

A background map of Europe and Eurasia, showing major cities and geographical features. The map is partially obscured by a dark blue vertical bar on the right side. The text 'CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE' is overlaid on the map in a light blue, serif font.

CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE

LEGISLATIVE ASSISTANCE
AND
RESEARCH PROGRAM

**PLEA BARGAINS:
A CONCEPT PAPER**

PROMOTING THE RULE OF LAW



**CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE
LEGISLATIVE ASSISTANCE AND RESEARCH PROGRAM**

**PLEA BARGAINS:
A CONCEPT PAPER**

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Concept Paper on Plea Bargains

I. Introduction

The term *plea bargaining* can be defined as the process whereby the accused—the defendant—and the prosecutor in a criminal case work out a mutually acceptable disposition of the case. That disposition is subject to court approval. However, the court is not involved in any negotiations leading to the agreement and, in the United States, is prohibited from such involvement.

Plea bargaining is a necessary element of the United States criminal justice system. Properly negotiated and structured, plea agreements in general benefit defendants, the government, and the judiciary. In addition, the public benefits from plea-bargaining because plea agreements result in the conservation of public resources as well as the quick disposition of criminal cases. Plea bargaining is also particularly useful to prosecutors of organized crime cases, as plea bargaining may lead to invaluable cooperation of defendants in the investigation and prosecution of other members of a criminal organization.

Both private defense counsel and public defenders look upon plea negotiation as a necessary part of the criminal justice system. Observers agree that the majority of felony convictions in the United States are the result of guilty pleas arising out of negotiations or bargains between the prosecution and defense. Statistics in criminal justice are always suspect, but most of those knowledgeable in the field of criminal justice estimate that as many as ninety percent of felony convictions are a result of plea bargains.

The plea of guilty is the most frequent method of conviction in all jurisdictions of the United States. Conviction without trial will and probably should continue to be the most frequent means for the disposition of criminal cases. This assumption is not based on notions of expediency but rather on the conclusion that a number of values are served by the disposition of many criminal cases without trial. The plea provides a means by which the defendant may acknowledge guilt and manifest a willingness to assume responsibility for his or her conduct. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment and often prevent undue harm to the defendant from the form of conviction. Also, pleas make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.

The burden of proof in all criminal litigation is entirely on the governmental prosecutor to prove each necessary element of the statutory violation against the defendant beyond a reasonable doubt. The defendant never carries the burden of proving innocence, although he or she may be required to prove the elements of certain affirmative defenses, such as self-defense. The defendant is presumed to be innocent at all stages of a criminal proceeding and is legally not guilty until conviction on a finding of guilt after trial, admission of guilt pursuant to a guilty plea, or a failure to contest guilt through entering a plea of no contest, or *nolo contendere*. The strength of the government's prosecution, therefore, rests not on whether the defendant actually committed the crime charged but rather on the government's evidence to prove that the defendant did.

Trials, therefore, carry significant risk for both the prosecution and the defendant. For the government, a trial always carries with it the risk of an acquittal, which in turn may result in a loss of credibility, which may lead to political consequences, particularly when the prosecutor is an elected official or works for an elected official. Often, a prosecutor is faced with issues affecting the substance or admissibility of evidence, such as when evidence is obtained by illegal or constitutionally impermissible means, for instance, through a coerced or otherwise infirm confession or an improper search or seizure.

For the defendant, a trial may result in conviction on one or more charges arising out of the same transaction or series of transactions and may also result in the presentation of evidence of aggravating or, less often, mitigating factors that may affect sentencing. As a rule, criminal statutes carry a range of potential penalties. Those penalties may include fines and periods of incarceration between statutorily set minimum and maximum periods, or a combination of both fines and incarceration. Under certain circumstances, depending on the nature of the crime or crimes charged and the defendant's criminal history, the court may place the defendant on probation or suspend an imposed sentence, pursuant to certain terms and conditions of sentencing. In addition, where the trial involves a joinder of offenses, the defendant faces a substantial risk of multiple convictions, the penalties for which may be imposed either concurrently or consecutively.

Trials also involve significant public and private expense. Prosecutors and public defenders generally operate on set budgets, which can be significantly strained by the preparation for and presentation of the case at trial. Court-appointed attorneys are generally private practitioners who accept defense litigation often at much lower hourly rates than those available in their private practices and often with maximum limits as to how much they can be paid, regardless of the numbers of hours expended in defending a criminal case. A defendant who privately retains an attorney at the defendant's own expense may spend tens, and even hundreds, of thousands of dollars for a case that goes through the trial and post-conviction stages. Very often, proper presentation of a case includes expenses in addition to attorneys' fees, which include the retention of paralegals, investigators, and expert witnesses, which add significantly to budget constraints. Conviction following a trial, finally, may also result in an additional public and private financial burden in the appeals process.

