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THE CRIMINAL DEFENSE LAWYER AS EFFECTIVE NEGOTIATOR: A SYSTEMIC APPROACH

RODNEY J. UPHOFF*

INTRODUCTION

In the first issue of the *Clinical Law Review*, Peter Hoffman challenged clinical legal educators to “take skills seriously”¹ by producing clinical scholarship that is “practical in its orientation and design” and written so as to enhance the ability of lawyers to represent their clients and to help law students prepare for law practice.² To Hoffman, the best clinical scholarship about skills combines theory and practice, but ultimately is grounded in actual lawyering experiences.³ Finally, Hoffman insisted, if skills-focused clinical scholarship is to be useful, it must be written so that lawyers and law students can read, understand and, above all, apply the analysis provided in that scholarship to the task of representing their clients.⁴

This article takes up Hoffman’s challenge in the context of examining the skill of negotiating or plea bargaining from the perspective of the criminal defense lawyer. I decided to focus on this particular skill for two reasons. As anyone familiar with the criminal justice system recognizes, criminal defense lawyers spend much of their time “plea bargaining.”⁵ Indeed, the vast majority of criminal cases are re-

* Associate Professor and Associate Director of Clinical Education, University of Oklahoma College of Law. I wish to thank Peter Joy, Terry Hull and Cindy Foley for their helpful comments and criticisms. I also would like to thank Koni Johnson and Lori Ketner for their assistance in the preparation of this article.

¹ Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLIN. L. REV. 93, 112 (1994).

² *Id.* at 114.

³ *Id.*

⁴ *Id.* at 114-15.

⁵ Plea bargaining, the negotiating process between the lawyer representing the government and the lawyer representing the accused in a criminal case, has been called an “essential component of the administration of justice If every charge were subjected to a full-scale trial, the states and federal government would need to multiply by many times the number of judges and court facilities.” *Santobello v. New York*, 404 U.S. 257, 260 (1971). Some critics, most notably Professor Albert Alschuler of the University of Chicago Law School, contend that plea bargaining is a pernicious practice that undermines constitutional ideals and ultimately, the legitimacy of the criminal justice system. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) [hereafter cited as “*Alternatives to Plea Bargaining*”]. Most scholars and practitioners agree, however, that plea bargaining is the

solved by a guilty plea.⁶ It seemingly would follow then, that criminal defense lawyers interested in obtaining the best results possible for their clients would concentrate on becoming effective negotiators.

And yet, despite the obvious importance of being good negotiators, criminal defense lawyers often do not bargain effectively. But why is this so? Before discussing the methods, approach or techniques that lawyers can use to enhance their ability to bargain effectively, it is critical to understand what it is about the practices of criminal defense lawyers and the criminal justice system that produces poor plea bargaining. It is only by understanding the systemic factors that pressure defense lawyers and defendants to settle most criminal cases and undercut defense counsel's negotiating strength that law students and practicing lawyers will be able to appreciate the difficulties they will encounter in implementing the approach and techniques described later in the article.

The article is designed, therefore, to address a critical need — improving the ability of those lawyers handling the defense of criminal cases to negotiate more effectively. As a lawyer and clinician who has struggled for much of the past 19 years to improve as a plea bargainer and to train others to plea bargain, I firmly believe that clinical legal educators are particularly well-positioned to respond to this need. Indeed, like Peter Hoffman, I believe that clinical legal educators have the responsibility to explore and debate those aspects or features of actual law practice that significantly affect lawyers' behavior.

Second, this article was written because each semester I have struggled to find a good introductory article on plea bargaining to provide to the students in my Criminal Defense Clinic. Although much

only viable mechanism for resolving the crush of cases that must be processed by underfunded criminal justice systems. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.1, commentary at 68 (2d ed. 1980). Alschuler's article not only forcefully attacks the notion that plea bargaining is inevitable, he sharply criticizes our present criminal justice system because it really only provides adversarial assistance of counsel to those who can afford to pay for quality representation. *Alternatives to Plea Bargaining*, at 1005. A full discussion of the merits and costs of eliminating plea bargaining as well as a critique of Alschuler's proposals is beyond the scope of this article. For a thorough evaluation of the issues surrounding the abolition or reform of plea bargaining, see UNITED STATES DEPARTMENT OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES (1985) [hereafter cited as "PLEA BARGAINING"].

⁶ Commentators generally estimate that over 90% of all criminal convictions in the state courts in this country are based on guilty pleas. *See, e.g.*, JAMES A. CRAMER, HENRY H. ROSSMAN & WILLIAM F. McDONALD, *The Judicial Role in Plea Bargaining*, in PLEA BARGAINING 139 (1980). The latest statistics compiled by the Justice Department indicate that about 92% of all felony state court convictions are the result of guilty pleas. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE BULLETIN, FELONY SENTENCES IN THE STATE COURT 1992, 9 (1995). It is likely that guilty pleas account for an even higher percentage of misdemeanor convictions in most jurisdictions. *See* Patricia A. Smith, *Forgotten in the Courts*, 2 CRIM. JUST. 14, 17 (1982).

has been written about negotiation and negotiation theory, little attention has been paid to the application of general negotiation principles to the plea bargaining of criminal cases.⁷ Most of the articles about plea bargaining are to be found in practice manuals or bar journals and they refer to negotiating criminal cases as an art⁸ or a “matter of instinct” that “defies written analysis.”⁹ These articles provide pointers and concrete suggestions without any theoretical background or analytical framework so that the reader is offered some guidance but gains little appreciation for the underpinnings or rationale for the suggested tactics. Admittedly, few law students or criminal practitioners want to wade through abstract articles on negotiation theory divorced from actual criminal practice.¹⁰ This article, then, seeks to bridge the proverbial gap between theory and practice by providing law students, lawyers and new clinicians a practical but analytical guide to the skill of plea bargaining. The article offers an approach to plea bargaining not only grounded in the theoretical literature about negotiation strategy but in the realities of criminal practice, client behavior and other salient aspects of the criminal justice system.

The article begins by looking at the pressures on defense counsel and the defendant to plea bargain.¹¹ Section I is intended to ensure that readers have the necessary background — in other words, are sufficiently grounded in experience — so that they can fully appreciate the importance of proper preparation and the significant pressures lawyers face to shortcut that preparation. The article argues that if defense counsel does not prepare adequately, she is not meeting her ethical responsibilities nor likely to achieve much success as a negotiator.

Before detailing the preparation necessary to effective negotiating, Section II briefly examines the importance of client consultation and raises the issue of the need to obtain the client’s consent before plea bargaining. Concluding that defense counsel normally should se-

⁷ A notable exception, however, is the work of Don Gifford of the University of Maryland Law School. See, e.g., Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiations*, 46 OHIO ST. L.J. 41 (1985).

⁸ See, e.g., James A. H. Bell, *Effective Plea Negotiations In A DUI Case Reduced To Practical Principles Of Flea Bargaining*, THE CHAMPION, April 1994, at 27.

⁹ See James Douglas Welch, *Settling Criminal Cases*, in THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 1029, 1033 (John G. Koeltl ed., 1989).

¹⁰ Hoffman undoubtedly is correct that much legal scholarship is written in “impenetrable prose” that puts off most lawyers and law students. Hoffman, *supra* note 1, at 114.

¹¹ Like Jerome Carlin, I believe it is critical “to explore the conditions supporting and impairing the lawyer’s capacity to carry out his ethical obligations.” JEROME E. CARLIN, *LAWYERS’ ETHICS: A STUDY OF THE NEW YORK BAR* 4 (1966). Thus, this article attempts to draw practical lessons from the literature on plea bargaining and on the criminal justice system as well as from my own lawyering experiences.

cure her client's consent before plea bargaining, Section II next presents a series of steps the criminal defense lawyer should take to ensure that she is properly prepared to negotiate a state criminal case.¹² Proper preparation culminates with counsel's selection of an approach or negotiation strategy tailored to the specific case she is handling. To assist that selection, Section II identifies the key variables that counsel should analyze before choosing the approach to be used in that case.

Section III then examines additional factors and considerations that are likely to affect the implementation of counsel's strategic approach. Although the negotiation dance is a fluid one requiring flexibility on counsel's part, the better counsel has prepared for the negotiation, the greater her chances for success. Finally, Section IV concludes by urging defense counsel to engage in a reflective critique of each negotiating session in order to improve counsel's ability to select and to implement a successful negotiation strategy.

In discussing defense counsel's role in the plea bargaining process, the article touches upon various ethical questions with which young lawyers will inevitably struggle as they strive to become effective, zealous criminal defense lawyers. Although in most instances, definitive answers are beyond the scope of this article, one answer rings clear. As the ABA Standards for Criminal Justice emphasize, "counsel's place in our adversary process of justice requires that counsel be guided constantly by the obligation to pursue the client's interests. Counsel must not be asked to limit his or her zeal in the pursuit of those interests except by definitive standards of professional conduct."¹³

¹² This article focuses on state criminal cases instead of federal cases for several reasons. First, most law students in a clinical program or young lawyers in practice will be involved in state court proceedings, negotiating against state prosecutors. Different procedures to a certain extent influence the way plea bargaining is done in the federal system. More importantly, the impact of the 1987 Federal Sentencing Guidelines on the behavior of the participants in the federal criminal justice system is so substantial that it requires separate treatment. For further insight into the extent to which the Sentencing Guidelines have profoundly influenced the plea bargaining process in federal criminal cases and the strategies to employ when bargaining under the Guidelines, see PHYLIS SKLOOT BAMBERGER & DAVID J. GOTTLIEB, *PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES* (3d ed., Supp. 1994); Donald A. Purdy, Jr. & Michael Goldsmith, *Better Do Your Homework: Plea Bargaining Under the New Federal Sentencing Guidelines*, 3 *CRIM. JUST.* 2 (1989). See also U.S. DEPARTMENT OF JUSTICE, *PROSECUTOR'S HANDBOOK ON SENTENCING AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984* (Nov. 1, 1987).

¹³ ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2, commentary at 126 (3d ed. 1993).

I. UNDERSTANDING THE CONTEXT: THE PRESSURE TO PLEA BARGAIN

A. Systemic Pressures to Plead Guilty

Although criminal defense lawyers are ethically required to serve as zealous advocates and to vigorously challenge the state's case,¹⁴ the vast majority of criminal cases are resolved by a guilty plea worked out through the plea bargaining process.¹⁵ There is no single or simple explanation as to why so many criminal cases settle or why defense lawyers are not better bargainers. A defendant and his or her defense lawyer may be influenced by a host of systemic forces and individual pressures to agree to a particular plea bargain. This section explores the most significant features of the criminal justice system and the attitudes and interests of defendants and their lawyers that affect the plea bargaining process.

To some commentators, criminal defense lawyers are often indifferent advocates or poor plea bargainers because they primarily care about resolving cases quickly with minimal effort and little zeal.¹⁶ Personal interests, not the client's best interests, dictate the representation provided by such defense lawyers. In his oft-cited work, "The Practice of Law as Confidence Game: Organizational Co-optation of a Profession," Abraham Blumberg denounced criminal defense lawyers as "double agents" who abandon their ethical commitment to zealously defend their clients and instead "help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty."¹⁷ To Blumberg, criminal defense lawyers are double agents

¹⁴ See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1969) [hereafter "MODEL CODE"]; ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.3, comment (1994) [hereafter "MODEL RULES"]; ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2 (3d ed. 1993). As Justice Powell noted:

In our system a defense lawyer characteristically opposes the designated representative of the State. The system assumes that adversarial testimony will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it but rather by advancing "the undivided interests of his client."

Polk County v. Dodson, 454 U.S. 312, 318-29 (1981).

¹⁵ See *supra* notes 5-6.

¹⁶ See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179-1210 (1975) [hereafter cited as "*The Defense Attorney's Role*"]; David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 8-11 (1973); David Luban, *Are Criminal Defendants Different?*, 91 MICH. L. REV. 1734, 1757 (1993).

¹⁷ Abraham Blumberg, *The Practice of Law as Confidence Game: Organizational Co-optation of a Profession*, 1 LAW & SOC'Y REV. 15, 20 (1967). For others who share Blumberg's views of the cooperative, non-adversarial nature of the criminal justice system, see, e.g., GEORGE COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* (2d ed. 1979); Jerome Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52 (1967).

because they use the attorney-client relationship to pressure or “con” defendants to plead guilty while appearing to work on their behalf. As double agents, defense lawyers primarily are interested in serving their own ends — and those of the regular players in the system — which generally are advanced by disposing of the client’s case quickly without regard for the client’s best interests.¹⁸

Blumberg undoubtedly is correct that there are criminal defense lawyers of limited ability, zeal or professional commitment who do manipulate their clients into ill-advised plea bargains.¹⁹ Some lawyers do promote their own interests at the expense of their client’s best interest. Moreover, Blumberg’s analysis highlights the substantial systemic pressures on criminal defense lawyers to behave in a cooperative, non-adversarial manner. And yet, Blumberg’s condemnation of criminal defense lawyers as double agents sweeps too broadly. There are simply too many dedicated defense lawyers, too much litigation and too many other variables affecting client decisionmaking to conclude that manipulative, complicitous criminal defense lawyers are the cause of most plea bargaining.²⁰

1. Defense Counsel’s Struggle: Coping With Time and Money Pressures

Unquestionably, defense counsel’s attitude, efforts and recommendation do strongly influence the defendant’s decision to plea bargain or go to trial. Some criminal defense lawyers do function as indifferent advocates. A public defender may be lazy, inexperienced, overwhelmed by a staggering caseload, burned out, fixated on another case, distracted by personal problems or affected by a combination of these factors, such that she shortcuts her preparation and fails to pro-

¹⁸ Blumberg, *supra* note 17, at 22-39. See also MILTON HEUMANN, *PLEA BARGAINING* 80 (1978) (concluding that criminal defense lawyers eventually succumb to the culture of the court system, a culture that rewards cooperation but sanctions defense counsel who adopts a formal adversarial approach).

¹⁹ See *The Defense Attorney’s Role*, *supra* note 16, at 1194-1206; ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 411 (1982). There are, unfortunately, too many reported accounts of criminal defense lawyers who render inadequate or minimal representation consistent with that depicted by Blumberg. See, e.g., Trisha Renaud & Ann Woolner, *Meet ‘EM and Plead ‘EM*, *FULTON COUNTY DAILY REP.*, Oct. 8, 1990, at 1 (describing the practices of Fulton County public defenders to plead as many cases as possible at arraignment to keep the office operational).

²⁰ For a more detailed critique of the limitations of Blumberg’s thesis, see Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 *CRIM. L. BULL.* 419 (1992). See also *PLEA BARGAINING*, *supra* note 5, at 86-87, 90-91 (concluding that Blumberg and others had “overstated the nonadversarial nature of plea bargaining”); LISA MCINTYRE, *THE PUBLIC DEFENDER* 46-48 (1987) (contending that Blumberg’s criticisms of public defenders have been largely discredited).

vide her clients competent representation.²¹ Similarly, the representation provided by retained counsel may suffer as a result of any of these factors as well as be compromised by that lawyer's personal financial interests.²²

The temptation to undercut the quality of representation provided in order to maximize one's profits or "to churn" cases to turn a quick fee, of course, is not unique to the criminal defense bar.²³ Nonetheless, the temptation and economic pressures on defense counsel are very real.²⁴ The ethical defense lawyer who values her professional responsibilities will resist the temptation to turn a fast profit and will provide her clients the best representation possible given the client's economic situation.²⁵

²¹ Various commentators have criticized public defenders as marginal advocates who tend to push their clients into plea bargains to cope with their excessive caseloads. See, e.g., MARTIN LEVIN, *URBAN POLITICS AND THE CRIMINAL COURT* (1977); CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* (1978); Michael McConville & Chester L. Mirsky, *Criminal Defense for the Poor in New York City*, 15 *REV. L. & SOC. CHANGE* 581 (1986-87); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in the Public Defender's Office*, 12 *SOC. PROBS.* 255, 255-77 (1965). Yet, many of those who complain about the quality of public defender representation recognize that it is not necessarily the lack of zeal, of commitment or of ability that plague public defender offices, but inadequate resources and high caseloads. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 *HASTINGS CONST. L.Q.* 625, 661-62 (1986); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 *WIS. L. REV.* 473. Nonetheless, numerous observers have reported that defendants represented by public defenders fare no worse — and sometimes substantially better — than defendants represented by retained defense counsel. See JONATHAN CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE* (1978); MCINTYRE, *supra* note 20; NATIONAL CENTER FOR STATE COURTS, *INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL* (1992). See also *infra* note 26. For an excellent discussion of the pressures and stresses which make the job of public defender such a challenge, see Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 *HARV. L. REV.* 1239 (1993).

²² Some lawyers undeniably are tempted to arm-twist their clients to plead guilty to earn an easy or excessive fee. See, e.g., DERSHOWITZ, *supra* note 19, at 411 ("these criminal lawyers regard clients the way a department store regards merchandise: the more quickly turned over at a profit, the better").

²³ For a description of the problem in the context of the representation provided by personal injury lawyers working on a contingent fee basis, see DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 96-112 (1974).

²⁴ As Justice Brennan observed:

a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee — a common arrangement for criminal defense attorney — or if his fees for court appointments are lower than he would receive for other work, he has an obvious financial incentive to conclude cases on his criminal docket swiftly.

Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). See also *The Defense Attorney's Role*, *supra* note 16, at 1179-1241, 1307-13.

²⁵ It is imperative that counsel ensure that each client understands the fee arrangement and that fee agreements are structured so that clients are not deprived of the opportunity

Public defenders commonly face very different pressures — staggering caseloads and inadequate support — that limit the time counsel has available to provide quality representation.²⁶ The defendant who has sat for three weeks in jail waiting to see a lawyer for the first time may be painfully aware of counsel's limitations. A weary or frantic lawyer scrambling to cope with too many cases hardly inspires confidence in her clients. A client who senses his or her lawyer is inexperienced as well as overburdened will be even more inclined to plead guilty and discouraged from pursuing the trial option.

Myths and preconceptions about appointed counsel may further fuel clients' anxieties. As many commentators have pointed out, indigent clients frequently mistrust appointed counsel.²⁷ A half-hearted or negative attitude by appointed defense counsel will increase the defendant's misgivings and encourage the defendant to plead guilty.

Thus, the indigent defender must find ways to reassure her clients that she has the time, talent and commitment to fight the prosecutor. The indigent defender cannot rely merely on hurried meetings in the back of the courtroom to communicate with her clients. To combat mistrust, defense counsel must schedule office meetings or go to the jail to see her clients. Above all, counsel must possess and display an attitude of respect and of concern which demonstrates to the client that she serves the client, not the state.²⁸

to go to trial. If the client's financial situation is so limited that she cannot afford to pay for adequate representation, counsel should assist the client to obtain appointed counsel.

²⁶ See *supra* note 21. Nevertheless, some public defenders do provide quality representation, especially those who work in programs with good support staff, investigative assistance and manageable caseloads. See, e.g., THE SPANGENBERG GROUP, CASELOAD/WORKLOAD STUDY FOR THE STATE PUBLIC DEFENDER OF WISCONSIN, FINAL REPORT (1990); U.S. DEPT. OF JUSTICE, AN EXEMPLARY PROJECT: THE D.C. PUBLIC DEFENDER SERVICE (1975). Indeed, it is the indigent defendant represented by a contract lawyer or an assigned private attorney who is most likely to receive substandard representation. See, e.g., NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 17-24 (1982); Uphoff, *supra* note 20, at 444-45; Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 324-36.

²⁷ *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). The failure of many public defenders to devote sufficient time and attention to client counseling and communication has been identified as a major factor in explaining the fact that many indigent clients have reduced confidence in and are less satisfied with the representation provided by public defenders. For an extensive discussion of the reasons clients mistrust appointed counsel, see, e.g., Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); CASPER, *supra* note 21, at 100-25; MCINTYRE, *supra* note 20, at 62-73.

²⁸ This is not to say that counsel's task is easy or that a positive, respectful attitude will always be reciprocated. Some clients will be impossible to reach. Additionally, the reports or complaints of other inmates may fuel the defendant's hostility toward or mistrust of appointed counsel. Counsel's attitude and efforts, however, will convince some clients and allow her to build needed rapport. For a good discussion of the importance of conveying to the client in the initial interview genuine concern and a willingness to work for the client

Clients are more willing to go to trial with lawyers they trust and who appear ready, willing and able to go to trial than with lawyers who evince a lack of confidence, ability or willingness to try the case. Yet, even zealous defense lawyers need be aware that their presentation of options and recommendations to their clients may discourage defendants from going to trial.²⁹ Given the uncertainty of predicting trial verdicts, the desire to avoid overly optimistic expectations and the resulting tendency to give cautious advice, combined with the fear that the defendant will receive a harsher sentence following a guilty verdict, even well-intentioned lawyers may subtly present their clients with options in a manner that influences them to plead guilty rather than go to trial.³⁰

2. *The Pressures on Defendants to Plead Guilty*

The decision of many defendants to plead guilty is the product of a number of individual forces and systemic factors which have little to do with the behavior of criminal defense lawyers. Indeed, the zeal or even the availability of counsel may have little affect on the defendant's decision. Simply put, a significant number of defendants just want to plead guilty.³¹ Few criminal defendants, even those who are innocent, actually want to go to trial.³² Many who are accused of a

as well as helpful suggestions designed to gain the client's trust, see ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 79 (1988).

²⁹ See *infra* text accompanying notes 232-33.

