



Across the Aisle

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Objectives

- Ethics on both sides of the aisle
- Prosecutor discretion
- Plea offers
- Communication
- Discovery obligations

Prosecutor Discretion

- Special prosecutor responsibilities (RPC 3.8)
 - “Minister of justice”, comment 1
- Prosecutors must uphold the ethics of their office and not talk garbage about your client in court
- Overcharging
 - Goal is to force your client to plead to the resolution the State wants from the outset

Prosecutor Discretion

- Negotiating with prosecutors (RPC 3.2, expediting litigation)
 - Keep bugging the prosecutor until you get the discovery, offer, therapeutic court referral you want
- It's tempting to send the DPA your client's life story
 - I promise, they don't have time to listen

Prosecutor Discretion, cont.

- Plea offers
 - Does your county allow its DPAs to have resolution discretion?
 - Must communicate offer to your clients
 - RPC 1.4, communication; RPC 1.3, Comment 3 (diligence);
 - If the offer contains a deadline, don't miss it
- Contract law: offer, acceptance, consideration, detrimental reliance, specific performance

Communication

- Confidentiality of communication (RPC 1.6)
 - Not informing the DPA or court that you haven't spoken to your client since first appearance
 - Balance: what *can* you disclose to benefit your client
- But candor to the court (RPC 3.3)
 - Cannot knowingly lie to the court
- In trial, may lose the ability to examine defense witnesses

Discovery Obligations

- Fairness to opposing party (RPC 3.4)
- Discovery obligations depending on who you represent
 - CrR and CrRLJ 4.7(a) and (b)
- Witness management

Demanding Evidence

- Put them in writing
- What to request and why

How to get what you want

- WSP records request for dash cam
 - Don't rely on the prosecutor
 - Your request may be faster than PA discovery
 - Note that you are defense counsel so it's not redacted

Discovery for Defense

- Fairness to Opposing Party (RPC 3.4);
- What does the defense have to discover (CrR 4.7(b))
- What do we safeguard from discovery and how to fight court order to discover

Witnesses

- State has duty to assist scheduling State witness interviews
- Confusion abounds: defense interview vs. deposition
- Defense witness discovery obligations

Hearings Ever in Your Favor

- Motion to dismiss
- Motion to compel discovery
- Omnibus

Motion to Dismiss

- Difference between RPC 8.4 (misconduct) and CrR 8.3 (governmental mismanagement)

Omnibus Hearings

- Expediate litigation (RPC 3.2) and diligence (RPC 1.3)
- Little known rule
 - Clients can plead guilty at omni (CrR 4.5(c)(vi))

Omnibus

- Oral motion for sanctions if discovery not received
- Make quick fill in the blank template for motion at omnibus

Motion to Compel Discovery

- Also known as “the prosecutor keeps ignoring you”
- Filing it has a potential to embarrass the prosecutor in front of the court
- But defense has the obligation to investigate the case

Discovery Obligations



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Omnibus

- CrR 4.5(c)(vi) At omnibus the trial court “shall” permit defendant to change his plea.

- Discovery violations – request sanctions
- CrR 4.(h)(7)
 - (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.
 - (ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Conclusion

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