

Negotiating with the Police & Prosecutors

*A paper presented by Stephen Lawrence¹ at the Aboriginal Legal Service
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A. Introduction

1. This paper attempts to deal with why, how and when criminal defence lawyers negotiate with police and prosecutors.
2. The paper is divided into four parts:
 - What is Negotiation?
 - Why Negotiate?
 - Matters for Negotiation and Relevant Legal Issues that Arise
 - How to negotiate

B. What is Negotiation? (Principles & Interests)

3. Textbook have been written on the topic. But put simply negotiation is the process by which you get what you want, or as much of what you want as is possible, from someone else.
4. The internet is rich with pithy quotes seeking to define the word:

Negotiating is the process of getting the best terms once the other side starts to act on their interest.

On Negotiating by Mark H. McCormack

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... negotiating is... a means of achieving one's goals in every relationship regardless of the circumstances.

The Art of Negotiating by Gerard I. Nierenberg

Negotiation is a field of knowledge and endeavor that focuses on gaining the favor of people from whom we want things.

You Can Negotiate Anything by Herb Cohen

Negotiation is a basic means of getting what you want from others.

Getting to Yes by Roger Fisher & William Ury

5. Theoretically at least the process of negotiation in the criminal law could be understand as a mechanism of attempting to resolve legitimate competing interests, without recourse to the adjudicative function of the Court, through the application of proper principles.

Principles

6. The proper principles involved include the legal rules (including the offence creating provisions and the rules of evidence that govern whether offences can be proven), the prosecution policy of the prosecuting authority and the ethical constraints governing both parties.
7. It is important to remember that the prosecutor is a public servant and accountable in ways fundamentally different to you.
8. Many people and institutions potentially take a legitimate interest in what the prosecutor does, including the their supervisor, their supervisor's supervisor, the victim, the police, the DPP, the Attorney-General, the opposition, any member of parliament, the ombudsman and the tax payers.
9. If the prosecutor can be said to have departed from the principles that govern their work the consequences can be significant.
10. To understand the content of those principles is therefore essential to negotiating effectively with the prosecutor.

11. That is why this paper focuses to a large extent on the Prosecution Guidelines and the relevant law governing prosecutorial decision making.

Interests

12. The legitimate interests, in this ideal negotiation model, vary dramatically as between the parties.

13. The prosecution's legitimate interests include:

- Achieving a conviction for the appropriate offence
- Achieving appropriate punishment following that conviction
- Efficient use of resources
- Fairness/Seeing justice done
- Protecting the victim from undue harm or trauma
- Advancing the public interest

14. The accused's legitimate interests may include:

- Securing an acquittal
- Securing the best possible deal in terms of charges
- Securing the lowest possible punishment
- Finalising the matter as soon as possible

15. But to understand the negotiation process in this way is to pretend that the system works perfectly and that negotiations will only involve the proper application of principles and the consideration of only the relevant and proper interests.

16. We know however that there are other improper principles and illegitimate interests that are at play, (even if few will ever admit some of them).

17. These might include:

- The ‘irrational’ client who has other interests that may lead them to reject an outcome that advances their interests as perceived by their solicitor.
- The prosecutor/defence lawyer whose true interest is to simply avoid running contested matters if at all possible. This factor is in reality a significant factor in the outcome of many negotiations.
- The prosecutor/defence lawyer who doesn’t understand the law or the facts properly and therefore impedes the proper resolution of the matter through applying the wrong principles.
- The Prosecutor/defence lawyer who is taking irrelevant/improper considerations/interests into account. This would include the defence lawyer who is advancing a ‘political’ objective, the prosecutor who seeks to defend the interests of police or the prosecutor who is influenced by the fact a matter has received sustained media attention.
- The prosecutor/defence lawyer whose personal dislike of their opponent compels them to oppose in circumstances where they might otherwise reach agreement. As a corollary of this, the prosecutor/defence lawyer whose conduct engenders these feelings of antipathy.

18. To properly play your role in a negotiation in the criminal context you need to understand what are the proper principles and legitimate interests, (and seek always to advance them), but also to identify and understand the hidden ones that dare not speak their name.
19. There is of course often no ‘right’ answer in a negotiation. Reasonable opinion will differ on what is an appropriate charge, even within the DPP’s office. Even assuming everyone involved is doing their best to advance the right interests in a principled way outcomes will vary depending on the people involved.
20. Ultimately not all matters can be negotiated into resolution. It is not a failure of negotiation if your client’s instructions don’t permit a negotiated outcome (even if the prosecutor is being very reasonable). That is why we have the Court system.

21. There will be matters in which you shouldn't and wouldn't even attempt to engage in negotiation. Some matters are just 'runners'. (I discuss below how these types of matters can lead to significant problems when lawyers attempt to negotiate the unnegotiable).

