

Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective

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There is a common perception that judges do not or should not play a role in the criminal plea bargaining discussions between prosecutors and defense counsel. However, in many state jurisdictions, judicial participation is allowed or even encouraged by statute or by case law. This Article briefly summarizes some of the issues with the plea bargaining process, including how structural issues with the way defense counsel are appointed and compensated, along with the power of prosecutors, makes good representation for defendants less likely. By then performing a fifty-state survey of rules for judicial participation in plea bargaining, the Article explicates both advantages and disadvantages of judicial participation in the plea process. Most importantly, it makes five recommendations for how states can involve judges in the plea process to retain the advantages while minimizing the disadvantages of judicial participation: having a separate judge or magistrate judge manage the plea process, recording plea bargains for future review, ensuring judges take a facilitative role during the plea process, involving defendants in the process where possible, and holding plea bargains in an informal setting.

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I. INTRODUCTION

What role should the trial court judge or other judges have in the criminal plea bargaining process? While judges often play a role in civil settlement conferences, there is a common perception that judges do not or should not play a role in the criminal plea bargaining discussions between prosecutors and defense counsel.¹ However, this absence of judicial participation is not always the reality. While there is a clear prohibition in the Federal Rules of Criminal Procedure on any participation by the judge,² in many state jurisdictions, judicial participation is allowed or even encouraged by statute³ or by case law.⁴

This Article attempts to survey the current landscape of different approaches to judicial participation in plea bargaining, and then use this

¹ See generally Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

² FED. R. CRIM. P. 11(c)(1); see *United States v. Baker*, 489 F.3d 366, 376 (D.C. Cir. 2007).

³ E.g., VT. R. CRIM. P. 11(e)(1).

⁴ E.g., *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983).

knowledge along with best practices in mediation and judicial settlement conferences to recommend how best to involve judges in the process. This question is particularly timely, as the Supreme Court has recently taken an interest in the effective assistance of defense counsel in plea bargaining,⁵ and the proper judicial role could help protect defendants' Sixth Amendment rights.

Part II of this Article briefly summarizes some of the issues with the plea bargaining process, including how structural issues concerning the way defense counsel are appointed and compensated, along with the power of prosecutors, makes good representation less likely. It then considers why, in light of the Supreme Court's recent jurisprudence, now is an appropriate time to consider the problem, and discusses how judges, in their more modern role of a managerial judge, can improve the process.

Part III then performs the first fifty-state survey detailing the different approaches to judicial involvement in plea bargaining. This survey compares the states in terms of whether judicial participation is allowed or prohibited by state statute or procedural rule, and whether the use of judges during plea bargains is prohibited, discouraged, treated neutrally, or encouraged.

Part IV then uses the lessons from the case law of the states as well as the existing literature on judicial participation to determine both the concerns with this practice, as well as the benefits that are realized. The concerns include a lack of voluntariness of the plea, lack of a neutral role in the process, that the judge may learn prohibited information, and that the judge should not usurp the prosecutorial function. However, benefits include ensuring that the defendant is informed of relevant information, performing a check on prosecutorial discretion, performing a check on defense counsel misconduct or malpractice, and improving efficiency.

Part V uses the different practices of the states to make five structural recommendations for how judges should be involved in the plea bargaining process that address the concerns of courts, but also retain the benefits. These recommendations include having a separate judge for the plea bargaining process than the trial judge, making sure the plea process is recorded, ensuring the judge plays a facilitative role in the plea process, involving the defendant where possible, and recommending that the plea process happen in an informal setting.

The Article then briefly concludes, outlining some of the findings as well as suggesting the need for reform of the plea bargaining process more generally.

⁵ See *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012) (petitioner could attack his guilty plea based on ineffective assistance at the plea bargaining stage, even when followed by a "full and fair trial"); *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012) (petitioner could attack a knowing guilty plea when attorney error caused a better plea to be unavailable); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010) (failure to inform about collateral consequences of deportation in plea bargain ineffective assistance).

II. USING JUDGES TO ADDRESS THE ILLS OF THE PLEA BARGAINING SYSTEM

Many have criticized the process of plea bargaining due to structural concerns about how it is organized. Now is an appropriate time to reconsider the issue, given the Supreme Court's recent jurisprudence in this area. Judges can help improve the plea bargaining process by addressing some of the structural deficiencies.

A. Critique of the Plea Process

Scholars have long criticized plea bargaining, arguing that the system under which plea bargains are conducted is inherently unfair to defendants, given the power differential between prosecutors and defendants, as well as the coercive nature of the process.⁶ Others have focused on the pressures and incentives that defense attorneys face which can prejudice their clients.⁷ They note that many defense lawyers are public defenders, who are paid fixed salaries to represent large numbers of indigent clients,⁸ or who are private attorneys appointed by the court for low hourly rates and subject to caps on compensation.⁹ This compensation structure creates little incentive for these lawyers to try cases¹⁰ and great incentive to plead cases out quickly in order to handle larger volumes.¹¹ In addition, these appointed lawyers are given few resources with which to try cases, and so are unlikely to afford the extensive discovery that may be required.¹²

In addition to having few financial incentives to take cases to trial, defense attorneys are often overburdened with the number of cases they have to handle. They often must handle hundreds of cases a year, meaning that plea bargains are often the norm as these attorneys have no time to go to trial.¹³ Many of these lawyers have no financial motivation to bargain well, because if they are public defenders or handle primarily court appointments, their reputation will not improve business as their clients have no choice of

⁶ See generally Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979, 1980 (1992).

⁷ See Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 576–82 (2014); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476–86 (2004).

⁸ Bibas, *supra* note 7, at 2476–86.

⁹ *Id.* at 2477.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 2479.

¹³ *Id.* at 2477.

counsel.¹⁴ Finally, defense attorneys are subject to pressures from judges and clerks to settle cases, either to avoid judicial reprisals or possibly to continue to receive court appointments.¹⁵

Due to these poor incentives, clients who have appointed attorneys as defense counsel can be prejudiced in several ways. A lawyer who cannot credibly threaten to take a case to trial is less likely to be offered concessions in the plea bargaining process.¹⁶ In addition, overburdened defense counsel with several cases have been known to trade off the settlement of certain cases against others, usually to the detriment of indigent clients and the benefit of paying clients.¹⁷ Appointed counsel will also file fewer motions, meet with their clients fewer times, meet with their clients later, and be less familiar with sentencing rules than paid defense counsel,¹⁸ all of which can lead to poorer outcomes.¹⁹

Compounding the deficiencies of defense counsel, prosecutors enjoy extraordinary power in the plea bargaining context.²⁰ Because prosecutors have virtually unchecked discretion to charge differently for the same acts and can add enhancements or charges if pleas are refused,²¹ defendants are strongly incentivized to take whatever deals are offered by the prosecution. In addition, increased penalties for existing crimes, mandatory minimum sentences, adding additional crimes to the penal code, and zero-tolerance policies all have contributed to the pressure on defendants to plead guilty.²² Despite the problematic nature of this power imbalance, the Supreme Court has found that using threats of increased prosecution during the plea process is constitutional.²³

Finally, scholars have decried the lack of procedural justice in the plea bargaining system.²⁴ They have argued that plea bargaining deprives the

¹⁴ Bibas, *supra* note 7, at 2479; *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1958 (1992).

¹⁵ *See* Bibas, *supra* note 7, at 2480; *see also* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1210–11, 1222, 1224 (1975).

¹⁶ Bibas, *supra* note 7, at 2478; *see also* Alschuler, *supra* note 15, at 1185–86.

¹⁷ Bibas, *supra* note 7, at 2480.

¹⁸ *Id.* at 2481–82; *see also* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 779–82. Even paid defense counsel retained by poor defendants that fall outside of the indigency standards may exhibit some of the same troubling behaviors.

¹⁹ Cognitive biases of defense counsel can also lead to poor outcomes, and untrained defense counsel are also more likely to be subject to these. *See* Bibas, *supra* note 7, at 2521–23.

²⁰ Alkon, *supra* note 7, at 582; *see also* Uphoff, *supra* note 18, at 796–802.

²¹ Alkon, *supra* note 7, at 582.

²² *Id.* at 585–86.

²³ *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Brady v. United States*, 397 U.S. 742, 750 (1970).

²⁴ *See generally* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 410 (2008).

defendants of *voice* to tell their side of the story, *neutrality* of process in that they deal only with prosecutors they perceive as biased, *trustworthiness* in that they feel that there is a lack of principled engagement by the prosecutor, and *respect* in that they are subject to pressure tactics, threats, and rough treatment.²⁵ This lack of procedural justice can lead to a significant sense of unfairness with the process in defendants' minds.²⁶ This, in turn, can lead to substantial problems with compliance by defendants, both in the probation system²⁷ as well as during incarceration.²⁸ Experience with the courts in this manner leads to negative attitudes and generalized dissatisfaction with the justice system,²⁹ which can also erode a feeling of obligation to obey the law.³⁰

B. *An Appropriate Time to Reconsider the Problem*

As mentioned above, structural issues with the criminal justice system give defense counsel few incentives to bargain well. Because of overworked public defense counsel, inadequate pay structure, and few resources to take cases to trial, as well as pressure from prosecutors and judges to maintain good relationships by being compliant, defense counsel rarely take cases to trial. In addition, defense counsel can sometimes commit real error in negotiating plea bargains. Defense counsel can be unprepared for the bargaining process, trade off their indigent client's interests for their paying client's interests, bargain too hard, bargain too easily, or refuse to bargain at all.³¹

These issues with the plea bargaining process are appropriate to consider now because of a pair of decisions handed down by the Supreme Court in 2012—*Lafler v. Cooper*³² and *Missouri v. Frye*.³³ In these decisions, the Supreme Court for the first time applied the protections of the Sixth Amendment right to effective assistance of counsel to the plea bargaining process.³⁴ Writing for the majority in *Frye*, Justice Kennedy stated that in order for the benefits of a plea agreement to be realized, “criminal defendants require effective counsel during plea negotiations. ‘Anything less . . . might deny a defendant effective representation by counsel at the only stage when

²⁵ *Id.* at 426–30.

