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Garden State CLE Presents:

DWI Sentencing
Meeting Your Client's Needs



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&

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Lesson Plan

I. Introduction

The goal of a defense advocate in a DWI case is to ascertain and needs of the client and attempt to resolve the case in a manner that best fulfills those needs. The ability to accomplish this goal is a function of:

- 1) The strength of the evidence against the client;
- 2) The probability of meeting the client's needs based upon the evidence;
- 3) The law related to DWI sentencing specific to the client's offense; and
- 4) The quality of the advocacy on behalf of the client.

II. Preliminary questions

Offense number

- a) A **first offense** level is indicated where the client has never been convicted of a DWI offense anywhere in the United States; or
- b) Has had one prior offense that occurred more than 10-years ago. The relevant date for this analysis is the date of operation for the offense, not the date of conviction.
- c) A **second offense** is indicated where the client has been previously convicted of a single DWI offense anywhere in the United States; or
- d) Has had two prior convictions, the second of which having occurred more than 10-years ago. The relevant date for this analysis is the date of operation for the second prior offense, not the date of conviction.
- e) A **third offense** occurs when the client has two prior offenses anywhere in the United States that are less than 10-years old based upon arrest date; or
- f) Three or more offenses anywhere in the United States regardless of the age of the last conviction.

III. Eliminating Prior Offenses

a) **Step-down** – The mere passage of time requires that a prior offense be disregarded for sentencing purposes after the passage of ten years. The date of offense is the relevant time marker. N.J.S.A. 39:4-50(a)(3) provides:

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

The step-down provisions also apply to the refusal charge. State vs. Fielding, 290 N.J.Super. 191(App. Div.1996).

b) **Laurick PCR Applications** - The grant of a Laurick application (State vs. Laurick, 120 N.J. 1(1990)) based upon a prior un-counseled conviction will eliminate the prior conviction for jail term enhancement. It also entitles the defendant to a step-down on the jail component of sentencing. State vs. Revie, 220 N.J. 126(2014). No time limit for filing this PCR application.

c) **Motion to Vacate a Guilty Plea** - Rule 7:6-2(b) - A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice. (No factual basis, etc, transcript necessary in most cases.)

d) **Post-Conviction Relief**: Ineffective assistance of counsel. Five-year limitation under Rule 7:10-2(b)(2). (Police reports and transcript, if available can be helpful in these cases)

e) **Trooper Dennis Cases** – PCR handled by Judge Fall's panel

Note double jeopardy issues related to DWI sentences that have been completely served. (State vs. Laird, 25 N.J. 298(1957).

IV. Range of Common Client Needs

- a) **D/L Loss** - The most significant need for clients is to avoid or minimize the loss of driving privileges. It is important to discuss with the client his driving responsibilities as to personal vehicle use as opposed to professional driving requirements (CDL, etc.)

- b) **Incarceration** - The vast majority of clients will want to avoid a jail term.

- c) **Immigration/Professional Licenses** – A collateral consequence of a DWI conviction is the impact it may have on immigration status or the ability to seek or maintain certain professional licenses.

- d) **Civil Consequences** – Accidents with injuries and property damage are a significant consideration. Moreover, a DWI or refusal conviction will bar the client from seeking damages himself for personal injury, property damages and pain/suffering.

- e) **Criminal Consequences** – The recklessness associated with a DWI incident may trigger a criminal prosecution. So too, operating on the revoked list during the window of the prior second or third offense DWI or refusal sentence.

V. Ignition Interlock Devices (IID)

a) Initial Client Meeting: IID Preliminary Questions

1) What offense number is this for the client? The sentencing for a first offense DWI (factually or by way of step-down) will be triggered in every case by the installation of the BAIID. Until a BAIID has been installed, a convicted defendant will be subject to an indefinite forfeiture of driving privileges.

2) What is the client's BAC? The BAC for a first offender will determine the length of the BAIID commitment or whether there will also be a determinate term of a license suspension.