Therefore, both the prosecution and defense have an interest in resolving criminal litigation, under appropriate circumstances, as early in the process as possible or appropriate. A negotiated plea bargain, therefore, obviates the need for trial and concomitant expense, relieves uncertainty, and gives the parties some control over the resulting disposition.

The courts also have an interest in the plea negotiation. While generally the court is not and should not be a party to the plea negotiation, by accepting plea bargains and taking seriously stipulated sentencing negotiations, the court encourages the early and expeditious resolution of the criminal process. This early resolution thereby eases the strain on overscheduled dockets, preserves public funds that would otherwise be expended in a jury trial, and promotes judicial efficiency.

II. Historical Background and Overview of Plea Bargains in the United States

For many years, there was no uniform or official system of plea bargaining in the United States. The system of plea bargaining in the federal system was officially recognized with the passage of the 1974 amendments to Federal Rules of Criminal Procedure Rule 11.¹ Many states follow similar rules.

A plea agreement usually involves the defendant receiving certain concessions in exchange for a waiver of the defendant's rights, including the constitutionally guaranteed right to a trial, and thereby eliminating the need for the trial. Concessions received by a defendant may include being allowed to plead guilty to a lesser offense, being allowed to plead guilty to only one or some of the counts of a multi-count indictment, or receiving a lenient sentencing recommendation by the government.

The United States Supreme Court has characterized plea bargaining as "an essential component of the administration of justice" that should be encouraged if properly administered. Courts generally have concluded that plea bargaining is vital to the United States criminal justice system, and, without plea bargaining, the system would deteriorate, especially considering the enormous number of criminal cases filed each year in the United States.

In addition to practical necessity and the conservation of judicial, prosecutorial, and law enforcement resources, plea bargaining has been justified for a number of reasons. Some of those reasons, articulated by courts, include:

1. plea bargaining permits a prompt resolution of criminal proceedings with all the benefits that result from final disposition and avoids delay and the uncertainties of trial and appeal,
2. plea bargaining results in improved equity, insofar as rigid sentencing guidelines may fail to take into account a defendant's particular circumstances,
3. plea bargaining avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release prior to trial,
4. plea bargaining protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release,
5. plea bargaining shortens the time between charge and disposition, thereby enhancing whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned, and
6. in the context of cooperation agreements, plea bargaining serves a greater good by allowing the government to prosecute higher-level criminals where such prosecution would not be possible without the information or testimony of the cooperating defendant.

¹ See Federal Rules of Criminal Procedure Rule 11 in Appendix B.

Other than the justification of necessity, all of the above justifications for plea bargaining presuppose fairness in securing the agreement between the defendant and prosecutor. This is one reason why promises made to defendants that induce the defendants to plead guilty, and the voluntariness of guilty pleas in general, are subject to court scrutiny.

Of course, the practice of plea bargaining is not without its critics. Opponents of plea bargaining argue that the system invites prosecutorial overreaching and abuse. For instance, the hope of leveraging guilty pleas may encourage prosecutors to overcharge initially. Critics have also stated the following negatives of plea bargaining:

1. the government enjoys enormous power over the accused, and the threat of larger criminal sanctions after trial strongly discourages defendants from invoking their constitutional rights,
2. defense counsel may have incentives to plea bargain even when it is not in the best interests of their clients, and
3. in the context of cooperation agreements, it is morally wrong to pressure defendants to testify against others in exchange for leniency.

Because so much of plea bargaining occurs behind the scenes, critics further argue that the above abuses go largely unchecked, and, consequently, the risk of convicting innocent defendants may increase.

III. The Procedural Steps to a Plea Bargain Agreement in the United States

A. How a Plea Bargain Is Initiated

A plea bargain is negotiated between the government represented by the prosecutor and the defendant represented by his or her counsel. As with the negotiations of contracts in the civil context, there is no set structure for negotiations of plea bargains. The negotiations can occur in person or via telephone, typically between counsel without the defendant's presence. However, defense counsel must apprise the defendant of the progress of negotiations, and defense counsel must convey to the defendant every formal offer made by the government.

