

Plea Offers: Power and Responsibility

New Prosecutors School
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Why do we make plea offers?

Practical Reasons – 97% of Cases!

- Courts are too crowded
 - 2000+ DWIs in Mecklenburg County every year
 - 180,000+ Total Cases
- Prevent Appeals to Superior Court
- Guarantee some kind of conviction
- A Prosecutor who makes no plea offers has no control over which cases go to trial

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Why do we make plea offers?

Ethical Reasons

- Role of a Prosecutor is not to "win" every case but to seek justice.
- Rules of Professional Conduct – Rule 3.8- Comment 1
"A prosecutor has the responsibility of a **minister of justice** and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

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Why do we make plea offers?

Ethical Reasons

- Act as a Buffer between Law Enforcement and Court System
- Act as a buffer between civilian complainants and Court System
 - NC one of the few states where citizens can take out criminal charges

To Achieve a fair and just outcome

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The Three Pillars of Plea Offers

- I – Foundation - Why
- II – Preparation - What
- III – Execution - How

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The Three Pillars of Plea Offers

- I - Foundation – The Law
 - The Elements of North Carolina Crimes
 - Structured Sentencing

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The Three Pillars of Plea Offers

I - Foundation – Office Policy

- What are your office/team policies?
 - Written policies or manual
 - Talk to experienced ADAs/Supervisors
 - Know your office policies and follow them
 - You are an ADA not the elected DA!
- Constantly evaluate your offers
 - Are you too harsh or too soft?
 - Are attorneys seeking you out or avoiding you?
 - Who in your office is **that ADA**?

Lack of consistency can kill office morale, create an inefficient court and make your office look bad!

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The Three Pillars of Plea Offers

I - Foundation – Reputation

- To get a plea they must know you can try a case
- You must be trustworthy

It takes 20 years to
build a reputation and
five minutes to ruin it.
If you think about
that, you'll do things
differently.

Warren Buffett

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The Three Pillars of Plea Offers

II - Preparation:

Access your evidence

- Talk to your witnesses
- Review statements, photos, video
- Know your Officer/Witness
- Information from Defense

Know your defendant

- Terrible Record?
- Community Problem?
- First Time Offender?
- What are you trying to achieve?

Know your docket

- Priorities can be relative

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The Three Pillars of Plea Offers

III – Execution

- Type of offer: Charge based / Sentenced based
- Communicate your offer clearly to Defense
 - Be **Specific**
 - If plea in future put offer in writing and with date of plea
- If there are issues with case consider bench conference
- You Control the docket and order of pleas
 - Have a known system (first come, first serve)
 - Exceptions should be made when needed
- When taking plea be clear and concise
- Let the Court know what is happening to each case on docket
- If sentenced based offer YOU inform the court – Take Control of the Arraignment

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The Three Pillars of Plea Offers

I - Execution – Candor

- You must disclose all material terms of plea agreement to the court
 - State Bar Ethics Opinion RPC 152 (1992) "Rule 1.2(c) of the Rules of Professional Conduct prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."
- Never agree to keep facts or Defendant record from the Court
 - State must present evidence of BAC in DWI. 20-179(a)(2)
 - The State and the defendant may not enter into a calculated agreement to underreport the defendant's record in order to reduce the defendant's exposure—even if the judge is advised of the tactic and does not object. 2003 Formal Ethics Op. 5.

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The 5 DONT's of Plea Offers

- 1) Turn off your brain as soon as defendant agrees to plea
- 2) Get bogged down
- 3) Let other people try and do your job
- 4) Bluff
- 5) Take anything personal

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The 5 DOs of Plea Offers

- 1) Work fast, make decisions, act don't react
- 2) Have your head on a swivel
- 3) Be comfortable saying "No"
- 4) Listen
- 5) Remember you are a "minister of justice."

"The qualities of a good prosecutor are as elusive and as impossible to define as those which make a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

United States Supreme Court Justice Robert H. Jackson, April 1, 1940

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Interested Parties: The Pro Se Defendant

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

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Interested Parties: The Defense Attorney and The Court

The Defense Attorney

- Must communicate plea offer to Defendant. Right to effective assistance during plea negotiations. See USSC cases Missouri v. Frye & Lafley v. Cooper

- In Superior Court put plea offer on record if Defendant rejects and pleads not guilty at arraignment

The Court

- Ensure there is a factual basis for a plea
- Ensure that the plea is knowing, voluntary and intelligent
- Court may NOT coerce plea. State v. Pait:

following a not guilty plea, court became visibly agitated and in an angry tone of voice said he was tired of these frivolous pleas and directed defense counsel to meet with client and come back with an "honest plea." Minutes later defendant pled guilty. Court ruled plea not voluntary.

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Interested Parties: The Victim

- Communication and transparency is key
- Be honest as to what the offer is and why
- Talk **BEFORE** the plea is extended not after
- Stay professional at all times

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