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Probation Officers Look at Plea Bargaining, and Do Not Like What They See

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The Probation Officers Advisory Group's survey provides valuable insights into plea bargaining practices under the federal guidelines. Probation officers play a crucial role in guideline sentencing, and their views on the plea bargaining process are significant both because of their proximity to that process and the influence they wield with judges. The survey responses thus deserve attention and may spark lively debate within the Sentencing Commission and elsewhere. Depending on one's perspective, the picture that emerges is of plea bargaining either as a safety valve to mitigate the harshness and rigidity of the guidelines, or an unregulated process that threatens the guidelines' gains in reducing unwarranted disparity.

I. Methodology and Presentation

Although the survey is revealing and important, anyone tempted to draw firm conclusions should exercise caution. As the authors readily acknowledge, the survey was not prepared or conducted scientifically. It measures probation officers' attitudes and perceptions, rather than generates any hard data. The format is confusing, with each question asking for an answer expressed in terms of a range of cases that fit the question's hypothesis. The six categories of percentages are not equivalent: at the high and low end there is a five percent spread, while the middle categories have a twenty or twenty-five percent spread. This asymmetry could distort the significance of the number of responses in each category. In addition, because the responses were by judicial district, with each response supposed to represent a consensus within that district, disparities between different judges, prosecutors and probation officers within a single district are masked.

II. Summary of Main Findings

The major focus of the survey is the concern of probation officers that plea agreements commonly fail to reflect the true facts of a case, thus distorting guideline calculations and making it difficult for the court to consider properly whether to accept a plea agreement. This perception is reflected both in the survey data and the comments. For example, approximately forty percent of probation officers believe that guideline calculations set forth in plea agreements in a majority of cases are not "supported by offense facts that accurately and completely reflect all aspects of the case."

If these perceptions are accurate, the survey is powerful evidence of guideline manipulation and evasion. Furthermore, because this question focuses on just one type of guideline manipulation, the survey suggests that such practices exist on a scale far exceeding the estimated 20-35% contained in the leading, Commission-sponsored, study of plea bargaining under the guidelines.[1]

A second detail that emerges from the survey is the wide variety of practices in different judicial districts. For example, while in about a third of districts guilty pleas routinely contain guideline calculations, in almost half the districts such calculations are quite uncommon. When there are guideline calculations in plea agreements, they may be purely informational or they may be intended to influence the sentence. In the latter case, it seems that prosecutors in some districts are much more aggressive in pursuing the aims of a plea agreement, normally seeking to secure a lower sentence for the defendant than would otherwise apply. All these findings support the impression that although some forms of sentencing disparity have been reduced under the guidelines, other forms remain or have been newly created.

Several other aspects of the survey results are worthy of comment.

(1) Plea agreements including a specific sentence pursuant to Rule 11(e)(1)(C) remain rare. Apparently judges are content to let the parties to a plea agreement guide the sentencing, but are unwilling to surrender complete control over the process.

(2) The offense conduct section of the presentence report is prepared either by the prosecutor, or by the probation officer based almost entirely on government submissions. This is a troubling abdication of the responsibility to assist the judicial role in sentencing by providing a neutral account of the case. It is ironic that so many probation officers seem troubled by the presentation of facts when the parties have reached agreement, but when facts are in dispute, the government's version is routinely adopted.

(3) Finally, probation officers report that judges generally side with the plea agreement when the presentence report disputes factual assertions made in the agreement. This perception is somewhat at odds with the frequent complaint heard from defense lawyers that the greatest obstacle to an acceptable plea agreement is often not the prosecutor, but a zealous probation officer whose analysis carries great weight with the judge.

III. Is Fact Bargaining a Problem?

A. The Probation Officer's View

The survey responses and the probation officers' additional comments reflect a concern that plea agreements which fail to set forth all possibly relevant

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facts are a problem in need of correction. Such a view from probation officers is understandable, since they are the only actors in the guideline system who feel a consistent institutional imperative to strictly construe and apply the guidelines. In their assigned role under the guidelines, probation officers often see themselves as guardians of the system's integrity. Their job is to apply the guidelines faithfully, and to do that they need access to all of the facts. Nonetheless, it is fair to ask whether their concern with fact bargaining and other forms of guideline "evasion" is overstated or even misguided.

B. The Pre-Guideline-System Standard

Plea bargaining, of course, is based on a mutual exchange of value, like a contract. The prosecutor receives a conviction without the costs and risks of a trial. The defendant may waive any right to appeal the sentence, which provides the government with further certainty and conserves resources. The defendant may also agree to assist in the investigation and prosecution of others. On the other side, the defendant who pleads guilty generally expects to receive a mitigated sentence. Reduced sentences are the stock-in-trade of plea bargaining; without them few defendants would plead guilty.

Before the advent of the guidelines, the process by which a guilty plea defendant received a reduced sentence was highly opaque and unpredictable. The plea would only definitively determine the maximum sentence; the rest would be up to the judge, perhaps aided by a recommendation from the prosecutor. Despite this general uncertainty, it was still clear that a significant guilty plea discount existed.[2] All parties understood that the discretionary sentencing decision would be affected by the guilty plea.

