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PLEA BARGAIN NEGOTIATIONS: DEFINING COMPETENCE BEYOND *LAFLER* AND *FRYE*

Cynthia Alkon*

Bargaining is, by its nature, defined to a substantial degree by *personal style*. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.¹

—Justice Anthony Kennedy, writing for the majority in *Missouri v. Frye*

INTRODUCTION

Virtually every criminal conviction in the United States is concluded through plea bargaining.² Yet the Supreme Court, in the companion cases of *Lafler v. Cooper*³ and *Missouri v. Frye*,⁴ has only recently begun to look more critically at plea bargaining to ensure that defendants' constitutional rights are protected in the process.⁵ However, as *Frye* illustrates, the Court has declined to examine what constitutes competent negotiation in plea bargains by dismissing analysis of the negotiation process itself as a question of "personal style" for which standards cannot be set.⁶ Instead, the Court has only examined effective assistance of counsel claims in one phase of plea bargaining: the client counseling phase.⁷ The Court's reluctance to more fully examine competent assistance of counsel during all phases of plea bargaining, not simply the client counseling phase, reflects the

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1. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (emphasis added).

2. *See id.* at 1407 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). This is not a new development. Since at least the middle of the twentieth century only a small percentage of criminal cases have been resolved through trial. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 495 (2004).

3. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

4. *Frye*, 132 S. Ct. at 1399.

5. As will be discussed below in Section III, the Supreme Court's more critical view of plea bargaining arguably started with *Padilla v. Kentucky*, 559 U.S. 356 (2010).

6. *See Frye*, 132 S. Ct. at 1408.

7. *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013).

Court's failure to consider developments in the field of negotiation over the last thirty years.

Negotiation scholars and practitioners have moved far beyond defining bargaining simply by "personal style." Instead, they view negotiation as a skill that can be taught and analyzed, and one for which basic standards of competency have been established.⁸ Negotiation scholars recognize that there are a variety of phases in every negotiation.⁹ Plea bargaining is the negotiation of a criminal case and therefore includes the three basic phases in any lawyer-assisted negotiation: the preparation phase, the negotiation phase, and the client counseling phase. For example, the preparation phase can include the first client interview, investigating the case, gathering information, doing legal research, and preparing the client for either involvement in the negotiation, or for what the possible options are as outcomes from the negotiation.¹⁰ The next phase is the negotiation phase, which includes discussions between the prosecution and the defense on the offers and counter-offers and may start and conclude on different days.¹¹ The negotiation phase is connected to the preparation phase as lawyers who fail to properly prepare for the negotiation may also fail to competently negotiate.¹² For example, a lawyer who fails to conduct a basic interview with their client may be unaware of a strong defense to the charges or of a possible motion, such as a motion to suppress evidence. If a lawyer is unaware of possible defenses and motions, the lawyer may fail to use that information as leverage to negotiate a better offer from the prosecution. The final stage of plea bargaining is counseling the client regarding whether to accept the offer.¹³ This is the only phase of plea bargaining for which

8. See, e.g., *ASSESSING OUR STUDENTS, ASSESSING OURSELVES* (Noam Ebner, James Coben & Christopher Honeyman eds., 2012); *VENTURING BEYOND THE CLASSROOM* (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2010); *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* (Christopher Honeyman, James Coben & Giuseppe De Palo eds., 2009) [hereinafter *RETHINKING NEGOTIATION TEACHING*].

9. See, e.g., John Lande, *Teaching Students to Negotiate Like a Lawyer*, 39 WASH. U. J.L. & POL'Y 109, 128–29 (2012). For a multi-disciplinary explanation of different negotiation stages in different types of negotiations beyond legal disputes, see I. William Zartman, *Process and Stages*, in *THE NEGOTIATOR'S FIELDBOOK* 95–98 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

10. For just one example of how to prepare to negotiate, see generally ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK* (1995) (including questions to help negotiators think through what information they have and what information they may need to decide how to approach the negotiation).

11. For a more detailed description of plea negotiation, see Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 594–614 (2014).

12. See, e.g., JILL PAPERNO, *REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL DEFENSE* 216–22 (2012) (describing preparation as "Getting Ready to Rumble" and listing information that a defense lawyer needs to know "[t]o effectively negotiate a disposition"). For a discussion of preparation in the context of prevailing professional norms, see Roberts, *supra* note 7, at 2665–69. For a list of what defense counsel should do to develop an overall "negotiation plan," see NAT'L LEGAL AID & DEF. ASS'N, *PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION* § 6.2 (2010) [hereinafter *NLADA PERFORMANCE GUIDELINES*].

13. See Roberts, *supra* note 7, at 2653 ("The case holdings thus all relate to an individual's right to information and counseling about a plea offer or guilty plea They regulate only the conversation between defense counsel and the client.").

the Supreme Court has started to define basic standards of competency. In three separate cases, the Court has held that basic competency requires lawyers to advise their clients of an offer,¹⁴ give competent advice about whether the facts are a violation of the law,¹⁵ and to advise about collateral immigration consequences of accepting a guilty plea.¹⁶

This Article will propose standards that the Court could use to define competency in each of the three stages of plea bargaining.¹⁷ This Article will focus on base-line competency, rather than excellence, as competency is the standard the Court uses in determining whether a defendant has been denied his Sixth Amendment right to effective assistance of counsel.¹⁸ This Article will first describe in Section I how the Court, in *Lafler* and *Frye*, has limited its view of the right to competent assistance of counsel to only the counseling phase of the plea bargaining process. Section II will then explain the Court's definition of competent assistance of counsel generally, and consider how the Court can use its existing standards to define competency in all three phases of plea bargaining. Section III will discuss how the field of negotiation views negotiation styles as simply a negotiation skill, not as a singular defining feature of negotiation defying analysis.¹⁹ Section IV will explain the phases of plea bargaining and suggest basic standards for competency in each phase.²⁰ This Article concludes that the Court must look beyond the counseling phase and should not shy away from defining competence in all three phases of plea bargaining. It is not only possible for the Court to define basic competency in the preparation and negotiation phases of plea bargaining, but it is also imperative that the Court do so to meaningfully protect defendants' constitutional right to counsel during plea bargaining.²¹

14. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

15. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012).

16. See *Padilla v. Kentucky*, 559 U.S. 356, 364–66 (2010).

17. However, as I have written elsewhere, *Lafler* and *Frye* fail to address the serious and systemic problems in plea bargaining. This Article is intended to help better define competent assistance of counsel in plea bargaining, while still recognizing that other areas need to be addressed to make plea bargaining a fair process that respects the rights of defendants. For a longer discussion of the systemic issues impacting plea bargaining, see generally Alkon, *supra* note 11.

18. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984).

19. See, e.g., Andrea Kupfer Schneider & Jennifer Gerarda Brown, *Negotiation Barometry: A Dynamic Measure of Conflict Management Style*, 28 OHIO ST. J. ON DISP. RESOL. 557 (2013); Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J. OF LAW & POL'Y 13 (2012).

20. See Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 309–10 (2013) (arguing that the Court has “effectively created a negotiation competency bar for criminal defense lawyers”).

21. “[I]t is hard to conceive of a role for counsel that does not include effective negotiation.” Roberts, *supra* note 7, at 2659.

I. *LAFLER* AND *FRYE*

In 2012, in the companion cases of *Lafler*²² and *Frye*,²³ the United States Supreme Court held that there is a right to effective assistance of counsel during plea bargaining.²⁴ In *Frye*, the defendant's lawyer failed to convey a plea offer to the defendant before it expired.²⁵ As a result, the defendant pled guilty to a felony of driving with a revoked license and was sentenced to three years in custody, instead of taking the original misdemeanor offer.²⁶ In *Lafler*, the defendant was charged with four counts including assault with intent to commit murder.²⁷ The victim was shot a total of four times in the hip, buttock, and abdomen.²⁸ The defendant's lawyer in this case did convey the offer, but did so with extraordinarily bad advice, telling his client that the prosecution "would be unable to establish his intent to murder" because the victim was shot below the waist.²⁹ This was so clearly wrong that the parties on appeal agreed that the advice fell below the required "objective standard of reasonableness."³⁰ Based on this poor advice, the defendant turned down a plea deal that was over one-third less than his eventual sentence.³¹ There were no errors in the trial itself, but the Court concluded that the trial did not cure whatever problems may have occurred during the plea bargaining process and specifically said that "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."³²

As I have said before, these cases are both textbook examples of bad lawyering, and as such, the Court did not articulate a new standard for competence or effective assistance of counsel.³³ Instead, it simply acknowledged that the already existing professional standard should apply during the plea bargaining stage.³⁴ Both cases were examples of bad lawyering in the counseling phase of plea bargaining, and

22. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

23. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

24. For a more detailed description of these cases, see Alkon, *supra* note 11, at 573–76; *see also* Roberts, *supra* note 7, at 2656–65.

25. *See Frye*, 132 S. Ct. at 1404.

26. *See id.* at 1404–05. The facts are also complicated by the defendant picking up a new case after the offer expired and before he pled guilty.

27. *Lafler*, 132 S. Ct. at 1383.

28. *See id.*

29. *Id.*

30. *See id.* at 1384 ("In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.").

31. *See id.* at 1383–84. He rejected an offer of 51–85 months in prison (4.25–7.08 years) and was sentenced to 185–360 months in prison (15.4–30 years) after the jury convicted him at trial.

32. *Id.* at 1386.

33. *See* Alkon, *supra* note 11, at 573.

34. *See, e.g.*, Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 610–13 (2013).

the Court focused entirely on what the lawyer did or did not do with his client (i.e., convey the offer, give accurate advice about the law, and advise on whether to take the plea deal).³⁵ The Court did not examine the plea negotiation process itself, but rather limited its analysis to the client counseling phase during plea bargaining.