The stronger the prosecution's case, the greater the likelihood the process will end with a plea bargain. To assess the strength of a case, the defense attorney must review all the evidence. Ordinarily, within a month after the defendant has been arraigned on the criminal charge, the defense will receive from the prosecution a copy of all the reports, witness statements, forensic tests, and other evidence that will be used against the defendant. The defense will conduct its own investigation of the alleged facts, often hiring its own expert for forensic testing and a private investigator for interviewing the witnesses.

Why will a case plead? Cases plead because it is usually in the best interests of the prosecution and defense. In the United States, for most crimes, the statutes provide for a maximum, but not a minimum, amount of incarceration time. Therefore, a charge of assault and battery with a dangerous weapon, for example, is punishable by imprisonment in the state prison for any term up to ten years. Instead of risking the sentence of a decade in jail, which might be imposed after a trial, the defendant might be willing to accept a lesser punishment. At the same

time, the prosecutor realizes that a guilty verdict after trial is not guaranteed. The certainty of a particular result encourages both sides to work out a plea.

The defense attorney and prosecutor discuss the case informally. In trying to reach a resolution, the prosecutor would consider the facts of the case: *e.g.*, in the assault case, was the weapon a baseball bat used multiple times with great force, causing hospitalization for weeks, or a shod foot that kicked the victim once, causing no serious injury? Is the defendant a first time offender or a seasoned criminal with a long record? What is the victim's feeling about what should happen to the defendant?

However, the prosecutor is not required to negotiate, and the prosecutor cannot be made to treat defendants who have committed the same offense similarly during plea bargaining. This is true as long as the prosecutor does not abuse this discretion. The fact is that no two defendants are the same. Each defendant may play a different role in the offense or have differing records as to past offenses; no two individuals come before the court or to the negotiations with situations that demand the same result. All that is required is that the prosecutor be able to demonstrate that the differentiation in treatment between defendants was not arbitrary or capricious.

Ordinarily, the negotiation process will take place between the prosecutor and the defense attorney. In such circumstances, it is essential that the prosecutor negotiate with the defense attorney as with an equal. Although plea discussions may be held outside the presence of the accused, the defense counsel has a duty to communicate fully the substance of the discussions to the client. It is important to remember that the decision to plead belongs to the accused and not to the counsel. In those situations where defense counsel have reportedly failed to inform clients of the prosecutor's offers, some prosecutors have sought to send written offers to the attorney with copies to the accused. This practice was the subject of an opinion by the American Bar Association Committee on Ethics and Professional Responsibility, which held that mailing a copy of the offer to the defendant was unethical.

In large part, the rationale for requiring the prosecutor to negotiate with counsel rests on the clear rule that an accused may not be coerced into a bargain. Coercion may result from impermissible false promises, false statements, or misrepresentations.

The very essence of plea negotiation is sentence reduction; thus, promises of leniency to the defendant are not coercive although promises of leniency for others may be suspect. Leniency promises do not fall in the same category as illusory promises, since leniency promises are promises the prosecutor intends to keep and can be fulfilled. While acknowledging that the agents of the state may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant,² the United States Supreme Court held that the weighing of a possible penalty by the defendant is not coercive.

² See *Brady v. United States*, 397 United States Reports 742 at 757 (1970). See also *Parker v. North Carolina*, 397 United States Reports 790 (1970), and *North Carolina v. Alford*, 400 United States Reports 25 (1970).

B. Two Types of Plea Bargains: Charge Dismissal and Sentence Reduction

The benefit given by the government in plea agreements usually takes the form of the dismissal of charges other than those to which the defendant will plead guilty. The government may also agree to recommend to the court certain sentencing calculations that are favorable to the defendant. The benefit given by the defendant is typically a waiver of constitutional rights resulting in the elimination of the necessity for a trial, thus resulting in a prompt disposition of the case and eliminating the government's need to expend resources preparing for and conducting a trial. In cooperation agreements, defendants also typically agree to such conduct as providing complete and truthful information, agreeing to testify in any necessary court proceeding, and so on.

The main goals of the defense attorney are to obtain either a reduced sentence or a conviction on less than all of the offenses charged. In charge bargaining, a defendant who is charged with several different crimes in the same case may agree to plead guilty to one or more of the crimes in exchange for an agreement to have the court dismiss the remaining charges.³ There would be no agreement as to what sentence the judge should impose. For example, a person charged with three counts of auto theft might be allowed to plead guilty to one count of auto theft with the understanding that the other two counts would be dismissed. Usually, the prosecutorial rule is to require the defendant to plead guilty to the most serious crime supported by the facts.

