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DEFENDING A DOMESTIC VIOLENCE CONTEMPT CASE

A Primer for Assigned Counsel

Written by the Working Group on Pro Bono Attorney Training Materials—Domestic Violence Contempt Matters

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CHAPTER 1 – ASSIGNMENT

You have been assigned to represent an indigent defendant charged with violating a restraining order. The purpose of this chapter is to explain how you were assigned a *pro bono* case.

In Madden v. Delran, 126 N.J. 591 (1992), the Supreme Court reaffirmed the bar's duty to represent indigent defendants without pay where the Legislature has made no provision for the Public Defender to represent defendants who are entitled to counsel. The Court recognized that it was placing a burden on the bar which should be more generally shared by the public at large. The Court said: "We realize it is the bar that is bearing the burden . . . . We trust that the bar understands the strong policy considerations that have persuaded us. As has so often been the case, it is the bar that makes the system work, often without compensation." Id. at 614.

Attorneys are most frequently assigned from the mandatory *pro bono* list to represent defendants who have been charged with contempt of a domestic violence restraining order as defined in N.J.S.A. 2C:29-9(b), a disorderly persons offense. Although disorderly persons offenses are normally heard in municipal court, under N.J.S.A. 2C:25-30, these contempt charges are heard in the Family Part of the Chancery Division of the Superior Court. Since the charge does not meet the legal criteria for the assignment of a public defender, assignment from the *pro bono* list is appropriate under Madden v. Delran.

Attorneys are assigned *pro bono* cases through the *pro bono* computer system, which was developed, and is currently maintained, by the Administrative Office of the Courts. The Supreme Court in Madden chose the current system of *pro bono* assignments in an effort to spread the burden among as many attorneys as possible. The system maintains a list of attorneys eligible for *pro bono* assignment for each county. The attorneys are in the order mandated by the Supreme Court in Madden. That is, the attorneys are ordered by the number of *pro bono* cases the attorney has done in the past and then alphabetically. So, at the top of the list are the attorneys who have never done a *pro bono* case, in alphabetical order. Next on the list are attorneys who have only done one case, in alphabetical order, etc. Attorneys are called upon whenever their name reaches the top of the list and a letter of notification is sent or a phone call to the attorney is attempted. The number of *pro bono* cases an attorney is required to do, depends on the number of attorneys in the county and the number of *pro bono* assignments in that county.

When the county *pro bono* coordinator needs to assign a *pro bono* case, he or she requests a name and the computer generates the next name on the list. Attorneys are not required to do a certain number of hours per year. Rather, attorneys are required to complete an assigned *pro bono* case, no matter how many hours that may require.

R. 2:7-2(d) governs the extent of the *pro bono* attorney's obligation on appeal. That rule provides:

> Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

If the defendant is being prosecuted in municipal court for a related disorderly persons offense, such as simple assault, the *pro bono* attorney is **not** responsible for representing the defendant in that matter. The municipal public defender will represent the indigent defendant in municipal court.

An attorney in New Jersey is responsible for mandatory *pro bono* service unless he or she fits within one of the exemption categories established by the Supreme Court. Currently there are 11 exemption categories numbered 81-91. Most of these categories relate to various kinds of government service, but there are also exemptions for retired attorneys (exemption code 86), attorneys who do other types of *pro bono* service (exemption code 88), and out-of-state attorneys (exemption code 90). As part of the annual attorney registration each spring, attorneys are asked to fill out the *pro bono* questionnaire, in which they certify to their exemption status.

CHAPTER 2 - CONTEMPT

The law of contempt is derived from the common law, statutes, rules of court, and judicial decisions. Contempt includes disobedience of a court order or misbehavior in the presence of the court by any person or misbehavior by an officer of the court in his official transactions. The essence of the offense is defiance of public authority. In the context of domestic violence restraining orders, contempt is based upon a violation of N.J.S.A. 2C:29-9(b). That section reads as follows:

> Except as provided below, a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered under the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c. 261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States when the conduct which constitutes the violation could also constitute a crime or a disorderly persons offense. In all other cases a person is guilty of a disorderly persons offense if that person knowingly violates an order entered under the provisions of this act or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States. Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of P.L.1991, c. 261 (C.2C:25-29) or substantially similar orders entered under the laws of another state or the United States shall be excluded from the provisions of this subsection.

A violation of this statute can constitute either a crime of the fourth degree or a disorderly persons offense. A disorderly persons level contempt of court complaint is prosecuted by the County Prosecutor in the Family Part of the Chancery Division in the Superior Court, N.J.S.A. 2C:25-30. Because an indigent defendant who has been charged with a disorderly persons level contempt may be subject to significant fines or a term of incarceration, he is entitled to the appointment of counsel.

A. Elements of Offense

A disorderly persons level contempt of court under N.J.S.A. 2C:29-9(b) contains the following elements, each of which must be proved beyond a reasonable doubt at trial. N.J.S.A. 2C:1-13(a).

1. Knowing violation of a restraining order, N.J.S.A. 2C:2-2(b)(2);
2. Entered by a court under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 to -35); or
3. Entered by a court under the provisions of a substantially similar statute under the law of another state of the United States.

Violations of terms of a restraining order entered under N.J.S.A. 2C:25-29(b)(3),(4),(5),(8), and (9) and similar laws of other jurisdictions are not considered to be contempt within the meaning of N.J.S.A. 2C:29-9(b). For enforcement of these orders, see N.J.S.A. 2C:25-30.

In a prosecution for this offense, it makes no difference that the underlying domestic violence restraining order was ultimately rejected, withdrawn or otherwise dismissed. State v. Sanders, 327 N.J. Super. 385 (App. Div. 2000).

