

Garden State CLE presents:

Municipal Prosecutor Training:
Prosecuting a DWI Blood Case



**Joseph P. Rem, Jr.,
Certified Criminal Trial Attorney**



Instructor

Part I – Discovery

The initial securing of a blood sample from a DWI suspect will usually involve the police and their response to an accident.

Injuries to the suspect may make it necessary for him to receive hospital treatment and not permit the administration of an Alcotest. If the defendant or another person has sustained a serious bodily injury or death, the case must be referred to the county prosecutor N.J.S.A. 2B:12-17.2. The municipal prosecutor has a duty to inform the municipal court judge as to death or any injuries. N.J.S.A. 39:5-51.

Police may choose to have blood drawn as either an adjunct or substitute to the Alcotest procedures without injuries as a factor

The blood sample may also be taken by the hospital for purposes of diagnosis and treatment.

1. Basic Discovery items will involve:

2. Police reports

3. Names of witnesses (Including persons who drew & tested samples)

4. Laboratory reports showing blood testing results

5. Charts & graphs (State v. Weller, 225 N.J.Super. 274 (Law Div. 1986)).

6. Issuance of a subpoena *duces tecum* in cases of hospital blood. State v. Dyal, 97 N.J. 229 (1984). See Rule 7:7-8(d)

Part II – Motions to suppress evidence

In blood cases, the motions to suppress evidence will center on four distinct topics and two exceptions to the warrant requirement, consent and exigent circumstances:

- 1. Unreasonable use of force – State v. Ravotto, 169 N.J. 227 (2001)**
- 2. Voluntariness of consent (burden is clear & convincing evidence)**
- 3. Defects in the search warrant application process**
- 4. Insufficient exigency to excuse the warrant requirement**

If an order suppressing evidence is granted, it is subject to an automatic stay and a review by the Law Division under Rule 7:5-2(c). An order granting a motion to suppress evidence shall be entered immediately upon decision of the motion. Within ten days after its entry, the municipal court administrator shall provide a copy of the order to all parties and, if the county prosecutor is not the prosecuting attorney, also to the county prosecutor. All further proceedings in the municipal court shall be stayed pending a timely appeal by the State, pursuant to R. 3:24.

Part III – Trial Procedures

- 1. Establish operation of a motor vehicle by defendant**
- 2. Establish intoxication without regard to blood from the available evidence, including admissions, witness statements, physical evidence, inferences and the nature of the accident.**
- 3. Establish that blood was taken in a medically acceptable manner. NJSA 2A:62A-10 (Any person taking a specimen pursuant to section 1 of this act shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken pursuant to section 1 of this act and in a medically acceptable manner. The certificate shall be signed under oath before a notary public or other person empowered to take oaths and shall be admissible in any proceeding as evidence of the statements contained therein.)**
- 4. Resolve *Crawford* notice Issues (State v. Kent, 391 N.J.Super. 352 (App. Div. 2007)).**

- 5. Establish chain of custody of blood sample (A party introducing tangible evidence has the burden of laying a proper foundation for its admission. This foundation should include a showing of an uninterrupted chain of custody. The determination of whether the State sufficiently established the chain of custody is within the discretion of the trial court. Generally, evidence will be admitted if the court finds “in reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed. A defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced.” State v. Morton, 155 N.J. 383(1998)**
- 6. (Convert blood serum to BAC in cases involving hospital blood. State v. Lutz, 309 N.J.Super. 317 (App. Div. 1998) (Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a “serum alcohol value.” Serum contains more water than blood, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16.) This can be a matter of judicial notice.**
- 7. Introduce blood alcohol level into evidence.**
- 8. Judge may draw adverse inference from an unreasonable refusal to provide a blood sample (State v. Cryan, 363 N.J.Super. 442 (App. Div. 2003).**

Part IV – Sentencing

It is vital that people who have suffered injuries or property damage be afforded an opportunity to appear and testify at sentencing. N.J.S.A. 39:4-50.11(g) ([A victim of a drunk-driver 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.)

N.J.S.A. 39:4-50.10 (“Victim” means, unless otherwise indicated, 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 of kin.)