Another form of charge bargaining involves an agreement to reduce the charged crime to a lesser crime. An example might be a single charge of grand theft. If additional facts were brought to the attention of the police and the prosecutor that show the evidence does not support a conviction of grand theft, but does still show a crime of attempted grand theft, a plea bargain could be agreed upon to allow the defendant to plead guilty to the lesser crime of attempted grand theft.

In addition, sometimes a defendant may be charged with a number of crimes in several separate criminal cases. One way to handle a large caseload more efficiently is to consolidate all of these cases into a single case. Then, as part of the plea bargain, the defendant is permitted to plead guilty to some of the charges—usually the most serious offenses—and the remaining charges are dismissed at the time of sentencing. These are some of the most common types of charge bargaining.

In sentence bargaining, a defendant agrees to plead guilty to all of the crimes charged but, in exchange, will be sentenced to an agreed-upon sentence. A defendant charged with one crime of grand theft would agree to plead guilty to the crime exactly as charged, but, in exchange for the plea, the defendant might receive a promise of a reduced sentence. Thus, instead of going to the state prison, the defendant might receive three years of formal supervised probation, serve six months in the county jail, and make restitution to the victim.

³ It would be important for legislators to be explicit about what happens to charges dismissed during charge bargaining. Absent a specific guarantee, charges may be reinstated later. On the other hand, even absent such a guarantee, in the United States, charges are rarely brought again after being dropped, to ensure the integrity of the long-standing plea bargaining process.

Many plea bargains combine both of these features. The defendant may be allowed to plead guilty to the most serious crimes with an agreement that the court will dismiss the less serious charges alleged. In addition, the agreement may allow the defendant to be sentenced to a term in state prison that is less than the maximum term allowed by law. With the ability to negotiate using both the number and degree of charges and the severity of the sentence, many possibilities are available.

C. A Plea of Nolo Contendere—No Contest

Although a plea of no contest alone is not usually considered a plea bargain, such a plea can be part of the agreement to induce a plea from a defendant. By this plea, the defendant does not admit guilt, but the effect is the same as a guilty plea. The defendant merely chooses to not contest the case and allow himself or herself to be convicted. The defendant is told that the court will treat the plea the same as a guilty plea: the defendant will be convicted and sentenced the same as if the defendant had entered a guilty plea.

This plea can be a great face-saver for the defendant. The defendant can tell family and associates that, although innocent, his or her lawyer said the defendant would be convicted if the case went to trial. Therefore, a plea bargain is the best course of action.

D. Indicated Sentence

An indicated sentence is not a plea bargain but has a similar effect. In some instances, the prosecutor and defense lawyer are unable to agree upon the proper sentence for a particular case. For example, on an illegal drug case, the prosecutor may feel the defendant should serve two years in state prison. The defense attorney may feel that six months in the county jail is enough. After a discussion with both lawyers, the judge may indicate to them that, if the defendant pleads guilty with no plea bargain, the judge will sentence the defendant to one year in the county jail. The defendant can then plead guilty as charged and, over the objections of the prosecutor, will be sentenced to one year in jail rather than go to prison for two years. This result sometimes takes the place of a plea bargain.

E. Differences between Plea Negotiations in White Collar Crime and General Crime

Plea bargaining in the criminal context is rather different in the general crime context than it is in the white collar crime context. For criminal cases typically generated by arrests, such as murder, robbery, burglary, and drunk driving, charges are routinely filed before a defendant retains a lawyer. Once a defense lawyer becomes involved, the lawyer needs initially to assess the strengths and weakness of the government's case. First, the lawyer must discuss the facts of the case with the client. Next, the lawyer must conduct whatever independent investigation is possible, including interviewing potential witnesses and reviewing physical evidence. In addition, particularly for "street crimes," prosecutors' offices likely will have an "open file" policy that allows the defense lawyer to see the evidence against the client, such as the police report and statements of witnesses.

Once the defense lawyer has made an initial assessment of the case, it is important to have a candid discussion with the client to inform the client of the options available and to weigh

those options. Typically, a defendant has three options. First, the defendant can plead guilty to the initial charge. Second, the defendant can seek a plea arrangement in which the defendant pleads guilty to a lesser offense or pleads guilty to the same offense with the assurance that the sentence imposed will be less than the defendant would receive if convicted after a trial. Third, the defendant can exercise the right to trial and refuse to plead guilty to any charge. In most “street crime” cases, defendants need not seek a plea arrangement, as prosecutors will offer a plea that involves a lesser offense or sentence because the prosecutors have too many cases to prosecute and too few resources to do so.

