

Art of Negotiation

Summary

Only a small percentage (approximately 10%) of cases actually goes through to jury trials. Most convictions are negotiated pleas or otherwise known as plea-bargains. A plea bargain is an agreement between the defense and the prosecution in which the defendant pleads guilty or no contest to one or more of the charges against him/her. In exchange, the prosecution may agree to drop/reduce a charge or recommend the judge enter a specific sentence to which the defendant agreed.

The number one rule with regard to negotiations is that you must act in the best interest of your client – this also includes explaining the ramifications to your clients.

For the Prosecution

- What impact does the Victim's testimony have?
- Who are the witnesses and what impact do they have on the case?
- How strong on the statements in the case?
- What are the overall circumstances of the case?
- Are there possible jury sympathies for the defendant?

For the Defense

- What is your client's background? Is there a history?
- Who are the witnesses and what impact do they have on the case?
- How strong on the statements in the case?
- What are the overall circumstances of the case?
- Are there possible jury sympathies for the Prosecution?

You cannot assume that all reports in the case are accurate. In order to gain a broad picture of the incident in questions, you must do some checking.

Look at the strengths and weaknesses of both sides before determining an appropriate settlement for the case. When the case(s) involves more than one charge, you may do one of three things:

- Settle none of the charges
 - Settle one or more of the charges, but not all of them
- Example: Settle the attempt charge, but go to trial on the battery charge.
- Settle all of the charges

A separate agreement is needed for each charge

Start your negotiation with the other side early. Know what your maximum and minimum limits are – what you will and will not accept. **All plea agreements must be finalized by the Thursday prior to your court date.** It is up to the prosecution as to whether the plea bargain goes through. The defense counselor must explain to the defendant the rights that he/she are waiving (giving-up) by accepting the plea agreement.

Those rights include: A) The right to plead not guilty.

B) The right to a speedy trial.

C) The right to question witnesses against the defendant.

Anything said during negotiations is confidential! You cannot use it in court – it is not admissible.

****See TBP rules for negotiation (below)**

Rules for Plea Negotiations

NOTE: 1. No Student Counselor can participate in case negotiations until they have attended the Negotiations class.

2. Guilty cases **cannot** be negotiated.

Negotiations can be conducted up to 5:00 P.M. on the Thursday before the trial is scheduled. No negotiations will be permitted after 5:00 P.M. on the Thursday before the trial date. The sooner negotiations are started the better. Negotiations will result in an absolute sentence to be imposed upon the Defendant and/or the dismissal of one or more of the charges against the Defendant, when the Defendant has multiple charges pending. Negotiated sentences cannot result in less than the minimum (8 hours community service and 1 jury duty) sentence being given for each charge.

PROCEDURE:

The Student Counselors will attempt to negotiate their cases with the Defendant's approval. After the Student Counselors have reached a negotiated plea and/or sentence **and the Defendant approves it**, each Student Counselor will contact their respective Senior Attorney and obtain the approval of **their SENIOR ATTORNEY**. There are **no exceptions** to the requirement that both prosecution and defense Senior Attorneys approve a negotiated plea prior to 5:00 P.M. on the Thursday **before** the trial is scheduled. **Remember the Senior Attorneys will often require restitution and/or counseling for cases in which such sentences are applicable. Both Senior Attorneys assigned to the case must approve the negotiated settlement before the Trial by Peers office is advised that the case has resulted in a negotiated plea.**

Once the Senior Attorneys have approved the negotiated plea, both Student Counselors will contact the Trial by Peers office and advise them that a settlement has been reached and approved by the Senior Attorneys. The Trial By Peers office will cancel all witnesses for the trial date. **However, the original trial date will remain the same and the Defendant must appear to enter his guilty plea with the Court.** Prior to the trial date, the prosecuting attorney will prepare a typed plea agreement that will be signed by both student counselors, prosecution and defense senior attorneys, the Defendant and one of the Defendant's parents and/or guardian.

Signatures can be obtained at the courthouse, but the form must be prepared in advance. Once everyone has signed the plea agreement the Defendant, Student Counselors and their Senior Attorneys will appear before the Court without a jury being present. The prosecuting attorney will advise the Judge that a negotiated plea has been reached and a copy of the signed plea agreement will be presented to the Judge. The Judge will then review the negotiated plea agreement.

