

# ETHICAL ISSUES IN PRESENTING PLEA NEGOTIATIONS TO CLIENTS

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## Wisconsin Supreme Court Rules of Professional Conduct

### **SCR 20:1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client**

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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#### WISCONSIN COMMITTEE COMMENT

The Committee has retained in paragraph (a) the application of the duties stated to "any proceeding that could result in deprivation of liberty." The Model Rule does not include this language.

#### ABA COMMENT

#### **Allocation of Authority between Client and Lawyer**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may

be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time. [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

### **SCR 20:1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### ABA COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Model Rules for Lawyer Disciplinary Enforcement R. 28 (2002) (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

#### **SCR 20:1.4 Communication**

(a) A lawyer shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### ABA COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### **Communicating with Client**

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the

lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

### **Explaining Matters**

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

### **Withholding Information**

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

#### **SCR 20:1.14 Client with diminished capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

#### ABA COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

#### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

#### **SCR 20:2.1 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 other

considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

#### ABA COMMENT

#### **Scope of Advice**

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[2] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[3] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

#### **Offering Advice**

[4] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary

under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

### **SCR 20:3.3 Candor toward the tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding 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 tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

## Fairness and Plea Bargains: How can defense attorneys raise the bar?

I. “Plea bargaining is a major part of the American criminal justice system. In fact, studies show that ninety-five percent of guilty convictions are the result of plea bargains. These plea bargains trigger many ethical and moral concerns, namely whether they, in practice, make the criminal justice system function better or worse.” Andrew Shaver, *ETHICAL LAPSES IN CRIMINAL PLEA BARGAINING: WHAT CAN BE DONE ABOUT THEM?*, 36 J. Legal Prof. 559, Spring 2012.

II. “Justice Brennan observed that, for the majority, the defense attorney had “talismanic significance” to the defendant's constitutional rights. The creation of this role assumes the criminal defense attorneys “will, almost invariably, urge their clients to choose the course that is in the clients' best interests.” *Id.* at 561.

III. “Professor Alafair S. Burke notes two distinct types of factors that can skew the defendant's and his attorney's, decision-making process. First, “[s]tructural factors such as limited pretrial discovery, attorney self-interest and incompetence, pretrial detention, and determinative sentencing can affect the parties' willingness and power to negotiate.” Second, “psychological and cognitive factors” such as “the individual defendant's optimism about his prospects or denial about his predicament” can cause irrational decisions in regards to accepting or rejecting plea bargains. Furthermore, defendants and attorneys may be enticed to plead guilty because of “information barriers” or “risk aversion.” Irrational behavior on the part of criminal defendants is likely inevitable; however, this documented irrational behavior further highlights the need for strong ethical rules governing their attorneys. “*Id.* at 564.

IV. Economic interests, (“[o]ne never makes much money on the cases one tries . . . , but they help to bring in the cases one can settle.”) or in the case of the hourly appointed lawyer the incentive of billing hours in litigation rather than negotiating a settlement can theoretically affect the advice the lawyer gives a client. *Id.* at 565.

V. How can we help our clients perceive the system as fair?

“First, a person's perception of whether a decisionmaking process was fair does not depend solely on the outcome, but also on various attributes of the process used to reach the outcome. [http://web2.westlaw.com/result/documenttext.aspx?ss=CNT&cfid=1&mt=Wisconsin&origin=Search&tnprpdd=None&sri=990&sskey=CLID\\_SSSA2350591161810&utid=2&method=TNC&db=LAWREV-PRO&cnt=DOC&rlt=CLID\\_QRYRLT47615591161810&rltdb=CLID\\_DB54334591161810&fmqv=c&eq=Welcome%2fWisconsin&rp=%2fWelcome%2fWisconsin%2fdefault.wl&query=MICHAEL+%2fS+O%27HEAR+%2fS+%22PLEA+BARGAINING%22&tnprpds=TaxNewsFIT&scxt=WL&service=Search&cxt=RL&vr=2.0&rlti=1](http://web2.westlaw.com/result/documenttext.aspx?ss=CNT&cfid=1&mt=Wisconsin&origin=Search&tnprpdd=None&sri=990&sskey=CLID_SSSA2350591161810&utid=2&method=TNC&db=LAWREV-PRO&cnt=DOC&rlt=CLID_QRYRLT47615591161810&rltdb=CLID_DB54334591161810&fmqv=c&eq=Welcome%2fWisconsin&rp=%2fWelcome%2fWisconsin%2fdefault.wl&query=MICHAEL+%2fS+O%27HEAR+%2fS+%22PLEA+BARGAINING%22&tnprpds=TaxNewsFIT&scxt=WL&service=Search&cxt=RL&vr=2.0&rlti=1)

[&sv=Split&n=50&fn= top&elmap=Inline&rs=WLW12.10 - FNF35339029718](#) Those attributes include: (1) \*421 whether the person had an opportunity to tell his or her side of the story (“voice”); (2) whether the authorities were seen as unbiased, honest, and principled (“neutrality”); (3) whether the authorities were seen as benevolent and caring (“trustworthiness”); and (4) whether the person was treated with dignity and respect. The perception of voice, neutrality, trustworthiness, and respect can promote the acceptance of decisions that are otherwise believed to be incorrect or substantively unfair. Indeed, in many settings, perceptions of process fairness exert greater influence over acceptance of the result than do the outcomes themselves. Second, the extent to which decisionmaking processes are perceived as fair helps shape beliefs regarding the legitimacy of the legal authorities responsible for the decision. And third, the perception that legal authorities have legitimacy enhances the sense that the authorities are entitled to be obeyed. Fair procedures thus promote cooperation with the authorities and compliance with their directives, as well as the development of a more general sense of obligation to obey the law. “Michael O’Hear, PLEA BARGAINING AND PROCEDURAL JUSTICE, 42 GALR 407, 422, Winter, 2008.