³⁰ Experienced lawyers recognize both the uncertainties of trial work and the impact of such uncertainty on defendants' plea decisions. See, e.g., PLEA BARGAINING, *supra* note 5, at 51-52; *The Defense Attorney's Role*, *supra* note 16, at 1205-06. Nonetheless, defense counsel must attempt to make a realistic prediction of the defendant's chances at trial if she is to provide competent advice to a client who needs such advice to make an informed decision. See ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.2, commentary at 74-75 (2d ed. 1980) ("defense counsel cannot predict many of these matters with certainty but the defendant is nonetheless entitled to counsel's best professional judgment"). To make a truly informed decision, however, the defendant needs more than just vague pronouncements about his or her chances at trial. Rather, counsel should use her best judgment to provide the client a range of percentages which reflect the likelihood of a guilty or not guilty verdict. Although percentages will be rough and necessarily inexact, they are more helpful — and more likely to minimize miscommunication — than counsel's use of terms like "good," "very strong" or "weak" to describe the client's odds at trial. For a further discussion of this issue, see DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH 337-45 (1991).

³¹ My experience as a public defender, administrator at a public defender office and as the director of two clinical programs mirrors the observations of Malcolm Feeley and Albert Alschuler who concluded that the vast majority of defendants in misdemeanor cases just want to plead guilty to get the case over with quickly. The "process costs" — time, money and inconvenience — of contesting the charge outweighed the possible gain to be won at trial. See MALCOLM FEELEY, THE PROCESS IS PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); *Alternatives to Plea Bargaining*, *supra* note 5, at 951-55.

³² Although the fact that the vast majority of defendants plead guilty does not necessar-

crime do not even consider going to trial a viable option.

Criminal defendants offer a variety of reasons to explain their reluctance to go to trial and their interest in a plea bargain. Internal as well as external pressures may shape the defendant's attitude. For many defendants, the prospect of actually going through a trial and having to take the witness stand is very intimidating. Fear, embarrassment, or the risk of adverse publicity drives some defendants to negotiate and to avoid trial. Unquestionably, the risk of a jail sentence or the prospects of a harsher sentence also deters many defendants from viewing a trial as a desirable alternative to pleading guilty.³³ For some, a pessimistic or fatalistic mind-set dampens any enthusiasm for going to trial. Standing up to the state by taking a case to trial is similar to taking on city hall, a Sisyphean task few are willing to readily embrace.

Some defendants, of course, have been through the system before and these prior experiences significantly influence their attitude toward plea bargaining. For some, especially defendants of color, their perception that the system is heavily stacked against them adversely affects their view of a trial as a viable option.³⁴ For other defendants, many criminal cases just do not seem to be "that big a deal" or are "nothing really to worry about." For these defendants, the time and trouble it would take to fight a particular charge is outweighed by the inconvenience the defendant feels.³⁵ It is easier and quicker simply to plead guilty and to get the matter resolved rather than spend time

ily prove that most defendants are reluctant to go to trial, it certainly supports that conclusion. Again, my experience and that of the public defenders and clinic students with whom I have worked for the past 19 years is that few defendants are really willing to go to trial. Even with strong cases involving minimal risk of any negative consequences and no legal expenses, defendants are reluctant to take any risk or take the added time to go to trial. Moreover, even experienced clinical supervisors are often unable to persuade reluctant defendants to set aside their misgivings and go to trial. For a further discussion of the impact of the defendant's fear of trial on client decisionmaking, see CASPER, *supra* note 21, at 68-77. There are, of course, some defendants who badly want to have their cases tried and who insist upon a trial even in the face of defense counsel's strong recommendation to settle. See, e.g., *id.* at 74-76; MCINTYRE, *supra* note 20, at 153-58.

³³ See PLEA BARGAINING, *supra* note 5, at 93-107. Most defendants also believe that by pleading guilty quickly they substantially increase their chances for a more lenient sentence. See *infra* notes 41, 56-58 and accompanying text.

³⁴ Numerous studies have demonstrated that defendants of color believe that their race affects their likelihood of success at trial. See, e.g., PLEA BARGAINING, *supra* note 5, at 101. Studies — and my own personal experiences — indicate that defendants are at times treated very differently because of their race. For a further discussion of the impact of race on the actors in the criminal justice system, see, e.g., Note, *Developments in the Law - Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988); *Symposium on Racial Bias in the Judicial System*, 16 HAMLINE L. REV. 475 (1993).

³⁵ This is particularly true of young defendants and those charged with a misdemeanor or a minor felony. For similar observations, see *Alternatives to Plea Bargaining*, *supra* note 5, at 951-55; PLEA BARGAINING, *supra* note 5, at 101; FEELEY, *supra* note 31, at 201.

going to trial even if the charge is baseless or the prosecution's evidence is very weak. Thus, the defendant's attitude about the charge, his or her other responsibilities and time commitments, financial resources, past experiences and perceptions about the criminal justice system all affect the defendant's ability to resist the pressure to enter a negotiated plea.

Some defendants readily admit their guilt and are reluctant to do anything other than acknowledge responsibility for the crime or crimes committed.³⁶ Sometimes this reaction is fed by the defendant's religious or moral feelings. In other instances, the defendant's "get it over with" attitude is spurred on by concerns that contesting a charge will have a negative effect on the defendant's family, financial situation or employment status.³⁷ Such defendants may be unaware of or fail to consider the long-term consequences of a hasty decision to plead guilty.³⁸

It may be very appropriate for the lawyer to push the defendant to fight a weak charge rather than merely accede to the defendant's get-it-over-with attitude.³⁹ At some point, of course, the lawyer's pushing or leaning hard becomes inappropriately coercive.⁴⁰ Conscientious defense counsel will seek through appropriate counseling to prod her clients to take a broader view of their best interests.

Many defendants, especially those who have already been through the system, recognize that the criminal justice system encourages the resolution of cases through plea bargaining. The prospect of securing a more lenient sentence, in fact, drives many defendants to want to plead guilty.⁴¹ The defendant who received a significant

³⁶ This is especially so when the defendant is truly remorseful or recognizes that she has no realistic prospect of an acquittal. See, e.g., *Alternatives to Plea Bargaining*, *supra* note 5, at 944, 950; PLEA BARGAINING, *supra* note 5, at 102.

³⁷ The Supreme Court acknowledged that such pressures do drive defendants to plead guilty, but found that such factors do not make the pleas coerced or involuntary. See *Brady v. United States*, 397 U.S. 742, 750 (1970).

³⁸ Although future job prospects, insurance rates or licensing options may seem unimportant to the client now, a good lawyer should draw the client's attention to the potential adverse consequences of a guilty plea. See *infra* notes 100-02 and accompanying text.

³⁹ See, e.g., Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 31 (1993) ("sometimes respect for clients means leaning hard on them to do the right thing"). See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2, commentary at 201 (3d ed. 1993) ("although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in fair persuasion and to urge the client to follow proffered professional advice").

⁴⁰ See *infra* notes 234-37 and accompanying text.

⁴¹ *Brady v. United States*, 397 U.S. 742, 756 (1970). Empirical evidence seemingly confirms the widely held view that defendants who go to trial tend to be sentenced more harshly than those who plead guilty to the same type of offense, although the degree of

break in an earlier case may be particularly anxious to enter into a plea bargain. Or the defendant may be savvy enough to know that it is advantageous to deal quickly with the police or prosecutor before other potential defendants or co-conspirators do.⁴² Indeed, a lawyer bent on finding the facts in an initial interview may be brusquely instructed or directed by a seasoned defendant just to “cut a deal.”

One of the difficult problems that new lawyers face in dealing with experienced defendants is that these defendants may be quite knowledgeable — and even more frequently, think they are very knowledgeable — about the plea bargaining process. This can be particularly intimidating for the inexperienced defense attorney. The fact that the defendant got a deal in a somewhat similar case in another jurisdiction or at an earlier time may create unreal expectations about counsel’s ability to secure a particular deal in this instance. The defendant also may lament that her proffered bargain is not as good as the deal her friend received. As every lawyer knows, individual facts and circumstances change the outcome of a case. Explaining this to a defendant who believes she has all the answers, however, can be particularly challenging. Defense counsel who can convince her clients that she is, in fact, working on their behalf, is likely to be more successful in persuading her clients to agree to plea bargains that are in their best interests and to refuse to accept poor deals.

Notwithstanding counsel’s advice, it is often the defendant, not the so-called “double agent” defense lawyer, who is insistent on work-

differential sentencing practices varies by jurisdiction. PLEA BARGAINING, *supra* note 5, at 93-107. It is difficult to determine, however, if judges are punishing those who go to trial or simply rewarding those who plead guilty. Judges seldom acknowledge that they punish anyone for going to trial, but will admit that they will give a more lenient sentence to a person who pleads guilty. *Id.* For a critical discussion of the judicial practice of rewarding defendants who plead guilty by sentencing them less severely than those convicted at trial, see *Alternatives to Plea Bargaining*, *supra* note 5, at 963, 978-94; Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining (Part 1)*, 76 COLUM. L. REV. 1059, 1976-87 (1976).

⁴² In some circumstances, the first defendant to cooperate may gain considerable consideration from the state. See AMSTERDAM, *supra* note 28, § 208. As has been widely reported, the federal government’s war on drugs has spawned a tremendous increase in the number of informants, the vast majority of whom are helping authorities to obtain a dismissal or reduction of their own charges. See, e.g., Peter Katel, *Justice: The Trouble with Informants*, NEWSWEEK, Jan. 30, 1995, at 48. Not surprisingly, then, a sizeable number of defendants not only are interested in exploring this alternative, but also realize the importance of getting to the prosecutor first. Nevertheless, counsel may find herself in an extremely tricky position trying to negotiate a cooperation agreement when she has had little time to investigate or discover what the prosecutor really knows. The prosecutor’s position, however, may be equally tricky. See *United States v. Mezzanatto*, 115 S.Ct. 797, 804 (1995) (recognizing the “painfully delicate” choices prosecutors face during the early stages of criminal investigations when they may be willing to offer immunity or leniency at sentencing in exchange for information). For a closer look at cooperation agreements, see Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992).

ing out a plea bargain. In many cases defendants simply recognize that our overburdened criminal justice system has been structured to discourage them from going to trial. Too few criminal defendants can really afford to pay the cost of mounting an effective defense.⁴³ In some jurisdictions, access to appointed counsel, the quality of indigent defenders and the resources provided to support the defense of the indigent affect the extent to which defendants have a meaningful right to go to trial.⁴⁴ The unrepresented defendant or the accused able to scrape up only a minimal retainer faces substantial pressure to plead guilty.⁴⁵ Take, for example, the defendant who has used his last \$500 to bail himself out and to retain counsel. His lawyer threatens to withdraw unless the defendant pays an additional \$2000 for a trial. Rather than fight the charge, the defendant pleads guilty to save the \$2000 fee. Or he accepts the proffered plea bargain because he simply cannot raise any more money. Thus, economic pressures often eliminate the criminal defendant's right to trial as a viable option.⁴⁶

Those pressures intensify for the defendant who is held in jail unable to make bail. Many defendants, especially first offenders, will

⁴³ The Florida Supreme Court observed that "[t]he relationship between an attorney's compensation and the quality of his or her representation cannot be ignored," *White v. Board of County Comm'rs*, 537 So.2d 1376, 1380 (Fla. 1989), an observation echoed by many courts and scholars. See, e.g., *Alternatives to Plea Bargaining*, *supra* note 5, at 1005; *The Defense Attorney's Role*, *supra* note 16, at 1179-1204. The O.J. Simpson case dramatically illustrates that point. See John H. Laugbein, *Money Talks, Clients Walk*, *NEWSWEEK*, April 17, 1995, at 32-34. For a detailed examination of the dramatic disparity in the quality of representation provided capital defendants, see *White*, *supra* note 26.

⁴⁴ Numerous reports and articles have detailed the serious deficiencies in the delivery of indigent defense services in many jurisdictions throughout the United States. See, e.g., *SPECIAL COMM. ON CRIMINAL JUSTICE IN FREE SOC'Y, CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS* (1988). For a closer look at the extent to which the local structure for delivering indigent defense services affects the decisions of indigent defendants and the overall quality of representation in a jurisdiction, see Uphoff, *supra* note 20, at 443-56.

⁴⁵ Numerous commentators have condemned the quality of representation provided by courthouse "hacks" who specialize in the quick plea. See, e.g., *Bazon*, *supra* note 16, at 8-11; *The Defense Attorney's Role*, *supra* note 16, at 1179-98.

⁴⁶ A defendant charged with the delivery of a controlled substance called me recently and asked if he could be represented by our clinical program. He was out on bail and managed to scrounge up \$500 to pay an inexperienced, young attorney to represent him. He was dissatisfied with the lawyer because the lawyer wanted him to plead guilty and the client insisted he was innocent. I explained to him the reasons we could not accept his case and that it was unlikely that he would be deemed indigent and provided appointed counsel because he was out on bail and had already retained counsel. He was out of money and really out of viable options, except, of course, to plead guilty. Not surprisingly, he did. For discussion of the extent to which systemic hurdles in obtaining appointed counsel, including a narrow definition of indigency, can restrict an accused's right to effective representation, see Rodney J. Uphoff, *The Right to Appointed Counsel: Why Defendants in Oklahoma Still Are Unrepresented*, 64 *OKLA. B.J.* 918 (1993). For a further discussion of the degree to which financial impediments and limitations restrict defendants' access to a fair trial, see *The Defense Attorney's Role*, *supra* note 16, at 1200-04.

agree to almost anything to get out of jail. It is all too common for defendants to enter a guilty plea merely as the quickest means to secure their release from jail.⁴⁷ Accordingly, defense counsel's ability to secure her client's release on bond is likely to minimize pressure on the defendant to agree to a poor plea bargain, thereby significantly improving counsel's negotiating position.

3. *Judicial and Prosecutorial Pressures*

Both trial judges and appellate courts contribute to the systemic pressure on defendants to plea bargain. Judges are increasingly under fire by the public and state legislators who clamor for tougher sentences and an end to the "coddling" of criminals. Trial judges, many of whom are elected, cannot grant defendants too many sentencing concessions without being labeled "soft on crime." Yet, overflowing court dockets and prison overcrowding create conflicting pressure on judges to move cases efficiently while still imposing tough sentences.⁴⁸ Plea bargaining enables trial judges to resolve large numbers of cases in an orderly, timely fashion that would not be possible if more cases actually went to trial.⁴⁹

Criminal defendants also are discouraged from challenging questionable rulings on suppression issues or taking marginal cases to trial because appellate review often is a lengthy process in which defendants enjoy only limited success.⁵⁰ In addition, the expanded application of the harmless error doctrine,⁵¹ the diminution of the

⁴⁷ A number of studies demonstrate that bail practices exert considerable pressure on criminal defendants to enter guilty pleas, especially if the defendant's inability to make bail is coupled with a delay in the appointment of counsel. *See, e.g.*, Uphoff, *supra* note 20, at 437-39; Gerald R. Wheeler & Carol L. Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice*, 26 *CRIME & DELINQ.* 319 (1980); HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 47-49 (1982).

⁴⁸ *See* Albert W. Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 *TEX. L. REV.* 629, 679 (1972) ("many trial judges seem to have become as preoccupied with 'moving cases' as traffic police are with moving vehicles") [hereafter cited as "Courtroom Misconduct"].

⁴⁹ *See* Santobello v. New York, 404 U.S. 257, 260 (1971); PLEA BARGAINING, *supra* note 5, at 93-107. *But see Alternatives to Plea Bargaining*, *supra* note 5, at 931-1011 (arguing that plea bargaining unnecessarily distorts case outcomes and undermines entire criminal justice system, thereby warranting substantial systemic changes).

⁵⁰ In Oklahoma, for example, indigent defendants have had to wait three or more years before a brief was even filed in their behalf on their direct criminal appeal. *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994). Even after this lengthy wait, the odds that the defendant's conviction will be overturned are slim. From January 1, 1993 until October 16, 1994, the Oklahoma Court of Criminal Appeals handled over 2,003 cases and affirmed approximately 95% of them. Telephone interview with Elizabeth Bridgers, Secretary for the Oklahoma Court of Criminal Appeals (May 8, 1995).

⁵¹ Commentators have decried the willingness of the courts to use the harmless error doctrine to affirm convictions despite the real possibility the verdict was compromised. *See, e.g.*, Bennett L. Gershman, *Symposium: The New Prosecutors*, 53 *U. PITT. L. REV.*

exclusionary rule,⁵² the narrowing of the scope of federal habeas corpus relief⁵³ and the difficulty of showing ineffective assistance of counsel⁵⁴ also encourage defendants to settle their cases. The message sent to defendants and defense lawyers, whether intended or not, is to cooperate and not litigate.⁵⁵

Trial judges send a similar message to defendants contemplating a trial: go to trial and if you lose, you will get a stiffer sentence.⁵⁶ Even if the defendant is initially unaware of this reality, defense counsel when discussing the defendant's options usually will raise this consideration.⁵⁷ The uncertainty of success at trial, combined with the real

393, 424-31 (1992).

⁵² See, e.g., Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549 (1990).

⁵³ For an overview of the extent to which the Supreme Court has restricted federal habeas corpus relief, see JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 641-48 (2d ed. 1994).

⁵⁴ For an extended discussion of the limitations of the *Strickland v. Washington* standards as a basis for evaluating reasonably competent representation or as a means to improve the substandard representation afforded many capital defendants, see White, *supra* note 26.

⁵⁵ This is not to say that defendants generally pay serious attention to the possibility of appellate review in making the decision to plead guilty or go to trial. In some cases, however, they do. It is the unusual case in which a criminal defense lawyer can advise a client when assessing the risk of trial to place much stock on the likelihood of favorable appellate review should the trial be lost.

⁵⁶ See *supra* note 41. Generally, a trial judge is forbidden from suggesting to a defendant that he or she is likely to receive a heavier sentence after trial because of the coercive impact of such a suggestion. See, e.g., *United States v. Corbitt*, 996 F.2d 1132, 1134-35 (11th Cir. 1993); *United States v. Barrett*, 982 F.2d 193 (6th Cir. 1992); *United States v. Bruce*, 976 F.2d 552, 555-58 (9th Cir. 1992). Standard 14-1.8 of the ABA Standards for Criminal Justice states that a judge should not impose any additional punishment on a defendant simply because that defendant chooses to go to trial instead of pleading guilty. The commentary to Standard 14-1.8(b) draws upon caselaw to support the contention that it is appropriate to give a defendant who is convicted at trial a harsher sentence based on accepted penological principles, but not to mete out extra punishment merely for going to trial. ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.8, commentary at 49 (2d ed. 1980). Proving that a defendant was punished for going to trial, however, is an extremely difficult task. Cf. *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1987) (constitutionally permissible to compel defendant to choose between possible leniency by pleading guilty and a harsher sentence if the defendant goes to trial).

⁵⁷ The perception among criminal defendants that they would receive a more severe sentence if they go to trial is "almost universal." PLEA BARGAINING, *supra* note 5, at 100-02. This perception may be based on advice of counsel or the product of comments made by police officers or fellow inmates. Although the extent to which sentencing practices bear out this common perception varies from jurisdiction to jurisdiction, the perception clearly influences a large number of defendants to plead guilty. *Id.* at 97-101. In fact, research suggests that most defendants plead guilty because they fear a harsher punishment if they go to trial. *Id.* at 93-107, 132. There are, however, some judges and certain cases where the defendant can, in fact, exercise the right to trial without risk of a harsher penalty. A good advocate who knows a judge's temperament and sentencing practices may urge a defendant to take a case to trial because the prosecutor's final offer is so harsh that the defendant can safely risk trial without incurring a worse sentence.

prospect of a harsher penalty should the defendant lose, makes the trial option for many defendants a risky gamble.⁵⁸ Thus, the defendant's fear of jail not only may seriously undercut counsel's ability to project a credible threat to go to trial, but also cripple the client's will to hold out for a better bargain.

Like their indigent defender counterparts, most prosecutors' offices lack sufficient resources to adequately investigate, prepare and try many cases.⁵⁹ Prosecutors, therefore, also are subject to considerable pressure to settle the vast majority of cases. Unlike defense lawyers, however, prosecutors retain considerable power and discretion in determining when cases are brought, which cases are dismissed or pushed and how cases are ultimately settled.⁶⁰ Courts have given prosecutors broad latitude both in the charging decision and in the bargaining process.⁶¹ The prosecutor often can select from a wide range of potential charges growing out of any criminal episode, which permits the prosecutor to charge one or multiple counts.⁶² In addition, prosecutors generally are free to offer concessions or to threaten additional punishment to force defendants to accept some negotiated deal. Prosecutors are well aware of the allure of a "no jail" recommendation and use it frequently to entice a defendant into a guilty

⁵⁸ The uncertainty of trial may be even greater in a state like Oklahoma where the jury imposes the sentence, *see* OKLA. STAT. tit. 22, § 926 (1991), making it even harder for defense counsel to provide a reasonable prediction of the consequences of a guilty verdict.

⁵⁹ *Santobello v. New York*, 404 U.S. 257, 260 (1971).

⁶⁰ A host of cases trumpet the considerable authority vested in the prosecutor in the American criminal justice system. *See, e.g.*; *United States v. Batchelder*, 442 U.S. 114 (1979) (permitting prosecutor to choose between different statutory penalty schemes applicable to the same conduct); *United States v. Stanley*, 928 F.2d 575 (2d Cir. 1991) (prosecutor has broad discretion to use additional firearm charge in effort to dissuade defendants from going to trial). For an excellent summary of the scope of prosecutorial discretion, *see* WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 559-94 (1985).