B. Characteristics of a Disorderly Persons Offense

1. A disorderly persons level contempt of court is considered to be a petty offense. Accordingly, there is no right to indictment or trial by jury for these offenses in the Family Court. In fact, these offenses are not considered to be crimes under New Jersey law. N.J.S.A. 2C:1-4(b). A person who has been convicted of a contempt offense under N.J.S.A. 2C:29-9(b) in the Family Court is subject to the following range of sanctions:

Jail Term 0 to 180 days	N.J.S.A. 2C:43-8
Fine $0 to $1000	N.J.S.A. 2C:43-3(c)
VCCO Assessment $50	N.J.S.A. 2C:43-3.1(a)(2)(a)
Safe Neighborhoods Fund $75	N.J.S.A. 2C:43-3.2(a)(1)
Probation	N.J.S.A. 2C:45-1(a)

Any person convicted of a second or subsequent non-indictable domestic violence contempt offense must serve a minimum jail term of not less than 30 days. N.J.S.A. 2C:25-30.

2. Sentencing under the New Jersey Code of Criminal Justice for disorderly persons offenses generally involves a weighing of various aggravating and mitigating factors listed in N.J.S.A. 2C:44-1. Of particular importance are aggravating factors related to the defendant's prior record, harm to the victim, and the risk that the defendant will commit another offense. Conversely, statutory mitigating factors are related to lack of harm, acts taken under strong provocation, and facilitation of the offense by the victim and the like.

3. In the event the defendant has spent time in custody in default of bail prior to the resolution of his case, he is entitled to day-for-day credit for time served against any jail term imposed by the sentencing judge. See R. 3:21-8 and R. 7:9-3.

Defendants charged with contempt in the family court are presumed to be innocent of the offense. N.J.S.A. 2C:1-13(a). Moreover, a defendant with no prior record is also entitled to a presumption of non-incarceration upon conviction. N.J.S.A. 2C:44-1(e). As with any criminal offense, the defendant may assert a wide variety of factual or affirmative defenses, including self-defense, necessity, diminished capacity and/or

statute of limitations, which for a disorderly persons offense is one year, N.J.S.A. 2C:1-6(b)(2).

It is not a defense to a contempt charge that the TRO or FRO was later vacated. The State need only prove that the order was in effect at the time of the alleged contempt. See State v. Sanders, supra, 327 N.J. Super. 385. Nor is it a defense that the victim consented to the contact. The restraining order must be obeyed until the court acts to change or rescind it. The behavior of the parties to the order cannot serve as a defense. State v. Washington, 319 N.J. Super. 681 (Law Div. 1998).

C. Companion Offense to the Contempt

On occasion, the contempt of court violation may be accompanied by a second criminal count charging the commission of a new petty disorderly persons offense, usually harassment. When this occurs, both the contempt and the new petty disorderly persons offense will be heard in Family Court. Conviction of a companion petty disorderly persons level offense carries the following range of sanctions:

Jail Term 0 to 30 days	N.J.S.A. 2C:43-8
Fine $0 to $500	N.J.S.A. 2C:43-3(d)
VCCO Assessment $50	N.J.S.A. 2C:43-3.1(a)(2)(a)
Safe Neighborhoods Fund $75	N.J.S.A. 2C:43-3.2(a)(1)
Probation	N.J.S.A. 2C:45-1(a)
DV Surcharge $100	N.J.S.A. 2C:25-29.4 (For N.J.S.A. 2C:33-4 violations)

When the new offense constitutes either a disorderly persons offense or a crime, the resulting contempt charge constitutes a crime of the fourth degree. County prosecutors will downgrade the contempt charges on occasion so that the matter can be heard in Family Court.

D. Commission of the Contempt of Court Offense

Typically, a disorderly persons level contempt of court will involve a situation where the defendant has initiated contact with a victim of domestic violence. The prohibited contact may occur following the issuance of either a Temporary Restraining Order (TRO) or a Final Restraining Order (FRO). The case may be initiated by law enforcement officials who have received information related to the violation from the protected victim or another person. If present, the police will immediately arrest the defendant, N.J.S.A. 2C:25-31, prepare a complaint charging the contempt violation on a warrant and seek prompt judicial review of issues related to probable cause and the setting of bail. If the defendant is not present, the police will utilize the same procedure and, upon issuance by a judicial officer, will seek to arrest the defendant under the authority of the warrant.

The underlying act that violates the restraining order, however, does not have to constitute a criminal offense. For instance, a defendant may place a phone call or send a text message to the victim. This could be a violation of the restraining order even though the phone call or text message standing alone is not a criminal offense. (See State v. L.C., 283 N.J. Super. 441 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996)).

E. The Complaint or Warrant

The complaint or warrant (CDR-2) containing the contempt charge will usually contain a bail condition prohibiting defendant from having any contact with the victim. This is independent of any no contact provisions contained in a TRO or FRO. The no contact bail condition will remain in effect even if the underlying restraining order is dismissed.

CHAPTER 3 - BAIL

New Jersey Court Rule 3:26-1 governs the right to bail before a defendant's conviction. According to the Revised Statewide Bail Schedules, issued May 12, 2009, (Directive #9-05), the bail range in disorderly persons domestic violence contempt cases is generally between $500 and $2,500, with the 10% cash bail option available. A court may set bail outside this range for good cause shown.

A. Right to Bail Before Conviction

Under R. 3:26-1(a), a person facing charges is entitled to a reasonable bail to ensure his or her presence in court. The factors a judge may consider in setting bail are:

1. The seriousness of the crime charged, extent of punishment prescribed by law, and the apparent likelihood of conviction;

2. Defendant's criminal record, if any, and previous record on bail;

3. Defendant's reputation and mental condition;

4. Length of defendant's residence in the community;

5. Defendant's family ties and relationships;

6. Defendant's employment status, employment record, and financial condition;

7. Identity of responsible community members who can vouch for defendant's reliability;

8. Any other factors relating to the defendant's life style, community ties, or risk of failure to appear, and the general policy against unnecessary detention.

