

Maricopa County Attorney's Office Prosecution Policies and Procedures

PLEA AGREEMENTS	EFFECTIVE DATE 08/13/2020	PROCEDURE # 7.1
SECTION GENERAL GUIDANCE, TIMING OF OFFERS, AND SETTLEMENT NEGOTIATIONS		
DISTRIBUTION TRIAL ATTORNEYS	REVISION DATE	REVISION #

Plea agreements make it possible to manage the high volume of cases in the criminal system while also holding offenders accountable. MCAO's goal in extending plea offers is to strike the balance between efficiency and accountability. To achieve this goal, the assigned DCA must consider all relevant facts and circumstances known about the offense and the defendant when the plea is offered. Among other things, this will include both the strengths and weaknesses of the case at trial; all aggravating and mitigating information; the views of any victim; the need to protect community safety and order; and the point during the prosecution at which the defendant agrees to plead guilty. Plea agreements must be tendered in compliance with both Arizona and Federal Constitutional Law. When considering an appropriate non-trial resolution, prosecutors should also carefully evaluate a case to determine whether diversion is an appropriate option. (See Chapter 17)

The policy guidelines contained in this chapter are provided to help DCAs achieve consistency when handling cases throughout the office. Given the number of variables between individual defendants and the facts unique to each case, it is not possible to handle every charge or every circumstance identically. While this chapter will help promote consistency, each DCA is expected to critically weigh the circumstances of each case to determine an appropriate initial offer. DCAs should engage in meaningful negotiations which includes discussing the case with defense counsel to learn as much as possible about the defendant.

A. GUIDELINES FOR INTERPRETATION AND DEVIATION AUTHORITY

1. DCA Deviations.

If the guidelines in this chapter state that a plea offer is a "presumptive offer" or that it may be increased or decreased based on the consideration of certain factors, the DCA may deviate from the presumptive offer. If the DCA believes that the presumptive offer is unduly harsh considering all the fact and circumstances including all available mitigation and aggravation, the DCA is encouraged to deviate from the presumptive offer. Assigned DCAs are encouraged to discuss the case with their bureau chief, assistant bureau chief, or other senior attorneys before deciding to deviate from a presumptive offer. When deviating from the presumptive offer, the DCA must document the reasons for doing so in the case notes, including noting the specific mitigating or aggravating factors supporting that result.

2. Bureau Chief and Division Chief Deviations.

If the guidelines in this chapter state that a person "must" or "shall" plead to a certain

sentence or level of offense, the DCA is required to obtain permission to deviate from that requirement.

If a deviation is required, the bureau chief may approve the deviation with two exceptions:

- a. **Violent Firearm Offenses Committed Against Police Officers.**
The division chief must approve any offer made in cases where the defendant commits a crime with a firearm against a peace officer. Division chiefs should ensure that all available information including any recordings of the event, internal investigations, and mitigation have been reviewed and considered before deciding if an offer is appropriate.
- b. **High Profile Cases.**
In high profile cases as defined in Employee Policy and Procedure 8.3, the chief deputy must approve any deviation after the division chief has reviewed the case and determined that the deviation is appropriate. The intent is not to resolve a high profile case differently from any other, but to ensure that the executive team has an opportunity to review and discuss the case, and so they are aware of what is happening in the case to handle inquiries from the media or the public. Note that any case where a police officer is charged with committing a violent crime is a high profile case.

B. VICTIM CONSIDERATIONS

1. **Victim input.** In all cases, DCAs must make reasonable efforts to obtain victim input about a plea offer before any offer is entered, but DCAs should make every effort to consult with any victim about the plea before it is extended to the defense. (See Prosecution Policy 9.16, Notice and Rights to Confer and Be Present). All contacts or attempted contacts with the victim should be documented in the case notes and will include the victim's view of the plea offer along with any comments about restitution. Any email exchange with the victim should also be included in the file. If the DCA at the change of plea proceeding cannot confirm that reasonable efforts were made to confer with the victim, the DCA must request that acceptance of the plea be deferred until the time of sentencing to ensure compliance with victims' rights.
2. **Victim objection to offer.** After full consultation, including the likely outcomes after trial, if a victim objects to a plea offer as too lenient or too harsh, the DCA should confer with the bureau chief prior to proceeding with a change of plea to determine if the offer should be revised in light of the victim's concerns.

C. CONFIDENTIALITY OF INTERNAL CASE DISPOSITION DISCUSSIONS

Internal discussions regarding possible plea offers and plea negotiations are MCAO work product and the substance of these communications should not be discussed with persons outside the office. This prohibition includes all informal case discussions (commonly

referred to as “staffings”) as well as more formal discussions in standing committees. This does not prohibit a DCA from explaining why a particular offer is or is not appropriate based on the specific facts and circumstances of the case. (See Employee Policy 6.4, Confidentiality of Information).

