PLEA BARGAINING IN THE UNITED STATES

Phase I Report

EXECUTIVE SUMMARY AND POLICY IMPLICATIONS

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Introduction

There have been empirical studies of plea bargaining in particular jurisdictions, but an approach geared to a national perspective has not occurred. Phase I of the study attempted to determine if issues previously discussed in connection with plea bargaining arise in a representative sample of jurisdictions. Conversely, we wished to ascertain if they were primarily indigenous to the specific jurisdictions studied.

A national examination of plea bargaining was necessary at this time because major studies previously published were based on field work completed over a decade ago. Since that time there has been increasing public concern about the issue and important Supreme Court decisions have profoundly affected plea bargaining. There have been also major recommendations made by national commissions and organizations both applauding and condemning plea bargaining.

Phase I research covered many of the issues addressed in previous research. The special contribution of this project is two-fold: 1) To provide a current look at the practices of plea bargaining and assess the direction of trends over the last decade; 2) To provide a broad national view, based on a substantial number of jurisdictions (30), as to how representative these issues are for all jurisdictions in the United States, and thus determine whether the policy implications are applicable to most jurisdictions.

EXECUTIVE SUMMARY AND POLICY IMPLICATIONS

Chapter One: OVERVIEW

What is Plea Bargaining?

There is no common definition of plea bargaining in general use throughout the United States, thus clouding discussions of plea bargaining issues. Moreover, the word "bargaining" has unpleasant connotations, causing some actors to deny that it exists. Allegations that plea bargaining has been abolished should therefore be approached skeptically. "Explicit" and "implicit" bargaining occurs. Explicit bargaining is specific. Where it is implicit defendants can "reasonably expect" certain dispositions, even though no overt bargaining has occurred. The kinds of agreements and dispositions can vary, depending on the circumstances of the case. Finally, not all criminal justice actors agree as to what elements constitute a plea bargain (whether it be some charge dismissals, a charge reduction, or an agreed upon sentence recommendation).

This study defines plea bargaining as "the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state."

The Extent of Plea Bargaining

Data available from 20 states indicates that the rates of pleas differ between jurisdictions. There appears to be little correlation between such rates and population size. One study

indicates that rural prosecutors accept plea bargains more readily than prosecutors in larger jurisdictions; another that relationships within a court system are the dominant factor in plea bargaining, with no correlation between plea rates and size of jurisdiction. These studies and data raise questions concerning assumptions about costs and caseload pressure in relation to plea bargaining.

In addition to varying plea rates, there are substantial differences in terminology and ways in which cases are counted. In counting cases most jurisdictions count defendants; some count the number of counts in an indictment. How cases are counted can make fundamental differences in terms of a statistical picture of plea rates, convictions and dismissals. Such terminological and counting differences cause difficulties in precisely assessing the meaning of the data.

The sparse data on plea rates, combined with counting and terminological problems, raises questions as to whether adequate data exists upon which to base generalizations about the influence of caseloads and consequent costs on plea rates.

Types of Plea Bargaining

The project classified plea bargaining in two ways, explicit and implicit. Both kinds can occur in one jurisdiction; but in 27 of 30 jurisdictions explicit plea bargaining was dominant, particularly in felony cases. Explicit plea bargaining involves overt negotiations between two or three actors (prosecutor, defense attorney and judge) followed by an agreement on the

terms of the bargain. Implicit bargaining involves an understanding by the defendant that a more severe sentence may be imposed for going to trial rather than pleading guilty. Defense attorneys can, however, be clear in advising the defendant of this probable outcome.

Where explicit plea bargaining occurs concessions may include charge modification, sentence agreement or both. The variety of sentence concessions or actors involved in the bargaining process may be virtually unlimited. Five major types of explicit plea bargaining were identified:

1. Judges participating and indicating the sentence.
2. Modification of charges by the prosecutor.
3. Prosecutorial agreement to make a sentencing recommendation.
4. Combination of 2 and 3.
5. Combination of 1 and 2.

Many jurisdictions had more than one type even though one or two types were dominant in each jurisdiction. The most common pattern involved charge modifications and sentence recommendations by the prosecutor (4). The second most common involved charge modifications alone (2). In one jurisdiction prosecutorial sentence recommendations are the dominant pattern; another combined charge bargaining and judicial indication of the sentence. In some jurisdictions judicial participation is substantial, although a minority of the judges may be so involved because of the way cases are assigned.

Chapter Two: THE PROSECUTOR'S ROLE IN PLEA BARGAINING

I. Background: Prosecutorial Discretion

The United States prosecutor began as a small town part-time position emphasizing traditional legal orientation towards the individual case. At the turn of the 19th century the growth of cities and increase in crime caused the prosecutor to begin modifying this role. The concentration of population continued after World War II. Many prosecutors in metropolitan jurisdictions now assume managerial and policy making roles.

Historically the inevitability and the desirability of prosecutorial discretion in screening and charging has been recognized. There has been an evolving role which judges have played in the plea bargaining process primarily as to the sentence imposed, a traditional judicial function. But prosecutors now more frequently than in previous decades make sentence recommendations or have established policies regarding sentence recommendations. Reaction from judges has been mixed.

Few jurisdictions have established a systematic and rigorous procedure to control the discretion exercised by assistant prosecutors in disposing of cases. Where this is done involves one of the following: 1) the chief prosecutor reviews the bargain in complex and serious cases; 2) a floor offer is established for particular crimes and clearance is required from a senior deputy for any variances; or 3) detailed standards are promulgated to guide assistants in the negotiating process. In other jurisdictions the chief prosecutor makes no such effort, stating that as professionals the assistants are free to exercise discretion.