The court also has the discretion to release a person on that person's own recognizance. The court may also impose terms or conditions appropriate to release, including conditions to protect the safety of persons in the community.

B. Contact Restrictions

There may be a criminal complaint pending in a municipal court filed at the same time as the TRO. That complaint may have a no contact provision as part of the bail. Even if the restraining order and the contempt charges are dismissed, your client may still be subject to a no contact order. Your client should check with the municipal court to determine if there is a criminal complaint before having any contact with the victim.

As assigned *pro bono* attorney, you have no responsibility to represent defendant in any criminal charges he or she faces in municipal court. A municipal public defender will represent the indigent defendant in those matters.

C. Review of Bail

Any defendant who is unable to post bail has a right to have his or her bail reviewed by a Superior Court Judge no later than the next day which is neither a Saturday, Sunday, nor legal holiday. R. 3:26-2(c).

A defendant's first motion to reduce bail must be heard by the court no later than seven days after it is filed. R. 3:26-2(d).

D. Logistics of Depositing Bail with the Court R. 3:26-4.

1. Signed Recognizance Required: When a defendant wishes to admit to bail, the defendant and his or her sureties must sign a recognizance before court personnel authorized to take bail, or if the defendant is in custody, before the person in charge of the place of confinement.

2. Terms of the Recognizance: The recognizance must contain the following terms required by R. 1:13-3(b):

a. The defendant agrees to appear at all stages of the proceedings until a final determination on the matter, unless otherwise ordered by the court;

b. The surety and bail bonds provide that the principal and surety agree to submit themselves to the court's jurisdiction;

c. The surety bond irrevocably appoints the clerk of the court with jurisdiction to serve as the defendant's and surety's agent for the purpose of receiving service of all papers affecting liability on the bond;

d. The defendant and surety waive any right to a jury trial concerning the bail and agree that liability of the principal and surety may be enforced by a motion in the pending action, and that the motion may be served by regular mail sent to the clerk of the court who shall copy and send the documents by ordinary mail to the principal and surety at the addresses stated in the bond;

e. Whenever a bond with sureties is required, the court may order a cash deposit in lieu of the bond.

3. Bail Program Registration Form Must Be Filed: The insurer of the surety bond must file a Bail Program Registration Form with the Clerk of the Superior Court before the court will accept a surety bond for the purposes of bail. R. 1:13-3(d).

4. Bail Deposited with Court's Finance Division Manager: Bail is deposited with the Superior Court's Finance Division Manager in the county where the offense was committed, provided that upon court order, bail shall be transferred from the county of deposit to the county where the defendant is to be tried.

5. Cash is Permissible: Cash may be accepted for bail, and in proper cases, no security need be required.

6. Real Estate May be Permissible: Real estate may be offered as bail if approved and deposited with the clerk of the county in which the offense occurred.

7. 10% Cash Bail: Except in 1st and 2nd degree charges listed in N.J.S.A. 2A:162-12, and unless the court orders otherwise, a defendant may satisfy bail by depositing with the court cash in the amount of 10% of the bail fixed, and the defendant's execution of a recognizance for the remaining 90%. No surety is required unless the court specifically orders a surety. If someone other than the defendant owns the 10% cash deposited with the court, that person may only charge lawful interest and no other fees and must submit an affidavit or certification with the deposit that identifies his or her lawful ownership and names any other person for whom the owner has deposited bail. Upon discharge, the cash may be returned to the owner named in the affidavit or certification.

8. No Bail Allowed if Undischarged Bails Remain: Unless the court finds good cause to otherwise permit, no surety, other than an approved corporate surety, shall enter into a recognizance or undertaking for bail if there remains any previous undischarged recognizance or bail undertaken by that surety.

E. How to Get Your Client's Bail Refunded

Source: Finance Division Operations Manual (Bail Discharge Procedures).

Once a case is completed to final disposition, the court will notify its Finance Division with the necessary information to discharge the bail and reimburse the money posted as bail.

In the rare case, the court may enter an order converting the already posted bail to an OR (own recognizance) or ROR (release on own recognizance) bail and release or discharge the posted funds prior to final disposition.

The Finance Division will need to have address verification before any checks are issued to reimburse bail funds. The surety can appear in person at the Finance Division after the case is disposed of in court to confirm their address. Finance must make a copy of the surety's identification or have them complete the change of address form if the address has changed.

1. If your client posted his / her own bail:

Your client must take the following documents to the court's Finance Division:

1. A copy of the final disposition of the case (if available);
2. Bail receipt (if available); and
3. Identification (required).

If your client's address is not current, the Finance Division may not be able to verify the address and will not issue a check to return bail money. These funds may become unrecoverable.

2. If someone else acted as the Surety and posted bail on behalf of your client:

You should advise the surety to check his or her mail for an address verification notice from the court and to promptly respond to the address notification notice.

If the surety has moved since he or she posted the bail, the surety must go to the court's Finance Division in person with valid identification to update their address information. In the alternative, the surety may call the Finance Office to request a change of address form and to obtain instructions on the needed certification that must accompany the completed form.

3. How long will it take to get the bail returned?

If bail is posted with cash or a money order, the Treasury Office will issue a check upon discharge of the bail to reimburse the bail posted (excluding the filing fee). It should take 10 to 14 business days for either the client or the surety to receive the check.

If property was posted in lieu of bail, the reimbursement process varies depending on the vicinage. You should contact the Finance Division with your client or surety to start the process of removing any liens.