VI. “In one (study), Jonathan Casper and his colleagues interviewed 628 felony defendants in three cities. They found that procedural justice in the processing of the defendants' cases made a significant contribution to outcome satisfaction. They further found a significant correlation between defendants' perceptions of procedural justice and the amount of time they spent speaking with their lawyers (which they associated with voice) and the respectfulness of the treatment they received from police officers at the time of arrest.” *Id.* at 422.

VII. “Furthermore, the proliferation of sentencing guidelines and mandatory minimum sentences over the past quarter-century has given prosecutors even greater leverage over defendants than they have traditionally enjoyed; when prosecutorial lenience is the only reliable means to avoid a draconian sentence, the prosecutor can effectively dictate the terms of the “deal.” Bargaining dynamics vary considerably from jurisdiction to jurisdiction, but, in many, Gerard Lynch's characterization of plea bargaining would be apt: administrative justice has replaced adversarial and the prosecutor now occupies the primary role in adjudicating guilt and setting punishments. In plea bargaining, then, the prosecutor may be perceived by defendants less as a negotiating partner and more as the key decisionmaker.

In short, there are good reasons to suspect that the procedural justice effects documented in so many other settings do, indeed, apply to the decisions of prosecutors in making and responding to plea offers.” *Id.* at 426.

VIII. Voice: “One common method for prosecutors to learn the defendant's side of the story is through police reports. Police, however, are not always diligent about collecting the

defendant's side of the story. Moreover, defendants may not think much of their opportunity to be heard by the police.” *Id.* at 427.

“Instead, before making a plea offer, the prosecutor should affirmatively ascertain whether the defendant had a meaningful opportunity to convey his or her side of the story, either through appropriately sensitive police processes or through an attorney. Thus, for instance, in cases in which police documentation does not indicate meaningful voice opportunities, the prosecutor should dig a little deeper, refraining from plea negotiations until after he or she has discussed the matter with the officers involved or has provided the defendant with a meaningful voice opportunity through counsel.” *Id.* at 427. The lawyer must also have a meaningful discussion with the client before presenting his side of the events.

IX. Neutrality: “Neutrality is associated with a decisionmaker who is unbiased, honest, and principled. Most prosecutors doubtlessly believe they are neutral, but the trick is to reassure defendants of this. Tyler identifies the use of objective criteria as an important means by which a decisionmaker can establish his or her neutrality. Decisions, moreover, should be explained so as to demonstrate that a neutral process was followed. In the plea bargaining context, then, prosecutors might enhance procedural justice by adopting objective criteria to guide their decisions and explaining to defendants why they take the positions they do. Explanations ought to be conveyed through defense counsel, but, recognizing that busy counsel may not effectively convey the information, prosecutors also should explain their reasoning in open court when the defendant is physically present to offer his or her guilty plea.” *Id.* at 429.

X. Trustworthiness: “People infer trustworthiness when they believe “that the authorities with whom they are dealing are concerned about their welfare and want to treat them fairly.” Perceived trustworthiness is enhanced when the authorities demonstrate that they have actually considered the information offered during voice opportunities. Thus, in the plea bargaining context, when explaining his or her positions, the prosecutor should expressly address any claims asserted by the defendant in support of more lenient treatment, that is, provide what was termed “principled engagement” above. “ *Id.* at 429.

XI. Respect: “Perceptions of respect are associated with simple politeness by the authorities, as well as the acknowledgement of citizens' legal rights. In the plea bargaining context, prosecutors might undertake a number of measures to enhance perceptions of respect. They might, for instance, take care to use the appropriate honorific when referring to the defendant (e.g., Mr. Smith, Ms. Jones) and discourage unnecessary handcuffing and other forms of rough treatment. They also should avoid exploding offers that expire before defendants have had a meaningful opportunity to confer with counsel or to litigate colorable suppression motions as such offers convey a disregard for the defendants' legal rights. Finally, after formal charges have been filed, prosecutors should avoid threats of enhanced charges in order to extract guilty pleas. A guilty plea represents the waiver of numerous constitutional rights, including the right to a jury trial and the privilege against self-incrimination. A prosecutor

shows disrespect for these rights when she threatens a recalcitrant defendant with charges that she evidently did not think appropriate to pursue in the first instance.” Id. at 430.

XII. Conclusion: “There are compelling reasons to believe, however, that thoughtful efforts to integrate procedural justice norms into plea bargaining will not only help the system do a better job of giving defendants the sort of fair treatment that they want and deserve, but also will advance important public interests in efficient and transparent crime control.” Id at 468.