Most new assistants learn to weigh competing goals and various factors through a process of socialization as to the norms of the courthouse. This usually involves working with a more experienced prosecutor and learning through trial and error.

II. Information and the Decision to Bargain

The prosecutorial decision to bargain occurs after consideration of a number of factors. Studies and project findings indicate that most prosecutors consider the strength of a case as an important factor prior to making a decision. Two other important factors relate to the seriousness of the offense and the prior record and reputation of the offender. Offense seriousness is frequently evaluated on the basis of its impact on the victim. The offender is viewed in terms broader than just the prior record. Information from a variety of sources is used to assess the offender in the community and any reputation as a "troublemaker".

Other factors are considered, including the reputation of defense counsel, how the police report the incident and their attitude towards the defendant, applicable sentencing provisions, the victim's account of the incident, the offender's prior relationship with the defendant, if any, and the offender's attitude towards the defendant (most frequently for the crimes of rape and assault).

Some studies found that underlying these specific factors are such constants as the caseload and other pressures on the

system (i.e., community attitudes). However, in individual cases these constants were not always crucial to the disposition of that case.

In general the ability of a prosecutor to make a rational decision stems from the information available at the decision making point. How this information is processed, how it is weighted or controlled, where it comes from, at which point in the process it is presented, and its methods of processing and use within a prosecutor's office, plays a key role in the prosecutorial decision making process.

In many jurisdictions police/prosecutor relationships can determine how police information is received, processed and used. The police supply two types of information: (1) the formal background of the defendant (rap sheet); and (2) their account of the crime and other information they regard as relevant. Prosecutors differ in their willingness to accept police evaluations at face value. Prosecutors and defense attorneys may attempt to influence the nature of the police description of a crime or police assessment of the defendant.

The victim may play an important role in the prosecutor's assessment of a case, particularly as to the qualitative information on which a decision may be based. Victim information can influence the prosecutor as to the seriousness of the offense or the offender.

Defense counsel may influence the supply, interpretation and control of information. In general defense counsel attempt

to ameliorate the potential harshness of the charge and sentence through information about the defendant's character indicating worthiness to receive a break.

Roles played by different actors may be evaluated in terms of their contribution to the information process. Systems vary as to who performs informational tasks and the degree to which there is a division of labor to perform them. This may be determined by the size of the jurisdiction, the relationships between the prosecutor and law enforcement agencies and the nature of the courthouse organization.

How information is processed and used may also depend on the going rate or market value of particular cases. And this consideration may be complicated by which particular assistant is handling the case. Assistant prosecutors may differ in their conclusions about the strength of the case and the seriousness of the offender.

The key factor of the strength of a case in the decision making process, combined with the pressures to move cases through guilty pleas, raises the question of whether innocent defendants can be convicted.

Can Innocent Persons be Convicted?

The presumption of innocence is at the heart of American jurisprudence. It means there can be no guilt until an adjudication of such guilt by a legally competent authority. The presumption directs officials how to proceed in a case and is in effect a command to ignore factual

guilt where the factual determination is adverse to the suspect and answers to legal questions which are favorable to the suspect may result in legal innocence.

Factual Innocence

Factual innocence or guilt relates to whether or not in fact the defendants committed the act charged. Actors in the system differ as to whether or not factually innocent defendants plead guilty. Most prosecutors and defense attorneys believe factually innocent people do not plead guilty. Almost all prosecutors assert they would not proceed with a case where they felt the defendant was in fact innocent.

Prosecutors differ as to the nature and scope of evidence for them to be convinced of a defendant's factual guilt. Almost all prosecutors say they do not engage in plea bargaining if there is no factual case. Most believe that defendants do not plead guilty if they are factually innocent and that the screening process (police and prosecutorial) is sufficiently reliable and error-free so that defendants passing through the screen are in fact guilty. Finally, in their view cases not screened out contain substantial evidence of factual guilt. Some actors (prosecutors and defense counsel) believe that all defendants passing through this screen are guilty of something.

Factual guilt may be determined by how the police and prosecutor obtain and screen information. These procedures differ markedly in the various jurisdictions. Moreover, when defense counsel enter into plea negotiations some prosecutors believe this to be evidence of factual guilt.

The major procedural safeguard against conviction of the factually innocent is judicial inquiry into the factual basis of the plea. But the extent of the inquiry varies substantially from judge to judge. Thus, the inquiry may not be infallible and a variety of pressures may cause a defendant to admit to facts which did not occur.

Some prosecutors and defense attorneys believe the plea negotiation process is superior to a trial in determining the factual truth of a case. Some believe that a conviction of a factually innocent defendant may more likely occur at trial than through plea negotiations. Others believe that adequate defense resources and careful screening would negate such a hypothesis.

Legal Innocence

A factually guilty defendant may be legally innocent because a "weak" case may be difficult to prove at trial. Bargaining permits "half a loaf" where trial outcome is in doubt. Historically, plea bargaining was referred to as "compromising" or "settling" criminal cases.

Scholars have criticized the half load philosophy as contradicting the prosecutor's duty to see that justice is done. Others criticise this practice because it occurs in weak or doubtful cases and may result in disparate treatment,

ignore rehabilitation needs and increase the risk of false conviction. Under this view the more difficult (marginal) the case the more it should merit careful scrutiny.

Other scholars support the "half loaf" philosophy, and distinguish factual guilt from issues calling for judgment as to legal guilt. They maintain that in these cases justice may more likely occur through negotiation, and that quasi-legal questions raise problems of "variable guilt" suitable for compromise.