3) Were you driving under the influence of drugs? There is no BAIID for a first offender u/I drugs, just a license forfeiture ranging from 7 to 12 months.

b) Initial Client Meeting: Legal Advice

1) Select a BAIID installation facility that is close to your home. This is because you will have to take your vehicle back for recalibration approximately every 60 days, a process that takes about one hour.

2) Shop around for the best price. Installers around the state have a variety of billing plans. Find the one that meets your financial abilities. You can find a list of licensed BAIID installers at this link:

https://www.state.nj.us/mvc/pdf/license/Licensed_Ignition_Interlock_Installers

3) If you cannot afford the cost of the BAIID, there are statutory discount programs available. If your family income does not exceed 100% of the federal poverty level, the monthly leasing fee shall be 50% of the fee established for persons who do not qualify for the reduced fee. If your family income does not exceed 149% of the federal poverty level, the monthly leasing fee shall be 75% of the fee established by regulation for persons who do not qualify for the reduced fee. Additionally, persons who qualify for a reduced fee are not be required to pay the initial installation fee, the cost for monitoring of the device, or any fees for calibration or removal of the device.

4) The BAIID only needs to be installed in one motor vehicle owned, leased, or principally operated by you.

5) During the term of the BAIID duration, you may not drive any vehicle in New Jersey other than one in which an ignition interlock device has been installed. If you do and get caught by the cops, you will be subject to a one-year suspension [N.J.S.A. 39:4-50.19(a)]. The same penalty applies to you if you try to start your vehicle by having someone (or something) else blow into the BAIID. The person who blows into the BAIID for you is a disorderly person [N.J.S.A. 39:4-50.19(b)(1)]. A person who knowingly allows you to operate a vehicle that does not have a BAIID is also a disorderly person. [N.J.S.A. 39:4-50.19(b)(3)].

6) A person who tampers with your BAIID or tries to circumvent its functions is a disorderly person [N.J.S.A. 39:4-50.19(b)(2)].

7) How does the BAIID work? In order to start your vehicle, you will have to blow a breath sample into the BAIID. If your BAC is less than 0.05%, the vehicle will start and function normally. However, a BAC of 0.05% or greater will prevent your vehicle from starting for one hour. After that time has expired, you can attempt to introduce another breath sample. Your BAIID will also require so-called rolling retests on a random basis about every 15 to 20 minutes while you are driving. If your BAC is measured at 0.05% or greater, the BAIID will create a loud, obnoxious noise in the vehicle and flash your lights and sound your horn. This will continue until you pull the vehicle over safely and shut off the engine. The engine will remain inoperable for one hour after which you can introduce a new sample of your breath.

8) You will have to bring your BAIID back to the installer about every 60 days so it can be recalibrated. If you do not perform this maintenance function, the BAIID will lock you out indefinitely and you will be unable to start your vehicle until you have obtained a one-time use lock-out code from your installer.

9) Can the BAIID be placed on other types of vehicles besides cars? Yes, it can be installed in trucks, motorcycles, boats and vehicles used at your place of work.

10) What if I do not own or drive any vehicle? Instead of the BAIID requirement, you will simply forfeiture your driving privileges for a period of time, depending upon your BAC level and what offense number this is for you. You will have to testify under oath that you do not own, lease or operate a motor vehicle. If you later acquire a vehicle during your suspension term, you must immediately notify the court and install an ignition interlock device in the vehicle. You may also be able to terminate the balance of your license suspension period by being resentenced.

11) What will happen when I go to court? If you are a first offender for either DWI with a BAC of less than 0.15%, a refusal, or both, it is important that you take the necessary steps to install the BAIID before your court date. If you are convicted by way of a guilty plea or a trial, the judge will forfeit your driving privileges until you go to the MVC and show proof that you have an interlock device. MVC will restore your driving privileges and return your license that will have a notation on it that you are restricted to driving vehicles equipped with a BAIID. If your BAC is 0.15% or greater, the installation of the BAIID will allow the judge to begin your license suspension term that will range from 4 to 6 months.

