Plea Bargaining from the Criminal Lawyer's Perspective: Plea Bargaining in Wisconsin

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PANEL DISCUSSION

PLEA BARGAINING FROM THE CRIMINAL LAWYER'S PERSPECTIVE: PLEA BARGAINING IN WISCONSIN*

PANELISTS

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United States Attorney, Western District of Wisconsin

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Nathan Fishbach
Whyte Hirschboeck Dudek S.C.

Deja Vishny
Office of the Wisconsin State Public Defender

MODERATOR

Daniel D. Blinka
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* This panel discussion was held as part of the Conference on Plea Bargaining on April 14, 2007, at Marquette University Law School. The transcript of the Panel Discussion has been lightly edited.
The primary purpose of the Conference is to present diverse views on plea bargaining. In addition to the articles, which represent varying academic and policy perspectives, we have assembled a panel of criminal law practitioners to contribute their insights and experience. Their remarks provide a window into how plea bargaining functions in the trial courts.

The panel consists of practitioners with backgrounds as prosecutors and criminal defense lawyers at both the state and federal levels. Their practice areas sweep broadly from homicide cases to white collar offenses.

The transcript below ranges over a variety of issues. It begins with brief introductions of the panelists followed by discussions of the following subjects:

- Plea Bargaining and the Role of the Prosecutor in Charging
- The Role of Defense Counsel in Plea Bargaining
- The Role of the Victim and the Impact of Victims' Rights
- External Factors Affecting Plea Bargaining: Sentencing Guidelines

For the reader's convenience, the discussion points above are marked in the transcript.

DANIEL BLINKA: Good afternoon. Those of you who were expecting or hoping for a musical interlude during the lunch hour are about to be sorely disappointed. But we thought that since this is a conference, and conferences are all about dialogue and discussion, that we'd present a round table discussion entitled Plea Bargaining in Wisconsin.

Now like most things in a criminal justice system, the reality is very different from the label. First, you'll see there is no round table in any way, shape, or form. Second, the title, Plea Bargaining in Wisconsin, connotes or at least implies that there may be something unique or special about how that practice is carried out in Wisconsin. I'm not sure of that, but I am sure that the people who are joining us on this panel today are likely to have far more insight into that than I do. It is really my pleasure to have assembled here today a panel that represents some of the very best criminal lawyers in the State of Wisconsin.

Let me start by introducing the panel. First, I'd like to introduce E. MICHAEL MCCANN. Mike McCann had the distinction of serving as the
District Attorney of Milwaukee County for thirty-eight years, from 1968 when he was first elected until January 1st of this year. Mike has been very active over the decades in the ABA’s criminal justice section. We are very pleased that he has joined Marquette Law School as a Boden Teaching Fellow and adjunct professor of law.

Sitting next to Mike, we have Michelle Jacobs. Michelle is the First Assistant United States Attorney in the Eastern District of Wisconsin. She has worked in that office for thirteen years in a variety of positions, including as chief of the criminal division.

The third individual is Erik Peterson. Erik is currently the United States Attorney for the Western District of Wisconsin, located in Madison. Erik has extensive experience working in the state criminal justice system as well. He spent seven years as the DA of Iowa County and three years as an Assistant DA in Richland County; thus, he has a background in state and federal, rural as well as urban, practice.

Next to Erik is Dean Strang. Dean is experienced in both state and federal criminal defense. He’s now in private practice in Madison with the firm of Hurley, Burish and Stanton. Before moving to Madison, Dean was the first Federal Defender in Wisconsin, located in Milwaukee. Dean has extensive trial and appellate experience including his role as co-counsel in a case that was much mentioned this morning, namely United States v. Booker, the landmark 2005 decision. While Dean was practicing in Milwaukee, we were very fortunate to have him teach a variety of courses on federal criminal procedure here at the Law School.

Next to Dean is Nathan Fishbach. Nathan is a former federal prosecutor who had a very distinguished career handling a number of very high-visibility cases. He is now in private practice where he handles any number of high-visibility white collar criminal defense cases for corporations and individuals for the law firm of Whyte Hirschboeck Dudek in Milwaukee.

And finally Deja Vishny is at the far end of the table. Deja is with the Office of the State Public Defender here in Milwaukee. She heads the homicide practice group in the State Public Defender’s Milwaukee office. We are also fortunate to have Deja as an adjunct professor at the Law School where she teaches a trial advocacy course. Deja is also on the faculty of the National Criminal Defense College.

So we have a very distinguished, very experienced panel, and I’m

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grateful that they were able to join us today.