By contrast, in a “white collar”⁴ criminal case, the defense attorney becomes involved in a much earlier stage in the process. The same essential elements of assessing the strength of the government’s case, the likely sentences involved, and collateral consequences are part of the representation of a white collar criminal defendant. Many white collar criminal cases, however, involve lengthy investigations before charges are brought, which allows criminal defense lawyers to be involved much earlier in the development of a case. Defense attorneys can establish a dialogue with prosecutors in the course of an investigation. This may allow defense attorneys to have an impact on the nature and extent of the charges that are ultimately brought. In addition, during this process, the defense lawyer, if the client is interested in exploring a plea bargain resolution of the matter, can discuss with the prosecutor potential charges that could be the basis for a plea bargain. The charges brought are important in evaluating the likely sentence to be imposed, particularly under the federal sentencing guidelines, which impose rigid requirements in terms of sentences for federal crimes.

Again, it is essential that the client be fully advised of the potential for a plea bargain and be in agreement with the defense counsel about even broaching the possibility with the prosecutors. It also must be recognized that the decision about accepting or rejecting the plea bargain must be that of the client alone. The client must be prepared to publicly acknowledge the commission of a crime and accept some punishment or go through the ordeal of a trial with the possibility of either complete vindication in an acquittal or conviction with a far more substantial sentence than he or she would otherwise get with a guilty plea.

F. Conclusion of Defense Attorney-Prosecutor Negotiations

In most cases, federal prosecutors require written plea agreements. Each federal prosecutors’ office has a standard form plea agreement, which can be modified to fit a particular case. Given the large range of circumstances and crimes that are subject to federal prosecution, modifications to form plea agreements can be substantial. The parties often haggle over language, additions, and deletions. Like contract negotiations in the civil context, it is common for the parties to negotiate a number of drafts of a plea agreement before the agreement reaches its final form.

If a mutually acceptable agreement is reached, the parties—the prosecutor, the defendant, and the defense counsel—sign the written agreement. The court is not a party to the negotiations and is prohibited by law from either participating in the creation of a plea agreement or forcing any party into entering a plea agreement. This prohibition is mainly because of the perceived

⁴ The term *white collar crimes* refers to nonviolent unlawful conduct.

undue influence that the court may bring to bear on either party. Such undue influence is deemed inappropriate given the legal requirement for voluntary plea agreements as well as the important rights potentially surrendered by both the defendant and the government in entering a plea agreement.

If the prosecutor and the defense attorney do not agree, some state jurisdictions allow the defendant to offer a plea, even over the objection of the prosecutor. The defense attorney would fill out a “Tender of Plea” form. On the same form, the prosecutor would state the recommended disposition. Both parties would be given an opportunity to appear before the judge and state the reasons for their views of the dispositional terms. A judge is free to accept or reject the plea tendered by the defendant. If the judge does not accept the tender, the defendant is given the opportunity of proceeding to a trial at a later date, and the proffered plea cannot be used as evidence against the defendant at that trial. The option to withdraw such a plea is not available in all jurisdictions, and a defendant may have to make a binding guilty plea.

On the question of fulfilling the promises made, the American Bar Association approach is that “a promise is a promise.” The American Bar Association Standards provide that a “prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.”

From the viewpoint of the defendant, the failure of prosecutorial performance in the agreement relates more often to remedy than to an analysis of the ethical considerations. Even if the prosecutor’s failure is ethical, the failure is an error. The subsequent question then becomes whether the plea is to be set aside or whether the court will require specific performance of the prosecutor’s promises.

The prosecutor, absent discovery of previously unavailable but crucial evidence, is usually required to follow up on the promised recommendations to the court. However, the prosecutor cannot bind the court, and a plea agreement still needs to be reviewed by a judge.

G. Colloquy in Court

After a plea agreement has been finalized, the parties present the agreement to the court. The court must determine whether to accept the defendant’s guilty plea. In the United States, the Federal Rules of Criminal Procedure provide guidance for the court in determining whether a plea agreement is acceptable. The rules require that a defendant’s guilty plea be made knowingly, intelligently, and voluntarily.⁵ These requirements are because a guilty plea constitutes a waiver of a defendant’s important Fifth Amendment and Sixth Amendment rights. The defendant has a Fifth Amendment right not to incriminate himself or herself and a Sixth Amendment right to a trial in which the government must prove the defendant’s guilt beyond a reasonable doubt. The court must find that a guilty plea satisfies the requirements of Rule 11 before the court can accept the plea.