However, the Court did recognize the importance of plea bargaining and explicitly stated, for the first time, that “criminal justice today is for the most part a system of pleas, not a system of trials.”³⁶ Through these decisions the Court is moving beyond viewing trials as the “touchstone” in criminal cases.³⁷ The Court also moved beyond viewing trials as the cure to any problems in plea bargaining as it is “insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”³⁸ The Court went on to state that “the negotiation of a plea bargain . . . is almost always the critical point for a defendant.”³⁹ These statements indicate that the Court could look more critically and expansively at plea bargaining as a whole in future cases.⁴⁰

II. EFFECTIVE ASSISTANCE OF COUNSEL

It is important to understand the case law that precedes *Lafler* and *Frye* to understand how the Court could move beyond only defining competence in the client counseling phase of plea bargaining. The foundational case to determine effective assistance of counsel is *Strickland v. Washington*.⁴¹ As will be discussed below, the Court in *Strickland* established a two-prong test that it later used in *Lafler* and *Frye* to determine whether a defendant has been deprived of effective assistance of counsel.⁴² After discussing the case law, this Section will next discuss the ABA Standards, as the Court looks to the ABA Standards in deciding whether a lawyer has met the first prong of the *Strickland* standard.⁴³

35. See Roberts, *supra* note 7, at 2656–65.

36. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

37. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1122 (2011) (“The most notable feature of the pre-*Padilla* landscape is that trials remained the norm, the touchstone guiding the Court.”).

38. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

39. *Id.*

40. Justice Scalia expresses just this concern in his dissents, stating that these decisions will mark the beginning of a “new boutique of constitutional jurisprudence,” *Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting), and lead to “cases galore” going up on appeal. *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).

41. *Strickland v. Washington*, 466 U.S. 668 (1984).

42. See *id.* at 668, 693–94.

43. See Gary Feldon & Tara Beech, *Unpacking the First Prong of the Strickland Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL’Y 1, 12 (2012).

A. *Strickland v. Washington*

In 1984, the U.S. Supreme Court held in *Strickland v. Washington*⁴⁴ that a defendant's Sixth Amendment right to counsel required that the lawyer be effective, and that this right was violated if (1) a lawyer's performance fell below an "objective standard of reasonableness,"⁴⁵ and (2) the defendant showed that but for the lawyer's performance, the case result would be different.⁴⁶ *Strickland* was a death penalty case and the Court stated that the "purpose" of the Sixth Amendment right to effective counsel was "to ensure a fair trial."⁴⁷ The Court went on to say that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."⁴⁸

The Court applied the *Strickland* two-prong test to plea bargaining in earlier cases,⁴⁹ but it was not until the 2010 case of *Padilla v. Kentucky* that the Court held that a defense lawyer had violated the *Strickland* standards during plea bargaining.⁵⁰ In *Padilla*, the lawyer failed to advise the defendant about the immigration consequences of his guilty plea.⁵¹ The Court concluded that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."⁵²

In *Lafler* and *Frye*, the Court found that defense lawyers had failed to meet the *Strickland* standard during the plea bargaining phase. In *Frye*, the Court explained that the first prong had been met as the defendant's lawyer had failed to perform at an objectively reasonable level.⁵³ In reaching this conclusion, the Court looked to the ABA Standards for Criminal Justice: Pleas of Guilty.⁵⁴ In *Lafler*, the Court explained how the second prong—that but for the performance of the lawyer, the result would have been different—can be established in the context of plea bargaining.⁵⁵ A defendant "must show the outcome of the plea process would have

44. *Strickland*, 466 U.S. at 687–88.

45. *Id.* at 688.

46. *See id.* at 691–96.

47. *Id.* at 686.

48. *Id.*

49. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985) ("We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

50. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) ("[C]onstitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.").

51. *See id.* at 359.

52. *Id.* at 367.

53. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408–09 (2012).

54. *See id.* at 1408 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(a) (3d ed. 1999), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf [hereinafter ABA GUILTY PLEA STANDARDS]).

55. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012).

been different with competent advice.”⁵⁶ In both *Lafler* and *Frye*, the Court referred to *Hill v. Lockhart*, a case in which the defendant alleged incompetent assistance of counsel because his lawyer told him that if he pled guilty, he would be eligible for parole before he was, in fact, eligible for parole.⁵⁷ The Court found that the defendant failed to establish that but for the incorrect advice the defendant would not have taken the plea deal.⁵⁸ In *Hill*, as in *Lafler*, *Frye*, and *Padilla*, the Court examined the question of whether the lawyer was competent solely during the counseling phase of the plea bargain.⁵⁹

Starting with *Strickland* in 1984, the Court was clear that it would not be too critical of defense lawyers as “[j]udicial scrutiny of counsel’s performance must be highly deferential.”⁶⁰ The Court went on to say that “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”⁶¹ Then, the Court established the hurdle that the defendant must overcome—that is, the presumption that the lawyer was engaging in “sound trial strategy.”⁶² The Court also explained that these strategic choices should be “respected”⁶³ because “advocacy is an art and not a science.”⁶⁴

Due to the Court favoring “deference,” the *Strickland* standard is not easy for defendants to meet.⁶⁵ Justice Stevens acknowledged this when he wrote in *Padilla* that “[s]urmounting *Strickland*’s high bar is never an easy task.”⁶⁶ The Court has only found ineffective assistance of counsel under the *Strickland* two-prong test during the counseling phase of the plea bargaining process.⁶⁷ However, *Padilla*, *Lafler*, and *Frye* open the door for the Court to look more critically at defense counsels’ conduct during plea bargaining beyond the counseling phase.

B. The ABA Standards

The Court refers to ABA standards in examining whether a defense lawyer fulfilled the first prong of *Strickland* in that their assistance met an “objective standard of reasonableness.”⁶⁸ For this reason, it is important to understand what

56. *Id.* at 1384.

57. *Hill v. Lockhart*, 474 U.S. 52, 54–55 (1985).

58. *See id.* at 60.

59. *See id.* (“In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain.”).

60. *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984).

61. *Id.* at 689.

62. *See id.*; *see also* *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011) (considering the question of trial strategy under *Strickland*); *Harrington v. Richter*, 562 U.S. 86, 108 (2011) (same).

63. *Strickland*, 466 U.S. at 681.

64. *Id.*

65. For a more detailed analysis of *Strickland*, see generally *Feldon & Beech*, *supra* note 43.

66. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

67. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408–09 (2012); *Padilla*, 559 U.S. at 360.

68. *See Padilla*, 559 U.S. at 367.

the ABA considers professional standards in plea bargaining.⁶⁹

The ABA Guilty Plea Standards list six specific “[r]esponsibilities of defense counsel.”⁷⁰ The first is the standard that *Frye* held was violated: defense lawyers should advise the defendant of “developments” in plea discussions and “promptly communicate and explain . . . all plea offers made by the prosecuting attorney.”⁷¹ The second requires that “after appropriate investigation,” defense lawyers should “advise the defendant of the alternatives available.”⁷² This standard clearly states that: “Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.”⁷³ The third standard is that the defendant must consent to the plea deal, and the defendant must have the ultimate authority to decide whether to accept the deal or not.⁷⁴ The fourth states that defense counsel should not “knowingly” misstate facts or the law in the plea discussions with the prosecuting attorney.⁷⁵ The fifth requires defense counsel to “explore the possibility of a diversion of the case from the criminal process.”⁷⁶ Finally, the sixth standard requires defense counsel to advise the defendant about collateral consequences from a guilty plea.⁷⁷

The ABA Guilty Plea Standards offer little direction to the Court in determining what is competent assistance of counsel during each of the three phases of plea bargaining. Most importantly for the purposes of this discussion, the Standards fail to provide any meaningful guidance regarding competent assistance of counsel during the negotiation phase itself. The standards instead focus more on the counseling phase of plea bargaining, as three of the six standards refer exclusively to this phase.⁷⁸ Two of the standards refer to preparation before negotiation.⁷⁹ Only one of the six standards exclusively refers to the negotiation phase of a plea bargain.⁸⁰ However, that standard offers little direction regarding appropriate or required conduct during plea negotiations beyond the already clear ethical guideline: that a defense lawyer (and prosecutor) should not misstate facts or the law.⁸¹ One of the six standards, the requirement to “explore the possibility of diversion,” could arguably also refer to the negotiation phase as it suggests a requirement that

69. Although some early cases (before 2000) seemed to suggest otherwise, the Court is now clear that it looks to the ABA Standards as a guide and does not consider them to be definitive tests. *See* *Feldon & Beech*, *supra* note 43, at 12 (citing *Bobby v. Van Hook*, 558 U.S. 4, 11, 12 (2009)).

70. ABA GUILTY PLEA STANDARDS, *supra* note 54, § 14-3.2(a)–(f).

71. *Id.* § 14-3.2(a).

72. *Id.* § 14-3.2(b).

73. *Id.*

74. *Id.* § 14-3.2(c).

75. *Id.* § 14-3.2(d).

76. *Id.* § 14-3.2(e).

77. *Id.* § 14-3.2(f).

78. *See id.* § 14-3.2(a), (c), (f).

79. *See id.* § 14-3.2(b), (e).

80. *See id.* § 14-3.2(d).

81. *See id.* § 14-3.1(f) (the prosecutor’s responsibilities); *id.* § 14-3.2(d) (the defense counsel’s responsibilities).

defense lawyers request diversion in plea negotiations if the defendant and the case are eligible.⁸² However, “exploring the possibility of diversion” also includes the preparation phase, as the defense lawyer may need to investigate whether the defendant qualifies.

The ABA has also developed Defense Function Standards.⁸³ These standards go into more depth regarding what defense lawyers should do, and, as such, provide additional and better guidance regarding competent assistance of counsel in plea bargaining. The Defense Function Standards require that the defense lawyer should “determine all relevant facts known to the accused” as soon as is possible.⁸⁴ As with the Guilty Plea Standards, the Defense Function Standards clearly state that defense counsel has a duty to investigate.⁸⁵ The Defense Function Standards go further and specifically state that defense lawyers’ “duty to investigate exists regardless of the accused’s admissions . . . or the accused’s stated desire to plead guilty.”⁸⁶ This duty also requires “efforts to secure information in the possession of the prosecution and law enforcement authorities.”⁸⁷ The phrasing of this duty reflects an understanding that actually getting discovery may not always be possible, particularly in jurisdictions that do not have open file discovery or other rules that require such disclosure.⁸⁸

The Defense Function Standards also go into more depth about the counseling process. These Standards require that lawyers inform themselves “fully on the facts and the law” before advising their client about the case.⁸⁹ The commentary states that lawyers should not only “inform the defendant of the maximum and minimum sentences,” but also “be aware of the actual sentencing practices of the court.”⁹⁰ Under this standard, defense lawyers need to know not only the strength of the prosecution case, but also the sentencing practices in the particular court.⁹¹ For example, do judges in this jurisdiction give higher sentences after trial? Do judges follow pre-sentencing report recommendations? Are there mandatory minimums associated with the charges? Defense lawyers are also to give “a candid

82. See *id.* § 14-3.2(e).

83. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-3.1–4-8.6 (1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (last visited Nov. 24, 2015) [hereinafter ABA DEFENSE FUNCTION STANDARDS].