D. GUILTY, NO CONTEST, AND *ALFORD* PLEAS

1. **Guilty pleas.** Guilty pleas should be used when resolving a case by plea agreement.
2. **“No contest” pleas.** “No contest” pleas should be offered only when the defendant is unable to provide a factual basis because of incapacity for reasons such as intoxication or a head injury.
3. **“Alford” pleas.** MCAO will not authorize a plea agreement based on *North Carolina v. Alford*, 40 U.S. 25 (1970). Deviations from this provision are not permitted.
4. **Factual basis.** For guilty pleas, the defendant must confirm that any facts supplied by defense counsel or the DCA are true and that the defendant committed them. The DCA must ensure that the factual basis provided to the court encompasses all elements of the offense(s) that the defendant is pleading to.

E. COURT REJECTION OF A PLEA AGREEMENT

If the judge rejects a stipulated term in a plea agreement, the assigned DCA may agree to the modification and proceed with sentencing if victims’ rights have been complied with and the modification does not violate any policy in this chapter. If the modification violates a policy in this chapter, the DCA should request a continuance and discuss the court’s request and reasons for it with the bureau chief.

F. FELONY DESIGNATION

1. **Offenses that must be designated as felonies.** Any plea agreement must include a designated felony if the case involves any of the following offenses:
 - a. Disorderly conduct involving a firearm (pursuant to A.R.S. 13-2904(A)(6));
 - b. Unlawful discharge of a firearm pursuant to A.R.S. 13-3107;
 - c. Endangerment involving a firearm (pursuant to A.R.S. 13-1201);
 - d. Residential burglary;
 - e. Aggravated robbery;
 - f. Robbery;
 - g. Aggravated Assault involving temporary but substantial injury or fracture;
 - h. Theft of Means of Transportation;
 - i. Taking the Identity of Another;
 - j. Theft or damage in excess of \$5000;
 - k. Leaving the Scene of an Accident Involving Serious Injury or Death.

2. Undesignated Felony Language

Standard language for undesignated felony pleas: The following language should be included in the stipulation paragraph of any undesignated plea agreement:

“This offense will remain undesignated at sentencing and may only be designated a misdemeanor after the defendant successfully completes the terms and conditions of probation.”

G. FINANCIAL MATTERS

1. **Restitution:** In Arizona, a victim has a constitutional right to receive prompt restitution for economic losses. When resolving a case with a plea agreement, all victims in the case, including those in dismissed counts, are entitled to full restitution. When the exact amount of restitution is known and agreed to by the victim at the time the plea is entered, the plea agreement should stipulate to that amount. Additionally, if a separate case is dismissed or not charged as consideration for the plea, the defendant’s agreement to pay full restitution to all victims in the uncharged or dismissed cases must be included in the stipulation paragraph. A prosecutor cannot agree to a specific amount of restitution or to a limit on the amount of restitution without the express consent of the victim.
2. **Investigation Costs for Racketeering:** For offenses included in the definition of racketeering in A.R.S. § 13-2301(D)(4) or a violation of A.R.S. § 13-2312, costs of investigation should be included as restitution to the State in any plea agreement. (See A.R.S. § 13-2314(D)(5)).
3. **Surcharges:** The Arizona Legislature has determined that surcharges are an appropriate mechanism for funding various criminal justice related programs. For this reason, DCAs should not agree to a waiver or reduction of surcharges in a plea agreement but may leave the final determination as to the amount of surcharge imposed to the court in appropriate cases based on specific facts and circumstances that are documented in the case notes.
4. **Restitution Liens:** MCAO does not file restitution liens on behalf of victims. Any victim interested in pursuing such a lien should be directed to the assigned advocate who can provide a form that the victim may elect to use. This provision does not prohibit the assigned DCA from signing a restitution lien prepared pursuant to A.R.S. § 13-806.

H. RESOLVING OTHER CASES AND CHARGES

1. **Resolving open cases and submittals.** The assigned DCA must make efforts to locate and resolve all pending cases and submittals at one time. Failing to resolve all matters is inefficient, can lead to unfair results for a defendant, and can undermine rehabilitation efforts. Before finalizing a plea agreement, the assigned DCA should verify whether any other MCAO cases or submittals are pending against the defendant and make every effort

to resolve them all at the same time.

2. **Handling cases where the defendant has been sentenced on another matter.** Despite our best efforts, there are situations where it is not possible to resolve every potential criminal matter at one time. This is usually due to unsolved or unsubmitted cases. In the event that a DCA is assigned a case where the crime happened near in time to a case for which the defendant has already been sentenced, the DCA should consider the sentence the defendant has already served and any rehabilitative efforts the defendant has made when determining an appropriate plea offer. In many cases the appropriate resolution is an offer with a concurrent sentence or a dismissal. DCAs should consult with the bureau chief before making an offer in this situation if the offer will result in additional incarceration.
3. **Agreements to dismiss or not file charges.** A DCA must not agree to dismiss or not file charges from other jurisdictions cases without their written approval. When agreeing not to file other charges, the DCA must specify in the plea agreement which charges will not be filed and that those charges will not be filed by the Maricopa County Attorney's Office. When applicable, the assigned DCA must ensure that victims' rights have been complied with and restitution is included when agreeing not to file or to dismiss other charges or cases.