C. Why Negotiate?

22. Nicholas Cowdery QC summarised the reasons for the parties in the criminal justice system to negotiate in the following way:

*“There are many reasons why it may be beneficial for both sides in the criminal justice process to talk to each other. For the defence side it may enable you more readily to fulfil your principal professional obligation to do the best for your client. For the prosecution it assists in the task of disposing of matters in the most effective manner – on the most appropriate charges and with the most economical use of public resources. Both imperatives are important, not least in order to reinforce public confidence in the criminal justice system as a whole”.*²

23. By 'doing your best for your client' Mr. Cowdery surely means to have inappropriate charges withdrawn, to obtain the best possible outcome in charge negotiations, to secure the best possible concessions on sentence and to secure the prosecution's cooperation in the various other ways that can be favourable to your client (some of which are discussed below).

24. In addition to those factors I would also point to the organisational interest of the Aboriginal Legal Service.

25. The more matters you can properly resolve through principled and appropriate negotiation the more time you can spend advancing the interests of other clients.

26. As a less than ideally resourced organisation it is imperative that ALS solicitors use every technique and method for efficiently processing work.

² Cowdery, Nicholas. 'Negotiating with the DPP'. Legal Aid Commission of NSW Criminal Law Conference 3 August 2006. Available online at <http://netk.net.au/Prosecutions/Pleabargaining.pdf> (accessed 28.05.2011)

27. This will benefit not only the individual client for whom you negotiate a good result but also the next client who is depending on you to properly prepare their fully defended matter.

D. What Matters are Negotiable in a Criminal Matter?

28. The most common thing that defence lawyers negotiate with the prosecution is the charge to which a client will plead guilty and the facts upon which they will do so.

29. In reality however we use our negotiation skill, or lack thereof, in a wider range of ways.

30. The following are some of the contexts in which we negotiate.

The Institution of Charges

31. In some circumstances you will have an opportunity to negotiate with police over the very institution of charges. This most commonly perhaps arises in circumstances where you represent a client who is yet to be arrested or charged and whom police are approaching, though you, to secure their cooperation in the investigation.

32. In these rare cases it may sometimes be appropriate to engage with police in an attempt to convince them why they should be investigating other avenues and not arresting your client or why the evidence is not sufficient to justify the institution of charges at all.

33. In some cases it will be your role to convince police that your client should be used as a witness rather than prosecuted. This is discussed further below as it raises particular legal and factual issues.

34. Youth justice conferencing. This is an area with which I am basically unfamiliar but I understand that solicitors representing children fairly commonly are in a position to negotiate the resolution of the matter through conferencing.

The Decision to Prosecute/Discontinuance of a Prosecution

35. Sometimes you will seek that your opponent withdraw/discontinue the prosecution in its entirety.

36. In some minor matters this process may occur at Court but more often than not it involves the exchange of formal correspondence.

37. The DPP's Prosecution Guidelines³ state:

"..The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:

(1) whether or not the admissible evidence available is capable of establishing each element of the offence;

(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not

(3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

38. Representations that charges should not be instituted or that charges should be discontinued are generally made in written form to the responsible solicitor or Crown Prosecutor (if the matter is a DPP matter) or to the Police Prosecutions Branch in the relevant area.

39. There is no magic formulae as to what form representations should take. I generally make it clear from the outset what the letter is seeking and then list the factors relevant to the public interest test that I say should lead to the outcome sought.

40. Where relevant I will cite case law to support the propositions advanced and quote any relevant part of the prosecution guidelines. The case law might include authority for the following propositions:

- Why some evidence is said to be inadmissible
- Why you say a particular witness is unlikely to be believed

³ <http://www.odpp.nsw.gov.au/guidelines/guidelines.html> (accessed 29 May 2011)

- Why you say a particular sentence outcome is likely
 - Why you say a particular jury direction will need to be given
41. Most commonly such a representation will be relying on a suggested lack of evidence capable of proving the charges. In some cases it will be that said that other discretionary factors justify discontinuance. These might include ill health, age, mental illness and so forth. In such cases you might want to include documentary or other material to support your argument.
42. When making representations you obviously need to make a judgment call about how likely your representation is to be accepted. You also need to assess how likely it is to focus the prosecutor's mind on how to improve the case against your client. Your carefully reasoned and researched representation may be the best legal advice available for the prosecutor on how to fix the case and convict you.
43. It is impossible to give real guidance on how to exercise your judgment in this area except that you need to put yourself in the prosecutor's shoes and consider how you would respond to the representation. If the problems in their case are eminently fixable then it may be better not to highlight them.
44. In Police matters I understand that in most cases the 'Area Prosecution Coordinator' ("APC") will decide the representation.⁴ In DPP matters it will depend on the seriousness of the charge but generally a Crown Prosecutor, or someone higher, will make the decision as to whether an indictable matter proceeds or not.
45. Generally the prosecutor with individual carriage of the prosecution will have significant influence on the outcome, even if the decision is formally made by someone else. As such your powers of persuasion will be well used if you can convince your opponent around to your point of view even if someone above them will make the ultimate decision. (In a recent matter I had the frustration of having my fairly lengthy and complex representation to the Director's Chambers decided upon in 21 minutes. It was clear the Director's Chambers must have heavily relied upon my

⁴ A/Superintendent Col Kennedy & Inspector Mark Taylor. Dealing with Police Prosecutors. A paper presented to the Legal Aid NSW Criminal Law Conference 3 July 2008. I could not find this paper online but do have a hard copy. Feel free to email me and I will forward you a scanned copy.

opponent to summarise the issues for them. The representation was unsurprisingly unsuccessful).

