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Negotiations Training 2008

Effective negotiation in District Court requires handling a lot of limited information in a short period of time under circumstances that make effective communication difficult. I hope to discuss some areas of preparation and thinking that may assist in your ability to become an effective negotiator in District Court.

I. **Client information:** It is important to have basic information regarding the client when conducting negotiations. I begin many of my interviews with the statement, "There is a lot of information that I will need to help you figure out what you want to do, but before I begin, what are your main concerns and questions?"

A. Client personal situation: What makes this client's case unique? What are this client's main concerns?

B. Potential Exposure: How much time is this client facing? What is the likely outcome?

C. Bottom Line: What punishment is the client willing to receive in a plea agreement before going to trial? What is your client's bottom line?

II. **Assistant District Attorney Information:** It is important to know something about your opponent. More experienced Assistant District Attorneys are often more reasonable in District Court because they have dealt with a wide variety of cases, and have handled more serious felonies. They are often more likely to give a better deal in District Court than less experienced ADAs who may feel like they need to be tough, or consider misdemeanor charges to be more serious than they really are.

- A. Personality Type: What motivates this ADA? Are they overworked bureaucrats? Are they social engineers? Are they more or less experienced? Do they like trying cases?
- III. **Judge information:** It is important to know something about the judge who will be asked to accept the plea or sentence within a range set forth in the plea.
 - A. Pet Peeves: Are there any charges that this Judge particularly despises?
 - B. Normal sentence under circumstances: What does this judge normally do under these circumstances?
 - C. How much information will I need to present to the judge about my client to get them to accept the plea? What can I do if the Judge rejects the plea? You may want to consider using a continuance to get a different judge.
- IV. **Trial Preparation:** Sometimes the ability to get a good plea offer for a client is directly proportional to the time and effort put into preparing the case for trial. Knowing the strengths and weaknesses of your case enables you to discuss your case with specifics and with a tone which demonstrates a willingness to try the case if you are unable to reach an agreement.
 - A. Credible Threat: Your only leverage in a plea negotiation in District Court may be your willingness to try a case and take up the Court's time with your case. You must therefore pose a credible threat of trial.
 - B. Willing to Try Losers: To pose a credible threat for trial, you must be willing to try losing cases like they were capital cases and make your opponent regret their failure to make a better offer – even if you lose.
- V. **Credibility:** The most important thing in plea negotiations and perhaps in all aspects of advocacy is your own credibility. As attorneys all we do is communicate, verbally and in writing. If people ever doubt the truthfulness of what you say, you have lost your effectiveness as an advocate.
 - A. Going the extra mile to be absolutely clear about the truth
 - B. Why your offer makes sense in this case
- VI. **Timing:** The ability to get a particular plea offer or get a plea agreement entered before a judge is assisted by good timing.

A. It is good to handle very complicated cases late in the day, or last. Your case may not get the attention it deserves if you approach an Assistant District Attorney or Judge with a complicated or nuanced case early in the morning. Wait until the easier cases have moved along, and the ADA or Judge has moved their docket a bit before clogging up the pipeline.

B. Likewise if you have something straightforward, get in early and get out quickly.

VII. Explaining the Offer: It is important that every client understands exactly what they are getting with a plea offer, and what they are giving up. It is easy in District Court to assume clients know more about the system than they really do. Try to treat every client like they are a first offender.

A. See Plea Transcript Check List

B. Knowing and Voluntary Plea: What is the client's exposure if found guilty? What is the likely outcome of a trial? What are the details of the plea agreement? What are the time commitments and monetary commitments? What rights does the client give up if they plead guilty? What are the direct consequences of their plea on their life?

C. Rejecting Plea Signed rejection of plea offer: It is sometimes a good practice to have clients sign a rejection of plea letter.

1. Charges, Record Level, Potential Exposure, Plea offer

2. Knowingly and voluntarily reject plea

VIII. Taking Plea: Closing the deal with a judge can be tricky. So it is helpful to prepare the client for accepting the offer.

A. Prepare Client for Appearing before Judge

B. "Yes, Sir"

C. Tuck in your shirt

D. Admission of responsibility

E. Less is more

C. Scott Holmes was an assistant Public Defender in Durham for two years before entering private practice where he handles primarily state and federal criminal cases and criminal appeals. He also takes civil cases involving Constitutional rights, discrimination, and excessive force.

