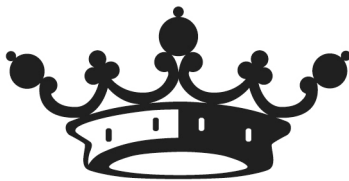


I N S I D E T H E M I N D S

Negotiating a Plea Deal in DUI Cases

*Leading Lawyers on
Analyzing the Latest Trends,
Navigating the Plea Bargain Process, and
Securing the Best Possible Deal*



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The Art of the DUI Plea Deal

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Introduction

With less than 10 percent of drunk driving cases decided by trial, most DUI cases are “won” or “lost” in the trenches of plea negotiations. Therefore, the best defense lawyers focus major resources on preparing clients for the plea bargain process. The “art of the deal” goes beyond horse-trading. It requires candid attorney-client communication, intense case investigation, and fierce negotiation.

This chapter will outline the methods I use in my DUI defense practice to prepare clients for plea bargaining. First, I educate the client about the elements of the crime the prosecutor must prove to convict, the criminal justice system, and the potential case outcomes. Next, I learn about the client’s personal needs and their resources for resolving the case. I then analyze the strengths and weaknesses of the case by collecting information and preparing to challenge police processes, test results, and testimony. Finally, I discuss plea possibilities with the prosecutor and present the options to the client. The typical result is a plea deal that suits my client’s best interests.

What Is Plea Bargaining?

Plea bargaining is the process of negotiation between the defense lawyer, the prosecutor, and sometimes the judge whereby the defendant pleads guilty to a lesser charge, fewer charges, or the original charge with a lighter-than-maximum sentence. In short, a plea deal is a settlement of a criminal case in which the prosecutor offers the defendant concessions in exchange for a guilty plea.

The vast majority of DUI cases result in a plea deal. Less than 10 percent of DUI charges actually lead to trial. Therefore, properly preparing your client for the plea bargain process is critical to succeeding as a DUI defense lawyer.

Although plea bargaining is politically controversial, courts recognize it is essential to the function of our criminal justice system. Plea deals allow the accused to avoid the risk of conviction at trial on original, more serious charges while permitting prosecutors to save public resources by obtaining

guilty pleas in cases that might otherwise go to trial. Plea bargaining supports a healthy judicial economy. From the standpoint of a defendant facing a high chance of conviction, a plea deal is an opportunity to minimize exposure to punishments such as jail and maximum fines, and maximize the predictability of the sentence. From the prosecutor's perspective, plea bargaining guarantees a conviction while requiring the defendant to admit wrongdoing and move forward toward rehabilitation. A good plea bargain suits the interests of the defendant and the state while quickly disposing of prosecution without trial.

Proving the Existence of a DUI Crime

Client understanding of the elements of a DUI offense is essential to meaningful plea bargain analysis. Although drunk driving laws differ from state to state, conviction generally requires the prosecutor to prove two basic elements of the crime: operation of a motor vehicle and impairment from alcohol or drugs.

One interesting aspect of most DUI statutes is that they do not require proof that the client actually drove a vehicle. Instead, courts recognize that the term "operating" is broader than the term "driving." To operate a motor vehicle, for purposes of DUI, the client must have exercised some control or manipulation over the vehicle. This includes driving, steering, backing, or any physical handling of the controls for the purpose of putting the car in motion, but it is neither necessary that these actions have any effect on the vehicle's engine nor essential that the car actually move in order for the prosecutor to prove the element of operation.

Regarding impairment, DUI laws do not require that the client be "drunk" in the common understanding of the word. To prove the element of impairment, the prosecutor must simply show that the defendant was under the influence of drugs or alcohol. If his or her blood alcohol concentration level was 0.08 percent or higher, he or she is presumed impaired. Another surprising twist in DUI law is that impairment is not limited to alcoholic beverages and illegal controlled substances. Indeed, in some situations, the influence of legally prescribed drugs or over-the-counter medications can lead to conviction.