This Article only discusses the Third Edition of the ABA Defense Function Standards, as the Fourth Edition, while approved by the ABA House of Delegates at the mid-year meeting in 2015, had not been published with commentary at the time this Article went to print.

84. *Id.* § 4-3.2(a), at 152.

85. See *id.* § 4-4.1(a), at 181.

86. *Id.*

87. *Id.*

88. For a more detailed discussion of the continuing failure of the U.S. Supreme Court to recognize the need for discovery in plea bargaining, see generally Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014).

89. ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, § 4-5.1(a), at 197.

90. *Id.* at 198.

91. *Id.*

estimate of the probable outcome” of the case.⁹² As with the Guilty Plea Standards, the Defense Function Standards require defense counsel to communicate offers⁹³ and advise the defendant about any plea discussions.⁹⁴

The Defense Function Standards, as with the Guilty Pleas Standards, require lawyers to explore diversion.⁹⁵ At the time these standards were written, problem solving courts—including drug courts, mental health courts, and veterans’ courts—were either recently established (drug courts) or not yet in existence.⁹⁶ It seems that this standard would apply to these types of courts, and that an objectively reasonable standard of care for lawyers is that they should know the variety of options that might be available—including alternative sentencing or diversion from prosecution.

III. DOES STYLE DEFINE NEGOTIATION?

Although the Court views negotiation as simply “personal style,”⁹⁷ negotiation scholars agree that negotiation is a skill that lawyers both need to, and can, learn how to do better.⁹⁸ Negotiation scholarship, starting with the classic book *Getting to Yes*,⁹⁹ is premised on the idea that negotiation is a skill and that people can improve their negotiation skills.¹⁰⁰ Negotiation scholars in law, and in other fields, have moved beyond the concept that negotiation is simply an art form or that being a good negotiator is an inherent personality trait that cannot be analyzed, studied, or taught.¹⁰¹ In the thirty or so years since negotiation became a recognized field,

92. *Id.* § 4-5.1(a), at 197.

93. *See id.* § 4-6.2(b), at 206.

94. *See id.* § 4-6.2(a), at 206.

95. *See id.* § 4-6.1(a), at 203.

96. The first drug court started in 1989 in Florida. Ten years later, in 1999, there were 492 such courts. By 2012, there were 2734 drug courts nationwide, including in every state. *See Drug Court History*, NAT’L ASS’N OF DRUG COURT PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Nov. 24, 2015).

97. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

98. Dispute resolution literature defines negotiation as a “consensual process,” as it requires both sides to agree to the eventual outcome. *See, e.g.,* LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 16 (4th ed. 2009).

99. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 3d ed. 2011) [hereinafter *GETTING TO YES*].

100. For an early example, see HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982). “There is an art and a science of negotiation. By ‘science’ I loosely mean systematic analysis for problem solving . . . The ‘art’ side of the ledger . . . includes interpersonal skills, the ability to convince and be convinced, the ability to employ a basketfull of bargaining ploys, and the wisdom to know when and how to use them.” *Id.* at 7–8. For more recent negotiation texts, see CARRIE MENKEL-MEADOW ET AL., *NEGOTIATION: PROCESSES FOR PROBLEM SOLVING* (2d ed. 2014); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (3d ed. 2014); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (6th ed. 2009); LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* (3d ed. 2005).

101. There is an ever-expanding literature on how to teach negotiation. For some more recent examples, see *RETHINKING NEGOTIATION TEACHING*, *supra* note 8; Schneider & Brown, *supra* note 19; Schneider, *supra* note 19;

scholars have identified at least six standard canons of negotiation.¹⁰² The negotiation canon includes style, but goes beyond that singular concept to include six other canons: strategy; personality; communication skills; the development of concepts about approaches to negotiation, including different types of negotiations (integrative v. distributive); looking for “bargaining zones;” and preparation for negotiation.¹⁰³ Most importantly for this discussion, negotiators and scholars who study negotiation agree that it is possible to analyze whether a particular negotiator did a competent, incompetent, or excellent job during the negotiation itself as well as during the preparation and counseling phase.¹⁰⁴

Negotiation courses teach about different negotiation styles and encourage students to use different styles depending on the circumstances and the goals for a particular negotiation.¹⁰⁵ Negotiation scholars have an ever-increasing number of labels to describe these styles.¹⁰⁶ One common approach is to identify five basic styles of negotiation: avoiding, compromising, accommodation, competitive, or collaborative.¹⁰⁷ Style is increasingly not considered to be a constant or inherent trait, but rather is seen as one component of any negotiator’s skill set; and being able to use a variety of styles to adapt to the particular situation is considered a mark of strong negotiating skills.¹⁰⁸

Early negotiation scholarship discussed the merits of expanding negotiation beyond a competitive or distributional approach.¹⁰⁹ The idea was to describe a form of negotiation where the negotiators move beyond the positions of the parties and look instead at the parties’ underlying interests.¹¹⁰ Scholars focused on how to be more integrative, or problem solving, in negotiation.¹¹¹ Recent negotiation scholars have recommended that it is time to move beyond thinking of negotiation as either integrative or distributive, as those terms often do not capture the variety

Lande, *supra* note 9. For an earlier example of work in the field discussing how to improve negotiation skills by the use of more mathematical models, see RAIFFA, *supra* note 100.

102. See generally Christopher Honeyman & Andrea Kupfer Schneider, *Catching up with the Major-General: Why There’s a Need for a “Canon of Negotiation,”* 87 MARQ. L. REV. 637, 640 (2004) (discussing the “ambitious” initiative of developing a canon of negotiation).

103. See *id.* at 643–44.

104. See, e.g., Schneider, *supra* note 19, at 27 (offering a description of varying skill levels as “minimum, average, and best”).

105. See, e.g., CRAVER, *supra* note 100, at 9–19.

106. For a discussion of the use of labels and the variety of labels describing negotiation from different fields, see Schneider, *supra* note 19, at 15–19.

107. See, e.g., G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 8–12 (2d ed. 2006). This is also the approach used by the Thomas-Kilman Conflict Mode Instrument.

108. See, e.g., Schneider & Brown, *supra* note 19, at 557; Schneider, *supra* note 19, at 23–24.

109. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). See generally GETTING TO YES, *supra* note 99.

110. For a more detailed description of positional negotiation, see John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 18–26 (2014).

111. For a description of how this approach has been integrated into negotiation texts, see *id.* at 27–28.

and complexity of what actually goes on in negotiations—particularly negotiations happening in the shadow of possible litigation.¹¹²

Negotiation scholarship has also discussed how to use various styles of negotiation to a party's best advantage. Negotiation scholars have conducted empirical studies to better understand how lawyers negotiate, and to determine if one style makes for a more effective negotiator as compared to another style.¹¹³ In one study, Andrea Kupfer Schneider studied lawyer negotiating styles and concluded that problem solving negotiation was perceived to be more effective by lawyers.¹¹⁴ A problem solving lawyer is one who works with their counterparts to try to satisfy the interests of their clients in a more collaborative and less adversarial way.¹¹⁵ Problem solving lawyers work to understand the parties' underlying interests to find solutions that "expand the pie," rather than merely divide the pie.¹¹⁶ By contrast, an adversarial negotiator is one who sees negotiation as a zero sum game and thinks that gains by one side must come at the expense of the other.¹¹⁷ Schneider also examined what skills effective lawyers use including tools such as assertiveness and empathy.¹¹⁸ Other studies have tried to measure how often lawyers use a particular negotiation approach.¹¹⁹ What this expanding body of empirical scholarship demonstrates is that it is possible to both examine and analyze how different negotiation styles are used in a negotiation process, and to draw conclusions about the success of a negotiator based on this analysis.¹²⁰

Negotiation scholars recommend that it is time to move beyond focusing on negotiation styles as a singular static element in a negotiation and to move towards

112. See Lande, *supra* note 110, at 6 ("A major problem in legal negotiation theory is the excessive focus on the adversarial and cooperative models of negotiation . . .").

113. See, e.g., *id.* at 2 ("[C]ompar[ing] generally-accepted theories of legal negotiation with empirical accounts of lawyers' negotiations to illustrate some misconceptions in the theories . . ."); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2001).

114. See Schneider, *supra* note 113, at 148.

115. See Menkel-Meadow, *supra* note 109, at 794–801 ("[F]ocuses on finding solutions to the parties' sets of underlying needs and objectives.").

116. Consider that:

By attempting to uncover those underlying needs, the problem-solving model presents opportunities for discovering greater numbers of and better quality solutions. It offers the possibility of meeting a greater variety of needs both directly and by trading off different needs, rather than forcing a zero-sum battle over a single item.

Id. at 795.

117. See *id.* at 764–65 ("It is assumed that the parties must be in conflict and since they are presumed to be bargaining for the same 'scarce' items, negotiators assume that any solution is predicated upon division of the goods."); see also *id.* at 783–89 (describing the underlying assumptions of the adversarial model).

118. See Schneider, *supra* note 113, at 147.

119. See, e.g., Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997) (analyzing negotiation and settlement approaches employed by civil litigators in New Jersey).

120. See Lande, *supra* note 110, at 46–49 (discussing a "framework for analyzing negotiation").

focusing on skills. Andrea Kupfer Schneider and Jennifer Brown have developed an instrument to help negotiators evaluate what negotiation style they use at different points during a negotiation.¹²¹ This instrument recognizes that a negotiation is rarely a singular event and that negotiators therefore use multiple styles during a negotiation.¹²² As Schneider and Brown say, “[m]any negotiators find that they shift—they change their styles in one way or another—to adjust to the rising temperature of the conflict.”¹²³ Schneider recommends that negotiation professors stop using style as the focus for analysis and advocates using particular skills that cut across various negotiating styles. These skills include: assertiveness, empathy, flexibility, social intuition, and ethicality.¹²⁴ Schneider recommends that negotiation students analyze whether they have reached a level of “minimum, average, or best” practices for each skill.¹²⁵ In doing so, Schneider recommends against teaching that style is the “key choice” the student must make in advance of the negotiation.¹²⁶ Instead, Schneider recommends that professors focus on teaching students how to be more effective with each skill.¹²⁷

This expanding body of literature takes a more nuanced view of negotiation than Justice Kennedy expresses in *Frye*.¹²⁸ While negotiation scholars recognize that style matters—unlike Justice Kennedy—the negotiation literature does not view style as a singular defining feature or one that is beyond analysis or criticism. Therefore, it is possible to critically analyze the negotiation process itself, looking at a variety of skills used by the negotiators. Style, when viewed correctly, is simply another negotiation skill. As the field of negotiation has developed, so too has a common understanding of what a competent negotiator should do during each phase of a negotiation. These common understandings inform the suggestions discussed in the following Section regarding what constitutes basic competency of a lawyer during the three phases of plea bargaining.