If the Judge refuses to approve the plea agreement:

1. The Defendant can agree to maintain his guilty plea and accept the sentence imposed by the Judge, or
2. The Defendant can maintain a not guilty plea and the case will be continued with a new trial date assigned. If the case is continued for a new trial date, the case cannot be negotiated and the case must be tried. If the Judge approves the plea agreement, the Defendant will formally enter his/her plea and the Judge will sentence him/her to the negotiated plea.

See sample Plea Agreement below.

Trial By Peers PLEA AGREEMENT

In the case of the State of Nevada vs. «Defendant», case number «CaseAlias». I, «FirstName» have agreed to enter a plea of guilty to the charge of «Charge», «Charge», «Charge» in exchange for the Court imposing the following sentence:

- _____ hours of community service
- _____ jury duties
- A Word essay on: _____

Letter of apology to: _____

Counseling _____

Other: _____

«FirstName», **please initial each after reading and agreeing.**

_____ 1) I, «Defendant» have been advised that by entering into this plea I am waiving the right to a trial by jury.

_____ 2) I, «FirstName» acknowledge that this plea is being entered into knowingly after consulting with counsel and that the above sentence is the only promise being made by the State of Nevada in exchange for my guilty plea.

_____ 3) I, «FirstName» am aware that in the event I fail to complete the sentence or otherwise exhibits an uncooperative attitude while in the Trial by Peers program, the Court reserves the right to modify the sentence for documented lack of cooperation.

All Signatures are required

«Defendant» Case # «CaseAlias»

Defendant Parent/Guardian

Prosecution Peer Counselor Prosecution Senior Attorney

Defense Peer Counselor Defense Senior Attorney

Clerk Judge

Sentencing

Summary

Once the jury finds a defendant “guilty”, the court moves into the sentencing phase. Each side, the prosecution and the defense, present their “Sentencing Arguments” to the jury where they include their recommended sentence. Once excused back to the jury room, the foreperson leads the discussion on how the sentence the defendant. The foreperson must sign the completed form prior to returning to the courtroom. There are numerous combinations of sentencing options that may be recommend and/or imposed by the jury to a guilty defendant. They include:

Mandatory:

1. Community Service – Depending on the severity of the offense, a juvenile can receive a minimum of eight (8) hours or a maximum of 40 hours of community service per offense. **All defendants must receive a minimum of 8 hours per offense.** Assigned community service hours may be completed with any not for profit organization within the Las Vegas area.
2. Jury Duty – Juveniles may receive 1, 2, or 3 assignments of jury duty. **All defendants must receive a minimum of 1 jury duty per offense.** Serving on the jury allows the defendant an opportunity to see what it is like on the other side of the law. Jury Duty is counted per evening not per case.

Other:

1. Letter of Apology – Since taking responsibility for their actions is a large part of Trial By Peers, defendants may be instructed to write a letter of apology. Upon the discretion of the jury, this letter may be written to the victim of the incident, the defendant’s parents and/or family, the police officer, schoolteacher and/or principal, or any other person involved in the incident.
2. Essay – Defendants may be instructed to write a 200 to 1,000 word essay on a topic assigned by the jury. The number of words is dependent upon the age of the defendant and the severity of the offense. Topics may include how the experience has affected the defendant, his/her family, or anyone else involved in the incident, what the defendant learned from performing community service, how the defendant would have been treated had s/he committed the offence when they were 18, or any other assigned topic that is accepted by the presiding judge.
3. Restitution (if applicable) – A defendant may be instructed to repay the victim for any damages, loss, or injury relating to the offense.
4. Counseling / Schooling – If the jury feels that the defendant would benefit from a period of counseling or schooling, then the may request that court order the appropriate, available option. Types of counseling/schooling utilized by TBP include but are not limited to anger management, drug counseling, and petit larceny class.
5. Other Options – The defendant may be ordered a unique sentencing option. These options may be in addition to, or instead of, the customary sentencing consequences. The judge has complete discretion to accept or deny these unique sentencing options. In all cases the presiding judge reserves the right to impose additional sentencing to what the jury awarded, as well as amend the sentence to a lesser punishment. Any future judge has the right to impose additional punishment for documented lack of cooperation to complete the imposed sentence or for displaying a poor attitude while completing their sentence.