12) What about second and subsequent DWI offenders? The imposition of sentence is not dependent upon the installation of the BAIID. The judge will sentence you immediately to license forfeiture and order that you install the BAIID during the forfeiture period and for an additional term of 2 to 4 years after your driving privileges have been restored.

13) What if I am not from New Jersey? You can satisfy the BAIID requirement by having the device installed in your vehicle in your home state. The installer must represent a company that is licensed to install BAIID devices in New Jersey. [N.J.S.A. 39:4-50.20].

14) Should the case go to trial? Under the new law, there is no downside to trying a first offense DWI and/or refusal. Because school-zone offenses for DWI and refusal have been repealed, prosecutors only have companion tickets to exert any pressure for a guilty plea. Many clients may wish to take a chance at trial on a first offense due to immigration, civil suits and other collateral consequences related to a DWI conviction.

15) Removal of BAIID—An ignition interlock device can be removed on the date the defendant completes the installation period only if he submits to the MVC certification from the BAIID vendor that:

(1) during the final 30 days of the installation period there was not more than one failure to take or pass a test with a blood alcohol concentration of 0.08% or higher unless a re-test conducted within five minutes of the initial test indicates a blood alcohol concentration of less than 0.08%; and

(2) that the defendant complied with all required maintenance, repair, calibration, monitoring, and inspection requirements related to the device.

If the vendor does not issue a certification to the person because there were two or more test results of 0.08 BAC or greater during the final 30 days, the vendor must forward the violation information to the MVC and the court. The municipal court judge must then decide whether to extend the period of ignition interlock device installation for up to 90 days or order the issuance of the certification from the vendor to the chief administrator.

VI. DWI/Refusals – First Offense Sentencing Range

Generally speaking, the key issue in meeting a client's needs will focus on the BAC.

a) First Offender DWI Sentencing – BAC < .10

First offenders charged with driving under the influence of alcohol or with a BAC ranging from .08 but less than 0.10

Fine range: \$250—\$400

Additional costs and assessments: \$390

License forfeiture: The sentencing judge must impose an indefinite period of license forfeiture until the defendant installs an ignition interlock device in one motor vehicle the person owns, leases, or principally operates whichever the person most often operates.

Once installed, the BAIID must remain in use for three months (See N.J.S.A. 39:4-50.17(a)(1))

Defendant has no vehicle: License forfeiture of 3 months

Jail: discretionary up to 30 days

IDRC: 12 to 48 hours

MVC Surcharges: \$3000 (payable \$83.33 per month)

b) First Offenders Charged with Driving with a BAC Ranging From 0.10 But Less Than 0.15%

Fine range: \$300—\$500

Additional costs and assessments: \$390

License forfeiture: The sentencing judge must impose an indefinite period of license forfeiture until the defendant installs an ignition interlock device in one motor vehicle the person owns, leases, or principally operates whichever the person most often operates.

Once installed, the BAID must remain in use for period ranging from seven months to one year. (See N.J.S.A. 39:4-50.17(a)(1)(b)).

Defendant has no vehicle: License forfeiture of 7 months to one year

Jail: discretionary up to 30 days

IDRC: 12 to 48 hours

MVC Surcharges: \$3000 (payable \$83.33 per month)

c) First Offenders Charged with Driving with a BAC of 0.15% or Greater

Fine range: \$300—\$500

Additional costs and assessments: \$390

License forfeiture: The determinate term of license forfeiture for a defendant with this BAC level does not begin to run until the defendant has installed a BAID in one motor vehicle the person owns, leases, or principally operates whichever the person most often operates. Thereafter, a forfeiture term will begin ranging from 4 to 6 months. The BAID must remain installed during the determinate term of the forfeiture and for an additional period of 9 to 15 months after the defendant's driver's license has been returned. (N.J.S.A. 39:4-50-17(a)(2) (b)).

