

## **Convincing a Reluctant Defendant Negotiation Aaron Jolly**

Note: Details of this case, including the names of individuals, have been omitted or changed to protect the confidentiality of the data.

### The Subject

I met with the subject of the interview at a restaurant. The subject of the interview, we'll call her Alice, is an old acquaintance of mine who I knew to be regularly involved in the process of negotiation. Alice is a local attorney who primarily handles family law and minor criminal law cases in the Midwest area. Alice is a young lawyer with approximately five years of post-degree experience, and is currently an associate attorney at a well-rounded small local firm.

Alice's role in this negotiation was as the primary negotiator. She was retained by her client in a criminal matter, and she engaged in multiple rounds of negotiation with a local prosecuting attorney's office in order to arrive at the bargain discussed in greater detail below. At no time was her client directly involved in the negotiations. Alice reported that she engages in this sort of negotiation on at least a daily basis and described it as a large chunk of her overall practice.

### Subject Matter

Alice reported that her client (we will call him "Jake") is a middle-aged male who is currently employed in the over-the-road trucking industry as a driver. Jake has a drug problem and becomes seriously violent while using drugs on a repeated basis. According to Alice, Jake recently got impaired and attempted to sodomize his wife against her will. During the episode, Jake got angry, slapped his wife, got in his pickup truck, and drove away from their house in an extremely impaired state. A short distance from Jake's residence, he crashed his truck into a parked car where he initially passed out. When he awoke, he saw several police officers approaching his vehicle. In a panic, Jake sped away from the scene, leading police officers on a brief chase before losing them for a short time. While attempting to hide from the police, he was spotted by one of the officers and taken into custody where he was given a series of drug tests and booked into the county jail. The local prosecuting attorney initially charged Jake with: 1) misdemeanor domestic assault in the third degree, 2) misdemeanor resisting arrest, 3) felony attempted forcible sodomy, 4) felony leaving the scene of an accident, 5) felony driving while impaired – chronic offender.

The subject matter of the negotiation, therefore, was whether and to what extent Jake would plead guilty to some or all of the charges against him in return for some measure of leniency on the part of the prosecuting attorney or the outright dismissal of certain charges against him. Thus, he was the only party in this negotiation with a personal stake in the direct outcome of the negotiation, apart from the reputational and otherwise ancillary stakes associated with both attorneys' representational goals.

## Parties and Context

This negotiation was a bit odd in that Alice found herself negotiating with both the prosecuting attorney and her own client on several occasions. As noted above, the parties to this negotiation were Alice's client, Alice, and the local prosecuting attorney.

Alice and the prosecuting attorney had an existing relationship at the start of the negotiation in the sense that she had engaged in plea bargaining and other legal representational activities with and against the local prosecutor on numerous occasions prior to the representation of the client that is the subject of this report. Additionally, the local prosecutor and Alice's client also had a preexisting relationship, in that, the local prosecutor had prosecuted charges against Jake prior to the subject of this negotiation on numerous occasions. Alice noted that the local prosecutor had been mostly unsuccessful in prosecuting her client in the past.

Because Alice and the local prosecuting attorney will undoubtedly deal with one another on many occasions in the future, she felt that she would have a continuing relationship after the instant negotiation concluded. Oddly, Alice also noted that because of Jake's "track record," he and the local prosecutor would also likely have a continuing relationship in the sense that it was very likely, in Alice's opinion, that the local prosecutor would have occasion to prosecute Jake again in the future, perhaps on multiple occasions. Alice indicated, that this sort of defendant/prosecutor continuing relationship actually influenced how the parties behaved, in that, she tended to see more respect and cooperation between the local prosecutor and her client because both knew that they would likely be in the same positions again in the future and were counting on that good will as a positive factor if/when that occasion came to pass.

From this history between the parties, and the prospect of future dealings, the ultimate goals of the parties are gleaned. Alice indicated that she got the sense from the local prosecutor that because the instant case against Jake was relatively weak (for reasons discussed below), his primary goal was to create a conviction record that would benefit his case against her client in the future when he, by all accounts undoubtedly, was arrested again. According to Alice, Jake put her in an odd position by insisting that his number one goal was to be able to continue using drugs. Thus, while Alice's goal was to get him the best possible deal with the least amount of incarceration time and fewest convictions possible, she found herself hamstrung by her client's insistence that the deal made between he and the prosecutor allow him to continue using drugs.

