Garden State CLE presents:

# Successful Plea Bargaining in Superior Court: The Written & Unwritten Rules

## Lesson Plan

# Introduction

**a. Successful Plea-Bargain is defined as:**

**A case disposition that meets or exceeds your client's expectations.**

**b. Preparation. In order to accomplish this goal, you must do the following:**

**1.) Set or adjust your client's reasonable expectations to an outcome that is most statistically likely to occur;**

**2.) Have complete command of New Jersey Code of Criminal Justice sentencing, including:**

**i.) Available alternative downgraded offenses;**

**ii.) Range of sentences (including MPI, CSL, Forfeiture of Public Office, D/L Loss, Jail, Fines, Probation, jail credits, gap time, etc.);**

**iii.) Collateral consequences (often more onerous than the direct sentence);**

**iv.) Client prepared to provide a factual basis for the plea.**

# Part I. The plea bargaining process - In general

# State v. Warren, 115 NJ 433 (1989).

**For some time, the courts have accepted plea bargaining as a legitimate and respectable adjunct of the administration of the criminal laws. The touchstone of any guilty plea is that it is voluntarily made by the defendant with an understanding of the nature of the charge as well as the consequences of the plea, and that there is a factual basis to support the plea of guilty for the crime or crimes. This is codified under our rules.**

**In making a plea agreement, the defendant waives significant constitutional rights; he or she surrenders the right to a trial, including the right to a jury, to counsel, and to present and confront witnesses-these, in return for the reduction or dismissal of certain charges and recommendations concerning the sentence. The State also surrenders important prosecutorial prerogatives: it foregoes the right to prosecute all of the charges, to justly seek convictions, and to anticipate the imposition of sentence informed by a full record demonstrating guilt. Thus, underlying the success of plea bargaining is the "mutuality of advantage" it affords to both the defendant and the State. The system enables a defendant to reduce penal exposure and avoid the stress of trial while assuring the State that the wrongdoer will be convicted and punished, and that scarce and vital judicial and prosecutorial resources will be conserved through a speedy resolution of the controversy.**

**Notions of fairness apply to each party in the bargaining process. “If plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either. However, although notions of fairness apply to each side, the State as well as the defendant, the defendant's constitutional rights and interests weigh more heavily in the scale. It is essentially for this reason that it is only the defendant who, under the Rules, is entitled to withdraw from a guilty plea if his or her sentencing expectations have been defeated by the imposition of a harsher sentence than that contemplated by the plea agreement.**

# Part II - The Rules of Court


## 3:9-2. Pleas

**A defendant may plead only guilty or not guilty to an offense. The court, in its discretion, may refuse to accept a plea of guilty and shall not accept such plea without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea. In addition to its inquiry of the defendant, the court may accept a written stipulation of facts, opinion, or state of mind that the defendant admits to be true, provided the stipulation is signed by the defendant, defense counsel, and the prosecutor. When the defendant is charged with a crime punishable by death, no factual basis shall be required from the defendant before entry of a plea of guilty to a capital offense or to a lesser included offense, provided the court is satisfied from the proofs presented that there is a factual basis for the plea. For good cause shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding. If a plea of guilty is refused, no admission made by the defendant shall be admissible in evidence against the defendant at trial. If a defendant refuses to plead or stands mute, or if the court refuses to accept a plea of guilty, a plea of not guilty shall be entered. Before accepting a plea of guilty, the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts, which shall then be filed with the criminal division manager's office.**

# 3:9-3. Plea Discussions; Agreements; Withdrawals

**(a) Plea Discussions Generally. The prosecutor and defense attorney may engage in discussions relating to pleas and sentences and shall engage in discussions about such matters as will promote a fair and expeditious disposition of the case, but except as hereinafter authorized the judge shall take no part in such discussions.**

**(b) Entry of Plea. When the prosecutor and defense counsel reach an agreement concerning the offense or offenses to which a defendant will plead on condition that other charges pending against the defendant will be dismissed or an agreement concerning the sentence that the prosecutor will recommend, or when pursuant to paragraph (c) the defendant pleads guilty based on indications by the court of the maximum sentence to be imposed, such agreement and such indications shall be placed on the record in open court at the time the plea is entered.**