CHAPTER 4 - DISCOVERY

1. Discovery Requests to the Prosecutor Seeking Discovery from the State

(Your assignment order should provide the information on whom to contact in the prosecutor's office to obtain your discovery)

N.J. Court Rule 3:13-3 provides the discovery rules in criminal cases.

A. R. 3:13-3(a)

Pursuant to R. 3:13-3(a), when the prosecutor has made a plea offer, defense counsel may ask the prosecutor to inspect and copy or photograph any relevant and discoverable material.

B. R. 3:13-3(b)

Pursuant to R. 3:13-3(b), defense counsel should request from the prosecutor a discovery package of all relevant and discoverable material, including the following:

1. Complaint or CDR (Complaint Disposition Record);
2. Copy of Temporary Restraining Order (TRO) or Final Restraining Order (FRO); and Proof of Service, if available;
3. Police Report(s) and any witness statements;
4. Affidavit of Probable Cause;
5. Defendant's criminal history (rap sheet); and
6. Any other records which may either incriminate or exculpate the defendant, including cell phone records or email messages.

C. R. 3:13-3(c)

Pursuant to R. 3:13-3(c), the prosecutor shall permit the defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package:

1. Books, tangible objects, papers or documents obtained from or belonging to the defendant;
2. Records of the defendant's statements or confessions and a summary of the defendant's admissions against interest that are not recorded but are known to the prosecutor;
3. Results or reports of physical or mental exams or scientific tests or experiments made in connection with the matter that are within the possession, custody, or control of the prosecutor;
4. Reports or records of the defendant's prior convictions;

5. Books, papers, documents, tangible objects, buildings, or places within the possession, custody or control of the prosecutor;
6. Names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information which may lead to them being called as a witness in the case;
7. Records of statements of any persons named above in subsection (6) which are within the possession, custody, or control of the prosecutor and any relevant record of those persons' prior convictions;
8. Police reports within the possession, custody, or control of the prosecutor;
9. Names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report of such an expert witness, or, if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

D. <u>Seeking Discovery to Support a Defense:</u>

You want to seek discovery of any evidence that may show that the complaint is:

1. Legally insufficient (i.e., failure to charge a crime);
2. Factually insufficient (i.e., the evidence in support of the complaint is insufficient, inadequate, or incompetent); or
3. Based on unconstitutional State conduct

If the evidence you obtain shows legal or factual insufficiency of the complaint, you should file a motion to dismiss the complaint.

You also want to seek discovery of any evidence that will show that the complaint is based on the State's conduct that either grossly violates the defendant's constitutional rights or is otherwise fundamentally unfair. If you obtain evidence that shows such prosecutorial misconduct, you should file a motion to dismiss.

You want to seek any discovery that would show that the defendant was never served with the restraining order at issue or that would show that the defendant lacked requisite knowledge of the restraints because under <u>N.J.S.A.</u> 2C:29-9 (b), it is a 4th degree crime to **purposely or knowingly** violate an order issued under the Prevention of Domestic Violence Act, <u>N.J.S.A.</u> 2C:25-17 to -35, or similar statute, when the conduct that constitutes the violation could also constitute a crime or a disorderly persons offense. In all other cases, it is a disorderly persons offense to **knowingly** violate an order entered under the Prevention of Domestic Violence Act. <u>N.J.S.A.</u> 2C:29-9(b).
Note: All matters before the Family Court are disorderly persons (DP) offenses.

E. Discovery of Exculpatory Evidence

You want to seek discovery of any exculpatory evidence, and you should file a motion to dismiss if the prosecutor failed to present to you any exculpatory evidence in its possession. State v. Hogan, 144 N.J. 216, 236-239 (1996); State v. Womack 145 N.J. 576, cert. denied, 519 U.S. 1011, 117 S.Ct. 517, 136 L. Ed. 2d 405 (1996).

F. Discovery to Support Other Defenses

You should seek discovery of any evidence that could support any other viable defense, such as a lack of jurisdiction or double jeopardy.

When appropriate, you should also seek discovery of any evidence that will support other Code defenses, including:

1. Claim of Right to Theft, pursuant to N.J.S.A. 2C:20-2(c), State v. Harris, 141 N.J. 525, 557-559 (1995);

2. *De minimus* Claim. If the discovery shows that the violation could be considered *de minimus*, you should file a motion to dismiss the complaint. (Only the Assignment Judge may dismiss a prosecution pursuant to the *de minimus* statute). State v. Vitiello, 377 N.J. Super. 452, 455 (App. Div. 2005); Pressler, Current N.J. Court Rules, comment 3.5 on R. 3:10-2 (2010);

3. Defense of Another. If defendant had a reasonable belief in the need to use force to protect another. See State v. Colon, 298 N.J. Super. 569, 576 (App. Div.), certif. denied, 150 N.J. 27 (1997);

4. Duress. If the defendant was coerced into committing conduct in circumstances that a person of reasonable firmness could not be expected to withstand. N.J.S.A. 2C:2-9(a); State v. B.H., 183 N.J. 171, 193 (2005);

5. Entrapment, see State v. Johnson, 127 N.J. 458, 464-475 (1992); State v. Florez, 261 N.J. Super. 12, 27-28 (App. Div. 1992), aff'd, 134 N.J. 570 (1994);

6. Intoxication. Involuntary or pathological intoxication is an affirmative defense under the Criminal Code, see State v. Sette, 259 N.J. Super. 156, 169-171 (App. Div.), certif. denied, 130 N.J. 597 (1992). However, voluntary intoxication is not a defense under the Code unless it negates an element of the offense. State v. Warren, 104 N.J. 571, 577 (1986). For example, voluntary intoxication would be a defense to a disorderly persons contempt charge, because it has a knowing mental element.