46. Prosecutors have significant consultation obligations under their guidelines⁵ and now under law⁶. You should be aware of these and factor them in when deciding the timing of your representation. You have none of those obligations and Prosecutor's will generally appreciate it if you show you understand and respect their obligations.

Discontinuance of other Proceedings

47. In addition to the prosecution of criminal offences, prosecutors (or advocates acting for some other manifestation of the Crown) also have carriage of other matters and you should feel equally free to request discontinuance of those matters if you can mount an argument that their continuation is not supported by the relevant statute or law.

48. These might include:

- Forensic Procedure Applications
- Proceeds of Crime Applications
- Costs Applications
- Sex Offender Applications

Charge Negotiation

49. Perhaps more common will be the situation where you are not asking that the prosecutor discontinue a case entirely but where you are requesting that a plea of guilty be accepted to a certain charge on the basis other charges are withdrawn and/or that certain facts are presented to the Court.

50. Most commonly charge negotiations commence at the request of the defence, though sometimes prosecutors will raise the prospect of a plea to lesser charges being

⁵ Prosecution Guideline 7, pg 13.

⁶ See for example, Section 35A of the *Crimes (Sentencing Procedure) Act 1999* and section 6 of the *Victims Rights Act 1996* which supports the Charter of Victims Rights which also mandates consultation.

acceptable. (When this occurs you will often start to immediately suspect something is coming unstuck in their case).

51. Observers sometimes cast aspersions on the process of charge negotiation suggesting it allows defendants to reduce their criminality and escape with little more than a slap on the wrist. Victims of Crime advocates often criticise the process⁷ and particular ‘bargains’ have been publicly critiqued.⁸ Prosecutors have come under sustained personal criticisms following such deals. One example was the resignation of the South Australian DPP following pressure generated largely by a series of controversial plea bargains he had approved.⁹
52. When you feel your opponent is being unreasonable in a charge negotiation it probably pays to bear in mind the potential consequences for them in any plea bargaining situation. (This goes back to the point I made earlier about prosecutors being subject to the rule of law in a fundamentally different way to you).
53. The benefits of the process for defendants are obvious, being that charges are reduced in seriousness as often is the factual basis of the plea.
54. The benefits for the community where summarised this way by the former Attorney-General Bob Debus in Parliament:

*“..There is no doubt that charge bargaining, which is also referred to by many as plea bargaining, is practised in every common law jurisdiction in the world. If a plea of guilty is entered as a result of a so-called charge bargain, in almost every case victims of the crime will not need to testify. Avoiding the trauma of court proceedings can hasten a victim's rehabilitation. That has a practical benefit, especially for victims of sex offences or when the victims are children. That is why many victims of crime thoroughly support charge bargaining. However, the process of charge bargaining has to be fair and just and must consider the rights of the victim”.*¹⁰

7 See for example, Johns, Rowena. Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services Briefing Paper No10/02. New South Wales Parliamentary Research Service. Pgs 52-62. Available online at

[http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/578C6F10C6D98565CA256ECF00083B4D/\\$File/10-02.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/578C6F10C6D98565CA256ECF00083B4D/$File/10-02.pdf) (accessed 29 may 2011)

8 For example the plea bargain that led to the plea of guilty in the matter of *R v AEM (jnr) & AEM (snr) & KEM* Discussed in ‘Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts’, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002, Annexure A, pp 3-4.

9 <http://www.abc.net.au/news/stories/2004/05/03/1100371.htm>

10 <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20010920024>

55. In the Samuels Report¹¹ the following answer was provided to the question ‘Charge Bargaining – Why?’:

“..The short answer to these questions is that guilty pleas provide very substantial benefits to the community by the saving in time and cost which would otherwise be consumed by contested trials. It was agreed by all with responsibility for the operation of the criminal justice system that charge bargaining, as the primary means of facilitating the disposal of indictable offences by a plea of guilty rather than by trial, was essential to the administration of justice. Without it, the system could not cope”.

56. The Samuels Report posited the ‘criminality principle’ as the ultimate consideration for the prosecutor in a charge negotiation process stating:

*“..The optimum outcome of a criminal prosecution is resolution by a plea of guilty to a charge which adequately represents the criminality revealed by facts which the prosecution can prove beyond reasonable doubt, and which give the sentencer an adequate range of penalty. A charge bargain must not compromise the principle – which I will call “the criminality principle” – made up of these three ingredients”.*¹²

57. DPP Prosecution Guideline 20 should be read by anyone seeking to understand the rules governing prosecutors in charge negotiations.