Prosecutors distinguish factual from legal innocence and guilt. Most are unwilling to dismiss a case solely because it may be difficult to obtain a jury conviction. Such cases are regarded as prime targets for plea negotiations.

Prosecutors regularly calculate the strength or weakness of a case and the probability of conviction at trial. Many believe this to be a reliable formula. But research indicates that estimating the strength of the case is a variable dependent upon many factors, including the experience of a prosecutor. The lines are hard to draw. Moreover, as a case progresses through the system the nature and scope of available information may change, thus causing differing estimates to be made.

There is skepticism regarding estimates of case strength stemming from prior experience with jury trials. In jurisdictions with few trials the adequacy of the sample of cases is limited. Where trials are more frequent the base of experience may be biased because of complex case selection procedures which consider many variables before a case goes to trial. Moreover, the estimate of conviction probabilities may be part of a self-

fulfilling prophecy, subject to change if more cases did go to trial.

Prosecutors differ as to the validity of the doctrine of legal guilt. Some argue that the law protects only the factually innocent; others feel obligated to inform the defense counsel when the prosecution's case has collapsed. Contact with victims affects some prosecutors who must choose between the concrete reality and an abstract ideal. Securing half a loaf appears to be a "natural" choice in many cases. Proponents of the "half loaf" deny its coerciveness because of the shades of judgment and the fact that the weakest case may still result in a jury conviction.

Added to these complexities are five patterns delineating the "weak" case: (1) Evidence linking defendant to crime is weak; (2) Evidence is strong but there is doubt about intent, self-defense, provocation or other legal defense; (3) Defendant committed act and cannot avail self or above defenses but a legal flaw may cause suppression of needed evidence; (4) Evidence necessary for trial is "absolutely" unavailable; or (5) "Theoretically" unavailable. Most prosecutors appear willing to plea bargain in all five situations, offering "sweet deals" in very weak cases.

The major differences in approaching weak cases occurs at the dividing line between the first three types and the last two types. In the first three plea bargaining may involve honest differences of opinion regarding the strength of the

case. The information available can be important in such cases and prosecutorial practices differ from jurisdiction to jurisdiction.

The last two kinds of weak cases raise issues other than levels of information. The propriety of "bluffing" is the issue. Bluffing has many meanings. A very few prosecutors will bluff in cases which to their knowledge involve factual innocence. Bluffing may mean refusing to provide information to defense counsel and "puffing" about the strength of a case, a practice regarded as hard bargaining. Another bluffing practice involves leading defense counsel to believe the case is ready for trial when it is not. For example, a key witness may be dead and hence no longer available absolutely.

A witness may be alive and on a trip around the world. In such a case the witness may be theoretically unavailable. One scholar condemns bluffing in these cases as the clearest example of the subversion of the doctrine of legal guilt through plea negotiation practices. Some prosecutors follow this practice if certain "ethical" bluffing practices are followed. They will not respond "ready for trial" when the clerk calls the calendar. But they will not on their own initiative tell that the prosecution is not ready to go to trial. Most prosecutors act under this standard. Two smaller groups involve prosecutors who bluff without restrictions and others who feel that bluffing of any kind is improper.

Some prosecutors are unwilling to dismiss cases they may lose at trial if they are reasonably certain of factual guilt. This is offensive to their sense of substantive justice. Others cite experiences where they have successfully gained convictions at trial when what they perceived as bluffing did not work.

Those few with no reservations about bluffing regard it as part of the "gamesmanship" of plea bargaining. The extent of bluffing is difficult to estimate and it varies markedly from jurisdiction to jurisdiction, and in some instances within a jurisdiction.

Judicial Supervision of Legal Innocence and Bluffing

There appears to be little effort by the judiciary to prevent bluffing. Few judges establish the legal basis of the plea when carrying out their responsibility for establishing a factual basis. Judges do not believe their supervisory responsibilities extend to establishing the probability of legal guilt of the defendant.

Evaluating a Case

When assessing the seriousness of the offense and the offender the prosecutor goes beyond the mere elements of the crime and into actual offender behavior. Thus the offense category does not inform the prosecutor of the seriousness of the offense in all cases. Relationships between the defendant and the victim and the effect of the crime on the victim are also examined.

A frequently used item of information on the offender is the prior record. But some research indicates that the prior criminal record by itself does not always play a key role. Included in the case estimate may be the defendant's demeanor, residence, and associates. The issue is whether or not the defendant is a "bad person."

The seriousness of the offender, the offense and the strength of the case are not examined as independent entities. Each may interact with the other and may affect the prosecutorial decision. One scholar believes these criteria are so intertwined that the prosecutor may consider them at the same time in making a decision.

Either view may be correct and it is clear that the strength of certain evidence may be colored by prosecutorial knowledge or perception of the defendant's or victim's character. Defense attorneys may intuitively understand this matter and when introducing information about the defendant's character try to affect the prosecutor's assessment of the strength of the evidence.

III. Prosecutorial Policies and Plea Bargaining

Most chief prosecutors do not provide their assistants with guidelines to help them properly evaluate the value of a case. Substitutes for such guidelines include the requirement that "difficult" cases be cleared with the chief prosecutor before a bargain is reached. Explicit policies may be established for certain specific offenses or certain types of offenders. Deviations from the norm must be cleared with a senior deputy.

There are few office policies relating to the accountability of assistant prosecutors. There are few enforced, systematic procedures for internal review of decisions (i.e., written documentation as to who authorized the decision and the grounds for it).