6. Mistake. If the defendant reasonably but mistakenly believes facts that negate the culpability element of an offense. State v. Sexton, 160 N.J. 93, 106-107 (1999);

7. Necessity. See N.J.S.A. 2C:3-2(a);

8. Renunciation of Purpose in a Conspiracy. See N.J.S.A. 2C:5-2(e);

9. Self-Defense. See State v. Moore, 158 N.J. 292, 300-301 (1999);

11. Statute of Limitations. see Pressler, Current N.J. Court Rules, comment 3.7 and 5.2 on R. 3:10-2 (2010);

12. Third Party Guilt. A defendant has a constitutional right to attempt to prove his innocence by proving that the crime was committed by a third party. See State v. Fortin, 178 N.J. 540, 590-591 (2004), State v. Jimenez, 175 N.J. 475, 486 (2003).

G. Discovery to Determine the Defendant's Competency

If appropriate, you should seek evidence on whether the defendant is competent to plead or stand trial. A defendant whose mental illness precludes his comprehension of his situation and his intelligent consultation with counsel may not be permitted to plead guilty. State v. Norton, 167 N.J. Super. 229, 231-232 (App. Div. 1979). With respect to a defendant's competency to stand trial, N.J.S.A. 2C:4-4 and State v. Spivey, 65 N.J. 21, 36-37 (1974). Essentially, a defendant must be able to assist in his own defense and consult with counsel with an understanding of the charges against him and their consequences. State v. Harris, 181 N.J. 391, 453-454 (2004), cert. denied, 545 U.S. 1145, 125 S.Ct. 2973, 162 L. Ed. 2d 898 (2005).

If a defendant is incompetent to stand trial and unlikely to regain competency, you should file a motion to dismiss the complaint. State v. Gaffey, 92 N.J. 374, 389 (1983). However, a court may order a defendant to be medicated if this would assure his competency. State v. Otero, 238 N.J. Super. 649, 655 (Law Div. 1989).

H. Discovery to Determine Competency of State's Witnesses

In some instances, a defendant may challenge the mental status of the State's witnesses, see State v. Franklin, 49 N.J. 286, 287-288 (1967), and even may challenge the competency of a mentally defective victim. See N.J.S.A. 2C:14-1(h); State v. Olivio, 123 N.J. 550, 552-553 (1991).

2. Reciprocal Discovery Obligations that Defense Counsel Owes to the State

Under certain circumstances, the defendant has reciprocal discovery obligations and must provide notice to the prosecution if he intends to assert affirmative defenses.

A. Written Notice of Affirmative Defenses:

Pursuant to R. 3:12-1, no later than seven days before the arraignment or status conference, a defendant must serve on the prosecutor written notice of either an intention to claim affirmative defenses or an intention to rely on the following sections of the Code of Criminal Justice including the following:

1. Duress, N.J.S.A. 2C:2-9;

2. Entrapment, N.J.S.A. 2C:2-12;

3. Ignorance or Mistake, N.J.S.A. 2C:2-4;

4. Intoxication, N.J.S.A. 2C:2-8;

5. Insanity, N.J.S.A. 2C:4-1.

   In State v. Worlock, 117 N.J. 596, 606-615 (1990), the court reaffirmed the State's adherence to the M'Naghton Rule to determine legal insanity. Note: the defendant's burden of proof of insanity is by only a preponderance of the evidence. State v. Lewis, 67 N.J. 47, 48 (1975);

6. Justification, N.J.S.A. 2C:3-1 to -11;

7. Lack of Requisite State of Mind (Mental disease or defect), N.J.S.A. 2C:4-2.

A defendant's burden of proof is to raise a reasonable doubt as to his mental capacity to form intent. N.J.S.A. 2C:4-2; State v. Johnson, 120 N.J. 263, 299-300 (1990); State v. Murray, 240 N.J. Super. 378, 398 (App. Div.), certif. denied, 122 N.J. 334 (1990). In State v. Galloway, 133 N.J. 631, 647 (1993), the court held that "all mental deficiencies, including conditions that cause a loss of emotional control, may satisfy the diminished capacity defense if the record shows that experts in the psychological field believe that that kind of mental deficiency can affect a person's cognitive faculties, and the record contains evidence that the claimed deficiency did affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime".

B. Notice of Alibi:

Pursuant to R. 3:12-2, the defendant is required to provide to the prosecutor written notice of intent to use an alibi defense.

Note: A defendant is not required to provide the State with notice of any defenses not covered by R. 3:12-1 or R. 3:12-2.

3. Depositions

Pursuant to R. 3:13-2, if it appears that a material witness is likely to be unable to testify at trial because of death, physical, or mental incapacity, defense counsel may make a motion, with notice to the parties, for a deposition of the witness and for the production of designated books, and non-privileged papers, documents, or tangible objects to be produced at the same time and place.

The deposition must be videotaped unless the court orders otherwise, R. 3:13-2(b), and may be used at trial in lieu of the live testimony of the witness in open court if the witness is unable to testify because of death or physical or mental incapacity or if the court finds that the party offering the deposition has been unable to procure the attendance of the witness by subpoena or otherwise. R. 3:13-2(c).

CHAPTER 5 – PLEA CONFERENCE

Your first appearance in court will typically be at the plea conference. Upon your arrival in court, you should introduce yourself to the prosecutor.

By this time, you should have already received the discovery from the prosecutor. If not, the prosecutor will provide the discovery to you. This may also be your first occasion to meet with your client, especially if he or she is in jail. You should read over the discovery, discuss the case with your client, and then meet with the prosecutor.