58. The Guideline states in part:

“..Where the appropriate authority or delegation has been obtained or is in place, a prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:

(a) the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing; and/or

(b) the evidence available to support the prosecution case is weak in any material respect; and/or

(c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or

(d) it will save a witness, particularly a victim or other vulnerable witness,

¹¹ Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed facts. Report by the Honourable Gordon Samuels AC CVO QC.. Available online at

[http://www.ipc.nsw.gov.au/report/lpd_reports.nsf/files/Report%201.PDF/\\$FILE/Report%201.PDF](http://www.ipc.nsw.gov.au/report/lpd_reports.nsf/files/Report%201.PDF/$FILE/Report%201.PDF) (accessed 29 May 2011)

¹² The Samuels Report pg 14

from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges”.

59. Understanding why prosecutor’s engage in charge bargaining is essential to understanding how to approach them and how to attempt to persuade them.
60. Nicholas Cowdery QC summarised the following circumstances “*where acceptance of a plea to a lesser or alternative charges might properly arise*”¹³:
- The timorous or reluctant witness
 - The unpersuasive witness
 - The case of overlapping or adequate penalties
 - Multiple offences
61. To this list of circumstances we should also take into account any illegitimate considerations we know or suspect may be motivating the prosecutor, (to the extent that we can properly and ethically make a particular request after taking them into account).

Admissions Made During Negotiation/Without Prejudice Documents

62. Practically speaking one should be aware that any indication to the prosecutor of what your client would be willing to plead to, or what facts they can agree to, could potentially be led by the prosecution as an admission against interest. This is much more likely to occur if the representation was made in writing. (I do not say this to dissuade you from making representations in writing).
63. This is not an unknown situation. In a trial matter in Dubbo this year the Crown served us with notice that the former ALS solicitor previously involved in the matter would be subpoenaed to give evidence in relation to a representation and ‘draft facts’ she had presented to the Crown during the negotiation process.
64. It is customary for solicitors, even in criminal matters, to mark their representations as being ‘without prejudice’. I would suggest this will be of uncertain effect should the

prosecution later seek to adduce evidence of the representation. (The *Evidence Act* 1995 (NSW) I understand is silent on the status of such documents).

65. Interestingly however the DPP Prosecution Guidelines do acknowledge the ‘without prejudice’ nature of representations.

66. Guideline 20 states:

“..Any written offers or representations by the defence must be filed. In many cases there will not need to be any written record from the defence; but in any case of complexity or sensitivity, the defence should be asked to put in writing (or to adopt a prosecution document recording), without prejudice, the offer of a plea and the reasons why it is considered an appropriate disposition of the matter. In some cases it may be appropriate to inform the defence that the prosecution will not consider an offer unless its terms are clearly set out in writing. The content and timing of such communications will be of significance to the defence as well, given the weight to be accorded to early and appropriate pleas”.

67. In circumstances where you have been invited to make a ‘without prejudice’ representation it may well be improper for the prosecution to seek to lead it and exclusion could be sought under section 138 of the *Evidence Act 1995* (NSW). Perhaps an argument could be made that given the content of guideline 20 that implicitly all such representations are made without prejudice. Perhaps an argument could also be made under section 137 on the basis the jury will not understand fully the reasons why such offers are made.

68. The prudent course is to be vigilant to ensure that all such representations are made strictly on instructions and this is carefully file noted and recorded.

Withdrawal of Pleas of Guilty

69. The reality of many plea negotiations is that the accused person is placed in a pressured and difficult situation. While they may ultimately accept the bargain offered they may do so grudgingly and/or without a full understanding of what they have agreed to.

70. In some such cases they will subsequently seek the leave of the Court to withdraw the plea. If this is contested by the prosecution you may, as their previous solicitor, be forced to account for the integrity of the plea.

71. This regularly occurs through the client waiving legal professional privilege and the client and their former solicitor providing sworn evidence as to the events surrounding the plea.
72. If you have not carefully recorded the relevant events you may be left extremely embarrassed.
73. If your former client's version of events conflicts with yours (as is common) and is subsequently accepted in preference to yours you may be even more embarrassed.

What Happens when the Prosecution Breaks a Promise?

