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COMMENTARY

Principles of Plea Bargaining

GEORGE BEALL*

This article was originally delivered as an address at the National College of Advocacy, an intensive one week, practical program of trial advocacy designed to strengthen skills of both new and seasoned practitioners. The text of that speech is on file in the office of the Loyola University of Chicago Law Journal, Chicago, Illinois. The transcript of the address was edited to eliminate its oral quality and to provide substantive clarification at some parts. Supporting footnotes were supplied where appropriate.

The Editors

Plea bargaining, plea negotiation, compromising criminal cases, trading out—whatever one chooses to label it—the disposition of criminal charges short of trial is as old as the criminal law itself, as pervasive as the number of this country's judicial jurisdictions, and as diverse in form as the countless types of criminal misconduct.¹

A discussion of plea bargaining requires that it first be defined.² There are variations on the theme, and some prosecutors' offices engage in one type of plea bargaining but not in others. The most common practice is "charge bargaining." The heart of charge bargaining is the defendant's tender of a plea of guilty or *nolo contendere* to one charge in return for a prosecutorial commitment to drop, reduce, or refrain from bringing additional charges. One common form of charge bargaining involves an agreement between prosecuting and defense attorneys whereby a defendant pleads guilty to a particular charge in exchange for the dismissal of other charges.

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1. Sporadic reference to plea bargaining appears in early American case law. *See, e.g.*, *United States v. Ford*, 99 U.S. 594 (1878). Until recently it has been considered a questionable device, to be used sparingly and to be disavowed by the parties when challenged.

2. This article concentrates on the typical situation where plea negotiations occur after formal charges are filed. There are exceptional circumstances, such as those involving former Vice President Agnew, where the deal was made before charges were brought. In cases where a person cooperates with the prosecutors he may be able to reach an agreement as to the nature of the charges brought before they are formally filed.

Another variation occurs when the defendant pleads guilty to a lesser charge than the one originally faced.

A second form of plea bargaining is called "sentence bargaining." This occurs when the defendant pleads guilty to the original charge in return for a recommendation from the prosecutor of sentencing concessions, such as a suspended sentence, probation, or imprisonment not to exceed an agreed term of years.³

The defendant's motive in plea bargaining is to reduce his maximum sentence exposure as much as possible. Typically, the prosecutor's motive is to secure a conviction and to eliminate the risk, time, and expense of litigation by getting the defendant to convict himself by a plea. Sometimes, however, the prosecutor may also be motivated by a desire to obtain evidence against another defendant more deeply involved in the crime. To do this, he may need the defendant's cooperation.

The kind of deal that can be offered to or negotiated by a defendant is a function of that individual's circumstances. At one end of the spectrum of possibilities facing the defense attorney is the defendant fortunate enough to be confronted by a weak prosecution case, or possessed of information of great value to the prosecutor. This defendant may be able to obtain a dismissal of all charges in exchange for his agreement to cooperate. This disposition, known as a "pass," amounts to complete immunity.

Another possibility, assuming the defendant's own transgression is both serious and provable, is for the defendant to seek in return for his willingness to plead, both a reduced charge (which limits his sentencing exposure), and even better, the favor of a prosecution recommendation of no incarceration. No jail, a "walk" as distinct from a pass, is for most defendants the ultimate prize.

The defendant and his counsel have two basic bargaining levers. First is the ever-present threat to go to trial and perhaps take appeals. Second, but only in exceptional cases, is the capacity to cooperate with the government by furnishing helpful information about the criminal activity of others.

The various bargaining points of the prosecutor include: (1) reduction of the original charges; (2) dismissal of other charges; (3) recommendation of probation or other leniency; (4) agreement to make no recommendation as to sentence or not to oppose a defense plea of leniency; (5) agreement to dismiss charges against a co-defendant; or (6) stipulation to a specific sentence such as restitu-

3. Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621, 621 (1976).

tion or incarceration at a particular penal institution. The various combinations and mutations are infinite.

However structured, plea bargaining has been at the eye of a storm of controversy for years. Criminal defendants and their attorneys extol the practice and advocate it as a necessary element in our system of criminal justice.⁴ Prosecutors and judges have long accepted as an article of faith that plea bargaining is necessary to avoid congestion in the courts capable of bringing the system to a grinding halt.⁵ Yet most members of the public, particularly those who are victims of crime, abhor plea bargaining and regard it as a violation of society's interest in seeing that criminal conduct is adequately punished.⁶

SILENT AGREEMENT AND BEYOND

Inexplicably, courts and prosecutors in this country have for generations simply pretended that plea bargaining did not exist.⁷ Like sex before Freud, everybody did it, but nobody talked about it. In fact, to enhance the chances of obtaining convictions in prosecutions based on bargained testimony, as well as to offset challenges to the credibility of a witness who had an interest in the outcome of a case, the "silent" agreement was developed.