Most systems involve partial internal review and control. A decentralized system may involve a senior deputy in charge of a team. Assistants must receive approval from that senior deputy before agreeing to a bargain. Senior prosecutors may establish a market value on a case. In other jurisdictions minimal review and control are present, and the chief prosecutor may view assistants as professionals who can exercise discretion.

Efforts by some prosecutors in establishing office policies have resulted in mixed reactions from assistants within the prosecutor's office, judges and defense attorneys. Judges and defense attorneys have defeated some of these attempts in a variety of ways.

The strongest examples of efforts at control involve the inauguration of partial or full "no plea bargaining" policies. These have met with considerable resistance and have involved direct negotiations between defense attorneys and judges as to the sentence in some instances. Assistants accustomed to bargaining and exercising discretion appear confused as to what their role is under a "no plea bargaining" policy.

Efforts by chief prosecutors to establish strong policies followed by resistance from a variety of sources, illustrates the difficulties in attempting change in a criminal justice system that may be characterized as a "non-system" of justice.

A prosecutor cannot dictate policy to the judges, control how police agencies may operate in a jurisdiction, or regulate the conduct of defense attorneys.

Despite these limitations the evidence suggests that strong policies can have a profound impact on the system. Certain functions, primarily charging, are controlled solely by the prosecutor. Strong screening procedures, in conjunction with the charging power, can reduce the possibility of factually and legally innocent defendants being convicted through plea bargaining. Strong screening can so screen out weak cases as to increase the number of trials and change sentencing patterns, particularly as to strong and serious cases.

Chapter Three: EFFECTIVE AND COMPETENT DEFENSE COUNSEL

Bench and Bar on Defense Counsel

The American Bar Association and the United States Supreme Court have attempted to delineate the role of defense counsel in the plea negotiating process. Under ABA standards defendants should not plead unless counsel is available or properly waived by the defendant. Defense counsel act in an advisory capacity; plea agreements can be made "only with the consent of the defendant." Counsel is required to be fully informed on the facts and law and advise the defendant with complete candor, neither understating or overstating risks or exerting undue influence.

According to ABA standards only the defendant makes decisions as to what plea to enter, whether to waive jury trial, or testify at the trial. All other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

If after a full investigation and study of the controlling law and evidence defense counsel believes that a conviction is probable, the defendant should be so advised and his consent sought to engage in plea discussions with the prosecutor. Counsel should keep the defendant advised of all proposals and developments and not knowingly misrepresent the status of the case during plea discussions.

The obligations of defense counsel should be read in connection with the ABA position that charge and sentence concessions are appropriate for defendants who plead guilty. The burden on defense counsel to properly advise a defendant is heavy, particularly when many believe that the sentence imposed is dependent on whether the defendant pleads guilty or goes to trial.

The United States Supreme Court has spelled out the general obligations of defense counsel, and has highlighted the irrevocable nature of a proper plea of guilty (it is a conviction). The court has emphasized the importance of defense counsel as the sole advocate of the accused, with responsibility for making certain that the defendant understands the rights waived upon pleading guilty, and the defendant's understanding of the available pleading options and their implications. A defendant must have full knowledge through out in order to make intelligent and voluntary decisions.

These standards are imprecise. The court has wrestled with few specific situations which would more precisely outline counsel's role. The court recognizes the difficulties which defense counsel has in advising defendants and the judgments which must be made. And it has placed basic responsibility on trial court judges to "strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courtroom."

The court does not hold defense attorneys responsible for predicting future changes in the law and does not include within "the range of competence demanded of attorneys in

criminal cases" the duty of investigating possible constitutional deprivation prior to a guilty plea. It holds that failure on the part of counsel to inform the defendant of possible constitutional defenses does not provide independent collateral relief. This holding was based on the grounds that a guilty plea represents a break in the chain of events which has proceeded it. Thus, when a defendant solemnly admits in open court his guilt "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

One scholar has criticized these rulings as "essentially hypocritical" because they ingore the records in the cases and degrade the right to trial by treating the waiver of this right in a manner not reconcilable with the court's treatment of other waiver problems.

Some lower courts have attempted to come to grips with defense counsel's role. One court described the ABA standards as relevant guideposts in an uncharted area, then concluded that there is a difficulty in judicial evaluation of counsel's effectiveness and competence. It cited the fact that little such evidence is reflected in the trial record.

Most plea discussions occur in judicial chambers, the prosecutor's office, or in the back of the courtroom or just outside of it, and no record of these discussions is made. Given the difficulties of assessing counsel's effectiveness from a trial record, the impossibility of such an assessment without any record suggests itself.

The legal delineation of counsel's role emphasizes the weakness of judicial supervision and the legal profession's unwillingness, reluctance or difficulty in grappling effectively with issues directly affecting the outcome of criminal cases. What is more to the point, the standards of the ABA and the Supreme Court do not address the realities of the system which go to the heart of defense counsel's role as an effective advocate.

Finding the Right Forum, Time and Participant

The right timing of a plea may be related to understanding the sentencing practices of different judges, obviously important in terms of the sentence imposed upon the defendant. Thus a defense attorney should know these practices, how a more acceptable judge may be scheduled, and who in the system can assist in the search, even in jurisdictions where judicial scheduling practices have attempted to end "judge shopping". In most jurisdictions actors indicated that with experience one can predict the type of sentence imposed by particular judges on particular offenders for particular crimes.

Other forums and other participants may also be important. Shopping for particular assistant prosecutors was characterized by some defense attorneys as critical. Not only did prosecutors have points of view on different issues, but defense counsel's relationship with certain assistants could affect the disposition.

