



MIDDLESEX COUNTY PROSECUTOR'S OFFICE POLICIES AND PROCEDURES



SUBJECT: ESCALATING PLEA POLICY	DATE OF ISSUE: 10-31-2016	EFFECTIVE DATE: 1-1-2017
RELATED POLICY/PROCEDURE: NJ A.G. Directive #2016-6; State of N.J. Constitution; Court Rule 3:9-3(c); Title 2C		POLICY NUMBER: 16-04
REVISION DATES:		Page 1 of 4

I. BACKGROUND

The Bail Reform Law and the corresponding amendment to the State Constitution were adopted by the State of N.J. The N.J. Attorney General issued Directive #2016-6 as a companion document to address some of the issues associated with requirements of the Bail Reform Law. As part of the A.G. Directive, there was a mandate that each Prosecutor in the state issue an office policy to address escalating plea procedures within their respective offices. This policy is being implemented to satisfy that mandate.

II. POLICY

It is the policy of the Middlesex County Prosecutors Office (MCPO) that all personnel are required to comply with all aspects of procedures as delineated herein and any deviations outside the parameters/exceptions contained herein shall be reported to the County Prosecutor without delay. Supervisory personnel are responsible for strictly enforcing all aspects of this policy.

This escalating plea policy applies to all indictable crimes, *not* just to offenses that are charged by means of a complaint-warrant or to cases where the defendant is detained pending trial.

III. ACTION

TABLE OF CONTENTS		
A.	PLEA OFFERS - PROCEDURES	pp. 1-3
B.	STRICT ADHERENCE TO VICTIMS' RIGHTS	pp. 3-4
C.	UNAUTHORIZED JUDICIAL PLEA OFFERS	p. 4
D.	NOTICES TO DEFENSE COUNSEL OF ESCALATING PLEA POLICY	p. 4

A. **PLEA OFFERS - PROCEDURES:** As part of the case review process, the Assistant Prosecutor to whom the case is assigned is required to assess the merits of the case and determine the parameters of the plea offers that should be extended to the defendant and the appropriateness of such offers. The Assistant Prosecutor shall utilize the criteria as delineated below.



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REVISION DATES:		Page 2 of 4

1. *FORMULATING THE BASIS OF A PLEA OFFER* - Any plea offer must be documented and must be based upon:
 - a. an objective and realistic assessment of the seriousness of the criminal conduct;
 - b. the strengths and weaknesses of the State's case;
 - c. the defendant's culpability, background and role in the criminal event or scheme;
 - d. the interests of any victim;
 - e. the likely sentence that would be imposed if defendant were to be convicted after a trial;
 - f. such other relevant facts and circumstances that may exist.

2. *ESCALATED PLEA OFFER POLICY AND INTENT:*
 - a. **Initial Plea Offers:** The intent behind the initial plea offer is to encourage defendants to plead guilty before indictments and thus before any post-indictment evidentiary hearings. Any offer that occurs after the initial plea offer is considered to be part of an escalated plea offer.
 - b. **Escalated Plea Offers:** The escalated plea offer must be reasonably calculated to provide a practical incentive for the defendant to accept the initial offer and to plead guilty before the significant additional expenditure of time of investigative, prosecutorial, grand jury, or judicial resources.
 - c. The plea offer must be tendered or confirmed in writing to defense counsel and contain an initial and escalated plea offer. The plea offer must outline the specific date and/or court event on which the initial plea offer will expire and the escalated plea offer shall take effect. At the pre-indictment conference and every court appearance thereafter where the defendant is present, the Assistant Prosecutor must explain the plea offer and escalated provisions on the record in the presence of the defendant and counsel.
 - d. Initial and escalated plea offers automatically expire on the dates and/or event outlined in the plea offer letter unless the time within which to accept or reject the plea offer is extended by the Assistant Prosecutor. Once an escalated plea offer is in effect, the State's sentence recommendation shall only be lowered if a Team Leader or Section Chief determines that a material change in the circumstances warrant a sentence more lenient than the one contemplated in the escalated plea offer.