The mechanics of this perversion of the criminal justice system required defense counsel and the prosecutor to agree informally and off the record that a defendant would plead guilty and possibly cooperate. In return, the prosecutor would recommend leniency. The prosecutor would not discuss the understanding openly with the accused, relying instead on the defense lawyer to relay communica-

4. *Id.*

5. *Id.*

6. *Id.*

7. The tradition of Anglo-Saxon jurisprudence has actively discouraged pleas of guilty. Litigation, whether trial by battle, ordeal, or some other would be fact-finding mechanism, was for centuries looked upon as the safest test of justice. At early common law, a procedure known as "approvement" reflected that tradition of discouragement:

It is, when a person indicted of treason or felony, and arraigned, confesses the fact before plea entered, and . . . accuses others of the same crime, in order to obtain his pardon. . . . Such approvement . . . is, in effect, equivalent to an indictment, since the appellee [accused] is equally called upon to answer it; . . . If found guilty, he [the accused] must suffer the judgment of the law; and the approver shall have his pardon. . . . If the appellee [the accused] be acquitted the approver shall receive judgment to be hanged, upon his own confession of the indictment, for the condition of his pardon had failed, *viz*: the conviction of another person.

W. BLACKSTONE, COMMENTARIES 893 (Gavit ed. 1941). This ancient practice did not exactly encourage cooperation.

tions. To insure that the silent agreement would be carried out, and that both sides would achieve maximum benefit, the accused would be required to enter a plea of guilty. It would be represented to the court that there were no agreements or understandings, and that the prosecutor would make no recommendation, at that point, as to disposition. The defendant would then give information and probably testify. After the trial of his accomplice, the defendant would be brought before the court for sentencing, the prosecutor would recommend leniency, and almost invariably, the court would follow the prosecutor's recommendation.⁸

What the prosecutor, the defense counsel, and the defendant knew definitely, and what the judge must have known, was that the State's decision to dismiss the remaining charges and make recommendations favorable to the defendant at sentencing was the product of plea bargaining. They all knew, but did not discuss the purpose behind the process.

To the State, the plea removed the risks of trial and guaranteed a conviction. To defense counsel, it was a good deal for his client. To the defendant, it was the way the system worked, a hypocritical bow to the false goddess Justice. To the judge, it was a pious fraud mandated by constitutional proscriptions of voluntariness and solicitude for the image of judicial integrity. Like some alcoholic in-law banished from the parlor when company came, plea bargaining was not permitted to show its face in public.

Recently, judges' and lawyers' attitudes toward negotiating guilty pleas have reversed. The lay public, while not necessarily of the same mind, knows plea bargaining is a fact of our daily lives because of Watergate, Agnew, newspaper editorials, and late night radio talk shows. More importantly, the United States Supreme Court in 1971

8. Daily courtroom scenes around the country ran approximately as follows:

THE COURT: Is this plea entered voluntarily of your own free will and volition?

DEFENDANT: Yes, your Honor.

THE COURT: Specifically, have any threats of any kind been made to force you to plead guilty?

DEFENDANT: No, your Honor.

THE COURT: Have any promises been made or inducements offered to make you plead guilty?

DEFENDANT: No, your Honor.

THE COURT: I want to inquire of both the state and defense counsel whether they are satisfied that the defendant's responses are true.

PROSECUTOR and DEFENSE COUNSEL (In unison while looking at their shoes): Yes, your Honor. They are true.

THE COURT: With those assurances, the Court will accept the plea. Mr. Prosecutor, what is the disposition of the remaining charges?

PROSECUTOR: The State respectfully moves to dismiss the remaining charges.

THE COURT: So ordered.

issued its own seal of approval to the legality of plea bargaining.

In *Santobello v. New York*,⁹ after negotiations with the prosecutor, the defendant withdrew a previous not guilty plea to two felony counts and pleaded guilty to a lesser included offense. The prosecutor, meanwhile, agreed to make no recommendation as to sentence. Many months later at the sentencing hearing, a new prosecutor recommended the maximum sentence, which the judge imposed. The defendant's efforts to withdraw the plea were unsuccessful. Chief Justice Burger, writing for the Court, reversed the conviction and remanded the case for further consideration in light of the Court's opinion.

For the first time, the Court squarely addressed the practice of plea bargaining. It did so in terms, which in the context of the past, were nothing short of revolutionary.

