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Ethical Considerations in Plea Bargaining
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ETHICAL CONSIDERATIONS IN PLEA BARGAINING

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INTRODUCTION:

Given that over 95 percent of all criminal convictions in this country are obtained by GUILTY PLEA rather than by trial verdict, the importance of the Rules of Professional Conduct (RPC) governing the conduct of prosecutors, defense attorneys and judges in this pervasive process of case disposition cannot be overstated (see 5/31/21 Albany Times Union article by Susan J. Walsh and Norman L. Reiner of the New York State Association of Criminal Defense Attorneys [NACDL]: "Lawmakers Have a Chance to Eradicate Trial Penalty," timesunion.com).

THE ALL-POWERFUL PROSECUTOR

With all due deference to the judiciary, the most powerful player in the process is the public prosecutor who has the discretion to bring charges (or not), to determine (based on the facts and law of the case), what level of offense(s) to charge, and whether to offer a plea to a lesser charge, with or without conditions (e.g., to testify against a co-defendant, pay restitution or resign one's position of employment) (see People v Hicks 98 NY2d 185 [2002]), Matter of Holtzman v Goldman 71 NY2d 564 [1988]).

The District Attorney (DA) can also, if so inclined, put a time limit on the availability of a reduced plea (e.g. before indictment upon a Superior Court Information or "SCI"), and require that as a condition of such plea, the defendant agree to a specified sentence (e.g., one year definite sentence on a Class A misdemeanor reduced from a felony), provided the judge (who must retain sentencing discretion) sees fit to go along with the arrangement (see People v Farrar 52 NY2d 302 [1982]).

If the court cannot agree after all, the People would have the right to move to vacate the plea on the ground that they were deprived of their benefit of the bargain (i.e., a specified sentence in exchange for a plea offer that was favorable to the defendant).

DISCOVERY OBLIGATION:

Of course, if the People choose to put the defendant on the clock with respect to a "limited-time-only" plea offer, in addition to their ethical duty to proceed in good faith only upon probable cause (RPC 3.8[a[), they must also comply with their obligation under CPL 245.25 (1) and (2) to provide discovery at least three days before the expiration date of the plea offer in the case of a charge commenced by a felony complaint, or at least seven days before the offer (to a crime) expires in the case of an indictment, SCI, Prosecutor's Information, Simplified Information or Misdemeanor Complaint.

In the event of non-compliance with discovery, then upon motion of the defendant, the court can consider the impact of such non-compliance upon the defendant's decision to accept or reject the plea. If the court finds that the non-disclosure materially affected the defendant's decision,

and the DA refuses to re-offer the plea, the court must PRECLUDE the admission at trial of any evidence not disclosed as required under the statute.

Clearly, the new discovery statute is intended to ensure compliance but, more importantly, to allow defense counsel to review the discovery in sufficient time to competently advise the client on the potential risks and benefits of taking the plea (vs going to trial) (RPC 1.1, 1.2 and 1.4), and permit the client to make an INFORMED DECISION. RPS 1.0 [j]).

PROSECTOR'S ETHICAL OBLIGATIONS:

Inasmuch as the DA holds the cards with respect to prosecutions and plea offers, (the defendant has no constitutional right to a plea (Weatherford v Busey 429 US 545 [1977]), the prosecutor's power is counterbalanced by the obligation to not just seek convictions, but to pursue justice that balances the concerns of the victims, the rights of the accused and the need for society to have faith and confidence in the criminal justice system.

As stated in the 1908 ABA Canons of Professional Responsibility, "the primary duty of the …prosecutor is not to convict but to seek justice. This special duty exists because: 1. the prosecutor represents the sovereign and therefore should USE RESTRAINT (and sound judgment) in the discretionary exercise of those powers, such as the selection of cases to prosecute; 2. during trial, the prosecutor is not only an advocate but may also make decisions (on behalf of the sovereign) normally made by an individual client ; and 3, in our criminal justice system, the accused is to be given the benefit of all reasonable doubts" (see Jason Tashea, "Prosecutors Must Maintain Ethical Conduct During Misdemeanor Plea Deals," ABA Journal 5/9/2019 - https://www.abajournal.com/news/article/prosecutors-must-maintain-ethical-conduct-during-misdemeanor-plea-deals-says-new-ethics-opinion).