**(c) Disclosure to Court. On request of the prosecutor and defense counsel, the court in the presence of both counsel may permit the disclosure to it of the tentative agreement and the reasons therefor in advance of the time for tender of the plea or, if no tentative agreement has been reached, the status of negotiations toward a plea agreement. The court may then indicate to the prosecutor and defense counsel whether it will concur in the tentative agreement or, if no tentative agreement has been reached and with the consent of both counsel, the maximum sentence it would impose in the event the defendant enters a plea of guilty, assuming, however, in both cases that the information in the presentence report at the time of sentence is as has been represented to the court at the time of the disclosure and supports its determination that the interests of justice would be served thereby. If the agreement is reached without such disclosure or if the court agrees conditionally to accept the plea agreement as set forth above, or if the plea is to be based on the court's conditional indication about the sentence, all the terms of the plea, including the court's concurrence or its indication concerning sentence, shall be placed on the record in open court at the time the plea is entered. Nothing in this Rule shall be construed to authorize the court to dismiss or downgrade any charge without the consent of the prosecutor.**

**(d) Agreements Involving the Right to Appeal. Whenever a plea agreement includes a provision that defendant will not appeal, the court shall advise the defendant that notwithstanding the inclusion of this provision, the defendant has the right to take a timely appeal if the plea agreement is accepted, but that if the defendant does so, the plea agreement may be annulled at the option of the prosecutor, in which event all charges shall be restored to the same status as immediately before the entry of the plea. In the event the defendant files an appeal in a case in which the plea agreement included a provision that the defendant will not appeal, the State must exercise its right to annul the plea agreement no later than seven days prior to the date scheduled for oral argument or submission without argument.**

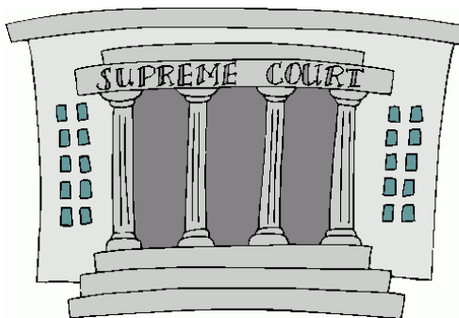
**(e) Withdrawal of Plea. If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.**

**(f) Conditional Pleas. With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea. Nothing in this rule shall be construed as limiting the right of appeal provided for in R. 3:5-7(d).**

**(g) Plea Cut Off. After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice**

# Plea Cut Off commentary by Supreme Court

**A "material change of circumstance" means a change occurring after the pretrial conference that strengthens or weakens the case of either the prosecution or the defense sufficiently to warrant a change in their plea-bargaining position. It may be either a change in fact or in the knowledge of counsel. Some typical examples that may constitute material change of circumstance are when new charges are filed after the plea cut-off has been imposed, a justifiable change of attorney has occurred, a witness becomes no longer available, a mistrial or hung jury occurs, or some evidence is newly discovered. However, a change that would ordinarily have been anticipated by a reasonably competent prosecutor or defense attorney, including some of the foregoing examples, is not material, nor is a change that results from counsel's lack of ordinary diligence. A "protracted trial" is one that will probably last two weeks or more. One example of manifest injustice is a sexual assault case in which the victim is a child: if the trial is likely to have a substantial adverse impact on the child, the court may grant waiver. "Manifest injustice" does not exist simply because the parties are able and willing to enter into a plea bargain on or before the date of trial.**



# Part III. Limitations on Plea Agreements

**a. Civil reservation - The burden of proof is on the defendant to show good cause why the civil reservation should be granted. State v. Tsilimidos, 364 NJ Super. 454 (App. Div. 2003).**

**b. The terms of the plea agreement must be meticulously adhered to, and a defendant's reasonable expectations generated by plea negotiations should be accorded deference. State v. Marzoff, 79 NJ 167 (1979).**

