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GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

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LESSON PLAN AND EVALUATION**

“GUILTY, YOUR HONOR” – PLEA BARGAINING IN SUPERIOR COURT

With

**Cheryl Cohen, Esq.
Asst. Prosecutor – Camden County (ret.)**

And featuring

Robert Ramsey, Senior Instructor

Program description

A criminal complaint has maybe a 2% chance of ending up with a trial. So a defense attorney needs to understand the plea bargaining process (and sentencing law) inside-and-out. This 1.5 credit program lays out the ten best plea bargaining tips for a defense attorney to bring a case to a resolution that is satisfactory for every party involved.

I. Introduction

- **Cheryl Cohen, Esq., Asst. Prosecutor – Camden County (ret.)**
- **Started in Monmouth County Prosecutor’s Office as a law clerk, then private practice as a law clerk for a few years, then 1986 to Camden County Prosecutor’s Office and remained there until December 2011 (25 years)**

II. Plea Bargaining

- **A jury trial is a failure of the lawyers to negotiate reasonably – meaning you know your file and know your witnesses – a real understanding of the case and can identify your strengths and weaknesses of the case in order to develop a plea and enter into plea negotiations**
- **Range of sentencing has not changed that much over the years – there are some that are more, such as NERA (85%) but the plea offers for many have begun to reflect that**
- **If you engage in plea negotiations there is an incentive to plead guilty if the facts are in favor of the state and it is up to the attorneys to negotiate reasonably**
- **When dealing with experienced, professional people the process is collaborative and not adversarial**
- **Come up with resolution that can satisfy everyone’s need simultaneously**
- **Must know the strengths of your case in a meaningful way and know the parameters of the law**
- **Understand with the parameters that can effect the plea offer, i.e. prior convictions**
- **Must also know the judge who is presiding over the case because if you are before a judge who will sentence higher in the range or lower in the range, then that is part of plea considerations**

III. Rules for Plea Bargaining

- **Collaborative effort, as opposed to adversarial**
- **Be honest and forthright with your adversary; ethical obligation to maintain certain information between attorney and client; being candid with the court, as well as other individuals in the court system because of your own reputation**

- **Collegiality and professionalism – important to maintain extremely collegial and professional relationship with adversaries**
 - **There are good reasons for doing this:**
 - **People remember an act of kindness**
 - **You can be advocates without being unpleasant – people will respond to you how you respond to them**
 - **Look at the long term effect that a poor attitude will have**
- **Respect – even when you disagree with your adversary, do not go to the first assistant or supervisor without advising the assistant prosecutor that you would like to do that**
 - **General practice is that defense can ask for a better sentencing deal from the judge, but the defense should always let the prosecutor know**
 - **Never go to the first assistant/supervisor until you have alerted your adversary first – that shows respect – done in a responsible and non-threatening way**
- **The statistical imperative – 1-2% of cases go to trial; most cases will resolve in a way other than trial**
 - **Get client's expectations ready to resolve by plea – set client's expectations early in the process**
 - **Think of what is a reasonable resolution**
 - **You need to know what the case is worth (both prosecutor and the defense) and the facts of the file in order to enter into meaningful plea negotiation**
 - **Exception (for the defense bar): if your client is in jail on a high bail, there are 3 possibilities for your client:**
 - **guilty and the state can prove it,**
 - **he is probably guilty – probably going to be convicted but reasonable plea offer may be in order since client has been in jail and getting jail credits anyway,**
 - **client is factually innocent but the state cannot prove guilt – you need to do everything to get your client out of jail by plea offer or by lowering bail – must encourage prosecutors to get their investigators out on the street to determine credibility of state's case**

- **Meeting the needs of all the participants simultaneously**
 - **Judge, Asst. Prosecutor, witnesses, victims, defendant, and defendant's family and defense counsel**
 - **At the time of the plea all the needs are satisfied**
 - **Judge has to be sure that the sentence is legal, interests of justice, victims feel that there has been justice, defendant is happy that resolution is best deal he can get, defense attorney has to be sure that he/she has done best for client**
 - **When one party cannot have needs met – jeopardizes the plea process**
 - **Sometimes families are never going to be placated even though the best interest of justice and within parameters of the law are met**
 - **Prosecutor should seek justice but everyone may not consider that it is an appropriate resolution**
 - **Victims are heard but they do not control the outcome of a case, i.e. domestic violence cases – you have to develop your case outside of need of victim to participate – look at needs of justice**
- **You have to know sentencing law and know it well – all the ins and outs, as well as elements of offenses – know tools available to structure the right sentence to fashion the proper plea offer**
 - **Know what programs are out there – sometimes can resolve a case by knowing alternatives to jail/prison – diversionary programs, drug courts, etc.**
 - **Know caselaw that is relevant – State v. Warren, 115 NJ 433 (1989)**
 - **Know presumption of incarceration and lengths to overcome that – know statutes as well as cases**
 - **Need to set your client's expectations based on your evaluation of the law**
 - **The most important skill you can have is expert knowledge of sentencing law because that is what makes you a great plea bargainer – you see the way to get to the result that your client is looking for**
 - **Do not involve the judge in the plea bargaining process – but if you need the judge to give an estimate of what the sentencing liability would be if the parties would agree to a certain plea, then that is permissible**

