

**CLE Handout | *Getting to Yes! Negotiating to Win* | Nov. 18, 2022**

Credit for much of this content goes to Ali Hohman and Ken Miller,

WDA CLE 2015 “When to Litigate -When to Negotiate”

“[C]riminal justice today is for the most part a system of pleas, not a system of trials… the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”

*Lafler v. Cooper*, 566 U.S. 156 (2012)

In light of [*Lafler v. Cooper* and *Missouri v. Frye*], it is clear that a defendant’s right to counsel extends to plea negotiations. Defense counsel must actually and substantially assist a client in deciding whether to plead guilty. In the plea bargaining context, counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty.”

*State v. Edwards*, 171 Wn.App. 379, 394 (2012)

**Negotiation: What Are a Criminal Defense Attorney’s Duties?**

**Duty to Investigate** – *State v. A.N.J.*, 168 Wn.2d 91 (2010).

* Duty to investigate or make intelligent and informed decision to forego investigation;
  + “The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.”
* Duty to investigate even if client admits guilt;
* Duty to consider and use experts where appropriate;

**Advise – includes risks and consequences of a plea, or foregoing a plea.** *Lafler v. Cooper,* 132 S.Ct. 1376 (2012), *State v. Edwards*, 171 Wn.App. 379 (2012), *State v. Estes*, 188 Wn.2d 450 (2017).

* This includes discussion of the strengths and weaknesses of the case. This is more than just the consequences of a plea/conviction – it involves what to expect at trial, evidentiary issues, alternative resolutions, and what the State may seek if convicted following a trial. This goes back to substantial and actual assistance that allows a defendant to make a knowing and informed decision to plead or set for trial.
* Includes impact of conviction to current charges, lesser charges, and impact of enhancements.

**Investigate and advise re: issues “intimately related to the criminal process” – beyond crime of conviction and confinement/fines**

* Immigration consequences (*Padilla v. Kentucky* ,559 U.S. 356, 365 (2010))
* Client’s fundamental right to parent, includes consequences such as NCO, ability to have meaningful contact and maintain a connection with children.
* Advice re sex offender/kidnap registration requirements (one of the issues in *State v. A.N.J*.)
* Other consequences that may flow from the conviction– DNA testing, 71.09, loss of firearm rights
* ***Anything else that matters to the client*** (RPC 1.2)
  + Examples: ability to travel to Canada (even minor offenses can impact), education benefits/student visas, SSI (can be disrupted while in jail), minor LFOs can have big impact for individuals living on a very low income.

**Review of criminal history –** *State v. Crawford*, 159 Wn.2d 86 (2006).

* Defense counsel’s performance deficient for failing to investigate impact of an out-of-state conviction that was a “strike” offense. In *Crawford*, the state had warned that an out of state conviction counted as a prior “adult felony” conviction prior to trial. Given the client’s extensive record and the out of state conviction, it was IAC to fail to investigate the criminal history. *Crawford*, at 99. The broader point here is that the DCH is important, and especially for offenses that have penalties for subsequent convictions, like DUI, NCOV, & DWLS. It’s also important for DV cases – check the parties in prior cases because it may be 404(b) evidence.

**Timely communication of plea offer**– *Missouri v. Frye*, 566 U.S. 134 (2012); See also RPC 1.4.

* Offers with a fixed date… allowing an offer to expire without advising the defendant or allowing him to consider it is IAC. *Frye*, at 1408.
* *In re the Discipline of Longacre*, 155 Wn.2d 723 (2005)(Defense attorney sanctioned for failing to communicate plea offers and potential consequences of trial)

Problems and Tips:

* In public defense, however, we often have problems getting hold of clients. Phone numbers change, people are out of minutes, they didn’t pay their phone bill…
* Best thing to do is to document attempts to contact. Make notes of phone calls, write a letter.
* But also communicate with the prosecutor! Ask to keep an offer open if you can’t contact your client.

**Common Issues in Plea Negotiations**

**Many issues arise from prosecutors who frustrate the defense duty:**

* Prosecutors who don’t know the law
* Prosecutors without relevant experience
* Offers that get worse after exercising a right
* Refusal to negotiate
* Refusal to consider other consequences
* Plea offers contingent on no interview of witness

**Newer prosecutors**

* New attorneys *and* new-to-practice area attorneys;
* DPAs who don’t know their county;
* DPAs who don’t understand their case;
* Mischarging cases;
* Misunderstanding of consequences.