IV. THE THREE PHASES OF PLEA BARGAINING

Every lawyer-assisted negotiation has at least three phases: the preparation phase, the negotiation phase, and the counseling phase. For the purposes of this Article, each phase will be discussed as a distinct part of the process; however, it should be recognized that these phases are often interconnected and may happen

121. See Schneider & Brown, *supra* note 19, at 557–58.

122. *Id.* at 575.

123. *Id.*

124. See Schneider, *supra* note 19, at 28–35.

125. See *id.* at 27.

126. See *id.*

127. See *id.* at 24–37.

128. Justice Kennedy is not alone in this, as practicing lawyers also fail to recognize that negotiation is a skill that can be taught. As a result, training for criminal defense lawyers more often focuses on trial skills, and more infrequently on negotiation skills. See Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2651396.

simultaneously, rather than in the linear fashion this discussion might suggest. For example, the preparation phase includes client interviewing, which may—as more information becomes available—also happen in other phases. The following discussion is not intended to fully explain the possible complexity of the plea bargaining process itself, nor is it meant to investigate every possible permutation of plea negotiations.¹²⁹ Rather, it is intended to suggest minimum bright-line standards of competence for each phase of a plea negotiation.

A. *The Preparation Phase of Plea Bargaining*

The first phase of plea bargaining is to prepare for the negotiation.¹³⁰ For criminal cases, basic competency requires that the lawyer understand the facts of the case, any possible defenses, any possible pre-trial motions, and the possible maximum punishment for a particular client.¹³¹ Acquiring this understanding is basic preparation both for trial and for negotiating a plea bargain.¹³²

A defense lawyer should always do this basic preparation, although competent preparation is not always time consuming. If a case is factually simple—for example, a misdemeanor driving under the influence of alcohol case—it is possible for a competent defense lawyer to complete preparation through an initial interview with the client, verifying lab results, and reading the police report.¹³³

129. For more in-depth studies of plea bargaining, see AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2010); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); ARTHUR ROSETT & DONALD R. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976). For historic views of how plea bargaining has grown in the United States and how it worked in earlier eras, see MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY* (2007); GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

130. For an article recommending that poor preparation for negotiating a plea bargain should give rise to an ineffective assistance of counsel claim, see Batra, *supra* note 20, at 326–27.

131. See, e.g., Vida B. Johnson, *Effective Assistance of Counsel and Guilty Pleas—Seven Rules to Follow*, 37 *THE CHAMPION* 24 (2013); see also NLADA PERFORMANCE GUIDELINES, *supra* note 12, §§ 6.1–6.2; ABA GUILTY PLEA STANDARDS, *supra* note 54, § 14-3.2(b) (“Defense Counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.”). For a discussion of preparing for negotiation focused on civil cases, see CRAVER, *supra* note 100, at 46–54.

132. For a list of questions a defense lawyer should consider asking at the first interview with their new client, see PAPERNO, *supra* note 12, at 73–79. Another reason that preparation for negotiation and trial demand the same information is that they are not separate and distinct processes. As Marc Galanter observed, in coining the term “litigation,” “[t]here are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals.” Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 *J. LEGAL EDUC.* 268, 268 (1984). For an empirical study of plea bargaining that reached this same conclusion, see Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement As a Product of Recursive Decisionmaking*, 30 *LAW & SOC'Y REV.* 335, 336 (1996) (“[P]lea bargaining can be seen to encompass not only multiple episodes of negotiating behavior but also a wide range of formal litigation proceedings. As such distinctions made between plea bargaining and taking a case to trial can actually be seen as relatively minor.”).

133. Not waiting for lab results before entering a guilty plea can create a serious problem if the lab results do not support the criminal charge. For example, the District Attorney in Houston Texas (Harris County) recently reported that “hundreds” of defendants pled guilty to drug crimes when test results later came in stating that the

The reality is that a large number of criminal cases begin and end on the day of arraignment.¹³⁴ Pleading a case out at arraignment can reflect highly competent counsel and representation. The question is not how quickly the case was resolved, but rather whether the lawyer did what is required to competently represent the defendant.¹³⁵ As will be discussed below, not every case needs to be investigated beyond interviewing the client and reviewing discovery from the prosecution, and there can be good reasons to take a plea deal on the first court appearance.¹³⁶

There are three basic questions that a defense lawyer needs to answer during the negotiation preparation phase.¹³⁷ First, the lawyer should determine if there are any possible defenses to the charge. Second, the lawyer should determine whether there are any possible pre-trial motions. Third, a competent defense lawyer should take basic steps to determine if there are possible additional charges or sentencing enhancements. The first two areas are directly relevant to the negotiation process itself as a defense or pre-trial motion can be used as leverage to persuade the prosecutor to make a better offer.¹³⁸ The third area is most relevant to the defense in the counseling phase as it is crucial information to know when counseling a client about whether they should accept the plea offer or not. If a defense lawyer discovers that there are possible additional charges or enhancements that the prosecutor—for whatever reason—has not yet added, it might be a reason to

item was not, in fact, an illegal substance. Michael Barajas, *Lab Reports Show Hundreds “Convicted in Error” for Drug Offenses*, HOUSTON PRESS (Oct. 29, 2014), http://blogs.houstonpress.com/news/2014/10/lab_reports_show_hundreds_convicted_in_error_for_drug_offenses.php.

134. See, e.g., Nancy Albert-Goldberg, *Los Angeles County Public Defender Office in Perspective*, 45 CAL. W. L. REV. 445, 461, 466 (2009).

135. This question is the same whether it is a misdemeanor or felony case as both carry significant consequences. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 287 (2011) (“Two ways in which the quality of misdemeanor representation matters more today than ever before merit particular attention: the proliferation of criminal records and the related phenomenon of an explosion in collateral consequences for minor criminal convictions.”).

136. See Alkon, *supra* note 11, at 598–601 (discussing how defendants may find court appearances more of a burden than a benefit, and how this can reinforce already existing power imbalances in the criminal justice system).

137. For a discussion on the importance of information gathering in negotiation, consider:

[I]nformation is the lifeblood of any negotiation, and at its core, negotiation is about protecting sensitive information of one’s own (to prevent oneself from being exploited) while extracting information from other parties. Good negotiators must therefore learn how to conduct extensive background research, to engage aggressively and relentlessly in asking questions and digging for answers, and to take other proactive steps to unearth or extract the most (and most accurate) information possible from all parties at the table.

Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 533 (2009).

138. For a discussion of persuasion in the context of civil cases, see Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1799 (2000) (“Perhaps the most common activity negotiators engage in at the bargaining table is attempting to persuade their opponent of the value of the negotiation’s subject matter or of other alternatives. The arguments advanced often appear remarkably similar to those that litigating parties might make to a judge or jury.”).

counsel a defendant to accept a plea deal while the deal is still available, assuming it is better than what would be expected after the prosecution discovers the additional charges and enhancements. The concern would be for the defense to accept the current plea offer before the prosecutor revokes it or makes a worse deal due to the added charge or enhancement.

1. Possible Defenses

Defense lawyers have three basic methods they should use to determine if there is a possible defense to the charges: request discovery, interview their client, and investigate the case. Basic competence requires a defense lawyer to use these methods to try to discover facts in a case that could form a defense—and therefore be useful—during the negotiation process.¹³⁹ Beyond the important question of actual innocence,¹⁴⁰ failing to discover a possible defense matters in the context of plea bargaining. Not every case with a strong defense goes to trial. Often, that defense is instead used as leverage in the plea negotiation.¹⁴¹ This applies equally to more serious and less serious cases. In a crowded court system, the mere suggestion of putting a case over to another date or taking it to trial can be enough leverage to nudge the prosecutor towards a better deal.¹⁴²

Due to caseload pressures and court crowding, the best time to raise a possible defense to get a better deal is usually early in the case, and often the earlier the better.¹⁴³ The question for the Court to consider is not whether the information that could constitute a defense would likely change the trial outcome, but rather

139. See ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, § 4-3.2(a), at 152. The Commentary to this section states, “[t]he lawyer needs to know essential facts The lawyer who is ignorant of the facts of the case cannot serve the client effectively.” *Id.* at 152. Essential facts include any possible defense.

140. See Alkon, *supra* note 11, at 601–03 (discussing how the negotiation atmosphere in plea bargaining can put pressure on innocent people to plead guilty); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014) (discussing the circumstances in which innocent defendants plead guilty to obtain release).

141. See, e.g., G. NICHOLAS HERMAN, PLEA BARGAINING 61–62 (3d ed. 2012) (“Factual and legal leverage points are the strong and weak aspects of the case . . .”).

142. However, not every defense offered is one that can be useful in the plea negotiation process. A defense that is supported only by the defendant’s statements is usually insufficient to convince a prosecutor to reduce the offer. Typical examples are those cases where the defendant claims the police lied or planted evidence. “The police officer lied” is not an easy defense to use at trial. Juries are often skeptical of the defendant’s version of events in the absence of any supporting evidence. Under these circumstances, a defendant may decide to go ahead and take the plea offer because of concerns that they will lose the case at trial and face more time in prison. However, if the defense is written in the lawyer’s file, it is possible that this could help if the case is later reviewed. This happened with a number of cases caught up in the Rampart Scandal in Los Angeles, including one case that I handled during that time when I was a public defender in Los Angeles in the late 1990s. Simple statements in the defense files that the “defendant denied the drugs were his” were often enough to withdraw guilty pleas and get cases dismissed. For a longer discussion of the Rampart case and the innocent defendants who pled guilty, see Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013). In total, 156 felony convictions were overturned or dismissed. *Id.* at 1138.