Once I have educated the client on the elements required for DUI conviction, our conversation turns to the statutory penalties. In my state, a first offense is a misdemeanor that results in a maximum sentence of six months in jail and fines up to \$1,000—plus probation, community service, substance abuse class, a driver improvement course, a driver's license suspension, and attendance at a Mothers Against Drunk Driving victims impact panel. Punishments increase with subsequent convictions. By the third offense, it becomes a felony with a jail sentence up to five years. Fourth and subsequent offenses could result in imprisonment of ten to thirty years. In short, it is important that the client understand that pleading guilty to a DUI now could result in more severe penalties for future offenses.

Preparing the Client for the Plea Bargaining Process

Preparing a DUI client for the plea bargain process begins with educating him or her about the criminal justice system, the charges faced, and the potential outcomes. The next step is getting to know the client, the case, and the client's personal needs, wants, and goals. Then I analyze the strength of our case and meet with the prosecutor to discuss alternatives to trial. Finally, my client and I engage in a thorough, candid conversation about the likelihood of success at trial and available plea bargain options.

Teaching the Client About the Criminal Justice System

Unlike many other criminal defendants, most of my DUI defense clients have no criminal history. They have not been arrested, indicted, or convicted before. Their experience with the criminal courts is limited to what they have seen on *Law & Order* and other television crime dramas. They do not understand the criminal justice system or know its players beyond the police officers who arrested them. Consequently, the plea process preparation begins with a rudimentary civics lesson on the respective roles of police, prosecutors, judges, probation/parole officers, and corrections staff. Once the client demonstrates a grasp on the players involved, I introduce them to the concept of plea bargaining.

Types of Plea Bargains

There are four basic types of plea deals in DUI cases:

- Charge bargains
- Count bargains
- Fact bargains
- Sentence bargains

To demonstrate how these forms of plea deals work, consider the plight of “DUI Danny,” a fictional client charged with two counts: driving while intoxicated with a 0.175 blood alcohol concentration and improper lane usage. With charge bargaining, a defendant pleads guilty to a less serious crime than the original charge—the prosecutor reduces Danny’s DUI to careless operation in exchange for a plea. With count bargaining, the accused pleads guilty to fewer counts than originally charged—Danny pleads to DUI and the prosecutor drops improper lane usage. With fact bargaining, a defendant pleads guilty while the prosecutor stipulates to certain facts that will affect punishment—Danny pleads to DUI with his blood alcohol reduced from 0.175 to 0.145 to avoid mandatory jail time. Finally, with sentence bargaining, Danny pleads guilty as charged with an agreement on the sentence he will be given pending judicial approval—Danny pleads to both charges with minimum penalties. In short, it is important that the client understand there are several potential types of plea deals that could lead to a desirable resolution of his DUI case.

Understanding the Charges and the Potential Consequences

Once familiar with the criminal justice system and its plea deal process, the client must appreciate the nature of the charges he or she faces. First, the client must understand the elements of the crime the prosecutor must prove to convict. Next, the client must comprehend the penalties that come with conviction. Finally, the client must realize that DUI is an enhanceable offense where penalties increase for repeat offenders.

DUI is a serious crime that poses an urgent and considerable threat to the accused client's freedom, wealth, and reputation. DUI defendants face two separate legal proceedings because of their arrest:

1. Criminal prosecution in city or district court
2. Administrative driver's license suspension by the state's office of motor vehicles

Criminal prosecution is obviously the more important of the two legal proceedings, because conviction can result in jail, fines, probation, community service, and other burdensome penalties. DUI conviction can also tarnish a client's permanent criminal record, resulting in lost employment, educational, and personal opportunities. Conviction can further haunt repeat offenders by drastically increasing penalties in future cases. Finally, conviction can cause insurance rates to skyrocket, costing thousands in additional premiums.

The administrative driver's license suspension process moves even faster than criminal court. Refusal to take or failure to pass a chemical breath test results in an automatic suspension of your driver's license by the office of motor vehicles. Typically, the arresting officer confiscates a client's license upon arrest. Thereafter, to challenge that driver's license suspension, the client must promptly request a hearing before an administrative law judge. The administrative law judge hearing usually presents the first—and best—opportunity to question the arresting officer about the DUI arrest and gather evidence such as police reports and video. This information is critical to evaluating the chances of success at trial and predicting available plea deal options.