74. In some cases it may be your opponent who withdraws from the bargain struck.
75. In those circumstances you should be aware that in some rare circumstances Courts will permanently stay prosecutions that rest on the departure by the prosecution from a representation or undertaking.
76. Departure by the Crown from representations or undertakings made is a well established basis for a permanent stay of proceedings of any indictment, primarily on the ground that a legitimate expectation that a person will not be prosecuted, or not prosecuted for a particular charge, is worthy of protection.
77. This principle was recognised by the South Australian Supreme Court in *The Queen v Milnes and Green*¹⁴, much of the jurisprudence is from elsewhere¹⁵ but has been adopted in Australian jurisdictions including New South Wales.¹⁶
78. Being a potential ground of abuse of process it is also relevant to the question of leave to amend an indictment or charge under section 20 of the *Criminal Procedure Act* 1986 (NSW).
79. The undertaking does not have to amount to an express promise, undertaking or offer of immunity. It can be implied and arise where a person 'is given to understand' that they are not to be prosecuted.¹⁷

14 [1983] 33 SASR 211

15 *Chu Piu-Wing v Attorney General* [1984] HKLR 411 *R v Croydon JJ, Ex Parte Dean* [1993] QB 769 *Bloomfield* (1997) 1 Cr. App. R. 135 *R v Townsend & Ors* [1997] 2 Cr. App. R. 540 *R v Latif and Shahzad* [1996] 1 1 ALL E.R. 353, *R v Inland Revenue Commissioners, Ex Parte Mead and Another* [1993] 1 ALL E.R. 772.

16 *Nolan v Curby* 1995 (unreported) No. 40757 of 1995 (Supreme Court of New South Wales Court of Appeal), *Rona v District Court of South Australia* (1995) 77 A Crim R 16, *R v Mohi* [2000] SASC 384

80. The representations are more important and departure from them more serious, when the undertakings are made to a Court.¹⁸
81. The reality often however is that you will not be able to force adherence to a deal that you consider has been made.

The Factual Basis of a Plea

82. Another common juncture in the criminal justice system where negotiation is required, or is useful, is the formulation and presentation of the ‘agreed statement of facts’.
83. This will generally occur after a plea to lesser charges is negotiated and removal of some ‘facts’ may be necessary to comply with sentencing law or as part of the ‘bargain’ that has been struck.
84. I would suggest that where possible you personally draft a proposed statement of facts when you are in the process of reaching agreement with the prosecutor.
85. This is preferable as it will invariably in subtle ways be tailored to your client’s interests.
86. It is also preferable where possible to avoid the “blackened out” “heavily redacted” statement of facts which leaves room for the judicial officer to speculate about the original version and possibly draw inferences, even unconsciously. (Though often practically speaking there may not be time to do so).
87. The DPP Guideline 20, discussed above, states of agreed facts:

“..If a version of the facts is negotiated and agreed, the ODPP lawyer or Crown Prosecutor involved must prepare or obtain a written statement of agreed facts to be signed on behalf of both parties. A copy must be kept on file with an explanation of how and when it came into being. Where reference to any substantial and otherwise relevant and available evidence is to be omitted from a statement of facts, the views of the police officer-in-charge and the victim must be sought about the statement of agreed facts before it is adopted”.

The views of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final

¹⁷ *R v Croydon JJ, Ex Parte Dean* (at pg 8 unreported version)

¹⁸ *Bloomfield* per Staughton L.J. at pg 143

decisions are made; but those views are not alone determinative. It is the general public, not any private individual or sectional, interest that must be served.

If facts for a plea of guilty to an indictable matter are agreed while the matter is in the Local Court, they should be amended later only if the evidence available has altered in a material respect. Ordinarily, however, a statement of agreed facts is to be finally settled by a Crown Prosecutor or Trial Advocate when agreement is reached for a plea of guilty in the District Court or Supreme Court.

88. Issues that arise in negotiations over facts generally involve “what goes in and what goes out”.

De Simoni Rule

89. Police prosecutors in particular will still attempt to craft facts that breach the rule contained in *R v De Simoni* (1981) 147 CLR 383:

“..... the general principle that the sentence imposed on a offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no-one should be punished for an offence of which he has not been convicted... The combined effect of the two principles ... is that a Judge, in imposing sentence, is entitled to consider all the conduct of the accused that would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. ” (supra at 389 per Gibbs J)

.....

At common law, the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge, appears to have been recognised as early as the 18th century.” (supra at 389, per Gibbs J)

90. In circumstances where a police prosecutor will only agree to reduce the charges if certain facts (which breach the rule) “stay in” then it will often be advisable to accept the deal and then to simply submit that as a matter of law the Magistrate should ignore them (of course in those circumstances you should not explicitly or implicitly agree not to make that submission).
91. A general principle that seems to be followed by most prosecutors is that they consider they have discretion when it comes to questions of omission, but they will rarely agree to insert a positive account of events if that account is not supported by the evidence in their case.

92. This may mean that you will have success in removing a punch or two when the assault is said to have been constituted by three punches, or you may succeed in removing a kick when the assault was said to have been constituted by a kick and a punch. You will probably not have success in convincing them to insert a slap if the victim has consistently maintained it was a punch.
93. Similarly you should not, as a matter of ethics, attempt to obtain the insertion of matters that conflict with your instructions. You may however reasonably seek omission of matters consistent with your instructions where it is proper to do so.