⁶¹ Unquestionably the prosecutor in the American criminal justice system occupies a position of extraordinary power with wide discretion subject to little review. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 3-1.1 (3d ed. 1993). For a critical examination of the broad extent of prosecutorial power, *see* Gershman, *supra* note 51, at 393-458. In addition, courts have afforded prosecutors wide latitude in the bargaining process. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor could properly carry out threat to prosecute defendant as habitual offender despite fact that threat was used to attempt to coerce defendant to plead to underlying felony).

⁶² Many commentators complain that prosecutors regularly abuse their charging power to overstate the defendant's criminal conduct and to enhance their negotiating leverage. *See, e.g.*, Gershman, *supra* note 51, at 405-09; Seymour Glanzer & Paul R. Taskier, *For Both the Experienced and Neophyte Criminal Lawyer — The Fine Art of Plea Bargaining*, CRIM. JUST. (Summer 1987) at 7. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9, commentary at 77 (3d ed. 1993) ("The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without 'piling on' charges in order to unduly leverage an accused to forego his or her right to trial.").

plea in a marginal case,⁶³ especially if the offer includes a reduction to a misdemeanor charge. Because a prosecutor's sentencing recommendations are readily accepted by most judges and the prosecutor is vested with virtually unfettered charging discretion, it is the prosecutor who really is in the position to dictate the level of punishment meted out to most defendants.

This is not to say, however, that the outcome or resolution of a criminal case in a jurisdiction is largely unaffected by the behavior and attitude of the judge handling the case. The personality and philosophy of the trial judge do matter.⁶⁴ The judge's scheduling practices, bail policies, motion and trial rulings and sentencing proclivities all influence the extent to which defendants and their lawyers perceive a jury trial as a viable option and, in turn, the inclination of defendants to select that option instead of agreeing to a plea bargain.

Nonetheless, it is the prosecutor, not the judge, who really controls the outcome of most criminal cases.⁶⁵ Prosecutors are not unmindful of their power. Certainly there are many prosecutors who attempt to wield this power in a fair and even-handed way.⁶⁶ There are other prosecutors, however, who make it very clear to defense lawyers that those lawyers who do not "play ball" with the prosecutor's office will pay a price.⁶⁷ Or, to put it more accurately, their clients will pay a price.

⁶³ See also PLEA BARGAINING, *supra* note 5, at 80. As Professor Alschuler observed, "[d]efendants who sensed even a slight possibility of conviction at trial usually found the prosecutor's offers irresistible." *Alternatives to Plea Bargaining*, *supra* note 5, at 1032. In Oklahoma, for example, prosecutors in Cleveland County routinely offer to first offenders to recommend a deferred sentence in exchange for a plea, especially if the state has proof problems. If the defendant completes the deferred period and meets all of the conditions of her deferred sentence — the most important of which is not committing any new offenses — the defendant's case is dismissed and expunged. If, however, the defendant commits a new crime, her deferred sentence is accelerated and she may then be sentenced up to the maximum provided by law. See OKLA. STAT. tit. 22, § 991(c) (Supp. 1994). It is difficult for a defendant to turn down a proffered deferred sentence and go to trial, thereby risking a conviction and harsher punishment, even though the defendant has a very strong defense or the state's case is weak.

⁶⁴ See ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.8, commentary at 44-45 (2d ed. 1980) (acknowledging that broad judicial sentencing discretion increasingly has been restricted but noting that judges still retain considerable discretion to increase or decrease a defendant's sentence). See also AMSTERDAM, *supra* note 28, § 217.

⁶⁵ Other commentators echo this observation. See, e.g., Gershman, *supra* note 51, at 405-24; PLEA BARGAINING, *supra* note 5, at 14.

⁶⁶ See Gershman, *supra* note 51, at 456 (despite serious systemic problem of prosecutorial misconduct, many prosecutors "behave with consummate fairness"); PLEA BARGAINING, *supra* note 5, at 51-60 (reporting the views of many prosecutors that overcharging and the use of "Bordenkircher tactics," see *supra* note 61, are generally improper and inconsistent with fair play).

⁶⁷ See, CASPER, *supra* note 21, at 136; DERSHOWITZ, *supra* note 19, at 401-02; HEUMANN, *supra* note 18, at 61-69.

B. *Resisting the Pressure to Conform*

The culture in any particular criminal justice system ultimately influences how plea bargaining is conducted in that jurisdiction and how many cases actually go to trial. If in a particular jurisdiction few defense lawyers file motions or take cases to trial, the pressure on other defense lawyers and defendants to follow suit is much greater than in a jurisdiction in which defendants regularly exercise their right to go to trial. A defense lawyer in a jurisdiction in which prosecutors rarely have to make any concessions because few cases are tried may find it more difficult to extract reasonable concessions from the prosecutor, even though the state's case is weak, than defense counsel in a county with a vigorous defense bar. The prosecutor in a county with a timid defense bar may single out the more zealous defense lawyer and refuse to provide her clients the kind of concessions generally provided the more pliant defense lawyers.⁶⁸ Defense counsel who stands up to fight in one case may be concerned that the prosecutor will take it out on her other clients.

The ethical rules⁶⁹ and ABA Standards⁷⁰ both mandate that defense counsel cannot compromise the representation of one client in order to serve the interests of other clients. Defense counsel is ethically bound to fight zealously on behalf of a client even though counsel's stance and efforts may irritate or offend a prosecutor who has the power to affect the disposition of counsel's other cases. Defense counsel bargaining with a vindictive prosecutor or in a culture where counsel's own zeal is contrasted with the lack of zeal of others, however, cannot help but experience the tension created in such a situation.⁷¹ It is easy to say that the lawyer's responsibility in that situation

⁶⁸ See Gifford, *supra* note 7, at 80 (noting that prosecutors punish attorneys who they deem to be too adversarial — defense lawyers, for example, who conduct a vigorous motion practice — by refusing to grant typical plea bargaining concessions to these attorneys' clients).

⁶⁹ See MODEL CODE DR 5-106, DR 7-101(A)(1); MODEL RULES 1.7, 1.9.

⁷⁰ ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.2(d) (3d ed. 1993) ("defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case"). See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.5, commentary at 162 (3d ed. 1993) ("The professional judgment of a lawyer should be exercised, within the bounds of law, solely for the benefit of his or her client and free of any compromising influences and loyalties. The lawyers' own interests should never be permitted to have an adverse effect on representation of a client.").

⁷¹ See, e.g., Ted Schneyer, *Sympathy for the Hired Gun*, 41 J. L. EDUC. 11, 24 (1991) (recognizing that the pressure to avoid antagonizing prosecutors with tremendous discretion produces "plea bargains too easily accepted by one-shot clients on the advice of lawyers trying either out of self-interest or for the good of their clients *as a class*, to maintain good personal relations with the judges and prosecutors with whom they must regularly work") (emphasis in original). See also Klein, *supra* note 21, at 669-73; DERSHOWITZ, *supra* note 19, at 404-05.

is to zealously defend the interests of the individual client even though it may make the lawyer's own practice more difficult and adversely affect her future plea bargains. And yet, defense counsel who is weighing whether to stand up to a prosecutor may feel very vulnerable and legitimately concerned about the impact of doing so.⁷² Nonetheless, lawyers who cave in to this pressure and undercut their representation to one client out of fear of prosecutorial retaliation ultimately are doomed to be marginal advocates, forced to accept whatever disposition the prosecutor dictates.

For some criminal defense lawyers this dilemma poses no difficulty. Some criminal defense lawyers simply are unwilling to do what it takes to be ready to take on a prosecutor on behalf of a client.⁷³ Such defense lawyers rarely bother to investigate or to prepare because they see no need; going to trial will never be an option. Defense counsel's job merely is to broker a deal. Plea bargaining means going to see the prosecutor and finding out the state's offer, so little preparation is required. To such lawyers, being a good negotiator in criminal cases involves little more than taking advantage of their personal contacts, relationships or interpersonal skills to persuade the prosecutor to grant their clients some concessions.

Criminal defense lawyers who primarily rely on contacts, personal relationships or personal magnetism to persuade prosecutors to give their clients favorable plea bargains sometimes are able to secure good or even tremendous bargains. Too often, however, a lack of preparation — and commitment — forces such lawyers to plead out

⁷² This pressure may be particularly intense in a rural or small county, *see* DONALD D. LANDON, *COUNTRY LAWYER: THE IMPACT OF CONTACTS ON PROFESSIONAL PRACTICE*, 145 (1990), but it affects every defense lawyer who has a number of pending cases with a prosecutor or who expects to be plea bargaining with that prosecutor in the future. Defense counsel cannot attempt to curry favor with a prosecutor by trading the interests of one client in return for a favorable disposition for another client. ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.2, commentary at 209 (3d ed. 1993). Such overt "trading" plainly violates the lawyer's duty of undivided loyalty to a client and is so blatant it is unlikely to be a serious systemic problem. But the desire to please a prosecutor with awesome discretion and the corresponding pressure to be "cooperative" to avoid alienating that same adversary unquestionably weighs on the mind of any defense lawyer who sits down to bargain a series of cases or who is subtly reminded during a negotiating session of a second case that needs to be discussed. Despite the client's right to zealous representation, it is simply not possible to advocate every client's case with equal zeal during plea negotiations. A defense lawyer cannot claim in every negotiation that the defendant deserves "a break" because of "special circumstances." For a more detailed description of defense counsel's unavoidably difficult position, *see The Defense Attorney's Role*, *supra* note 16, at 1210-24. A full exploration of this important but complex issue is, however, beyond the scope of this article.

⁷³ My experience reflects the observations made by numerous commentators. *See, e.g.*, DERSHOWITZ, *supra* note 19, at 400-02, 404-05; Bazelon, *supra* note 16, at 8-11; Blumberg, *supra* note 17, at 20-31.

their clients to bargains that are not in the clients' best interests. The problem is most acute for the defendant who is innocent or who does not wish to accept the state's plea offer. For these defendants, the defense lawyer who is trying to live off of or get by on personal contacts will not want to offend or alienate friends on the prosecutor's staff. The defendant will be given the choice of "playing ball" or finding a new lawyer.

This is not to say that defense counsel should ignore the importance of attempting to maintain cordial relations with the lawyers in the prosecutor's office.⁷⁴ An arrogant or unnecessarily hostile attitude is unlikely to redound to the client's benefit.⁷⁵ Nevertheless, defense counsel cannot allow her interest in maintaining a cordial relationship with a prosecutor to compromise her representation of a client.⁷⁶

⁷⁴ Charles Craver reports that he has seen an excellent negotiator with a sarcastic, derisive style who treated everyone with contempt. According to Craver, he was a proficient bargainer because his adversaries acquiesced to his demands to terminate having to deal with him. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 2 (2d ed. 1993). Given the superior bargaining position the prosecutor normally possesses, it is extremely unlikely that a criminal defense lawyer would have much success adopting this negotiating style. In fact, my experience mirrors that of Gifford and Amsterdam: a friendly, accommodating style usually works best. See Gifford, *supra* note 7, at 80-81; AMSTERDAM, *supra* note 28, §§ 101, 212.

⁷⁵ My experience in different jurisdictions confirms the observations of numerous observers that prosecutors will find ways to penalize defense lawyers they dislike. See, e.g., Gifford, *supra* note 7, at 78 (prosecutors will punish defense lawyers they view as too adversarial by refusing to grant typical plea bargains); PLEA BARGAINING, *supra* note 5, at 51 ("prosecutors will make the discovery procedures more cumbersome for certain defense attorneys whom they disliked or distrusted"); Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLIN. L. REV. 299, 308-17 (1994) (describing frustrations felt by clinician defense lawyers who had to deal with Roxbury prosecutors who treated them poorly, in part because of their adversarial attitude). Although a prosecutor clearly has the discretion to choose to plea bargain with some defendants and not with others, *Russell v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993), overt discrimination by a prosecutor against a lawyer or the clients of that lawyer is, of course, impermissible. See *Bourexis v. Carroll County, Md.*, Narcotics Task Force, 625 A.2d 391 (Md. Ct. Spec. App. 1993). See also *Complaint of Rook*, 556 P.2d 1351 (Or. 1976) (prosecutor disciplined for refusing to offer similarly situated defendants plea bargain offered to other defendants because he disliked their lawyer); *Boulas v. Superior Court*, 188 Cal. App. 3d 422, 233 Cal. Rptr. 487 (2d Dist. 1986) (case dismissed because prosecutor attempted to steer defendant wishing to plea bargain away from original lawyer whom the prosecutor disliked to a different lawyer). But a prosecutor's broad discretion gives her considerable — and virtually unchecked — room to make life miserable for the defense lawyer whose attitude or conduct arouses the prosecutor's ire. See AMSTERDAM, *supra* note 28, § 212.

⁷⁶ This is particularly true, but difficult to do, if the prosecutor is arrogant and heavy-handed. Although a cooperative, friendly approach with such a prosecutor, is not going to change his personality or competitive bargaining style, counsel's positive, professional attitude may minimize hostility and tension in the bargaining session and avoid sparking excessive competitive behavior on the part of the prosecutor. CRAVER, *supra* note 74, at 72-77.

Thus, the conscientious defense lawyer is often in a precarious position. Defense counsel must attempt to provide zealous representation in a system geared to the efficient resolution of cases which, for the most part, means entering into negotiated settlements. It is the criminal defense lawyer who vigorously investigates the facts, researches the law, raises appropriate and creative motions, demonstrates a willingness to go to trial and competently handles the trial who is providing the representation demanded by the ethical rules and ABA Standards. Yet, counsel who seeks to gain an advantage for her client in the plea bargaining process by engaging in legitimate tactics — such as filing and aggressively litigating discovery motions, suppression motions, requests for jury instructions, and the like — runs the risk of alienating judges and prosecutors primarily concerned about efficiently disposing of the mass of cases on their crowded dockets.⁷⁷ Similarly, a good defense lawyer may want to respond to a prosecutor's inappropriate or unjustified threats in the plea bargaining process by refusing to continue to negotiate and going to trial. She may want to do so not only to secure justice for her individual client but also to demonstrate her willingness to go to trial rather than accept a poor plea bargain.⁷⁸ Defense counsel may find herself, however, forced to agree to a poor plea bargain despite her efforts, recommendations and desires because ultimately the choice of accepting a proffered settlement is the client's.⁷⁹

It is important to recognize, then, that it is the defendant's inter-

⁷⁷ See HEUMANN, *supra* note 18, at 61-75 (describing prosecutorial and judicial hostility to defense lawyers who file pre-trial motions). As Justice Brennan noted, a criminal defense lawyer not only has an obvious financial interest in resolving a case quickly, that lawyer "may have a strong interest in having judges and prosecutors think well of him." *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). Nonetheless, Brennan concludes, "good lawyers undoubtedly recognize these temptations and resist them." *Id.* at 761-62. For a disturbing story of a good public defender who resisted such temptations and lost her job, at least in part because of her zealous advocacy, see Lincoln Caplan, *Unequal Loyalty*, A.B.A. J. (July 1995) at 54.

⁷⁸ Some practitioners suggest that defense lawyers turn down unacceptable plea bargains and go to trial — even though the jury may be out only fifteen minutes — to convince inflexible prosecutors that they have the will to fight. See, e.g., Bell, *supra* note 8, at 27. Such an approach is likely to reap some benefits for future clients. Nonetheless, although defense counsel has a strong personal and professional interest in rejecting a poor bargain to send a clear message to an inflexible prosecutor that she will not be pushed around, counsel cannot unilaterally refuse a deal — or manipulate the client's decision concerning the deal — in order to enhance her professional stature or improve her credibility for future negotiations. See *supra* notes 69-72 and accompanying text.

⁷⁹ See MODEL RULE 1.2(a); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2(a) and commentary (3d ed. 1993). For a further look at the extent to which the client's desires to settle and unwillingness to go to trial may undercut counsel's ability to secure a good outcome, see *The Defense Attorney's Role*, *supra* note 16, at 1306-13; CRAVER, *supra* note 74, at 267-69.

ests, attitude and desires, together with various systemic pressures, that frequently put criminal defense lawyers in a difficult and frustrating position. Defense lawyers all too often find themselves representing an unsympathetic defendant with a lengthy criminal record in a case without any apparent defense. The zealous advocate with a case in which the defendant has little or no leverage confronts a daunting challenge. Many defense lawyers have endured the unpleasant task of going to negotiate on behalf of an unemployed recidivist who simply wants to plead guilty and "bargaining" with a particularly hard-headed prosecutor who is perfectly aware that the state's case is virtually unassailable. In such a case, defense counsel may feel more like a beggar than a bargainer, left with little more than the unenviable chore of imploring a mean-spirited prosecutor to be fair or reasonable.⁸⁰

Defense counsel cannot allow her frustrations and a sense of futility to undermine her representation or undercut her preparation.⁸¹ In fact, criminal defense lawyers have some or even good leverage in a significant number of cases and will often be negotiating with prosecutors willing to listen and prepared to grant some reasonable concessions. Thus, while defense counsel must be sensitive to systemic pressures and be conscious of the extent to which such pressures influence the decisionmaking of criminal defendants, defense counsel must become as effective as possible in insulating defendants from the pressure to enter into poor plea bargains, learn how to generate and maximize leverage, and develop the best range of alternatives possible for their clients. Good lawyering demands that defense counsel devote the time and energy necessary to achieve the best possible result. Ab-

⁸⁰ Although the image of the advocate going hat in hand to beg for mercy for one's client may be far-removed from the romanticized view of the criminal defense lawyer depicted in the movies, on television and in print, it is all too familiar to those who have represented many criminal defendants. See, e.g., Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69 (1988); JAMES S. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?: THE MAKING OF A CRIMINAL LAWYER* (1983). Many public defenders, especially those in programs with excessive caseloads, have had to struggle with a sense of frustration and burn-out that, in part, is fueled by the task of negotiating too many cases, with too little leverage, with opponents who arrogantly wield their power, on behalf of clients who seldom seem to care. See generally MCINTYRE, *supra* note 20, at 159-66; Ogletree, *supra* note 21.

⁸¹ Like most public defenders, I gave my all for my clients despite the fact that many of them felt I "wasn't a real lawyer." It was frustrating to see a poor family scrape up \$1000 at the last hour to pay a private lawyer to plead the client guilty to a deal that I spent days negotiating. Even more frustrating was a case in which I spent over 80 hours putting together a well-orchestrated sentencing hearing only to have the judge rubber-stamp the prosecutor's sentencing recommendation. The temptation to shortcut one's preparation in the face of such frustration can be difficult to resist.

sent such preparation, counsel will not be providing the zealous representation her clients deserve.

II. THE NEGOTIATION PROCESS: PLANNING THE DANCE

A. *Learning the Music and the Steps*

Good criminal defense lawyers do not start out assuming their client is guilty or that a plea bargain is the best resolution of the case. Rather, as the ABA Standards for Criminal Justice recognize, the competent, committed advocate will "conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction."⁸² Even if the defendant expresses a clear desire to plead guilty, the lawyer still has the responsibility to undertake an appropriate investigation to ensure that the client's intended guilty plea has a basis in fact and in law.⁸³ Admittedly, the extent of that investigation and the lawyer's ability to push for a trial will be significantly hamstrung if the defendant lacks the will or desire to contest the charge.⁸⁴ Nonetheless, the diligent defense lawyer understands that the defendant may not recognize potential defenses or appreciate legal challenges so she will carefully evaluate the merits of the case before even considering jettisoning the trial option.

Similarly, in gathering information from the defendant about his or her background and in investigating the case, defense counsel should take care not to allow a client's professed preference for a guilty plea to cause counsel to prejudge the case or to curtail the search for valid defenses and important legal issues. Moreover, be-

⁸² ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1(a) (3d ed. 1993).

⁸³ ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, commentary at 181-82 (3d ed. 1993) (discussing defense counsel's duty to investigate and make a detached evaluation regardless of the client's admission of guilt or stated desire to plead guilty). *See also* Woodward v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990) (strong presumption of competence of counsel is not appropriate when lawyer advises client to plead to an offense which counsel has not investigated).

⁸⁴ Unquestionably, courts take into consideration the attitude and behavior of the defendant in assessing ineffective assistance of counsel claims based on the adequacy of counsel's investigation. For example, in *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *cert. denied*, 461 U.S. 901 (1983), the defendant refused to identify witnesses and insisted he wanted no one to testify on his behalf at trial and offer mitigating evidence. The court noted that the defendant's refusal to assist counsel did not negate the attorney's duty to investigate, but concluded that "the scope of that duty was limited by Gray's [the defendant's] refusal." *Id.* at 1094. A number of courts, however, have found that defense counsel's failure to investigate or present mitigating evidence based on defendant's instructions constituted ineffective assistance of counsel. *See, e.g.,* *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991); *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir.), *cert. denied*, 479 U.S. 996 (1986); *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987).

cause such preparation is a necessary prelude to negotiation, defense counsel should not prematurely press the defendant for permission to negotiate.⁸⁵ Defense counsel who too eagerly pushes the merits of plea bargaining or "working out a deal" may lose her client's confidence.⁸⁶ If the client is unfamiliar with the workings of the criminal justice system, it may be appropriate for defense counsel to discuss the settlement option. Prior to doing so, however, defense counsel should discuss with the defendant his or her expectations and desires regarding the case⁸⁷ and undertake an appropriate factual and legal investigation.

