

Practice Standards

December, 2012

Section VI, Qualifications and Duties of Counsel

13. The Process of Plea Negotiations:

A. In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of the following:

- a. the maximum term of imprisonment, fine or restitution that may be ordered, and any mandatory sentence, as well as the possible adverse impact on those with a guilty plea;
- b. the possibility of forfeiture of assets;
- c. other consequences of conviction including, but not limited to, deportation, the forfeiture of professional licensure, the ineligibility for various government programs including student loans, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, the loss of the right to vote, the loss of the right to hold public office, and potential federal prosecutions;
- d. any possible and likely sentence enhancements or parole consequences, and the actual possibility of programs from the Department of Corrections;

B. In developing a negotiation strategy, counsel should be completely familiar with:

- a. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to, the following:
 - i. not to proceed to trial on merits of the charges;
 - ii. to decline from asserting or litigating any particular pretrial motions;
 - iii. an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
 - iv. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
- b. benefits the client might obtain from a negotiated settlement, including, but not limited to, an agreement that provides:
 - i. that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - ii. to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;
 - iii. that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - iv. that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence, or one within a specified range;
 - v. that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, a specified position with respect to the sanction to be imposed on the client by the court;

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- vi. that the prosecution will not present, at the time of sentencing and/or in communications with the preparer of the official pre-sentence report, certain information; and,
 - vii. that the defendant will receive, or the prosecution will recommend, specific benefits concerning the client's place and/or manner of confinement and/or release on parole, and the information concerning the client's offense and alleged behavior that may be considered in determining the client's date of release from incarceration, taking into consideration availability of probation from Department of Corrections.
- c. the position of any alleged victim with respect to conviction and sentencing. In this regard, counsel should:
- i. consider whether interviewing the alleged victim or victims is appropriate and, if so, who the best person to do so is and under what circumstances;
 - ii. consider to what extent the alleged victim or victims might be involved in the plea negotiations;
 - iii. be familiar with any rights afforded the alleged victim or victims under Montana law; and,
 - iv. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.
- C. In conducting plea negotiations, counsel should be familiar with:
- a. the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, and a plea in which the defendant is not required to personally acknowledge his or her guilt - see North Carolina v. Alford plea;
 - b. the advantages and disadvantages of each available plea according to the circumstances of the case;
 - c. whether the plea agreement is binding on the court, prison, and parole authorities; and,
 - d. possibilities of pre-trial diversion.
- D. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and probation department which may affect the content and likely results of negotiated plea bargains.