A Look at the Possible Outcomes

After I have explained the plea bargain process within the context of the criminal justice system and the client understands the nature of his or her DUI charges, a discussion of the possible outcomes ensues. We address the best possible outcome (dismissal of all charges or acquittal), the worst (conviction with maximum penalties, including jail), and the many possibilities in between (conviction with lesser penalties, conviction on lesser charges, conviction on fewer charges, conviction with the option to clear the record, or pre-trial diversion, etc.). The better educated a client becomes about possible outcomes, the more likely his or her expectations will be reasonable.

The possible outcomes conversation usually begins and ends with an explanation of the risk/reward paradigm of trial on the merits. Depending on the facts of the case, trial usually represents the biggest possible gamble for a DUI client. On the reward side of the equation, trial offers the client a chance for an acquittal. Acquittal translates to no jail, fines, probation, courses, or community service. Acquittal keeps the client's criminal record clean. Aside from pre-trial dismissal of charges—the unlikeliest of long shots—acquittal is a best case outcome for a DUI defendant. Conversely, on the risk side of this paradigm, trial presents the possibility of a maximum punishment sentence. Conviction at trial could result in imprisonment. In many courts, there is an unofficial but well-understood policy that a defendant's punishment will be more severe if he or she is convicted at trial rather than pleading guilty beforehand. This policy differs from court to court, so it is important to know the tendencies of the presiding judge.

In addition to potential punishment, it is also important that a pleading client understand the other tradeoffs involved in plea deals. Most significant is the waiver of the following legal rights: the right to a trial before a judge or jury, the right to confront and cross-examine witnesses, the right to remain silent, the right to refrain from self-incrimination, the right to produce evidence and witnesses, the right to present a defense, and the right to appeal. It is not enough to simply list these waived rights to the client. Rather, each right should be thoroughly explained in relatable lay terms so the client fully appreciates what they are giving up.

Learning the Needs of the Client

Having educated my client on the criminal justice system and the DUI process, I stop talking and start listening. Before analyzing the case and negotiating any plea deals, a good defense lawyer must come to grips with the defendant's needs, wants, and goals for the case. Each client's priorities and needs are different. For example, consider the differences presented by the following fictional clients:

- *Nurse Nellie*: a single twenty-two-year-old nursing school student accused of first-offense DUI

- *Paul Provider*: a married thirty-five-year-old father of three who works three-week-long shifts on offshore oil rigs, also accused of first-offense DUI
- *Ronnie Repeater*: a widowed sixty-five-year-old alcoholic accused of fourth-offense DUI

Nellie, Paul, and Ronnie's dissimilar stations in life indicate distinct needs in their DUI plea deals. For example, Nellie's charge jeopardizes her future career because a drunk driving conviction could prevent her state's nurse licensing board from granting her a license to work. In all likelihood, Nellie's top priority is clearing her record to save her career. Nellie will spend and do whatever it takes to obtain a plea bargain that includes pre-trial diversion, post-conviction expungement, or some other criminal record-clearing option. Paul, on the other hand, would be less concerned with whitewashing his criminal record, since misdemeanor convictions are common and not career threatening in the oil field. Paul's top priority is more likely providing for his family by saving money. He would likely jump at a quick plea deal that included low fines and the flexibility necessary to work offshore for weeks at a time. Finally, unlike Nellie and Paul, Ronnie faces the possibility of a felony conviction with imprisonment of up to thirty years. His career and finances are secondary concerns. Ronnie requires a plea deal that avoids a long-term prison sentence.

In addition to informing me of my client's goals and preferences, this process allows me to take stock of each client's resources for resolving their DUI case via plea deal. For example, wealthy clients can afford to hire extra experts, pay larger fines, retain counselors, purchase ignition interlock devices, and so on. Clients with more free time can attend time-consuming driver improvement classes, substance abuse courses, counseling sessions, Alcoholics Anonymous meetings, court appearances, and so on. Some clients even possess that rare aptitude for serving prison time that allows them to forego other more expensive, time-consuming penalties in favor of a few days in jail. Whatever the client's resources, it is important to know what I am working with prior to meeting with the prosecutor to discuss pleas.

Most DUI clients want to avoid jail at all costs. Some seek clean records above all. Many clients want most to minimize negative financial

consequences. A few want to “get it over with” as quickly as possible with minimal interruption to their lives. All DUI clients have personal, individual stories to share that have bearing on the type of plea deal most suitable for them.