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.¹⁰

The Court declared that the disposition of charges after plea negotiations was not only essential but also highly desirable.¹¹ It leads to a prompt and final disposition of most criminal cases; it avoids much of the "corrosive impact of enforced idleness" during pretrial confinement for those denied release while trial is pending; it protects the public from accused persons who are prone to continue criminal conduct while on pretrial release; and by abbreviating the time between charge and disposition, it enhances rehabilitative prospects of the guilty when they are ultimately imprisoned.¹²

Santobello swept away the deceptions of the past. The Court made it clear that a bargain is binding and should be publicly disclosed to the court and placed on the record. Today, it is common practice for the judge, when inquiring as to voluntariness, understanding, and consequences of the guilty plea, to inquire whether plea bargaining has occurred in the case at bar, thereby specifically advertent to the Supreme Court's statement that plea bargaining is "an essential component of the administration of justice." Agreed

9. 404 U.S. 257 (1971).

10. *Id.* at 260.

11. *Id.* at 261.

12. *Id.*

arrangements are then stated in open court and put on the record. Hence, the practical significance of *Santobello* is to bestow the blessing of the highest court in the nation on plea bargaining. As a theoretical matter the decision also has the effect of removing any doubt created by earlier decisions that a plea entered as a result of negotiations will indeed be voluntary within the constitutional commands of the fifth amendment.¹³

Notwithstanding the unequivocation of the Court in *Santobello*, plus respectable support from the ABA's massive project on Minimum Standards for Criminal Justice, and the President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission of 1972), plea bargaining is still heavily attacked. The successor to the President's Commission, the National Advisory Commission on Criminal Justice Standards and Goals (the Peterson Commission), called for abolition of plea negotiations "as soon as possible, but in no event later than 1978."¹⁴ Controversy surrounding some of the Watergate cases and Spiro Agnew's alleged "sweet deal" have generated an explosion of public interest concerning the legitimacy of plea bargaining¹⁵ as an institution.¹⁶

Some prosecutors, in fact, have quit plea bargaining except in rare cases, condemning the practice and adopting policies against it. But this is neither the time nor the place to debate the esoteric point. For present purposes, the usefulness of plea bargaining can be summarized as follows: it serves the interests of our criminal justice system. With respect to the individual case in which the deal is negotiated, it accomodates or offsets the ever-present, but variable factors of the litigation hazard. In terms of administration of the courts it permits disposition of 90% or more of all cases by guilty pleas. In a broader sense, the aims of society are served by encouraging the cooperation of those who are caught in crimes in order to bring to justice the more culpable or more dangerous offenders.

13. A year later, in *Giglio v. United States*, 405 U.S. 150 (1972), the other side of the coin was examined. The Court held that whenever there is an agreement between a witness and the prosecutor concerning the disposition of charges against him, due process requires that this fact be revealed to those against whom the witness testifies. Failure to do so is reversible error.

14. U.S. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS — REPORT OF THE TASK FORCE ON COURTS (1973).

15. Notwithstanding such criticism, the Supreme Court recently reaffirmed its sanction of plea bargaining in *Blackledge v. Allison*, 97 S. Ct. 1621 (1977).

16. In July of 1977, Georgetown University released a study commissioned by the United States Department of Justice describing in great detail the dimensions of plea bargaining in the United States. The study, while reserving judgment on the question of whether plea bargaining should be completely eliminated, concluded that the whole process is in need of tighter control and more openness. Georgetown University Law Center's Institute on Criminal Law and Procedure—Plea Bargaining (1977).

Conversely, to speak of the elimination of the practice is visionary and hopelessly idealistic. It is an entrenched practice, arising out of perceived necessity, buttressed by powerful traditions, and blessed by judicial opinions. Furthermore, abolition, as the Peterson Commission suggests, would probably result in again driving the practice underground. It is better for plea bargaining to be brought into the open and controlled by standards such as those of the ABA, than to be returned to the backrooms of the courthouse.

So long as we have an adversary system of criminal justice, where prosecutors are in substantial control of what charges and what cases to bring, where courts possess a wide range of sentencing discretion, and where rehabilitation of offenders remains more dream than reality, the natural and inevitable pressures on both sides to "bargain out" will be irresistible. Frank acknowledgement of these facts and concomitant efforts to make the process more rational represent wholesome steps forward in the administration of criminal justice.

THE TIME TO BARGAIN

From the defense standpoint, one of the *last* questions counsel addresses to a client on his behalf should be whether the client should bargain. A negotiated disposition, after all, bears the same relation to an acquittal that an amputation bears to penicillin therapy—it is never the preferred treatment. It falls far short of full cure and is invariably accompanied by unpleasant side effects.¹⁷ Hence, while prosecutors try to begin plea negotiations as soon as possible after a case is filed, the policy of defense counsel is to delay, gambling that the State's case will weaken with the passage of time.¹⁸

17. In the context of political corruption or "white collar" cases, one can safely conclude that those who bargained for their freedom have also incurred social ostracism, personal and professional disgrace, and perhaps financial ruin. The cost of dealing for those criminal defendants, while seemingly cheap in terms of criminal responsibility, may be very dear to their self-esteem, family, and community standing.

