



Negotiations – Prosecutor's Perspective

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The Basics

- ▶ Approximately 90% of criminal cases resolve by a plea bargain.



Tips for Negotiating

▶ Do's

- ▶ Understand you are not the only one with a "client"
- ▶ Support your offer by providing the state with legal and factual basis
- ▶ Be honest about what you can and can not get your client to agree to
- ▶ Understand the procedures of pleas and sentencing to avoid procedural issues that derail the plea and agreement

▶ Don't's

- ▶ Don't make unrealistic offers to start
- ▶ Don't ask for a dismissal without a legal basis
- ▶ Don't claim entitled to a plea and negotiations are required
- ▶ Don't suggest the State ignore criminal history
- ▶ Don't ignore the State's obligations



ETHICAL OBLIGATIONS AND CHARGING STANDARDS

Prosecutor's Ethical Duties – ABA 3-1.2

- ▶ Seek justice within the bounds of the law, not merely to convict.
- ▶ Serves the public interest and should act with integrity and balanced judgment to increase public safety;
- ▶ Pursue appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances;
- ▶ Protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Decision to Prosecute: Crimes Against Persons

- ▶ RCW 9.94A.411 (2)(a):
 - ▶ Crimes against persons will be filed if sufficient **admissible evidence** exists, which, when considered with the **most plausible, reasonably foreseeable defense that could be raised under the evidence**, would justify conviction by a reasonable and objective fact finder.
 - ▶ With regard to offenses prohibited by RCW 9A.44.040, 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, 9A.44.089, and 9A.64.020 the prosecutor should avoid pre-filing agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW 9.94A.670.

Evidentiary Standards – RCW 9.94A.411

- ▶ Decision NOT to prosecute:
 - ▶ No public purpose,
 - ▶ It would defeat the underlying purpose of the law,
 - ▶ It would result in a decreased respect for the law.
- ▶ Examples:
 - ▶ Contrary to legislative intent;
 - ▶ Antiquated statutes;
 - ▶ De minimus violation;
 - ▶ Confinement on other charges;
 - ▶ Disproportionate cost of prosecution;
 - ▶ Improper motives of complainant;
 - ▶ Immunity;
 - ▶ Victim request;
 - ▶ Little or no injury or damage

Evidentiary Sufficiency - Caselaw

- ▶ Great charging discretion w/ SRA does not violate separation of powers. *State v. Lewis*, 115 Wash.2d 294 (1990).
- ▶ Not required to decline to prosecute a de minimis violation. *State v. Stewart*, 141 Wash.App. 791 (2007).
- ▶ Prosecutor may increase initial charge when a fully informed and represented defendant refuses to plead guilty to lesser charge. *State v. Bonisisio*, 92 Wash.App. 783 (1998); *State v. Lee*, 69 Wash.App. 31 (1993).
 - ▶ Note: Prosecutorial vindictiveness is the intentional filing of more serious crimes in retaliation of a defendant's lawful exercise of procedural rights. See *State v. Korum*.



VICTIMS RIGHTS

RCW 7.69 : CRIME VICTIMS, SURVIVORS, AND WITNESSES

RCW 7.69.010

- ▶ “In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime ...”
- ▶ “The legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system.”
- ▶ “The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and **that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.**”

RCW 7.69.030 – Rights of victims, survivors and witnesses

- ▶ §(10): With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program, or **any other support person of the victim's choosing**, present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;

RCW 7.69.030

- ▶ (6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;
- ▶ (12) With respect to victims and survivors of victims in any felony case or any case involving domestic violence, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing upon request by a victim or survivor;
- ▶ (13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

PLEA AGREEMENTS

RCW 9.94A.450 PLEA DISPOSITIONS

- ▶ Standard:
 - ▶ Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial.
- ▶ Basis for Plea Agreement
 - ▶ Evidentiary problems
 - ▶ Request of the victim if not result of pressure from the defendant
 - ▶ Discovery of facts that mitigate seriousness of defendant's conduct
 - ▶ Defendant's criminal history
 - ▶ Defendant is cooperating in other matters

RCW 9.94A.431: Plea agreements; information to the court; approve or disapprove.

- ▶ (1) If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The prosecutor shall inform the court on the record whether the victim or victims of all crimes against persons, as defined in RCW 9.94A.411, covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement. The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

RCW 9.94A.421: Plea Agreements

- ▶ In a case involving a crime against persons as defined in RCW 9.94A.411, the prosecutor shall make reasonable efforts to inform the victim of the violent offense of the nature of and reasons for the plea agreement, including all offenses the prosecutor has agreed not to file, and ascertain any objections or comments the victim has to the plea agreement.
- ▶ In no instance may the prosecutor agree not to allege prior convictions.

SENTENCING

Sentence Procedures

- ▶ RCW 10.64.024
 - ▶ Mandatory detainer pending sentencing
- ▶ RCW 7.69.030(13)
 - ▶ Victim Impact Statement
- ▶ RCW 9.94A.500
 - ▶ Presentence Investigation Requirement and time frame

9.94A.460. Sentence Recommendations

- ▶ The prosecutor may reach an agreement regarding sentence recommendations.
- ▶ The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement.

RCW 9.94A.670: Special Sex Offender Sentencing Alternative

- ▶ No Alford Pleas
- ▶ “The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. “
- ▶ “The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.”
- ▶ Victim