July 6, 2020

Roster Attorneys
Macomb County Bar Association

RE: Negotiating Pleas and
Request For Deviation From
Macomb County Prosecutor’s Office

REF: Summary of Procedure from Bar Meeting of 7-2-2020

Dear Roster Attorneys:

Over 30 of you attended the MCBA Meeting on 7-2-2020. This meeting set out the current procedures at the Macomb County Prosecutor’s Office concerning plea negotiation and deviation requests. This letter summarizes important points from that meeting.

Macomb County APAs have expanded discretion to negotiate plea offers in appropriate cases. It is suggested that you first discuss pleas with the APA assigned in your case. When your case is in District Court, a Deviation request in OUI/DUI/OUID cases can be made to the District Court Chief, Paul Bukowski, or to Bill Harding, or to Bill Cataldo. Requests for deviations in all other types of cases should be made to Bill Harding and/or Bill Cataldo.

In other cases, District Court plea discussions begin with the assigned APA. It can be elevated to the District Court Chief. Written deviation requests are made to Bill Cataldo or Bill Harding:

Plea / Deviation Requests

To get a timely response, (generally a matter of days, not weeks), written deviation requests should all be made to the Prosecutor’s office by emailing requests to: pamela.bednard@macombgov.org.
Requesting a deviation is made easier if you follow these steps. Keep in mind that due to COVID-19 restrictions, the Prosecutor reviewing your request may not have a physical file in their possession to review your request. It is suggested that a deviation request provide certain basic information to allow for favorable review:

- Basic information about the case:
  a) Charges
  b) Court where case pending
  c) Case number
  d) Judge
- Next Scheduled Court date(s) and type or hearing (e.g. PCC/Exam/Pt, etc)
- Describe the criminal history of the client
  a) Include both adult and juvenile history
  b) Include all pending matters
- Describe mitigating circumstances
  a) Mention the “equities” in the case and why a deviation is “fair” and makes sense
  b) Highlight aspects of the case (e.g. limited involvement of client, lack of interest in prosecution by victim, ability to pay restitution, non-recurring contact between client and victim, etc)
- Describe programming client participates in
  a) Provide an assessment
     (e.g. in OWI/OUID = Substance abuse assessment; in CSC sexual deviancy assessment, etc.) Your goal is to demonstrate lack of recidivism.
  b) Provide recommended course of treatment
     (e.g. attend in-pt, attend out-pt, participate in counseling, attend AA/NA, etc)
  c) Provide that client is following the recommended course of treatment
     (e.g. AA attendance, counseling records, etc)
- Ask for what you want
  The approach I support is “Boldly asserted and plausibly maintained.” You should ask for an appropriate deviation, based on the facts, documentation, and equities in the case. If you believe that your bold request will be denied, you can propose an alternative if your first proposal is not palatable. You should propose things that your client will accept. (A wishful proposal that your client will never agree with may be counter-productive)

Keep in mind that any deviation request will involve the prosecutor: (1) talking to the victim; and (2) discussing the case with the OIC. Consideration will also be made to factors in the case, including: payment of restitution; no further contact with the victim; family support.

You may also consider using Community Corrections to assess your client. They can make recommendations about bond and sentencing, and assist with things like setting up in-patient treatment.
Provide a copy of your deviation request to the Public Defender’s Office. This will help develop a list of professionals and places where a person may be referred for different types of assessments. Simply “cc” your deviation request to publicdefender@macombgov.org. The copy you provide will help create a resource list for attorneys who need different types of assessments for their clients.

Bench trials can be considered in many cases. Even in capital cases. You are reminded that the Prosecutors Office is seeking to move cases forward, and if your client is frustrated by a lengthy jail stay, or simply wants to get to trial quicker, you can explain the possibility of a bench trial in appropriate cases. You should discuss this possibility and agreement with your client ahead of any discussion with the Prosecutor.

Prosecutors also have more discretion for using and supporting requests for MCL 771.1, HYTA, and MCL 769.4a in appropriate cases. The Prosecutor in your case may also weigh in on requests for Sobriety Court, Drug Court, or Veteran’s Court. In the past, the Prosecutor may have objected to use of these programs or referrals to specialty courts. Alternatively, they may have simply left this to the Court’s discretion. The posture of the Prosecutor’s Office is reportedly changed, and you should discuss whether they will support requests for these programs. A unified front before the Court may persuade the Judge to treat your client appropriately.

As always, keep up the vigorous defense of your clients. I trust that this information will help

And … as always – stay safe.

Sincerely,

Thomas J. Tomko

Public Defender Administrator
Macomb County Office of Public Defender

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1 At the meeting of 7-2-20, one MCBA member mentioned that he successfully used “Center for Assessment” in Huntington Woods for a CSC assessment. By copying the Public Defender’s Office with a copy of a deviation request, this resource can be added to an “Evaluator Resource List” to provide to other MCBA members seeking CSC assessments for their clients in support of their deviation request.