In yet other jurisdictions some defense attorneys characterized the police as important in prosecutorial

decision making. Obtaining delay was cited as effective in cooling down police animosity towards a defendant.

One scholar found that discretionary power to confer privilege or be lenient is also power not to confer privilege or leniency. It is susceptible to abuse, discrimination, favoritism and caprice and "may be extremely damaging to private interests." Thus effective defense counsel must know how to thread a path through a labyrinth of interrelationships and practices. Neither the ABA or the courts have addressed these problems in setting standards for effective assistance of counsel.

Defense Counsel's Effectiveness -- Relationship With Other Actors

Defendants may have apprehensions as to whom defense counsel is serving. Perhaps the most important consideration in evaluating the effectiveness of defense counsel are the relationships with other actors in the system, characterized as "symbiotic" in nature by one scholar. A defense attorney stated the importance of relationships another way: "Personality conflicts hurt the defendant." In some jurisdictions, a "don't rock the boat" attitude dominated and actors (judges included) who took their duties in an adversary system seriously found other actors in the system critical of their performance.

What emerges is a picture of shared relationships as being of prime importance in many jurisdictions. The existence of a stable work group within a courtroom and its method of operating may have a direct relationship to the severity of the charge or sentence. Some defendants notice and resent this

and may prefer to handle their own cases. One national commission concluded that "the plea bargaining system is characterized by deception and hypocrisy which divorce the [defendant] from the reality of his crime."

Defendants' suspicions are shared to some extent by the public, a matter frequently alluded to by prosecutors who made attempts to restrict or prohibit plea bargaining in their jurisdiction.

The suspicions by defendants and the public are to some extent based on the relative secrecy with which negotiations are conducted.

Defense Counsel's Effectiveness -- The Presumption of Innocence

Many defense counsel appear to assume that a defendant is guilty of something, thus enhancing the rate of guilty pleas as well as reinforcing a "presumption of guilt throughout the system." This view may distort the attorney-client relationship and obstruct the investigation into facts and law mandated by the ABA and Supreme Court. Certainty as to factual guilt appears to override investigation into legal guilt.

Both public defenders and private defense attorneys may "lean" on defendants in persuading them to plead guilty. A burning out syndrome was noted for some public defenders, thus causing them to assume that most defendants are guilty, thus leading to the danger of innocent defendants pleading guilty to crimes. Yet other defense attorneys (public and private) insist that assertions of innocence by a defendant

would cause them to go to trial. Some defense attorneys expressed uneasiness at being subject to litigation through post conviction habeas corpus petitions by defendants dissatisfied with counsel.

Advice on how to plead in an individual case remains a difficult estimate frequently based on sketchy information, a less than cooperative client, and diverse pressures from the system. There is a problem in assessing the effectiveness of counsel at trial where there is a record. The informality and relative secrecy of plea negotiations, and the fact that no record is kept, make it virtually impossible to evaluate defense counsel's effectiveness in the plea bargaining process.

Defense Counsel's Effectiveness -- Use and Misuse of Delay

Defense attorneys can use delay to assist their client or assist themselves in collecting a fee. On occasions delay may serve both purposes. Many actors in the field and some studies indicate that delay can be of substantial assistance to defendants, particularly those on some form of pretrial release. It may adversely affect defendants who are detained in jail during this period.

On occasion the prosecution and defense may use delay as a weapon in their attempt to bring about a settlement of a case without trial. It is difficult to determine in a given case when the defense maneuvers affect the defendant adversely or favorably. And the practices of judges in granting continuances vary widely from jurisdiction to jurisdiction and indeed from courtroom to courtroom.

Defense Counsel's Effectiveness -- Public V. Private Counsel

Confusion and conflict revolve about the relative advantages and disadvantages of these two kinds of counsel. Some believe the public defender is disadvantaged because of a high volume of cases and lack of resources. Some public defenders are frustrated at being unable to have personal contact with defendants. Yet some prosecutors indicate that public defenders know the system better and can be more effective than private counsel.

Misdemeanor cases sharply illustrate the problem where defendants with privately retained counsel under no financial constraints were able, in the words of one assistant prosecutor, to "paper them to death" and try large numbers of misdemeanor cases successfully. At the opposite extreme are misdemeanants who are permitted by the court to waive counsel casually and then are sentenced to prison. In between are an assistant public defender and assistant prosecutor dealing with large numbers of cases without adequate preparation.

The relationship between public defenders and prosecutors may depend on the public defenders' perception of their role. In some jurisdictions a cooperative relationship led to cases being pled out with regularity. The public defender "leaned" on "guilty" defendants to plead guilty. The relationships appeared amicable. In other jurisdictions the public defender followed a policy of trying cases where innocence was asserted without pressuring the defendant. In these jurisdictions some hostility and tension was observed between the public defender and the prosecutor's office.

Threats of "court Busting" (taking all cases to trial) were found in the literature and in jurisdictions visited. Most actors seem to feel this represents a potential strength in the public defender's office since organizationally only a public defender could realistically carry out such a threat. We found no instances of it being actually carried out and were unable to assess the reality of this threat.

The existence of a private "cop-out bar" was found in a number of jurisdictions. Public defender services and strong prosecutorial screening policies appear to have had an adverse affect upon such a bar. Many actors reported this bar to be shrinking by virtue of one or both of the above occurrences. A high degree of sensitivity towards the issues involved in plea bargaining and apprehension by actors in the system of the public's view may also have contributed to the decline of the "cop-out bar."