**c. Neither the State nor Defendant has the absolute right to require the sentencing court to conform the sentence to the specific terms of the agreement. State v. Davis, 175 NJ Super. 130, 140 (App. Div. 1980). From the perspective of the sentencing judge, the agreement must call for a legal sentence and be in the interests of justice.**

**d. Even if the parties express their satisfaction with the agreed sentence, the sentencing judge can refuse to accept any of the terms and conditions of the agreement. If this occurs, the defendant may withdraw his plea and re-plead or go to trial. The State may then also reinstate dismissed counts of the indictment. State v. Nichols, 71 NJ 358, 361 (1976).**

**e. The defendant may argue for a sentence beneath an agreed sentence cap. The State may not withdraw from such a sentence. State v. Warren, 115 NJ 433 (1989).**

**f. The defendant must establish an adequate factual basis for the plea. (But see State v. Smullen, 118 NJ 408 (1990)).**

# Part IV. Withdrawal from Plea Agreement (Rule 3:9-3(e))

**a. Sentence in excess of negotiated maximum. State v. Warren, 115 NJ 433 (1989)**

**b. Defendant misinformed or reasonable expectations under the agreement were not met. State v. Howard, 110 NJ 113 (1988). This includes significant collateral consequences. See generally State v. Bellamy, 178 NJ 127 (2003). (Deportation consequences, see State v. Nunez-Valdez, 200 NJ 129 (2009)).**

**c. No adequate factual basis. State v. Tate, 220 NJ 393 (2015); State v. Gregory, 220 NJ 413 (2015); State v. Perez, 220 NJ 423 (2015); State v. Barboza, 115 NJ 415 (1989)**

**d. Illegal sentence, defined as a sentence that exceed penalties authorized by statute or include a disposition not authorized by law. Generally, an illegal sentence can be corrected at any time, because the defendant has no expectation of finality in an illegal sentence. However, the defendant may not be re-sentenced when the illegal sentence has been completely served. See State v. Laird, 25 NJ 298 (1957); State v. Schubert, 212 NJ 295 (2012).**

# Part V. What could possibly go wrong?

**State v. Hess, 207 NJ 123 (2011) (Plea agreement banned argument for mitigation, lesser sentence, unduly prejudicial evidence and filing appeal.)**

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**State v. Tate, 220 NJ 393 (2015) (No factual basis for guilty plea under offense charged in indictment)**

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**State v. Nunez-Valez, 200 NJ 129 (2009) (Defendant relied upon false or misleading information)**

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**State v. Smullen, 118 NJ 408 (1990) (Abbreviated factual basis in sex cases.**

# Part VI. The Unwritten Rules

**1.) A criminal jury trial in Superior Court is recognized as a failure and a breakdown of the system. In theory, every criminal case should be resolved by way of plea agreement or dismissal.**

**2. Judges are under enormous pressure to move cases and clear backlog. They are evaluated upon productivity, not the wisdom of their rulings. Accordingly, routine (i.e. unnecessary) criminal trials have an unacceptable opportunity cost to the system. This pressure is also exerted on prosecutors by the judiciary.**

**3.)The number of jury trials has diminished to the point of near extinction over the past 25 years due to NERA, Graves Act, School Zone Offenses, etc. This means that, by an overwhelming statistical probability, your case will plead out at some point.**

**4.) The best structure of a plea agreement is win-win. A successful plea agreement will accurately identify and meet all the reasonable needs of all the participants simultaneous:**

**Defendant**
**Prosecutor**
**Public**
**Witness**
**Cops**
**Victims**
**Judge/Probation**


# 5. Unwritten rules for defense attorneys

**a.) Throughout the entire process, you must be prepared to try the case should an acceptable agreement not be reached.**

**b.) Respect for your adversary and his time is essential. So, don't give your adversary unnecessary work to do. Unwarranted motions to suppress or frivolous *Miranda* hearings will not facilitate a successful plea agreement. However, no professional prosecutor should have a problem with a *bona fide*, meritorious pretrial motion. It is important to let your adversary know by phone, letter or in-person about the merits of your motion. The motion may impact on the plea offer.**