143. See Johnson, *supra* note 131, at 25.

whether it would likely change the negotiation outcome.¹⁴⁴

a. Request Discovery

Defense lawyers should seek discovery from the prosecution in each case to determine if there are any possible defenses.¹⁴⁵ This includes asking for the police report, any witness statements, and any lab results. This is easier in jurisdictions with open-file discovery.¹⁴⁶ The key question for a court to examine here is whether the defense lawyer requested discovery, not whether the prosecution actually provided it. However, in some jurisdictions it is possible that simply requesting discovery raises a tactical question—if, for example, the prosecution threatens to withdraw any plea offers when the defense requests discovery.¹⁴⁷ That kind of prosecutorial behavior raises other serious constitutional questions.¹⁴⁸ But, for the purposes of determining whether the defense lawyer acted competently, the issue is whether they asked for discovery, or had a legitimate reason for not requesting discovery.¹⁴⁹

b. Interview the Client

Defense lawyers should not rely only on prosecution discovery, but should also ask questions to determine whether there is a possible defense during the initial client interview.¹⁵⁰ Implicit in this discussion is the basic requirement that lawyers actually interview their clients before a case is resolved through plea bargain-

144. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012) (“Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.”). Consider also that:

If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Id. at 1387.

145. See *Roberts*, *supra* note 7, at 2671. However, in the absence of open-file discovery, seeking discovery may not mean that defense lawyers actually get discovery. See *Alkon*, *supra* note 88, at 409–15, 418–21.

146. See, e.g., *Alkon*, *supra* note 88, at 418–21.

147. See, e.g., Robert Guest, *Michael Morton Act Becomes Law—No More Closed Files in Texas*, DALLAS CRIM. DEF. LAWYER BLOG (May 16, 2013), <http://www.dallascriminaldefenselawyerblog.com/2013/05/michael-morton-act-becomes-law-no-more-closed-files-in-texas.html>.

148. For example, the prosecution has a constitutional duty to turn over any exculpatory evidence to the defense. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

149. This is not to suggest that the court should not also take a critical look at prosecutorial behavior in plea bargaining and better define what is acceptable. For a discussion of the ethics issues when prosecutors offer better deals to weaker cases instead of dismissing them, see RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 191–216 (2011).

150. See, e.g., ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, § 4-3.2(a), at 152; NLADA PERFORMANCE GUIDELINES, *supra* note 12, § 2.2.

ing.¹⁵¹ Failing to talk with the client about the case, what he did or did not do, and any possible defenses is a clear bright line to establish ineffective assistance of counsel.¹⁵²

For the average driving under the influence of alcohol or drug possession charge, the facts are usually fairly straightforward as the criminal charges themselves are fairly simple. However, regardless of the seriousness of the case, a minimally competent defense lawyer should ask basic questions to determine whether there is a defense. For example, was the defendant actually driving? How much alcohol did he drink, and what did he eat during that time?¹⁵³ In a drug possession case, the question is also very straightforward: did the defendant actually possess the drugs? Minimal competency requires that the defense lawyer make a note in their file of the answers to these questions.

It may sound like something that should not need to be spelled out, but when under pressure to process cases, and with limited funding for defense counsel services, there are unfortunate (and appalling) examples of lawyers failing to conduct even a basic client interview.¹⁵⁴ For example, in December 2013, the United States District Court for the Western District of Washington at Seattle found a violation of the Sixth Amendment right to counsel because indigent defense services were so poorly staffed and funded that lawyers engaged in a “meet and plead” system.¹⁵⁵ Lawyers did not have confidential communications with their clients and failed to ask basic questions about cases and explore whether there were any possible defenses.¹⁵⁶ The District Court expressed concern that lawyers handling cases in this way may miss a case of actual innocence by failing to talk to their clients.¹⁵⁷ And, equally important, a defense lawyer may miss a possible defense that should be further investigated to ultimately engage in meaningful plea bargaining and to provide appropriate advice about whether to take a case to trial or accept the plea deal.¹⁵⁸

151. See ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, § 4-3.2(a), at 152 (“As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information . . .”). One of the key goals of client interviewing is to get information from the client about the case. See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 62–65 (1990); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 89–91 (3d ed. 2007).

152. See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1126–27 (W.D. Wash. 2013) (“A failure of communication precludes the possibility of informed judgment.”).

153. In the Los Angeles County Public Defender’s Office there was a standard list of questions for all driving under the influence of alcohol cases. Of course, this is not always determinative as defendants often had standard answers, such as “two beers” when asked how much they drank.

154. See, e.g., *Wilbur*, 989 F. Supp. 2d at 1124–25, 1127.

155. See *id.*

156. See *id.*

157. See *id.* at 1127.

158. See *id.* at 1127–28.

c. Investigate the Case

Defense lawyers should do appropriate follow-up investigation after discovery or when new information is provided by their clients.¹⁵⁹ The Court has shown a willingness to hold that the failure to investigate constitutes ineffective assistance of counsel when lawyers fail to investigate and present mitigation evidence in death penalty cases.¹⁶⁰ Although the *Strickland* Court cautioned that “reasonable professional judgments support the limitations on investigation,”¹⁶¹ the Court went on the say that:

[i]n other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.¹⁶²

In examining the duty to investigate in the specific context of plea bargaining, the Court should focus on three basic questions: (1) was it reasonable to investigate; (2) did the failure to investigate result in bad advice to the defendant regarding whether to accept a plea deal or not; and (3) did the failure to investigate result in a failure to make a counter-offer when there were grounds to do so.¹⁶³ For example, if the defendant tells the lawyer that he has an alibi witness, it is reasonable to expect the lawyer to try to find that witness. If the defendant says that he knows he had not had enough to drink to be over the legal limit, it is reasonable for the defense to re-test the blood, or order the maintenance records on the breath machine.¹⁶⁴ The Court should consider such examples of basic investigation when

159. See Roberts, *supra* note 7, at 2671; see also ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, § 4-4.1(a), at 181; NLADA PERFORMANCE GUIDELINES, *supra* note 12, § 4.1(a) (“Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt.”); see also, e.g., *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005) (holding that it was ineffective assistance of counsel for a lawyer to recommend that the defendant plead guilty when the attorney had failed to retain a medical expert to fully investigate the medical records in a felony injury to child case).

160. The Court has held that defense counsel’s failure to investigate possible mitigation evidence in death penalty cases violates the right to effective assistance of counsel. See, e.g., *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000).

161. *Strickland v. Washington*, 466 U.S. 688, 691 (1984).

162. *Id.*

163. This can impact a court’s decision regarding whether a decision to recommend accepting or rejecting a plea deal was “strategic” or merely ill-informed. See Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora’s Box?*, 27 CRIM. JUST. 4, 8–9 (2012).

164. It is good practice for defense lawyers to routinely do both of these things in driving under the influence cases as part of their standard investigation practices. See, e.g., FLEM K. WHITED, III, DRINKING/DRIVING LITIGATION CRIMINAL AND CIVIL TRIAL NOTEBOOK §§ 5:8–5:8.1, 5.11 (West 2013) (discussing how to attack the accuracy of breath machines at trial); Michael S. Taheri & James F. Orr, *Litigating a Driving While Intoxicated Case*, 76 AM. JUR. TRIALS 213, at § 65 (2015) (“The likelihood of success when presenting an argument directed at the accuracy of a test will, in large part, be predicated on the quality of the pretrial investigation and trial presentation of the client’s theory of defense.”); see also *Top DUI Lawyer Mistakes*, LAW OFFICE OF JAMES C.

reviewing a lawyer's preparation for plea negotiations, and should hold such preparations to be a fundamental requirement for effective assistance of counsel.¹⁶⁵

Related to the requirement that defense lawyers investigate possible defenses to the underlying charges is the duty to investigate alleged prior convictions or enhancements.¹⁶⁶ For example, if there is an enhancement due to an allegation that drugs were sold in a "school zone," it is reasonable to expect the defense lawyer to verify that the location was in fact a school zone. Defense lawyers should also investigate any priors that are alleged and that form the basis for increasing the penalty due to habitual offender statutes. For example, if only felony convictions count for the particular habitual offender statute, then the defense lawyer should order the records on the prior to verify that the charge the defendant was convicted of was actually a felony and was not reduced, for example, to a misdemeanor.

2. Possible Pretrial Motions

The second basic determination a lawyer needs to make to be minimally competent in the negotiation preparation phase is whether there are possible pretrial motions, such as a motion to suppress evidence due to an illegal search.¹⁶⁷ A minimally competent defense lawyer should always ask basic questions about the circumstances of the police stop and the search. For example, if the reason for pulling over the car is a broken taillight, the defense lawyer should confirm that the taillight was in fact broken.

However, pretrial motions can be difficult for the defense to win. And, in some courts, the threat of running a pretrial motion can be a reason for the prosecutor to "pull all plea offers off the table."¹⁶⁸ It is also possible that the threat of a pretrial motion can act as leverage, particularly if the prosecutor thinks it is well founded, to get a better plea offer. Therefore, a minimally competent defense lawyer should know where, when, and how to use the threat of pretrial motions to a client's advantage. This is not to suggest that it is ineffective assistance of counsel to proceed with a pretrial motion even after the prosecution has threatened to increase

FORSLUND, <http://colorado-dui.com/parts/lawyer mistakes.html> ("[A] lawyer should get copies of the various logs, maintenance records, and the operator's license or certification.") (last visited Feb. 6, 2016).

165. For examples of cases in the appellate process that have as an issue the defense lawyer's failure to investigate, see *Ex Parte Harrington*, 310 S.W. 3d 452, 458 (Tex. 2010); *Henley v. Bell*, 487 F.3d 379, 387–88 (6th Cir. 2007).

166. See, e.g., *Harrington*, 310 S.W. 3d at 459–60 (holding that it was ineffective assistance of counsel for a lawyer to fail to investigate a prior conviction in a Driving While Intoxicated offense when the prior was used to elevate the charge to a felony). In *Harrington*, the defendant advised his lawyer that the prior was not his and the lawyer advised defendant to plead guilty without any further investigation into the alleged prior conviction. *Id.* The prior did not belong to the defendant. *Id.* at 455.