At the time my interview of Alice was conducted, she had engaged in what she believed to be the last round of negotiation with the local prosecutor, and had tendered what she believed to be the local prosecutor's final offer to Jake for his consideration and decisions. The case was set for trial the following week, and Alice indicated that if Jake did not accept the deal, or make a decision on it altogether, that the case would go to trial the following week with certainty.

## The Negotiation Process

Alice reported that this particular negotiation was conducted over several rounds and with several offers and counter-offers being made. Because of the multi-faceted nature of this negotiation, relevant topics of interest are discussed below categorically.

### *Initiation*

Alice reported that the local prosecutor emailed her an initial offer to plea bargain. According to Alice, it is the custom of the prosecuting attorney's office to send an initial offer prior to trial to almost all defendants in criminal cases. In this case, the local prosecutor's initial offer was to drop the misdemeanor charges of domestic assault and resisting arrest, while Alice's client would plead guilty to the felony charges of attempted forcible sodomy, leaving the scene of a crime, and driving while impaired – chronic offender. Alice indicated that these charges would have resulted in a likely prison sentence of approximately seven actual years served in prison, with a corresponding term of parole and supervised release for approximately two to four years following incarceration.

### *Preparation*

Alice reported that she took a number of steps in preparation for the negotiations with the local prosecutor. Because Alice knew that any deal, or sentence imposed following a trial or other adjudication would likely require Jake to attend some form of prolonged drug treatment program, she convinced him to do so on his own volition to demonstrate his willingness to take steps to correct his criminal behavior. Additionally, Alice met with Jake and attempted to glean from him what sort of deal he would be willing to accept. At this initial meeting, Jake told her that he would not likely make any deal, wanted to take the matter to trial, but would entertain any offers the prosecuting attorney had to make.

Alice said she thoroughly went over the case against Jake with him, and explained to him that she believed several of the charges were not supported by sufficient evidence, but that if he went to trial, she believed he would be convicted on at least one, possibly two, of the felony charges against him which would likely result in a significant prison sentence against him. Alice noted that this conversation did not seem to move Jake in any way.

### *Sequence of Events*

When Alice received the local prosecutor's initial offer she immediately relayed it to Jake. As discussed above, he was not amenable to accepting a deal at all, and, in this instance, he was unimpressed with the offer tendered by the prosecuting attorney. Alice told me she wanted to "low-ball" the prosecutor with her counter-offer because she genuinely believed he had some doubt as to the strength of his case, and she thought that by offering to plea to something very minor she might be able to convey her client's willingness to go to trial if a much better offer were not made. Alice said she counter-offered with a deal where the prosecutor would dismiss all charges except for the misdemeanor domestic assault, which was the case she believed was most supported by the evidence (a 911 call had some evidence on it), and which was most likely to garner a conviction if the case were to go to trial.

To Alice's surprise, the local prosecutor rejected her counter-offer with a rather generous counter-counter-offer. The local prosecutor emailed Alice with an offer that allowed Alice's client to plead guilty to only the DWI charge, dropped all other charges, and required Jake to go through DWI / Drug court (meaning a much more intensive court supervision with several treatment and other goal requirements). As part of this offer, the local prosecutor would recommend only a minimal amount of shock

incarceration in the county jail, and her client would likely not have to serve anything over ten days of total incarceration provided he did not violate the terms of the drug court sentencing and probation. Alice said she thought she had made an excellent deal for her client and was elated to call him and report the good news.

Much to Alice's chagrin, however, Jake told her that he would not make that deal because it would flatly require him to abstain from using drugs—something which he was altogether unwilling to do. Alice was disappointed—and concerned for her client—and put on her counselor's cap for brief period. Alice went over Jake's series of criminal convictions, the many problems that drugs had caused in his personal life, the much-improved health and personal wellbeing he had obtained in the brief treatment program that she had sent him to voluntarily, and she told him that she thought he really ought to give the deal a second thought and try to improve his life in general. Alice said she put a thinking period on the offer for one week at which time she and Jake agreed they would talk again about the offer.

After the one week of thinking time had expired, Alice called him and inquired as to whether he would accept the deal. He said he just didn't think he could do it, and that if he went to DWI court and failed, he would face much more harsh punishment than if he just went to trial and took his chances. Although disappointed, Alice recognized that Jake was making a realistic assessment of his capacity to be successful, and agreed with him that she would seek another offer.