²⁶ *Id.* at 424.

²⁷ *Id.* at 433.

²⁸ *Id.* at 434–35.

²⁹ Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 875 (1997).

³⁰ O’Hear, *supra* note 24, at 435.

³¹ See Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 325–31 (2013).

³² *Lafler v. Cooper*, 132 S. Ct. 1376, 1380 (2012).

³³ *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

³⁴ See Batra, *supra* note 31, at 309.

legal aid and advice would help him.”³⁵ Unfortunately, for the reasons stated above, counsel is often less than “effective,” and the “help” is not realized.

Unlike at trial, if a defense counsel is constitutionally deficient in his representation during a plea bargain, there is little recourse for the defendant. Defendants in criminal cases are rarely present during the plea bargaining process.³⁶ While defendants may be able to determine certain errors of defense counsel, such as the failure to actually consult with the defendant before conducting the plea negotiation or failing to communicate the terms of any plea offer to the defendant regardless of whether the defendant is present during the bargaining, many other errors will be harder to detect as the defendant will not be present for them.³⁷ A defense counsel who is unprepared in a plea negotiation, who does not counter any offer from the prosecution, or who does not introduce any mitigating evidence will go undetected.³⁸ And in particular, any errors of defense counsel comportment, such as belligerence to the prosecutor rising to the level of ineffective assistance of counsel or other unprofessional behavior, would not be witnessed by a defendant who is not present at the plea bargain.³⁹ While prosecutors may witness such behavior, they are not incentivized to report such actions because prosecutors and defense counsel work closely with each other as repeat players in the plea bargaining system, and in addition, poor defense counsel behavior can often be beneficial to the prosecutor.⁴⁰

C. Using Judges as the Appropriate Neutrals to Address Ills of the Plea Bargaining System

Using judges as neutrals during the plea process can address several of the ills of the plea bargaining system identified above. Judges could serve as a check on both defense and prosecutorial misconduct and ensure that defendants get better representation.⁴¹

Adding a judge as a neutral to oversee the plea bargains that usually take place between the prosecution and defense counsel may seem to challenge the traditional notion of the role of the judge. Under the “traditional judicial

³⁵ *Frye*, 132 S. Ct. at 1407–08 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)).

³⁶ G. NICHOLAS HERMAN, PLEA BARGAINING § 7:04 (3d ed. 2012); *see infra* Part V.D (discussing how to involve the defendants in the plea process).

³⁷ *Batra*, *supra* note 31, at 326–31.

³⁸ *Id.*

³⁹ *Id.* at 326.

⁴⁰ *See, e.g.*, *United States v. Khoury*, 755 F.2d 1071, 1074 (1st Cir. 1985) (erroneous estimates of sentencing and erroneous legal opinions about the binding effect of government promises do not make plea involuntary).

⁴¹ *See infra* Part V.

role”⁴² judges rely on “parties to frame disputes and on legal standards to help resolve them.”⁴³ Under this view, the level of control and degree of discretion that judges have in running a settlement conference would allow too much unfettered control over the process and could lead to coerced settlement.⁴⁴

However, a more modern view of the judicial role can be seen in a common practice in the civil context: that of the judicial settlement conference. Rather than the traditional role identified above, modern judges take a more “managerial” role towards their docket in the civil context, meeting with counsel and clients to settle cases before they come to trial.⁴⁵ Under this conception of judges, the management of cases is more important than any individual trial, and the judge can have a positive impact on the outcome of the dispute by becoming more, rather than less, involved.⁴⁶ Adopting this model for the criminal context allows judges to play an appropriate role in the resolution of criminal cases without exceeding the judicial role conception.⁴⁷

However, states divide on what amount and character of judicial involvement they will allow. Part III, below, surveys the landscape of different state approaches to judicial participation.

III. CURRENT APPROACHES TO JUDICIAL PARTICIPATION IN PLEA BARGAINING

Whether judges participate in the plea bargaining process varies widely across jurisdictions. Recently, the Supreme Court reaffirmed that any participation by a judge at the plea bargaining stage necessarily violates the Federal Rules of Criminal Procedure for cases in the federal system.⁴⁸ In coming to this conclusion, the Court relied heavily on Federal Rule of Criminal Procedure 11(c)(1), which states that “[a]n attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”⁴⁹

⁴² Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363–87 (1978).

⁴³ Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29 (2003) (adopting the Fuller model); see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982) (same).

⁴⁴ Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1893–95 (2006).

⁴⁵ Resnik, *supra* note 43, at 376–77.

⁴⁶ *Id.* at 376–77, 379; see also Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge,” *Judicial Mediation in the United States*, 12 J. L. & SOC’Y 1, 3 (1985).

⁴⁷ See *infra* Part V (providing recommendations for how judges should appropriately conduct the process in this role).

⁴⁸ *United States v. Davila*, 133 S. Ct. 2139, 2140 (2013) (finding that these cases should be reviewed for harmless error).

⁴⁹ FED. R. CRIM. P. 11(c)(1).

Despite the federal prohibition, the states vary widely in allowing or disallowing judicial participation in plea bargaining. Of course, in every jurisdiction, the judge invariably participates in the plea bargaining process through accepting or rejecting the plea bargain itself. However, when the judge goes beyond this activity, either to discuss the plea bargain with one or more counsel, or even further, to serve as a neutral during the plea bargaining negotiation, states divide on how much involvement is permitted.

The sections below survey the approach of different states from the most restrictive to the most permissive in terms of participation allowed by state statutes, court rules, and case law. A minority of state statutes or court rules mirror Federal Rule of Criminal Procedure 11(c)(1) directly and have an outright prohibition on judicial involvement in plea bargaining of any kind. Any participation by a judge is seen as so inherently coercive that it renders any subsequent plea involuntary as a matter of law.⁵⁰ However, even in such states, plea bargaining may be allowed (but discouraged) by the case law interpreting these statutes.⁵¹ In other states, judicial participation is allowed by statute or procedural rule, but is either prohibited or discouraged by the courts. A few courts are neutral or silent on the issue of judicial participation as well. In contrast to the federal rule and a minority of states, several states have explicitly allowed judges to be involved in the plea bargaining process, in various types of roles. The following sections categorize each of the states.

A. Judicial Participation Expressly Disallowed by Statute or Procedural Rules

Several states explicitly prohibit judicial participation by judges in the plea bargaining process. Many of these track the language of Federal Rule of Criminal Procedure 11(c)(1).⁵² These types of statutes or rules of procedure are found in the states of Colorado,⁵³ North Dakota,⁵⁴ South Dakota,⁵⁵ West

⁵⁰ See, e.g., *United States v. Anderson*, 993 F.2d 1435, 1438 (9th Cir. 1993); *People v. Clark*, 515 P.2d 1242, 1243 (Colo. 1973).

⁵¹ Compare WASH. REV. CODE ANN. § 9.94A.421 (2014), with *State v. Wakefield*, 925 P.2d 183, 187–88 (Wash. 1996). See also *infra* Part III.A.

⁵² FED. R. CRIM. P. 11(c)(1).

⁵³ COLO. R. CRIM. P. 11(f)(4) (“The trial judge shall not participate in plea discussions.”).

⁵⁴ N.D. R. CRIM. P. 11(c)(1) (“The court must not participate in these discussions.”); see also *State v. Vandehoven*, 772 N.W.2d 603, 607 (N.D. 2009) (citing *State v. Dimmitt*, 665 N.W.2d 692 (N.D. 2003)) (“Rule 11(d)(1), N.D. R. CRIM. P. [now N.D. R. CRIM. P. 11(c)(1)], provides, ‘the court shall not participate’ in plea agreement discussions. On this point, the federal rule is substantively identical to our rule and prohibits the court from participating in any plea discussions.”).

⁵⁵ S.D. CODIFIED LAWS § 23A-7-8 (2014) (“A court shall not participate in such discussions.”). *But see* *State v. Bolger*, 332 N.W.2d 718, 720 (S.D. 1983) (judge meeting with defense counsel concerning the likelihood of judge accepting a plea bargain after parties had developed deal not considered “participation”).

Virginia,⁵⁶ Arkansas,⁵⁷ Tennessee,⁵⁸ Pennsylvania,⁵⁹ and Utah.⁶⁰ Other states and the District of Columbia⁶¹ have enshrined this explicit prohibition in their court rules, including Georgia,⁶² Mississippi,⁶³ New Mexico,⁶⁴ and Virginia.⁶⁵

⁵⁶ W. VA. R. CRIM. P. 11(e)(1) (“The court shall not participate in any such discussions.”); *see also* State v. Welch, 734 S.E.2d 194, 199 (W. Va. 2012) (citing State v. Sugg, 456 S.E.2d 469, 487–88 (W. Va. 1995)) (“Rule 11(e)(1) draws a bright-line prohibiting judicial participation in plea negotiations.”).

⁵⁷ ARK. R. CRIM. P. 25.3(a) (“The judge shall not participate in plea discussions.”). There has been no case law explicating this rule.

⁵⁸ TENN. R. CRIM. P. 11(c)(1) (“The court shall not participate in these discussions.”). There has been no case law explicating this rule.

⁵⁹ PA. R. CRIM. P. 590(B)(1) cmt. (“Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.”); *see also* Commonwealth v. Johnson, 875 A.2d 328, 331–32 (Pa. Super. Ct. 2005) (“It is settled that a plea entered on the basis of a sentencing agreement in which the judge participates cannot be considered voluntary Indeed, a trial judge is forbidden from participating in any respect in the plea bargaining process prior to the offering of a guilty plea. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office The unquestioned pressure placed on the defendant because of the judge's unique role inevitably taints the plea.” (citation omitted)).