Once counsel has completed that investigation and is satisfied that the prosecutor possesses a sound factual basis for the crime charged, counsel may seek the client's permission to negotiate.⁸⁸ De-

⁸⁵ See *supra* notes 82-83. In some cases, however, it may be critical to act quickly. The first defendant to the prosecutor's office in a multi-defendant case may be able to secure a terrific advantage. See AMSTERDAM, *supra* note 28, § 208. See also *supra* note 42.

⁸⁶ Other commentators also have warned of the dangers of prematurely broaching the subject of pleading guilty, especially with a client who has consistently insisted she is innocent. See, e.g., AMSTERDAM, *supra* note 28, §§ 208-09. Moreover, raising the subject of plea bargaining too quickly may exacerbate the tendency of many clients to mistrust appointed counsel. See Gifford, *supra* note 7, at 78.

⁸⁷ A defense lawyer cannot simply assume what the client's priorities are; she must ask. A client may be much more concerned about collateral or non-legal consequences than the ultimate disposition of the criminal charge, but without an adequate inquiry, counsel may not accurately determine the client's true priorities. See CRAVER, *supra* note 74, at 48-49; BINDER, BERGMAN & PRICE, *supra* note 30, at 2-15.

⁸⁸ In the first edition of the Standards Relating to the Defense Function, Standard 6.1(b) stated that: "[w]hen the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable." ABA STANDARDS FOR CRIMINAL JUSTICE 6.1(b) (1971). Standard 6.1(c) of that same edition added that: "[o]rdinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor." As the commentary to the initial version of Standard 6.1 made clear, advance permission was to be obtained before counsel initiated negotiations because the decision to plea bargain was the client's. See *supra* note 79 and accompanying text. If counsel did have discussions with the prosecutor, those discussions were to be kept preliminary and tentative in nature prior to securing client consent and counsel was to make no binding commitments or disclosures about the defense.

In the second edition of the Defense Function, 6.1(c) was dropped and subsection (b) was modified to read: "[a] lawyer may engage in plea discussions with the prosecutor, although ordinarily the client's consent to engage in such discussion should be obtained in advance." ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1(b) (2d ed. 1980). The commentary to Standard 4-6.1(b) retained the same language from the commentary to the first edition, declaring that "[u]ltimately, the definitive decision whether to engage in plea discussions is for the client, as is the decision of how to plead . . . [C]ounsel may have an opportunity to advance the client's interests without making any disclosures concerning the defense. Ordinarily the client's consent should be sought and obtained before any approaches are made . . ."

The ABA's latest version of 4-6.1(b) was further modified to read: "[d]efense counsel may engage in plea discussions with the prosecutor. Under no circumstances should de-

fense counsel should make clear that engaging in settlement negotiations does not necessarily mean that counsel is recommending that alternative. Counsel should discuss with the client the extent of counsel's settlement authority as well as the client's goals or desired outcomes. If the client is not interested in pursuing a plea bargain and insists on going to trial, defense counsel ought not initiate any settlement discussions. This does not mean, however, that defense counsel ought not try to persuade the defendant to reconsider such a choice, especially if counsel's investigation suggests there is little chance to prevail at trial. Indeed, it would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining.⁸⁹ Moreover, defense counsel is still obligated to relay to the defendant any offer made by the prosecutor.⁹⁰ If defense counsel, however, is unable to persuade a

fense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced." ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1(b) (3d ed. 1993). Although the change was noted in the history of the standard, no explanation was given for the change except to observe that "[t]he client's consent ordinarily need not be sought and obtained before any approaches are made, as there will be occasions when some discussion, perhaps only of a very tentative and preliminary nature, will occur before an opportunity arises to obtain the defendant's consent. However, defense counsel should keep the client apprised of all significant developments arising out of plea discussions." ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1(b), commentary at 205 (3d ed. 1993).

Although this modification grants defense counsel more flexibility and is consistent with Standard 4-5.2, which gives defense counsel exclusive control over case tactics, the change is inconsistent with a client-centered approach to decisionmaking. See generally BINDER, BERGMAN & PRICE, *supra* note 30. See also Robert D. Dinerstein, *Client Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 715 (1987); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781 (1987). Given the importance of the decision to plea bargain, the fact that defense counsel may be disclosing critical information, the fact that many prosecutors interpret a willingness to bargain as a concession of guilt, and the ABA's own expressed policy of not engaging in any negotiating until the lawyer's factual as well as legal preparation has been completed, see *supra* note 83, it makes little sense to eliminate the requirement that ordinarily the client's consent be obtained prior to any negotiation. If counsel is approached before she has permission to bargain, she can still listen to a prosecutor's overtures about a possible bargain while politely indicating she is not authorized to engage in any negotiations. If an unusually good opportunity presents itself, the version of 4-6.1(b) found in the first and second editions still allowed defense counsel to take advantage of the opportunity to advance the client's interests. But those earlier versions wisely suggested that the "ordinary" practice should be to secure the client's consent before any plea bargaining. See ABA STANDARDS FOR CRIMINAL JUSTICE 6.1 and commentary (1971); ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1 and commentary (2d ed. 1980). See also MODEL RULE 1.4, comment.

⁸⁹ See White, *supra* note 26, at 371-74; AMSTERDAM, *supra* note 28, § 201. See also *infra* notes 230-39 and accompanying text.

⁹⁰ See, e.g., *United States v. Rodriguez*, 929 F.2d 747, 751 (1st Cir. 1991). See also MODEL RULE 1.2(a) & comment; ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.2(b) (3d

defendant to allow her to negotiate, counsel generally should not continue to seek a plea agreement with the prosecutor even though counsel feels that a plea bargain is in the defendant's best interest.⁹¹

If defense counsel and the defendant agree that plea bargaining should commence, counsel must prepare so that she can negotiate effectively. As every article or text on plea bargaining recognizes, good preparation is the key to successful negotiating.⁹² Although this point may seem obvious, it is clear that a significant number of defense lawyers initiate negotiations when they have done little more than interview the client and briefly review the police reports.⁹³

Effective preparation for a plea bargaining session — like effective preparation for trial — begins with a thorough client interview. Rarely will defense counsel be able to effectively represent a client without learning as much as possible about the client and his or her knowledge of the facts surrounding the charges.⁹⁴ It is also critical

ed. 1993). For a thorough discussion of the scope of this obligation, see Keith Bystrom, *Communicating Plea Offers to the Client*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER — PRACTICAL ANSWERS TO TOUGH QUESTIONS* 84 (Rodney J. Uphoff ed., 1995).

⁹¹ Although a full discussion of the roles and relative decisionmaking prerogatives of attorney and client is beyond the scope of this article, it is clear that the decision whether to plead guilty must be left to the client. See *supra* note 79 and accompanying text. If the defendant is making a choice — not to plea bargain — that defense counsel feels is contrary to the client's best interests, defense counsel should attempt to persuade the client to change her position, but ultimately must respect that choice or, if appropriate, attempt to withdraw from the case. *Faretta v. California*, 422 U.S. 806, 834 (1975) (Brennan, J., concurring) (observing that defendant, not his lawyer or the State, will bear the personal consequences of a conviction and thus, even though defendant may conduct his own defense ultimately to his own detriment, that choice should be respected). Like Professor Anthony Amsterdam, I do not believe it generally is appropriate for counsel to threaten to withdraw to coerce the defendant into a plea bargain even though counsel feels the bargain is in the client's best interests. AMSTERDAM, *supra* note 28, § 201. If the defendant's competency is in question, the lawyer's position becomes extremely delicate and difficult. See MODEL RULE 1.14. For a look at defense counsel's demanding role when representing an impaired defendant, see Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. REV. 65, 65-109.

⁹² See, e.g., AMSTERDAM, *supra* note 28, §§ 208-11; CRAVER, *supra* note 74, at 47; Glanzer & Taskier, *supra* note 62, at 8; ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* 176 (1981).

⁹³ See, e.g., Robert L. Doyel, *The National College-Mercer Criminal Defense Survey: Preliminary Observations About Interviewing, Counseling and Plea Negotiations*, 37 MERCER L. REV. 1019, 1025-27 (1986); Klein, *supra* note 21, at 667-75. Inadequate preparation leaves defense counsel without the ability to marshal much leverage or use that leverage to secure a desirable plea bargain.

⁹⁴ See, e.g., MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 87-141 (1990); ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.1 & commentary (3d ed. 1993). Although lawyers and commentators may disagree as to the best methods of securing facts from those accused of criminal offenses, there is little disagreement that defense counsel must secure the facts, including damaging ones, if counsel is going to be able to mount an effective

that defense counsel learn as much as possible about the client's personal circumstances and background. This information not only is needed to determine if an affirmative defense such as a battered woman's defense or insanity defense should be raised, but also it will enable counsel to personalize the accused if the defendant subsequently takes the stand at trial.⁹⁵ At a minimum, counsel needs to know about a defendant's living situation, dependents, employment history, education, past and present legal difficulties,⁹⁶ disabilities and mental health history. In some cases, however, especially murder cases with the possibility of the death penalty, counsel's inquiry into the defendant's past will need to be even more extensive.⁹⁷

Some clients may be reluctant to open up to personal questions or may view questions about their background as unnecessary prying. Counsel cannot, however, simply give up. Indeed, counsel's failure to adequately pursue information about the defendant's background, in some instances, can constitute ineffective assistance of counsel.⁹⁸ Counsel usually can avoid or overcome a client's negative reactions to such inquiries by explaining the importance of such questions and, if appropriate, delaying sensitive questions until counsel has managed to establish rapport with the client and win the client's trust at least to some extent.

tive defense. For a critical look at the intentional or selective ignorance approach to client interviewing, see FREEDMAN, *supra* at 109-41. See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.2 & commentary (3d ed. 1993). For a succinct, helpful guide to securing the client's story, see AMSTERDAM, *supra* note 28, § 63.

⁹⁵ It is generally acknowledged that defense counsel should humanize or personalize the defendant when presenting the accused as a witness. See *Waters v. Thomas*, 46 F.3d 1506, 1519 (11th Cir. 1995). In *Waters*, Judge Clark agreed with the strategic importance of humanizing the defendant, but severely criticized defense counsel's decision to put the defendant on the stand and implement that strategy, given the facts of the case. Indeed, Judge Clark concluded that *Waters'* lawyer "either intentionally sabotaged his client's case, or he had no idea what his client would say on the stand" because *Waters'* testimony "did anything but 'humanize' him in the eyes of the jury." *Id.* at 1544-45 (Clark, J., dissenting and concurring). For an excellent discussion of the importance of humanizing the defendant in a capital case, see *White*, *supra* note 26, at 360-67.

⁹⁶ The defendant's criminal record clearly is one of the most important of the factors influencing the disposition of the defendant's case. See PLEA BARGAINING, *supra* note 5, at 76. It is not always easy for defense counsel to find out the true state of a client's prior record. The client may be confused about the disposition of prior charges or fail to appreciate whether an earlier offense was actually a criminal offense, a misdemeanor or felony, or ultimately expunged. Some clients will attempt to hide or lie about their record. Before making any representation about a client's record or lack of one, defense counsel usually would be well-advised to ask the prosecutor to supply counsel a copy of the client's record.

⁹⁷ Simply put, in death penalty litigation, counsel's ability to find mitigating circumstances in the defendant's past may be the difference between life and death for a client. See *White*, *supra* note 26, at 337-55.

⁹⁸ See, e.g., *Brewer v. Aiken*, 935 F.2d 850, 857 (7th Cir. 1991); *People v. Perez*, 148 Ill.2d 168, 592 N.E.2d 984, 170 Ill. Dec. 304 (1992). See also *supra* notes 83-84 and accompanying text.

To negotiate effectively, defense counsel must be so familiar with the defendant and her life experiences that counsel can personalize or humanize the defendant when talking with the prosecutor.⁹⁹ Defense counsel who is unaware or unprepared when the prosecutor inquires about the defendant's present job status or work history may seriously undermine the effort to obtain a favorable sentencing concession. Finally, defense counsel who is informed about and ready to present effectively the defendant's mitigating personal circumstances also will be able to afford the defendant zealous representation at sentencing.

In addition, it is critical that defense counsel inquire about the defendant's personal situation so counsel can advise the client about the collateral consequences of a guilty plea or conviction.¹⁰⁰ A criminal conviction can cost a defendant the right to drive, a professional license or even the ability to remain in this country. Although a defense attorney's failure to alert or warn a defendant about such collateral consequences generally has not been deemed sufficient to invalidate a plea or to secure reversal of a conviction on grounds of ineffective assistance of counsel,¹⁰¹ the lawyer's role as counselor requires that she apprise the client of considerations that are likely to affect the client's life. Indeed, these so-called collateral consequences may be considerably more important to the defendant than the pun-

⁹⁹ A recent case handled by a law student intern at the University of Oklahoma's Criminal Defense Clinic highlights the importance of personalizing the defendant. The client, an undergraduate student, was charged with felony shoplifting. Although the defendant had no prior record, the prosecutor would only agree to recommend probation, but would not reduce the charge to a misdemeanor. After several fruitless negotiating sessions, the student re-interviewed the client and gathered more information about her background. He learned that the client had held two jobs during high school and still graduated at the top of her class; that she had maintained her scholarship and honor roll status at the University while continuing to hold a job; that she was the first of a large, very poor family to attend a university; that she was active in her church and participated in a number of community service projects. Armed with this additional knowledge, the student was able to present a more sympathetic picture of the defendant and, ultimately, able to convince the prosecutor to reduce the charge.

¹⁰⁰ See ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.1 & commentary at 75 (2d ed. 1980) (urging defense lawyers to fully advise defendants of collateral consequences when the defendant raises any question about such consequences or the nature of the case suggests such consequences may result from the defendant's plea); AMSTERDAM, *supra* note 28, §§ 204-05 (stressing that no intelligent plea decision can be made without considering all possible consequences; also setting forth a useful checklist of possible consequences).

¹⁰¹ See, e.g., *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992) (defense counsel not required to warn alien client that he likely would be deported if he pleaded guilty); *United States v. Yearwood*, 863 F.2d 6, 8 (4th Cir. 1988) (guilty plea not invalid because of counsel's failure to alert defendant to deportation consequence); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (holding that defendant's potential deportation is a collateral consequence). *But see Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir.), *cert. denied*, 497 U.S. 1011 (1990) (counsel's erroneous parole advice constitutes ineffective assistance because defendant's decision to plead guilty was based on this advice).

ishment meted out by the judge at sentencing in the criminal case.¹⁰² Accordingly, defense counsel should make the defendant aware of the full impact of a criminal conviction and help the defendant evaluate possible collateral consequences before making significant decisions about the case.

Next, counsel must attempt to assess the strength of the prosecution's case as well as counsel's ability to attack that case or successfully present an affirmative defense. In some cases, this is a fairly easy proposition. The defendant, for example, is caught in front of numerous witnesses walking out of a store with an item she was attempting to steal and gives a statement admitting the offense. In many other cases, however, defense counsel faces a formidable challenge in assessing the true strength of the prosecution's evidence. This task is complicated by the fact that counsel may have limited access to the prosecution's case, especially in the early stages of a criminal prosecution.¹⁰³ If defense counsel, either by statute or because of the practices of the local prosecutor, has easy and early access to police reports and other discovery material, counsel's task is much easier.¹⁰⁴

¹⁰² For example, possible civil litigation or a forfeiture action growing out of the events which led to the defendant's criminal charge may be of much more concern to the defendant. It is critical not only that defense counsel evaluate the interplay between the defendant's pending criminal case and a possible civil action, but also recognize the double jeopardy implications of multiple proceedings against the defendant. Counsel may be able to manipulate this interplay between the criminal and civil actions to secure dismissal of the criminal case. *See, e.g.,* *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994) (drug tax stamp was penal in nature, not a mere civil penalty); *Austin v. United States*, 113 S. Ct. 2801 (1993) (civil drug forfeiture action is punishment for double jeopardy purposes); *United States v. Halper*, 490 U.S. 435 (1989) (civil sanction can be punishment for double jeopardy purposes); *United States v. 405,089.23 in U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) (civil forfeiture action is punishment barring subsequent criminal action).

¹⁰³ *See, e.g.,* OKLA. STAT. tit. 22, § 2002 (1994) (defense not entitled to any discovery prior to a preliminary hearing). *But see* FLA. STAT. ANN § 3.220 (1995) (providing for broad discovery, including the taking of discovery depositions, within 15 days of the defendant's notice of election to participate in discovery). Discovery practices vary widely from state to state, within a state and often even within a particular jurisdiction. *See* LAFAYETTE & ISRAEL, *supra* note 60, at 725-41. For a discussion of the merits of early defense access to discovery material because, among other reasons, it facilitates informed plea bargaining, see ABA STANDARDS FOR CRIMINAL JUSTICE 11-1.1 & commentary (2d ed. 1980).

¹⁰⁴ In some jurisdictions, defense counsel may be able to speak directly with the arresting or investigating officers and gain considerable information about the prosecution's case, the impact of their testimony as well as their attitude about the defendant. *See* AMSTERDAM, *supra* note 28, §§ 91-95 (urging counsel to seek information directly from police). The willingness of police officers to talk with defense counsel varies significantly from jurisdiction to jurisdiction and even within a particular police department. Moreover, counsel must listen with a skeptical ear to information provided by the police because officers at times will embellish, distort or even lie to convince counsel that the defendant should "cooperate" in some fashion. For a detailed look at the extent to which police officers will stretch the truth and bend constitutional requirements to help secure convic-

To meaningfully assess the prosecution's case, defense counsel usually will need to secure the assistance of an investigator¹⁰⁵ and often expert witnesses as well.¹⁰⁶ Accordingly, it is incumbent upon defense counsel to file a motion requesting the appointment of an expert or investigator at the state's expense and arguing that such assistance is necessary to assure the defendant's right to due process and the effective assistance of counsel.¹⁰⁷ National studies consistently show, however, that criminal defense attorneys frequently fail to obtain or are denied ready access to adequate investigative assistance and expert services despite the importance of such support services.¹⁰⁸

As part of the investigation leading up to settlement negotiations, defense counsel also should attempt to ascertain if the prosecutor has any significant proof problems. Counsel should try to determine if the state's witnesses are still around and actually available to testify. This is easier to discover in a state like Oklahoma where the prosecution's witnesses must be identified on the initial charging document.¹⁰⁹ Similarly, talking to prospective defense witnesses, particularly alibi witnesses, is an important part of the preparation process. Counsel must not only be able to assess the strength of the defense witnesses' testimony but be able to realistically predict whether those witnesses will

tions, see Myron Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992).

¹⁰⁵ Even if counsel has the time to investigate a case on her own (which is often not the case), it is particularly problematic for counsel to attempt to interview witnesses — especially those witnesses who are or potentially could become adverse — without the assistance of a third person. “Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.” ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.3(e) (3d ed. 1993). Defense counsel who acts as her own investigator, therefore, runs a serious risk of compromising the effective impeachment of witnesses and the successful defense of her client's case. See ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.3, commentary at 187-88 (3d ed. 1993); MODEL RULE 3.7; MODEL CODE DR 5-102(A).

¹⁰⁶ For a discussion of the importance of experts in preparing an arson case and the difficulties of preparing for trial without such assistance, see Larry A. Hammonds & Jon M. Sands, *Trial By Fire: Preparing to Defend an Arson Case*, THE CHAMPION, April 1995, at 4.

¹⁰⁷ Counsel will have to rely on *Ake v. Oklahoma*, 470 U.S. 68 (1985) (indigent capital defendant entitled to funds to hire psychiatrist to assist the defense) and cases which have extended *Ake* (see, e.g., *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (reversing conviction for failure to supply state-funded expert on hypnosis); *Ex Parte Dubose*, No. 1930827, 1995 WL 124653 (Ala., Mar. 24, 1995) (defendant entitled to funds to retain DNA expert); *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995) (failure to provide defendant with forensic pathologist violated due process)).

¹⁰⁸ See, e.g., LEFSTEIN, *supra* note 26; ABA STANDARDS FOR CRIMINAL JUSTICE 5-1.4 & commentary (3d ed. 1992); NATIONAL STUDY COMMISSION ON DEFENSE SERVICE, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976).

¹⁰⁹ See OKLA. STAT. tit. 22, § 384 (1991).

actually show up and testify at trial.¹¹⁰ In addition, counsel must judge the strength of the defendant's own testimony and the merits of the defendant's taking the witness stand.

Another aspect of counsel's preparation is to determine the status and positions of any co-defendants, co-conspirators or other persons involved in the events underlying the charge facing the defendant. The existence of other individuals who also are implicated in the crime often complicates counsel's task. These people may play a key role in exonerating or burying defense counsel's client. Again, it may be difficult to figure out in advance of a negotiating session whether these other persons are planning to plead guilty or to testify against counsel's client.¹¹¹ Nonetheless, the more information that defense counsel has about the role that others played in an offense and the defendant's relationship with these other persons, the better able counsel will be to assess the risks the defendant faces.

In addition to determining if the state has sufficient, available evidence to convince the jury beyond a reasonable doubt of the defendant's guilt, defense counsel should ascertain whether the legality of any aspect of the state's case can be challenged. This evaluation also should be made, as best as possible, before attempting to resolve the case. Certainly defense counsel should be able to conduct the necessary legal research to determine if the charging instrument,¹¹² the manner in which the charge was brought¹¹³ or the underlying statute¹¹⁴ is subject to any constitutional or other legal challenge.

