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"Sandbagging" & Guilty Plea Offers

By Joel Cohen

Criminal defense lawyers have been accused of a lot of "stuff." Suborning perjury, playing fast and loose with the truth in court, misleading prosecutors, intimidating prosecution witnesses, etc. There are some rotten apples at the Bar.

But now we're collectively accused of something more astonishing: "intentionally *not* communicating a plea offer to a defendant in order to "bank" a better outcome for the defendant if the trial turns out poorly."[1] That's right, the national "fraternity" of criminal defense lawyers is being accused of sandbagging. The purpose? To give clients a second bite of the apple by enabling them to seek *vacatur* of their convictions when they proceed to trial, get convicted and are sentenced more harshly than an initially proposed, but undisclosed plea offer.[2]

Just imagine – we are being accused *as a group* of being disposed to unethically withholding critical information from clients across the board, at the risk of potential disbarment (especially if we admit the truth about it),[3] in order to provide "zealous" counseling to our clients. Frankly, as the National Council of Criminal Defense Lawyers and the American Civil Liberties Union declare in a recent amicus brief in the U.S. Supreme Court, the mere suggestion is "preposterous" and "insulting"![4]

The *Frye* Case

How did this all come about? On October 31, the Supreme Court heard argument on a Missouri prosecutor's certiorari petition in *Frye v. State*[5]– one of two Missouri cases before the Supreme Court, from the Missouri Court of Appeals (along with a related case, *Cooper v. Lafler,*[6] from the Sixth Circuit), claiming ineffectiveness by counsel in the guilty plea process. *Frye* raised the issue of whether a defendant who validly pleads guilty can successfully assert a claim of ineffective assistance of counsel by alleging that his attorney's failure to communicate an earlier plea offer resulted in a more onerous sentence.

Without question, a lawyer is obliged to report a plea offer to his client – just as a civil litigator is obliged to communicate a settlement offer from his adversary to his client – and the failure to do either would constitute an ethical lapse. Specifically, Rule

1.4(a)(1)(iii) of the New York Rules of Professional Conduct provides that "[a] lawyer shall promptly inform the client of material developments in the matter including settlement or plea offers." The Comments to the Rule are even clearer: "[a] lawyer who receives from opposing counsel . . . 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 reject the offer."[7]

But suppose, as in *Frye,* the lawyer just forgets to communicate the plea offer to his client. Is there a legal remedy available to the client to vacate the harsher sentence for such an ethical lapse?[8] Possibly, if the Supreme Court were to hold that a "constitutional," not merely ethical, violation occurred.

The Facts

What happened in *Frye*? On November 15, 2007 a Missouri prosecutor sent Frye's trial lawyer a written plea offer which was stamped as "received" by trial counsel's office four days later.[9] Trial counsel's handwritten notes on the plea indicated that counsel clearly read and considered the offer.[10] The plea offer proposed the following: 1) the prosecutor would defer the pending felony charge against Frye of driving while his license had been revoked (he having three prior misdemeanor convictions for the same offense) and Frye would spend 10 days of "shock" in the country jail; or 2) Frye would serve 90 days on an amended misdemeanor in the county jail. The prosecutor's letter left the offer open until December 28, 2007.[11]

For some reason (likely the press of business or too many clients) even though his note-to-file read "probably should . . . talk to him"[12] (presumably meaning that Frye should accept the deal), Frye's attorney never conveyed the seemingly generous plea offer to Frye. On March 3, 2008, oblivious to the expired November 15 offer, Frye entered an "open" guilty plea to the Class D felony of "driving while revoked."[13] At sentencing, the State again recommended a deferred felony charge plus 10 days of shock time.[14] The sentencing court rejected the State's recommendation, and imposed a *three year sentence* in the Missouri Department of Correction. Yes, it seems plausible, even had Frye been informed of and accepted the earlier deal, the sentencing judge could have rejected the prior lenient offer and nonetheless imposed a three year term. Still, Frye was never given the option to accept that deal through no fault of his own.

Was this the type of "ineffectiveness of counsel" that would entitle Frye to a remedy of "specific performance," or something short of it? That remains to be seen, as the Supreme Court will have to address whether plea negotiations actually accord Sixth Amendment protection particularly when the defendant later pleads guilty, given that there appears to be no constitutional right to a plea bargain.[15] Indeed, the issue is very complicated and fraught with difficulty for the Court given the fact that approximately 97% of federal and 94% of state convictions result from guilty pleas[16] in which defendants might conceivably argue that their lawyers didn't *ably* negotiate guilty pleas deals or adequately inform them of offers made to them.[17]

Sandbagging

The issue addressed here, however, is something different – namely, an argument advanced by Missouri in the Supreme Court in seeking to reverse the Missouri Court of Appeals' decision to vacate Frye's felony conviction on grounds of attorney ineffectiveness.[18]