The prosecutor will make a plea offer to resolve the case. You will then privately discuss the plea offer with your client. If your client refuses to accept the plea offer, you should advise the prosecutor. Perhaps with some additional discussion, the case can be resolved. If not, the court will set a trial date. As assigned counsel, you will have to handle the trial. That is discussed in the next chapter.

As indicated in the previous chapters, the relevant statute is N.J.S.A. 2C:29-9(b). A defendant who is found guilty of contempt may be sentenced to up to six (6) months in the county jail. It is important that you advise your client that if there is a second or subsequent guilty plea or conviction for contempt, the defendant must serve a minimum of not less than thirty (30) days in the county jail. N.J.S.A. 2C:25-30. However, this is not the case if the defendant is convicted simultaneously of multiple contempt charges even if the conduct occurred on separate occasions.

Typically, for a first offense, the prosecutor will offer a plea of probation. This is fact sensitive, however. Again, depending on the circumstances, the prosecutor may insist on jail time (which would include time the defendant has already served if arrested and jailed on the warrant). The court may impose jail time for a first contempt offense if aggravating circumstances outweigh mitigating circumstances. N.J.S.A. 2C:44-1.

Pursuant to N.J.S.A. 2C:44-1 aggravating circumstances considered by the court are:

- victim particularly vulnerable;
- risk that the defendant will commit another offense;
- defendant's prior record;
- policy seeking to deter defendant and others;
- policy avoiding sense that "fines are only the cost for doing business";
- victim over sixty (60) or disabled.

Mitigating circumstances considered by the court are:

- defendant's conduct neither caused nor threatened serious harm;
- defendant did not contemplate that the conduct would cause or threaten serious harm;
- substantial grounds exist to excuse or justify the defendant's conduct, though failing to establish a defense;

- victim induced or facilitated the commission of the act;
- defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
- defendant's conduct was the result of circumstances unlikely to recur;
- defendant's imprisonment would entail excessive hardship to self or dependents.

If the defendant is going to plead guilty, you must fully advise the defendant regarding the plea and the consequences of accepting the plea. It has been held that if defense counsel fails to adequately communicate a plea offer to a defendant, that such is *prima facie* evidence of inadequate representation of counsel. State v. Powell, 294 N.J. Super 557 (App. Div.1996).

You should advise the defendant that in addition to the probation or time to be served in the county jail, the defendant will have to pay a VCCO (Victims of Crime Compensation Organization) fine ($50) per count and a Safe Neighborhoods fine ($75) per docket.

Also, if the defendant will be pleading guilty to an act of domestic violence (one of the 14 criminal code statutes set forth at N.J.S.A. 2C:25-19), the defendant will be assessed a $100 surcharge pursuant to N.J.S.A. 2C:25-29.4. If the defendant is to serve a period of probation, there will be a minimal monthly fee. You can request that any fines, penalties, and costs be paid over any ordered period of probation.

A. The Defendant Accepts the Plea Offer

When the case is ready to be presented to the court, the prosecutor and you will be asked to place your appearances on the record. The defendant will then be administered the oath. The prosecutor will place the terms of the plea agreement on the record. You will likely be asked if you concur with the prosecutor's recitation of the plea agreement.

A factual basis for the guilty plea will have to be placed upon the record. In other words, either you or the prosecutor will ask questions of the defendant regarding his or her conduct and the defendant will have to acknowledge his or her guilt. This will be discussed further below. Before doing so, however, the court will make sure that the defendant understands the consequences of the plea.

The court has discretion as to whether or not to accept a defendant's guilty plea. Prior to accepting the plea, the court should first address the defendant as to his or her personal understanding of the charge and the consequences of accepting a plea. When addressing the defendant, the court must question the defendant under oath or by affirmation. State v. Herman, 47 N.J. 73 (1966); State v. Reali, 26 N.J. 222 (1958); State v. James, 84 N.J. Super 109 (App. Div. 1964). The line of questioning is to ensure that the defendant is properly represented and is acting voluntarily, and not under the influence of threats, promises, or inducements not disclosed on the record.

The questions asked of a defendant before the factual basis is taken should cover the following:

1. Whether the defendant understands the charges and the plea;
2. Whether the defendant is pleading guilty freely and voluntarily;
3. Whether the defendant understands that by pleading guilty, certain rights are forfeited, including but not limited to:
    a. The right to a trial, where the State must prove one guilty beyond a reasonable doubt,
    b. The right to remain silent,
    c. The right to confront the witnesses;
4. Whether the defendant understands by pleading guilty, he or she will
    a. Have a criminal record,
    b. Pay a VCCO fine of $50 for each count to which they are pleading guilty,
    c. Pay a transactional fee of $1.00 for each occasion when making a payment or installment payment for any offense, and a transactional fee of $2.00 for each occasion when making a payment or installment payment for any offense and the sentence is to probation or otherwise requires payments of financial obligations to the probation division,
    d. Pay a Safe Neighborhood Services Fund assessment of $75 for each docket under which they are pleading guilty,
    e. Pay a surcharge of $100 for each guilty plea to one the 14 criminal code statutes set forth at N.J.S.A. 2C:25-19,
    f. Pay a fee for the term of probation;
5. Whether the defendant's assigned counsel answered all questions and is the defendant satisfied with advice received from counsel;
6. Whether the defendant is under the influence of any alcohol, drug, or other mind-altering substance which would affect the defendant's ability to understand the plea or the proceedings;
7. Whether the defendant has any questions concerning the plea.

Again, the requirements for accepting a plea require a determination that the plea was entered into freely and voluntarily. The defendant must have adequate representation (unless they have waived the right to counsel). The judge will account for the mental state of the defendant. A plea is not automatically deemed involuntary because defendant may be under the influence of a prescription medication. State v. Clark, 104 N.J. Super. 67, 70 (Law Div. 1968), aff'd, 110 N.J. Super. 562 (App. Div.), certif. denied, 57 N.J. 135 (1970), and State v. Colon, 374 N.J. Super. 199 (App. Div. 2005).