In order for a court to adequately perform its required review of the circumstances of a guilty plea, the court asks a number of questions of the defendant during what is commonly

⁵ Federal Rules of Criminal Procedure, Rule 11.

referred to as the “plea colloquy.”⁶ This colloquy occurs in open court in the presence of all parties. When a defendant pleads guilty pursuant to a plea agreement, the court must be informed of the essence of any promises made to the defendant. The court must satisfy itself that no improper or illegal promises have been made to the defendant in order to induce the decision to plead guilty. This is consistent with the court’s duty to ensure the voluntariness of the plea. In the context of a cooperation agreement, the agreement may be filed with the court, and the plea colloquy occur, under seal. By doing this, others are not alerted to the defendant’s cooperation with the government. This is often done for the defendant’s safety, as well as to protect the integrity of any ongoing investigation.

During the plea colloquy, the court typically attempts to satisfy itself of, *inter alia*, the following:

1. the defendant is fully aware of, and understands, the nature of the charges against him or her,
2. the defendant is aware of the maximum and possible mandatory minimum penalties for the charge or charges to which the defendant is pleading guilty,
3. the defendant understands and concurs with all important terms of any plea agreement,
4. the defendant understands that the court is not bound by any government sentencing recommendations promised in the plea agreement, and the defendant has no right to withdraw the guilty plea if the court does not accept the sentencing recommendation unless the plea agreement is a special and rare type of agreement valid only if its terms are approved and followed by the court,
5. the defendant fully understands and waives his or her constitutional rights, including the right to be represented by an attorney, the right to persist in a plea of not guilty, and the right to trial by jury, at which the defendant would have the right to assistance of counsel, the right to confront and cross-examine witnesses, and the right against compelled self-incrimination,
6. the defendant’s guilty plea is not the result of force, threats, or any promises apart from any plea agreement, and
7. the defendant admits to a factual basis for the guilty plea, that is, the defendant admits to facts that satisfy the elements of the crime or crimes to which the defendant is pleading guilty.

A defendant is required to give a factual basis for the plea, or, in the case of a *nolo* plea, the state or the defense attorney may give a factual basis. The court, if it finds that the factual basis is insufficient to support a finding of guilt, may choose to reject the plea and require the case to be tried. While there is no specific requirement that the court do so, the court may conduct further inquiry into the factual basis with both the prosecutor and the defense attorney in

⁶ For an example of a judge’s script for a plea acceptance, *see* Appendix C.

the defendant's presence. The court may ask the defense attorney whether the defense attorney is aware of any defenses that may have been asserted or of any reason why the defendant's guilty plea is not appropriate.

Therefore, it is incumbent on the defense attorney to provide adequate counsel to allow the defendant to frame his or her factual basis adequately to meet the statutory elements of the offense to which the defendant is pleading.

The judge may also inform the defendant that, if the sentence imposed is greater than the recommendation, the defendant can withdraw the plea. The option to withdraw is only available when the original plea agreement stated that the tender of the guilty plea is conditional upon the acceptance of the sentence recommendation. In most cases, a guilty plea may not be withdrawn. However, judges are reticent to impose a harsher than agreed to sentence because doing so may undermine the plea bargaining system. Often, if there is a great disparity between what the judge feels would be appropriate under the circumstances and what the plea agreement calls for, the judge has a right to not accept the plea agreement.

A defendant may desire to plead guilty in exchange for what he or she believes is a favorable sentence, and the prosecutor may be willing to impose that sentence for a variety of reasons. However, the judge must be certain that the plea is made in accordance with constitutionally mandated procedures and be satisfied that the sentence is appropriate under all the circumstances.

At the time of sentencing, a probation officer has conducted an investigation and has provided a written report containing facts and information about the defendant. The report may contain information from the police, victims, and people familiar with the defendant. The judge will often check the information provided by the probation officer to be certain the defendant understands English and has sufficient education to engage in a discussion of his or her rights. Most judges explain each constitutional right in simple language that can be easily understood and then ask the defendant to tell the judge what some of these rights mean to him or her. Furthermore, a judge will then ask the defendant if he or she agrees with the prosecutor's statement of the evidence in the case and if he or she is pleading guilty because he or she is, in fact, guilty. It is important to ask the defendant to tell the court in their own words what crime or crimes the defendant has been charged with. At this point, the judge may also offer to answer any questions that the defendant may have, either for the court or for the defense attorney.