Noting that 80% of all state criminal dockets consist of misdemeanors, most of which are resolved by guilty pleas (frequently at the first appearance) entered by unrepresented defendants (mostly minorities), the ABA issued Formal Opinion #486 on May 9th, 2019, stating that prosecutors must, (consistent with their ethical obligations under RPC 3.8, 1.1 1.3, 4.1 4.3, 5.1. 5.3 and 8.4):

1. ensure that each charge incident to a plea has an adequate basis in fact and law;
2. ensure that the defendant is informed of his/her right to counsel, how to obtain counsel and be given time to do so;
3. avoid negotiation tactics that discourage the defendant from seeking the advice of counsel;
4. avoid offering pleas on terms that knowingly misrepresent or underrepresent the potential consequences of a plea, thus encouraging the defendant to plead guilty without a full understanding of both the direct (e.g. jail, deportation) and collateral consequences (e.g. loss of employment) that may likely follow the guilty plea.

As the Opinion stated, "the observance of special obligations of prosecutors under the RPC is critical to achieving fair and just guilty pleas."

See https://www.abajournal.com/files/aba_formal_opinion_486.pdf

At least insofar as indigent defendants are concerned, the chance of an uncounselled guilty in Erie County is slim, inasmuch as ACP attorneys are present in the town and village courts at the arraignment, and public defenders represent indigent clients starting at the first appearance in Buffalo City Court. Nevertheless, it is worth emphasizing that plea bargaining represents a

critical phase of proceedings at which the defendant is entitled to the effective representation of counsel (Padilla v Kentucky 539 US 356 [2010]).

RPC 3.8 SPECIAL RESPONSIBILITIES OF PROSECUTORS:

a. A PROSECUTOR SHALL NOT INSTITUTE, CAUSE TO BE INSTITUTED, OR MAINTAIN A CRIMINAL CHARGE WHEN THE PROSECUTOR KNOWS THAT THE CHARGE IS NOT SUPPORTED BY PROBABLE CAUSE.

b. A PROSECUTOR IN CRIMINAL LITIGATION SHALL MAKE TIMELY DISCLOSURE TO COUNSEL FOR THE DEFENDANT (OR TO A *PRO SE* DEFENDANT) OF EXISTENCE OF EVIDENCE OR INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED, MITIGATE THE DEGREE OF THE OFFENSE, OR REDUCE THE SENTENCE, EXCEPT WHEN RELIEVED OF SUCH RESPONSIBILITY BY A PROTECTIVE ORDER.

Comment # 1 states that a prosecutor, as a minister of justice, must ensure that the defendant is accorded PROCEDURAL JUSTICE and that guilt is decided upon sufficient evidence. A knowing disregard of those obligations or a systemic abuse of prosecutorial discretion could, in certain instances, could constitute a violation of RPC 8.4 (MISCONDUCT) which proscribes:

a. purposeful violations of the RPC'S (whether directly or through the acts of another);
b. illegal conduct that adversely reflects on HONESTY, TRUSTWORTHINESS AND FITNESS AS A LAWYER (see also RPC 3.3);
c. conduct that involves DISHONESTY, FRAUD OR MISREPRESENTATION;
d. conduct that is PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE;
e. words or conduct implying an ability to influence a court on irrelevant grounds or
f. to achieve results by means that violate the RPC or other law;
g. conduct that UNLAWFULLY DISCRIMINATES in the practice of law; or
h. engaging in any other conduct that adversely reflects on the lawyer's fitness to practice.

Comment 2 to Rule 3.8 *supra* states that while an unrepresented defendant may waive important procedural rights such as the right to a preliminary hearing, prosecutors should NOT seek to obtain waivers of such rights from them. (This would not apply to a defendant who appears *pro se* by choice with court approval or to the lawful questioning of an uncharged suspect who has knowingly waived his/her right to silence and to counsel).

BEWARE OF THE HARD LINERS:

Despite these important responsibilities and checks on their authority, some prosecutors view defendants not as accused citizens cloaked in the presumption of innocence but as criminals awaiting their just desserts. Consequently, some may take a hard line as a matter of policy or practice and refuse to offer any reduced pleas at all, or post indictment, and insist, in the case of pre-indictment pleas, that judges not offer any commitments before sentencing, lest the defendant be given a double dip of leniency.