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		Page 3 of 4

- e. When a Team Leader or Section Chief approves a waiver from an escalated plea, they shall provide a written notice to the designated Deputy 1st Assistant Prosecutor regarding the waiver decision (e-mail is notice is acceptable).
3. **NEGOTIATION AND MODIFICATION OF PLEA OFFERS:**
 - a. Assistant Prosecutors may negotiate with the defense counsel before an initial plea offer is tendered, and during the period of time when a tendered plea offer remains outstanding and has not expired. The negotiations may include discussions concerning the strength of the case and likelihood of a guilty verdict, outcome of suppression and other pretrial motions, defendant's culpability and role in the criminal scheme.
 - b. Nothing in this policy shall be construed in any way to create a right or entitlement to a plea offer. An outstanding plea offer, whether an initial offer or an escalated offer, may be withdrawn or modified at any time to reflect the current facts and circumstances of the case and the offender.
 - c. Nothing contained herein shall prevent the reduction of a plea offer in exchange for the defendant's substantial cooperation, nor alteration of the standards and procedures for approving a cooperation agreement, provided, however, that in determining the value of the defendant's cooperation, emphasis shall be placed on the timing of the cooperation so as to encourage defendants to provide assistance at the earliest opportunity, and before other persons provide information or assistance that would lessen the need for or value of the cooperation to be provided by the defendant.
 4. **DRUG COURT AND PLEA OFFERS:** A defendant is not required to agree not to apply for Drug Court, or otherwise categorically preclude him/her from being sentenced to Drug Court, where he/she is clinically and legally eligible to be sentenced to treatment in lieu of imprisonment pursuant to N.J.S.A. 2C:35-14 (special probation) or N.J.S.A. 2C:35-14.2 (compulsory Drug Court ordered by the court without application by the defendant).
 5. **PLEA OFFERS – CONTINGENCIES** - Plea offers initiated by the prosecution may be contingent on a co-defendant's pleading guilty.
- B. **STRICT ADHERENCE WITH VICTIMS' RIGHTS:** No actions associated with this policy shall be interpreted as or utilized to counter any and all protected rights



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REVISION DATES:		Page 4 of 4

guaranteed to victims pursuant to Article 1, paragraph 22 of the N.J. Constitution, N.J.S.A. 52:4B-36, and any other statute or Directive concerning victims' rights (e.g., submission of written victim impact statements within reasonable time; the right to consult with the prosecuting authority prior to the conclusion of any plea negotiations; etc.)

C. UNAUTHORIZED JUDICIAL PLEA OFFERS:

1. An Assistant Prosecutor shall not consent to judicial participation in plea negotiations pursuant to Rule 3:9-3(c) without first obtaining express authorization from the Prosecutor.

2. In the event that a court, without the consent from the Assistant Prosecutor (and the Prosecutor) pursuant to Rule 3:9-3(c), advises a defendant that if the defendant pleads guilty the court will impose a lesser term of imprisonment than that contemplated by the plea offer tendered by the Assistant Prosecutor pursuant to the escalating plea policy, the Assistant Prosecutor shall immediately alert his/her Team Leader or Section Chief, who will then be responsible for immediately notifying the designated Deputy 1st Assistant Prosecutor. With the approval of the County Prosecutor, the Director of the Division of Criminal Justice shall be consulted to consider appropriate remedies (e.g., reporting non-compliance with the Court Rule to the appropriate judicial authorities; issuing written submissions by the County Prosecutor confirming that the Assistant Prosecutor has no authority to give such consent; or instructing the Assistant Prosecutor not to attend or otherwise participation in a Rule 3:9-3(c) proceeding.).

D. NOTICES TO DEFENSE COUNSEL OF ESCALATING PLEA POLICY: In contrast to other policies, a written copy of this escalating plea policy may be provided to defense counsel upon request.