
TOUCHING TENNIS TALES

STATE V. MILLER

NEGOTIATION

[CRIMINAL PLEA BARGAINING]

Teaching Note

This negotiation simulation presents a criminal case in which a young man (age 24)–Matthew Miller - became entangled with a female high school senior (age 17) – Jane Dowd -and state sexual predator laws, as they apply to school coaches. Mr. Miller is a skilled and avid tennis player. He had been a high school Spanish teacher and women’s tennis coach and was aware of state law prohibitions against teachers having sexual contact with a student. After a few years of teaching, Miller took a job in tech but continued to coach the women’s tennis team.

It seems that Miller mistakenly thought the state laws against dating relationships with students applied only to teachers, not coaches. “At the start of the tennis season, Matt told some female team members it was okay to text with him because he was no longer their teacher. That's when the flirting, texting, snap chatting, and twittering began in earnest.”

There’s no dispute that there was mutual attraction and plenty of flirting between Miller and Dowd.

At some point, Miller suggests a private, paid tennis lesson for Dowd on a Saturday – a relatively common practice among school tennis coaches. Dowd secures her mother’s permission, and the tennis lesson occurs. After the lesson, Miller offers to drive Dowd home; Dowd invites him in, knowing her mother will not be there. After a cold drink and friendly banter, they talk about “fooling around” and proceed up to the bedroom. As described in the case text, what happened next is sit-com material: [after some kissing]

Sitting on the bed, Matt off his shirt and placed his hand on Jane’s thigh but they were otherwise still clothed when they heard the garage door open! Jane’s mother had come home from work early. Shirt in hand, Matt ran past Mrs. Dowd and drove away.

What happened next complicates the problem, as the prosecution sees it as an attempted bribe. As stated in the simulation:

That evening, Ms. Dowd's parents contacted Mr. Miller and demanded an explanation. Mr. Miller and his parents came to the Dowd house immediately. After an unconvincing attempt to concoct a story (some juice spilled on my shirt), Mr. Miller eventually admitted to being in Ms. Dowd's bedroom. Mr. Miller said he was very sorry and embarrassed and asked them not to tell anyone else. Mr. Miller's mother pleaded with the Dowds, asking them not to ruin her son's life and asking: "What it would take to let it go" and "How could we help your daughter?" The Dowds interpreted this as an offer of compensation, and the police later saw it as an attempted bribe. Mr. Miller's parents say they just wanted to help the Dowds get counseling for Jane.



The Dowds did contact the police, who charged Mr. Miller with one count of Attempted Sexual Battery, a third-degree felony under state statute. Even though Jane Dowd appears to have consented if there was "sexual conduct" (involving penetration), that would constitute a crime under the statute because Mr. Miller was a coach at the victim's school. On the current evidence, the police charged it as an attempt, rather than an actual Sexual Battery.

From a negotiation and plea-bargaining perspective, the attorneys must attempt to meet their clients' interests.

Prosecution's Interests and Concerns:

Not surprisingly, the prosecutor is concerned about public perception, Jane Dowd, her parents, and generally protecting the public. Here is a shortened version of the state's interests and concerns listed in the simulation:

- Some community members and a local radio personality have been vocal about predators going to prison.
- Jane Dowd is tearful and feels guilty and sorry for Matt– for whom she cares. She is confused and feels bad for her parents too.
- Jane Dowd's parents want Mr. Miller to be forced to register as a sex offender so that he never coaches youth again. They are not adamant that he serve prison time but seek substantial supervised probation (more than 5 years) and public warning for as long as possible. They are also concerned about paying for some counseling for Jane. (The prosecutor thinks family counseling might be a good idea.)
- The prosecutor recognizes that the more this case is publicized, the more it harms Jane too. And Jane might suffer even more if the consequences are harsh for Mr. Miller.
- The prosecutor anticipates (correctly) that Mr. Miller will want to avoid prison at all costs and will not want to register as a sex offender. However, he may be willing to be on probation or do community service or some such and would likely agree not to coach through any school.

Defendant's Interests and Concerns

Here is a shortened version of the defendant Matt's interests and concerns, listed in the simulation:

- Matt knows (and worries) that Jane is upset and tearful and feels guilty and confused.
- Matt's priorities are avoiding prison at all costs and not registering as a sex offender.
- Matt thinks it's unfair that he would be charged or stuck with a criminal felony record when he didn't know he was doing anything wrong. He knew that Jane Dowd was 17; he was no longer her teacher; he was interested in a relationship with her. That shouldn't be a crime! If he had known that such a relationship was still illegal for coaches, he never would have done it. There was no coercion or pressure. Flirting was mutual. Jane contacted him about



the private lesson offer and invited him into her house. Only Matt was shirtless when her mother came in. Matt apologized. No harm was done.

