Garden State CLE
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Video Course Evaluation Form

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Required: When you hear the bell sound, write down the secret word that appears on your screen on this form.

Word #1 was: _____ Word #2 was: _____

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What did you like most about the seminar?

_____

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_____

_____

I Certify that I watched, in its entirety, the above-listed CLE Course

Signature _____ Date _____

Garden State CLE presents:

The Allowing Offense

Lesson Plan

Table of Contents

Part I – Elements of Offense

How the offense is committed:

a. NJSA 39:4-50(a)

1. Under the Influence:

Permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control;

2. *Per Se* Violation:

Permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more [but less than 0.10%] by weight of alcohol in the defendant's blood;

b. NJSA 39:4-50(a)(1)(i)

1. Under the Influence:

Permits another person who is under the influence of narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control;

2. *Per Se* Violation:

Permits another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle;

c. Culpability – Statute appears to be strict liability, but requires "knowledge" as an element for both the *per se* violation as well being under the influence.

The elements of the allowing offense have been defined by the Appellate Division as follows. "Accordingly, we hold that before a person may be convicted of permitting another person to operate a motor vehicle under the influence of intoxicating liquor or drugs, or in violation of the statutory standard for blood alcohol level, the State must produce evidence from which the trier of fact may reasonably infer, beyond a reasonable doubt, that such owner or custodian knew or reasonably should have known, of the permittee's impaired condition to drive." State v. Skillman, 226 N.J. Super. 193, 199-200, 543 A.2d 1016 (App. Div. 1988).

d. Culpability – The level of knowledge must be objective – not subjective.

The allowing offense under N.J.S.A. 39:4-50(a) requires a showing of knowledge in an objective sense, not subjective. Thus the test is what a reasonable person knew or should have known from the attendant circumstances, not what the defendant actually knew regarding the intoxicated state of the person whom he permitted to drive. State v. Zanger, 370 N.J. Super. 360, 851 A.2d 134 (Law Div. 2004).

e. Culpability – Note that a defendant charged under the school zone allowing offense (NJSA 39:4-50(g)) is subject to vicarious liability.

Part II – Plea Bargaining Restrictions

a. Guideline 4(A)

GUIDELINE 4. LIMITATION.

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50);

b. State v. Hessen, 145 NJ 441, 458-59 (1996)

Moreover, the Legislature clearly viewed a person who allows an intoxicated person to drive as one who contributes to the awful consequences of drunk driving and, therefore, shares the responsibility for those consequences. That person is as blameworthy as the drunk driver-her conduct is included in the drunk-driving statute, *N.J.S.A.* 39:4-50; it is an offense of equal magnitude to drunk driving; and it is subject to the same punishment that is applicable to an intoxicated driver. The act of unleashing a drunk driver onto the highways creates the very risk to the safety of other drivers and the public that is posed by the intoxicated driver. The Legislature has seen fit to define the offense as one of the same gravity as drunk driving itself and to prescribe identical punishments for both offenses. Those considerations impelled this Court to treat these two types of offenders consistently, subjecting them to identical restrictions in plea bargaining.

The policies behind our prohibition on plea agreements are as readily applicable to those who allow an intoxicated person to drive as they are to the driver. Both are responsible for the "senseless havoc" of drunk driving. In the eyes of the law there is no distinction in culpability or punishment between drunk drivers and those who allow the drunk to drive. The Guideline that prohibits plea bargaining in all drunk-driving cases recognizes no distinction between the two offenders.

c. Note commentary in State v. Kashi, 180 NJ 45, 47 (2004)

In *State v. Hessen*, 145 *N.J.* 441, 454-59, 678 *A.*2d 1082 (1996), we addressed whether the ban against plea bargaining for the offense of driving while under the influence of liquor or drugs, *N.J.S.A.* 39:4-50(a), applied to a charge of "permitting" an intoxicated person to drive one's vehicle. In finding that the ban applied, we stated that *N.J.S.A.* 39:4-50(a) includes four specific offenses:

[1] Operating a motor vehicle while under the influence of intoxicating liquor or drugs;

[2] Operating a motor vehicle with a blood alcohol concentration of 0.10% or more;

[3] Permitting another person who is under the influence of intoxicating liquor or drugs to operate a motor vehicle which one owns or has in one's custody or control;

[4] Permitting another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle which one owns or has in one's custody or control.

