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## Brooklyn lawyers address plea-bargain issue



David Levine, Esq.

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Brooklyn Daily Eagle

On April 8, members of the Brooklyn legal community came together to discuss the impact of two iconic Supreme Court rulings on the ways criminal plea bargains are conducted.

In 2012, the United States Supreme Court issued two rulings regarding effective counsel and plea bargaining. In both cases, *Missouri v. Frye* and *Laffer v. Cooper*, the court held that the right to effective counsel granted in the 6th Amendment extends to plea bargains and negotiations.

The roundtable was hosted by the New York State-Federal Judicial Council to determine how the recent rulings will impact plea bargains in New York.

“All United States courts both state and federal are required to

abide by binding precedent of the United States Supreme Court," noted Brooklyn attorney Bruce Baron. "The recent extension of the constitutional right to effective legal assistance, in cases of plea bargain deals, is consistent with the New York State Code of Professional Responsibility for both civil and criminal matters. An attorney must always inform their client of all material facts, law and circumstances".

Plea bargains are negotiation deals between defense counsel and the prosecution in a criminal case where the defendant agrees to enter a plea of guilty for a reduced sentence. In some instances, the plea bargain includes services that may be beneficial to the defendant such as, drug rehabilitation and job training workshops.

In the Frye and Copper cases, the court ruled that right to effective assistance of counsel applies not merely to criminal trials, but also when a plea bargain offer is rejected or lapses because of bad advice from a lawyer.

The cases caused some concern for attorneys. "The Frye and Cooper decisions will open the floodgates," John Carney told the Brooklyn Daily Eagle. "Everyone can claim that they received bad advice. I don't know how it is going to be judged as to whether bad advice was given."

Brooklyn attorney David Levine noted that the Frye and Cooper decisions posed a potential issue for criminal defense attorneys. "Most criminal defense attorneys do not carry malpractice insurance like civil lawyers do," said Levine. "If a criminal defendant loses a trial, the lawyer is protected because it is the jury that found the defendant guilty. In civil cases, there is a dollar amount that can be placed on the lawyer's failure."

However, there are instances wherein a criminal defendant can have a claim against his/her attorney for bad counsel despite a jury verdict. The Frye and Cooper decisions provide criminal defendants a vehicle to assert bad counsel with regard to plea bargains.

A primary issue addressed during the roundtable was how criminal defense attorneys can insulate themselves from potential claims from former clients asserting that they did not receive adequate advice regarding a plea bargain.

"Criminal defense practitioners can insulate themselves by putting on the record whatever plea offer is made," noted Jay Schwitzman, president of the Kings County Criminal Bar Association. "Attorneys must communicate to their client any offer received. Whatever offer is made in terms of a plea bargain has to be made to the client."

"I often have clients sign an affidavit attesting that, as their attorney, I provided them with the facts of their case, the strength and weakness of their case, and advised them of an offered plea bargain and the ramifications of such plea bargain offer," said Levine.

Schwitzman seconds this method as an effective way to avoid a Frye or Cooper challenge. "You should memorialize the offer of the plea bargain," he told the Brooklyn Daily Eagle. "Put everything in a letter to the client or in the form of a written waiver."

Some lawyers have gone further than a mere waiver between attorney and client. "I have noticed some attorneys put the fact that they advised their client of a plea bargain on the record," said Carney. Schwitzman said that this is not an advisable tactic.

Levine provided an additional option for attorneys seeking protections an allegation of providing bad advice to criminal defendants. "There is ancillary education that lawyers should embark on to ensure that plea bargains do not affect other issues in the defendant's life, such as immigration concerns," said Levine. "You do not want to advise a client to take a plea bargain, only to later find out that that bargain poses a negative threat to other ongoing legal issues in that person's life."

All in all, lawyers have to "be well versed in criminal law and the nuances of the law," advised Schwitzman. "They must be aware of the various types of plea bargains or alternative sentences available to criminal defendants."

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