

## Plea bargaining needs attention

By Jim Nowlan

Forget the riveting trials on Law & Order. The real action in the criminal justice system takes place out of sight between prosecutor and defense attorney in the plea bargaining process, where 95 percent of all guilty pleas are meted out. Most attorneys say the process works well and is absolutely necessary, yet woe unto a defendant who thinks he is innocent and has to choose between a plea agreement and a trial by jury.

A plea bargain is an agreement entered into between the prosecution and the defendant in which the latter enters a plea of guilty in exchange for either a sentence less than the maximum or a reduced or amended charge less than the original charge. As U.S. Supreme Court justice Anthony Kennedy has said: “For the most part, plea bargaining determines who goes to jail and for how long. It is not some adjunct to the criminal justice system. It is the criminal justice system.”

But as Timothy Lynch of the Cato Institute has written, the system often punishes people who want to exercise their right to go to trial, as when the prosecutor recharges to a harsher crime if the defendant refuses to accept a plea bargain. And since about 90 percent of felonies end in convictions, an innocent defendant may feel coerced into accepting a plea bargain to a crime he did not commit.

This situation may be unusual, but isn't justice for all the goal of the criminal justice system?

On the plus side, prosecutorial discretion in determining a defendant's charges improves the system's efficiency. And since many states and the federal government have strict—some would say severe—sentencing guidelines, the charging phase may be the only opportunity for the justice system to grant leniency.

As a practical matter, the criminal justice system is almost overwhelmed with cases. As Vermilion County (IL) state's attorney Randall Brinegar explains: We have 750-800 felony cases filed each year, and we have one circuit judge assigned to hear felony cases. Hypothetically, if we could try one case every working day, which would be impossible, that would be 250 trials a year. What would we do with the other cases?

Is the public willing to spend significantly more money in staffing the system with more judges, prosecutors, police officers, evidence technicians, public defenders and the many roles that are parts of the criminal justice system? I doubt it. And are citizens willing to be called regularly for jury duty?

I spent time in a courtroom the other day. An assistant state's attorney and a public defender worked through a stack of case files for minor offenses, but including serious DUIs, reducing charges here and reducing penalties there, agreeing on guilty pleas. The judge approved all the plea agreements, and everyone seemed satisfied, including the defendants.

But plea bargaining can be abused by undercharging, that is, charging less than the prosecutor can prove, or by offers that are too generous. This could result from an overwhelming caseload or a prosecutor who simply doesn't like to try cases.

There is even a minor effect in the process from the CSI (Crime Scene Investigators) television program, which might deter prosecutors from going to trial if possible. For example, in DUI cases that are in the gray area between .05 and .08 percent alcohol in the blood, a prosecutor might worry that a jury would expect all kinds of tests and investigative evidence not collected by the police. In such a case, a prosecutor might subconsciously, I am told by prosecutors, weigh that and offer a reduction from a DUI charge to reckless driving, rather than go to trial.

In a perfect world with only wise and fair prosecutors and defense attorneys, plea bargaining would be a constructive element in the criminal justice process. In an imperfect world, plea bargaining is an imperfect yet absolutely essential part of the process. Federal and state courts (most criminal law is handled by the state courts) should evaluate and oversee plea bargaining more acutely to limit the potential for coercion of defendants and undercharging of crimes.