In all cases, the defendant faces the embarrassment and humiliation of voluntarily admitting in open court to his serious criminal misconduct. He will lose certain civil rights, may be prevented from obtaining certain licenses or types of employment, may be unable to enlist in the armed services, or may be deported. If the defendant had to cooperate and testify as part of the deal, he will face cross-examination as a government witness.

Moreover, he forever gives up the opportunity to tell his family and close friends that he was really innocent or the victim of a biased jury. Turning state's evidence is also likely to result in loss of job or business, and perhaps, physical reprisal against him or his family. Most people are somehow hostile toward those who have exchanged testimony for immunity.

18. One study of the criminal justice system in Chicago showed that the conviction rate declined from 92% in cases that were tried promptly to 48% in cases that were substantially delayed. Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 300 (1968).

One finds with a criminal defendant, however, that the thought of a possible deal is almost always near the surface. The subject is generally raised by the defendant. He cannot eat and has trouble sleeping at night. He is convinced that his telephone is tapped and that he is being followed. The uncertainty of his fate bothers him more than anything else. At that point, the principal functions of defense counsel are to calm his client, to convince him that the facts must be studied and the case assessed carefully and dispassionately, and to warn him of the adverse consequences that can flow from plea bargaining.¹⁹

In this situation defense counsel can usually bide his time. Agreements with prosecutors are available, if the conditions are satisfactory, to virtually every defendant. They come in many sizes, shapes, and styles, and they are made at all stages of the process: at the beginning of an investigation, after indictment, in the midst of a trial, or even after a defendant has begun to serve a sentence.

A defendant who has information valuable to the prosecutor can afford to sit tight rather than negotiate immediately. This requires considerable nerve on the part of counsel, particularly when prosecutors call the defendant into their office and tell him he is in grave trouble or accuse him of being a liar. Often they hint that they may be charmed by his cooperation. Prosecutors lecture that the first people to make deals will get the best deals. The corollary, of course, is that there will come a time when no deals will be offered.²⁰

It is not only the defendant with valuable information who may be able to strike a favorable bargain. Although the prosecutor's natural inclination is to deal with the small person in order to reach the larger culprit, understandings may also be reached with the latter offender. This may be necessitated by technical problems in the case, or because the government is uncomfortable with some of its witnesses. Where there are multiple defendants, the prosecutor may want to get the most prepared or effective defense lawyer out of the case. In these instances, bargains are made exclusively on a litigation hazard basis and do not include a defendant's cooperation as an element.

19. See note 17 *supra*.

20. Prosecutors like to talk in metaphors, such as: "The boat is leaving. It's filling up. Those who get aboard now receive a discount on their tickets and a seat in first class. When the boat is full, it'll leave the dock and everybody left behind will get the shaft." Sometimes the metaphor is varied, e.g., "The train is leaving the station," or "The paramutual window is closing." The defendant may easily be unnerved by such references.

As a humorous aside, one of the important witnesses who cooperated in the Spiro Agnew investigation revealed that when he expressed fear at being left on the dock, his lawyer told him, "You can wait—with the heavy luggage you have, the boat will come back to get you."

Ultimately, deciding when to deal is a function of practical, legal, and visceral considerations. From a defense point of view, the best deals are usually made when the prosecution comes forward first.

BARGAINING MECHANICS

Certain unavoidable, perhaps immutable, considerations motivate prosecutors in their negotiations to induce guilty pleas. Difficulties with the case, such as lack of proof, missing witnesses, length of a trial and other similar considerations often dictate the decision to bargain. Before making a plea offer, a good prosecutor evaluates the nature of the offense, whether or not any personal injuries were sustained by the victim, and whether any weapons were used in the commission of the crime. Prosecutors normally will not negotiate until they have checked to see if the defendant has any prior transgressions; for this they usually consider convictions and cases that were disposed of in other ways.

Several other factors are also important. For example, the age of the defendant will be a substantial variable in determining whether he will benefit from any rehabilitation measures which might be arrived at through a guilty plea. The degree of culpability of the defendant is also important. Whether he was the principal or motivating actor in the crime or merely an aider or abetter, whether he acted out of sheer criminality, whether he suffered from a mental disorder at the time the crime was committed, whether he has been cooperative with the police, and whether he exhibited a tendency toward contrition or rehabilitation are all elements taken into consideration by the prosecutor in evaluating plea negotiations.

In most instances, the police officer involved in the case will be consulted. The effect of a plea upon the continuing relationship between the prosecutor's office and the police department is a significant factor to be weighed by the prosecutor. Defense counsel, in some cases, may have greater difficulty in persuading a policeman to ratify a deal than in obtaining the acquiescence of the prosecutor.

With few exceptions, the prosecutor surrenders most in plea bargaining. He recognizes that an overly lenient deal will subject him to subsequent media criticism, possible repudiation from the judge, and accusations by the public that he frustrated society's interest in seeing prosecution to the fullest extent of the law.

