Getting to Yes! Strategies for Negotiating to Win

SHELLEY AJAX, JORDAN GODDARD, SHAUL GOLDBERG, BRENT HART, SARAH HUDSON, MODERATED BY CINDY ARENDS ELSBERRY

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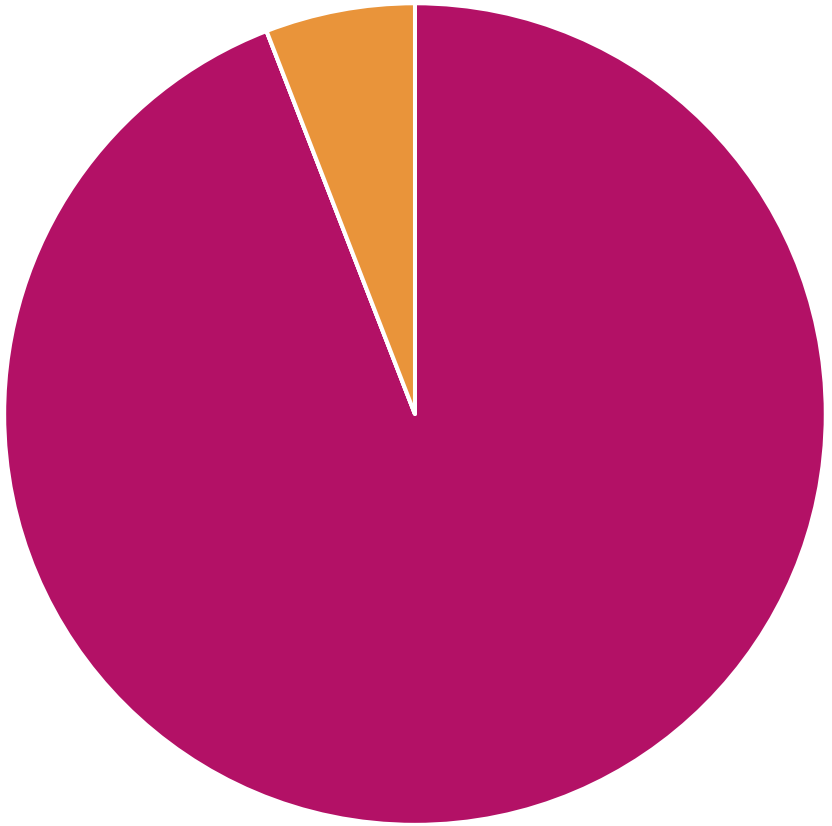
Effective Negotiations

- "[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*, 132 S.Ct. 1376, 1388 (2012)

95%

cases resolved through a plea bargain



Defense Attorney's Duties

Duty to investigate case:

→"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."

State v. A.N.J.

Defense Attorney's Duties

→**Duty to advise of risks of foregoing plea offer – going to trial**

Lafler v. Cooper,

State v. Estes

→**Duty to timely communicate plea offers**

Missouri v. Frye, RPCs 1.3,1.4*, In re the Discipline of Longacre*

→ **Duty to investigate criminal history**

State v. Crawford

"Intimately connected" to criminal process

→**Duty to consider/advise about what matters beyond crime of conviction and punishment**:

- Immigration consequences (*Padilla*)
- Parent/child – dependency
- Sex offender registration, loss of firearms
- DNA, 71.09, travel, education, SSI/benefits…
- ***Anything important to the client that flows from conviction*** (RPC 1.2)

Common problems

- Client
- Systemic
- **Prosecutors**

- Don't know the law
- Don't know their case
- Offers get worse after exercising a right
- Refusal to negotiate
- Refusal to consider other consequences
- No witness interview

Negotiation Refresher

***The Four Pillars*:**

1.Separate the People from the Problem

2. Focus on Interests, Not Positions

The Four Pillars:

The order of the pillars matters. If one of them doesn't seem to be working, consider readdressing an earlier pillar.

3. Invent Options for Mutual Gain

4. Insist on Using Objective Criteria

- **BATNA:** Best Alternative to a Negotiated Agreement
  - Every party has a BATNA. Be aware of them.
  - If the other party is unrealistic you might need to remind them of their BATNA. Do it gently if possible.

legally held
trust. noun
a trustee
as its

Hypo

Client is distrustful

- Charged conservatively
- Maybe additional charges
- Plea offer is very good
- Client rejects

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- *Can't reach client*
- *Client needs more time*

Hypo

Vulnerable Client

- Additional Consequences
- Prosecutor doesn't care (or hostile)
  - Immigration consequences
  - Right to parent

Hypo

No deals!

- Serious cases:
  - Three Strikes
  - Serious violent
  - Juveniles in adult court

or

Office wide policy…….

Hypo

- *New DPA*
  - *Don't know law*
  - *Don't know case*

Hypo

- ***No Witness Interview!***

See WDA Practice Advisory

Take Aways

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- Start with the client
- Think broadly – beyond crime(s) and jail/prison time
- Know your case, the client, and the prosecutor
- Investigate – overcharged, proof problems
- Work arounds for frustrating prosecutors
  - PRA, going up the chain, educating …

- **Your tool – client's right to counsel**
  - Prosecutors/Courts "Interfere with the Right to Counsel"