Under State v. McIlhenny, 357 N.J. Super. 380, 384-385 (App. Div.), certif. denied 176 N.J. 430 (2003), there must be full prosecutorial disclosure, an adequate factual basis, and the plea is entered voluntarily, then the judge accepting the plea need not be aware of all exculpatory material in the investigation. Further, the judge must not find evidence of coercion by third persons.

In addition to the voluntary requirement when accepting a plea, the court is also concerned with the procedural elements. For each crime, the court must conclude that there is a factual basis for every element of the crime being pled. If there is not a factual basis for each element, then the court must reject the plea. State v. Pineiro, 385 N.J. Super 129, 137 (App. Div. 2006), State v. Nolan, 205 N.J. Super 1 (App. Div. 1985). A defendant, on appeal, can question whether or not there was a factual basis for the plea and can be grounds for an appeal of ineffective assistance of counsel.

The questions asked of a defendant to establish the factual basis for the guilty plea should cover the following:

1. That the defendant was aware of the existence of the restraining order barring the defendant from having contact or communication with the victim;
2. Whether the defendant violated the restraining order;
3. The circumstances surrounding the violation of the restraining order, including all necessary facts to establish the violation;
4. If the defendant is also pleading guilty to other charges (i.e. harassment), the defendant must acknowledge that he or she committed the necessary elements of that offense.

After the defendant sets forth an adequate factual basis for the plea of guilt, the court will ask you if you would like to be heard before sentencing. At this time, you can request that any fines be paid over a period of probation (if probation is part of the plea). You can advise the court of any other relevant facts or circumstances which you believe would impact on the court's ultimate decision regarding the plea. The court may also ask the defendant if there is anything he or she would like to say before sentencing. The court will ask the prosecutor the same thing.

Typically, the court will follow the plea agreement. At the conclusion of this proceeding, the court will discharge any bail posted by the defendant. The defendant will be presented with an appeal rights form at the conclusion of the proceeding. You and the defendant will have to sign the form before you leave.

B. The Defendant Rejects the Plea Offer

If the defendant rejects the plea offer made by the prosecutor, you and the prosecutor will have to fill out a trial memorandum which will list any anticipated witnesses to be called at trial and set forth any stipulations.

The parties will appear before the court. The oath will be administered to the defendant. The prosecutor will place the terms of the plea offer on the record. You will be asked if that is your understanding of the plea offer.

The defendant will also be questioned about his or her understanding of the plea offer. The defendant will be made aware of the consequences of rejecting the plea offer and

advised of the maximum penalties which may be imposed if the defendant is found guilty of the charge(s). The court will confirm that the defendant wishes to reject the plea.

Any bail posted by the defendant will be continued. The defendant will be reminded that he or she must continue to abide by the restraining order (if it still exists). The court will set a trial date which will be inserted into the trial memorandum. The court will advise the defendant that if there is no appearance at the trial, the bail will be forfeited and a bench warrant will be issued for the defendant's arrest.

C. The Prosecutor's Request to Dismiss

In some cases, the prosecutor may decide to dismiss the case at the plea conference. This may occur if there is no proof that the defendant knew of the existence of the restraining order or when the victim refuses to cooperate with the prosecutor.

In this event, the parties will appear before the court and the oath will be administered to the defendant. The prosecutor will place the reasons for the request to dismiss on the record. You will be asked if the defendant stipulates to probable cause for the issuance of the complaint.

If the court accepts the dismissal, the defendant's bail will be discharged. The defendant will be reminded to abide by the restraining order (if it still exists).

CHAPTER 6 – TRIAL

As noted in the previous chapter, if the case did not resolve at the plea conference, the matter is scheduled for trial. A trial memo should have been prepared at the plea conference wherein all witnesses were listed. Make sure that they have been properly noticed (by subpoena, if necessary to secure their appearance) of the trial date.

The prosecutor will make an opening statement and then you will make an opening statement. The prosecutor will call the State's witnesses. You will have an opportunity to cross-examine each of the State's witnesses.

At the end of the State's case, you can make a motion to dismiss if there is insufficient evidence to support a finding of guilt. If that motion is granted, the case is dismissed. If that motion is denied, you should proceed and call your first witness. The prosecutor will be permitted to cross-examine your witnesses.

Under the Fifth Amendment to the United States Constitution, the defendant has the right to remain silent. Therefore, he or she need not testify at the trial.

The State must prove, beyond a reasonable doubt, that the defendant knowingly violated a restraining order. State v. Finamore, 338 N.J. Super. 130, 138 (App. Div. 2001).

After hearing from the witnesses, you will make a closing argument, followed by the prosecutor's closing argument. Depending on the complexity of the matter, the number of witnesses called, and the evidence submitted, the court may request written submissions.

Again, depending on the length and complexity of the case, the court may decide the case immediately from the bench or may prepare a written decision.

Case Summaries

In conclusion, the following are many of the cases that may have application in your case. This list is by no means complete, and is current as of January 2010:

State v. Castagna, 387 N.J. Super. 598 (App. Div.), certif. denied, 188 N.J. 577 (2006).:

> To prove that defendant caused another to make harassing communications on his behalf (1) the defendant must have had a purpose to harass; and (2) the statements to the intermediary must have been made with the purpose that they be passed on to the victim.

Finamore v. Aronson, 382 N.J. Super. 514 (App. Div. 2006):

> A defendant may attend a child's activities even when the FRO prohibits defendant contacting plaintiff unless the FRO expressly prohibits attendance at such activities. In this case, "the specific restriction was never ordered. It cannot be inferred or presumed".