Once the sentence has been read by the jury and accepted by the presiding judge the defendant and a parent/guardian are asked to see the Clerk to sign a form acknowledging the imposed sentence. The Trial by Peers office will then mail a letter to the defendant explaining the necessary steps to take for successful completion. The completion of all imposed sentencing options must be documented and returned to the Trial By Peers office within a specified amount of time, depending on the severity (generally 30 days from the court date). Should a defendant fail to complete their sentence in the specified amount of time, s/he is required to reappear in front of a judge and explain the reasons for noncompletion. If all sentencing options are completed and turned into the Trial by Peers office prior to the scheduled date to return to court, then the defendant does not have to reappear in court.

****See sample sentencing arguments below**

Sample Sentencing Argument

Prosecution

Ladies and gentleman of the jury, I would like to thank you for reaching the just verdict of guilty. The prosecution recommends that the defendant receive _____ because _____. Requiring the defendant do ___ hours of community service ensures that the community is involved and benefits from this hearing. Having the defendant serve on jury duty enables him/her to gain a new perspective of the law. A ___ word essay on _____ will allow the defendant to rethink their actions and hopefully encourage more appropriate behavior. Lastly, requiring the defendant to participate in _____ class will help him/her to develop the skills that he/she needs to avoid this type of problem in the future. Again, the prosecution asks that you follow its recommendation of _____.

Defense

Your Honor, ladies and gentleman of the jury, _____(Defendant) has a ___ grade point average, is involved in _____ and works part-time. He/she has also received _____ as punishment at home. _____(Defendant) has never been in trouble with the law before and asks you to please keep this in mind when you deliberate for sentencing. The defense asks that you recommend a sentence of _____. Thank you for your time and patience.

Sample Guilty Plea Argument

Prosecution:

Good evening, Your Honor, ladies and gentleman of the jury, my name is _____, and I represent the State of Nevada in this case. On (date) the defendant committed the crime of _____. (Details NRS with definition) The prosecution recommends that the defendant receive _____ because _____ (details of crime). Requiring the defendant do ___ hours of community service ensures that the community is involved and benefits from this hearing. Having the defendant serve on jury duty enables him/her to gain a new perspective of the law. An essay will allow the defendant to rethink their actions and hopefully encourage more appropriate behavior. Lastly, requiring the defendant to participate in _____ class will help him/her to develop the skills that he/she needs to avoid this type of problem in the future. Again, the prosecution asks that you follow its recommendation of _____. Thank you for your time and attention.

Defense:

Good evening, Your Honor, ladies and gentleman of the jury, my name is _____, and I represent the defendant, _____. On (date) my client, _____ committed _____ (crime). _____ (Defendant) has taken full responsibilities for his/her actions by admitting his/her guilt. _____ (Defendant) has a ___ grade point average, is involved in _____ and works parttime. He/she has also received _____ as punishment at home. _____ (Defendant) has never been in trouble with the law before and asks you to please keep this in mind when you deliberate for sentencing. The defense asks that you recommend a sentence of _____. Thank you for your time and patience.

Sentencing Arguments

All sentencing arguments to answer each of the following questions for the jury:

1. Who – Who did it
2. When – When did the crime take place
3. Where – Where did the crime occur
4. What – What actually took place
5. How – How did it happen
6. Why – Why should the jury impose a particular sentence

Prosecution Example:

On May 4, 2009, at 1:20 a.m. the Defendant along with three of his friends had each decided to tell their parents that they were staying at the other friend's house that way they could be out without their parents knowing. There is no reason for 14 year olds to be out at 1:20 in the morning.

Not only is getting into trouble likely, but it is also very dangerous especially since their parents had no idea where they were. Luckily the Defendant was seen by the police and arrested for violating curfew before anything really bad could happen. Given the Defendant's preplanning, his lack of awareness as to the dangers involved in his actions, and the fact that had the Defendant not gotten caught by the police, he would have ended up getting into even more trouble since when he was arrested he was in possession of a crow bar. For those reasons I ask that you sentence the Defendant to 35 hours of community service, 3 jury duties, and a life of crime class.

Defense Example:

On May 4, 2009, Joe made a mistake and instead of doing the right thing he went along with his friends. Joe is here tonight taking responsibility for his actions, he has plead guilty to violating curfew. Joe has not been charged with any other crime because he did not commit any other crime. Joe did have a crow bar that night, but he had it because he found it when they were walking through a vacant lot. Joe understands he was lucky not to have been hurt that night. Joe has been severely punished by his parents, he was grounded for two months (no cell phone, no video games, no after school activities and he had to do extra chores at home). Joe is a good kid, a good student and while he should experience the justice system so he can make sure he never does something like this again, I ask that you give him 15 hours of community services, 1 jury duty and a letter of apology to his parents.