With such prosecutors, in the rare case where a favorable plea is offered, it may well be because a key witness went south, important evidence was lost, or the court has given them a bad feeling about the defendant's pending suppression motion.

Other, less scrupulous prosecutors may seek an indictment on a questionable higher charge (e.g., Assault 1st degree rather than Assault 2d degree), believing that their chances of getting a conviction on a higher charge is enhanced (not unlike a used car dealer who inflates the price.) Worst case scenario, a vigilant judge may reduce the charge to what it should have been in the first place after reviewing the Grand Jury minutes.

While the vast majority of prosecutors are honorable, fair-minded people who are mindful of their ethical duties, even when the playing field is level, the vast majority of defendants elect (as noted at the outset) to cut their losses with a plea (hopefully one that is reduced and accompanied by an acceptable sentence commitment) rather than roll the dice at trial and risk a far more onerous punishment.

THE PRICE OF NOT PLEADING GUILTY:

Plea bargaining has always been seen as a time-honored (if not time-worn) practice of criminal case resolution involving concessions on both sides (e.g., a lesser charge and sentence for the defendant and a conviction with testimony for the prosecution against a non-pleading co-defendant) (Santobello v NY 404 US 257 [1976]). However, many in the defense bar (among others) see it as a grossly imbalanced system where the prosecutor calls the shots and defendants are put in the unenviable position of either pleading guilty (which occurs almost always) or risking a far greater sentence if convicted after trial. (Some would say that they put themselves there).

NACDL REPORT:

The National Association of Criminal Defense Lawyers conducted a two-year study of significant sentencing disparities between post-plea and post-verdict convictions across the country. The report concluded that the Sixth Amendment right to a jury trial has been pushed to the brink of extinction. NACDL Reports, The Trial Penalty: The Sixth Amendment Right To Trial on the Verge of Extinction and How to Save It (July 2018.) – see https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf Consequently, according to the report, more defendants (mostly minorities) spend more time in jail pre-disposition, more innocent people are convicted (mostly to cut their losses), and the People's proof seldom is subject to the bright light of cross examination which has been described as "the greatest legal engine…for the discovery of the truth." Id., citing US v Salerno, 505 US 317, at 328 (1992) (Stevens, J., dissenting; referencing 5 J. Wigmore, Evidence §1367, p. 32 (J. Chadbourn rev. 1974.)

In a follow-up op-ed entitled "Lawmakers Have a Chance to Eradicate the Trial Penalty" https://www.timesunion.com/opinion/article/Lawmakers-have-a-chance-to-eradicate-the-trial-16213644.php, the authors reference two bills currently pending before the State Senate and Assembly (S/1279 and A/5689) which, in their view, would go a long way to reducing the incidence of trial trepidation including proposals to:

1. prohibit waivers of the right to appeal the undue harshness of a sentence as a condition of a guilty plea (under current law, a valid waiver forecloses such argument on appeal [see, for example, People v Pittman 163 AD3d 1461 [4th Dep't 2018]);

2. enable appellate review of adverse suppression rulings despite a waiver of appeal and

3. streamline the ability of poor persons to obtain prompt legal representation for appeal purposes.

JUDGES AND GUILTY PLEAS:

Like most prosecutors, the vast majority judges are honorable and ethical public servants who try their best to be fair and even-handed in the administration of justice. They are also human beings and (mostly) elected officials who are not unmindful of public safety, sentiment and perception. While most judges prefer also to be perceived as being fair-minded (perhaps "firm but fair" in an election year), it seems that the last thing any judge would want is to be seen as a lily-livered wrist slapper who is soft on crime and lenient with criminals.

There are some judges who may pride themselves on being "no-nonsense" dispensers of justice (i.e., tough sentencers). Very few would be so naive to state (on the record) that they would make a defendant pay a heavier price for exercising his/her right to a trial, although one village justice of yore was heard to say, "those who demand the most of the justice system will receive it." Another judge reportedly advised counsel that if the facts at trial played out as described in conference, the defendant would get the maximum punishment and be sentenced consecutively. Needless to say, a bench trial was not a good option.