167. See NLADA PERFORMANCE GUIDELINES, *supra* note 12, §§ 5.1–5.2.

168. This is such a common problem that one blog asked for criminal defense lawyers to report instances of such conduct to the Florida Association of Criminal Defense Lawyers. Dexter Domini, *Johnny K Clocks Waxman*, JUST. BUILDING BLOG (May 12, 2014), <http://justicebuilding.blogspot.com/2014/05/johnny-k-clocks-waxman.html>.

the plea offer, or to revoke it if the motion is lost. In determining whether the lawyer was competent, the first question is: Did the lawyer know whether there were any possible pretrial motions? Secondly, did the lawyer fully advise the client about what might happen—including the probability of winning the motion—giving the client an opportunity to decide whether to proceed or take the deal? A lawyer should do both to meet the minimal standards of competency.

3. *Possible Additional Charges or Sentencing Enhancements*

The third basic determination a minimally competent lawyer needs to make in the negotiation preparation phase is to find out if the defendant could be facing more time due to additional sentencing enhancements or charges. A minimally competent lawyer should know the possible sentencing enhancements and ask questions to determine if any additional enhancements might apply.¹⁶⁹ Defense lawyers should also determine if there are other related charges that could be filed in the case. Prior convictions can add years to a defendant's sentence.¹⁷⁰ Prosecutors regularly allege prior convictions as part of the charging document.¹⁷¹ Rap sheets and other records of prior convictions can also be part of the standard discovery prosecutors give to defense lawyers.

The question, then, is what is the defense lawyer's duty when the prosecutor may not be immediately aware of the prior conviction? It can be a challenge for defense lawyers to find this information before the prosecutor does and to secure a plea deal without enhancements. Prosecutors often do not have information about prior convictions at arraignment when they make the initial plea offer.¹⁷² If they know the record is incomplete, they may delay making an offer, but prosecutors

169. Courts, however, have not yet held that there is a duty to advise about possible future penalty enhancements if a defendant takes a plea deal. *See, e.g.*, *United States v. Reeves*, 695 F.3d 637, 640–41 (7th Cir. 2012); *United States v. Richie*, No. 94 CR 633, 2013 WL 4082699, at *1 (N.D. Ill. Aug. 12, 2013).

170. For a discussion of how enhancements contribute to the power imbalance in plea negotiations, see Alkon, *supra* note 11, at 598–601, 603–05.

171. Prior convictions can change what crime is charged. For example, California Penal Code section 666 is a specific provision for the offense of petty theft where there is a prior conviction, so a prosecutor intending to charge for that specific crime will put the prior conviction into the charging document. *See* CAL. PENAL CODE § 666 (West 2016). Prior convictions can also act to enhance penalties and therefore need to be part of the charges filed. For example, federal prosecutors are advised that they “should regard the filing of . . . prior convictions as equivalent to the filing of charges.” U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.300 (2014), <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>.

172. Amending the charges to add prior convictions once they are discovered is a standard part of criminal practice. This regularly happened to my clients when I was a Deputy Public Defender in Los Angeles, often due to the Three Strikes Law. *See* CAL. PENAL CODE § 667 (West 2016). The most difficult example was with a client who had been charged with a second strike drug possession case. As a second-strike case her maximum penalty would have been six years in prison. The prosecutor, however, found a prior from another jurisdiction and planned to amend the charges to allege it as a third strike case, which carried a minimum penalty of twenty-five years to life in prison. Unfortunately, on the day the prosecutor planned to amend the charges, the judge called the case in my absence (I was next door handling a sentencing hearing after a jury trial). He did this despite the prosecutor advising him that I had not had a chance to advise my client about the serious change in the case. The judge called the case and my client was brought into the court with her two co-defendants. The prosecutor made the motion to

are often unaware that they do not have this information for a few reasons. For example, the prior may be from another state, so it may take a little longer to discover it, and it may not show up on the initial rap sheet.¹⁷³ Another common situation is that the prior may be under a different name, and the defendant's various "AKAs" may not have caught up with him.¹⁷⁴ This is a minefield for many defendants. And, this is an important issue in the context of discussing whether to accept or reject a particular plea offer as a defendant's prior convictions could radically change the possible punishment. A competent defense lawyer will routinely explain this to their clients.¹⁷⁵ A competent defense lawyer will also specifically ask a client if they have any priors that the defense lawyer does not currently know about.

However, as every defense lawyer knows, asking clients these questions does not always mean that they will receive truthful or accurate answers.¹⁷⁶ Sometimes defendants have serious cognitive deficiencies, causing them to neither understand nor be able to articulate their own prior convictions.¹⁷⁷ Sometimes defendants think that if they just keep quiet, their prior convictions will never be discovered.¹⁷⁸ Sometimes the priors are so old that defendants think they "aren't good"

amend the charges against my client and announced the new maximum penalty. As the prosecutor told me afterwards, as soon as my client heard the words "twenty-five years to life in prison," she fainted.

173. For example, in Tarrant County, Texas, the court records do not include prior convictions from any other county in Texas, much less from outside the state.

174. Defendants can have a variety of names for a number of reasons. Women who get married may change their names. People may have nicknames that they use, and some people give false names when they are arrested. Police officers may also write the name down incorrectly and that incorrect name could be listed as an "AKA." If a person had been arrested in multiple jurisdictions or has cases dating back a few decades under other names, it can take time for the prosecutor to sort it out and get every relevant case associated with that person alleged in the new case.

175. See ABA GUILTY PLEA STANDARDS, *supra* note 54, § 14-3.2 ("Defense counsel . . . should advise the defendant of the alternatives available and address consideration deemed important by defense counsel . . . in reaching a decision."). Commentary to section 14-3.2 states that "[a] defendant also needs to know the probable sentencing outcome." *Id.* § 14-3.2 cmt.

176. Client interviewing and counseling texts regularly discuss this problem as it exists with all clients, not only criminal defendants. See, e.g., KRIEGER & NEUMANN, *supra* note 151, at 104–06 (3d ed. 2007); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 247–68 (2d ed. 2004).

177. Up to ten percent of the prison population may be people with cognitive disabilities. See, e.g., Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, THE ARC (Aug. 2009), <http://www.thearc.org/page.aspx?pid=2458>.

178. When I was a Deputy Public Defender in Los Angeles, I regularly asked my clients a series of questions about prior convictions when handling cases where the priors could matter. This included any felony case in California (to determine if the client had a conviction that could be used as a strike under California Penal Code section 667, see CAL. PENAL CODE § 667 (West 2016)) and driving under the influence of alcohol cases where prior convictions changed the penalty and could—depending on the number of priors and the age of the prior—increase the case to a felony. See CAL. VEH. CODE §§ 23540, 23546, 23550 (West 2016) (penalties for driving under the influence with prior convictions within ten years). It was not unusual for a client to deny any priors and then when the prosecutor discovered and alleged the prior, the client would say a version of, "I didn't think they would find it."

anymore or have forgotten about them.¹⁷⁹ Regardless of why a defendant fails to give an accurate answer, the key in terms of analyzing whether the defense lawyer is competent is not whether the defendant gave the information, but whether the lawyer asked the question and explained its significance—including why the defendant should take the plea deal if there is any chance of a prior being found that could be used to enhance the sentence. Further, if the defendant acknowledges the existence of a prior that could be used to enhance the sentence, the defense lawyer should advise the client about whether to take the deal as offered without the additional enhancement. It may not always be advisable to take the deal even in the face of possible enhancements. If, for example, there is a strong defense or a strong likelihood that the case could ultimately be dismissed, a lawyer could competently advise his or her client to not plead guilty.¹⁸⁰

A minimally competent defense lawyer should also be aware of factual circumstances that could increase the defendant's maximum penalty.¹⁸¹ For example, the use of a gun or possession of a larger amount of drugs can add time to the possible maximum sentence.¹⁸² If there is a gun mentioned in the police report, or lab results with the weight of the drugs, but no gun or other appropriate enhancement added to the charges, a defense lawyer should recognize that there has been a possible oversight. A minimally competent defense lawyer will advise their client about the possible enhancement and, if the plea offer is an otherwise good deal, advise their client to take it before the enhancement is added.

B. *The Negotiation Phase of Plea Bargaining*

The specific question in *Frye* that Justice Kennedy did not want to address concerns what constitutes competence in the negotiation process.¹⁸³ There are

179. It is an understandable mistake as it is not always clear how long a prior can be used because there is not a single rule applicable in all cases. In addition, the laws can change. For example, prior to the Three Strike Law in California, there was no equivalent penalty and defendants were not advised about a possible three-strike sentence. In addition, many defendants suffer from cognitive disabilities, mental illness, or substance abuse that can make it more difficult for them to understand how and when prior convictions are valid and might be used against them.

180. Twenty percent of all criminal cases were dismissed in Texas in 2012 and some categories of cases had even higher dismissal rates. For example, 34.8% each of murder, sexual assault of an adult, and misdemeanor cases were dismissed. STATE OF TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2012, at 38 (2012), http://www.txcourts.gov/media/454873/2012-Annual-Report-2_1_13.pdf.

181. See, e.g., PAPERNO, *supra* note 132, at 73 (discussing questions to ask at the initial interview including if the defendant is on probation or parole and about any prior arrests).

182. See, e.g., CAL. PENAL CODE § 12022.53 (a)–(b) (West 2016) (“[A]ny person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.”).

183. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (referring to plea bargaining and stating that “it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process”).

three bright lines that the Court could look to in examining whether a lawyer's performance in the negotiation process itself meets basic competency standards: first, if the lawyer fails to even engage in plea bargaining and their client goes to trial and gets convicted; second, if the lawyer fails to make a counter-offer when there are grounds to do so; and third, if the lawyer is unaware of the "standard offers" in particular kinds of cases and their client pleads out to a substantially worse deal.

1. *Failure to Negotiate a Plea Deal*

Engaging in plea bargaining can be important due to the realities of the trial penalty.¹⁸⁴ Researchers report that defendants who go to trial and are found guilty can receive prison sentences that are over four times higher than those who plead guilty.¹⁸⁵ Defense lawyers should know the possible penalty their client could face, and at least seek a plea deal.¹⁸⁶ There is, of course, no right to a plea bargain, which means it is entirely within the discretion of the prosecutor to decide whether to offer a deal.¹⁸⁷ There are some cases, such as capital murder cases, where the prosecution makes no offer regardless of what the defense lawyer does.¹⁸⁸ However, even in cases where it is highly unlikely that the prosecution will make an offer, the defense should still ask.¹⁸⁹ As Jenny Roberts states, "the lack of a right

184. For a discussion of how the trial penalty impacts the negotiation atmosphere in plea bargaining, see Alkon, *supra* note 11, at 603–05.