Defense Counsel's Effectiveness -- Resources

In general the resources which appear to be required by the ABA and Supreme Court are not available in misdemeanor courts. Public defenders and defense attorneys were observed handling such cases by rote with little advance preparation in evidence. For felony cases the availability of resources was sufficient for proper investigation to be undertaken in selected cases.

To overcome such limited resources the ABA and a number of defense attorneys place great stress on the nature and scope of discovery proceedings whereby defense counsel may learn of the strength of the prosecution's case. We found

wide variances in discovery procedures, and sometimes they were dependent upon relationships between defense attorneys and the prosecutor's office.

It seems difficult for counsel to meet the standards of effectiveness required by the ABA and the courts without access to the information upon which the prosecution is based. We found that public and private defense attorneys, along with prosecutors, consider the strength of the case, the background of the offender and the seriousness of the offense in advising the defendant. With inadequate information as to these three factors defense attorneys could not rationally advise defendants on the issue of how to plead.

Should there be a continued lack of resources, accompanied by ineffective discovery, we must ask whether effective assistance of counsel is possible under such circumstances, an issue not addressed by the ABA or the courts.

Defense Counsel's Effectiveness -- Is Defense Counsel Necessary?

One surprise was the allegation that defendants might fare better without counsel. This point of view was scattered among prosecutors, public defenders and private defense attorneys. These attitudes were supported by one study indicating that in misdemeanor court defendants with no counsel who plead not guilty fared substantially better than defendants with counsel.

The network of relationships and pressures found in many jurisdictions is important to the plea bargaining process.

There is evidence that many defense attorneys regard their relationship with prosecutors fundamental to their effectiveness. Playing the game and not rocking the boat preserved the proper relationship. And as noted earlier, the game is played in secret, a factor encouraging the informal relationships endemic throughout the system. Has this so distorted the adversary system as to render counsel ineffective?

Chapter Four: THE ROLE OF THE JUDGE

Judicial Participation in Plea Bargaining

Judicial participation in plea discussions is opposed by the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. It is also prohibited by the Federal Rules of Criminal Procedure. Some states disallow any form of judicial participation, while others, such as Illinois, prohibit the judge from initiating plea bargaining but allow participation in the discussion.

In our observations we found at least some judges in more than half of the jurisdictions visited taking an active role in the negotiation process. This participation took place in scheduled and unscheduled pretrial conferences in chambers or at the bench. The prosecutor and defense counsel were usually present. In 12 of 25 states visited by project staff there is case or statutory law which speaks to the issue of judicial participation by the judge. Ten states prohibit it; two states permit it.

A major objection to judicial participation in negotiations is based on the powerful position of the judge. Plea negotiations involving direct judicial participation might be inherently coercive. A second major objection is that a judge cannot properly oversee a process in which he is a direct participant.

Those advocating a direct judicial role suggest that only through active judicial participation can a sufficient amount of predictability in the sentence be insured. Some believe

that such participation may expedite the process. Contrary to those objecting to judicial participation, there is a belief that only through involvement can a judge effectively oversee the plea bargaining process.

Judicial participation may not involve influencing the kind of agreement which may be reached. But judges may "encourage" or "force" defense attorneys and prosecutors to arrive at some plea agreement. Such "arm twisting" tactics by judges may place prosecutors and defense attorneys in the position of pleasing the court by reaching any agreement. This conflicts with their obligations to the people and defendant. It may affect later proceedings in a case. As one defense attorney stated, "A lot of things can happen in the course of trial -- particularly when a judge doesn't like you."

Sentencing Differential Between Guilty Plea and Trial

It has been alleged that judges induce guilty pleas by imposing more severe sentences when a defendant chooses a trial rather than pleading guilty. Some studies suggest that differential sentencing exists at the misdemeanor and felony levels.

There is a split as to the propriety of differential sentencing. Proponents believe leniency is proper for those who accept responsibility for their conduct by pleading guilty and contribute to the efficient and economical

administration of the law. They assert that those submitting themselves to prompt correctional measures should be granted sentence concessions, and that differential sentences for those demanding trial is not undue punishment if it is not excessive. Those opposed believe that guilty pleas have no direct relevance to the appropriate disposition of an offender and that the constitutional right to trial should not be the cause of enhanced punishment.

Direct evidence of differential sentencing among one or more judges was found in three fourths of the jurisdictions studied. These judges cited two major reasons. First, they profess to believe that by pleading guilty a defendant takes the first step towards rehabilitation. Second, they stated that during trial they may obtain adverse information about the defendant and the crime or that defendants may perjure themselves. These judges believe such information justifies a harsher sentence.

Behind this practice, however, is an attitude that differential sentencing is a proper way to encourage defendants to plead guilty, thereby expediting the flow of cases. This position was disguised or not admitted by some judges; others were frank in upholding the practice. Some studies indicate that some defense attorneys, as well as prosecutors, support the practice. In at least four jurisdictions we found evidence of a "standard discount." Defendants who plead guilty received a particular punishment. If convicted at trial, however, they received an added increment. Defense attorneys knew of this practice. Thus, it is a form

of "implicit bargaining."

Forms of Judicial Participation - General

Several observations regarding judicial participation in plea bargaining may be made. Judges do not agree on, nor do they perform their judicial role uniformly. The ways in which individual judges participate in or supervise the plea bargaining process differs substantially.