Going Behind Agreed Statement of Facts

94. Once facts are agreed the prosecutor should not attempt to go behind them either through cross-examination or through the tendering of inconsistent evidence.
95. In *Falls v R* [2004] NSWCCA 335 Justice Howie said at 39:

“..I have previously in Palu, above, expressed my views about the unsatisfactory situation where the Crown tenders material that either supplements or contradicts the agreed statement of facts. Greg James J expressed similar concerns in Barri. I also believe it to be unsatisfactory for an offender to give evidence as to the facts and circumstances of the offence where the Crown, with the consent of the defence, has tendered what purports to be an agreed statement of facts. Either the document tendered is an agreed factual basis upon which the court is to sentence the offender or it is not. If there is some area of the facts not covered in the statement and that is in dispute, then this should be made clear to the sentencing judge and the matter determined appropriately by evidence and submissions”.

96. Attempts to cross-examine behind agreed facts are an attempt to withdraw from the ‘bargain’ you have struck with the prosecutor and should be vigorously objected to.

Jurisdiction

97. In New South Wales the Prosecutor can decide whether some criminal offences are dealt with in the Local Court or on indictment before the District Court.¹⁹

¹⁹ See section 260 of the *Criminal Procedure Act 1986* (NSW)

98. This question of venue can have significant consequences for the penalty ultimately imposed and may influence the accused in their decision to plead guilty or not guilty. It may be that through a process of negotiation you can persuade the prosecutor to keep the matter in the Local Court rather than electing to proceed on indictment in the District Court.
99. Guideline 8 of the Prosecution Guidelines deal with how the Prosecutor exercises this discretion:

An election should not be made unless:

(i) the accused person's criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or

(ii) for some other reason, consistently with these guidelines, it is in the interests of justice that the matter not be dealt with summarily (eg. a comparable co offender is to be dealt with on indictment; or the accused person also faces a strictly indictable charge to which the instant charge is not a back-up).

Election decisions and review of those decisions in matters under Division 1A of the Act should be made by a Crown Prosecutor, a Trial Advocate or a Managing Lawyer (or an Assistant Solicitor or Deputy Solicitor if circumstances dictate).

The Leading of Evidence

100. Sometimes you will be able to persuade a prosecutor to not lead certain evidence, or to lead it in a particular way.
101. This might occur if you persuade your opponent that the Court is likely to deal with the evidence in a certain way in any event and it would be waste of time to argue the matter.
102. This occurs frequently in agreeing edits to pre-recorded complainant's evidence or videos of ERISP's with accused persons.
103. Reasonable minds can differ on this point but I have never been a fan of the 'ambush' school of thought when it comes to raising evidentiary objections. I regularly provide my opponent with notice of the issues I intend to argue and where possible provide an outline of argument in advance. Sometimes they change course

and agree not to lead the evidence, sometimes they don't. Occasionally they still argue the point but do so in way influenced by what you have put to them.

104. Most prosecutors will be very grateful for advance notice of issues and the building of a relationship of trust is assisted.
105. Often crucial is providing in advance copies of documents you intend to tender in hearings/trials and sentence matters. If copies are provided in advance your opponent will be much more likely to agree to their tender as they will have had the opportunity to read, consider and if necessary verify their contents.
106. Timely provision will also assist in building the relationship of mutual trust.

Concessions on Penalty

107. It is reasonably common as part of negotiations that you will seek from your opponent some concession as to the submissions they will make or not make on sentence. This concession will often be sought as part of a charge negotiation.
108. Consistent with their wider obligations in sentence hearings prosecutor will generally not "support" any particular sentence outcome but may agree to submit that a certain sentence would be "within range" or agree to not make submissions at all.
109. These can be valuable concessions and can significantly influence the Magistrate or Judge.
110. Nicholas Cowdery QC has said the following on the issue:

"..It should be noted that a charge agreement as to an appropriate sentence is not binding – it is for the sentencing judge alone to decide the sentence to be imposed. In R v Ahmad [2006] NSWCCA 177 the Court was critical of such an arrangement. In that case the Crown and defence had purported to agree that a certain non-parole period was appropriate. A charge agreement cannot bind the judge in any event and is to be regarded as akin to a submission to the court (R v GAS (2004) 217 LR 198). That applies to facts, as well as to sentence. It is preferable that there not be any agreement as to sentence recorded in the material presented to the court.

In GAS; SJK v The Queen (2004) HCA 22 the High Court dealt at some length with the principles affecting plea agreements (a Victorian description). The following matters may be extracted.