Examples might include

* Discovery issues – DPAs who don’t know what is supposed to be included in discovery. Go around the DPA with a public records request. Yes, you can file a motion, but a PRR is usually much faster, and might give more information.
* Public vs. Private roads.
* Deserted areas.
* NC/AHO that force massive detours because of the residence of the AV.
* Actual case where AV lived on Hwy 97 in Tonasket – NCO required 12-mile detour to get to town.
* Hypothetical case – what if AV lived on only route between HC and Courthouse?
* DUI – prosecutors who don’t drink.
* DV cases – prosecutors who don’t understand that the AV may contact the Defendant.
* Technology cases – prosecutors who don’t understand how Facebook, Skype, etc… work.
* Mischarging cases –examples:
  + Theft of a pet vs. Theft 3rd degree (9.08.070 vs. 9A.56.050)
  + VNCO vs. Violation of an Antiharassment Order (26.50.110 vs. 10.14.120/170)
  + DUI vs. Baby DUI (46.61.502 vs. 46.61.503)
  + DUI vs. Physical Control (46.61.502 vs. 46.61.504)
* Misunderstanding of consequences involves a wide variety of issues.
  + DPAs not understanding immigration consequences- push back with Equal Protection arguments
  + Effect of DV conviction on custody proceedings
  + Entry into Canada following conviction of relatively minor offenses.
  + Education benefits & student visas.
  + Consequences from foreign governments (e.g. Saudi client facing drug charges).
  + Seasonal workers – can’t take a week off of work to sit in jail in the middle of harvest.

**Offers That Get Worse**

* Plead guilty - 90/90 + $250; if set for trial or motion, 90/85 + $500.”
* This is backwards – it punishes a defendant for challenging the state’s evidence and encourages defense attorneys to settle quickly without raising issues.
* “Plead guilty - 90/85 + $500; 90/90 +$250 for resolution before [some date]
  + Some DPA offices do this, called the “trial tax” the state should not be punishing defendants for raising legitimate issues or exercising constitutional rights.
  + Issue is an initial offer that specifically penalizes exercising a right. There is no issue with offering a lower sentence for a speedy resolution, or even withdrawing an offer if the case drags on. The issue is tying the worse offer directly to the exercise of a right.
  + DPAs may object at sentencing under ER 410(a) arguing that evidence of their offers is inadmissible.
  + But under ER 1101(c)(3), the rules need not be applied when “…sentencing, or granting or revoking probation.”

**Refusal to Negotiate**

What can you do about a DPA who gives take-it-or-leave it pleas?

* Communicate – we use “plea bargaining,” not “plea dictation.”
* Un-agreed recommendations. Give the Judge a reason to follow your recommendation
* Try to whittle away the State’s evidence piecemeal.
  + Un-agreed recommendations are tricky and involve some extra client advice. The judge doesn’t need to follow the defense recommendation *either*, and can sentence according to the State’s recommendation or ignore both recommendations entirely.
  + In practice, judges seem to like to split the baby. There are a handful of strategies that help the judge come down on your side:
    - Evidence of a proactive client. This includes treatment, classes, restitution… anything you can provide that shows the judge that your client is serious about handling issues that arose as a result of the charge.
    - These are even more effective if you can demonstrate that they were done on the client’s own initiative – for example, immediately seeking treatment following a DUI or drug charge; or making restitution for damage to property in a hit and run or malicious mischief case.
    - Mitigating circumstances – there are some that are statutory - see RCW 9.94A.535. These are felony guidelines, but can still be raised in lower courts. But be careful with some of them – the point is to mitigate, not exculpate, and if the judge believes the client is attempting to shift blame, they can backfire.
    - The right to allocution – sometimes an apology goes a long way.
  + Whittling away at the State’s evidence piecemeal through investigation. Attack small portions of the State’s case from different angles and show that you have enough to raise an arguable issue. If you show the DPA that you can take away several small pieces of the case, you may be able to re-open a dialog.