JUDICIAL CANONS:

The Judicial Canons of Ethics (see ABA Model Code) are intended to guide judges in the performance of their duties with an eye toward conducting themselves in a manner that promotes public confidence in the administration of justice.

Canon #1 states that JUDGES MUST UPHOLD THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY;

CANON #2 requires judges to conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the judiciary;

CANON #3 directs judges to perform their duties fairly, impartially, and diligently.

When judges lean on defense counsel to persuade their clients to take a plea offer (whether because they're trial-averse or hung up on standards-and-goals), routinely follow prosecutors' sentence recommendations, or slam the defendants at sentencing post-verdict (when all bets are off), the judges risk losing their impartiality (or appearance thereof) and may be acting as a *de facto* extension of the People rather than as a neutral and unbiased magistrate.

The decision whether to plead guilty is a fundamental one that only the defendant can make (RPC 1.2[a]) after counsel has clearly communicated the particulars of the offer and the defendant's sentence exposure (including any commitments, conditions and any significant collateral consequences.) When counseling a client, counsel should not just write off the trial option and advise the client to take a plea just because the People and the judge may be

pushing the idea. If the prosecutor is eager to secure a plea, it may be a sign that the People's case has problems or that the prosecutor is gun-shy.

That said, the client needs to understand that sentencing after trial is almost always more severe than when it is a bargained-for disposition resulting from a plea negotiation. In most cases, it's for very good reasons -- including the fact that guilt has been publicly determined by a jury and all the unpleasant details of the defendant's criminal conduct have been aired out in detail. In contrast, a plea colloquy usually covers only the bare-bones facts, sufficient to cover the elements of the crime, and a pre-sentence report seldom has the same effect as hearing witnesses describe in-person what they went through on account of the defendant's conduct.

SOME CASES:

In People v Dupuis 2021 NY Slip Op. 01680 (4th Dep't 3/19/21): the Fourth Department noted that the defendant, who was convicted of Sex Abuse 1st degree, failed to preserve his argument that the trial court penalized him for exercising his right to trial. The AD deemed the argument to be lacking in merit anyway, noting that, "the mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is NOT PROOF that the defendant was punished for asserting his right to trial, and there is no indication in the record… that the sentencing court acted in a VINDICTIVE MANNER based on the defendant's exercising his right to a trial" (citing People v Garner 136 AD3d 1374 [4th Dep't 2016]).

The court also noted that inasmuch the *quid pro quo* of the plea bargaining process almost necessarily involves offers to moderate sentences that ordinarily would be greater, it is expected that sentences meted out after trial may be more severe than those that were proposed in connection with a plea offer (citing People v Martinez 26 NY3d 196 [2015] and People v Pope 141 AD3d 1111 [4th Dep't 2016]).

It should be noted that in order to preserve the argument of punitive sentencing for appeal, the defendant should challenge the sentencing immediately after judgment is imposed. (People v Stubinger, 87 AD3d 1316 [4th Dep't 2011]). Also, as noted above, an appellate challenge to the harshness of a sentence is generally foreclosed by a valid waiver of appeal (see People v Sanders 180 AD3d 1327 [4th Dep't 2018]).

See also People v Pena, 50 NY2d 400 (1980) where the court rejected the defendant's argument that his five-to-fifteen year indeterminate sentence upon his conviction for Robbery 1st degree (stemming from the knife-point theft of money from the victim), was unfairly punitive after he previously rejected plea offers to Robbery 3d degree (with a two-to-four year sentence commitment conditioned upon testifying against the co-defendant), and then a plea to the entire indictment (with a three-to-six year commitment).

In order to prevail then, defendants need to show at least some element of vindictiveness in the sentence rather than facts related to the level and nature of the offense for which the defendant was convicted (compared with any lesser plea that was offered), the defendant's criminal history, and the effect of the crime on the victim.

In a few cases, the facts at trial may be less damning than were portrayed by the prosecutor before trial (e.g., where there are elements of self-defense albeit not enough to warrant an acquittal, or the defendant was also a victim of domestic violence.) See People v Addimondo, 2021 NY Slip Op 04364 (2d Dep't 7/14/21) where the trial court imposed a 19-year sentence upon a Murder 2d degree charge, but which was dramatically reduced based on evidence

adduced at a sentencing hearing per PL 60.12 regarding the defendant's long history of domestic violence and sexual abuse at the hands of the victim.