We no longer subscribe to the position that *N.J.S.A.* 39:4-50(a) describes four specific offenses. Rather, we agree with the Appellate Division that *N.J.S.A.* 39:4-50(a) creates one offense that may be proved by alternative evidential methods. Our view is fortified by the sentencing provisions in *N.J.S.A.* 39:4-50(a), providing penalties for the "first offense," "second violation," and "third or subsequent violation." *N.J.S.A.* 39:4-50(a)(1)-(a)(3). The terms "first offense," "second violation," and "subsequent or third violation," refer to the single offense of driving while intoxicated set forth in *N.J.S.A.* 39:4-50(a). Consequently, we hold that *N.J.S.A.* 39:4-50(a) is a unified offense under which a defendant can be found guilty on alternate bases.

Part III – Inferences of Guilt from Silence

a. State v. Stas, ___ NJ ___ (2012)

We find that the Law Division's reliance on defendant's silence at the scene of the accident prejudiced a substantial constitutional right and was clearly capable of producing an unjust result. The Law Division could not convict defendant of the "allowing" offense under *N.J.S.A.* 39:4–50 unless it concluded beyond a reasonable doubt that Putz had been the driver, in contravention of both defendants' trial testimony. *N.J.S.A.* 39:4–50. The State's evidence on that issue, presented at the municipal court and relied upon in the de novo trial before the Law Division, consisted of two components: Putz's statement to police, recanted at trial, and defendant's silence as he observed the testing, interrogation and arrest of Putz. The Law Division prominently featured defendant's silence in its explanation of the basis for its decision, not only as it affected defendant's credibility but as substantive evidence of his guilt. Defendant's silence, improperly relied upon by the Law Division, cannot be isolated from the remaining evidence considered by the court. Because the improper evidence of silence was a significant factor in defendant's conviction, we reverse and remand to the municipal court for a new trial.

b. Non-testimonial Evidence

Refusals – State v. Stever, 107 NJ 543, 558 (1987)

Voice Identification – State v. Carey, 49 NJ 343 (1967)

Breath Samples – State v. DeLorenzo, 210 NJ Super. 100 (App. Div. 1986)

Field Sobriety - State v. Taylor, 199 NJ Super. 339 (Law Div. 1984)

Part IV – Ethical Issues Related to Joint Representation

a. Rule 7:7-10

No attorney or law firm shall enter an appearance for or represent more than one defendant in a multi-defendant trial or enter a plea for any defendant without first securing the court's permission by motion made in the presence of the defendants who seek joint representation. The motion shall be made as early as practicable in the proceedings in order to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

b. RPC 1.7

RPC 1.7. Conflict of Interest: General Rule

- **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    - **(1)** the representation of one client will be directly adverse to another client; or
    - **(2)** there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- **(b)** Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
    - **(1)** each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
    - **(2)** the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    - **(3)** the representation is not prohibited by law; and
    - **(4)** the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

c. In re Guidone, 139 NJ 272, 276-77 (1994)

The more difficult issue is the appropriate measure of discipline. The purpose of discipline is not to punish the offender but to protect the public. Through our disciplinary system, we seek to maintain the public's confidence in the integrity of attorneys. Consequently, “The severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant circumstances.

We have generally found that in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline. Of course, when an attorney's conflict of interest causes serious economic injury to clients, we have not hesitated to impose a period of suspension.

Part V – Civil Liability

a. Duty of a passenger to warn other passengers—Absent a special relationship between the operator and passenger, such as guardian and ward, a passenger owes no duty under New Jersey law to warn other passengers in a motor vehicle of the intoxicated condition of the operator. Champion ex rel. Ezzo v. Dunfee, 398 N.J. Super. 112, 939 A.2d 825 (App. Div. 2008).

b. Duty of a passenger to render aid to an injured victim—The passengers of a motor vehicle that has been operated by an intoxicated driver have an affirmative duty to come to the aid of a person injured by the intoxicated driver as well as a duty to refrain from thwarting the intoxicated operating from seek help or aiding the injured victim. Podias v. Mairs, 394 N.J. Super. 338, 926 A.2d 859 (App. Div. 2007).

c. Loss of Cause of Action following conviction:

NJSA 39:6A-4.5

b. Any person who is convicted of, or pleads guilty to, operating a motor vehicle in violation of R.S.39:4-50, section 2 of P.L.1981, c. 512 (C.39:4-50.4a), or a similar statute from any other jurisdiction, in connection with an accident, shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.