¹¹⁰ As every experienced criminal defense lawyer knows, many of the defendant's family members, friends, and acquaintances are willing to help the defendant. Too often, however, that help, for a variety of different reasons, does not include actually testifying at trial.

¹¹¹ If a co-defendant is unrepresented, counsel should attempt to obtain information directly from the co-defendant. In most instances, however, the co-defendant will be represented and should not be contacted without the permission of the co-defendant's lawyer. MODEL RULE 4.2; MODEL CODE DR 7-104(A)(1); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

¹¹² The indictment, information or complaint may be fatally defective because, among other reasons, it fails to allege each of the essential elements of the charged offense, *see, e.g.*, *Fitzsimmons v. State*, 426 A.2d 4 (Md. Ct. Spec. App. 1981), or it fails to describe the alleged crime with sufficient particularity, thereby providing inadequate notice to the defendant, *see, e.g.*, *Miller v. State*, 827 P.2d 875 (Okla. Crim. App. 1992).

¹¹³ For example, in some jurisdictions the indictment may be subject to challenge based on the insufficiency or unreliability of the evidence underlying the indictment, *see, e.g.*, *Adams v. State*, 598 P.2d 503 (Alaska 1979), or because the state's excessive delay compromised the defendant's Sixth Amendment right to a speedy trial, *see, e.g.*, *Doggett v. United States*, 502 U.S. 976 (1991).

¹¹⁴ *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1983) (California statute making it illegal to loiter "without apparent reason or business" and to refuse to supply identification to a police officer was unconstitutionally vague); *People v. Smith*, 862 P.2d 939 (Colo. 1993) (Colorado statute prohibiting offensively coarse language was facially overbroad).

Although occasionally a prosecutor may welcome such a challenge, most prosecutors do not want to expend limited resources and to be embroiled in a time-consuming constitutional battle.¹¹⁵ Defense counsel who can identify and mount an effective challenge to the constitutionality of a statute will find herself with a strong bargaining chip. The prosecutor may well decide to abort the case at the trial level rather than risk the statute being struck down.

Defense counsel confronts a more difficult task in assessing the viability of most evidentiary motions. With limited access to the state's case, the defense lawyer often must speculate what explanations law enforcement officers will proffer to justify their seizure of the accused or of some incriminating evidence. Counsel then must predict how those justifications will play before the trial judge and possibly an appellate court. Unquestionably, defense counsel's ability to raise and to litigate suppression motions effectively is an important factor in defense counsel's overall effectiveness.¹¹⁶ Aggressive motion practice may enable counsel to secure the dismissal of charges in a case in which the defendant has no defense on the merits. It is essential, therefore, that before starting any serious negotiations, counsel determine whether any motions are appropriate, assess the strength of those motions and prepare fully to argue those motions if counsel and the client deem it strategically wise to do so.¹¹⁷

Before initiating plea bargaining, a few final preparatory steps are necessary. Defense counsel should scour the statutes to try to find lesser offenses which directly or indirectly deal with the defendant's conduct. There may be another felony offense, a misdemeanor or even a municipal ordinance violation that defense counsel can argue is a better fit or a suitable compromise in the defendant's case. In some

¹¹⁵ As busy trial lawyers, most prosecutors do not have the time or inclination to brief weighty constitutional issues. They may be particularly reluctant to take on a well-designed attack on a questionable statute that has been a useful weapon in the prosecution's arsenal.

¹¹⁶ For an extensive discussion of the importance and of the strategic uses of pretrial motions, see AMSTERDAM, *supra* note 28, §§ 221-253A. The effective use of appropriate motions often will induce a prosecutor to offer a favorable plea bargain. See White, *supra* note 26, at 370.

¹¹⁷ It may not always be desirable to file suppression motions because that action may be perceived as hostile by the prosecutor. See *supra* note 68 and accompanying text. In some instances, however, it may be necessary early in the case to file such motions to preserve the defendant's right to litigate them even though counsel has not yet formulated a negotiating strategy. Before making any final decisions regarding motions, defense counsel must consult with and involve the defendant. See MODEL RULE 1.2 & comment. For a discussion of the issue of whether the client or the attorney is the ultimate decisionmaker in the context of suppression motions, see George Bisharat, *Pursuing the Questionable Suppression Motion*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, *supra* note 90, at 63.

instances, defense counsel may even be able to find an administrative regulation that covers the defendant's behavior. Counsel also should determine if there are any local conventions — *e.g.*, a dismissal upon payment of terms — which represent a suitable resolution of the defendant's charges.¹¹⁸

Just as it is important for defense counsel to be aware of any local conventions which may provide a simple and satisfactory resolution of the defendant's case, it is critical to learn the "standard deal" in a case such as the defendant's. Although a prosecutor's initial offer will depend on a number of variables, prosecutors generally work from a starting point or "standard deal" that is based primarily on the nature of the charge and the defendant's record.¹¹⁹ The extent to which a prosecutor ultimately will be willing to deviate from that "standard deal" generally depends on a host of factors including: time and resources; defense counsel's ability, reputation and relationship with the prosecutor; evidentiary concerns; the victim's wishes; and the aggravating and the mitigating circumstances of the case.¹²⁰ Nevertheless, the criminal defense lawyer who is aware of the "standard deal" prior to going into a negotiating session will be better able to plan for that

¹¹⁸ During the 1980's in Milwaukee, Wisconsin, for example, it was fairly common for counsel to be able to secure the dismissal of a traffic case by agreeing to pay a relatively modest monetary penalty. This "dismissal upon terms" was not provided for by statute, but was an accepted local practice which enabled an overcrowded system to dispose of a large number of minor cases. On the other hand, the current local convention in East Moline, Illinois, whereby defendants in drug cases are allowed to pay significant fines in exchange for a recommendation of no prison time raises serious questions of the fairness and the propriety of permitting wealthy defendants to buy their way out of trouble. Interview with Rita Fry, Public Defender for Cook County (Apr. 28, 1995).

¹¹⁹ These "standard deals" may be contained in written guidelines formulated by those in charge of the prosecutor's office or based on unwritten practices developed over time and passed on to newer members of the office. Indeed, many "prosecutors have developed criteria that guide the exercise of their discretion. These standards and rules of thumb are not to be found in codes, case reports, and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the effective defense lawyer." ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1, commentary at 204 (3d ed. 1993). For an example of a prosecutor's office which has developed a set of written guidelines for the handling of misdemeanor cases, see MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE, GUIDELINES FOR THE DISPOSITION OF MISDEMEANOR CASES (1994).

¹²⁰ For an examination of the factors that prompt prosecutors to offer concessions in their cases, see ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9, commentary at 73-75 (3d ed. 1993). Professor Amsterdam observes that the factors influencing a prosecutor to exercise discretion in favor of an accused are "innumerable," but he identifies some deserving particular mention: (1) the prosecutor's personal belief in the accused's innocence, (2) the strength of the state's case, (3) the likely availability of evidence at trial, (4) the habits, attitudes and sympathies of local judges and juries, (5) docket congestion and the prosecutor's own workload, (6) the extent to which the police, complainant, and media are likely to be satisfied by the outcome of the plea bargain, (7) the defendant's prior record and potential dangerousness, (8) potential exposure of police misconduct or error, and (9) the accused's cooperation. AMSTERDAM, *supra* note 28, § 100.

session as well as to respond to developments in the negotiating process.¹²¹

Defense counsel also must weigh the possibility that the defendant could be prosecuted in another forum for the events which form the basis for the defendant's pending charge. It may well be in the defendant's interest for counsel to persuade the prosecutor that the case would be more appropriately handled in that other forum.¹²² In some instances, counsel may have to engage in plea negotiations in different forums on the same matter or in several jurisdictions involving multiple cases in an effort to minimize the defendant's punishment or exposure.¹²³ In other cases, counsel may have to make discrete inquiries about general policies or practices of prosecutors in another county or of federal authorities in an effort to secure information — without arousing attention — about the likelihood of charges being filed against the defendant.¹²⁴

Finally, many defendants are caught up in the criminal justice system because they have alcohol, drug or mental health problems. Such problems may have led directly to the defendant's pending charge or they may be significantly affecting the defendant's life and her ability to cope with any demands or restrictions placed upon her. Prosecutors and judges recognize the significance of substance abuse and mental health problems and, to varying degrees, attempt to respond to such problems in plea bargaining and sentencing.¹²⁵ Such problems

¹²¹ As the commentary to ABA Standard 4-6.1 recommends, defense counsel who is handling a case in a jurisdiction in which she is unfamiliar with the usual plea bargaining and sentencing practices should check with an experienced local practitioner or the local public defender's office, if any, to ascertain if there is a standard deal or disposition in the type of case she is handling. ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1, commentary at 204-05 (3d ed. 1993). For a discussion of the risks of ignoring this advice, see *infra* notes 156-59 and accompanying text.

¹²² For example, cases involving university students can be handled by university administrators who may mete out an academic punishment less serious and more appropriate for counsel's client. On the other hand, defense counsel may wish to avoid an available administrative process and the imposition of administrative sanctions because for some clients, the consequences may be more serious than the punishment accorded by the criminal justice system.

¹²³ See, e.g., *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (successive murder prosecutions by two States for the same murder not barred by the Double Jeopardy Clause).

¹²⁴ Defense counsel should be aware of the Department of Justice's "Petite policy," formally acknowledged in *Petite v. United States*, 361 U.S. 529 (1960), whereby federal prosecutors will not commence a federal prosecution following a state prosecution for the same substantive offense without prior authorization from the Justice Department and compelling reasons. A plea agreement made with a state prosecutor is not binding on a federal prosecutor. See *Meagher v. Clark*, 943 F.2d 1277, 1281 (11th Cir. 1991); *United States v. Sandate*, 630 F.2d 326, 328 (5th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981).

¹²⁵ It is common in state courts for judges to weigh a defendant's personal characteristics in determining an appropriate sentence. See generally ABA STANDARDS FOR CRIMINAL JUSTICE 18-6.3 (3d ed. 1994).

may, at times, be mitigating and lead to very favorable outcomes for some defendants. In other cases, however, a defendant's mental condition or drug problem may lead to a much harsher disposition. If defense counsel is aware of a client's condition or problem as a result of counsel's confidential communications with the defendant, defense counsel should not disclose the existence of that condition or problem without the defendant's consent.¹²⁶

If a competent client acknowledges a problem and accepts counsel's advice that it is strategically wise to disclose the problem, counsel still may need to substantiate or document the problem in order to secure an advantage during the negotiation process. In addition, it may be extremely helpful to develop a program or plan for addressing the client's problem. Indeed, defense counsel's ability to find a suitable program not only may be necessary to convince the prosecutor and judge to agree to a disposition of the defendant's case that allows her to remain in the community, but it also may be critical to helping the defendant stay out of the criminal justice system in the future.¹²⁷

B. Selecting the Right Music and Choreographing the Steps

Once defense counsel has taken the steps necessary to prepare to plea bargain, she must formulate an appropriate negotiating strategy to use for that particular case. Some commentators have argued that

¹²⁶ See MODEL RULE 1.6. In some cases, the defendant's behavior at the time of the arrest, her statements to the police or the defendant's subsequent conduct make non-disclosure a moot issue because the prosecutor is well aware of the defendant's condition or problem. In such a case, defense counsel should discuss with the defendant her desires and attitudes regarding counseling or treatment for the problem. Defense counsel's role is particularly sensitive, however, in any case in which the prosecution is unaware of the defendant's problem or counsel is unsure of the nature or extent of the client's possible problem or condition. In such instances, defense counsel clearly must obtain the defendant's permission before attempting to utilize the client's condition or problem during negotiations. In some cases, communication problems or the defendant's mental state may cause counsel to question her client's competency. Defense counsel may need to consult with an expert, review the client's medical records and treatment history or advise the client to speak to an expert before taking any action to resolve the case. For a detailed discussion of defense counsel's role in representing a mentally impaired defendant, see Uphoff, *supra* note 91. For a discussion of the important assistance a mental health expert can render in ensuring that defense counsel provides quality representation, see James J. Clark, Lane J. Veltkamp & Edward C. Monahan, *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, CRIM. JUSTICE (Summer 1993) at 23.

¹²⁷ See Doyel, *supra* note 93, at 1028-29 (noting in survey of criminal defense lawyers that they rated knowledge of sentencing alternatives and treatment programs as critical factors in defense counsel's success in plea negotiations). Defense counsel should recognize, however, that many clients have longstanding problems that they are either unwilling or unable to handle. Thus, the strategy of presenting a sentencing proposal involving probation with participation in a treatment program may ultimately backfire by resulting in a revocation of probation and a longer sentence than the defendant originally would have received.

a particular negotiating style or set of principles is applicable in any negotiation context.¹²⁸ Other theorists contend that a lawyer's negotiating approach should vary depending on the lawyer's assessment of the particular negotiation in question, the context and the players involved.¹²⁹

Professor Don Gifford has fashioned a negotiating strategy which he argues can be used by criminal defense lawyers as a model in most plea bargaining situations.¹³⁰ According to Gifford:

negotiation theory suggests that the plea bargaining strategy most likely to succeed in a typical case is one which begins with a competitive approach and progresses to a cooperative approach as negotiations continue. To accomplish this strategy switch, the defense attorney should attempt to maintain a cordial and accommodative relationship with the prosecutor, even during the early phases of bargaining.¹³¹

Gifford concludes that the use of this strategy for most criminal cases is possible — despite the fact that the mechanics of plea bargaining and the behavior patterns of the attorneys vary depending on the locale and the case — because the plea bargaining process “generally exhibits certain characteristics that determine which strategy is likely to succeed.”¹³²

Although Gifford's model provides a helpful starting point in choosing a negotiating strategy, it does not eliminate the need for defense counsel to examine and to analyze carefully a number of systemic factors, including the characteristics identified by Gifford,¹³³ to

¹²⁸ See, e.g., FISHER & URY, *supra* note 92 (criticizing competitive negotiating and calling for principled negotiations based on a problem-solving or integrative approach); GERALD WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) (proposing a cooperative negotiating strategy).

¹²⁹ See, e.g., Gary Lowenthal, *A General Theory of Negotiation Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69 (1982).

¹³⁰ See Gifford, *supra* note 7, at 73-82. Gifford's article also provides an excellent summary of different theories of negotiation and outlines three distinct negotiating strategies: competitive, cooperative and integrative. *Id.* at 41-58.

¹³¹ Gifford, *supra* note 7, at 82. Gifford describes the competitive negotiator as one who “tries to maximize the benefits for his client by convincing his opponent to settle for less than she otherwise would have at the outset of the negotiation process.” *Id.* at 48. The competitive strategy utilizes tactics including a high initial demand; limited disclosures of facts and one's own preferences; few and small concessions; threats and arguments; and apparent commitment to one's position during the negotiating process. *Id.* In contrast, the cooperative negotiator seeks to develop trust by initiating concessions designed to create reciprocal concessions and ultimately a fair agreement. *Id.* at 52-54.

¹³² *Id.* at 73.

¹³³ According to Gifford, before selecting a negotiation strategy, defense counsel should consider the following systemic characteristics or factors: the prosecutor, the relative bargaining power in the specific case, the desire to maintain good working relations with the prosecutor and judge, the systemic pressure to dispose of the case quickly, the need to maintain a good rapport with a client, and the local bargaining norms. Gifford, *supra* note

see how these factors play out in counsel's specific case. It is the interplay of these factors which invariably will affect counsel's ability to achieve a desirable plea bargain. Gifford admits that "when deciding a negotiating strategy, the defense attorney should always determine the factors that distinguish the instant case from the usual plea bargaining situation. If these factors are important, the attorney may want to modify the suggested strategy."¹³⁴ Even adopting Gifford's model, then, defense counsel in every case must examine a host of important systemic factors. Although these factors will change somewhat from jurisdiction to jurisdiction and even from case to case within a jurisdiction, counsel's analysis of these variables is essential if counsel is to obtain the best plea bargain possible for the client. Just as a failure to prepare adequately may be fatal to counsel's success in plea bargaining, the use of any generalized approach without analyzing the specific variables relating to the defendant's particular case undoubtedly will limit counsel's effectiveness.

The first factor counsel must consider, albeit not necessarily the most important, is the strength or weakness of the defendant's case.¹³⁵ Unquestionably, the stronger the prosecution's case, the less leverage counsel will have in the bargaining process. On the other hand, if the defendant has a strong defense, defense counsel may wield considerable leverage in the process. Yet, as has already been suggested, it is often difficult for defense counsel to assess the strength of the prosecution's case with any precision.¹³⁶ Even if defense counsel has early access to the state's evidence, experienced trial lawyers recognize that a case that is strong on paper may not be nearly as strong when the witnesses actually testify at trial. In fact, as noted earlier, the state's witnesses may not show up at trial or they may testify wholly inconsistently with what is contained in the police reports.¹³⁷ Although de-

7, at 74-78.

¹³⁴ Gifford, *supra* note 7, at 82.

¹³⁵ Research suggests that both the decision to plead guilty and the terms of the final plea bargain are influenced heavily by the strength of the state's case. PLEA BARGAINING, *supra* note 5, at 65-66.

¹³⁶ See *supra* notes 103-09 and accompanying text. In describing the uncertainty of the defense's appraisal of the prosecution's case in connection with an assessment of the advisability of a guilty plea, Justice White observed that: "considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seems improvident, although they were perfectly sensible at the time." *Brady v. United States*, 397 U.S. 742, 756-57 (1970).

¹³⁷ "Police reports are universally decried by prosecutors as inadequate and unreliable. . . . Prosecutors know that the police often omit or distort information in their police reports. Therefore, without interviewing the police and the witnesses themselves, prosecutors are never very sure about how strong their cases really are." PLEA BARGAINING, *supra* note 5, at 22. My experience with police reports in a number of jurisdictions is similar. The accuracy of the reports varies considerably. Accordingly, defense counsel

fense counsel generally will be in a better position to assess the strengths and weaknesses of the defense case, counsel's ability accurately to assess the likelihood of an acquittal ultimately turns on her experience, the case and the quality of her judgment.

In addition, defense counsel must determine if there are any aggravating or mitigating circumstances related to the defendant's crime which distinguish it from similar offenses. For example, a battery case between two men in which the victim sustained a black eye is likely to be viewed differently than if the same case resulted in a fractured jaw. Similarly, the prosecutor may view the seriousness of a defendant's battery offense as markedly worse if the victim was elderly or the beating was accompanied by racial slurs.¹³⁸ Because the aggravating or mitigating circumstances of an offense often will influence how others in the system view the defendant's case, defense counsel must weigh the impact of any such circumstances in the defendant's case before selecting a negotiation strategy.¹³⁹

A second significant variable that defense counsel must take into consideration when formulating a plea bargaining approach is the prosecutor handling the defendant's case.¹⁴⁰ The personality, philosophy, trial ability and negotiating style of the prosecutor should influence defense counsel's approach in a variety of ways. For example, a particular prosecutor may be generally reluctant to go to trial and eager to dispose of cases by way of negotiation. If defense counsel is aware that the prosecutor assigned to the case has such an attitude, counsel may have more leverage than when facing a prosecutor who loves to try cases. Similarly, some prosecutors are superb trial lawyers while others are weak. Thus, in evaluating the likelihood of success at trial and correspondingly, the viability of the trial option should nego-

should not accept police reports at face value nor assume that such reports necessarily contain accurate information. For a detailed examination of the problem of police misconduct in drafting police reports, see Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993).

¹³⁸ In fact, many states have enacted legislation authorizing more serious penalties for crimes involving certain classes of victims, *see, e.g.*, OKLA. STAT. tit. 22, § 991a-9 (1991) (elderly or incapacitated victim) and for offenses which were racially motivated, *see, e.g.*, WIS. STAT. § 939.645 (1993) (enhanced penalties if defendant intentionally selected victim based on race, religion, color, disability, sexual orientation, national origin or ancestry).

¹³⁹ Indeed, defense counsel's ability to effectively package the mitigating circumstances of the case together with the defendant's mitigating personal characteristics is often critical to counsel's success in the negotiating process. *See supra* notes 94-99 and accompanying text. *See also* PLEA BARGAINING, *supra* note 5, at 77-78.

¹⁴⁰ Numerous studies confirm that plea bargains vary significantly depending on the identity of the prosecutor handling the case. *See, e.g.*, Julie Horney, *Plea Bargaining Decision Factors*, in *IMPROVING MANAGEMENT IN CRIMINAL JUSTICE* 73 (A.W. Cohen & B. Ward eds., 1980); WILLIAM RHODES, *PLEA BARGAINING: WHO GAINS? WHO LOSES?* (1978); Gifford, *supra* note 7, at 74-76.

tiations break down, counsel must take into account the prosecutor's trial skills.