DEFENSE COUNSEL AND GUILTY PLEAS:

Since most of defense counsel's labors center on the art of damage maintenance (i.e., negotiating the best possible plea disposition under the circumstances) counsel must be mindful of the ethical rules with respect to COMPETENCE, (RPC 1.2), DILIGENCE (RPC 1.3) , COMMUNICATION (RPC 1.4) CONFIDENCES (RPC 1.6) AND CONFLICTS (RPC 1.7)AND THE RULES OF ETHICS IN ADVOCACY (RPC 3.1-3.4).

The rules of advocacy apply also to counsel's conduct while on trial which are important because the only other option, if a plea is rejected by the client and the case is not dismissed (whether upon a challenge to the sufficiency of the grand jury minutes or after a motion to suppress evidence), is to proceed to trial.

BE A TRIAL LAWYER FIRST:

It is worth stating that counsel must be willing to take cases to verdict if they want to be taken seriously by prosecutors and judges. That is not to suggest that counsel should scoff at a favorable offer when the People's proof otherwise appears to be strong, but if the case is triable (i.e., there are genuine issues of fact, serious credibility questions regarding the prosecution witnesses, a plausible defense) then counsel should not just roll over and accept (let alone beg) for a plea.

If counsel has a reputation as a bargain hunter rather than a trial lawyer, he/she will likely get what he/she (but not necessarily the client) deserves. But if the lawyer is regarded as one who can and will try cases (hopefully with occasional success), he/she may well find that future plea offers will be more attractive and beneficial to the clients. This all assumes, of course, that counsel has PREPARED EACH CASE COMPETENTLY, THOROUGHLY AND DILIGENTLY.

RPC 1.1 COMPETENCE:

This rule states that:

a. a lawyer should provide a client with COMPETENT REPRESENTATION which requires the LEGAL KNOWLEDGE, SKILL, THOROUGHNESS AND PREPARATION NECESSARY FOR THE REPRESENTATION.

b. a lawyer SHALL NOT handle a legal matter that he/she knows or should know that he/ she is not competent to handle without associating with a lawyer who is competent to handle it.

The rule does not require a lawyer to be the best at his/ her craft (though everyone should strive to be), but it is important to bring his/her education, training and experience to bear and: READ THE RELEVANT STATUTES AND CASES, READ THE ACCUSATORY INSTRUMENT FOR LEGAL SUFFICIENCY (and move to dismiss where appropriate), READ ALL THE DISCOVERY, IDENTIFY AND EVALUATE ANY/ALL PERTINENT SUPPRESSION ISSUES,

MEET WITH THE CLIENT IN PERSON (with a ACP social worker if warranted) and get his/her side of the story, IDENTIFY SUBSTANTIVE STRENGTHS AND WEAKNESSES IN THE PEOPLE'S CASE, SIZE UP THE PROSECUTORS ASSESSMENT OF HIS/HER CASE and LISTEN FOR (and where appropriate), SEEK THE BEST POSSIBLE DISPOSITION.

Just because a lawyer is new or lacking in experience (everyone starts somewhere), does not mean that counsel should run away from a case. However, counsel should not hesitate to confer with ACP staff attorneys or more experienced counsel for guidance. If you're not yet fully competent to handle a case, seek help, get competent and proceed accordingly, keeping in mind that you should also be conducting your own independent investigation (with the assistance of ACP investigators when needed).

c. A lawyer SHALL NOT INTENTIONALLY:

1. fail to seek the OBJECTIVES of the client through reasonably available means permitted by law and the RPC'S; or

2. PREJUDICE OR DAMAGE the client during the course of the representation except as permitted by these rules (e.g., under RPC 1.6[2], a lawyer may disclose confidential information to prevent the client from committing a crime or to defend him/herself against an accusation of misconduct [RPC 1.6[5][i]).