⁶⁰ UTAH R. CRIM. P. 11(i)(1) (“The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.”).

⁶¹ D.C. SUPER. CT. R. CRIM. P. 11(e)(1) (“The Court shall not participate in any discussions between the parties concerning any such plea agreement.”); *see also* Boyd v. United States, 703 A.2d 818, 821 (D.C. Cir. 1997) (“Rule 11(e)(1) leaves no room for doubt that its purpose and meaning are that the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him of a plea agreement.” (citation omitted)).

⁶² GA. UNIF. SUPER. CT. R. 33.5(A) (“The trial judge should not participate in plea discussions.”).

⁶³ MISS. UNIF. CIR. & CNTY. CT. R. 8.04(B)(4) (“The trial judge shall not participate in any plea discussion.”); *see also* Fermo v. State, 370 So. 2d 930, 933 (Miss. 1979) (“While a trial judge must control the sentencing phase of a criminal trial and has the responsibility and duty of approving or disapproving a recommendation by the prosecutor, he should never become involved, or participate, in the plea bargaining process. He must remain aloof from such negotiations.”).

⁶⁴ N.M. DIST. CT. R. CRIM. P. 5-304(A)(1) (“The court shall not participate in any such discussions.”); *see also id.* r. 5-304 cmt. (“By the adoption of this rule, the Court has specifically eliminated all judicial involvement in the plea bargaining discussions. The judge’s role is explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant.”); State *ex rel.* Anaya v. Scarborough, 410 P.2d 732, 735 (N.M. 1966) (“There is no provision in our statutes or rules wherein a pre-trial conference in criminal proceedings is permitted or contemplated. Indeed, it is difficult to imagine how the constitutional guaranties to one charged with a crime can be made effective in any kind of proceeding wherein admissions, concessions or agreements of any kind are made by an accused before proof is presented to establish a prima facie case.”).

However, at least one state court in this group, Washington, has found that despite the prohibition in its statute,⁶⁶ the relevant inquiry is not whether the judge participated, but “whether such participation resulted in an involuntary plea.”⁶⁷

B. *Judicial Participation Prohibited by Case Law*

A number of state statutes or rules of procedure are silent on the issue of whether judicial participation in plea bargaining is allowed, but some of those state courts have ruled on the issue and found that any judicial participation is expressly prohibited, under the same rationales as the courts in Part III.A. These are the states of Alaska,⁶⁸ Kansas,⁶⁹ Texas,⁷⁰ Wisconsin,⁷¹ and Nevada.⁷²

C. *Judicial Participation Discouraged by Case Law*

In other states where statutes or court rules allow or are silent on judicial participation, state courts have discouraged but not explicitly prohibited judges from being involved with the plea process.

⁶⁵ VA. SUP. CT. R. 3A:8(c) (“In any such discussions under this Rule, the court shall not participate.”). There has been no case law interpreting this rule.

⁶⁶ WASH. REV. CODE ANN. § 9.94A.421 (2014) (“The court shall not participate in any discussions under this section.”).

⁶⁷ *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (quoting *State v. Pouncey*, 630 P.2d 932 (Wash. App. 1981)).

⁶⁸ *State v. Buckalew*, 561 P.2d 289, 292 (Alaska 1977) (“Alaska’s trial judges shall be totally barred from engaging in either charge or sentencing bargaining.”).

⁶⁹ *State v. Oliver*, 186 P.3d 1220, 1226 (Kan. 2008) (“These cases provide a clear, fair, and workable standard for trial judges. Judges should not participate in the negotiation of the proposed terms of a plea agreement, nor should they encourage the defendant to accept or reject any of the proposed terms.”).

⁷⁰ *Lynch v. State*, 318 S.W.3d 902, 903 (Tex. App. 2010) (“A trial judge should avoid participation in plea negotiations until an agreement has been reached, in order to avoid the appearance of any judicial coercion or prejudgment of the defendant since such influence might affect the voluntariness of the defendant’s plea.” (internal quotation marks omitted)); *see also State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983) (“Judicial involvement in plea negotiations runs afoul of due process and fundamental fairness in several ways.”).

⁷¹ *State v. Hunter*, 692 N.W.2d 256, 259 (Wis. 2004) (“We have recently recognized a ‘bright-line’ rule that bars ‘any form of judicial participation in plea negotiations before a plea agreement has been reached.’” (citation omitted)); *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970) (“A trial judge should not participate in plea bargaining.”).

⁷² *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006) (“[W]e expressly prohibit any judicial participation in the formulation or discussions of a potential plea agreement with one narrow, limited exception: the judge may indicate on the record whether the judge is inclined to follow a particular sentencing recommendation of the parties. Any other comments or discussion by the judge relating to a potential plea must be strictly avoided.”).

A number of states allow judicial participation in their state statutes, but the courts have found such involvement problematic and have discouraged or envisioned a limited role for such participation. Such is the case in Illinois,⁷³ Maryland,⁷⁴ Missouri,⁷⁵ Maine,⁷⁶ Hawaii,⁷⁷ and New Jersey.⁷⁸

In other states, the existing laws are silent on the issue of judicial participation, but nevertheless the courts have similarly discouraged, but not

⁷³ Compare ILL. SUP. CT. R. 402(d)(1) (“The trial judge shall not initiate plea discussions. Upon request by the defendant and with the agreement of the prosecutor, the trial judge may participate in plea discussions.”), with *People v. Smith*, 941 N.E.2d 975, 984 (Ill. App. Ct. 2010); *People v. Fox*, 345 N.E.2d 139, 142 (Ill. App. Ct. 1975) (suggesting that judicial participation comes with a risk of coercion that needs to be monitored by courts), and *People v. Robinson*, 308 N.E.2d 88, 91 (Ill. App. Ct. 1974).

⁷⁴ Compare MD. R. 4-243, with *Barnes v. State*, 523 A.2d 635, 641 (Md. Ct. Spec. App. 1987) (“Subsection (c) of that standard states that the judge may meet with defense counsel and the prosecutor when the parties are unable to reach a plea agreement on their own, but that the judge’s role in such a meeting should be to ‘serve as a moderator.’ . . . Subsection (f) further cautions that ‘the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.’”).

⁷⁵ Compare MO. SUP. CT. R. 24.02(d) (“The court shall not participate in any such discussions, but after a plea agreement has been reached, the court may discuss the agreement with the attorneys including any alternative that would be acceptable.”), with *State v. Tyler*, 440 S.W.2d 470, 474 (Mo. 1969) (“We agree with the suggestion of defendant’s counsel that a judge should not ordinarily participate in plea discussions. Those discussions should usually be limited to the attorney for defendant and the prosecuting attorney.”).

⁷⁶ Compare ME. R. CRIM. P. 11A. advisory note (“The amendment to M.R. Crim. P. 11A(a) clarifies the current limitation on a court participating ‘in the negotiation of the specific terms of the plea agreement’ by making a positive statement regarding the court’s capacity to participate in such negotiations.”), with *In re Cox*, 553 A.2d 1255, 1257 (Me. 1989) (“There are strong and persuasive reasons for limiting the role of the trial judge in plea negotiations.”).

⁷⁷ Compare HAW. R. PENAL P. 11(f)(1) (“The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.”), with *State v. Gumienny*, 568 P.2d 1194, 1200 (Haw. 1977) (“The independence of the trial judge from the plea bargaining process must be a paramount consideration in our review of plea bargaining procedures.”).

⁷⁸ Compare I N.J. SUP. CT. R. 3:9–3 (stating that the judge does not enter into the discussions with respect to plea bargaining except pursuant to paragraph (c)—after a plea agreement is reached, and at the request of both parties, the judge may have the tentative agreement disclosed along with the reasons therefor prior to the time for plea), with *State v. Poli*, 271 A.2d 447, 450 (N.J. Super. Ct. App. Div. 1970) (suggesting that judicial participation should be forbidden, but ultimately deciding the case on other grounds).

prohibited, judges from participating. Such is the case in Louisiana,⁷⁹ Michigan,⁸⁰ California,⁸¹ South Carolina,⁸² Nebraska,⁸³ and Ohio.⁸⁴

D. *Judicial Participation Considered Neutral or Unspecified by Courts*

A few states have considered cases where judges have participated in plea bargaining, and while the participation has been allowed, the states have not specifically encouraged or discouraged the practice. The states of Connecticut,⁸⁵ Florida,⁸⁶ Indiana,⁸⁷ Oklahoma,⁸⁸ and Alabama⁸⁹ fall into this category.

⁷⁹ *State v. Sims*, 981 So. 2d 838, 841 (La. Ct. App. 2008) (“[T]he Louisiana Supreme Court declined to adopt a rule absolutely prohibiting the participation of Louisiana trial judges in plea negotiations, but cautioned that a judge doing so ‘should take extreme care to avoid the dangers described in the ABA commentary’” (citation omitted)).

⁸⁰ *People v. Cobbs*, 505 N.W.2d 208, 211–12 (Mich. 1993) (stating that the judge can be involved only to accept or reject a plea agreement, or to state on the record whether the proposed sentence seems acceptable, but no other role).

⁸¹ *People v. Weaver*, 118 Cal. App. 4th 131, 148 (Cal. Ct. App. 2004) (“There is no rule in California forbidding judicial involvement in plea negotiations. Nonetheless courts have expressed strong reservation about the practice.”).