General policy decisions aside, many prosecutors follow basic rules of practice, such as:

- 1) Never discuss a plea of guilty with defense counsel unless he has signed his appearance for the defendant. If two lawyers represent one defendant, insist on the presence of both.

2) If you do not know counsel, or have no confidence in him, do not discuss the case in the absence of another prosecutor or police officer.

3) Always prepare a memorandum of plea discussions.

4) Where the defense is seeking a reduction of the charge, attempt to have the new charge reflect the essential facts of the case so that the criminal record will be reasonably informative if prosecution for another crime occurs in the future.

5) Always make an assessment of how much of the case to reveal before discussing a plea. To some extent, the degree of revelation will depend on the integrity of defense counsel.

6) Where multiple defendants are involved, speak with counsel for all before entering into an agreement with any one of them. When less than all defendants wish to plead, insist on a stipulation that shows the criminal participation of those defendants, or else defer sentencing.

7) Where one defendant is to stand trial and another is to plead guilty, differences in sentences must be justified, at least in part, by their respective roles in the crime or by their past records. Furthermore, negotiations with one defendant may limit the range of dispositions for the co-defendants.

8) Victims should always be kept informed. They usually accept reasonable explanations for what has happened in their case. Where the crime is against the person, the individual involved, as well as the witnesses, should be consulted personally. Most prosecutors will not proceed with the plea until the complaining witness has been notified and has been given an opportunity to be present. Where the crime is against property, the prosecutor will probably strive to obtain restitution.

From the defendant's point of view, an awareness of these practices is essential. Additionally, the defense lawyer must have the same grasp on the facts of the case as he would if the case were to be tried. He must know its strengths and weaknesses, and he must know where the prosecution's case is vulnerable. Counsel must gauge both the seriousness of the offense and his client's age and prior convictions—facts that will be relevant at a sentencing hearing. The elements of the offense charged and the potential sentence exposure must also be known.

To be effective, the defense lawyer needs to convince the prosecutor that he will not be intimidated. He must convey the feeling that he can and will try the case if satisfactory plea arrangements cannot be reached. Counsel should leave the prosecutor with the impression that a plea will deprive him of the most interesting part of the case—the trial.

Often counsel is limited in how far he is authorized to go in a

bargain. If so, the government should be made aware of these limitations in unmistakable terms. As is true with good prosecutors, defense lawyers should be careful about how much of their case to reveal during plea negotiations. A corollary rule is that the attorney must accurately represent his client's potential for assistance. When trading information, he must be careful not to overstate that potential.

Prosecutors are driven to make deals as tough as possible in order to make witnesses seem more credible as well as to sustain their own personal considerations. Like any attorney, he deals out of self-interest, whether it be to close a weak case, to obtain a key witness, or just to make the job easier. Counsel's task is to identify what the prosecutor is really seeking.

For the defendant, plea bargaining is usually the last alternative, following consideration of two basic variables. First, the decision to plead involves a determination that the case cannot be won under any circumstances. Second, it involves a defendant who seeks the certainty of disposition as soon as possible, rather than face uncertainty for an indefinite period. This is why counsel should obtain the defendant's consent before any approaches are made to the prosecutors, and why the defendant should be advised every step of the way.

JUDICIAL PARTICIPATION

While negotiations are invariably conducted between defense counsel and prosecutor, one cannot lose sight of the role of the judge. Somehow, before the defendant surrenders his fundamental rights to jury trial, confrontation of witnesses, and other constitutional protections, a reading should be taken of the judge's probable attitude. Although the bargain is with the prosecutor, the objective is acceptance by the court. Both counsel and prosecutor share the determination to make an agreement the court will honor.

Practices and attitudes of local judges toward their role in the bargaining process vary. Some merely accept or reject the prosecutor's recommendations passively, without any advance indication. Others actively intervene in the negotiating stage to encourage disposition, and may go so far as to indicate their view of sentencing before entry of a plea.²¹

To clarify and regulate plea discussions in federal court, Rule 11(e)(1) of the Federal Rules of Criminal Procedure was enacted, categorically stating that "[t]he court shall not participate in any

21. See, e.g., *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970); *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966).

such discussions."²² The commentaries leave no doubt that the purpose of the rule is to prevent the disposition judge from taking any part whatsoever in pre-trial discussions or communications regarding sentencing.²³ However, the rule does state that if a plea agreement is reached, its disclosure is required to be on the record and in open court, or on a showing of cause, in chambers, at the time the plea is offered.²⁴ At that point the court will notify the parties of its acceptance or rejection of the agreement, or it will defer its decision until there is an opportunity to consider the pre-sentence report.²⁵

Of course, defendants and their lawyers always want to know the judge's attitude before entering a plea. Many judges have agreed, theorizing that pre-plea revelation of sentence is not the kind of disclosure that is the equivalent of "discussion" within the meeting of Rule 11; rather, it provides the government and defense counsel with additional data to be used in reaching an authorized plea arrangement.²⁶

That attitude was recently repudiated by the Second Circuit in *United States v. Werker*.²⁷ In *Werker*, two bank robbery defendants

22. Federal Rule of Criminal Procedure 11(e)(1) provides:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or greater offense, the attorney for the government will do any of the following:

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

See also ILL. REV. STAT. ch 110A, § 402(d)(1) (1970).

