

February 5, 2007

Dear District Court, Felony and Major Felony Panelists,

It is now over a year since the new District Attorney took office in Nassau County and the defense bar has seen a number of changes in our local criminal justice system. One of the most significant is that there are minimal or no offers on many cases. This includes both misdemeanors and felonies. With that and other changes in the District Attorney's office in mind, the following suggestions are made with a view toward leveling the playing field.

WAIVER OF RIGHTS

In the past, when the defense was asked to waive speedy trial or C.P.L. 180.80 relief, it was done with a view toward having a conference that might produce an acceptable plea bargaining offer. There appears to be little or no logic present where such rights are waived by the defense and the only resulting offer from the District Attorney's office is a plea to the charge. I therefore suggest the following:

- In any felony case where you feel or know that the District Attorney's office will not plea bargain, do not sign the yellow and white forms. Instead, push for 180.80 relief and prepare for trial.
- In any felony case where you sign the yellow and whites but later learn that no reasonable offer will be forthcoming, demand a felony exam, place on the record the fact that you do not consent to any further adjournments, and prepare for trial.
- With any felony case that is in your judgment trial bound, there is no use for the yellow and whites. Have nothing to do with them.

- Note that at least one County Court Judge has taken the position that once the yellow and whites are signed, the defense is permanently barred from seeking 180.80 relief. This is his position despite clear language to the contrary. Accordingly, be wary of casually signing these forms.
- The philosophy behind the foregoing thoughts on waiver of speedy trial or waiver of 180.80 rights applies equally in District Court (for speedy trial and 170.70 rights).

ASSISTANT DISTRICT ATTORNEY ASSURANCES

- If the ADA advises you that there are no written or oral statements in the case, put that fact on the record, ask for the ADA's acquiescence on the record, and note the date and identity of the court reporter in case you need the minutes later.
- If the ADA advises you of any fact that would help your case, do the same thing, or, if the statement is made outside of court, note the date, place and time, and put it on the record in the ADA's presence the next time you appear in court.

PLEA BARGAIN OFFERS

- If the ADA makes an acceptable plea bargain offer but the plea can't be taken on the day of the offer, try to bind the District Attorney's office to the plea by placing it on the record in the ADA's presence or by asking the Judge to mark the Court file that the offer has been made by the prosecution and accepted by the defendant.

DISCOVERY

- There are a growing number of defense attorneys who feel that **on all cases, unless a plea is imminent**, voluntary disclosure forms (VDFs) should be rejected and demands for bills of particulars and discovery should be filed.
- In the alternative, if you accept VDFs but still feel the case may be going to trial, file a demand after receiving VDFs.

EARLY CASE ASSESSMENT BUREAU

The District Attorney's office now has an Early Case Assessment Bureau where ADAs review the preliminary paperwork prepared by the police. This may involve

additions, deletions, and/or alterations by the A.D.A. Based thereon, the following are offered for your consideration.

- Take the position that all such actions by the prosecution constitute discoverable material and not work product.
- Include demands for preliminary paperwork and all subsequent drafts in your discovery demand.
- Cross examine the police on these matters at hearings and trial.

TRIALS

- If the District Attorney's office does not make a suitable offer, you should, assuming your client acquiesces, try the case. The statutory caps of \$2400 for misdemeanors and \$4400 for felonies are routinely exceeded when a case goes to trial. If a case should be tried and if you take that case to trial, regardless of the outcome, I will be pleased to receive your voucher in excess of the statutory cap.
- Along this line, if the defendant wants a case tried, it should be tried. Please be advised that the Legal Aid Society has a committee that must approve a misdemeanor plea whenever the offer is over nine months. If you have been pleading such cases out, you should re-think your philosophy.

The foregoing suggestions are just that. I do not presume to tell you how to practice law. I am aware, however, that the District Attorney's office has changed and I therefore feel that to maintain the balance of power in this county the defense must change as well. If any of you have other suggestions, I would be pleased to hear from you.

Thank you for your attention to these matters.

Very truly yours,

Patrick L. McCloskey