**c. Do you want to get big or small in the court room?**

**d.) The hotdog conveyor-belt theory of plea bargaining.**

**e.) Note distinction in autonomy, latitude and freedom of action between an average assistant county prosecutor and a deputy attorney general.**

**f.) First principle of New Jersey Justice: A body in jail tends to stay in jail – a body out of jail tends to remain out of jail. Accordingly, time is on your side. When your client is in jail, take the plea - out of jail, accept no plea.**

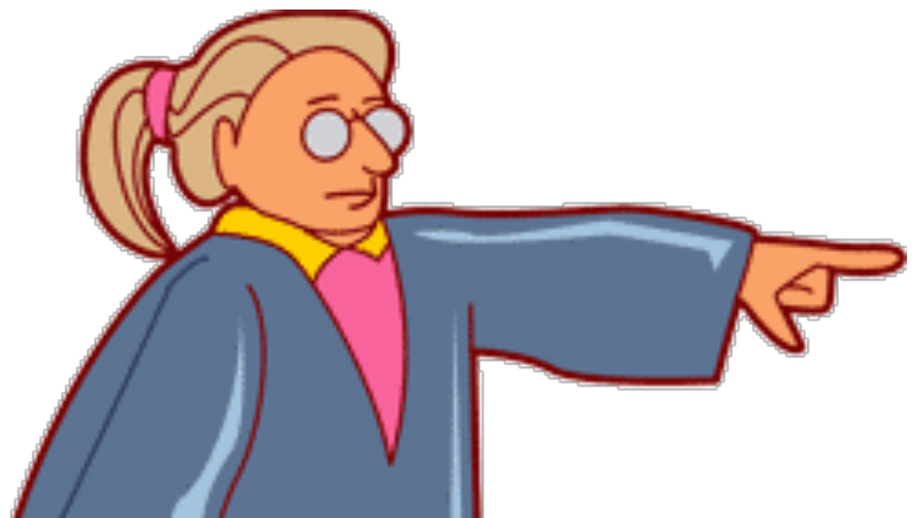
**g.) The longer your client has languished in jail, the better the offer will be. [Example, straight time or even an MPI offer can transmogrify into a spilt sentence when your guy has close to a year in the county jail in default of bail.]**

**h.) Sometimes - extraordinary personal, health or family circumstances for a defendant can be important. Talk to the prosecutor quietly when you have time (phone or in person - but have something to say). Don't waste your adversary's time.**

**i.) Nice guys finish first. Get a read on your adversary and subordinate your own ego.**

**j.) . The judge can take "no part" in any of the discussions or negotiations between the prosecutor and the defendant with respect to negotiating a particular plea agreement. You should never negotiate in front or within earshot of a judge.**

**k.) Judges may inquire into the status of plea negotiations and may, upon request of both sides, indicate the maximum sentence it would impose under a tentative plea agreement. See R. 3:9-3(c).**



# 6. Unreasonable prosecutors their plea offers.

**a.) Just how serious are they with this stupid offer? (Inquire at Criminal Case Management about how many jury trials the entire office or the assistant on the case did in the prior year.)**

**b.) Why is this plea offer so unreasonable?**

**Is your guy really a bad criminal who merits a harsh sentence?**

**Is it due to a statute, AG Guideline, grievous harm to a victim or case law?**

**Or is their unreasonable offer the result of local/state politics, office policy or a personality clash?**

**Remember, once the trial begins, a good case only gets worse and a bad case only gets better. Weigh and evaluate the risk of going to trial as opposed to accepting the unreasonable agreement.**

**c.) Appealing to supervisors. It is critical that you alert your adversary before you go over his head to a supervisor or the First Assistant.**

**d.) Private conference with judge when case can't move. The judge may pressure prosecutor so as to avoid a trial. This tactic will work best in counties with lots of cases and very few trials. See R. 3:9-3(c).**

**e.) When your client is being unreasonable. Your discussions with your client must be aimed at finding the true reason for his objection and resolving that discrete issue. Many times, clients will base their objections on irrelevant, minor issues or upon a misunderstanding. Remember, the client's initial explanation may not be the real reason for his resistance.**

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