23. FED. R. CRIM. P. 11(e)(1) (Advisory Committee Notes).

24. FED. R. CRIM. P. 11(e)(2).

25. *Id.*

26. "To deprive the attorney of the opportunity to talk to the judge about a guilty plea before a defendant has made up his mind to plead guilty, would deprive him of one of the most valuable tools of his defense." *Brown v. Peyton*, 435 F.2d 1352, 1357 (4th Cir. 1970). Most commentators have criticized judicial participation. See, e.g., ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (1968); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29 (1974); Ferguson, *The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26 (1972). But see Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499 (1971); Comment, *New Federal Rule of Criminal Procedure 11(e): Dangers in Restricting the Judicial Role in Sentencing Agreements*, 14 AMER. CRIM. L. REV. 305 (1976); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964). For a comprehensive analysis covering both sides of the argument, see Altschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

27. 535 F.2d 198 (2d Cir. 1976).

sought unsuccessfully to obtain from the assistant state's attorney an agreement on a recommendation for a minimum ten year sentence instead of the twenty-five years provided by statute. In accordance with the policy of that particular prosecutor's office, the assistant refused to discuss any possible recommendations concerning sentence in return for a plea of guilty.²⁸ At a pre-trial conference, defense counsel informed the judge of the government's refusal, and requested that he indicate whether a greater than ten year sentence would be imposed following a guilty plea. The judge requested, and later obtained, the defendant's permission to inspect a pre-sentence report.²⁹ The judge further indicated that he would advise counsel of the sentence to be imposed if the defendant were to plead guilty, and would announce it at a later conference. In the interim, the government filed a petition for mandamus, which the court of appeals granted, concluding that "fair and expeditious disposition of criminal cases is best achieved by the trial judge completely abstaining from any participation in any discussions or communications regarding sentence, except as provided in Rule 11. . . ."³⁰ Whether all federal judges will adhere to the Second Circuit's interpretation of Rule 11(e)(1) is uncertain.³¹

FURTHER CONSIDERATIONS

Various other intricacies often dictate the decision to plead. In federal prosecutions, particularly public corruption or conspiracy cases where the government has an obvious need for insider witnesses, a defendant declining to become a cooperative witness can still be forced to testify under judicially imposed "use immunity."³²

28. *Id.* at 200.

29. This was in accordance with Federal Rule of Criminal Procedure 32(c)(1), which provides, in pertinent part:

The [presentence] report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

30. 535 F.2d at 205.

31. See generally ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 3.3(a) (1968); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON COURTS, § 3.1 (1973). The Alaska Supreme Court recently held that the trial judge had no place in state plea negotiations. *State v. Buckalew*, 561 P.2d 289 (Alaska 1977). The court cited four reasons: (1) judicial participation creates an impression in the defendant's mind that he will not receive a fair trial in front of this judge; (2) judicial participation makes a determination on plea voluntariness difficult; (3) promising a certain sentence is inconsistent with the intended use of a pre-sentence report; and (4) the risk of not going along with the disposition may seem so great to the defendant that he will be induced to plead guilty even when innocent. *Id.* at 291.

32. 18 U.S.C. § 6002 (1970):

Whenever a witness refuses, on the basis of his privilege against self-

Thus, an attorney must tell his client that while it may sound good to say that he refused to compromise himself to the authorities, the government has the last card to play.

When assessing the defendant's potential value to the prosecutors, defense lawyers recognize that the traditional technique for building an investigation is to work from the bottom up. Put simply, the prosecutor gets hard evidence against the low level people and either offers them immunity in exchange for their cooperation or accepts a plea to minor charges. Their testimony is used against the middle level people, who are themselves used to obtain trial witnesses against the top conspirators. Therefore, it is important to determine where the defendant is positioned upon that ladder since the appropriateness of a particular disposition can only be evaluated against the backdrop of the larger investigative picture.

A case in point is John Dean.³³ Early in the Watergate case, the Special Prosecutor's Office decided that because of his extensive involvement in the cover-up, they could offer Dean nothing less than a plea to a felony. Immunity was out of the question regardless of the importance of securing his cooperation and testimony against those who might prove more culpable.