Defense counsel may have dealt with a prosecutor enough to be able to determine if that prosecutor has a particular or unusual negotiating style. Certainly some prosecutors appear to engage in the bargaining process when, in fact, they never intend to move off of their initial offer. This negotiating approach — making a reasonable opening offer and refusing to budge — has been labeled Boulwarism in the labor context.¹⁴¹ Defense counsel negotiating with a prosecutor who adopts such a highly competitive strategy may be making a mistake if she responds to the prosecutor in a cooperative manner and discloses weaknesses in the state's case or positive aspects of the defense case in an effort to convince such a prosecutor to grant concessions.¹⁴² Indeed, disclosing information to such a prosecutor may strengthen his or her hand by weakening the defendant's chances for success at trial. On the other hand, if the prosecutor is a fair and reasonable negotiator, counsel may be inclined to share more information and do so early in the bargaining process. Whenever possible, therefore, defense counsel should attempt to learn as much as she can about the prosecutor's bargaining style.¹⁴³

As discussed earlier, heavy caseloads pressure many prosecutors to plea bargain most of their cases.¹⁴⁴ Thus, caseload pressure may provide defense counsel important leverage. This pressure tends to be

¹⁴¹ See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 48 (1982). This tactic is named after Lemuel Boulware, who, as a vice-president of General Electric, utilized such an approach in negotiating with the company's unions. In the labor context, the tactic has been deemed to be an unfair labor practice if the employer combines a "take-it-or-leave-it" bargaining offer with a widely publicized stance of unbending firmness, leaving the employer unable to alter its original position. See *NLRB v. General Elec. Co.*, 418 F.2d 736, 762 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *Air Line Pilots Ass'n, Int'l v. The Flying Tiger Line, Inc.*, 659 F. Supp 771, 775 (E.D.N.Y. 1987).

¹⁴² See Gifford, *supra* note 7, at 60-62, 79-82. It is highly unlikely that a hard-bargaining prosecutor will suddenly start being reasonable in response to defense counsel's cooperative approach. Indeed, "it is almost impossible for cooperative/problem-solving persons to induce competitive/adversarial people to behave in a cooperative way." CRAVER, *supra* note 74, at 21.

¹⁴³ See Gifford, *supra* note 7, at 75-76. Unlike Gifford I have not found prosecutors generally to be cooperative bargainers. Rather, it has been my experience that many prosecutors are hard, positional bargainers who are often able "to obtain a favorable result simply by being stubborn." FISHER & URY, *supra* note 92, at 12. No matter what style the prosecutor has, defense counsel would be wise to attempt to look at the defendant's case from the prosecutor's perspective in order to better anticipate the prosecutor's likely approach, arguments and bottom line. *Id.* at 23 (stressing the value of a negotiator putting herself in her adversary's shoes).

¹⁴⁴ See *supra* note 59 and accompanying text. See also Richard B. Gerstein, *Plea Bargaining from the Prosecutor's Standpoint*, in *PRACTICING LAW INSTITUTE, FOURTH ANNUAL CRIMINAL ADVOCACY INSTITUTE, WINNING THE CRIMINAL CASE BEFORE TRIAL* 53, 57 (1971).

somewhat uneven, however, so defense counsel may be in a better bargaining position at certain times than at others.¹⁴⁵

Defense counsel's bargaining strategy also should take into consideration the charging process used by the prosecutor's office. If possible,¹⁴⁶ defense counsel should attempt to get involved in the process before formal charges are filed because counsel may be able to exert a positive influence on the charges finally selected or even block the issuance of charges. Frequently, however, counsel will not be retained or appointed until after formal charges are filed. Counsel nonetheless should bear in mind that the nature of the charging process is likely to influence the prosecutor's willingness to dismiss or to reduce charges as part of a plea bargain.¹⁴⁷

Many prosecutors' offices have written office policies regarding certain crimes and particular types of sentencing-related concessions.¹⁴⁸ These policies may severely restrict a particular prosecutor's ability to dismiss cases or reduce charges to lesser offenses. The more informed defense counsel is about such policies, the better able counsel will be to obtain a favorable disposition for the client. Moreover, the prosecutor's freedom to bargain frequently depends on the prosecutor's status or rank in the office. Young prosecutors tend to feel the need to appear "tough" and so are often reluctant or even unwilling to dismiss charges. This is particularly so if the charges have been filed by an experienced, senior prosecutor. The culture or politics of a prosecutor's office also may limit the individual prosecutor's freedom to bargain.

Finally, most prosecutors' offices, especially the larger ones, have an internal chain of command which defense counsel needs to con-

¹⁴⁵ See CRAVER, *supra* note 74, at 16 (noting that the negotiator's ability to take advantage of time and caseload pressures will lead to more favorable settlements).

¹⁴⁶ Not only must it be possible, but it also must be desirable strategically to get involved in the charging process. In some cases and in some jurisdictions, it may be more advantageous to wait to negotiate until formal charges actually have been issued.

¹⁴⁷ The process or structure for arriving at an initial charging decision varies significantly among jurisdictions. Rigorous screening by an experienced prosecutor who uses a high threshold level of proof and discusses the case with police officers and civilian witnesses before issuing the charges leads to much different plea bargaining than that which occurs in a jurisdiction in which charges are filed based on a paper review. The prosecutor working in an office which utilizes a more elaborate screening review is less likely to consider dismissing a charge than the prosecutor who knows that the charges were based only on a cursory review of police reports. For a more detailed look at the manner in which different charging procedures affect the plea bargaining process, see PLEA BARGAINING, *supra* note 5, at 9-48.

¹⁴⁸ Office policy may dictate that the prosecutor always recommend a prison sentence in an armed robbery case or in any burglary case in which the defendant has a prior burglary conviction. The extent to which a prosecutor's office has formalized procedures and policies varies markedly and turns largely on the office's size, past practices, and the ideology of the chief prosecutor. See PLEA BARGAINING, *supra* note 5, at 44-46.

sider in formulating her negotiating strategy.¹⁴⁹ If there is a viable review process within the prosecutor's office, counsel may be able to negotiate somewhat differently than if no such review is possible. Say, for example, that a young, fairly hard-headed prosecutor is handling a minor felony case. If defense counsel knows that she ultimately can go over that prosecutor's head to a senior prosecutor if she is not satisfied with the prosecutor's final offer, then counsel's negotiating tactics may be different than in a situation where no such review is possible.¹⁵⁰ If the senior prosecutor or final decisionmaker in a prosecutor's office is unreasonable or unapproachable, defense counsel will have to cope with the fact that the initial prosecutor is the one who must be convinced if a favorable bargain is to be obtained.

Defense counsel's ability to obtain a favorable outcome also is influenced by another variable: the judge assigned to the defendant's case. In some jurisdictions this variable is particularly hard to assess because no particular judge is assigned in advance of a trial or a guilty plea hearing. This increases defense counsel's uncertainty and limits her ability to predict the merits of going to trial, arguing sentencing or accepting a settlement offer. The importance of this variable, therefore, depends in large part on the scheduling practices and procedures of the jurisdiction. Nonetheless, defense counsel must recognize that the client's critical decisions as well as counsel's leverage in the bargaining process may turn substantially on the personality, philosophy and sentencing proclivities of the judge to whom the case finally is assigned.¹⁵¹

Defense counsel generally is in a better position when going into a negotiating session if she is knowledgeable about the judge who will eventually hear the case. The judge may be a tyrant or exceptionally fair at trial.¹⁵² The judge may be reasonable or extremely harsh in imposing sentences. Some judges blindly follow the sentencing recommendations of prosecutors while others are open to defense coun-

¹⁴⁹ *Id.*

¹⁵⁰ Counsel must be mindful that going over a prosecutor's head may damage counsel's relationship with that prosecutor and adversely affect future negotiations. If possible, defense counsel should seek to obtain review by a senior prosecutor in a manner that does not directly challenge or threaten the prosecutor handling the case. Nonetheless, counsel's responsibility to provide zealous representation may require counsel to pursue a review despite the potential damage. See *supra* notes 69-72 and accompanying text. Counsel must remember, however, that seeking internal review too often may reap diminishing returns.

¹⁵¹ See PLEA BARGAINING, *supra* note 5, at 78.

¹⁵² For an interesting discussion of the legitimacy of "shopping" for a judge whose biases are likely to work to the defendant's advantage, see Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEG. ETHICS 1, 33-34 (1994).

sel's arguments.¹⁵³ Some judges clearly punish defendants who go to trial and lose. Other judges are very responsive to political pressure, especially near election time.¹⁵⁴ Thus, a judge may be more willing to accept a plea bargain or respond favorably to a defense lawyer's sentencing argument in certain cases — those out of the public eye — than in others.¹⁵⁵

Admittedly, defense counsel may be hard-pressed to get an accurate assessment of how a particular judge will respond to a certain client or specific offense. Nevertheless, a lawyer is courting disaster if she fails to take into account the extent to which the sentencing proclivities of the judge may control the outcome of a case.¹⁵⁶ Take, for example, the case of an appointed defense lawyer in Wisconsin who was representing a defendant charged with a residential burglary. Although the defendant had just turned eighteen and had no adult record, he did have a lengthy juvenile record that included several burglary adjudications. Defense counsel approached the prosecutor with a proposed plea bargain: his client, a first offender, would plead guilty to the charge in exchange for a recommendation of probation. The experienced prosecutor quickly agreed, recognizing that in front of Judge Fine, the judge who was assigned to the case, the prosecutor's recommendation of probation was really meaningless in light of the judge's usual practice of sending a person to prison for a second bur-

¹⁵³ See CASPER, *supra* note 21, at 136-44 (decrying willingness of judges to defer to prosecutorial recommendations); PLEA BARGAINING, *supra* note 5, at 68, 93-107 (influence of judge's sentencing reputation and willingness to follow prosecutors' recommendations varies significantly).

¹⁵⁴ Indeed, as Justice Stevens warned, some trial judges in capital cases are "too responsive . . . to a political climate in which judges who covet higher office — or who merely wish to [be reelected every six years and thus remain judges] — must constantly profess their fealty to the death penalty. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." *Harris v. Alabama*, 115 S. Ct. 1031 (1995) (Stevens, J., dissenting).

¹⁵⁵ Trial judges may find it extremely difficult to give a lenient sentence, even if warranted, if the glare of public attention is too bright. See, e.g., *State v. Comstock*, 485 N.W.2d 354 (Wis. 1992) (reversing trial judge who vacated guilty pleas to two reduced misdemeanor counts and reinstated four felony counts when victim (daughter of a county official) and her supporters appeared at the sentencing protesting the agreement). Defense counsel's ability to find a means to take the public heat off of the judge may well be the difference between prison and probation for a client. For example, in one case I handled, getting a friendly clerk to hastily re-schedule a sentencing for a Friday afternoon without the press being alerted definitely produced a more receptive climate and enabled me to persuade a reluctant judge to grant probation to one of my clients who was facing a lengthy prison sentence.

¹⁵⁶ See ABA STANDARDS FOR CRIMINAL JUSTICE 4-6.1, commentary at 204 (3d ed. 1993) (ignorance of the criteria that guide the court's discretion as well as the court's attitude and practices regarding plea bargains is as much a handicap to effective representation as is unfamiliarity with the law or the facts of a case).

glary offense. Given this defendant's extensive juvenile record, Judge Fine clearly would not view him as a first offender. Defense counsel and his client, both unaware of Judge Fine's sentencing philosophy and practices, entered the guilty plea with the expectation that the judge would follow the prosecutor's recommendation. To their shock, Judge Fine gave the defendant eight years in prison.¹⁵⁷

This case illustrates the importance of securing information about the sentencing judge. Because the defense lawyer in this case knew nothing of Judge Fine or his sentencing practices, defense counsel really did not get any benefit from the deal he struck with the prosecutor.¹⁵⁸ Had he been aware of Judge Fine's attitude toward residential burglars and his sentencing policies, counsel may have been able to strike a bargain for a shorter prison recommendation which, in turn, Judge Fine may have followed. Or, at least, defense counsel may have been better prepared to go into the sentencing hearing with more ammunition and arguments designed to persuade Judge Fine to deviate from his standard practice in such cases. Finally, had the defendant been advised that Judge Fine was likely to send him to prison if he entered a plea, the defendant may have evaluated his trial prospects differently and decided to go to trial. In the end, however, lack of preparation and analysis robbed the client of effective representation.¹⁵⁹

¹⁵⁷ For the judge's own view of this case, see RALPH ADAM FINE, *ESCAPE OF THE GUILTY* (1986). Under Wisconsin law, the defendant in this case had no basis for appeal because it is well-settled that a judge is not bound by any recommendation nor obligated to advise the defendant before imposing sentence that he or she is not inclined to follow the prosecutor's recommendation. *Young v. State*, 182 N.W.2d 262 (Wis. 1971). In other jurisdictions, a defendant who enters a guilty plea pursuant to a plea bargain will be permitted to withdraw that plea and go to trial if the judge is unwilling to accept the negotiated agreement. See, e.g., FED. R. CRIM. P. 11(e)(4); *United States v. Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987); *State v. King*, 553 P.2d 529 (Okla. Crim. App. 1976).

¹⁵⁸ Indeed, good criminal defense lawyers are able to realistically assess the value of any proffered plea bargain because they know the prosecutors' standard offers and the general sentencing practices of the judges in their jurisdiction. See *The Defense Attorney's Role*, supra note 16, at 1229-30, 1268-70.

¹⁵⁹ The failure to accurately predict a judge's willingness to follow a sentencing recommendation generally will not render a plea involuntary or constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). See *Chichakly v. United States*, 926 F.2d 624, 630 (7th Cir. 1991) (plea not involuntary even though counsel's prediction that plea would result in light sentence did not come true); *United States v. Garcia*, 909 F.2d 1346, 1348-49 (9th Cir. 1990) (trial judge did not abuse discretion in refusing to withdraw plea even though counsel erroneously predicted sentence); *Baker v. United States*, 781 F.2d 85, 91 (6th Cir. 1986) (a plea is not involuntary or counsel's representation defective simply because counsel's good faith predictions turn out to be "mistaken either as to facts or as to what a court's judgment might be on given facts"). Nevertheless, if defense counsel materially misinforms the defendant about a plea or her advice is very far from the norm, the defendant may be able to successfully challenge the plea. See, e.g.,

As with most prosecutors, most judges have heavy dockets which pressure them to move cases. To relieve pressure on their dockets, judges push all of the actors in the system to settle their cases.¹⁶⁰ Judicial settlement pressure may work to the client's advantage or disadvantage depending upon the case and the other systemic variables discussed in this article. Defense counsel's ability to recognize, to understand and to manipulate that pressure to the client's advantage may spell the difference between a good or marginal outcome for the client.

Another significant variable in the bargaining process is defense counsel's own reputation, preparation and relationship with the other actors in the system.¹⁶¹ Some defense lawyers in certain cases will be able to obtain a very favorable outcome for a client simply because of who they are. It may be that defense counsel formerly worked in the prosecutor's office or has a particularly good relationship with the prosecutor handling the case.¹⁶² Defense counsel's reputation as a brilliant lawyer often will give that lawyer considerable leverage in the plea bargaining process. Similarly, defense counsel's poor reputation — especially as a lawyer who never goes to trial — will severely diminish that lawyer's bargaining power.¹⁶³ The extent to which defense counsel can successfully implement a competitive negotiating strategy will, in part, be a function of counsel's trial abilities and her capability of projecting a credible threat to take a case to trial.¹⁶⁴

Lawyers who are just starting out in a jurisdiction usually will have comparatively little bargaining power until they gain a reputation as a willing and able trial lawyer. It may be difficult for such a lawyer, therefore, to adopt a highly competitive negotiating stance in an effort to wring concessions out of an experienced prosecutor because that prosecutor will not view defense counsel's threat to go to trial as credible. A criminal defense lawyer can enhance her credibility and begin to build a good reputation by demonstrating through

United States v. Day, 969 F.2d 39, 40 (3d Cir. 1992); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir.), cert. denied, 497 U.S. 1011 (1990); Laycock v. New Mexico, 880 F.2d 1184, 1186 (10th Cir. 1989); Iaca v. Suun, 800 F.2d 861, 865 (9th Cir. 1986).

¹⁶⁰ See PLEA BARGAINING, *supra* note 5, at 130, 136; *Courtroom Misconduct*, *supra* note 48, at 679-85. For a detailed examination of the ways judges formally and informally encourage settlement, see PAUL RYAN, ALLAN ASHMAN, BRUCE D. SALE, & SANDRA SHANE DU-BOW, AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE (1980).

¹⁶¹ See PLEA BARGAINING, *supra* note 5, at 68.

¹⁶² See, e.g., DERSHOWITZ, *supra* note 19, at 400-02; PLEA BARGAINING, *supra* note 5, at 68.

¹⁶³ *The Defense Attorney's Role*, *supra* note 16, at 1187; CRAVER, *supra* note 74, at 65. Even more damning than a reputation as an inept trial lawyer is a reputation for being dishonest or deceitful. Such a reputation will be difficult to overcome. See, e.g., PLEA BARGAINING, *supra* note 5, at 52; CRAVER, *supra* note 74, at 313-14.

¹⁶⁴ See CRAVER, *supra* note 74, at 65.

good motion practice and through effective presentations in court and in negotiating sessions that counsel knows the law as well as the facts of her case.¹⁶⁵ The criminal defense lawyer who fails to investigate her case or to research the law and who evinces a willingness to plead guilty quickly to dispose of her cases is doomed to a reputation as a mediocre advocate.¹⁶⁶

There are other variables which have a significant effect in some but not all criminal cases. Arresting officers clearly exercise considerable discretion in determining what charges, if any, actually are brought against a criminal defendant.¹⁶⁷ Moreover, police officers regularly communicate with prosecutors about defendants and their cases. Not surprisingly, then, the attitude and input of the arresting or investigating officers will at times greatly influence a prosecutor's attitude about a case.¹⁶⁸ In some jurisdictions, defense counsel may be able to influence the feelings of the arresting or investigating officer with respect to the defendant and to get that officer to make a positive comment on the defendant's behalf or, at least, refrain from denigrating the defendant.¹⁶⁹ In other cases or in other jurisdictions, prosecutors may be generally unresponsive to feedback from the police regarding case dispositions.¹⁷⁰

Some prosecutors are very sensitive to crime victims so that the attitude and input of the complaining witness may be critical in determining the parameters of a plea bargain.¹⁷¹ This may be especially true in certain types of offenses such as sexual assault or domestic violence.¹⁷² Certainly, actors in the criminal justice system have paid more attention to victims of crime in recent years.¹⁷³ Nonetheless, the

¹⁶⁵ See Glanzer & Taskier, *supra* note 62, at 8.

¹⁶⁶ See DERSHOWITZ, *supra* note 19, at 415; *The Defense Attorney's Role*, *supra* note 16, at 1186-87; Gifford, *supra* note 7, at 79-80.

¹⁶⁷ LAFAVE & ISRAEL, *supra* note 60, at 3-12, 563.

¹⁶⁸ See PLEA BARGAINING, *supra* note 5, at 69 (reporting that the impact of the police on plea bargaining varied markedly by jurisdiction). See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.1 (3d ed. 1993) (recommending that the prosecutor seek input from law enforcement officials before reaching a plea agreement).

¹⁶⁹ See PLEA BARGAINING, *supra* note 5, at 69 (in four of six jurisdictions surveyed, researchers found that most prosecutors felt police opinion mattered and made a "substantial difference" in their plea bargains).

¹⁷⁰ *Id.* at 69 (25% of the prosecutors surveyed said they rarely or never sought police input).

¹⁷¹ See ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.1, commentary at 72-73 (2d ed. 1980) (advising prosecutors to seek input from victims before reaching a plea agreement).

¹⁷² Prosecutorial responsiveness to victims' concerns varies significantly from jurisdiction to jurisdiction. See PLEA BARGAINING, *supra* note 5, at 68-69. In light of the decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), permitting victim impact testimony in death penalty cases, prosecutors are more likely than ever to solicit input from family members in capital cases.

¹⁷³ The increased role that victims play in the criminal justice system is reflected by the

influence the complaining witness will have in the disposition of a case will vary significantly depending on the crime, prosecutorial policies and the underlying merits of the case.¹⁷⁴ In some instances, the desire of the complaining witness to dismiss or drop the charges may provide defense counsel considerable leverage.¹⁷⁵ On the other hand, the complaining witness may pressure a reluctant prosecutor to push a marginal case to trial rather than work out a reasonable settlement. Defense counsel, then, cannot afford to ignore this variable before selecting a negotiation strategy.

Linked to the attitude of the complaining witness is the attitude of the community toward crime in general and to defense counsel's client in particular. Defense counsel's efforts to secure a favorable disposition for a client may be thwarted because of the publicity and attendant public sentiment generated by a particular crime.¹⁷⁶ Similarly, a crackdown on drunk driving, car jackings or drug dealing may produce intense publicity which complicates the ability of the prosecutor and defense counsel to arrive at an acceptable plea agreement. In fact, defense counsel's ability to achieve a favorable outcome for a client may depend on counsel's success in minimizing media attention.¹⁷⁷ At the very least, counsel must be sensitive to this variable before settling on an approach to use with the prosecutor.

Once defense counsel has prepared thoroughly and has analyzed the factors likely to affect the defendant's case, counsel is ready to plea bargain. To bargain effectively, defense counsel must develop a

victims' rights legislation enacted in many states and the corresponding media attention provided to victims and victims' rights groups. See, e.g., Jerry Adler, *Bloodied But Unbowed*, NEWSWEEK, Apr. 3, 1995, at 54-56. For a further look at victims' rights issues, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS IN CRIMINAL TRIALS (1995).

¹⁷⁴ See PLEA BARGAINING, *supra* note 5, at 69 (concluding that victims' wishes rarely are considered outside of notorious cases and, in some jurisdictions, rape cases). Even in those states providing a victim the right to have the sentencing judge informed of the impact of the crime on the victim, the victim need not be advised of the details of a plea agreement. See, e.g., WIS. STAT. § 950.04(2m) (1995).