- 1 It is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person.*
- 2 It is the accused person, alone, who must decide whether to plead guilty to the charge preferred.*
- 3 It is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any fact beyond what is necessarily involved as an element of the offence must be proved by evidence, admitted formally (as in a Statement of Agreed Facts) or admitted informally (as in a statement from the bar table that is not contradicted).*
- 4 There may be an understanding between the prosecution and defence as to evidence that will be led or admissions that will be made, but that does not bind the judge (except in the practical sense that the judge's capacity to find facts may be affected by evidence and admissions). There may also be an understanding between the prosecution and defence as to the submissions of law that will be made, but that does not bind the judge”.*

Adjournments

111. Fairly commonly you will be in the position of having to seek an adjournment of a matter due to the need for further inquiries, preparation etc. Your chances of successfully obtaining the adjournment will be greatly increased if it is not opposed.
112. It will often be advisable to alert your opponent of your intentions as far in advance as possible and carefully explain the reasons for the request. Their cooperation may be the thing you need to get the adjournment. An opponent with whom you have developed a good working relationship will tend to act in your favour in such circumstances where they can reasonably do so. They are much more likely to do so if advance notice has meant they have been able to devote preparation time to other matters in anticipation of the matter being adjourned.

Granting of Bail and Bail Variations

113. Bail is perhaps the most important area in which it is of assistance to secure your opponent's consent.
114. This can sometimes be done by discussing the matter in advance, floating possible conditions and providing relevant material in advance.

Section 32 *Mental Health (Forensic Provisions) Act 1990* Applications

115. This would probably be rare but securing the prosecution's agreement to a section 32 disposal would obviously be of assistance in obtaining the order.

The Conduct of Investigations/Legitimate Requests for Further Investigations

116. The prosecutor has at their disposal the New South Wales Police Force, a powerful force for evidence collection, which can be available to the accused free of charge, if the prosecutor is convinced that it is appropriate for the evidence to be obtained by police.
117. You can seek to persuade the prosecutor that exculpatory evidence which would appear to exist should be gathered and presented. These arguments will generally succeed if the prosecutor is convinced it falls within their roles and duties to obtain the evidence.
118. DPP Guideline 26 states:

"..If the defence provides a statement of a witness containing evidence that is unfavourable to the prosecution case, the material may be investigated by police. In any event, such action does not alone oblige the prosecution to call that evidence in its case".

119. The DPP Prosecution Guideline 2 states:

"..A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The "public interest" is to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.

In carrying out that function

"it behoves him - Neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."

(per R R Kidston QC, former Senior Crown Prosecutor of New South Wales, in "The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958) 32 ALJ 148.)

It is a specialised and demanding role, the features of which need to be clearly recognised and understood. It is a role that is not easily assimilated by all legal practitioners schooled in an adversarial environment. It is essential that it be carried out with the confidence of the community in whose name it is performed.

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

(per Rand J in the Supreme Court of Canada in Boucher v The Queen (1954) 110 CCC 263 at p 270.)

Calling Exculpatory Witnesses

120. These obligations extend to calling all relevant witnesses even if they do not support the prosecution case. You can seek to persuade the prosecutor that they should call a witness that they do not intend to call. You then get the benefit of cross-examining the witness rather than examining them in chief. In some situations the prosecutor may call the witness and ask them only introductory questions leaving you to cross-examine into evidence the relevant evidence.

121. DPP Guidelines 26 states:

"..The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a

witness by making him or her available or, in some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief (see Rule A.66B(j) of the Solicitors' Rules – Appendix

B).

Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (eg The witness is not available or not accepted as a witness of truth). In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness”.

Disclosure

122. Often you can avoid having to resort to a subpoena if you can persuade the prosecutor that they should obtain material (from or through police) and disclose it to you. DPP Guideline 18 deals with disclosure.

Induced Statements/Turning Crown

123. Occasionally you will deal with a client who it appears may obtain the best possible result by ‘turning Crown’ and becoming a witness for the prosecution. This can occur at the suggestion of the defence and will in some situations lead to the discontinuation of a prosecution or a plea to reduced charges.
124. Negotiations of this nature are sensitive and should be conducted carefully and recorded in the file.
125. Often an ‘induced statement’ is taken as part of the process of the Crown ascertaining whether they wish to use the person as a witness. DPP Guideline 15 deals with the taking of induced statements.
126. If you have a client considering turning Crown it may be that the first step would be a conversation with the prosecutor floating the possibility. (If the matter is still at the investigation stage a conversation with the officer in charge of the investigation may be appropriate).
127. This initial step may be followed up by the taking of an induced statement.

128. In turn the charges may be discontinued if the contents of the induced statement is of sufficient value to the prosecution.
129. In these situations it is prudent to bear in mind that you may end up becoming a witness if the defence at trial believe your evidence could somehow bear upon the credibility of the witness. As such you should carefully record all conversations but particularly those (non-privileged) ones you have with investigating police.

Judge Alone Trials and Other Crown Discretions

130. DPP Guideline 24 deals with the factors the Crown takes into account when considering whether to consent to a judge alone trial. If you are considering a judge alone trial you should seek the Crown's consent through negotiation notwithstanding that it is not strictly necessary following the recent changes to the law in that area which have removed the 'Crown veto'.