**Other Consequences**

* Indigent clients face much different challenges.
  + LFOs, Fines, and Jail can cause long-term consequences.
* Deportation is not a “collateral” consequence.
  + Immigration status does **not** pose an equal-protection issue. *Padilla v. Kentucky*, 559 U.S. 336, 373 (2010) – Defenders and prosecutors should work together and consider consequences like deportation. The risk of deportation may play a role in a judge’s sentencing discretion. *State v. Quintero Morelos*, 133 Wn. App. 591, 137 P.3d 114 (2006)

\_

* For indigent clients, even small fines have big consequences. If you are on SSI, SSD, or other limited income and you have $700 a month coming in, then even payments of $25-50 a month mean choosing what bills to pay. Incarceration can mean the loss of government benefits like SSI/SSD for the period of incarceration as well. Clients living hand-to-mouth have limited options when faced with LFOs and Fines. Even a DWLS 3 with the standard fines and costs is a month’s salary.
* The impact of lengthy incarceration is obvious – loss of income, likely loss of job, mounting bills… and if the family’s sole breadwinner is incarcerated, then the collateral consequences spill over to family members as well.
* We’ve run into DPA’s who refuse to consider immigration status when doing plea negotiations. *Padilla* expressly sanctioned immigration status as a factor in plea negotiations. And in WA, *Quintero Morelos* expressly recognizes that “federal law has the potential to influence the actual punishment visited upon a criminal defendant in state court.” *QM* at 600. If it’s not an equal protection issue for the judge to do it, then the DPA’s shouldn’t have a concern either.

**Communication**

* Don’t wait until the last minute to negotiate.
* Be reasonable.
* Be open and pleasant.
* “No incentive to plea” won’t get you very far.
* Be proactive – treatment, evaluations, classes…
* Discuss similarly situated individuals.
* Document what you present (medical issues, completion of classes, results of evaluations).
* Email is an effective documentation tool, but be cautious of tone. It gives us a nice, written record. But tone is hard to read in emails***. Also, emails can make their way into a record – don’t write anything you don’t want the judge to see!***

**Avoid Pitfalls**

* Victim-bashing… unless you have a reason.
* LEO-bashing… unless you have a reason.
* “The crime isn’t a big deal.”
* “The law is unjust.”
* Threatening delay tactics.
* Speaking condescendingly to the DPA.
* DPAs hate it when defense attorneys bash victims and LEOs. Sometimes, though, there are victims and LEOs that the prosecutor needs to know about. If you have a good reason, bring it to their attention, but otherwise, it’s not going to help your client.
  + Arguing that a law is petty or unjust will also get you nowhere. The law may in fact be petty or unjust, but the place to raise that argument is Olympia, not in district or superior court. Unless, of course, the injustice is a constitutional claim or other issue that you can actually litigate… Commercial Sex Abuse of a Minor cases as an example (is it victimless when it is a police sting? DPAs don’t care)

**Know the Case, Client, *and* the DPA**

* DPAs have cases; we have clients – DPA might not know facts.
* DPA might not realize there is an evidentiary issue.
* DPA policies might restrict their negotiation.
  + When is it OK to go over a DPAs head?
* Going over DPA’s head – It’s done very rarely. You need a totally unreasonable offer that the DPA won’t budge on.
* Know the DPA’s internal policies. Sometimes they might like to give you a better offer, but their internal policies won’t let them. For example – multiple DWLS, multiple Theft, Theft combined with Trespass…
* DPAs rarely know the facts of a case as well as the defense attorneys. The reality of the matter is that they have a *lot* more cases than you. They don’t have the timesink of dealing with clients, and they have an office of resources at their disposal… but that doesn’t mean they store the facts of the case in their heads. Don’t assume the DPA is aware of evidentiary issues in their case – bring it to their attention.

**Maintain Credibility**

* You can lose it in an instant – FOREVER.
* You might win a battle, but lose the war.
* DPAs talk to each other.
* Don’t “cry wolf” or say the same thing about every client.
* It’s OK to not disclose information.
  + But check the discovery rules first!
* Don’t lie to the DPA.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

* + Pulling a fast one on a DPA works… once. And it won’t work again on that DPA, or any other DPAs in the office, or that the DPA talks to amongst his DPA friends.
  + Same thing goes for crying wolf… but if you have a lot of similar defenses that you can back up with documentation, don’t hesitate to raise them – that’s not crying wolf.
  + Keeping your cards close to your chest is a legitimate tactic… except when it violates a discovery rule. Trial by ambush is heavily frowned upon, but that doesn’t mean that trials need to be surprise-less.