It is important to remember that while counsel is responsible for determining the reasonably available legal avenues to a desired outcome, (and communicating the options and their attendant risks and benefits), it is the client who determines the objectives of the representation. (see RPC 1.2 infra):

RPC 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN LAWYER AND CLIENT:

a. subject to these provisions, a lawyer SHALL ABIDE a client's decisions concerning the objectives of the representation and, as per RPC 1.4, shall CONSULT with the client as to the means by which they are to be pursued. In a CRIMINAL CASE, the lawyer SHALL ABIDE BY THE CLIENT'S DECISION, after consultation with the lawyer as to the PLEA TO BE ENTERED, whether to waive a jury trial and whether the client will testify.

The decision whether or not to plead guilty, as noted above belongs to the defendant (whether or not counsel agrees), provided counsel has given the defendant sufficient information (in particular, the full range of sentence exposure and any collateral consequences which, while not necessary to a knowing, voluntary and intelligent plea, may be of paramount importance to the defendant's decision).

Conversely, the decision whether to move to WITHDRAW A GUILTY PLEA is also a fundamental decision (as opposed to a lawyer's strategic decision) that only the defendant can make (see Ethics Opinion 1175 of the NYSBA COMMITTEE ON PROFESSIONAL ETHICS, 10/28/19).

b. a lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Counsel may find that he/she does not agree with or approve of the client's lifestyle, views or activities but counsel should not let any such disagreement affect the level of his/her commitment to defending the client zealously within the bounds of the law (see also RPC 3.1[a]: a lawyer representing a criminal defendant in a proceeding that could result in incarceration should defend the proceeding so as to require that every element of the case be established).

It should be noted, however, that if the client insists on taking action with which the lawyer fundamentally disagrees, the lawyer may seek court permission to be relieved of the assignment. (see RPC 1.16 [c] 4]). For example, the client is released on a charge of disorderly conduct and trespass for demonstrating outside of an abortion clinic. He tells his lawyer that he will resume his activities. The lawyer is a pro-choice advocate. That lawyer would be well within the rules to move to withdraw.

(see RPC 1.2 1[d]-[g] for remaining text of the rule).

RPC 1.3 DILIGENCE:

a. a lawyer shall act with reasonable DILIGENCE AND PROMPTNESS.

b. a lawyer shall NOT NEGLECT a legal matter entrusted to the lawyer.

c. a lawyer shall not intentionally fail to carry out his/her responsibilities to the client but may withdraw as set forth under RPC 1.16

Note #1 instructs that a lawyer should pursue a matter on a client's behalf despite opposition, obstruction or personal inconvenience, and shall take whatever lawful and ethical measures are required to vindicate a client's cause (including advocating for dismissal, where appropriate and pursuing the best possible disposition).

Note #2 states that a lawyer must CONTROL his/her workload so that each case can be handled diligently and promptly.

Regarding the matter of attorney responsiveness, note #3 states that "NO PROFESSIONAL SHORTCOMING IS MORE WIDELY RESENTED THAN PROCRASTINATION…UNREASONABLE DELAY CAN CAUSE A CLIENT NEEDLESS ANXIETY AND UNDERMINE CONFIDENCE IN THE LAWYER'S TRUSTWORTHINESS."

So, if for example, counsel's client is anxious to know whether a favorable plea offer is available, (or none at all), counsel should take reasonable steps to obtain answers to such questions without leaving the client hanging on tenterhooks.

RPC 1.4 COMMUNICATION:

A lawyer shall:

1. PROMPTLY INFORM THE CLIENT OF:

ii. ANY DECISION OR CIRCUMSTANCE with respect to which the client's INFORMED CONSENT is required;

ii. any information REQUIRED BY COURT RULE;

iii. MATERIAL DEVELOPMENTS in the case including PLEA OFFERS (and the absence of any reduced plea offer so that the client can decide whether to have counsel pursue a favorable sentence commitment if he/she pleads guilty to the charge);

2. REASONABLY CONSULT with the client about the means by which the client's objectives are to be accomplished.

(e.g., Lawyer: "since the DA is not offering any plea, we're going to move to suppress your statements to police which I believe we can get kicked because the police interrogated you while you were in custody and they didn't read you your rights, and if we win that motion, we'll be in a much stronger position if we go to trial. Or, the DA may realize that her case is weakened and give us the plea offer you wanted in the first place. The downside is that if we lose the motion, the DA will definitely not offer any reduced plea, and she'll be feeling pretty good about going to trial. And if the jury convicts you, we'll have good grounds to appeal the denial of our motion to suppress.").