The shocking argument, which the Missouri Attorney General intelligently left in his briefcase when he approached the rostrum for his Supreme

Court argument – indeed, even Justice Scalia would likely have smacked him down simply for making it – was that, if the Court were to uphold the Missouri Court of Appeals, attorneys across the country would engage in *deliberate* ineffective assistance by not communicating plea offers.[19]

Even more interesting was Missouri's argument in its Reply Brief advancing its argument that "'any offer can be pocketed by defense counsel and held in reserve' to act as a cap on the defendant's criminal liability."[20] The State further argued that it was actually "*not* suggesting that defense attorneys are a shady class of attorneys who will simply ignore or willfully violate their ethical duties to game the system."[21] "To the contrary," defense attorneys would be trying to minimize the loss of liberty for their clients – and by withholding vital information from the clients, they would actually be "zealously" representing those clients: "If counsel's silence about an offer will transform the [generous] offer into an irrevocable offer, the two ethical obligations begin to conflict. . . . In short, defense attorneys will in some cases be confronted with the real possibility that withholding a plea offer might be the best means of obtaining the best possible result."[22]

Is this a joke? The State believes that the Supreme Court should reinstate Frye's guilty plea because, if not, the Court would open the floodgates for defense attorneys to bamboozle the courts by withholding prosecutor plea offers in their back pockets, to use someday – to publicly proclaim: "I'm incompetent and provably so. Accordingly, give my client what he should have been given, had I not screwed him by keeping it to myself." Such an argument is so absurd that *the State* should arguably be subject to disciplinary action just for raising it.[23] As the Defendants' *amici* point out, state and federal courts have been entertaining these types of ineffective assistance claims for decades and continuing to acknowledge these claims is unlikely to have a significant impact on post-conviction litigation in the courts.[24]

For example, in *People v. Fernandez,* the New York Court of Appeals was presented with an ineffective assistance of counsel case where the defendant claimed he was denied his Sixth Amendment rights when his counsel failed to inform him of a plea offer. There, the Court explained that to prevail on a claim of ineffective assistance of counsel, the defendant had the burden to prove "that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer." Parenthetically, the Court went on to deny the claim, stating that "[d]efendant's self-serving statement that he would have accepted the plea despite his claimed innocence, without more, is insufficient to warrant a hearing in light of the similar plea offer he rejected days before and trial counsel's affirmation that at the time of the alleged offer he believed the charges would likely be dismissed because the People could not locate a necessary witness."[25]

Ethical and Legal Consequences

Respondent's amicus brief pokes holes in the State's argument that "defense lawyers will intentionally neglect to inform their clients of plea offers to create 'a sort of insurance policy.'" Importantly, respondent's *amici* in *Frye* and *Cooper* point out that "pocketing a plea offer" could result in disbarment, malpractice lawsuits and loss of business.[26] Disbarment? Yes, indeed – for if a defense attorney sits on an offer made to his client he would be more than gaming the system. He would be deliberately committing a fraud on the court, not to mention on his client, by willfully keeping the client in the dark to later accord him a remedy – a post-conviction sure-shot. This lawyer would not simply be "ineffective," but deliberately and affirmatively so.

For instance, *In re De Rycke*, was a disciplinary

proceeding in Minnesota, where the Court held that disbarment was an appropriate remedy for an attorney who, among other ethical violations, failed to inform clients of plea offers.[27] There, the Court felt that disbarment was warranted because, along with his other violations, the attorney's neglect "potentially subjected his clients to jail time that could have been avoided."[28] Similarly, in *Lawyer Disciplinary Bd. v. Turgeon*, the Disciplinary Board imposed a two-year suspension on an attorney who failed to inform his client of a plea offer.[29] Thus, because these ethical violations would result in serious disciplinary action, courts have refused to presume that lawyers would deliberately (or as Petitioners in *Frye* argued "strategically") engage in ineffective counseling.

Conclusion

However the Supreme Court ultimately decides *Frye* (and *Cooper*) – meaning whether Sixth Amendment rights attach to plea negotiations – and whether or not the Supreme Court buys the silly "sandbag" argument advanced by Missouri that lawyers would be willing to wholesale withhold vital plea offer information from their clients, lawyers need to redouble their efforts to ensure that their clients are told almost contemporaneously of each plea offer proposed by the prosecutor, however ridiculous it may seem.

And while it is true that a client may, in advance, give his lawyer authority to unilaterally reject any plea offer more onerous than X, best practices surely suggest that each offer be communicated back to the client. After all, when things go bad, clients sometimes tend to change their recollections about the precise breadth of authority given to the lawyer. We don't want to be caught in a swearing contest pitting us against the client which can raise ethics and malpractice issues, not to mention damage to our reputations.

Joel Cohen, a former federal and state prosecutor, practices white-collar criminal defense law at Stroock & Stroock & Lavan LLP and teaches Professional Responsibility as an Adjunct Professor at Fordham Law School. Jennifer Pass Zaluski, an associate at Stroock, participated in the preparation of this article.