Not only does this type of a discussion with the defendant assure the judge that the defendant does understand the rights and the crime charged, but the defendant's ability to understand is reflected on the record in the defendant's own words for any future judicial review.

After the judge has decided that the defendant understands his or her rights and voluntarily gives up the rights by pleading guilty, the judge must then decide whether to accept the sentence and approve the negotiated plea.

In some jurisdictions, at the conclusion of the probation officer's sentencing report, the officer makes recommendations for the sentence to be imposed. The recommendation need not reflect the plea agreement and may differ from it. Probation officers are expected to use their individual judgment.

It is important for judges to have confidence in prosecutors and to know that the prosecutors will not agree to inappropriate sentences merely to avoid the effort of trial preparation and the trial. On the other hand, when the state recognizes there is weakness in its case because witnesses may be unavailable or reluctant to testify or there are serious evidentiary or legal problems, a negotiated plea is appropriate to obtain a conviction and sentence.

In addition, the prosecutor has an obligation to represent the peoples' interest in the sentencing process, and judges rarely reject a guilty plea and agreed sentence when the judges are confident that the plea agreements represent a result attained through a good faith arms-length negotiation. However, it is important for the judge to consider the sentence in light of the sentence the judge feels would be imposed if the defendant pled guilty without any agreement or if the defendant were being sentenced following conviction after a trial.

If the sentence does not provide for incarceration, and the judge believes this defendant should be imprisoned for some period of time, the plea is usually rejected. On the other hand, if the defendant is to be imprisoned under the plea, the plea will not be rejected merely because the judge would have imposed a slightly longer sentence. Although different judges exercise different levels of discretion, significantly less than ten percent of pleas are rejected.

IV. Considerations on Pleas

Although some participants in the United States criminal justice system philosophically or practically oppose bartering in the criminal context, the majority of participants in the system find plea agreements necessary and entirely acceptable. All sides agree that the best interests of all parties and the public are usually served by plea agreements that are properly structured.

There have also been allegations that prosecutors deliberately overcharge in order to have more room for negotiation. Overcharging may be "vertical," in which the offense is raised to a higher level than the circumstances seem to warrant, thus letting the charge encompass a "lesser included offense." Overcharging may also be "horizontal" and involve charging a defendant with a number of offenses arising out of the same facts. In neither case would the charges be dismissed for lack of probable cause because the evidence is available; the overcharging may only be in the opinion of the attorney for the accused.

Charging before all of the evidence is available may result in overcharging due to a fear that the evidence may not support some offenses later or that charges may result from further witness interviews. The use of higher or multiple charges may provide leverage in the plea bargaining process, but whether the charges are too severe for the circumstances may well depend on whether one is looking at the matter from the side of the prosecutor or the defense attorney. It is, however, professionally irresponsible to deliberately and calculatingly raise the charges only with the thought of creating a bargaining chip.

The plea agreement may also include the prosecutor's agreement to consent to a deferred sentencing or deferred adjudication. For example, in Wyoming, except for certain enumerated crimes such as certain homicides and sexual assaults, a defendant who has not previously been convicted of a crime may, with the defendant's consent and the consent of the prosecutor,

request consideration as a first offender.⁷ If the court decides that first offender treatment is appropriate, the court may accept the defendant's guilty plea but defer an adjudication of guilt pending a sentence of probation from one to five years. Upon the defendant's successfully completing the terms of probation, the charges are dismissed, and the defendant has no criminal record of conviction. Because this procedure requires the state's consent before the court can consider first offender treatment, it is a powerful bargaining tool in the plea negotiation process.

A. Consequences of a Guilty Plea

For federal and some state offenses, sentences are prescribed by sentencing guidelines that significantly reduce the discretion of judges and permit more accurate assessments of potential sentences. There are also collateral consequences of a conviction, such as losing the right to vote, carry a firearm, or do business with the government that can be significant to certain defendants and must be addressed with the defendants before making a decision on a plea offer. A guilty plea may also lead to deportation consequences that must be carefully considered. A guilty plea constitutes a waiver of a defendant's important Fifth Amendment and Sixth Amendment rights, the most notable of which are the defendant's Fifth Amendment right against self-incrimination and the defendant's Sixth Amendment right to a trial in which the government must prove the defendant's guilt beyond a reasonable doubt. The defendant must give up his or her constitutional right to a jury trial and the right to confront witnesses, and there is a very limited appeal right.