¹⁷⁵ See, e.g., AMSTERDAM, *supra* note 28, § 104. See also White, *supra* note 26, at 368-69 (arguing that defense lawyers in capital cases may be able to facilitate a favorable plea bargain by talking with the victim's family members).

¹⁷⁶ In a case that received national attention, Susan Smith was convicted and given life for murdering her two young sons. Yet, prior to trial, her lawyers, David Bruck and Judy Clarke, were unable to persuade the prosecutors to recommend a life sentence in exchange for Smith's guilty plea largely because the case generated so much publicity and emotion that plea bargaining was really not politically feasible.

¹⁷⁷ Although the attorney may have a personal interest in maximizing publicity about a case, such publicity may not serve the client's best interest. Before waging any defense in the media, counsel must ensure that such a strategy is, in fact, likely to work to the client's advantage, not just the lawyer's. For an article contending that proper use of the media does serve the client's best interests, see Robert L. Shapiro, *Using the Media to Your Advantage*, THE CHAMPION, Jan./Feb. 1993, at 7.

negotiation strategy that is tailored to the specific case she is handling and that appropriately takes into account the systemic factors likely to affect the disposition of the case, including the culture of the local criminal justice system as well as counsel's own negotiating style. In short, defense counsel must formulate a strategy that maximizes her ability to take advantage of whatever leverage she can muster to achieve the best possible outcome for her client.

III. IMPLEMENTING THE STRATEGY: MINIMIZING DANCING IN THE DARK

The question of how counsel should proceed to implement the negotiation strategy she has selected inevitably is linked to counsel's reasons for choosing the strategy as well as counsel's own negotiating style. Defense counsel must, of course, remain flexible and able to respond to the ebbs and flows of the negotiation session. This article does not offer a choreographed script, road map or game plan to use in the typical plea bargain session. The better counsel is at anticipating moves and developments in the negotiating session, the better she will be at devising initial plans and developing contingencies that will allow her to respond effectively as negotiations unfold. Given the number of variables involved and the fact that circumstances often change drastically during negotiations, counsel must be able to analyze a changing situation, respond to rapid developments and make tough judgment calls.

The complexity and fluidity of the plea bargaining process lends me to disagree with Donald Gifford regarding the relative roles of counsel and client in selecting a negotiating strategy. Gifford takes the view that defense counsel not only must discuss negotiation strategy with the client but that the choice of strategy is a joint decision.¹⁷⁸ Gifford's position is different from that espoused by ABA Standard 4-5.2 which provides that, after consultation, strategic and tactical decisions are the exclusive province of defense counsel and from Anthony Amsterdam's position that defense counsel controls all tactical decisions including "what discussions will be had with the prosecutor."¹⁷⁹

¹⁷⁸ Gifford, *supra* note 7, at 59.

¹⁷⁹ AMSTERDAM, *supra* note 28, § 85-A. See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.1, commentary at 148-49 (3d ed. 1993) ("the existence of such discussions between counsel and client about the appropriate ends and means of representation do not signify, of course, that counsel must simply defer to whatever decisions the client makes about how the representation should proceed. A lawyer is not required to pursue objectives or employ means simply because a client may wish or demand that the lawyer do so."). Most courts recognize that tactical decisions are defense counsel's responsibility. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). In *Jones*, however, Justice Brennan argued for giving more control over tactical decisionmaking to the defendant. In his view, "the func-

Even though it may be generally desirable for counsel to discuss the choice of negotiating strategy with the client and secure the client's consent to a particular approach, it is often not feasible.¹⁸⁰ Although a lawyer generally should be required to seek the client's permission before negotiating,¹⁸¹ she should not be obligated to fully discuss negotiation strategy in every case. The choice of negotiation strategy may change dramatically depending on a variety of factors, including which prosecutor is available on a given day. The need to react to a wide range of contingencies and to maneuver in a free-flowing bargaining session may preclude meaningful discussion and selection. As a practical matter, the client's lack of a telephone or transportation problems may seriously hamper or block communication between lawyer and client, thereby delaying counsel's plea bargaining. In the end, although a client's input into the lawyer's selection and implementation of strategy may be desirable, it is not, and probably ought not, be mandated.¹⁸²

On the other hand, counsel cannot select a strategy which ignores the best interests of the client as defined by the client herself. For example, the defendant may stand to gain by supplying information or

tion of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant." *Id.* at 759 (Brennan, J., dissenting). As Brennan acknowledges, the need to make quick decisions at trial justifies giving the attorney decisive authority over certain strategic choices. *Id.* at 760. In contrast, decisions as to what issues to press on appeal or what negotiating strategy to employ may allow for enough deliberation and reflection that such important tactical decisions should be the client's.

¹⁸⁰ See ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.9, commentary at 178 (3d ed. 1993) (noting that while counsel should seek to explain strategy and keep the client informed, "a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail"). See also MODEL RULE 1.4, comment.

¹⁸¹ See *supra* note 88.

¹⁸² Model Rule 1.4 requires that counsel explain a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As a proponent of client-centered decisionmaking, I believe counsel should make every effort to involve the client in important decisions such as the selection of negotiation strategy. I seriously question, however, that Gifford truly believes that the choice of negotiation strategy is a joint decision. If so, then it is surprising that his list of factors to be considered in choosing between a competitive and noncompetitive strategy should include the "likelihood of future interaction with the opposing party." Gifford, *supra* note 7, at 65. If the choice of strategy turns, in part, on the need to maintain a continued relationship with the lawyer on the other side — and Gifford suggests such a need calls for a noncompetitive approach — the fully informed client is likely to be decidedly unenthusiastic about basing a choice of strategy on the lawyer's interest in maintaining good relations with another lawyer. My strong hunch is that the defendant would want the lawyer to use whatever strategy maximizes the defense's advantage in the present case regardless of the impact of such a strategy on the lawyer's future clients or her relationship with opposing counsel. An extended discussion of this critical issue is, however, beyond the scope of this article.

agreeing to testify against other people. "Rolling over," "flipping" or "ratting out" someone else can be extremely advantageous to the defendant.¹⁸³ It also can be dangerous and indeed, even deadly. Some defense lawyers take the position that they will not provide representation to any client who wishes to turn on another person to save himself or herself.¹⁸⁴ Others argue, however, that defense attorneys, especially those representing an indigent defendant, have an ethical obligation to assist the defendant who wishes to be "a rat" or "a snitch."¹⁸⁵

Providing information to the state clearly is an alternative which may be in the best interest of some clients. Because a client has the right to set the objectives of the representation¹⁸⁶ and providing information may be critical to that client's securing her objective — say, for example, a dismissal of the charges — the client ought to have the power to decide whether or not to cooperate with the state. A private lawyer who does not wish to represent "a rat" is permitted to do so but only if that lawyer has secured the client's informed consent at the outset of the representation.¹⁸⁷

¹⁸³ The terms used to describe the process whereby a person provides information to the police or prosecutor in exchange for some benefit vary from jurisdiction to jurisdiction and change over time. The use of an informant is a commonly accepted tool in the state's battle against crime, a tool that unquestionably works to the benefit of some defendants and potential defendants. See AMSTERDAM, *supra* note 28, § 105 (urging defense lawyers to carefully evaluate and to fully advise their clients about any cooperation agreement before entering into any such agreement). See also *supra* note 42.

¹⁸⁴ See Monroe Freedman, *The Lawyer Who Hates Snitches*, THE CHAMPION, April 1994, at 25-26 (noting that prominent defense lawyer Barry Tarlow refused to defend snitches because to do so was "morally and ethically offensive" and contending that "many other defense lawyers and even some prosecutors and judges, share that view"); C. Rabon Martin, *Apology For a Veteran Drug Lawyer's No-Flip Policy*, THE CHAMPION, March 1995, at 29 (defending his right to refuse to represent snitches).

¹⁸⁵ See, e.g., James E. Boren, *Re: Teresa E. Storch Letter*, THE CHAMPION, April 1995, at 50; Teresa E. Storch, *Representing Snitches*, THE CHAMPION, June 1994, at 31, 48.

¹⁸⁶ MODEL RULE 1.2(a); MODEL CODE DR 7-101(A)(1), EC 7-7, EC 7-8.

¹⁸⁷ It is critical that the terms of the relationship be set at the very beginning. Before a lawyer accepts a fee from a defendant, the client must be fully advised of the standard tactics and measures that defense counsel will refuse to employ as a matter of principle. Accordingly, the private lawyer must advise the defendant that she will not assist the client to "rat" on someone else even though the client may wish to do so, that such a ploy may be in the client's interest and that other defense lawyers would be willing to render such assistance. If at that point the client still wishes to retain counsel, then the lawyer has properly limited the objectives of representation. If a paying client and attorney cannot agree on the allocation of decisionmaking authority with respect to tactical decisions, the client is free, of course, to find a lawyer more willing to accept client direction.

This is not to say that a lawyer functions merely as the client's mouthpiece or that counsel cannot refuse to represent a client for moral or personal reasons. See ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.5, commentary at 162 (3d ed. 1993). In fact, the comment to Model Rule 1.2(c) expressly provides that "[t]he terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude

Absent such informed consent, however, defense counsel cannot unilaterally refuse to seek or even consider a cooperation agreement because of the lawyer's own philosophy or principles.¹⁸⁸ This is especially true for the defense lawyer who represents the indigent who has no opportunity to select counsel.¹⁸⁹ Eliminating a potential option for the defendant without even giving her the opportunity to consider that option is particularly offensive because the defendant may find herself sold out by a co-defendant — represented by a defense attorney with a different philosophy — who has cut a deal with the prosecutor to testify against the defendant. It is the defendant, not defense counsel, who ultimately must decide whether cooperation is an alternative the client wishes to pursue.¹⁹⁰

Counsel's strategic decisions and her efforts to implement those decisions, therefore, should be consistent with the client's expressed objectives. The committed defense lawyer will use whatever means possible — within ethical bounds — to obtain the optimum result for her client.¹⁹¹ Notwithstanding counsel's best efforts, she may run up

objectives or means that the lawyer regards as repugnant or imprudent." *See also* Freedman, *supra* note 184, at 26 (agreeing that it is proper for a lawyer to limit representation if done at the onset of relationship and noting that Barry Tarlow advises his clients of his philosophy against snitching prior to taking a case).

¹⁸⁸ In *Smith v. State*, 717 P.2d 402 (Alaska Ct. App. 1986), the court found defense counsel to be ineffective for failing to advise the defendant that he was not legally bound by a prior "double or nothing" agreement to plead guilty to a second rape case after losing a first rape trial. The court observed that counsel may have "understandably" felt foreclosed as a matter of personal integrity and ethics from giving the defendant advice which would encourage him to renege on the agreement. Yet the court concluded that "the concern of Smith's counsel with his own ethical and moral dilemma was squarely at odds with his duty to 'conscientiously protect his client's interest, undeflected by conflicting considerations.'" *Id.* at 406.

¹⁸⁹ *See Jones v. Barnes*, 463, U.S. 745, 757 n.2 (1983) (Brennan, J., dissenting). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2, commentary at 125 (3d ed. 1993) (although ethical standards apply equally to retained and appointed counsel, differences in the nature of the lawyer's employment may affect aspects of the attorney-client relationship).

¹⁹⁰ *See* AMSTERDAM, *supra* note 28, § 105 (describing defense counsel's role in assisting the defendant to decide whether to cooperate as involving many of the same considerations as advising the defendant whether to accept a negotiated plea).

¹⁹¹ Although some critics challenge the unbridled partisanship and non-accountability of the standard concept of the criminal defense lawyer, *see, e.g.*, William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993), most commentators, courts and practitioners adhere to the view that a "lawyer's professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 586 (1986). The criminal defense lawyer "is obligated not to omit any essential lawful and ethical step in the defense" and has the responsibility of "furthering the defendant's interest to the fullest extent that the law and the applicable standards of professional conduct permit." ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.2, commentary at 122-23 (3d ed. 1993).

against a factor over which she has little control. For example, counsel and the prosecutor assigned to the case may have a personality conflict that started in law school. Although a negotiating strategy is separate and distinct from a negotiator's personal characteristics, style and strategy often do get intertwined.¹⁹² Yet, as Gifford argues, the more the lawyer can separate her own personal characteristics from her negotiating strategy and use competitive, cooperative and integrative tactics, the more effective that lawyer is likely to be.¹⁹³

Thus, not only should defense counsel try to rise above personality conflicts, she should adopt a style that works for and is consistent with her personality. As in trial work, trying to mimic someone else's style rarely is effective.¹⁹⁴ Nor is it generally desirable for counsel to approach every bargaining session in the same way or with one uniform style. Rather, defense counsel must settle on an approach that will be effective with the prosecutor with whom she is bargaining.

Not only must defense counsel have adequately prepared before structuring a negotiating approach, counsel must be prepared for the actual bargaining session. Particularly when dealing with a prosecutor for the first time, defense counsel should demonstrate counsel's keen familiarity with the facts and the law of the case. This does not mean, however, that defense counsel should show off. Rarely will this impress the prosecutor, especially if the prosecutor is a seasoned veteran. Rather, it means that counsel should have a good command of the facts and of the client's background so that counsel can respond to the prosecutor's inquiries and project a confident image.¹⁹⁵ If counsel fumbles around in her file to determine if the client is presently employed or how many children the client has, the prosecutor will draw negative conclusions about counsel's preparation. For the novice lawyer trying to make a favorable impression, lack of familiarity with one's file sends precisely the wrong message.

Both sides may go into a plea bargaining session attempting to find out more about their opponent's case while bluffing or posturing about their own case. Of course, neither defense counsel nor the prosecutor may lie during negotiations.¹⁹⁶ The line between a lie or

¹⁹² Gifford, *supra* note 7, at 47-48. Indeed, Gerald Williams suggests that one's negotiating approach is likely to be determined largely by one's personality and experience. WILLIAMS, *supra* note 128, at 41.

¹⁹³ Gifford, *supra* note 7, at 47-48.

¹⁹⁴ Craver also recommends that lawyers adopt a negotiating style that suits their personalities. CRAVER, *supra* note 74, at 4. In my opinion, however, defense counsel with an aggressive, confrontational style rarely will benefit from such a style. See *supra* notes 74-75 and accompanying text.

¹⁹⁵ See CRAVER, *supra* note 74, at 110-11 (stressing that self-assurance is an important attribute of successful negotiators).

¹⁹⁶ Model Code DR 7-102(A)(5) states that "[i]n his representation of a client, a lawyer

deliberate misrepresentation and bluffing, posturing, puffing or gamesmanship, however, is not always clear. The Comment to Model Rule 4.1 reflects this uncertainty by acknowledging that “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact . . . and a party’s intentions as to an acceptable settlement of a claim are in this category.” Not surprisingly, then, there is widespread disagreement among practitioners and scholars as to the kinds of statements and tactics that are improper.¹⁹⁷

Professor Alschuler claims that prosecutorial “bluffing” is widespread and that prosecutors willingly misrepresent facts to sustain their bluffs and obtain convictions.¹⁹⁸ On the other hand, the authors of *Plea Bargaining: Critical Issues and Common Practices* found little evidence that prosecutors deliberately misrepresent facts.¹⁹⁹ Rather, their research suggests that prosecutors generally agree that such conduct in negotiations is improper and unethical. Nonetheless, their research also shows that many prosecutors feel they can legitimately attempt to bluff defendants into pleading guilty in cases in which the prosecutor has various weaknesses or proof problems and that they frequently do so.²⁰⁰

In attempting to realistically assess the strength of the state’s case, therefore, counsel must recognize that the prosecutor may be bluffing about her case.²⁰¹ Especially when one is dealing with an adversary for the first time, it may be difficult to ascertain if the prosecutor’s case is as solid as she represents.²⁰² Defense counsel may want to

shall not . . . [k]nowingly make a false statement of law or fact.” Similarly, Model Rule 4.1 declares that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”

¹⁹⁷ See, e.g., PLEA BARGAINING, *supra* note 5, at 49-60; CRAVER, *supra* note 74, at 309-27; James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

¹⁹⁸ Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 65-68 (1968).

¹⁹⁹ PLEA BARGAINING, *supra* note 5, at 50-60.

²⁰⁰ *Id.* at 50-60. See also James Zagel, *Pleas of Guilty*, in PRACTICING LAW INSTITUTE, FOURTH ANNUAL CRIMINAL ADVOCACY INSTITUTE, WINNING THE CASE BEFORE TRIAL 63, 75 (1971) (contending that many prosecutors “do not attempt to bluff a plea of guilty from a guilty defendant against whom [their] case is weak, unless the defendant commits crimes of violence” and recommending that “bluffing . . . be used only in cases where the interests of society are overwhelming”).

²⁰¹ “[A] careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position To conceal one’s true position, to mislead an opponent about one’s true settling point is the essence of negotiation.” White, *supra* note 197, at 927-28.

²⁰² As in poker, the more experience a person has with an adversary, the more one should be able to read that person’s bluffs. For a discussion of the manner in which an adversary’s communication and behavior may reveal information about that adversary, see

direct specific questions to the prosecutor to force her to reveal whether, in fact, her critical witnesses are available or whether particular evidence has been duly analyzed.²⁰³ Assuming that the prosecutor will respond truthfully to such inquiries, defense counsel will be in a better position to successfully resolve the case.²⁰⁴ Indeed, the more defense counsel can develop her skill as a patient, active listener, the more likely it is that she can induce the prosecutor to disclose even more information in the negotiating session than the prosecutor intended.²⁰⁵

It is ill-advised and dangerous for defense counsel to get caught exaggerating or stretching the truth.²⁰⁶ Again, this is particularly so when dealing with an adversary for the first time. If defense counsel asserts that the client has been in the jurisdiction for only a short time to which the prosecutor responds by noting the defendant's conviction for drunk driving five years ago in the same county, defense counsel may find herself in a very difficult position.²⁰⁷ This will, of course, happen to every defense attorney from time to time because counsel will be relying, at least in part, on information from a client who may have lied or been confused about certain facts.²⁰⁸ Nevertheless, de-

CRAVER, *supra* note 74, at 87-92.

²⁰³ See PLEA BARGAINING, *supra* note 5, at 52-60 (urging defense lawyers to ask direct questions to unmask bluffing and suggesting that prosecutors would respond honestly if asked); CRAVER, *supra* note 74, at 80-81 (stressing the advantages of questioning one's adversary to gain information and to exert control over the negotiating session); FISHER & URY, *supra* note 92, at 88 (suggesting that negotiator respond to an offer by asking for an explanation of the offer).

²⁰⁴ Prosecutors may be willing to respond to certain direct questions, but they may view the questions as confrontational or competitive bargaining and only respond if defense counsel is willing to share information about the defense case or respond to the prosecutor's questions. See Zagel, *supra* note 200, at 76 (urging prosecutors to ask defense counsel what the defense will be).

²⁰⁵ See CRAVER, *supra* note 74, at 12.

²⁰⁶ See PLEA BARGAINING, *supra* note 5, at 52:

A major incentive for not crossing the line between legitimate puffery and outright deceit is self-interest. An attorney's personal credibility and reputation are at stake. Credibility is essential for lawyers, particularly in the criminal courts. There seems to be no middle ground. One is trustworthy or not. Once lost, credibility is hard to regain. Without it, the practice of law can be considerably more difficult.

Rather than lie, counsel should selectively respond or skillfully avoid answering the prosecutor's question in a way that protects critical information without arousing the prosecutor's suspicions or closing off communication. For a discussion of effective avoidance techniques, see ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING* 422-28 (1990).

²⁰⁷ See Glanzer & Taskier, *supra* note 62, at 8 ("nothing undermines a defense lawyer's credibility so much as the making of factual or legal assertions that the prosecutor knows are wrong").

²⁰⁸ Indeed, as any experienced criminal defense lawyer knows, while the client deserves the benefit of any doubt as well as counsel's non-judgmental attitude, counsel should be wary of blindly accepting a defendant's assertions of fact as true. See Gary Goodpaster,

fense counsel should attempt to ensure that lack of familiarity with her client's case does not add to this problem.

It may not be advisable for defense counsel to seek to resolve a case in counsel's first meeting with the prosecutor. Although a host of factors, including the defendant's pretrial detention, financial restraints or employment needs as well as the machinations of a co-defendant, may affect the timing of negotiations,²⁰⁹ frequently counsel would be wise to delay any attempt to resolve the case in order to utilize the first meeting with the prosecutor to discover more about the state's case.²¹⁰ The wisdom of such a delay depends on the case and the context or course of that initial negotiating session. As explained earlier, the key to effective negotiation not only is determining what one's specific goals are in any bargaining session and discussing with the client anticipated responses, but then being able to respond to changing circumstances as negotiations unfold. Moreover, even if counsel receives an offer that counsel knows is acceptable to the client, it may be wise to delay any acceptance of that offer until a later meeting. Once again, counsel's decision depends on the circumstances, including the risk of the offer being withdrawn, and the client's wishes.

Usually it is not desirable to have the client actually participate in the bargaining session. Criminal defense lawyers generally prefer not to have the client present since the client's facial expressions or remarks may undermine counsel's efforts.²¹¹ Nevertheless, in rare instances, a properly prepared defendant can be instrumental in securing a good outcome.²¹²

Many texts on negotiation stress the importance of negotiating on

The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 75 (1986) (suggesting that *Strickland's* assumption that counsel can take at face value information supplied by the defendant is contrary to the experience and practice of most criminal defense lawyers).

²⁰⁹ See *supra* notes 41-47 and accompanying text.