⁸² *Harden v. State*, 277 S.E.2d 692, 695 (S.C. 1981) (citing and disavowing *Beaver v. State*, 247 S.E.2d 448 (S.C. 1978); *State v. Cross*, 240 S.E.2d 514 (S.C. 1977)) (“We acknowledge the controversial nature of the general subject of plea bargaining, and also acknowledge that the broad language of our earlier *Cross* and *Beaver* decisions, if not the facts of them, seems to indicate adherence to an ‘insurance’ approach. We now specifically disavow adherence to the apparent position of the Federal Rules quoted in *Cross* that there are no circumstances in which a trial judge should participate in the plea bargain process prior to the taking of the actual plea. We believe that the position of the ABA Standard here set forth is sound. It provides access by the State and the defendant to the judge, and yet provides standards to guide all concerned so that the fear of coercion in the plea-bargain process, to which we are sensitive as the *Cross* and *Beaver* decisions indicate, should be minimal.”).

⁸³ *State v. Ditter*, 441 N.W.2d 622, 625 (Neb. 1989) (“Unlike the circumstances in *Svoboda*, [the defendant’s counsel], not the defendant, initiated the discussion to obtain the best possible arrangement for the defendant. In response, the trial judge indicated the possible penalties the defendant faced depending on the course of action he chose. The record indicates no comments by the trial judge on the weight of the evidence, nor any comments by the judge indicating that he thought the defendant was guilty. We also find persuasive the fact that, unlike the situation in *Svoboda*, the defendant’s attorney communicated with the judge. Thus, the defendant was further shielded from any alleged coercion on the part of the judge by his attorney.”).

⁸⁴ *State v. Byrd*, 407 N.E.2d 1384, 1388 (Ohio 1980) (“Although this court strongly discourages judge participation in plea negotiations, we do not hold that such participation *per se* renders a plea invalid under the Ohio and United States Constitutions. Such participation, however, due to the judge’s position in the criminal justice system presents a great potential for coerced guilty pleas and can easily compromise the impartial position a trial judge should assume.”).

⁸⁵ *State v. D’Antonio*, 877 A.2d 696, 718–19 (Conn. 2005) (“[We] conclude that a trial court presiding over a trial after having first participated in unsuccessful plea

A few states, according to research by this author, have not ruled on the issue of judicial participation in plea bargaining when the statute in that state is silent on this issue.⁹⁰ In Delaware, Iowa, Kentucky, New Hampshire, Rhode Island, and Wyoming, courts have not ruled on the proper role of the judge in the plea process, nor is there a state statute or procedural rule on point.

E. Judicial Participation Allowed by Statute and Encouraged by Courts

Finally, there are many states that allow participation by a judge during the plea process, and often encourage the practice for various reasons.⁹¹ New York,⁹² Arizona,⁹³ Idaho,⁹⁴ North Carolina,⁹⁵ Massachusetts,⁹⁶ Oregon,⁹⁷ Minnesota,⁹⁸ Montana,⁹⁹ and Vermont¹⁰⁰ are all such states.

bargaining efforts is not, by itself, plain error requiring reversal. Violation of this prophylactic rule does not require reversal when the record demonstrates that the defendant otherwise has received a fair trial and sentencing before an impartial court, and that the core danger of judicial vindictiveness has not been realized.”); *see also* State v. Revelo, 775 A.2d 260, 268 (Conn. 2001) (approving of a procedure whereby a trial court may participate in the negotiation of a plea agreement between the state and a defendant, so long as a different judge presides at trial and sentencing if the negotiations are unsuccessful); State v. Niblack, 596 A.2d 407, 412 (Conn. 1991).

⁸⁶State v. Warner, 762 So. 2d 507, 513 (Fla. 2000) (citing People v. Cobbs, 505 N.W.2d 208, 212 (Mich. 1993)) (“[W]e do not proscribe judicial participation in the plea bargaining process; however, judicial involvement must be limited ‘to minimize the potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice.’ . . . The trial court must not initiate a plea dialogue; rather, at its discretion, it may (but is not required to) participate in such discussions upon request of a party.”).

⁸⁷Ellis v. State, 744 N.E.2d 425, 429 (Ind. 2001) (“While judicial involvement in plea negotiations can certainly go too far, a complete prohibition on judicial comment regarding a proposed plea agreement would create a separate set of problems.”).

⁸⁸Ryder v. State, 83 P.3d 856, 863 (Okla. Crim. App. 2004) (“Appellant relies on *United States v. Daigle*, 63 F.3d 346 (5th Cir. 1995) . . . [which based its decision on] Rule 11(e)(1) of the Federal Rules of Criminal Procedure, which prohibits judicial participation in plea negotiations Oklahoma has no such provision [Therefore, a]s Appellant did not accept the offer, and as he has not shown the trial court’s inquiry was improper, no error or prejudice occurred.”).

⁸⁹Alabama v. Smith, 490 U.S. 794, 801 (1989) (neither avowing nor disavowing the practice).

⁹⁰Local court rules may allow or forbid judicial participation in these cases.

⁹¹*See infra* Part IV.B.

⁹²N.Y. CRIM. PROC. LAW § 220.50 prac. cmt. (“New York practice is flexible and leaves the procedure to the individual judge, who may follow a preferred uniform practice or may vary it in accordance with the particular circumstances of the case.”); *see also* McMahon v. Hodges, 382 F.3d 284, 288 (2d Cir. 2004) (citations omitted) (“The district court concluded that McMahon’s first argument had no merit, noting that the state court system permits a judge to participate in [plea] negotiations, and that, according to the United States Supreme Court, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a

deep-seated favoritism or antagonism that would make fair judgment impossible. Because New York State law permits a judge to participate in plea negotiations and the trial judge had not displayed a deep-seated favoritism or antagonism that would make fair judgment impossible, there was neither a state-law nor a constitutional basis for requiring him to recuse himself.”).

⁹³ ARIZ. R. CRIM. P. 17.4(a) (“The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice.”).

⁹⁴ IDAHO CRIM. R. 11(f)(1) (“The court may participate in any such discussions.”).

⁹⁵ N.C. GEN. STAT. ANN. § 15A-1021(a) (West 2013) (“In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant’s entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.”); *see also id.* § 15A-1021 cmt. (“Subsection (a) is basic. It legitimates plea negotiations, prohibits the judge from taking an active role in the actual striking of any bargain, and indicates that counsel may represent a defendant’s interests and that the defendant need not be present.”); *see also* State v. Frink, 582 S.E.2d 617, 621 (N.C. Ct. App. 2003) (“Defendant asserts the trial court’s interest can be implied by the fact Judge Gore presided over both Douglas’ open plea and defendant’s trial. We find no support for this proposition, and accordingly hold there is no merit to defendant’s argument that Judge Gore was not impartial, and overrule this assignment of error.”).

⁹⁶ MASS. R. CRIM. P. 11(a) (“At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.”); *see also* Commonwealth v. Damiano, 441 N.E.2d 1046, 1050–51 (Mass. App. Ct. 1982) (“In sum, the criticized lobby conference did nothing more than crystallize several choices for Damiano which were intended to assist him in making an informed decision as to his plea. None of the choices imposed pressures beyond those normally affecting a defendant in his situation.”).

⁹⁷ OR. REV. STAT. ANN. § 135.432(1)(b) (“Any other judge, at the request of both the prosecution and the defense, or at the direction of the presiding judge, may participate in plea discussions.”); *see also* State v. Kimsey, 47 P.3d 916, 924 (Or. Ct. App. 2002) (citing State v. McDonnell, 794 P.2d 780 (Or. 1990)) (“Plea negotiation in criminal cases is widely regarded as a legitimate and ‘essential component of an efficient and effective justice system,’ one that, if properly administered, ‘should be encouraged.’”).

⁹⁸ MINN. R. CRIM. P. 15.04 subdiv. 3(2) (“The judge may accept a plea agreement of the parties when the interest of justice would be served.”); *see also* State v. Anyanwu, 681 N.W.2d 411, 414 (Minn. Ct. App. 2004) (“We are not suggesting that any involvement by a district court judge in a plea negotiation is improper. We recognize that a district court judge has a delicate role in a plea negotiation and necessarily plays a part in any negotiated guilty plea.”). The opinion posits a limited role for the judge, where the judge cannot become “excessively involved” but may communicate a discreet inquiry into the propriety of the settlement. *Id.* at 414–15.

IV. MOTIVATIONS FOR AND AGAINST JUDICIAL PARTICIPATION

As mentioned above, states and courts vary in their approach to judicial participation in plea bargaining. In weighing these different approaches, courts and scholars have considered issues that may arise with judicial participation and also benefits that judicial participation can bring. This section looks at some major concerns expressed by courts and commentators in allowing judges to participate in the plea process, as well as reasons for allowing such participation. The next section keeps these competing considerations in mind to fashion recommendations for judicial involvement in the plea process.¹⁰¹

A. Courts' Concerns with Judicial Participation

Courts either that have followed statutory bans on judicial participation or that have enacted court rules expressing concerns with the practice have done so on several related, but separate grounds.

1. Ensuring Voluntariness of Defendant's Plea

Courts' primary concern with judicial participation in plea bargaining is that the involvement of a judge in the process will render the defendant's plea

⁹⁹ MONT. CODE ANN. § 46-12-211 (West 2014). While the Montana Code itself is silent as to judicial participation, the comments state: "Subsection (1) identifies the parties involved in the plea agreement process. The Commission recognized that the 1987 statute precluded judicial participation in the plea negotiations, but the new statute neither prohibits nor authorizes judicial involvement. The Commission believed that circumstances sometimes warrant judicial participation in such discussions." *Id.* cmt. 1; *see also* State v. Milinovich, 887 P.2d 214, 216 (Mont. 1994) ("A review of the Commission Comments to [the statute] clearly indicate that the Montana Legislature did not intend to limit court participation in plea agreement discussions to certain circumstances The Legislature did not identify limits of court participation in the plea agreement process."). The court held in *Milinovich* that the participation by the judge—giving the defendant advice as to the job done by his lawyers—was not an active role. The judge did not offer what the terms of the agreement should be, nor did the judge threaten the defendant with any action if the defendant decided not to take the agreement. The judge's participation was not improper, "nor did he wrongfully induce or coerce" the defendant. *Id.*

¹⁰⁰ VT. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment."); *see also id.* cmt. ("There are, however, advantages to the defendant in having some advance sense of the judge's position The rule leaves it to the judge, having in mind the circumstances of each case, to decide whether to participate in the discussions. If the judge does participate, the requirement of a record will permit review of any claims of prejudice or undue influence." (citing ABA Minimum Standards § 3.3(a), Commentary)); *see also* State v. Davis, 584 A.2d 1146, 1148 (Vt. 1990) ("In difficult cases, where the parties are deadlocked, the judge may be able to help to fashion a compromise.").