Preparing a Suitable and Strategic Defense for Negotiation

Analyze the Case

After getting to know my client and his or her needs, my attention turns to the strengths and weaknesses of the case. DUI charges give rise to a number of potential legal defenses from factual, technical, and legal standpoints. If handled properly, these issues can lead to the suppression of incriminating evidence such as field sobriety tests, breathalyzer results, or arresting officer testimony. This may contribute to better plea options. Therefore, I analyze the merits of the case by investigating the facts, reviewing police reports, watching police video, visiting the scene of the arrest, interviewing witnesses, employing experts, preparing and filing discovery motions, requesting an administrative law judge hearing, and cross-examining the arresting police officer.

Obtain Information

Discovery motions are particularly effective tools for obtaining evidence and information from the police and prosecutor. Motions must be filed in time to scrutinize the evidence before it goes cold and make use of the information in plea negotiations. The more information obtained via motions, the more defenses become available and the better the chances of obtaining a favorable plea.

The best DUI defense attorneys examine the scene of the arrest. Some also send a private investigator to do so. Examining the scene provides a lawyer with the intimate knowledge necessary to effectively question and cross-examine the arresting officer. For example, if the road surface on which the client performed the walk-and-turn and one-leg stand is not level or safe, that fact might invalidate those field sobriety tests. Moreover, if your underlying traffic charge is improper lane usage, the presence of a pothole,

other roadway defect, or obstruction may contradict the officer's allegation that intoxication caused the client to swerve out of the lane of traffic. Finally, photographs and video of the scene can aid the attorney in defending the case before the judge.

Challenge Processes, Results, and People

Police officer mistakes in administering field sobriety tests are a common strength in a DUI defendant's case that often leads to better plea options. Because such mistakes can invalidate results and lead to possible acquittal, prosecutors are particularly sensitive to this issue. Field sobriety tests are designed to determine whether you are under the influence, but their results are not automatically admissible at trial. Police officers must administer the tests while following strict procedures and under conditions conducive to proper testing. If the officer was improperly trained, or if he or she misapplied suitable training, the results should be thrown out. Likewise, if the field sobriety tests were given in inadequate lighting, on uneven ground, or in harsh weather, the results should be challenged. Finally, if the client suffers from certain physical conditions such as obesity, advanced age, or orthopedic injuries, the results are invalid.

Breathalyzer challenges are another avenue that can lead to improved plea deals. The purported purpose of the chemical breath test is to measure a defendant's blood alcohol concentration at the time of the alleged offense. However, like field sobriety tests, breathalyzer results are not automatically admitted into evidence at trial. In each case involving chemical breath testing, I scrutinize the breathalyzer results and consider related objections. In many situations, a good DUI attorney can discredit breathalyzer results through challenges to the machine's measuring tolerances, defective equipment, inadequate operator credentials, improper operator protocol, and the physical and/or medical conditions of the client. The process involves obtaining breathalyzer records through the discovery process, analyzing the records closely, confirming faults through cross-examination, and, finally, zealously objecting to the breathalyzer results by motion to suppress evidence. Another tactic for challenging breath test results is to present an expert witness to testify regarding the machine, test protocol, and/or blood alcohol concentration. If I can establish that the breathalyzer

device was not working, that its operator improperly administered the test, or that the machine or its operator lacked proper documentation for training, certification, or calibration, the breathalyzer results can be suppressed and the client's plea options should improve.

The prosecutor's case will usually rely heavily, if not exclusively, on the strength of the arresting officer's testimony. Often, the court finding my client guilty or not guilty at trial depends upon whether the judge or jury believes the officer's version of the facts over the defendant's recollection. Prosecutors know this, so when I expose problems in an arresting officer's testimony, plea bargains get better. Therefore, I cannot allow the officer's testimony to go uncontested. Instead, by using the administrative driver's license hearing to subpoena and cross-examine the police officer, I thoroughly question the officer about the quality of the investigation, the officer's training and experience, the officer's bias, the police report, and the officer's prior disciplinary problems.

Presenting the Plea to the Client

Once I have educated my client on the charges and process he or she faces, learned about his or her wants and needs, and studied the case, it is time to meet with the prosecutor to debate plea options. If a plea bargain is offered, I will then convey the offer to my client, and we will discuss his or her options, confident that he or she is fully prepared to decide whether to plead guilty or go to trial.