²¹⁰ See CRAVER, *supra* note 74, at 81 (noting that because plea bargaining is a process, the first meeting often should be used primarily to gather information).

²¹¹ This holds true for lawyers negotiating in other contexts as well. See CRAVER, *supra* note 74, at 50-51, 239-40.

²¹² In a number of my own cases, the client's presentation of the underlying events or personal circumstances was so compelling or so sympathetic that we decided to have the client participate in the bargaining session. I am convinced that we were able to achieve as good or even better results in these cases than if I alone had made the same presentation to the prosecutor. This tactic works because certain clients are able to humanize their story in a way that is impossible for even the most eloquent defense lawyer to do. See *supra* note 95 and accompanying text. However, many clients do not perform well in front of skeptical prosecutors who are likely to respond negatively to the client's mistakes, embellishments or excuses. Thus, counsel should use this tactic only if she believes that the client, prosecutor and case are such that the tactic is likely to advance the overall negotiating strategy.

one's own turf.²¹³ Rarely is this possible in the criminal context. In the vast majority of cases, negotiations will occur in a courtroom, the hallway of the courthouse or in the prosecutor's office. The setting as well as the extent to which the prosecutor is focused on plea bargaining may influence counsel's ability to obtain a favorable result. It may be desirable to catch the prosecutor in the back of a courtroom and strike a deal when the prosecutor is not really attentive to the task at hand. On the other hand, defense counsel must be mindful not to allow herself to be caught off-guard and to negotiate a case when counsel is not fully prepared to do so. A skilled negotiator will manipulate the timing of events and the setting to maximize that lawyer's advantage. Moreover, it is usually best to avoid negotiating under pressure to make a decision unless counsel is in the best position to take advantage of that pressure.²¹⁴

In some cases, it may be desirable to approach the prosecutor with a proposed bargain rather than wait for the prosecutor to make an offer. Research suggests that there is a positive correlation between a negotiator's original demand and her final outcome.²¹⁵ Thus, defense counsel may be undercutting herself if her initial settlement proposal is too reasonable or too modest.²¹⁶ If defense counsel decides to present an initial settlement proposal, counsel should consider demanding the most extreme position she can rationally defend.²¹⁷ On the other hand, if counsel's proposed settlement offer is wholly unrealistic, the offer may be counterproductive. The prosecutor may either dismiss counsel as incompetent or inexperienced or respond by refusing to offer any concessions.²¹⁸ The decision to make an initial proposal and the crafting of that proposal depends, therefore, on counsel's assessment of the best overall negotiating strategy to employ in the particular case.

Counsel's overall strategy also dictates the selection of other negotiating techniques or tactics to use.²¹⁹ Because in most cases the prosecutor wields superior bargaining power, defense counsel generally will be attempting to utilize persuasive arguments, rather than

²¹³ See, e.g., CRAVER, *supra* note 74, at 65-67; FISHER & URY, *supra* note 92, at 135.

²¹⁴ See FISHER & URY, *supra* note 92, at 124 ("a good negotiator rarely makes an important decision on the spot").

²¹⁵ Gifford, *supra* note 7, at 49.

²¹⁶ See CRAVER, *supra* note 74, at 55-57.

²¹⁷ See CRAVER, *supra* note 74, at 56 ("proficient negotiators generally attempt to develop the most extreme positions they can rationally defend").

²¹⁸ Accord S. SIEGEL & L. FOURAKER, BARGAINING AND GROUP DECISION-MAKING: EXPERIMENTS IN BILATERAL MONOPOLY 93 (1960). In my experience, I also have found this to be the case.

²¹⁹ For a description of negotiation tactics and techniques applicable in a wide range of contexts, see CRAVER, *supra* note 74, at 124-45.

threats, to gain concessions from the prosecutor.²²⁰ Counsel's ability to strike a responsive chord with an innovative or emotional presentation may succeed in moving a cynical prosecutor to offer a more favorable bargain.²²¹

In other instances, defense counsel's ability to extract a reasonable offer or settlement turns on counsel's success in convincing the prosecutor that the defense actually is willing to go to trial. In a substantial number of cases, the threat to go to trial is hollow and has little impact on the prosecutor.²²² In some cases, however, defense counsel's confident insistence that she really has no alternative but to try the case may cause the prosecutor eventually to offer a settlement that is more favorable to the defense than the case really warrants.²²³ Defense counsel's reputation and skill as a trial lawyer — combined with a demonstrated willingness to go to trial if necessary — often is the key to success as a negotiator. Indeed, if counsel is able to convince the prosecutor that a trial will be a costly, hard-fought battle, the prosecutor may conclude that even though he or she will win in the end, the victory may not be worth the effort expended.²²⁴

Although occasionally counsel's candid assessment that she is looking to resolve the case may be a useful step in securing a reasonable outcome, it may also signal to a prosecutor that the defense is simply unwilling to go to trial.²²⁵ For some prosecutors, this knowl-

²²⁰ Defense counsel may succeed in securing a better bargain if she is able to persuade the prosecutor that they share interests — to avoid the conviction of an innocent person, to get the defendant help, to eliminate the need for a messy trial, to arrive at a fair resolution — which will encourage more cooperative bargaining on the prosecutor's part. See FISHER & URY, *supra* note 92, at 70-76.

²²¹ See CRAVER, *supra* note 74, at 128, 134 (noting the impact of persuasive, emotion arguments).

²²² An idle threat at best has no effect and at worst may cut off negotiations. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 529 (1978); Lowenthal, *supra* note 129, at 86.

²²³ See CRAVER, *supra* note 74, at 243, 248 (recognizing that a skilled negotiator may undermine a stronger opponent's confidence by effectively denying the existence of the other side's superior strength or by convincingly adopting an inflexible position that causes the other side "to blink"). In fact, counsel's refusal to blink and continued preparation for trial may be the only way to move a tough-minded, stubborn prosecutor to offer a better bargain. Counsel's ability to pursue this approach, however, turns on the willingness of the client to resist the pressure to cave in and on the potential downside of a trial. See FISHER & URY, *supra* note 92, at 98-128 (discussing the importance of developing a best alternative to a negotiated agreement as a standard to measure proposed agreements so counsel does not become too committed to reaching an agreement).

²²⁴ This point is repeatedly made in the literature. See, e.g., PLEA BARGAINING, *supra* note 5, at 68; CRAVER, *supra* note 74, at 65; White, *supra* note 26, at 369-70; Gerstein, *supra* note 144, at 57.

²²⁵ If the prosecutor is a competitive bargainer — as I believe most are — she may see counsel's cooperative attitude as a sign of weakness and refuse to grant any reciprocal concessions. Indeed, empirical evidence demonstrates that a lawyer using a cooperative

edge allows them to drive a particularly harsh bargain. Defense counsel who clearly signals an unwillingness to go to trial may find herself at the mercy of the prosecutor.²²⁶ Asking for mercy is rarely the approach of choice. Rather, counsel must ensure that her cooperative gestures are seen as principled concessions to reach a fair bargain, not a sign of weakness, anxiety or fear.²²⁷

In cases in which the defense has substantial leverage, counsel should give the prosecutor an opportunity to save face if possible.²²⁸ Emphasizing in a bargaining session the existence of facts not known to the prosecutor's office when the initial charging decision was made permits the prosecutor to utilize those facts to dismiss the case. Thus, even though the initial charging decision may have been a horrendous one, the second prosecutor is able to justify the dismissal without taking a slap at a fellow prosecutor.

In other instances, however, defense counsel may have the leverage to insist upon a dismissal or favorable bargain that is hard for a prosecutor or prosecutor's office to swallow. Although the prosecutor may lack leverage in this particular instance, he or she may pressure defense counsel to enter into a reasonable plea bargain so as to not embarrass or cause a political problem for the prosecutor's office.²²⁹

approach is vulnerable to exploitation by a competitive negotiator. Lowenthal, *supra* note 129, at 83-88; WILLIAMS, *supra* note 128, at 48-49. See also Gifford, *supra* note 7, at 79-82 (arguing that generally defense lawyers should begin with competitive tactics because prosecutors generally start out competitively but concluding that defense counsel should shift to a more cooperative approach because prosecutors generally adopt a cooperative strategy). Although I have dealt with prosecutors who were cooperative bargainers, I do not agree with Gifford that most prosecutors "become predominately cooperative" primarily because of the prosecutor's unique role as a "minister of justice." *Id.* at 75.

²²⁶ See CRAVER, *supra* note 74, at 218-19; DERSHOWITZ, *supra* note 19, at 415.

²²⁷ See, CRAVER *supra* note 74, at 113-24. For an extended discussion of the strategy of "principled negotiation," see FISHER & URY, *supra* note 92.

²²⁸ See CRAVER, *supra* note 73, at 248-49 (acknowledging importance of face-saving gestures in other bargaining contexts). I disagree, however, with Gifford's suggestion that an appropriate device for allowing the prosecutor to save face and thereby "still maintain[ing] a cordial personal working relationship with the prosecutor" is to paint the client as "obstreperous" and to attribute to him or her "the responsibility for [counsel's use of] competitive tactics, such as refusing to enter pleas or raising certain defenses." See Gifford, *supra* note 7, at 81. I agree it is important to foster a good relationship with prosecutors, but it should not be necessary, nor is it generally appropriate, to do so at the expense of a client. Accord DERSHOWITZ, *supra* note 19, at 405, 414 (noting that while the temptation to sacrifice individual clients to maintain a reputation for moderation or integrity may become "overwhelming," defense counsel must be certain he or she is interested "only in achieving the best legal result for the client and not in serving some other personal or professional interest").

²²⁹ Craver argues that a lawyer who is going to be involved in future dealing with an adversary should not use tactics that might be fruitful in the instant case if the lawyer has a reasonable fear that such actions might have negative future consequences. CRAVER, *supra* note 74, at 25. Although Craver goes on to state that a client does not have the right to expect his lawyer "to employ disreputable tactics" — and I agree — I strongly disagree

The pressure on defense counsel may be intense, particularly if combined with a veiled threat by the prosecutor to keep this case in mind in future negotiating sessions. Unquestionably, defense counsel will be called upon to make tough choices. Nevertheless, because counsel represents an individual defendant, not a particular cause or future clients, she is obligated to secure the best result possible for a client even though it may negatively impact future clients.

IV. AFTER THE MUSIC HAS STOPPED: LEARNING FROM ONE'S NEGOTIATING EXPERIENCE

Defense counsel cannot unilaterally accept or reject a prosecutor's settlement offer. Rather, counsel must fully discuss with her client any settlement offer made by the prosecutor even if counsel believes that the prosecutor's settlement offer is unacceptable or not in the client's best interests.²³⁰ Counsel must provide sufficient advice, including a realistic assessment of the probable outcome if the plea bargain is rejected and the case tried, so that the client can make an informed decision.²³¹ It is then up to the client to make the decision whether to accept or to reject the offer.²³²

ABA Standard 4-5.1 calls for the defense lawyer to "advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome," but cautions counsel "not to intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." As all experienced lawyers know, the manner in which the pros and cons of a plea bargain or any settlement offer are communicated to a client shapes the ultimate decision. It is critical, therefore, that defense counsel be mindful of the systemic pressures described in this article when counseling a client regarding a proposed plea bargain.

For example, many defendants, especially first offenders, are reluctant to go to trial if exercising that option raises the possibility of a jail sentence. For many defendants, the prospect of going to jail is so unnerving that they will agree to almost anything if the negotiated disposition guarantees that the defendant will not serve any jail time.²³³ When explaining options to a client, therefore, defense coun-

with his suggestion that a lawyer should bypass a short-term gain for a present client if it would be at the expense of prospective clients. *See supra* notes 69-72 and accompanying text.

²³⁰ *See supra* notes 90-91 and accompanying text.

²³¹ *See* ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.1 (3d ed. 1993); MODEL RULE 1.4. *See also supra* notes 29-30 and accompanying text.

²³² *See supra* note 79.

²³³ *See supra* note 63.

sel should avoid unduly emphasizing the risks of incarceration. Although the lawyer must advise the client of the likely adverse consequences of a proposed course of action, she should do so in a way that does not cause the client to fixate on the small risk of incarceration. Like the doctor who overplays the small risk of an adverse side effect, thereby causing the patient to reject a very safe medical procedure, the lawyer who unnecessarily focuses the client's attention on the risk of jail may discourage the client from pursuing an alternative that really is in the client's best interest.

It is improper for counsel to allow her own needs or interests to affect her presentation of the client's options. If counsel feels strongly that the client's best interests will be served by selecting a particular option, she may use "reasonable persuasion to guide the client to a sound decision."²³⁴ Sometimes that means counsel should encourage the defendant to go to trial. But it also means in some cases that counsel should urge the defendant to accept a plea bargain even though it entails a long prison stint rather than taking a hopeless case to trial. The line between "reasonable persuasion" and manipulation which robs the client of the right to make one's own decisions is, however, not a bright one. Indeed, as Albert Alschuler has accurately described, the defense lawyer's task is often incredibly difficult:

When a lawyer refuses to "coerce his client," he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty that, somehow, it should have been the lawyer's duty to prevent. When a lawyer does "coerce his client," however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve.²³⁵

So once again, defense counsel finds herself in a difficult bind. It is appropriate to lean on clients to keep them from making poor decisions regarding plea bargains. In my view, how hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client's ability to make informed decisions, the certainty of the harm, the client's rationale for his or her decision and the means used to change the defendant's mind.²³⁶ Defense counsel generally should not be permitted to threaten to withdraw to coerce a defendant into accepting a plea bargain that counsel feels is in the client's best inter-

²³⁴ ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.1, commentary at 198 (3d ed. 1993).

²³⁵ *The Defense Attorney's Role*, *supra* note 16, at 1310.

²³⁶ A full exploration of the issue of how far and under what circumstances defense counsel can go to pressure the client, however, requires a separate article. For an interesting essay that explores this issue but outside of the criminal context, see William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

est.²³⁷ Rather, defense counsel ultimately must respect the individual's constitutional right to turn down a plea bargain and to go to trial, even if that choice is foolhardy.²³⁸ Nevertheless, it may be very difficult for counsel to respect a foolish decision which harms her client, especially for the lawyer defending an accused facing the death penalty.²³⁹

If the defendant decides to accept an offer, it is important for defense counsel to reduce the agreement to writing to avoid misunderstandings.²⁴⁰ Given the volume of cases in most prosecutor's offices, it is particularly important to memorialize the agreement if counsel anticipates that the prosecutor with whom counsel struck the plea bargain may not be in court at the time the guilty plea is entered or she foresees possible confusion about the details of the bargain. A simple confirmation letter to the prosecutor often will be sufficient. In some instances, a more detailed written document is appropriate.²⁴¹

A final step that a lawyer should take at the conclusion of a negotiation — for her own sake as well as that of future clients — is to reflect upon the experience and carefully assess what strategies or techniques were effective. Too many lawyers complete a plea bargaining session without stopping to consider what worked and what did not, never thinking about what could have been done differently. As a result, too many lawyers repeat their mistakes and do not even recognize their limitations. Growth and improvement as a negotiator,

²³⁷ See *The Defense Attorney's Role*, *supra* note 16, at 1310; *AMSTERDAM*, *supra* note 28, § 201. *But see* *Uresti v. Lynaugh*, 821 F.2d 1099, 1102 (5th Cir. 1987) (stating that defense counsel has the right to ask the court for permission to withdraw if the client refuses to plead guilty and insists on going to trial when counsel feels the choice is "foolhardy"); *State v. Schweitzer*, 1992 WL 142274, at *2 (Wis. Ct. App. Apr. 14, 1992), *rev. denied*, 490 N.W.2d 24 (Wis. 1992) ("when an attorney decides that a defendant should plead guilty under a plea agreement and that to go to trial is foolhardy, the attorney, without question, has the right to seek withdrawal as counsel if the defendant refuses to plead guilty"). It is difficult to square such decisions with the defendant's right to choose to go to trial and the ethical command of Model Rule 1.2.

²³⁸ *Faretta v. California*, 422 U.S. 806, 834 (1975) (Brennan J., concurring).

²³⁹ Defense counsel who is a client-centered decisionmaker confronts her most difficult challenge in a capital case when her client insists on turning down a plea bargain that will save his or her life. For a further discussion of the difficulty of deciding how much pressure to bring to bear on the capital defendant who is turning down a plea bargain counsel feels is in the client's interest, see *White*, *supra* note 26, at 371-74.

²⁴⁰ See *Glanzer & Taskier*, *supra* note 62, at 42.

²⁴¹ Care must be taken to ensure that the written agreement accurately reflects the actual agreement. Courts disagree whether prior oral understandings can be considered in resolving a dispute about the meaning of a written agreement. *Compare* *In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986) (written agreement should be viewed in the context of negotiations and ought not be interpreted to contradict specific oral understanding) *with* *Hartman v. Blankenship*, 825 F.2d 26, 29 (4th Cir. 1987) (contract principles bar consideration of testimony of oral understanding prior to a written agreement if that agreement was meant to contain the final bargain).

indeed as a lawyer, comes from learning to extract from one's performances and experiences lessons which can be applied in the future.²⁴² Law schools historically have not done an adequate job preparing law students to be reflective practitioners.²⁴³ Although most law schools have improved their skills instruction in recent years, many lawyers now in practice were never taught the skill of systematically critiquing or evaluating their own work. Not surprisingly, then, many lawyers have not cultivated this important skill.

The good lawyer will review and evaluate her preparation, her strategy and the negotiation session with an eye toward future negotiations.²⁴⁴ Good lawyers learn from both their successes and their failures. But the speed and extent of the lawyer's development as a proficient negotiator usually will be a function of her reflective abilities.²⁴⁵ The following checklist is provided as a starting point for those interested in acquiring or honing this skill:

POST-PLEA BARGAIN CHECKLIST²⁴⁶

1. How good was your:
 - a) overall pre-negotiation preparation?
 - b) knowledge of law relating to the case?
 - c) knowledge of facts?
 - d) knowledge of defendant's personal characteristics?
 - e) knowledge of defendant's expectations and concerns, especially potential collateral consequences?
2. Did you select a particular negotiating strategy and why?
3. Did you and your client select a certain goal?

Did you achieve that goal?

Did you set a high enough goal?

If you achieved everything you sought, is there reason to believe that your goal was set too low?
4. Did you discover at any time in the negotiation process that any of your pre-negotiation assessment was inaccurate?
5. Did you pick up information during the negotiating process which aided

²⁴² See ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 218-20 (1992).

²⁴³ *Id.* at 233-44. For an excellent discussion of the importance of becoming a reflective professional, see DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER (1987) and THE REFLECTIVE PRACTITIONER (1983).

²⁴⁴ See AMERICAN LAW INSTITUTE — AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: STANDARDS, METHOD AND SELF-EVALUATION (1992).

²⁴⁵ See CRAVER, *supra* note 74, at 207-14.

²⁴⁶ This is a modified version of a post-negotiation checklist suggested by CRAVER, *supra* note 74, at 212-14.

you?

Could you have done anything during the process to learn more about the prosecutor's strategy, goals or the merits of the state's case?

6. Did you or the prosecutor make any unintended verbal or nonverbal disclosures?
If so, what prompted those disclosures?
7. Did any contextual factor such as time or location affect the negotiation? If so, could you have influenced that factor?
8. Who made the first offer and what prompted it?
9. Who reacted to the first offer and in what manner?
10. Did the prosecutor employ any specific bargaining tactics or techniques?
If so, how did you react to those tactics?
11. How did the prosecutor react to any techniques you used?
12. Were there other tactics which you might have been able to use to advance your position?
13. Which party made the first concession and how was it handled?
14. If subsequent concessions were made, were they reciprocated? If not, why not?
Were the concessions "principled" and if so, what did either party articulate?
15. How was the plea bargain finalized?
Did either side appear to make greater concessions in wrapping up the bargain?
16. Did each side initially bargain competitively? If not, which side did not?
Did either party switch to a cooperative/integrative approach? If so, which party and why?
Were both parties bargaining cooperatively at the end? If not, why not?
17. Did time pressures influence either side or the concessions made? If so, could you have used this factor to your advantage?
18. Did you "bluff"? If so, how?
Do you think the prosecutor "bluffed"? If so, how?
Is there anything you could have done to unmask the "bluff"?
19. Did you resort to any misrepresentation of fact or law?
Is there any reason to suspect that the prosecutor may have?
20. Who do you think got the more favorable plea bargain and why?
Is there anything else you could have done to achieve a more favorable outcome for your client?

CONCLUSION

Unquestionably, the criminal defense lawyer has an obligation to try to secure the best possible result for each client counsel represents. For the vast majority of clients in criminal cases, defense counsel's task will be to obtain the best plea bargain possible. The lawyer committed to providing quality representation, therefore, must learn to be

an effective negotiator. Effective negotiating, like good card playing, requires sound judgment, intuition, the ability to read the other players and the flexibility to adapt to a changing context. And like success in cards, success in negotiations depends in part on luck but more on preparation, study and reflective decisionmaking. In the end, the defense lawyer who takes the time to prepare and then to tailor an individualized approach is more likely to obtain desirable plea bargains.

Finally, the criminal practitioner who takes the time after each plea bargaining session to carefully analyze that session in an effort to determine what worked or did not work and the reasons for her success or failure is likely to improve as a negotiator. Finding the time to be reflective is not easy. And, as with most things in life, becoming a good negotiator takes hard work. In the end, however, that time and effort will pay enormous dividends for the criminal defense lawyer and her clients.