C. The Changes Wrought by Guidelines

Under the guidelines, the sentencing impact of a guilty plea is more clearly ascertainable. There are a variety of ways in which a plea agreement can affect a sentence. As an initial matter, charge bargaining can be used to avoid the application of a mandatory minimum, to limit the possible maximum sentence, or to influence the selection of the applicable offense guideline. However, because of the real offense sentencing elements in the guidelines, such as the relevant conduct guideline and the increasing number of cross-references within offense guidelines, charge bargaining has little or no effect in many cases. Alternatively, sentence bargains in which the plea agreement includes a specific sentence can be a powerful plea bargaining tool; but as the survey indicates, they remain quite uncommon.

With charge bargaining often of little utility, and sentence bargaining unavailable, prosecutors and defense counsel frequently turn to fact bargaining and guideline-factor bargaining. Given the way the guidelines operate, this can be the surest way to influence the sentence of a defendant who pled guilty. If the judge accepts a plea agreement specifying, for example, that the sentence is to based upon a certain amount of money or drugs, or that the defendant is to receive a reduction as a minor participant or for accepting responsibility, the plea agreement will have influenced the sentence in a concrete way. Considering the tools at the disposal of the parties to an agreement, fact and guideline-factor bargaining are natural outgrowths of the guidelines.

Some probation officers apparently believe it is the prosecutor's responsibility to take every step to ensure the maximum guideline sentence, and they seem to view fact and guideline-factor bargaining as an inappropriate prosecutorial exercise. However, the entire plea bargaining process shows that prosecutors are not aways driven to obtain the maximum possible sentence. Charging decisions, and charge bargaining, commonly reflect a prosecutor's conscious decision not to seek such a sentence. Although the Justice Department's approach to these matters has varied over time, it has generally supported or at least tolerated charge bargaining affecting the guidelines and decisions not to pursue the most serious provable charges.[3] Further, sentence bargains, where they are accepted by courts, can potentially be used to completely bypass the guidelines.[4]

No one wants to encourage attorneys to mislead the court, and there is no doubt that fact and guideline-factor bargaining can involve attorneys in being less than completely candid. However, it should be remembered that other forms of bargaining, such as the liberal granting in some districts of § 5K1.1 motions for a departure based on substantial assistance, involve at least as much "evasion" as fact or guideline-factor bargaining. In some ways, fact or guideline-factor bargaining is preferable to charge bargaining. The value to a defendant of a charge bargain can prove illusory because of the relevant conduct rules or if the judge departs from the guidelines. A plea agreement, on the other hand, setting forth the applicable guideline range, or resolving the major disputes likely to arise at sentencing, particularly if combined with a provision stating that the sentence imposed will be within the guideline range (*i.e.*, will not include any departures), can provide fairness and predictability.

D. Other Problems Deserve Priority Attention

The continued vitality of plea bargaining, as reflected in probation officers' responses to the survey, does illustrate some problems with the guidelines. First, it is more often prosecutors than judges who determine which defendants receive

more lenient sentences. It has been well established that sentencing discretion has been shifted, not eliminated. It is troubling for discretionary leniency to be so much in the hands of prosecutors, but the current structure of the guidelines and mandatory minimums means that often the only real choice is between the power of prosecutorial leniency, implemented through plea bargaining, and unduly harsh sentences. Second, the widely divergent practices that prosecutors follow demonstrates that sentencing disparity is alive and well, although in a less visible form.

The persistence of discretion and disparity does not mean that guidelines should be abandoned. However, the excessive restriction of judicial discretion reflected in the guidelines and mandatory minimums has clearly been a mistake. The survey of probation officers tends to support the widely held view that carefully guided judicial discretion, including more liberally-tolerated departures, will improve upon rather than detract from the guidelines. If the Sentencing Commission's current effort at guideline simplification is successful, if the mandatory minimums are scaled back or eliminated, if the many overly harsh aspects of the guidelines are ameliorated, there will be time to consider how to regulate plea bargaining that manipulates or evades the guidelines. For now, though, prosecutors and defense attorneys should not be discouraged from seeking to resolve cases fairly, with an eye towards how their actions will affect the defendant's sentence.

NOTES

[1] *See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity Not Disparity*, 29 Am. Crim. L. Rev. 833, 845 (1992); *See also* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501 (1992); David N. Yellen, *Two Cheers for A Tale of Three Cities*, 66 S. Cal. L. Rev. 567 (1992).

[2] The Sentencing Commission found that, on average, a preguidelines defendant who pleaded guilty received a thirty to forty percent lower sentence. *See* U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 48 (1987).

[3] *See Justice Department Guidance for Prosecutors: Fifteen Years of Charging & Plea Policies*, 6 Fed. Sent. R. 299-353 (1994) (various articles).

[4] *See United States v. Aguilar*, 884 F. Supp. 88 (E.D.N.Y. 1995) (Rule 11(e)(1)(C) plea can be accepted even if agreed-upon sentence deviates from guidelines).