E. How to Negotiate

131. This is perhaps the most difficult part of any paper that seeks to stimulate thought and perhaps educate on the issue of negotiation.
132. What works with one person will not work with another. What persuades one person might annoy another.
133. Some prosecutors, very few, are almost impossible to negotiate with. Most, (even ones with little respect for the defence and their interests), will negotiate to some degree. The majority in my experience range from very reasonable to sometimes reasonable.
134. One basic and fundamental rule that applies in all circumstances is to always negotiate with respect and courtesy, even if you are making forceful or uncomfortable points. This will greatly increase your chances of successfully negotiating. Leave your ego at the door of any negotiation.

135. Think twice before you negotiate in writing with any degree of rudeness or forcefulness. Someone may one day review what you have written. What seemed robust at the time might later seem rude and silly.

136. As part of preparing this paper I informally surveyed a number of friends and former colleagues with experience working on the 'dark side'.

137. I can do no better than to anonymously recount some of their comments:

- *“Rule #1: Don't be a F*kwit.
Rule #2: Don't be a F*kwit”*
- *“..But in answer to your question, one thing that regularly strikes me is this: often it can be a 50/50 call whether the prosecutor makes the concession sought by the defence. It sounds incredibly obvious, but I am SO much less likely to make that concession if defence have displayed a lack of courtesy & respect. Basic manners & good people skills go such a long way to making a good lawyer. (In particular, the priggish young lefty crusader types tend to forget their manners. They assume that all prosecutors must be fascist cheats, when in reality only a minority fit that description)”*
- *“It is in this way that I would say reputation is everything. Lawyers who I had a view of as being reasonable, honest, diligent, etc, were most likely to get their way with me because they had the benefit of that reputation. I would more readily give audience, more quickly or willingly be persuaded, etc. As soon as you think you are talking to a doof you shut down. If you have a repall with the other side, then you know that you want to keep that relationship, as do they, and the compromise is likely the most reasonable and proportionate one to make. To get that reputation you should have your own standards and own currency. Don't ask, urge, argue, etc for something that is extreme”*
- *“..Rule 1: The Prosecutor is not evil however a few do worship Satan;
Rule 2: Assume that the Prosecutor has read the brief and are alive to likely defences, you will however sometimes be pleasantly surprised.
Rule 3: Feign respect for Prosecutors and most will feign it in return. Some are Satan worshippers.
Rule 4: Prosecutors do not have clients however they are responsible to many people. Their decisions therefore have to be justifiable and able to withstand scrutiny. It is therefore usually pointless to make requests during negotiations that amount to little more than "please";
Rule 5: Prosecutors are creatures of "Facts", facts that can/cannot be proved etc. Always therefore approach a Prosecutor with a clear view of what facts your client will agree with and of course consistent with this thought, what they do NOT agree to.
Rule 6: A Prosecutor must build a case that is structurally sound (beyond reasonable doubt). It follows that they may be very anxious about the ability of their structure to withstand attacks.*

Rule 7: Always remember prosecution witnesses are very often prior or future defence clients. They therefore often come with the same baggage and issues. See Rule 6.

Rule 8: There is no dark or light side of justice only silly people who like to pigeon hole people and of course the other kind.

Rule 9: You will usually get a better result for your client by making the Prosecutor laugh, to be contrasted with kicking them in the groin. Your client also knows this. Note however some Prosecutors are Satan worshippers.

Rule 10: Most Prosecutors are human and thus are prone to failings of ego, sloth, hubris, petulance, sloth, simple ignorant prejudice and sloth. Some worship Satan, slothfully.

Rule 11: Do NOT make the mistake of believing your own hype.

Rule 12: Few complainants are liars, few Police are crooked and few Prosecutors worship Satan. Note however they all are somewhat human and thus can be mistaken about their recollections.

Rule 13: Choose your battles carefully. Fight them only once you are prepared and well armed.

Rule 14: If you accept Rule 9, then only ever make concessions or undertakings to Prosecutors that you have clear instructions to make. This avoids the need "on instructions" to proceed contrary to previous statements. Thus you avoid the Prosecutor believing, at best, you are incompetent and at worst, dishonest.

Rule 15: You are 1) a professional and 2) your client's mouthpiece. Prosecutors think that that order is VERY important!!!

Rule 16: In a courtroom the egos of the judicial officer and the Prosecutor usually occupy all available space. Beware adding your own to that space.

Rule 17: Prosecutors sometimes forget that they are the pointy end of the state acting against an individual. Gentle tactful reminding of this fact can reap regards. Some however worship Satan".

138. As a former member of the dark side myself I can only agree with the common underlying sentiment. That is, treat your opponent with respect and courtesy and you are much more likely to get what you want.
139. On the procedural side, make a careful record of all your negotiations. They can come unstuck badly and your reputation may be on the line when that occurs. In some circumstances you will only negotiate in writing or in e-mail. In others you will do so orally but will require a witness. Many prosecutors I am happy to have lengthy oral discussions with about possible resolutions and facts. This will generally depend on who your opponent is and the degree to which you know they will honour their word and not verbal you. In any event careful file notes should be kept.

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