This conversation begins with a quick recap of the possible outcomes, from best to worst. It is important to compare the plea offer on the table to the better and worse potential outcomes. This gives the client a sense of the ground they have gained via plea bargaining, and it reminds him or her of the possibilities given up by pleading guilty. I always prefer to convey plea deal offers to my client in person in my office. This allows me to eliminate the undue influence of the know-it-all "man behind the curtain"—a client's friend or family member who knows little about DUI law or the facts of the case, but who nevertheless distracts the client with strong opinions about what constitutes a good plea deal. Meeting in person also allows for deeper, better dialogue. I would not recommend conveying plea offers by e-mail,

fax, or telephone. It is always worth my time (and my client's) to meet in person in my office.

Sometimes, with or without a third party's bad influence, my client will be unhappy with the plea options. My reaction depends on the reasonableness of the client's dissatisfaction. For example, consider a weak case (high likelihood of conviction at trial) where the prosecutor has agreed to a pre-trial diversion (essentially a qualified dismissal with no conviction) in exchange for a client's participation in jail-free penalties similar to a minimal sentence. If the client is resistant to accept that deal because of the inconvenience of the penalties, that response is unreasonable and I plainly tell him or her so. I do not indulge his or her self-pity, which is likely rooted in an irrational, unproductive failure to accept the reality of the situation. Rather than waste the prosecutor's time by asking him or her to sweeten an already attractive offer, I tell the client that he or she must decide between the best deal available and trial on the merits. There is no sense in holding out hope for an unreasonably better deal. However, if the client's refusal to accept a deal is reasonable, I do not hesitate to go back to the prosecutor to work out a better resolution. Hopefully, my earlier work educating the client about the crime, process, and reasonably likely outcomes guides the client's thinking during this important phase of the case.

Conclusion

The aforementioned process for preparing clients for plea bargaining is essential to success in most DUI cases. By educating my client about the elements of the crime, the criminal justice system, and potential case outcomes, I have laid the groundwork for reasonable client expectations. By familiarizing myself with my client's needs and resources, I have outlined the parameters of productive plea negotiations. By investigating the strengths and weaknesses of the case and preparing to challenge police processes, test results, and testimony, I have armed myself with the tools required to build a successful plea deal. Finally, by engaging the prosecutor and client in straightforward conversations about reasonable options, I have culminated the plea bargain process with a result that probably suits my client's best interests.

No matter your style, the approach discussed in this chapter can work for you in your DUI defense practice. Plea bargaining is an art, not a science. If you incorporate my foundation of educating the client, analyzing the case, and engaging the prosecutor into your own system, no reasonable plea deal will be beyond your reach. Good luck.

Key Takeaways

- To be a successful DUI defense lawyer, you must prepare your client for the plea bargaining process.
- Educate your client about the plea process, the elements of the offense required for conviction, the criminal justice system, and the potential outcomes.
- Learn as much as you can about your client, including their needs, goals, and resources, to ensure you are able to successfully resolve their case via plea deal.
- Collect as much information about the case as possible, including anything available from the police or prosecution (e.g., discovery evidence) and personal observations from the scene of the arrest.
- Be prepared to challenge police processes, test results, and testimony to ensure the best possible plea bargain.

Parker Layrisson is a Louisiana lawyer who has received the highest ratings available from Martindale.com (AV preeminent) and Avvo.com (10.0 superb). In 2009, New Orleans magazine named him to its list of “Top Lawyers as Chosen by Their Peers.” He is a former city prosecutor, state assistant attorney general, and federal judicial law clerk. He was also editor in chief of the Louisiana Law Review. He founded the Parker Layrisson Law Firm, which maintains offices in New Orleans and Ponchatoula, Louisiana.

Mr. Layrisson graduated with honors from Tulane University and LSU Law Center. He is a former number-one-ranked student at LSU Law, where he earned the highest grade in his criminal law class and achieved membership in the prestigious Order of the Coif (top 10 percent graduate). He also completed a program in criminal justice at

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Dedication: *This chapter is dedicated to my best friends, Wil and Angelique Richardson. I value their support and friendship more than they will ever know.*



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