It is important to make a distinction between what is typical for a judge and typical for the jurisdiction. Typicality can refer to how most judges (or prosecutors or defense counsel) conduct themselves in the plea bargaining process. It can also refer to how most plea bargains are reached. For example, in a jurisdiction with a large number of judges, two may actively participate in plea negotiations and dispose of 80% of the criminal docket in that jurisdiction. The remaining judges may not participate in plea negotiations and account for only 20% of the caseload. The percentage of judges involved indicates the typical form to be one of judicial nonparticipation. Looking at the proportion of case dispositions, however, the typical form becomes one of active judicial participation in plea bargaining.

On-Site Observations of the Judicial Role

We found general judicial support for the concept of plea bargaining in all but one jurisdiction, El Paso, Texas. There was considerable variance, however, as to types of plea

bargaining and the form of judicial participation deemed desirable and proper by members of the judiciary.

The most common rationale for plea bargaining was the need to move cases. A second rationale was that plea bargaining disposed of minor or obvious cases which shouldn't be tried, thus making time for cases which should be tried. A third reason was that plea negotiations achieved substantive justice and mitigated the harshness of the law in many cases.

Judges split on the role of the prosecutor in plea negotiations. Most want sentence recommendations because of the prosecutor's familiarity with the case and possession of useful information. Others felt that prosecutorial sentence recommendations constitute an encroachment on the judicial role.

Four factors shape judicial interaction with other actors in the criminal justice system: (1) The level of the court (felony or misdemeanor); (2) The method of assigning prosecutors and public defenders to the court; (3) The dominant type of plea bargaining arrangement; and (4) The size of the judicial operation.

Data on case docketing and judge shopping suggest a pattern involving two elements: (1) The selection of a judge as a sole or major part of the plea bargain; and (2) Finding a judge who sentences leniently or follows a prosecutorial sentence recommendation without fail.

Judge shopping may be curtailed by randomly assigning judges to cases. It is effective only where the judge assigned the case is responsible for its disposition (individual calendaring), thus precluding the selection of judges through the use of continuances. Where master calendaring permits cases to be reassigned at each stage of the proceeding it appears to facilitate judge shopping and liberal granting of continuances to defense counsel and prosecutors. This wastes court time, as well as the time of prosecutors, witnesses, victims and defendants.

Forms of Judicial Participation - Specific

Data in this report suggests that judicial participation may be classified in two ways: (1) Whether or not the judge participates in explicit plea negotiations and the extent to which that occurs; and (2) The extent to which differential sentencing is practiced as a means of inducing pleas. Using these criteria our data suggests six major types of judicial participation. These may be identified as follows:

(1). No explicit or implicit bargaining; and no "leaning" on other participants to plea bargain.

(2). No explicit bargaining; may or may not bargain implicitly; and "leans on" or "facilitates" bargaining by other participants.

(3). No explicit bargaining; may or may not bargain implicitly, and "forces" pleas through pressure on other actors.

(4). Explicit bargaining with a specific sentence recommendation; may or may not bargain implicitly.

(5). Explicit bargaining with a general sentence or recommendation; may or may not bargain implicitly.

(6). Implicit bargaining only.

Of the six types outlined above, forms (4) and (5) appear to be the most common.

Variations existed as to the specific manner in which judicial participation occurred. Generally it occurred in chambers or off the record in court. One judge held discussions on the record, in court, a practice noticed for its lack of typicality. Generally the prosecutor and defense attorney were present, but there were instances where discussions did not include both.

Formal Judicial Supervision of Guilty Pleas

Of 25 states visited, 21 have adopted a statute or criminal rule pertaining to some judicial supervision of the guilty plea process. All states have cases which require some of these responsibilities to be fulfilled. Individual judicial compliance with these rules and court opinions covering in court supervision of guilty pleas varies widely.

Those aspects of supervision on which courts have concentrated are the following: (1) The plea entered by the defendant is both a knowing and voluntary one; (2) There is a factual basis for the plea; (3) The defendant should be informed of the sentencing consequences of his plea; and (4)

The defendant be allowed to withdraw the plea where there has been a violation of due process. Most judicial efforts appear to be directed toward determining if the plea is both knowing and voluntary. Judges rarely inform the defendant of any collateral consequences of the plea.

Factual Basis of the Plea

A variable pattern was observed, ranging from accepting pleas of guilty as sufficient evidence of a factual basis, to the opposite extreme, where the judge required evidence to be presented by hearing at least one witness before accepting the plea.

In three-fourths of the jurisdictions visited judges determine factual basis and accuracy of the plea by simply asking the defendant if he has committed the offense charged. Most judges indicated they would delve more deeply into the facts where the defendant asserted innocence. Other judges said that they would refuse to accept such a plea.

Until recently, guidelines were quite general, and could be met with little more than a cursory inquiry of the defendant by the judge.

Withdrawal of Guilty Pleas

Most judges allowed defendants to withdraw guilty pleas if the sentence was harsher than that agreed upon during a plea negotiation. Only one judge indicated he would not routinely allow the defendant to withdraw his plea in such a case.

There are two rationales for allowing plea withdrawal in situations where a sentence agreement between the defense attorney and prosecuting attorney is not binding on the judge. Prosecutors know judicial sentencing practices; therefore recommendations were generally consistent with expectations based on these practices. Not allowing withdrawal where the judge could not follow the recommendation would undercut the prosecutor's position in future negotiations. Second, judges believed it was only fair to the defendant that if the agreement could not be implemented it should not be binding.

Thus the withdrawal of guilty pleas arising out of plea negotiations does not appear to be a significant problem in the jurisdictions visited.