¹⁰¹ *See infra* Part V.

involuntary.¹⁰² Due to the fact that in most jurisdictions, a plea of guilty by the accused must be made “voluntarily” and “knowingly,”¹⁰³ the concern is that judicial participation is so coercive that judicial involvement renders the plea involuntary.¹⁰⁴

Several courts have expressed the view that the authority of a judge can have a coercive effect on the defendant’s plea bargain, particularly when that judge is also the trial judge. For example, West Virginia has concluded that “[t]here are . . . good reasons for the rule admitting of no exceptions. First and foremost, it serves to diminish the possibility of judicial coercion of a guilty plea, regardless of whether the coercion would cause an involuntary, unconstitutional plea.”¹⁰⁵ Similarly, the District of Columbia has determined that:

[j]udicial intervention is proscribed because a judge’s participation in plea negotiations is “inherently coercive.” This court has recognized that the unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.¹⁰⁶

Courts that have concerns around the voluntariness of a defendant’s plea have sometimes allowed judicial participation, or at least not found a guilty plea invalid, if the court is satisfied that the plea was made voluntarily despite judicial participation.¹⁰⁷ This suggests that these courts are less concerned with judicial participation per se, and more with the impact it has on the defendant’s mindset.

¹⁰² See Jennifer Marquis, Casenote, *State of Connecticut v. D’Antonio: An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 464 (2006).

¹⁰³ *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 253–55 (S.D.N.Y. 1966).

¹⁰⁴ No federal court in a habeas corpus proceeding reviewing a state prosecution has held that due process prohibits participation altogether, and, given the procedures in states encouraging participation, no court would be likely to do so.

¹⁰⁵ *State v. Welch*, 734 S.E.2d 194, 199 (W. Va. 2012) (alteration in original) (citation omitted); see also *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970) (“[T]he defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he will be induced to plead guilty even if innocent.”).

¹⁰⁶ *Boyd v. United States*, 703 A.2d 818, 821 (D.C. Cir. 1997) (citation omitted) (quoting *German v. United States*, 525 A.2d 596, 600 n.5 (D.C. Cir. 1987)).

¹⁰⁷ See, e.g., *State v. Frink*, 582 S.E.2d 617, 621 (N.C. Ct. App. 2003).

2. Learning Prohibited Information

Another reason cited for limiting the judge's role in plea bargaining is that the judge may hear something, such as an implicit admission, during the plea bargaining process that would bias the judge either during sentencing or during trial itself. Many rules of evidence make it clear that statements made in the course of plea bargaining are not admissible as evidence in a criminal case. For example, Minnesota Rule of Evidence 410 states in relevant part:

Evidence of a plea of guilty, later withdrawn . . . or of an offer to plead guilty . . . to the crime charged or any other crime or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any . . . criminal . . . action, case, or proceeding whether offered for or against the person who made the plea or offer.¹⁰⁸

In *State v. Brown*,¹⁰⁹ the court, interpreting this rule of evidence, ordered a new trial for a defendant when a statement from an omnibus hearing, which was considered to be made in connection with a plea bargain in front of the judge, was entered into evidence at trial.

The concern with learning prohibited information is therefore that “during the course of negotiations between the court and the defendant, the defendant may very well make explicit or implicit admissions or confessions that would not normally be admissible before the court during formal trial.”¹¹⁰ This is a particular risk as the rules of evidence are not at play during a plea bargain, so there is no prohibition against discussing otherwise prohibited evidence such as prior crimes, violent history, etc. Furthermore, during plea bargaining, the prosecution is not required to produce mitigating evidence that defense counsel would be entitled to at trial, so the judge may not be able to consider all evidence in the light that he or she would see it during trial.

This risk may be well founded given what we know about judges' abilities to ignore inadmissible information.¹¹¹ In particular, judges have difficulty disregarding information revealed during a settlement conference or about prior criminal convictions (both relevant in this context), even when reminded that the information was inadmissible.¹¹²

3. Not Being Seen as a Neutral Party

Another concern expressed by courts regarding the involvement of judges in the plea process is the damage it may do to the perception of the judge's

¹⁰⁸ MINN. R. EVID. 410.

¹⁰⁹ *State v. Brown*, 792 N.W.2d 815, 824–25 (Minn. 2011).

¹¹⁰ *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983) (en banc).

¹¹¹ See generally Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

¹¹² *Id.* at 1251.

independent role. By participating in the process, the courts worry that the judge “has stepped into the position of one of the parties to the negotiation” and “abandoned its role as an independent examiner.”¹¹³ Similarly,

judicial participation in plea discussions creates a misleading impression of the judge’s role in the proceedings. As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he suggests to the defendant.¹¹⁴

Courts have recognized, of course, that the judge is still involved in the plea process because the judge is the one who ultimately accepts the plea deal fashioned by the prosecutor and defense counsel. Some states that have expressed the concern about neutrality have limited the judicial involvement with plea bargaining to allowing the judge to express his or her opinion regarding the likelihood that he or she will accept the deal before it is entered.¹¹⁵

4. *Not Usurping the Prosecutorial Function*

Some courts have expressed disapproval of the judicial role in plea bargaining when judges have effectively *negotiated directly* with the defense counsel or defendant. In these cases, courts have sustained objections by prosecutors to deals reached directly between a defendant and the court on the grounds that the judge was exceeding his or her authority and intruding into the prosecutorial function.

For example, in *State v. Carlson*,¹¹⁶ the Alaska appellate court issued a mandate to the trial judge to refrain from allowing a defendant to plead guilty to a lesser charge that had not been brought against him by the state. Because the district attorney had not concurred with this reduction in charge,¹¹⁷ the court found that the trial judge was exceeding his authority. The Alaska appellate court felt that the judge’s action was meant to “usurp the executive function of choosing which charge to initiate based on defendant’s willingness to plead guilty to a lesser offense” and because the court “was in effect

¹¹³ *State v. Anyanwu*, 681 N.W.2d 411, 414–15 (Minn. Ct. App. 2004) (quoting *State v. Johnson*, 156 N.W.2d 218, 223 n.11 (Minn. 1968)).

¹¹⁴ *State v. Welch*, 734 S.E.2d 194, 199 (W. Va. 2012) (quoting *State v. Sugg*, 456 S.E.2d 469, 487–88 (W. Va. 1995)).

¹¹⁵ *See, e.g.*, GA. UNIF. SUPER. CT. R. 33.5(B) (“If a tentative plea agreement has been reached, upon request of the parties, the trial judge may permit the parties to disclose the tentative agreement and the reasons therefor in advance of the time for the tendering of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the judge will likely concur in the proposed disposition if the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties.”).

¹¹⁶ *State v. Carlson*, 555 P.2d 269, 270 (Alaska 1976).

¹¹⁷ *Id.*

ordering the district attorney not to prosecute the murder charge,” this action “violated the separation of powers because the decision [of] whether to prosecute a case was committed to the discretion of the executive branch.”¹¹⁸

Similarly, in *Commonwealth v. Manning*, a Massachusetts appellate court found that “the judge exceeded his authority when he accepted a plea to a lesser included offense over the Commonwealth’s objection, because by doing so, he intruded on the function of the prosecutor, which is to decide what crime to prosecute.”¹¹⁹ As the court explained, because

there is no conceptual distinction between a judge’s decision, over the objection of the Commonwealth, to accept a plea to a lesser included offense and a judge’s attempt to dismiss a valid complaint or indictment, because in each instance the judge’s action intrudes on the executive branch’s authority to decide what crimes to prosecute,¹²⁰

the judge performed an “act reserved exclusively to the executive branch.”¹²¹ Other courts have sustained similar objections.¹²²

B. *Reasons for Courts to Encourage Participation*

The concerns that courts have expressed above are not universally shared. Many courts and scholars have found there are several advantages to judicial participation in the plea bargaining process as well.¹²³

1. *Ensuring that the Defendant Is Informed*

As noted in Part II, defense counsel are frequently overburdened and may not be able to provide effective representation to their clients.¹²⁴ In these cases, defendants may not be able to understand the nature of the plea bargained offer or what may happen if the case goes to trial. Here, the presence of a judge could “provide the defendant and defense counsel with additional facts and factors for consideration in the total evaluation of whether a plea of guilty should or should not be entered.”¹²⁵ Such a requirement can

¹¹⁸ *Id.* at 272.

¹¹⁹ *Commonwealth v. Manning*, 917 N.E.2d 771, 775 (Mass. App. Ct. 2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See, e.g.,* *People v. Orin*, 533 P.2d 193, 199–200 (Cal. 1975); *People v. Christensen*, 906 N.Y.S.2d 301, 303 (N.Y. App. Div. 2010); *People v. Smith*, 126 Cal. Rptr. 195, 197 (Cal. Ct. App. 1975). *But see* *State v. Loveless*, 194 P.3d 202, 205 (Utah Ct. App. 2008) (prosecution’s permission was not required for trial court to accept defendant’s plea of guilty to one of two alternately charged offenses).

¹²³ *See, e.g.,* Isaac Borenstein & Erin J. Anderson, *Judicial Participation in Plea Negotiations: The Elephant in Chambers*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 1, 2 (2009).

¹²⁴ *See supra* Part II.