State v. Smith, 374 N.J. Super. 425 (App. Div. 2005):

> The police may question those present at the scene of domestic violence without giving *Miranda* warnings as long as the inquires are "reasonably related to confirming or dispelling suspicion and those questioned are not restrained to a degree associated with formal arrest".

State v. Ashford, 374 N.J. Super. 332 (App. Div. 2004):

> An indigent is entitled to assignment of counsel when charged with disorderly offense of contempt and criminal mischief. Waiver of right to counsel must be knowing and fully informed and subject to retraction if imprisonment is imposed.
>
> The trial judge must be mindful of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), where an excited utterance by victim as testified to by police officer is insufficient to convict for contempt. The right of confrontation guaranteed by the Sixth Amendment requires that victim be called as a witness if available.

State v. Cassidy, 179 N.J. 150 (2004):

> Even if a TRO or FRO fails to meet the "technical and substantive requirements for a restraining order" and therefore is "an invalid order . . . the order nonetheless has legal effect until vacated". (FN 3).

State v. Lozada, 357 N.J. Super. 468 (App. Div. 2003):

The trial court erred in failing to sever for trial charges of third-degree stalking and fourth-degree violation of a domestic violence restraining order, and convictions on both offenses were reversed.

State v. Masculin, 355 N.J. Super. 250 (Ch. Div. 2002):

A defendant may be found guilty of contempt for violating a TRO even when municipal judge who issued the order failed to comply with Rule 5:7A.

State v. Brito, 345 N.J. Super. 228 (App. Div. 2001):

Defendant was charged with contempt for violating FRO. The trial judge dismissed the complaint when complainant failed to appear at the status conference. The dismissal was reversed on the basis that the complaint could not be dismissed for failure of the State's witness (the alleged victim) to appear for a routine status conference even though the notice provided by the court indicated that it would be so dismissed.

State v. Mernar, 345 N.J. Super. 591 (App. Div. 2001):

Contempt complaint was dismissed because of the absence of proof of valid service of the TRO by law enforcement. The State appealed dismissal on basis that defendant had actual notice of the TRO. The charge of violation of TRO was reinstated by the Appellate Division. "[A] contempt action may proceed against the defendant who has actual knowledge of the restraints imposed, even though the injunction [TRO] was not regularly served."

State v. Finamore, 338 N.J. Super. 130 (App. Div. 2001):

Defendant's contempt conviction for telephoning victim four times about parenting time was overturned. The parties' 1995 property settlement agreement (entered **after** FRO) was "rife" with provisions that invited or required some sort of contact between the parties.

State v. Sanders, 327 N.J. Super. 385 (App. Div. 2000):

Defendant's contempt conviction for violating a temporary restraining order (which was later vacated after trial) was upheld. "An order of the court must be obeyed unless and until a court acts to change or rescind it."

State v. Krupinski, 321 N.J. Super. 34 (App. Div. 1999):

Defendant's conviction for contempt was reversed for two reasons. First, defendant was permitted under matrimonial order to go onto property to remove lawnmower. Second, defendant's going onto property to remove lawnmower, delivering children to front door and giving wife car seat, were "trivial, non-actionable events".

State v. Washington, 319 N.J. Super. 681 (Law Div. 1998):

Even though parties had reconciled and lived together from October 1996 until December 1997, the August 7, 1995 FRO was valid and continued in effect. The defense that the order was rendered null and void by the reconciliation was rejected. Defendant found guilty of contempt for his May 10, 1998 telephone calls.

State v. Hoffman, 149 N.J. 564 (1997):

The Supreme Court overruled the Appellate Division and found that the act of sending in the mail a torn up copy of a court order was an act of contempt, and did constitute a "contact" and was in fact a "communication".

State v. Wilmouth, 302 N.J. Super. 20 (App. Div. 1997):

A defendant cannot be deemed to be in contempt of a domestic violence restraining order where his conduct conforms with the parties' understanding of the terms of the order, and where his conduct does not, in itself, constitute domestic violence.

State v. Chenique-Puey, 145 N.J. 334 (1996):

Severance of contempt charges and other criminal charges may be necessary. Sets forth elements of crime of contempt (4th degree) as follows: (1) a restraining order was entered; (2) defendant violated the order; (3) defendant acted purposely or knowingly; and (4) the conduct that constituted the violation also constituted a crime or disorderly persons offense.

State v. J.T., 294 N.J. Super. 540 (App. Div. 1996):

Standing at victim's property line and staring at her house without speaking is "contact".

State v. L.C., 283 N.J. Super. 441 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996):

Affirmed finding that defendant-wife was guilty of contempt by going to residence of and speaking to husband's girlfriend who was a protected party.

State v. Bowser, 272 N.J. Super. 582 (Law Div. 1993):

Mandatory 30 day sentence for contempt does not apply to defendant who is convicted simultaneously on multiple contempts which occur on separate occasions.

State v. Nelson, 255 N.J. Super. 270 (Law Div. 1992):

Delaying Family Part contempt trial to conclusion of criminal trial may be appropriate to avoid prejudice.

2C:6-1:

Authorizes bail to be fixed higher than $2,500 for D.P. or 4th degree contempt if there is finding that (a) "defendant poses a serious threat to the physical safety of potential evidence or of persons involved . . ." or (b) "bail of that amount will not reasonably assure the appearance of the defendant as required". Landmark

State v. S.K., N.J. Super. (App. Div. 2012)

Defendant's conviction for violating a domestic violence restraining order is vacated and the complaint is dismissed because the provision of the order prohibiting defendant from "any other place where plaintiff is located" is overly broad and not authorized by the Prevention of Domestic Violence Act, and also because defendant did not provide a sufficient factual basis for his guilty plea and conviction.