185. See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 224–30 (2007) (discussing that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (reporting trial penalties ranging from thirteen percent to 461 percent, depending on the state and the offense); see also *Berthoff v. United States*, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001) ("Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible.").

186. For a discussion about whether it constitutes ineffective assistance of counsel to not engage in plea negotiations due to a highly adversarial style, see Batra, *supra* note 20, at 330–31 (addressing Justice Scalia's dissent to *Frye* in which he asked, "does a hard-bargaining 'personal style' now violate the Sixth Amendment?" (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1413 (2012) (Scalia, J. dissenting))).

187. See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."). With more serious cases, such as homicide, prosecutors may not make any offer.

188. For example, the U.S. Attorney's Office in Boston did not offer a plea bargain in the Boston Marathon bombing case to defendant Dzhokhar Tsarnaev. See Evan Perez, *Boston Bombing Trial Lawyers Fail to Reach Plea Deal*, CNN (Jan. 5, 2015, 5:19 PM), <http://www.cnn.com/2015/01/05/politics/dzhokhar-tsarnaev-trial-plea-deal-fails/index.html> (describing the Justice Department's resistance to removing the death penalty as a possibility). Tsarnaev was later convicted and sentenced to death. See Ann O'Neill, Aaron Cooper & Ray Sanchez, *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced To Death*, CNN (May 17, 2015, 3:46 PM), <http://www.cnn.com/2015/05/15/us/boston-bombing-tsarnaev-sentence/index.html>.

189. See ABA DEFENSE FUNCTION STANDARDS, *supra* note 83, at 205 ("Plea discussions should be considered the norm, and failure to seek such discussions an exception unless defense counsel concludes that sound reasons exist for not doing do.").

to have the prosecution make an offer or even engage in plea bargaining underscores the need for defense counsel who is effective at getting the prosecution to the bargaining table.”¹⁹⁰

This question was presented by the recent appeal of O.J. Simpson from his conviction for robbery. In that case, Simpson and five other men went to a hotel room in Las Vegas to “reclaim” what Simpson said was his property.¹⁹¹ Only Simpson and one of the other men went to trial. The other defendants pled guilty, some in exchange for testifying at trial or for providing a voluntary statement to the police.¹⁹² The men who pled guilty were sentenced to terms ranging from probation to forty-eight months in prison.¹⁹³ The fifth defendant was convicted after being tried with Simpson and appealed his conviction on the grounds that having Simpson as a co-defendant in the same trial was “undue prejudice.”¹⁹⁴ After his conviction was overturned, the fifth defendant pled guilty to a probationary term with time suspended.¹⁹⁵ All five men completed their probation before Simpson’s case came up on appeal.¹⁹⁶ Simpson was convicted at trial of twelve counts including kidnapping, assault, and conspiracy charges.¹⁹⁷ He was sentenced to a total of thirty-three years in prison and will be eligible for parole after serving approximately one third of that time.¹⁹⁸

Simpson appealed his conviction on a number of grounds, but the one that is most interesting for this discussion is his allegation that his defense lawyer failed to convey a plea offer.¹⁹⁹ The district court in Nevada dismissed this ground for appeal stating that “no evidence supports” that Simpson’s lawyer failed to convey a plea offer.²⁰⁰ There was conflicting evidence about what offer or offers were conveyed and the extent of the negotiation between the defense lawyers and prosecutors.²⁰¹ The court concluded that “the negotiations . . . lacked sufficient clarity to be considered a formal offer”; that Simpson’s lawyer did convey the offer and discuss the seriousness of the case with Simpson; and that because it was a package deal with the fifth defendant, and the other defendant refused the deal,

190. Roberts, *supra* note 7, at 2665.

191. See Nevada v. Simpson, No. 07C237890-4, 2013 WL 6237199, at *1–3 (Nev. Dist. Nov. 26, 2013).

192. See *id.* at *10–11.

193. See *id.*

194. See *id.* at *11.

195. See *id.*

196. See *id.* at *10–11.

197. The twelve counts were: conspiracy to commit a crime; conspiracy to commit kidnapping; conspiracy to commit robbery; burglary while in possession of a deadly weapon; first degree kidnapping with use of a deadly weapon (two counts); robbery with use of a deadly weapon (two counts); robbery with use of a deadly weapon; assault with use of a deadly weapon (two counts); and coercion with use of a deadly weapon (two counts). See *id.* at *11–12. At sentencing, two of the charges were dismissed as redundant to the kidnapping charges. *Id.*

198. See *O.J. Simpson Gets Up to 33 Years in Prison*, CBS NEWS (Dec. 5, 2008), <http://www.cbsnews.com/news/oj-simpson-gets-up-to-33-years-in-prison/>.

199. See *Simpson*, 2013 WL 6237199, at *25–26.

200. See *id.* at *26.

201. See *id.* at *25–26, *42–43.

there was not a valid offer.²⁰²

The Simpson case presents a few interesting questions. First, what should a defense lawyer do if a client declares, “I’m not going to take more than county jail time”? One version of events in the Simpson appeal is that Simpson was adamant that he would not take prison time, and did not understand why he could not get the probationary deals the prosecution was offering to other defendants.²⁰³ Clients regularly make such declarations, and, equally, regularly back down from them. Competent assistance of counsel requires a defense lawyer to negotiate the best possible deal for the client and then to convey that offer. Due to the trial penalty, a client’s declaration that they will not take any deals, or only take a deal with a certain amount of jail time, or no jail time, should not prevent a competent defense attorney from engaging in serious negotiations with the prosecution for the best possible deal. And, if a fair offer is made, even if it is higher than what the defendant states he wants, a competent defense attorney should fully advise a client about the consequences of failing to take the deal. The district court in Nevada found that Simpson’s lawyer did fully advise him of the consequences.²⁰⁴

A second question coming out of the Simpson case is whether it constitutes ineffective assistance of counsel to not get a formal offer on a case where it is possible to do so.²⁰⁵ There were different accounts of whether there was even a final plea offer and what its terms were, or whether there were merely “preliminary discussions” and no formal offer.²⁰⁶ It is also unclear whether there were any serious discussions about the “package deal” with the fifth defendant and whether the prosecution would have ultimately allowed Simpson to plead separately.²⁰⁷ In Simpson’s case, with its multiple charges and potentially long sentence, basic competency requires serious plea negotiations and a concerted effort to get a final offer from the prosecution.²⁰⁸ There are a number of factors to look to in determining whether basic competency has been met under these circumstances. First, did the lawyer ask for an offer? If the prosecution refused to make an offer or insisted it had to be packaged with other defendants, did the lawyer push on this

202. *See id.* at *43.

203. *See id.* at *42–43.

204. *See id.* (“Mr. Galanter conveyed the offer to Mr. Simpson and advised him of the seriousness of the case . . .”).

205. *See Roberts, supra* note 7, at 2664 (“[I]f the prosecutor does not make an offer, must defense counsel take steps to explore the alternatives? It is difficult to conceive of a counsel’s role, particularly in a system where so many cases are resolved through bargaining, that does not include such a duty.”).

206. *See Simpson*, 2013 WL 6237199, at *41–43.

207. *See id.* at *43 (“To the extent that an offer was made, that offer was contingent on both defendants accepting the offer. Mr. Stewart declined to resolve the case, so Mr. Simpson would not have been able to accept the offer under the State’s terms.”). It is unclear, however, if the State would have agreed to make a separate offer as it seems Simpson’s lawyer never asked.

208. *See Roberts, supra* note 7, at 2666–67 (referring to the ABA Standards for Criminal Justice “Duty to Explore Disposition Without Trial,” which states that pursuing plea discussions “should be considered the norm, and failure to seek such discussions an exception”).

point? Prosecutor's offices are hierarchical structures. The final decision maker is usually up the chain of command. If a defense lawyer does not get the offer they want from the prosecutor assigned to the court, basic competency may require—depending on the jurisdiction—that the defense lawyer try to get the offer from a supervisor, or wait until the day of trial.²⁰⁹

2. *Failure to Make a Counter Offer*

The second bright line that the Court could look to when determining basic competence during the negotiation phase is whether the defense lawyer failed to make a counter-offer. However, not every plea negotiation requires extended offers and counter-offers.²¹⁰ As will be discussed below, there are cases with standard offers where—in the absence of a reason to justify a better deal—it is not incompetent assistance of counsel to fail to actually bargain and for the defendant to accept the first offer the prosecutor makes. Yet, there are circumstances where failing to try to get a better offer could be ineffective assistance of counsel. If the defendant has a viable defense, this can be grounds for a better offer from the prosecution. Depending on the discovery laws in the state, the defense may not be required to divulge their defense to the prosecution until trial.²¹¹ Defense attorneys in these states are often reluctant to give information to the prosecution because surprising the prosecutor at or near trial creates a tactical advantage.²¹² However,

209. In more serious cases, prosecutors sometimes become more agreeable to making a better offer when they are about to impanel a jury—especially in high volume urban courts when it is a day that the courts are full. Aging cases may also help to get better deals as the evidence becomes weaker or due to an “unexpected pretrial or trial development.” See HERMAN, *supra* note 141, at 80.

210. Defendants commonly accept the prosecutors' offer. See Lande, *supra* note 110, at 15–16.

211. If the defense does not involve the introduction of evidence or witnesses beyond the prosecution case, there is nothing for the defense to reveal before the trial begins. However, generally, under reciprocal discovery laws, the defense is required to turn over evidence and witness names that they intend to introduce at trial. See, e.g., CAL. PENAL CODE § 1054.3(a) (West 2016) (“The defendant and his or her attorney shall disclose to the prosecuting attorney: (1) The names and addresses of persons, other than the defendant, *he or she intends to call as witnesses at trial*, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons *which the defendant intends to offer in evidence at the trial*. (2) Any real evidence which the defendant *intends to offer in evidence at the trial*.” (emphasis added)). Some states have time limits built into their laws and are not dependent on when a defense lawyer may “intend” to offer the evidence at trial. See, e.g., GA. CODE ANN. § 17-16-4 (b)(1), (b)(3)(C) (West 2015) (requiring the defense to turn over required discovery to the prosecution “no later than five days before the trial” is due to begin).