¹²⁵ Thomas D. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 515 (1971).

also cause the prosecutor to be more forthcoming with his case,¹²⁶ partly because, as in judicial settlement conferences in the civil context, parties can be more forthcoming and disclosures can be compelled due to the candor requirements for lawyers.¹²⁷

A number of state courts have found that judicial involvement in the plea bargaining process can help defendants be better informed. In Massachusetts, the court recognized that any system where a defendant must give up rights has an element of coercion, and the presence of a judge in a plea bargain conference “did nothing more than crystallize several choices for [the defendant] which were intended to assist him in making an informed decision as to his plea. None of the choices imposed pressures beyond those normally affecting a defendant in his situation.”¹²⁸ Similarly, in Louisiana, a court found that a judge “correctly informed the defendant” of the position of the state, rather than having an undue influence on him.¹²⁹

2. *As a Check on Prosecutorial Power*

As mentioned in Part II, prosecutors have an incredible amount of power at their disposal in plea bargaining.¹³⁰ Judges have found prosecutorial power in plea bargaining to be troubling. As United States District Court Judge Jed Rakoff has noted, this imbalance of power can often lead to innocent people pleading guilty, in order to avoid adverse results at trial. He explains that,

Plea bargains have led many innocent people to take a deal People accused of crimes are often offered five years by prosecutors or face 20 to 30 years if they go to trial The prosecutor has the information, he has all the chips . . . and the defense lawyer has very, very little to work with. So it’s a system of prosecutor power and prosecutor discretion.¹³¹

Judicial participation in plea bargaining could help check prosecutorial power in a number of ways. First, the prosecutor has a dual role in our justice system. As Albert Alschuler noted, one of the roles that the prosecutor takes on is that of the judge, deciding what the right outcome for the defendant is in light of the defendant’s particular circumstances.¹³² In this way, the prosecutor is different than a typical negotiation adversary in a civil suit, in that prosecutors are also motivated by and tasked with a quasi-judicial role, as well

¹²⁶ *Id.*

¹²⁷ See Parness, *supra* note 44, at 1897 & n.42.

¹²⁸ Commonwealth v. Damiano, 441 N.E.2d 1046, 1050–51 (Mass. App. Ct. 1982).

¹²⁹ State v. Sims, 981 So. 2d 838, 842 (La. Ct. App. 2008).

¹³⁰ See *supra* Part II.

¹³¹ Gilien Silsby, *Why Innocent People Plead Guilty*, USC NEWS (Apr. 18, 2014), <http://news.usc.edu/61662/why-innocent-people-plead-guilty/>, archived at perma.cc/63R4-7ZQY.

¹³² Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53 (1968).

as that of advocate.¹³³ Prosecutors considering themselves as in a quasi-judicial role are more likely to evaluate the facts in a neutral fashion, as research has shown that role-based considerations exert a strong influence on decision-making.¹³⁴ Prosecutors negotiating in front of a judge will be encouraged to check egocentric bias and negotiate more fairly. Second, the judges themselves can act as an information source for the defendant, allowing the defendant and his counsel access to information about whether the prosecutor's offers are reasonable in light of what a judge may sentence after trial, and what the judge himself has seen. As many defense counsel are less than fully informed about "going rates" for crimes,¹³⁵ the judge can, in a neutral fashion, supply this information.

3. *As a Check on Defense Counsel Misconduct*

As mentioned above,¹³⁶ defense counsel are often unable or unwilling to provide adequate counsel for all defendants, but may be shielded from the consequences of such action because plea bargains occur in private, with no supervision from either the client or prosecutor.¹³⁷ Adding a judge to the process can allow oversight of the defense counsel to make sure that he or she is prepared and is not falling below the standards for effective assistance.¹³⁸ Not only is judicial participation in the process an incentive for defense counsel to prepare adequately, a judge can also report any instances of ineffective assistance to the relevant sanctioning bodies, providing an additional check on the defense counsel.

4. *Improving Efficiency*

Some commenters who have encouraged the use of judges in the plea bargaining process, either by statute or by court rule, have suggested that a benefit of this sort of involvement is efficiency for the court system.¹³⁹ However, efficiency is at best a secondary consideration, and there is mixed data on whether this advantage is a true one.

If judicial plea bargaining conferences occur early in the general proceedings, then understandably all parties could function more efficiently in

¹³³ *Id.* at 54; see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 193–94 (2007).

¹³⁴ See generally BRUCE J. BIDDLE, *ROLE THEORY: EXPECTATIONS, IDENTITIES, AND BEHAVIORS* (1979).

¹³⁵ Batra, *supra* note 31, at 314.

¹³⁶ See *supra* Part II.

¹³⁷ See *infra* Part V.D (considering adding defendants to the plea process).

¹³⁸ See Batra, *supra* note 31, at 319–25.

¹³⁹ See, e.g., Peter W. Agnes, Jr., *Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges*, 31 SUFFOLK U. L. REV. 263, 307 (1997).

a system where many courts are strained. Efficiency is obviously beneficial because it can preserve resources for the court, the prosecution, the defense counsel, and defendant himself. Of course, if plea bargains occur later in the process, and nearer to the trial, then many resources will have already been used on proceedings, discovery, etc. However, even when plea bargains occur early in the process, it is important they are not primarily motivated by efficiency itself. In particular, if the court is primarily motivated by efficiency, more defendants may be encouraged to plea due to coercion by the judge and the appearance of such an efficiency maximizing system could cause the public to lose confidence in the judicial system as a whole.¹⁴⁰

Efficiency is at most a secondary consideration of the system, as most cases settle regardless of judicial participation.¹⁴¹ In addition, there is little good data on efficiency in the civil analog to plea bargaining, namely judicial settlement conferences, and studies are mixed on the court savings from such conferences.¹⁴² Because it is unknown how many more cases would settle with this proposed model, and given the high settlement rates of plea bargains already, it is unlikely that more efficient settlement would significantly change this number. Importantly, efficiency might be a mask for problems, rather than a sign of positive change.¹⁴³

While efficiency may be a positive byproduct of adding judges, focusing on the other benefits allows us to make recommendations below.

V. RECOMMENDATIONS

If states or the federal government do consider adding judges to the plea bargaining process, it is important to take into account both the advantages and concerns raised above. In an ideal system, many or all of the advantages would be preserved, while putting into place systems that will mitigate the concerns with the process. This section makes five recommendations for a system that involves judges in the plea bargaining process: (a) having a separate judge or magistrate to manage the plea process; (b) ensuring that the proceedings are recorded; (c) making sure that the judicial role is clearly facilitative, rather than a directive neutral; (d) involving the defendant where possible; and (e) creating an informal setting.

¹⁴⁰ See generally Raisa Litmanovich, *In the Name of Efficiency: How the Massachusetts District Courts Are Lobbying Away the Constitutional Rights of Indigent Defendants*, 29 B.C. THIRD WORLD L.J. 293 (2009).

¹⁴¹ See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

¹⁴² See Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1364–71 (1994).

¹⁴³ See generally Litmanovich, *supra* note 140.

A. *Separate Judge or Magistrate to Manage the Plea Bargaining Process*

As mentioned above, having the same judge (or a magistrate judge) involved in the plea bargaining process running the trial of the defendant is concerning for several reasons. From an evidentiary standpoint, the judge may hear evidence during the plea bargain that either is later not admissible or is generally prejudicial so that he or she may not be able to conduct the trial in a fair manner.¹⁴⁴ And a defendant, knowing that the judge will later be conducting the trial, will be incentivized to follow the instructions of the judge.¹⁴⁵

An appropriate way to address these concerns while still ensuring the benefits of judicial supervision of plea bargains is to require a separate judge or magistrate judge from the trial judge to manage the plea bargaining process. This safeguard will ensure that the benefits of judicial participation are maintained, but any evidence heard by the judge in the plea bargain does not taint the future proceedings. Knowing that a separate judge will be involved at the trial level may also address the concern of judicial coercion during the plea process, as these judges will have less authority to force parties into settlement with threats of adverse rulings during the trial stage.

Several states that allow plea bargaining already include the safeguard of recusal by the judge presiding over the plea discussions in proscribed circumstances. The state of Arizona allows the participation of judges in plea discussions both via statute and case law, but the state's rules of criminal procedure provide that "[i]f a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself"¹⁴⁶ In the case of a withdrawn plea, Illinois goes further and *requires* recusal by the judge.¹⁴⁷ Similarly, Connecticut requires judicial recusal if the prior negotiations that involved the judge were unsuccessful.¹⁴⁸

While these states contemplate recusal arising from the withdrawal of a guilty plea or an unsuccessful negotiation, the state of Oregon, which encourages judges to be involved in the plea bargaining process,¹⁴⁹ requires a separate judge as part of the plea process. Oregon's statute provides that:

Any *other* judge, at the request of both the prosecution and the defense, or at the direction of the presiding judge, may participate in plea discussions. Participation by a judge in the plea discussion process shall be advisory, and

¹⁴⁴ Marquis, *supra* note 102, at 485.

¹⁴⁵ See *supra* Part IV.

¹⁴⁶ ARIZ. R. CRIM. P. 17.4(g).

¹⁴⁷ ILL. SUP. CT. R. 402(d)(2) ("If the defendant thereupon withdraws his or her plea, the trial judge shall recuse himself or herself.").

¹⁴⁸ State v. Niblack, 596 A.2d 407, 411–12 (Conn. 1991).

