

No Bargain

THE CRIMINAL JUSTICE SYSTEM HAS COME TO ACCEPT THE practice of plea-bargaining. The concept is quite simple: After being charged, an individual is given an incentive to resolve his or her case quickly, in exchange for pleading guilty or no contest. The incentive is usually a reduced sentence or lesser charges. Given the huge volume of cases and the efficiency the plea-bargain offers, it has become an indispensable tool of the criminal court system.

Misguided use or abuse of the plea bargain, however, can have counterproductive social, economic and ethical impacts, including mistrust of the criminal justice system and high costs. Given that prison populations and crime rates in Florida remain stubbornly high, an examination of this form of justice is a worthy exercise. This is an election year, with several state attorney posts being contested, so it's perhaps an ideal time to examine the implications of the plea bargain.

While the plea bargain is simple to understand in principle, there are many variations in actual practice. To be most effective and most just, plea offers should be tailored for the circumstances of each defendant. This method would require a good deal of front-loaded effort but would produce the best result. As in any investment scenario, research, due diligence and careful analysis produce the best return. Unfortunately, this method is employed least often.

One step removed from the ideal is the "standard offer." Using the standard offer, prosecutors simply offer any person charged with a particular crime the same, standardized plea bargain: six months for cocaine possession, for example. This method is the quickest and easiest for a prosecutor to employ, because it substitutes formula for reasoned judgment.

The standard offer is by far the most popular plea deal but not the most efficient. Because standard offers are often initially too punitive to be immediately accepted, they encourage individuals to negotiate, often remaining in jail to "fight" the case while arranging depositions, requesting audio and video, searching for witnesses, filing motions, etc. In the end, when trial dates near, prosecutors usually make better offers, thus defeating the purpose of the original offer: to save time and money.

Here in Duval County, state attorneys often use a graduated system of offering plea bargains. The graduated plea bargain imposes an additional element of pressure on a defendant in terms of time, charges or enhancements of some kind. Each variation encourages anyone who thinks they may lose at trial to accept the offer. It does not encourage those who are guilty to accept, because trial outcomes are often negative for the innocent as well; it merely encourages quick acceptance.

These offers are coercive, deny all due process safeguards that remain with other forms of plea bargains, and are inherently inefficient in terms of costs and concepts of fundamental fairness. They also encourage the most dangerous and experienced offenders to receive the lightest sentences and the most disadvantaged to be exposed to the harshest sanctions.

Event-limited offers consist of initial offers that remain valid only until depositions are scheduled. Once depositions are set, the terms of the deal change, becoming less desirable for the defendant. This has the effect of ratcheting up the pressure to motivate acceptance of the offered bargain.

One issue with this approach is the ethical implication of the state, in effect, punishing defendants for having the audacity to investigate their cases. The Florida Bar rules require a defense attorney to be thorough and prepared. The American Bar Association guidelines require a defense attorney to investigate a client's case, even when considering plea bargains. Event-limited offers deprive clients of informed attorney input and attorneys of an opportunity to do their jobs.

The root of plea bargains can be found in contract law. However, in no other contract scenario is due diligence punished. Imagine buying a car or house and being told the offered price will be doubled if you hire a mechanic or home inspector to assess the deal. In a market scenario, like buying a car or a house, you can simply decline and find another seller. But in the criminal system, there is no other seller.

State attorneys often remark that clients know if they are guilty and therefore whether or not the offer is a good one, but this misses the point. How a layperson can determine whether an offer is a good one depends on their legal case, not their moral position or their own thoughts of guilt or innocence. This is particularly true where elements of a crime include knowledge or intent.

Take the crimes of uttering or dealing in stolen property, for instance. Very often a person is approached by a third party and told they will be paid for cashing a check or pawning an item for someone with no I.D. They innocently attempt to assist and are arrested and charged. They are given a time-sensitive offer and are pressured to make a decision. They know only that they indeed

tried to cash a check or pawned an item they now know to be counterfeit or stolen. What they do not realize is that the element of knowledge and intent to defraud at the time of the incident are simply not present.

Another variation of the graduated offer consists of the state adding charges if the defendant refuses the initial offer. This can occur when someone pawns stolen items, for instance. Charged with dealing in stolen property, a defendant who refuses can have the charge of burglary added. Faced with such circumstances, most defendants simply take the offer before things get worse, guilty or not.

Even if the logic of a defendant's knowledge of guilt had merit, consider the natural outcome. Those savvy enough to know they are guilty and without legal defense are most likely to seize the initial offer, do the least time and earn the earliest release date. Those who cling to their innocence end up doing the most time at the highest cost for the least valid reason. Those who dare to investigate their own cases have to make life-altering decisions under the worst of circumstances in a time-pressured environment.

As justification for this practice, state attorneys have told me that once they have to spend an hour in deposition, they are justified in doubling an offer, say from 36 months to 72 months, because that hour is, in their view, a waste of taxpayers' money. How they can equate the value of one of their taxpayer-funded hours to a taxpayer eventually paying for someone being incarcerated for an extra three years is beyond my limited powers of logic.

Graduated offers are really meant to intimidate a defendant into taking a plea quickly. The corollary to this is that quick pleadings minimize work for the State Attorney. Therefore, while up-front work on the state's part creates the best plea offers for all involved, tiered offers minimize the state's workload at the expense of all involved. The American Bar Association guidelines rightly point out that "the role of prosecutors is to seek justice, not merely to convict." For these reasons, the graduated offer should not be used or used extremely rarely.

Given the tremendous effects the use of the plea bargain has on the judicial system's overall efficiency, candidates for state attorney should comment on their approach to this practice. How elected state attorneys train their staff, which practices they endorse or restrict, has an impact on public perception, court caseloads, jail population levels and therefore on budgets and taxes. It also implicates their essential mission, which is to seek justice, not just to convict people who, for whatever reason, have been arrested. If proper effort goes into making intelligent and just plea offers, then everyone is better served. ☺

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