Defendant has no vehicle: License forfeiture of 13 to 21 months.

Jail: discretionary up to 30 days

IDRC: 12 to 48 hours

MVC Surcharges: \$3000 (payable \$83.33 per month)

d) First Offenders Charged With Driving Under the Influence of Drugs or Allowing Operation While Under the Influence of Drugs.

Fine range: \$300—\$500

Additional costs and assessments: \$389

License forfeiture: There is no BAID permitted for these defendants. Forfeiture ranges from 7 months to one year.

Jail: discretionary up to 30 days

IDRC: 12 to 48 hours

MVC Surcharges: \$3000 (payable \$83.33 per month)

e) **Refusals—First offenders**

Fine range: \$300—\$500

License forfeiture: For a first refusal, the judge must impose an indefinite forfeiture of driving privileges until the defendant installs an ignition interlock device in one motor vehicle owned, leased, or principally operated by the person, whichever the person most often operates. Once installed, the BAID must remain on the vehicle for a term ranging from 9 to 15 months (N.J.S.A. 39:4-50.17(a)(2)).

Companion DWI sentence: Statute is silent as to concurrent or consecutive BAID terms.

Defendant has no vehicle: License forfeiture of 9 to 15 months which may run either consecutive to or concurrent with the DWI license forfeiture.

Jail: None

IDRC: 12 to 48 hours

MVC Surcharges: \$3000 (payable \$83.33 per month)

VII. DWI Second Offense Sentencing Range

In the vast majority of cases, a companion refusal charge will be dismissed as part of a plea agreement. License suspension for second offense refusal (factually or in connection with) must run consecutive to DWI suspension.

DWI Fine range: \$500—\$1000

Additional costs and assessments: \$390

License forfeiture: Second offenders are subject to a license forfeiture ranging from one to two years. N.J.S.A. 39:4-50(a)(2). The BAIID must be installed both during and following the period of forfeiture set forth in the sentence. (N.J.S.A. 39:4-50.17(b)). After the forfeiture term is over and the defendant has received his license again, the BAIID must remain installed for an additional term ranging from 2 to 4 years. (N.J.S.A. 39:4-50.17(b)). Note, the amended statute does not specifically exclude U/I drugs drug or allowing drugged operation cases from the BAIID requirement as it does for first offenders.

Defendant has no vehicle: License forfeiture of 1 to 2 years followed by a forfeiture ranging from 2 to 4 years. These suspensions must run consecutively to the DWI license forfeiture.

Jail: 2 days (can be served in IDRC) to 90 days

RC: 48 hours of detainment

Community service: 60 days

MVC Surcharges: \$3000 (payable \$83.33 per month)

VIII. DWI Third or Subsequent Offense **Sentencing Range**

In the vast majority of cases, a companion refusal charge will be dismissed as part of a plea agreement. License suspension for third offense refusal (Factually or in connection with) must run consecutive to DWI suspension.

Fine range: \$1000

Additional costs and assessments: \$390

License forfeiture: Third or subsequent offenders are subject to a license forfeiture of 8 years. N.J.S.A. 39:4-50(a)(3). The BAID must be installed both during and after the forfeiture term in the sentence of the Court and must remain installed for an additional period ranging from 2 to 4 years after the forfeiture term is over and the defendant's license has been restored. (N.J.S.A. 39:4-50.17(b)). Note, the amended statute does not specifically exclude U/I drugs drug or allowing drugged operation cases from the BAID requirement as it does for first offenders.

Companion DWI sentence: Statute is silent as to concurrent or consecutive BAID terms.

Defendant has no vehicle: License forfeiture of 8 years followed by a forfeiture ranging from 2 to 4 years. These forfeitures must run consecutively to the DWI license forfeiture.

Jail: 180 days (up to 90 days can be served in an IDRC-approved inpatient facility)

IDRC: Completion of IDRC program an MVC condition of license restoration.

MVC Surcharges: \$3000 (payable \$83.33 per month)