There were two other possibilities. The government could have tried Dean, and then used him after his conviction as a witness against the others. This would have meant a substantial delay in prosecuting the higher officials. Alternatively, the prosecutors could have indicted Dean and his superiors simultaneously but separately, and then delayed Dean's trial. They could have given him testimonial immunity, compelled his testimony against the others, and brought him to trial later. This approach had obvious disadvantages. Dean would have been an easy target on cross-examination

incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

33. John Dean was an advisor to President Richard Nixon. During the 1972 Presidential election, members of the committee to re-elect Nixon were suspected of breaking into the National Democratic Headquarters. A conspiracy was uncovered that reached the inner circle of the President.

since he would have told his story under immunity, and the immunity could have made his later conviction impossible.

Fortunately for the Special Prosecutor, the problem was solved when Dean accepted an offer to plead guilty to a broad charge of conspiracy to obstruct justice. This compromise relieved the prosecutors from an otherwise uncomfortable dilemma.

A defense attorney's recurring nightmare is the soured deal. After bargaining with a prosecutor for a particular disposition of a case, especially a specific sentence, there remains the uncertainty that the court will reject the recommendations. *Santobello*, for example, involved the Supreme Court's reversal of a conviction where a new prosecutor, apparently ignorant of his predecessor's commitment to refrain from making a sentencing recommendation, recommended the maximum sentence. In remanding the case to the state court, the Court outlined two basic remedies for the disgruntled defendant: (1) the specific enforcement of the agreement or; (2) defendant's withdrawal of his guilty plea.³⁴ The Court deemed fairness to be the basic requirement underlying every plea bargain.³⁵ The plea must be voluntary and knowing,³⁶ and if it is induced by a promise or commitment by the prosecutor, the essence of those promises and commitments must be fulfilled.³⁷

Relief for the promise that is not fulfilled can occur where there is a mistake on the part of the prosecutor. In *United States v. Brown*,³⁸ the defendant entered into a bargain to plead guilty to possession of stolen mail in return for a dismissed forgery charge. Further, the government was to recommend that he receive a sentence of three years to be served at Lorton Reformatory concurrently with the unexpired term of another sentence. At sentencing, however, another prosecutor merely brought the bargain to the attention of the court without making the promised recommendation. The court thereupon sentenced the defendant to a term of four years without mention of incarceration at Lorton.³⁹

The Court of Appeals for the Fourth Circuit reversed, holding that the "halfhearted" recommendation by the new prosecutor did not comply with the terms of the bargain.⁴⁰ It made no difference that defense counsel had earlier brought the reasons for the bargain to

34. *Santobello v. New York*, 404 U.S. 257, 263 (1971).

35. *Id.* at 261.

36. *Id.* See also *Brady v. New York*, 397 U.S. 742 (1970).

37. *Santobello v. New York*, 404 U.S. at 262.

38. 500 F.2d 375 (4th Cir. 1974).

39. *Id.* at 376-77.

40. *Id.* at 377.

the attention of the trial judge. The test to be applied was an objective one: "whether the plea agreement has been breached or not—irrespective of prosecutorial motivations or justifications for the failure in performance."⁴¹ The case was remanded for full compliance with the bargain.⁴² Thus, the result in the case was specific performance of the original agreement.

If the court rejects the prosecutor's recommendation for a particular sentence, that in itself is insufficient for later relief if, at the time the defendant's plea is entered, he is advised that the recommendation is not binding on the court.⁴³

However, the courts do afford relief where prosecutors make specific sentencing promises which are unfulfillable because the prosecutor lacked authority to do so.⁴⁴ The leading case in this area is *United States v. I.H. Hammerman II*,⁴⁵ involving one of the government's key witnesses in a bribery case against former Vice President Spiro T. Agnew. The witness pleaded guilty to an information charging obstruction of the enforcement of tax liens, and signed a written agreement with prosecutors whereby he became a government witness. Although the agreement did not commit the United States Attorney to make a sentence recommendation, the government concluded that it should do so after the Vice President had himself received a suspended sentence.⁴⁶ To assure the court's acceptance of no incarceration, the entry of the plea was delayed until counsel could meet with the court to hear the government's affirmative argument that imprisonment would be inappropriate. At that

41. *Id.* See also *Miller v. State*, 272 Md. 249, 322 A.2d 527 (1974) (Prosecutor violated agreement not to comment on sentencing when he indicated his disagreement with presentence report).

42. 500 F.2d at 378.

43. See, e.g., *United States v. Wagner*, 529 F.2d 518 (4th Cir. 1976); *United States v. Futeral*, 539 F.2d 329 (4th Cir. 1975). Most judges, however, are reluctant to reject the prosecutor's recommendation since to do so dissuades future defendants from taking pleas in that courtroom. This would cause an immense burden on the court, when one considers that in some localities as high as 95% of all criminal convictions arise out of guilty pleas. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (Approved Draft 1968); *Brady v. New York*, 397 U.S. 742, 752 n.10 (1970). Nevertheless, Albert Altschuler chronicles a misdemeanor case in Cook County, Illinois, where a prosecutor obtained a guilty plea and testimony by promising a short sentence to run concurrently with one already received. After the defendant performed his part of the bargain, the prosecutor made his promised recommendation to the court. "Without a word of explanation, the judge sentenced the defendant to a substantial jail term, to begin after the expiration of his current sentence." Altschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1067 (1976).