I. STIPULATED TERMS AND PROBATION TAILS

1. **"No jail" stipulations prohibited.** To give the court flexibility in determining an appropriate sentence based on all the facts known at sentencing, a plea agreement must not include a stipulation to "no jail."
2. **Probation supervision level.** When stipulating to probation, it is presumed that the stipulation will be written as "The defendant shall be placed on probation," except as noted in (I)(3) below. This allows the sentencing judge to place the defendant on the appropriate level of supervision based on the risk assessment information in the presentence report. In appropriate cases, however, DCAs may stipulate to "supervised probation" or "intensive probation" but the reasons for doing so should be documented in the file.
3. **Probation terms.** When a plea agreement includes the possibility of probation, if the offense involves an offense that has specialized probation terms, the plea agreement should stipulate to at least "supervised probation" and those terms, unless the DCA determines those terms are not necessary based on the specific facts and circumstances of the case. Examples include the following: family violence offenses should include DV terms, gang offenses should include gang terms, white collar and fraud offenses should include white collar terms, and sex offenses should include sex offender terms. If the DCA has information regarding mental health issues, mental health terms should be recommended.
4. **Probation tails.** A term of probation following a prison sentence can be a useful tool

to give a defendant access to treatment services and increased supervision to improve reintegration into the community and reduce recidivism. However, limited probation resources must be considered when deciding when a probation tail is appropriate. Except for lifetime probation cases, DCAs should not include a probation tail following a stipulated prison term of seven or more years. In addition, probation tails should only be used when the offender's individualized circumstances and needs indicate supervision will benefit the offender and the community.

J. TIMING OF PLEA OFFERS

1. Early Disposition Offer

If appropriate, early disposition offers may be extended before arraignment at the status conference or the preliminary hearing. Absent extraordinary circumstances that are clearly noted in the file, no Early Disposition Offers will be held open post-arraignment, except for cases where a defendant goes directly into Rule 11 proceedings before arraignment. In that case, the early disposition offer may be reextended, if appropriate, at the conclusion of the Rule 11 proceedings.

2. Post Arraignment Offer

Upon assignment in Superior Court, DCAs must promptly review each case to determine if a plea offer is appropriate. DCAs should extend offers and set plea deadlines early enough to minimize the need for trial preparation. Plea deadlines should be reasonable based on the facts and circumstances of the case. All plea offers must include a specific plea deadline date and any extensions of that date should be clearly noted and explained in the file. Reasonable requests for extensions, particularly those that do not require the investment of additional trial preparation resources, should be granted.

3. Subsequent Plea Offers

If the defendant rejects a plea offer or if the offer expires, the presumption is that any future offer will be harsher in order to encourage cases to settle in an efficient manner. This policy does not prohibit the assigned DCA from making a better offer if the facts and circumstances relied upon for previous offers have materially changed or it is otherwise in the interest of justice. Reasons for making an improved offer must be included in the case notes.

K. SETTLEMENT NEGOTIATIONS

DCAs are required to participate in all settlement negotiations in good faith which means making reasonable efforts to justly resolve the case including a fair consideration of all mitigation evidence available. Defense and prosecution may fairly disagree about the impact of mitigation compared to all the other facts and circumstances, but DCAs should be able to justify their offer in light of the mitigation. Good faith participation in settlement

negotiations does not require DCAs to continue to negotiate a case after a reasonable plea deadline has expired.

L. RECORD OF PLEA DEADLINES AND NEGOTIATIONS

1. If a plea offer is made, the DCA must document the offer, the defendant's acceptance or rejection of the plea offer, and any reasons cited by the defense attorney for rejecting the offer, including any relevant comments made by the defendant. Any record of plea negotiations, including email communication, must be retained in the file.
2. At a settlement conference or similar pretrial hearing, the DCA must make a complete record in open court of the prior plea negotiations, rejected plea offers (if applicable), the potential sentence the defendant faces if convicted, and any other related issues to provide a thorough appellate record of the defendant's pretrial decisions.
3. If a defense attorney claims that a previously assigned defense attorney failed to communicate the plea offer to the defendant in time to meet a plea deadline, or if the defense attorney claims to have misinformed the defendant of the plea offer, the DCA must make a record to clearly establish the defense claims. DCAs are advised to consult with MCAO's Appeals and Post-Conviction Bureau to ensure an appropriate record is made. The DCA should consult with his or her bureau chief as to whether the incident should be referred to the MCAO Ethics Committee for review.