212. Reciprocal discovery laws were fairly new in California when I first started working in the Los Angeles County Public Defenders office in the early 1990s. More experienced defense lawyers had not been obligated to turn over any information before trial and recommended turning over as little as possible as late in the process as possible. Because the laws were new, our training programs routinely covered how to handle discovery including advice to not turn over defense witness names and other information until we were sure the case was going to trial and we could therefore “intend” to offer the evidence. Due to the frequency of plea bargaining, we had regular discussions about when we “intended,” with some deputy public defenders maintaining they did not intend until the trial actually began. One problem with this approach is that judges can exclude the evidence if they find that the defense has not complied with discovery obligations. See, e.g., CAL. PENAL CODE § 1054.5(b). For a discussion

for a variety of reasons, defendants may be unwilling to take their case to trial. The decision of when, where, and how much information the defense should turn over to the prosecution can be a difficult tactical question. And, a defense lawyer's decision of whether to turn over information is likely an area that the courts will be hesitant to second-guess in the absence of a clear reason to do so.²¹³

The question is whether there is ineffective assistance of counsel in the negotiation process because the defense lawyer failed to engage in any meaningful negotiation and the defendant accepted the first offer made. To answer this, one factor to consider is whether there was information that could have assisted in the negotiation that the defense lawyer failed to use, and whether that failure was due to a legitimate tactical decision.²¹⁴ For example, did the defense lawyer fail to point out that their client had no criminal record and make a counter-offer requesting diversion or a reduced sentence? If the prosecution's case is weak, did the defense lawyer make a counter-offer pointing out those weaknesses? There can be tactical reasons to not raise the weaknesses in the prosecutor's case. However, experienced defense counsel understand that the prosecutor can often figure out their possible defense. For example, in a driving under the influence of alcohol case, the defense is either: The defendant wasn't under the influence, or the defendant wasn't driving. If the defense is based on a problem with the evidence gathered—for example, the breath machine had documented maintenance problems—turning that information over to the prosecution has few downsides. The documentary evidence is not going to change and it is strong evidence for the prosecutor to use to either reduce the charge or dismiss the case. In this kind of a case, failing to engage in negotiation with this additional information would be ineffective assistance during the plea negotiation process.

3. *Failure to Know the "Standard Offers"*

The third bright line that the Court could use in examining whether a lawyer was competent during the negotiation phase is to determine if the lawyer knew the standard offers in the particular jurisdiction for similar cases. Leading negotiation literature recommends that negotiators learn what the other side may agree to and

of the tactical questions surrounding when the defense should reveal information, see PAPERNO, *supra* note 12, at 161–62.

213. This would be consistent with the general approach the Court has taken when evaluating defense lawyer competency starting with *Strickland* in 1984. See *supra* Section II.A and accompanying notes 60–67.

214. A related concern, discussed *supra* in Section IV.A, arises if the lawyer fails to do the basic preparation in the case and does not find out information such as if there is a defense. As discussed above, a lawyer who fails to do basic case preparation is providing ineffective assistance of counsel. The question here is premised on the assumption that the lawyer knows the information, and considers whether it is ineffective assistance to fail to use it in the context of plea negotiations.

generate options.²¹⁵ Part of negotiation preparation is trying to determine the possible outcomes for the negotiation.²¹⁶ In civil cases, this can mean knowing what the insurance limits are. In criminal cases, the first question to ask is what is the maximum punishment for the crime charged? But, as Stefanos Bibas points out, this is the equivalent of the “sticker price” for a car as “only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”²¹⁷ The more important question is what is the standard offer for this type of case?²¹⁸ There are cases that do not have standard offers because they are more complex, more varied, or more politically volatile.²¹⁹ But, cases such as drug possession, driving under the influence of alcohol, and drug sales lend themselves to standardized treatment depending on the defendant’s record and the severity of the case (for example, was the blood alcohol level .10 or .18?). Defense lawyers should learn what to expect before making any recommendations to their client. And, if the defense lawyer learns that the offer is not “standard” for the particular court, she should use the standard offer to negotiate for a better deal.

Defense lawyers who practice in the same court for any period of time quickly learn what is standard. The challenge is for lawyers who are new to the courthouse or for lawyers generally to have a sense of standard offers in a jurisdiction as a whole. For example, Los Angeles County has over forty courthouses.²²⁰ California is not a sentencing guideline state, so there is no enforced uniformity beyond the maximum sentences in the California Penal Code.²²¹ The “standard offers” can vary greatly between, for example, the court in Compton and in Norwalk. The way to learn what to expect is to talk to lawyers practicing in the particular courthouse. Stefanos Bibas criticizes the lack of easy and open access to this information, and suggests collecting and distributing such information through sentencing commissions.²²² Depending on the jurisdiction, publicizing plea deals in the absence of full information about the cases could be a political hot potato that could result in worse deals as prosecutors will not want to be publicly seen as “going easy” on

215. See *GETTING TO YES*, *supra* note 99, at 42–81. Option generation is a concept that may have limited value in plea bargaining. See Alkon *supra* note 11, at 605–08 (discussing the inapplicability of the negotiation concept of Best Alternative to a Negotiated Solution (BATNA) in plea bargaining).

216. See, e.g., Andrea Kupfer Schneider, *Aspirations in Negotiation*, 87 MARQ. L. REV. 675 (2004); SHELL, *supra* note 107, at 31–34.

217. Bibas, *supra* note 37, at 1138.

218. See Roberts, *supra* note 7, at 2671 (arguing that both likely trial outcomes and plea discounts are “baselines for negotiation”).

219. The federal system and states that have sentencing guidelines may have more standardized approaches even with more serious offenses.

220. See *Courthouses in Los Angeles County*, SUPERIOR COURT OF CAL.: CTY. OF LOS ANGELES, <http://www.lacourt.org/courthouse> (last visited Nov. 24, 2015).

221. California is not one of the twenty-one states with sentencing guidelines. See NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (July 2008), http://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx.

222. See Bibas, *supra* note 37, at 1160.

defendants. Jenny Roberts and Ronald Wright suggest a different approach that could avoid this unintended consequence, which is that defender offices themselves could collect this information.²²³ If data were collected “in-house,” it would give defense lawyers a place both to find out what the going rates are, and to confirm the going rate. However, in terms of basic competency, in the absence of good data collection, defense lawyers who are new to a court should ask their colleagues what is normal in similar cases. A defense lawyer who fails to make these basic inquiries before negotiating a plea deal, or at a minimum before counseling a client about whether to accept the deal, is providing ineffective assistance of counsel.

C. *The Counseling Phase of Plea Bargaining*

Client counseling can be extraordinarily complicated and lawyers struggle with how to best communicate with their clients, particularly if they are juveniles or suffer from cognitive disabilities.²²⁴ The Court has already established three basic areas of minimum competency during the client counseling phase of plea bargaining. First, as *Lafler* states, a defense lawyer should know the law and accurately advise the defendant about their chances at trial in the context of giving advice about whether to accept a plea deal.²²⁵ Second, as *Frye* stated, a lawyer should advise their client of all plea offers.²²⁶ Third, a defense lawyer should advise their client about the collateral immigration consequences of a guilty plea.²²⁷ A fourth area that the Court has yet to establish is that minimum competency requires that a defense lawyer know the possible maximum penalty in the case and advise the client correctly about their possible sentence if they are convicted.²²⁸

Competent negotiation requires that defendants understand what will happen if they do not agree to the plea deal. In negotiation terms, this is often referred to as the Best Alternative to a Negotiated Agreement (“BATNA”).²²⁹ Due to the trial penalty, there is a question about whether trial can be considered a “best alternative” to a negotiated agreement in the context of plea negotiations.²³⁰ However, a defendant cannot evaluate whether a plea offer is good, or a trial is

223. See Roberts & Wright, *supra* note 128 (draft at 35) (“[D]efender offices need to collect—and, in many jurisdictions, start to collect—better data to support their negotiations.”).

224. See generally Abbe Smith, “I Ain’t Takin’ No Plea”: *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007) (discussing the challenge of counseling juvenile defendants about whether to go to trial or take deals in more serious cases).

225. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012).

226. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

227. See *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010). If it is unclear what the immigration consequences will be, the attorney should advise the client about the uncertainty. *Id.*

228. See, e.g., *Garcia v. United States*, 679 F.3d 1013 (8th Cir. 2012).

229. See GETTING TO YES, *supra* note 99, at 97–106. For a discussion of the BATNA as applied to plea bargaining, see Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997).

230. See Alkon, *supra* note 11, at 605–08.

worth the risk, without knowing what the maximum possible sentence could be if he is convicted. Sentencing laws can be complicated. It is not always easy to calculate the possible maximum.²³¹ However, this is basic information that every defendant needs to know as part of the counseling process to decide whether to accept a plea deal or not. Understanding and being able to calculate the maximum sentence accurately is basic competency for any criminal defense lawyer in the counseling phase of plea bargaining.

CONCLUSION

Nearly every defendant convicted of a crime in the United States is convicted through the plea bargaining process.²³² Through its decisions in *Lafler* and *Frye*, the Supreme Court is finally showing a willingness to more critically examine plea bargaining to better protect defendants' rights. However, thus far, the Court's failure to understand negotiation has limited their focus to a single phase of plea bargaining: The client counseling phase. It is time that the Court move beyond this narrow focus and recognize the right to competent assistance of counsel during all phases of plea bargaining. As this Article illustrates, doing so does not require the Court to do something that is neither "prudent nor practicable."²³³ Rather, the Court needs to simply apply the already established standards in negotiation to the plea bargaining context.

It is true that negotiating plea bargains is different from negotiating civil cases, which is different still from negotiating a transactional deal. While these differences may mean that some negotiation theory is less applicable in the plea bargaining context, there are still basic standards of competence in negotiation that ought to apply regardless of the type of case being negotiated. The Court can and should address how to better define basic competency in the context of plea bargaining—the predominant process used to resolve criminal cases in this country. To do so requires the Court to look beyond the view that negotiation is simply about style, and to recognize that negotiation is a key lawyering skill; and as such, can and should be subjected to analysis and scrutiny to ensure that every defendant enjoys their basic constitutional right to counsel not only during trial, but also during plea bargaining.

231. The O.J. Simpson case is a good example with twelve charges some of which would run concurrently and some of which could run consecutively. See *Nevada v. Simpson*, No. 07C237890-4, 2013 WL 6237199, at *6–7 (Nev. Dist. Nov. 26, 2013).

232. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); see also Galanter, *supra* note 2, at 495 ("From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13 percent to 15 percent. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001): from 12.6 percent in 1991 to less than 4.7 percent in 2002.").

233. See *Frye*, 132 S. Ct. at 1408.