3. keep the client REASONABLY INFORMED about the status of the matter. (L: "the judge is supposed to rule on the motion next Friday and, depending how he decides, I'll either approach the DA about the plea you wanted, if you still want to go that way, or we'll ask the court to set a trial date.").

4. PROMPTLY COMPLY with the defendant's requests for information.

(C: "now that our motion to suppress has been granted, what did the DA say about the reduced plea?" L: she said she had to take it up with her supervisor." C: " As soon as she tells you one way or the other, let me know right away, ok?" L: "Will do.").

5. CONSULT with the client about any RELEVANT LIMITATION on the lawyer's conduct when the lawyer knows that the lawyer expects assistance not permitted by the RPC'S or other law.

(e.g., Lawyer: "since you admitted to me that you shot the defendant, I cannot ethically call this witness that you provided to testify that you were someplace else at the time of the crime because I cannot knowingly offer false testimony (see RPC 3.3[3]).

(e.g., Lawyer: "I appreciate your loyalty on behalf of your spouse, but you've already told me that you were not the driver and that you switched seats with him after the accident because your husband is on probation for DWI. So, I cannot knowingly allow you to perjure yourself by pleading guilty under oath to DWI.").

6. a lawyer shall EXPLAIN a matter to the extent reasonably necessary to permit the client to make INFORMED DECISIONS regarding the representation.

RPC 1.6: CONFIDENTIALITY OF INFORMATION:

a. a lawyer shall not KNOWINGLY REVEAL CONFIDENTIAL INFORMATION, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person unless:

1. the client gives INFORMED CONSENT;

2. the disclosure is IMPLIEDLY AUTHORIZED to advance the client's BEST INTERESTS and is either reasonable under the circumstances or customary in the professional community.

(e.g., counsel may, in a pre-trial conference with the court and prosecutor, reveal so much of the defendant's version of events as will advance his cause (i.e., to obtain a favorable plea and/or sentence commitment or plant seeds of doubt about the People's case).

CONFIDENTIAL INFORMATION consists of information gained DURING OR RELATING TO THE REPRESENTATION OF A CLIENT, FROM WHATEVER SOURCE, THAT IS:

a. PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE;
b. LIKELY TO BE EMBARRASSING OR DETRIMENTAL TO THE CLIENT IF DISCLOSED;
c. INFORMATION THAT THE CLIENT HAS REQUESTED BE KEPT CONFIDENTIAL.

(see subdivision 3[b][1-6] for circumstances permitting the L to withdraw from the case).

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

As a general proposition, counsel should be WARY of representing co-defendants in the same case because such representation is usually fraught with potential if not actual conflicts of interest. The lawyer owes a duty of undivided loyalty to the client, undistracted by the interests of another client. If for example, the prosecutor offered an attractive plea to one client (C#1 (in exchange for testimony against the other (C#2), counsel could not advise C#1 to accept the plea, for to do so would inure to the detriment of C#2. Also, at the trial of the C#2, counsel could not cross his examine C#1 without violating his confidences (and trust), and if counsel soft-pedaled the examination, C#2 would surely feel that he was being sold out.

a. Except as provided in paragraph b, a lawyer SHALL NOT represent a client if a reasonable lawyer would conclude that either:

1. the representation will involve the lawyer in representing differing interests; or

2. Note: (f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. See Rule 1.0(f)

2. there is a SIGNIFICANT RISK that the lawyer's PROFESSIONAL JUDGMENT on behalf of the client will be ADVERSELY AFFECTED by the lawyer's own FINANCIAL, BUSINESS, PROPERTY or OTHER PERSONAL INTERESTS.

(e.g., L counsels C to take a plea because the day-certain trial date conflicts with L's pre-paid vacation flight to Hawaii).

b. Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does NOT involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives INFORMED CONSENT, confirmed IN WRITING.

RULE 2.1 LAWYER AS ADVISOR:

In representing a client, a lawyer shall exercise INDEPENDENT PROFESSIONAL JUDGMENT AND RENDER CANDID ADVICE. In rendering advice, a lawyer may refer not only to law but to considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

(e.g., L to C, a public official: "if you take the misdemeanor plea, the judge will give you a conditional discharge, you can avoid a felony prosecution and you won't be barred from running again for public office.").