¹⁴⁹ State v. Kimsey, 47 P.3d 916, 924 (Or. Ct. App. 2002).

shall in no way bind the parties. If no plea is entered pursuant to these discussions, the advice of the participating judge shall not be reported to the trial judge. If the discussion results in a plea of guilty or no contest, the parties, if they both agree to do so, may proceed with the plea before a judge involved in the discussion.¹⁵⁰

This idea of recusal is consistent with the Model Code of Judicial Conduct Canon 2.6(B),¹⁵¹ which also contemplates settlement in criminal matters.¹⁵² Recusal is also contemplated if appropriate.¹⁵³ The safeguard of recusal is also consistent with rules regarding judicial settlement conferences in civil cases as well.¹⁵⁴

B. *Recording*

Regardless of the amount of participation by the judge in plea bargaining, any participation by the judge in the plea process should be included on the record of the case. While this recommendation does seem to be in conflict with the traditional role of neutrals in a legal dispute,¹⁵⁵ the proposal addresses several concerns with the judicial involvement in the plea bargaining process.

Courts that have adopted or endorsed a rule favoring judicial involvement in plea bargaining have routinely suggested that having the involvement on the record can be beneficial. Vermont, a state that allows and encourages judicial involvement in the plea discussions,¹⁵⁶ includes a rule that mandates: “The court shall not participate in any such discussion unless the proceedings are taken down by a court reporter or recording equipment.”¹⁵⁷ The commentary to this rule lays out the reasons that recording is required: “If the judge does participate, the requirement of a record will permit review of any claims of prejudice or undue influence,”¹⁵⁸ which addresses the concerns of courts that

¹⁵⁰ OR. REV. STAT. ANN. § 135.432(1)(b) (2014) (emphasis added). Not all states require recusal, such as Florida, which leaves it up to the judge. *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000).

¹⁵¹ MODEL CODE OF JUDICIAL CONDUCT Canon 2.6(B) (2010) (“A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.”).

¹⁵² *Id.* cmt. 2(6).

¹⁵³ *Id.* cmt. 3.

¹⁵⁴ *See, e.g.*, U.S. DIST. CT. C.D. ILL. LOCAL R. 16.1(B) (“The settlement conference in a matter to be tried to the court must be conducted by a judge who will not preside at the trial of the case.”); ALASKA R. APP. P. 222(c) (“The settlement officer shall not participate in subsequent judicial decisions related to the case, unless the parties have waived this disqualification.”).

¹⁵⁵ *See* Bruce Pardy & Charles Pou, *Confidentiality*, in *MEDIATION ETHICS: CASES AND COMMENTARIES* 227 (Ellen Waldman ed., 2011).

¹⁵⁶ VT. R. CRIM. P. 11(e)(1).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*r. 11(e)(1) reporter’s notes.

disfavor judicial involvement due to concerns with the voluntariness of the plea under these conditions.¹⁵⁹

In addition, the commentary to this rule addresses the broader concern that the secrecy of plea agreements generally leads to public distrust. “The theory of the rule is that if all factors pertaining to any plea agreement reached are spread upon the record, the under-the-table aura surrounding such agreements, and consequent public distrust of them, will be dissipated.”¹⁶⁰ The commentary also promotes the keeping of records for plea bargaining to allow for judicial review by a subsequent judge:

Disclosure of the plea agreement will prevent abuse of the procedure by permitting judicial review of the propriety and fairness of the agreement in every case. Moreover, such review at the time the plea is taken will avoid the cost and delay of the post-conviction proceedings by which agreements are now occasionally reviewed.¹⁶¹

Other courts and commenters have also suggested the need for a record of any judicial involvement in plea bargaining because it allows for the defendant, if he is not present for the plea bargain, to know what was said. In Massachusetts, a state that allows for “lobby conferences” between judges, prosecutors, and defense counsel regarding pleas¹⁶² but allows these conferences to be unrecorded,¹⁶³ courts have suggested that having these conversations off the record is problematic. In a Massachusetts case, a defendant was arrested after running out of a home and was caught with property from the home on his person, along with a screwdriver, flashlight, and a small amount of cocaine. After an unrecorded lobby conference where sentences were discussed and determined, and from which he was absent, he then subsequently pled “guilty to breaking and entering in the nighttime, larceny of property of a value over one hundred dollars, possession of burglarious tools, and possession of a class B substance (cocaine).”¹⁶⁴ He later alleged that the prosecutor withdrew an offer for a lighter sentence on the breaking and entering charge than what was eventually recommended to the court. Based on his absence from the discussions and the withdrawal of the offer among other issues, the defendant tried to withdraw his plea. The court suggested that these unrecorded lobby conferences do not allow the defendant, if he or she is absent from the conference, to know what was said.¹⁶⁵ “We note that, if a lobby conference is held, the better practice is to record it, and

¹⁵⁹ See *supra* Part IV.

¹⁶⁰ VT. R. CRIM. P. 11 reporter’s notes.

¹⁶¹ *Id.*

¹⁶² Litmanovich, *supra* note 140, at 298.

¹⁶³ Borenstein & Anderson, *supra* note 123, at 25–26.

¹⁶⁴ Commonwealth v. Fanelli, 590 N.E.2d 186, 187 (Mass. 1992).

¹⁶⁵ *Id.* at 189.

provide a copy of the recording to the defendant on request, so that the defendant may know what was said.”¹⁶⁶

Recording judicial involvement also has the potential to reduce extensive litigation over what was said during the conference. The Supreme Judicial Court of Massachusetts has decried the potential for extensive litigation due to unrecorded lobby conferences in Massachusetts in a defamation case involving a judge. The judge reportedly said during a lobby conference that a fourteen-year-old rape victim should “get over it,” but witnesses could not corroborate this statement and denied the judge ever made it. The Massachusetts court, in addition to awarding the judge damages for defamation, took the opportunity to decry the use of unrecorded judicial conferences. The court stated:

If there ever was a case that demonstrates the need for lobby conferences, where cases or other court matters are discussed, to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference (that involving the robbery case) had been transcribed. We trust that the lesson learned here will be applied by trial judges to prevent unnecessary problems that often arise from unrecorded lobby conferences.¹⁶⁷

Other courts have similarly suggested or required the recording of judicial participation in plea bargaining.¹⁶⁸

One of the issues, of course, with recording plea negotiations is it violates our notions of appropriate confidentiality in the context of dispute resolution facilitated by a neutral.¹⁶⁹ Confidentiality, whether as a duty to keep disputants’ disclosures secret or as an evidentiary privilege,¹⁷⁰ is thought to increase trust in the neutral and between the parties, and to increase disclosure because parties are secure in the knowledge that the disclosures will not be

¹⁶⁶ *Id.*

¹⁶⁷ *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 758 n.15 (Mass. 2007).

¹⁶⁸ *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006) (prohibiting all off-the-record discussion of plea negotiations between the parties and the judge). The Nevada Supreme Court required that the judge place even the conversation regarding whether or not he agreed with the sentence recommendation presented to him by the parties on the record and have it transcribed. *Id.* Florida takes the same approach. *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000) (“A record must be made of all plea discussions involving the court.”). The court in *Warner* indicated that the judge may state on the record the length of the sentence he feels is appropriate considering the information available to him at the time, including an appropriate sentence for the reduced charge based on a prosecutor’s offer to reduce charges based on a guilty plea. *Id.* Recording has also been suggested as a best practice to protect defendants in cases where the prosecutor negotiates directly with the defendant. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4.1(b) (1993); NAT’L DIST. ATTORNEYS ASSOC., NATIONAL PROSECUTION STANDARDS § 24.4 (2d ed. 1991).

¹⁶⁹ This definition can cover a number of processes, including mediation, collaborative problem solving, etc.

¹⁷⁰ *Pardy & Pou*, *supra* note 155, at 228–29.

used against them in the future.¹⁷¹ In addition, confidentiality strengthens the neutral's appearance of impartiality and increases the parties' confidence in the facilitative process as a whole.¹⁷²

Yet the protection of confidentiality in neutrally facilitated disputes, even in the civil arena, is not absolute. In particular, the Uniform Mediation Act provides for disclosure in the case of professional misconduct by the mediator, parties, party representatives, and non-parties present.¹⁷³ In addition, many states have exceptions for privilege in the mediation context for claims against the mediator.¹⁷⁴ The Model Rules of Professional Conduct require disclosure of attorney misconduct, with no exception for mediation or negotiation.¹⁷⁵

In the case of judicial participation, without the recording, any *post hoc* disclosure would not be sufficient for any defendant or prosecutor wishing to challenge the results of the plea process. As there is a concern about judges being overly aggressive in the encouragement of settlements in plea bargaining,¹⁷⁶ if a defendant claimed that his or her plea was not voluntary, he or she would have to engage in a "he said / she said" with the judge—a contest which the defendant is very likely to lose. Recording the plea negotiation, whether it is kept sealed or not, can be a check on any judge who may be tempted to go beyond the bounds of his professional duties in the neutral role in the plea process.

If recording is used, all parties should be informed that the statements are being recorded and included on the record. Just as mediators must tailor the parties' expectations of confidentiality,¹⁷⁷ so should a judge participating in the plea process. To ensure more candid disclosure, it is recommended that these recordings be sealed and unsealed only when a challenge is made to the comportment of the judge in the process, particularly in cases where the judge is accused of being coercive in the plea process. Regardless of whether the judge chooses the conference in chambers or in open court, he or she should reveal in her introduction to the process that the proceedings are being recorded, so that all parties are informed of the posture.

C. *Setting the Role of the Judge*

If a judge who is not the trial judge in the case, and who is recorded, does participate in the plea bargaining process, he should also have guidelines for how he participates. Deciding on the role of the judge is important, as the judge's role conception, just as in the civil settlement context, has a direct effect on the choice of settlement techniques that are used and the types of

¹⁷¹ *Id.* at 230–31.

¹⁷² *Id.* at 231.

¹⁷³ UNIF. MEDIATION ACT § 6, 7A U.L.A. 91 (2003).

¹⁷⁴ *Id.*

¹⁷⁵ MODEL RULES OF PROF'L CONDUCT r. 8.3 (2013).

¹⁷⁶ *See supra* Part IV.