B. Grounds for an Appeal

In the United States, reversal by a higher court for ineffectiveness of counsel following a guilty plea occurs only when the defendant proves that there was a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on a trial. An attorney must render competent service to the client during the plea bargaining process. The competency of counsel is frequently raised in post-conviction proceedings, since, absent other narrow factors, a defendant may not challenge a guilty plea unless the lawyer was incompetent. In general, mistaken tactical judgments about legal issues will not result in an invalidation of a guilty plea.

The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into the decision. A defendant is not entitled to withdraw the plea merely because the defendant discovers, long after the plea has been accepted, that the defendant guessed incorrectly the quality of the state's case or the likely penalties attached to the alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then-applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the state will have a strong case is not subject to later attack because the defendant's lawyer correctly advised as to possible penalties. This is true even if later pronouncements of the courts

⁷ See Wyoming Statutes Section 7-13301.

hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

In contrast to purely tactical recommendations, defense counsel must advise the defendant of the alternatives to a guilty plea. If there is reliance on misleading advice in this context, the defendant is considered to have been denied effective assistance of counsel. However, a defendant who does receive erroneous advice must have relied on the advice to the point that the plea would be otherwise involuntary.

A valid waiver of a defendant's right to trial requires that the court ascertain at sentencing that the guilty or nolo contendere plea must be voluntarily, knowingly, and intelligently given by the defendant and that there is a factual basis to support the plea. At sentencing, therefore, the full plea agreement must be disclosed to the court in the defendant's presence, and the defendant is asked to acknowledge whether the agreement recited is what the defendant understood the plea agreement to be. Further, the court is required to conduct a hearing into whether the defendant has been threatened or promised something in addition to the recited agreement and whether the defendant has voluntarily entered into the plea agreement after having been advised by the attorney of the nature and elements of the charges and available defenses. The court must ask the defendant whether the defendant is satisfied with the attorney's representation. The defendant may be asked whether the defendant understands the maximum sentence that may be imposed. The defendant is always, in many state and all federal courts, advised by the court that the court is not bound by the plea agreement as to sentencing and that the defendant may not be allowed to withdraw or change the plea if the court does not accept the sentencing recommendation or request. Finally, the court should advise the defendant on the record of the specific rights that the defendant is giving up by pleading guilty or nolo contendere.

V. Department of Justice Guidelines Regarding Plea Agreements

The United States Department of Justice issues uniform guidelines for all federal prosecutors throughout the country. The guidelines state that plea agreements "should honestly reflect the totality and seriousness of the defendant's conduct." Prosecutors start from the premise that a defendant should be charged with, and be required to plead guilty to, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction. However, in making charging and plea offer decisions, prosecutors may consider such factors as:

1. whether the actual penalty yielded by the offense is proportional to the seriousness of the defendant's conduct,
2. whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation, and
3. maximization of the impact of federal resources on crime.

Department of Justice guidelines set out the following as some of the factors to be considered in determining whether entering into a plea agreement would be appropriate:

1. the defendant's willingness to cooperate in the investigation of others,

2. the defendant's history with respect to criminal activity,
3. the nature and seriousness of the offense or offenses charged,
4. the defendant's remorse or contrition and willingness to assume responsibility for the criminal conduct,
5. the desirability of prompt and certain disposition of the case,
6. the likelihood of obtaining a conviction at trial,
7. the probable effect on witnesses,
8. the probable sentence or other consequences if the defendant is convicted,
9. the public interest in having the case tried rather than disposed of by a guilty plea,
10. the expense of trial and appeal,
11. the need to avoid delay in the disposition of other pending cases, and
12. the effect upon the victim's right to restitution.

Many of the criticisms of plea bargaining result from prosecutors' failures to adhere to the guidelines set out above. If federal prosecutors generally adhere to the above guidelines, the likely result would be plea bargains that are relatively fair among all defendants. The integrity of the criminal justice system would not be undermined. Sometimes, plea bargains are based on improper factors, such as, for example, the prosecutor's relationship with defense counsel or the prosecutor's personal goals. Defendants should receive sanctions for their crimes that may not be the harshest sanctions but are nevertheless appropriate given factors such as the defendant's remorse or cooperation with the government, the state of the government's evidence, and the preservation of public resources.