal court by the Superior Court. Perhaps the best course is for defense counsel to reveal such circumstances to the prosecutor during plea negotiations, rather than risk an outcome that will be deemed void at some future date.

c) Prior convictions for DWI and refusal – R.P.C. 3.3(a)(5) implicates other ethical challenges for attorneys at during plea negotiations that has yet to be decided. In Mitchell vs. United States, 526 U.S. 314(1999), the Court ruled that, apart from establishing a factual basis for a guilty plea, a defendant has the unconditional right to remain silent at sentencing. Additionally, no adverse inferences can be drawn by the Court from the defendant's silence. This issue becomes vitally important when the issue relates to prior DWI convictions in New Jersey and other states.

The State is the moving party at sentencing. Moreover, establishing the existence of prior DWI convictions has been assigned to the prosecutor through the case law.

Specifically:

We now order that during the initial conference for a DWI matter, the court shall inquire whether the pending matter represents the first or subsequent DWI for a defendant. If the record reflects that the defendant has a prior conviction for DWI, the prosecutor must inform the court, defendant, and defense counsel whether it occurred between the critical dates of November 5, 2008 and April 2016, information readily available to the State in the defendant's abstract. If so, we now order that the court must then schedule a

discovery conference for the State to fulfill its obligation and provide to the defendant and counsel, as well as the court, discovery indicating whether the defendant is a Dennis-affected defendant. State vs. Zingis, 259 N.J. 1, 18(2024).

Prior convictions that occurred out-of-state can impact N.J. DWI sentences. It is doubtful that the existence of a prior conviction as related by the defendant to his attorney constitutes a privileged communication due to the public nature of such records. However, it does appear that neither the defendant nor his attorney has an affirmative, ethical duty to reveal such convictions. Perhaps the best procedure is for both the defense attorney and his client to remain silent and leave the State to its proofs. The key is to not affirmatively mislead the prosecutor during the plea negotiations nor the Court at sentencing.