- **Always go to speak with the judge with your adversary**
- **Always let the judge know in advance what your intentions are in meeting/conferencing**
- **Best to address the judge on the record to avoid any question that may come up in the future**
- **Judge will signal to you where the court is within the parameters of the agreement**
- **Prepare your client**
 - **Client should be fully aware of the plea offer, prepared to give proper factual basis**
 - **Rehearse with your client in advance so that client can articulate that he did the things for which he is pleading guilty**
 - **Client should be advised of all direct consequences of the plea**
 - **For collateral consequences, to the extent you are aware, you should get those out as well**
 - **Explain process to client and what is going to happen in court – tell client he will have an opportunity to speak in court as well**
 - **Let client know that certain things can be addressed if you are prepared for it, i.e. transferring probation to the county of residence**
 - **Consider keeping a copy of the plea form in your office to review in advance with the client and to answer questions**
- **Respect for victims of crime**
 - **Our state constitution affords victims certain rights**
 - **You gain nothing by being adversarial with victims**
 - **Be collaborative and sympathetic to victims – try to get to a point where client can make the victim whole**
 - **When adversarial with a victim, attorneys hurt themselves and their reputation as well**
 - **Don't need to be disrespectful when you are disagreeing with the victim's position**
 - **Apologies by client to victim in writing and to read in court? If money losses, start paying now – contact prosecutor's office before any money is paid to avoid any**

improprieties (In re Friedland, 59 NJ 209, 220 (1971)) – good faith steps could encourage the court to accept plea

- **Adopt a sympathetic attitude with victims**
- **Work in cooperation with the prosecutor’s office in addressing victims**
- **Prosecutors and defense counsel can both facilitate closure for the victim**
- **Persistence**
 - **Be persistent but not obnoxious**
 - **Extremely important skill for defense bar to have when dealing with prosecutors in the plea process**
 - **Be persistent but respectful in order to stay in the forefront of the prosecutor’s mind – keeping in mind the volumes of cases that prosecutors have and your case may not be at the top of the list of priorities**

IV. Things to know for successful plea bargaining

- **You need to know your case and be able to evaluate your case if put to the test of a trial**
- **Three types of cases:**
 - **Cases you will win every single day**
 - **Going to lose these cases every single day**
 - **Cases that can go either way**
- **Must determine where your case falls in that spectrum of cases**
- **Never know what a jury is going to do**

V. Advice to young attorneys for successful plea bargaining

- **Try not to pretend that you are inexperienced – don’t use bravado – if you are inexperienced, own it!**
- **Adversaries don’t mean that they will not be professional**
- **Prosecutors hold these cards a plea bargaining:**
 - **What is your client’s prior criminal history?**
 - **What is the degree of this offense?**
 - **What is the harm to the victims?**
 - **How egregious was this conduct?**
- **Defense attorneys should think from position of a prosecutor and then look at defense point of view in order to try to resolve a case by a plea; and vice-versa**
- **Ask for guidance from those who know more than you – don’t be afraid to ask for help**

- **Watch and learn**
- **Asst. Prosecutors in general have wide amount of latitude in plea offers – but when dealing with the AG’s office it is completely different – decisions being made there are political in nature and the DAG you are dealing with may have little to no ability to deal with the file and adjusting the plea offer**
- **AGs don’t have the latitude that county APs have – need to be pretty high up in the AGs office in order to have some freedom**
- **AGs need 4-5 levels of approvals in order to change a plea offer**
- **Do not expect the same treatment/procedure dealing with DAGs – less caseload, less turnover pressure as county prosecutors, political – know rules of the game**

VI. What is winning?

- **For defense – meeting the needs of clients, setting needs and then meeting and exceeding the needs are “winning”**
- **For the state – looking for reasonable resolution that gets within acceptable range – so if defense can present prosecutor with resolution within that acceptable range, then that is considered a “win”**
- **“mutuality of advantage” in the plea bargaining process**