44. *Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976); *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976); *United States v. Frontero*, 452 F.2d 406 (5th Cir. 1971).

45. 528 F.2d 326 (4th Cir. 1975).

46. *Id.* at 328 n.2.

meeting, the sentencing judge specifically stated that, while the prosecutor's argument was forceful, the court was not bound by his sentencing recommendation.

However, following the conference one of the prosecutors stated to Hammerman's attorney his belief that the court had given the desired indication that it would accept the government's recommendation. He stated specifically that the court had given the "signal" which counsel had been seeking.⁴⁷ Thereafter, at the arraignment, the government officially made the affirmative recommendation that punishment not include incarceration. Although noting that it would give consideration to that recommendation, the court affirmed that it would not be bound by it. After inquiring whether there were other agreements, understandings, or inducements, and being told there were none, the court accepted Hammerman's guilty plea and sentenced him to a term of eighteen months.⁴⁸

Hammerman appealed from the sentence, seeking either specific enforcement of the plea bargain, including the prosecutor's assurance of acceptance by the court, or in the alternative, an evidentiary hearing on the substance of his claim. He contended that he was misled by the prosecutor's statement into believing that the court would accept the prosecution's recommendation. The Fourth Circuit Court of Appeals held that, even though the prosecutor lacked the power to implement the prediction of no incarceration, his unfulfillable promise likely induced reliance and belief by Hammerman and was thus an essential element of the plea bargain.⁴⁹ This was true despite Hammerman's response at arraignment that there were no other understandings or commitments by the government. The court recognized that Hammerman's reasonable fear that a truthful response might jeopardize the bargain may have produced an answer that was false.⁵⁰

Since the prosecutor's misrepresentation flawed the plea, the court deemed withdrawal of the plea to be the appropriate relief.⁵¹ The court followed the prescribed remedy contemplated by Rule 11(e)(4) of the Federal Rules of Criminal Procedure whereby a court, if it decides to reject the plea arrangement, must inform the defendant of that fact and allow him an opportunity to withdraw the plea.⁵²

47. *Id.* at 329-30.

48. *Id.* at 330.

49. *Id.* at 330-31.

50. *Id.* at 331.

51. *Id.* at 332.

52. Federal Rule of Criminal Procedure 11(e)(4) provides:

If the court rejects the plea agreement, the court shall, on the record, inform the

The risk of a broken bargain necessitates establishing some form of a written record of the plea agreement. In Maryland federal court for instance, the prosecutor routinely recites the terms of the bargain in a letter to defense counsel. In some jurisdictions, counsel or the court may prepare and utilize forms for that purpose. In others, defense counsel states the bargain orally in open court and has it recorded by the court reporter. No matter how the record is made, the important consideration is preservation of the specific details of the bargain for appellate review in case of direct or collateral attack.⁵³

CONCLUSION

There is one final consideration. While there are no formal ethical guidelines for either the prosecutor or defense counsel regarding the substance of plea bargaining,⁵⁴ an advocate must deal honestly and without the usual tendency to exaggerate. In negotiating sessions of any kind, it is difficult for attorneys to avoid exaggerations. Prosecutors tend to overstate the culpability of a defendant while defense attorneys tend to minimize it. The conventional wisdom is that plea bargaining is a game; however the excesses of advocacy should not lead one to twist the rules to suit the situation. During negotiations, the attorney's reputation for honesty and fair dealing is as much at risk as the defendant's fate or freedom. While it is difficult for attorneys not to succumb to "bluffing," the successful advocate is the one who bargains honestly, knowing that if he deceives the court, makes the prosecutor look like a fool, or misleads defense counsel, the unprofessional conduct is likely to be remembered by all.

parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant an opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea, or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

53. *People v. West*, 3 Cal. 3d 595, 610, 477 P.2d 409, 418, 91 Cal. Rptr. 385, 394 (1970), suggests four possible methods of incorporating the plea bargain as part of the record: (1) the bargain can be related orally and recorded by the court reporter; (2) the bargain can be set forth by the clerk in the minutes of the court; (3) the parties can file a written stipulation stating the terms of the bargain; or (4) forms may be utilized to record the bargain.

54. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1970). See also *Brady v. United States*, 397 U.S. 742, 748 (1970) and *Von Moltke v. Gillies*, 332 U.S. 708, 721, 725 (1948), which address the need for defense counsel to be certain that the defendant's choice of plea is made with full knowledge and that counsel have no interest that would conflict with those of this client.