¹⁷⁷ Pardy & Pou, *supra* note 155, at 234–35.

settlement reached.¹⁷⁸ States that allow judicial participation in the plea bargain process may vary on the role that they see the judge playing. These approaches can be classified into two important categories, borrowing from the language of mediation: judges who play a *directive* role, and judges who play a *facilitative* role.¹⁷⁹

1. Judges Playing a Directive Role

In many jurisdictions, states have been concerned that judges are playing a role that is too *directive*. In mediation, a mediator who has a directive orientation is explicitly open with the parties about what the parties *should* do to resolve the dispute.¹⁸⁰ This orientation can take the form of giving advice to one or both parties on how to resolve the dispute, or making explicit suggestions to the parties about how they should resolve the dispute, or “trashing, bashing, and hashing it out”¹⁸¹ behavior, such as negotiating with one side to take the offer from the other. The mediator’s role in this situation is to get the dispute resolved, rather than being a facilitator of the discussion. This is often the role of the judge in civil settlement negotiations.¹⁸²

In the scholarly literature on mediation, the idea of directive mediation has come under critique for being harmful to party autonomy.¹⁸³ By directing parties to settlement through making suggestions about how the parties should settle, the worry is that the parties themselves will agree to settlements that they consider unfair, that they consider unresponsive to their needs, or that they will be unable to follow through on. Particularly if the mediator is seen as in a position of authority, these concerns are heightened. With a more directive role, the quality of the settlement may be lessened.¹⁸⁴

In the civil settlement conference these concerns are presumably mitigated, as both sides are often represented by counsel. But given the structural concerns for defendants specified in Part II, these are more salient in the criminal context. Because, as states that have banned judicial participation have noted, the presumed issue with judicial participation is that defendants will be coerced into settling because they are directed to by a judge in a

¹⁷⁸ Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 506–07 (1985).

¹⁷⁹ Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG., Winter 2003, at 22 [hereinafter Riskin, *Who Decides What?*]; Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996) [hereinafter Riskin, *Understanding Mediators’ Orientations*].

¹⁸⁰ Riskin, *Understanding Mediators’ Orientations*, *supra* note 179, at 28.

¹⁸¹ James J. Alfini, *Trashing, Bashing, and Hashing It out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 47 (1991).

¹⁸² Menkel-Meadow, *supra* note 178, at 508.

¹⁸³ Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 937 (1997).

¹⁸⁴ Menkel-Meadow, *supra* note 178, at 507–08.

position of authority, having a judge play a directive role could exacerbate this problem. And as defense counsel and judges are repeat players in the plea bargaining system, a defense counsel who does not “go along with” a judge’s recommendation, even if the judge is separated from the trial judge, may pay consequences in future criminal matters.

2. *Judges Playing a Facilitative Role*

Another role that a neutral can play in a dispute is that of a facilitator. In this role, the neutral’s job is not seen as one who will settle the dispute, but one who will facilitate a discussion where the parties can come to a resolution of a dispute themselves.¹⁸⁵ Presumably, this resolution will be better than any alternatives, such as litigation, as the parties maintain their autonomy during the process. This is the role that judges are encouraged to play in states where they are encouraged to participate.

States such as Massachusetts envision the role of a facilitator for judges in the plea process. “Trial judges are permitted to inform defendants about their options and about the ramifications of a decision to enter a plea or proceed to trial.”¹⁸⁶ They also caution against “imposed pressures beyond those normally affecting a defendant in [the] situation.”¹⁸⁷ Similarly, Michigan finds that “[t]he judge’s neutral and impartial role is enhanced when a judge provides a clear statement of information that is helpful to the parties,”¹⁸⁸ as long as there is not a “coercive atmosphere” produced.¹⁸⁹ Illinois also believes that judges should avoid “coercion” of defendants to accept settlement, and California is most explicit in the type of role it wishes its judges to play. California courts have stated that “the judge should maintain total neutrality and at the same time probe continually for a common meeting ground.”¹⁹⁰ This opinion relies on the ABA Standards for Criminal Justice commentary, in stating that it is a “basic principle that the court should never, through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.”¹⁹¹

Judges participating in the plea process should play a facilitative role, and states contemplating the use of judges in the plea process should be explicit in their procedural rules about the fact that judges should play a facilitative,

¹⁸⁵ Riskin, *Who Decides What?*, *supra* note 179.

¹⁸⁶ *Commonwealth v. Carter*, 733 N.E.2d 582, 584 (Mass. App. Ct. 2000).

¹⁸⁷ *Commonwealth v. Damiano*, 441 N.E.2d 1046, 1050–51 (Mass. App. Ct. 1982).

¹⁸⁸ *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993).

¹⁸⁹ *Id.* at 211 (quoting *People v. Killebrew*, 330 N.W.2d 834, 843 (Mich. 1982)).

¹⁹⁰ *People v. Sandoval*, 140 Cal. App. 4th 111, 127 (Cal. Ct. App. 2006) (internal quotation marks omitted).

¹⁹¹ *People v. Weaver*, 118 Cal. App. 4th 131, 147–48 (Cal. Ct. App. 2004) (internal quotation marks omitted).

rather than directive, role.¹⁹² The judge may weigh in on information presented by each side, and provide the defendant assurances that the process is being conducted fairly. This type of participation can also ensure consistent results based on the unique facts of each case.¹⁹³ A judge tasked with a facilitative role is much less likely to run afoul of the concerns, mentioned above, regarding the voluntariness of the plea and to be seen as less than neutral. If the judge plays this more facilitative role, where the parties are left to make the decision about what to accept, this will allow the judge to serve as a check on both parties in a neutral manner and to ensure that both sides are informed.

D. Involving the Defendant Where Possible

It is true, as one commenter has discussed, that:

Most defendants do not understand our system of criminal justice and cannot be made to understand. They are, in the main, too optimistic: they believe that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted. They suspect, however, that the "legal establishment" (including perhaps their own attorney) is conspiring to deprive them of the right to trial, and even when defense attorneys have the time for patient explanations (as they often do not), defendants may not fully realize the extent of the penalty that our system exacts for an erroneous tactical decision.¹⁹⁴

Many defendants do not understand the role that the defense attorney is playing in the plea bargain and do not necessarily trust the advice they are given.¹⁹⁵ In addition, defendants are not usually included in the plea bargaining process, and so many errors by defense counsel during the plea bargain process can go undetected.¹⁹⁶ Both of these problems can be somewhat ameliorated by including the defendant at the plea bargain whenever possible.

A defendant who is involved in the plea bargain process can use the judge as an information source to supplement and validate the information that he is receiving from his own defense counsel. This is particularly so if, as recommended above, the judge is playing a facilitative role and providing neutral information about the process. In this role, the judge can confirm in a

¹⁹² States already specify mediators must follow facilitative standards. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 2014) (“(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them; (b) A mediator may not impose his own judgment on the issues for that of the parties.”).

¹⁹³ Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 214–15 (2006) (discussing how judges in German courts play this role).

¹⁹⁴ Alschuler, *supra* note 15, at 1310.

¹⁹⁵ *Id.*

¹⁹⁶ *See supra* Part II.

neutral way the information that the defendant learns about sentencing ranges, enhancements, etc. presented by the prosecutor and defense counsel.¹⁹⁷ In addition, the defendant can observe how zealously his attorney is participating in the plea process, and this observation may encourage defense counsel to be more prepared and provide better representation. Having the defendant involved in his or her own plea bargain can also increase the perceived procedural fairness of the process for the defendant, as allowing the defendant to participate and also to ask questions of the judge increases the defendant's voice¹⁹⁸ in the process, leading to greater compliance and greater satisfaction with the process.¹⁹⁹

It may be the case that, due to valid logistical or tactical reasons, defense counsel will not want to involve the defendant. However, judges who are involved in the process and states that involve them can set a norm of defendant participation in plea bargaining that defense counsel will need to explicitly justify contravening, in order to encourage more participation.

E. *Informal Setting*

One other small concern that judges who participate in plea bargains should consider is the setting in which the plea bargain takes place. Courts have expressed reservations that if the judge is participating in the plea discussion, the defendant will not consider his plea voluntary, even if the judge is not the trial judge. If this is the case, the setting in which the defendant is left to weigh his options should be as comfortable as possible.

The conference need not occur in the courtroom. Instead, it can occur in chambers, or in a dedicated settlement room. This is the approach taken in Arizona courts, with favorable results.²⁰⁰ The informal setting may help with the concerns around coercion expressed by the courts. In particular, the more relaxed atmosphere may especially help for a criminal defendant with past convictions, who may perceive the informal setting as noticeably different from that of an intimidating courtroom. The manner in which the judge introduces himself, and the judge reminding the defendant that the judge is there to give neutral advice, may help as well.²⁰¹

¹⁹⁷ See Ronald T.Y. Moon, *Visions of a New Legal System: Could There Be a Legal System That Better Incorporates the Strengths of ADR and Existing Legal Institutions?*, 15 REV. LITIG. 475, 480 (1996).

¹⁹⁸ O'Hear, *supra* note 24, at 426, 433–35.

¹⁹⁹ *Id.* at 433–35.

²⁰⁰ Robert L. Gottsfield & Mitch Michkowsky, *Settlement Conferences in Criminal Court*, ARIZ. ATT'Y, April 2007, at 8, 10–11.

²⁰¹ See Moon, *supra* note 197, at 480.

VI. CONCLUSION

Allowing judges to participate, in a limited way, in the plea bargaining system would not fix all of the ills of the plea bargaining system. Given the structural issues involved with plea bargaining, no one change can do so. In the future, legislatures and courts must act to address some of the larger ills of the system, such as overburdened defense counsel and prosecutorial power.

However, by allowing judges to participate in a prescribed way, with a separate judge for the plea process, recording the negotiations, setting the role of the judge appropriately, and allowing an informal setting, states can realize benefits of adding a neutral to the process that is familiar with the system and that participants will accept. States that already allow participation should add in these reforms, and states that are considering participation can try to pilot programs in this limited way.