Policy Implications

1. Data Base - The existing data base does not track cases through the criminal justice system, indicate with specificity the type of disposition, the stage at which it occurred or distinguish between felonies and misdemeanors. Until such a data base is available many controversial issues in plea bargaining cannot be properly evaluated, much less resolved. The gross data available indicates that population may have no correlation with plea rates, a finding confirmed by several studies. What this means in terms of costs and pressures of the docket cannot be ascertained. It is essential that adequate data be available to answer these two questions.

It is also essential that uniform terminology be adopted to describe the flow of cases through the system. There must be an agreed upon definition of plea bargaining and agreed upon stages of the criminal justice process which describe the status of a case as it progresses through the system. Without definitional and terminological uniformity it is virtually impossible to attempt answers to the many issues involved in plea bargaining.

2. Openness and Accountability - With rare exception plea negotiations are conducted off the record regardless of who participates in the discussions or the forum in which the discussions take place. Legal standards for assessing the

effectiveness of defense counsel and those requiring formal supervision of the plea bargaining process by the courts are framed in generalities. They do not require the courts to do more than make cursory inquiry into the realities of the plea negotiation process and whether or not actors have lived up to their obligations. Thus trial courts exercise little real supervision; appellate courts rely on trial courts for such supervision; and there is virtually nothing on the record for appellate courts to review.

This situation exists because of the informality, low visibility, and the nature of the relationship between the actors in a given court system. Many improper practices documented in this report in part result from such an environment and atmosphere. Bringing the plea negotiation process into the open and on the record will not resolve all the problems recounted in this study. But the application of sunshine to the process is a necessary first step in restoring a proper balance between the adversary system and plea negotiations.

The American Bar Association is now reviewing its Pleas of Guilty standards and is considering approaches which would bring more of the process into the open.

3. Prosecutors' Office Policies and Enforcement - Commentators and standard-setting organizations have recommended that

prosecutorial discretion in general, and particularly in regard to plea bargaining, should be controlled by internal office policy guidelines. The American Bar Association Project on Standards for Criminal Justice has recommended that "each prosecutor's office should develop a statement of (i) general guidelines to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair efficient and effective enforcement of the criminal law.

"In the interests of continuity and clarity, such statements of policies and procedures should be maintained in a handbook of internal policies of the office."

The ABA recommendations are weak, merely recommending that some "general policies" be established. Even this recommendation has not been adopted in many jurisdictions.

The National Advisory Commission on Criminal Justice Standards and Goals has also recommended that office policies be developed. It went further than the ABA and specified that the policies should be "detailed." Few prosecutors have attempted to provide detailed guidance in assessing factors relevant to plea bargaining. Prosecutors should develop policy guidelines with respect to plea bargaining decision making; such guidelines should be specific.

There has been little attention to the question of internal accountability within prosecutors' offices. Office policies must

be implemented. This means that the chief prosecutor must be able to determine who made the critical decisions in a case, on what grounds, and whether there was appropriate clearance from a supervisory official. This type of internal accountability does not exist in many prosecutors' offices.

4. The Victim and Plea Bargaining - The study has found that some prosecutors do confer with victims in particular kinds of cases. It also found that in general victims do not play a key role in the plea bargaining process. The victim has a right to be heard. Moreover, information which only the victim may be able to supply can be of value to the prosecutor in assessing the nature of the case.

A key factor in plea making decisions is the seriousness of the offense, particularly in harm done to the victim. It is an important factor in many prosecutorial decisions. Some judges indicated that differential sentencing may be a result of their opportunity to observe both the defendant and the victim at trial, thus obtaining a clearer picture of how the crime affected the victim. If this is vital to a judge in determining the sentence after trial it should be no less vital in determining the sentence after a plea of guilty. It makes little sense to say that the harm to the victim is only applicable in the sentencing decision where there has been a trial.

5. Resources and Information - It is abundantly clear that the kind of information received by prosecutors and defense attorneys, and how it is processed and used, may have a fundamental impact on the decision making process for both parties in plea discussions. Where the flow of information is controlled or weighted can have an important bearing on decisions. Therefore the same information should be made available to all actors in the system, consistent with the requirements of privacy and the integrity of an ongoing investigation.

Of critical importance is the need for adequate information for defense counsel. Defense counsel has a heavy burden which can be met only if the resources available to obtain such information are made available or full discovery becomes the rule, providing defense counsel with the same information available to the prosecutor. Without such an information flow the right to effective counsel may be impossible to achieve.

6. Can Plea Bargaining Be Abolished? - This project reserves its judgment on the question of eliminating plea bargaining. Without commitment to a particular view some observations can be made. A prosecutor may eliminate plea bargaining in his office, but this does not mean that plea bargaining will have been eliminated from the criminal justice system. It may move to a different locus of actors, i.e. the defense counsel and the judges. A prosecutor who persuades these actors to join in eliminating overt plea bargaining may only institute an implicit system which has even less visibility.

and control than an explicit system.

Before considering this step criminal justice officials should consider other alternatives which may reduce the visible defects in plea bargaining. Some of the above suggestions may substantially limit the impact of the observed defects. Some other suggestions relating to managing the system and case flow may also be beneficial.

If the problem is too many bargains struck to reduce case backlog, the remedy may be more thorough prosecutorial screening. If the question is a matter of saving costs, a possible remedy may be the establishment of a cut off point after which plea bargains are no longer accepted. In short, where prosecutors are not managing by careful allocation and control of resources, plea bargaining may be used as the solution to many ills in the system. This may result in a high rate of "undesirable" plea bargains (ones which were not carefully considered with the kind of deliberation they deserve). The answer should not necessarily involve throwing out the baby with the bath water.

END