For More Information

Joel Cohen
212.806.5644
jcohen@stroock.com

1. Brief of Respondent at 48, *State v. Frye*, No. 10-444 (2011) (emphasis in original), 2011 WL 2837937 at 48 (explaining the State's suggestion that granting relief to the Respondent would result in unethical behavior by defense attorneys). In its brief, Petitioner argued that "a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." Brief of Petitioner at 36, *State v. Frye*, No 10-444 (2011), 2011 WL 1593613 at 36.
2. Brief of Petitioner, *supra* note 1, at 36.
3. *See* New York Rules of Professional Conduct, Rule 1.4(a)(1)(iii).
4. Brief for the National Association of Criminal Defense Lawyer et al. as Amici Curiae Supporting Respondents at 3, *Lafler v. Cooper, State v. Frye*, Nos. 10-209, 10-444 (2011) (noting that "[d]efense attorneys, just like prosecutors, are members of the bar and officers of the court, and it is both preposterous and insulting to suggest that they would deliberately engage in ineffective assistance.").
5. *See Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010).
6. *See Cooper v. Lafler*, 376 Fed.Appx. 563 (6th Cir. 2010).
7. *See* New York Rules of Professional Conduct, Rule 1.4, Comment 2. *See also*, ABA's Criminal Justice Standards 4-6.2(b) ("[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.").
8. In *Nix v. Whiteside*, the Court explained that under *Strickland*, "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.

When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply standards of professional conduct applicable to those it admits to practice in its courts." *Nix v. Whiteside*, 475 U.S. 157, 165. (1986).

9. *Frye v. State*, 311 S.W.3d 350, 351-2 (Mo. Ct. App. 2010).

10. *Id.* at 352.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *But see Mickens v. United States*, 257 Fed. Appx. 461 at *2 (2d Cir. 2007) (noting that the Second Circuit has found that "a defendant suffers a Sixth Amendment injury where his attorney fails to convey a plea offer. Defense counsel have a constitutional duty to give their clients professional advice on the crucial decision of whether to accept a plea offer from the government.") (quoting *Pham v. U.S.*, 317 F.3d 179, 182 (2d Cir. 2003). In *Mickens*, the Court ultimately dismissed the ineffective assistance claim on the grounds that the defendant had not proved that he was prejudiced by the attorney's behavior. *Mickens*, 257 Fed. Appx. at *2.

16. *See* Brief for the National Association of Criminal Defense Lawyer et al. as Amici Curiae Supporting Respondents, *supra* note 4, at 4.

17. However, as the Respondent's *Amici* point out, the Court confronted and rejected the argument that granting such a right would open the "floodgates" to additional post conviction litigation in *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) and *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010). In *Padilla*, the Court explained, "[s]urmounting Strickland's high bar is never an easy task," and "[t]here is no reason to doubt that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *See* Brief for the National Association of Criminal Defense Lawyer et al. as Amici Curiae Supporting Respondents, *supra* note 4, at 21.

18. *Frye v. State*, 311 S.W. 3d 350.

19. Brief of Petitioner, *supra* note 1, at 36.

20. Reply Brief of Petitioner at 16, State v. Frye, No. 10-444 (2011), 2011 WL 3663396 at 16.

21. *Id.* at 17 (emphasis added).

22. *Id.* at 17.

23. *See* New York Rules of Professional Conduct, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.").

24. Brief for the National Association of Criminal Defense Lawyer et al. as Amici Curiae Supporting Respondents, *supra* note 4, at 21 (citing *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super Ct. 1978); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982)).

25. *People v. Fernandez*, 5 N.Y.3d 813, 308 N.Y.S.2d 22 (2005); *See also People v. Basagoitia*, 55 A.D.3d 619, 865 N.Y.S2d 313 (2d Dep't 2008) (denying ineffective assistance claim where defendant failed to establish that counsel did not disclose plea offer to him).

26. Brief for the National Association of Criminal Defense Lawyer et al. as Amici Curiae Supporting Respondents, *supra* note 4, at 19-20 (citing *United States v. Day*, 969 F.2d 39, 46, n.9 (3d Cir. 1992); *In re De Rycke,* 707 N.W.3d 370 (Minn. 2006); *Lawyer Disciplinary Bd. V. Turgeon*, 557 S.E. 235 (W. Va. 2000)).

27. *In re De Rycke, supra* note 23.

28. *Id.* at 374.

29. *Turgeon, supra* note 23..

New York
180 Maiden Lane
New York, NY 10038-4982
Tel: 212.806.5400
Fax: 212.806.6006

Los Angeles
2029 Century Park East
Los Angeles, CA 90067-3086
Tel: 310.556.5800
Fax: 310.556.5959

Miami
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3100
Miami, FL 33131-5323
Tel: 305.358.9900
Fax: 305.789.9302

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