- Matt is worried about having to reveal a criminal felony conviction on future job applications. It would be far better to plead to a misdemeanor, such as trespassing.
- Matt doesn't want to register as a Sex Offender, because he knows that will restrict where he lives while also branding him in such a way that it may prevent him from getting future work. It may even get him fired from his current job.
- Matt is willing to do anything "creative" that will enable him to avoid a criminal record or registering as a Sex Offender.
- Matt (likely with help from his parents) is willing to pay for any psychological counseling Jane needs. How much could that cost? Imagine 20 sessions at \$250 each; that would only be \$5,000. The Millers would gladly pay that much, maybe more. Matt is employed; he can or will soon be able to afford it.
- Only if necessary, Matt has authorized his lawyer to agree to plead guilty to the Attempt, be on probation, and agree not to coach through any school. (If possible, Matt would like to build his side business in private tennis coaching at a local club. If necessary, he would be willing to restrict his tennis clients to post-high school graduates, at least for a while.)

The simulation materials contained detailed summaries of the constraints set by Ohio Law for coaches' or teachers' sexual contact with students, and the sexual predator registry requirements. When one pleads to or is found guilty of certain sexual assault actions, the predator registry rules can't be waived or avoided. They are automatic and severe.

Zones of Agreement

Whether the parties will agree, and what they will agree to have everything to do with the way they interpret the facts, how the "narrative" is presented, and frankly, what their leanings/backgrounds are. Plea agreements from an Attempted sexual assault, long probation, and even potential registration as a sex offender are possible – though not favorable to the defendant. Better for the defendant, and also possible would be a plea to a trespassing misdemeanor (anything that doesn't involve a sexual predator registry), shorter probation supervision, restrictions against future coaching for anyone underage, etc. Financial contribution to Jane's counseling therapy is fine and might help alleviate Matt's feelings of guilt too. One problem with harsher terms for Matt is that these could prove harmful to Jane's emotional health too, as backlash from her tennis team friends is likely.

What does effective negotiation look like in this case?

I am happy to report that I've used this case in my negotiation course, with law students and at least once, a panel of experienced prosecutors and defense attorneys. In the course of a project to create a criminal plea-bargaining video using this case, I've discussed and tested it with a considerable number of attorneys on both sides. Before shooting the final videos, I conducted at least 4 or 5 "test runs" with different sets of prosecutors and defense lawyers. Both the test runs and the final video project yielded the following insights, which confirm much of the wisdom in the negotiation field.



- People can and do interpret facts differently based on their experience and role. In this case, I had included a detail to the effect that the tennis coach knew he couldn't have a relationship with a student while a teacher and had obeyed that rule. The case states that he had waited to start a previous relationship with a young woman only after she graduated. These facts were used by some to say that he was a serial predator, a groomer of young women. (I had written them in to suggest he was a rule follower and wouldn't have so much as flirted with Jane Dowd if he had realized the restrictions applied to non-teachers.
- The way the lawyers characterize the defendant – the narrative – matters greatly. If the prosecutor comes to *believe* that Matt is young, socially immature (techie), his feelings for Dowd were real (and mutual), thought he was following the rules, is very sorry, etc., and is not any future threat to the community – lighter plea terms are possible. Does the prosecutor want to ruin his life?
- It may be worth (gently) noting that the victim (Jane Dowd) will likely suffer more if his punishment is harsh, even if her parents don't see that at the moment.
- Instead of starting the conversation, with "How about reaching a deal..." it's important for the defense to begin painting a picture of the defendant EARLY. That will color the prosecutor's thinking thereafter.
- Prosecutors and defense attorneys are repeat players. Particularly in a small county (and frankly even in a large one) they will negotiate many plea agreements. While defense counsel should effectively represent their client's perspective and interest, they should never flip or fail to respect the prosecutor's role.
- Especially because a prosecutor often has dozens of files on any given day, defense counsel should be prepared and fully knowledgeable about their case. However, they should not seek to hide negative facts when describing the case to the prosecutor. Acknowledge what might be problematic. Yes, explain, but don't hide. When the prosecutor sees the police reports, text messages, and other evidence, they will know if the defense counsel has misrepresented the case. This will not serve the client well.
- A full plea bargain would not likely be reached upon the first discussion of this case. Both sides would want time to confer with actors on their side: the prosecutor with the police, the victim, and her parents; defense counsel with the defendant and, likely, his parents. They would need to interview witnesses, review reports, etc. It bears repeating that defense counsel is wise to begin characterizing the defendant and the not-so-evil narrative of what happened.

As referenced earlier, I did create a video of experienced prosecutors, defense counsel, and a sitting judge (formerly a prosecutor and defense counsel) negotiating a plea bargain for this case. The entire project was initiated by Suffolk University Law Professor Dwight Golann and funded by the Dispute Resolution Program there. University of Cincinnati College of Law also provides support through the video-editing work of AV Specialist Michael Mimms, and other research assistants. As you'll see when viewing the video, it's a series of short clips, organized around how NOT to negotiate this plea, and then more skillful and strategic ways to approach it. In the final segment, after the plea is presented in chambers, all of the lawyer participants discuss the plea-bargaining process. The video is available at: <https://www.adrvideo.org/negotiation/>. The password is "adrteacher123".

If you have any trouble with this, please feel free to contact me or Dwight: aaronmc@ucmail.uc.edu, Marjorie.aaron@gmail.com, or dgolann@suffolk.edu.