### *Final Agreement*

Not wishing to reveal the true reason why her client rejected the deal, Alice informed the prosecutor that she and her client did not think he would be able to meet the time requirements associated with drug court, and that some other arrangement would have to be made in order to avoid taking the case to trial. Alice was utterly shocked to receive an email from the prosecutor later that same day that offered to drop all felony charges, if her client would agree to plead to the misdemeanor domestic assault, and a reduced misdemeanor DWI charge with a short thirty-day shock incarceration and supervised probation. Alice called the local prosecutor and was able to glean from her conversation with him that his main goal was to get some convictions on her client's record that would be helpful in future prosecutions should her client re-offend.

At the time of our interview Alice had conveyed the prosecutor's final offer to her client who was thinking it over. Alice indicated that she got the impression from her client that he would accept the offer.

### Possible Alternative Explanations of the Events

Perhaps Jake and the prosecutor would view the facts differently than Alice described. Perhaps Jake would have denied or minimized some of his actions, though he would have little credibility given his chronic drug use. Alice's account seems very plausible.

### Analysis and Insights About Dispute Resolution Derived From the Case

Alice thought that the most critical factor in the negotiation was the lack of evidence to guaranty a conviction on any one of the counts for which Jake was charged. Alice indicated that had the evidence been a little stronger against him, she felt that the prosecutor may have decided to take the case to trial to get what he believed to be a dangerous criminal locked up and out of the public sphere. The second factor that Alice thought was critical was the motivation of her client to continue using drugs. Alice felt that this was one of the strangest negotiations she had ever participated in because one of the interests of her client was the continued detrimental behavior that caused his predicament in the first place. Alice said she struggled heavily with how to deal with that particular quirk of this case.

Ultimately, however, Alice was very satisfied with the outcome of the negotiations. Alice felt as though her client was both getting a “good deal,” so to speak, and was also going to be required to get some of the help with substance abuse that she believed he desperately needs.

### Impressions and Insights

The most obvious lesson I learned from this interview was that negotiating in real life is very different from negotiating in the classroom and the theoretical discussions about the process of negotiation that we have learned thus far. That being said, there are clear parallels that can be drawn from the material we have studied and the real life, rubber meeting road, negotiation discussed in this report.

First, the interesting wrinkle in this negotiation was the actual interests of the parties involved. At first Alice clearly thought her client was just a self-centered drug-user who wanted to keep using drugs without any regard for the consequences. Once Alice engaged in the counseling process; however, she was able to learn that Jake's real interest was in not failing any program that would require him to abstain from using drugs because of his genuinely held belief that he would be unsuccessful. This is a wonderful illustration of how understanding a party's interest as best as possible can dynamically shift the entire negotiating process. At that point, Alice could have just written off Jake as a drug-user and let happen what will happen. Or, more likely, she could have taken his rejection and not been able to make a reasoned counter-offer that would have generated a much less generous counter-offer from the prosecutor because she would not have been able to say that he would not be able to meet the demands of the DWI court. In either case, understanding his interest in using drugs was key to the successful negotiation of this conflict.

Second, as noted above, Alice “low-balled” the local prosecutor with her first counter-offer. This was a form of anchoring which caused a couple of different things to happen. First, she was able to convey her disbelief in the strength of the prosecutor's case without boldly saying so. Second, she was able to bracket the negotiation between the local prosecutor's initial offer and her counter-offer which provided a wide bargaining zone in which to conduct further negotiations. While anchoring sometimes has its drawbacks, in this instance it seems to have paid off well.

Finally, one of the chief differences that I noted between the material we have studied and the exercises we have conducted, and the negotiation that was the subject of this interview is the manner in which the negotiation was conducted. All of our negotiations in class have been in person, face-to-face negotiations where the parties

had the opportunity to meet one another, engage in small talk, develop rapport etc. Here, however, all of the negotiations were conducted either via email or over the telephone. It would be interesting for future classes to participate in at least one exercise where the negotiation took place over email or telephones like I'm certain many, if not most, real-life negotiations do. Lawyers are busy people, and most don't have much time to get together with opposing counsel and go round and round over what the terms of a deal are going to be, what the real interests of the parties are, etc. But, learning to do as much of that as possible over correspondence would be a wonderful skill to add to the negotiators skillset for real-world practice.

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