RPC 3.1 NON-MERITORIOUS DEFENSES:

a. a lawyer shall NOT defend a proceeding or controvert any issue therein unless there is a BASIS IN LAW AND FACT for doing so that is not frivolous.

b. a lawyer's conduct is FRIVOLOUS if:

1. the lawyer KNOWINGLY advances a defense that is UNWARRANTED under existing law (unless there is a good faith basis to argue for reversal of existing law);

2. the conduct has no reasonable purpose other than to delay or prolong the resolution of the case in violation of RPC 3.2, or serves merely to harass or maliciously injure another; or

3. the lawyer knowingly asserts material factual statements that are FALSE.

RPC 3.3 CONDUCT BEFORE THE COURT:

a. a lawyer shall not knowingly:

1. MAKE A FALSE STATEMENT of fact or law to a court or FAIL TO CORRECT a FALSE FALSE STATEMENT OF MATERIAL FACT OR LAW previously made by the lawyer to

the court;

2. FAIL TO DISCLOSE CONTROLLING LEGAL AUTHORITY KNOWN BY THE LAWYER TO BE
DIRECTLY ADVERSE TOTHE CLIENT'S POSITION (and not disclosed by the prosecutor);

3. OFFER OR USE EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE;

b. a lawyer who represents a client before a court and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take REASONABLE REMEDIAL MEASURES (including, if necessary, disclosure to the court).

c. the above-stated duties apply even if compliance requires disclosure of confidential information.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL:

a lawyer SHALL NOT:

a.(1) suppress any evidence that the lawyer/client has an obligation to reveal or produce;

2. advise or cause a person hide or leave the jurisdiction so as to become unavailable as a witness;

3. conceal or fail to disclose that which, by law, the lawyer is required to reveal;

4. knowingly use perjured testimony or false evidence;

5. participate in the creation or preservation of false evidence;

6. knowingly engage in other illegal conduct or conduct in violation of the rules.

d. in appearing before a court on a client's behalf, a lawyer shall not:

1. state or allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence;

2. assert personal knowledge of facts in issue except when testifying as a witness;

3. assert a personal opinion as to the justness of a cause, the guilt or innocence of the defendant ("your honor, my client, maintain his/her innocence of these charges.").

4. ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

FINAL THOUGHTS:

As is evident, the Rules of Professional Conduct apply to counsel's conduct at every stage of client representation from the commencement of the case through final disposition. Since so much of defense counsel's work is devoted to negotiating and obtaining the best possible resolution short of a trial, close attention must be paid to the rules insofar as they relate to advising the client, negotiating with the prosecutor and persuading the court to impose the least onerous sentence under the circumstances (preferably one that is more rehabilitative than punitive in nature).

Counsel should also keep in mind that competent, diligent representation includes not only providing accurate information and reliable advice that enables the client to make an informed decision with respect to a guilty plea, but also preparing the client for and accompanying the client to the pre-sentence interview so that he/she make a favorable impression on the probation department and set the stage for a fair and reasonable sentence. And, as with most human interactions, the success of the lawyer-client relationship depends, to a great extent, on counsel's ability to engender trust with candid communication and responsiveness. That is one of the hallmarks of ethical lawyering.

The Rules of Professional Conduct are intended not just to discipline (i.e., censure, suspend or disbar) lawyers for conduct that violates them, but more so, to protect the public in its reliance on the integrity and responsibilities of the legal profession (see Matter of Rowe 80 NY2d 336 [1992]). How well that is accomplished is certainly open to serious question, if not doubt, in light of often significant delays between transgression and discipline (in many cases, several years) and inconsistencies across judicial departments in sanctions imposed for similar misconduct. (see Stephen Gillers, "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public", NYU Journal of Legislation and Public Policy, Vol. 17, No. 2, Paper # 14-43, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469758).

Nevertheless, counsel should always be mindful that what they do (or fail to do) in the course of client representation can have a profound impact not just on the client but on the public's perception of the competency and integrity of the legal profession. So, whether in the context of plea negotiations or in-court proceedings, counsel should adhere to the highest standards of professional responsibility.