Now in terms of the protocol, what I will do is ask a series of questions, and to the extent that we can draw upon the discussions in the first two panels this morning and in the third panel that will follow this afternoon, so much the better. Some questions will be directed to the entire panel. Others, however, will be directed more at the prosecutors or at the defense lawyers.

PLEA BARGAINING AND THE ROLE OF THE PROSECUTOR IN CHARGING

DANIEL BLINKA: The first thing that I want to address is the critical issue of the prosecutor’s discretion in plea bargaining. This is a very rich, very important issue that I would like all members of the panel to address. I’m going to ask the panelists to do something very difficult, which is to try and take something this complex, drawing upon their own experiences, and to try and capsulize it in maybe three or four minutes, if at all possible. Specifically, I’d like you to address the role of the prosecutor in charging and bargaining and the extent to which charging decisions are affected by plea bargaining considerations. In short, I want to consider the role of leverage. Mike, I’d like to start with you.

E. MICHAEL MCCANN: Sure. First, I want to thank Marquette for doing this. Having been a practitioner in the field all my life, it’s so important that the practice which governs so many dispositions in the United States of America be subjected to serious scrutiny as you are doing.

I finished law school in 1963 and started as an assistant district attorney. I was shocked to see in the more serious cases the prosecutor and the defense attorney would discuss with judicial involvement what the disposition of the case would be. They would then go out and, on the record, the judge would studiously extract from the defendant his promise there had been no deals made, that he was doing this freely. As a young lawyer, I was shocked by it. Everybody would attest to the judge, yeah, there had been no deals cut. Of course, there’s always a break after you conferred with the judge, the defense attorney went out, talked with the defendant, and then this went on the record to protect it from being overturned someday. That stopped in Wisconsin in a decision2 in 1967 or ‘68 where the court said that’s out, that’s going to

end, no more judicial involvement, no more secret deals, and so on. Everything's got to be on the record, and, as district attorney, I implemented that very aggressively: There is going to be no participation of the judges. You're going to put it on the record.

I think in assessing this, you have to have some basic idea what our policy was. Number one, open file, everybody was going to get the full file. Number two, we prized integrity. Ethical compliance was important. You would earn respect in our office by being an ethical person, and you would bring problems upon yourself if you acted unethically. Also, there was a time when we used to talk with the arresting officer and have the witnesses before us. That was the best possible way to assess the case. Most offices assess off paper (the reports written by police), as we do now presently. You rarely find, if ever, a police officer say, “this is a lousy case” or “this witness that accused this guy was drunk, I wouldn’t trust him in court.” Those who criticize plea bargaining fail to realize that, and they somehow accord to the initial prosecutor's decision to charge a pristine quality that's just totally inaccurate.

Charging is the least informed stage for the prosecutor. He hasn't talked to the victim, he hasn't talked to the witnesses, he maybe got a biased report from a police officer. That case is going to change to a very good extent, but there it is, it's issued at this least informed stage where you haven't heard from the defense or what defense is available, talked to the witnesses and so on. You do it under the press of time. You can't review many of these cases. If there's a hundred cases in the large metropolitan office, you can't lay over eighty of them for review next week. That's got to be resolved right then and proceed forward. So you're issuing charges many times with the realization that a final assessment must await additional information, which may well result in reduced charges. We had an express policy: no overcharging to gain a negotiating advantage. We adopted basically the ABA principles on charging from the prosecution standards. By the way, I'm on the panel reworking those standards right now, which will be the fourth edition, reviewing the prosecution and defense standards.

I always tried to hire people who acted reasonably. When I was a young man, I thought that there was a conceptual overlay between a person being kind and just and being liberal, but that isn't the case. Some of the meanest bastards I ever met were liberals, and some of the

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3. An “open file” policy generally means that the prosecutor opens his or her file to the defense, with the exception of work product.
most kind, gentle people were conservatives. I wanted people to charge justly, work the courtroom justly. As I grew older, I felt better justice arose with a mix.

For example, say a defendant charged with burglary is looking at seven plus years on a sentence. The guy is in here for the third time. The first time he was convicted of burglary for breaking into gas stations. He got probation. Second time he got probation and three months, or even three months at the House of Correction or the local jail. Now he's coming in for the third time for burglary. I'm the prosecutor in the case. Deja Vishny is the defense attorney. The charge carries seven years or even ten years. Deja and I have been practicing in front of Judge Smith for three years. We know Judge Smith is going to give this guy two or three years, no matter what I say and no matter how much she begs for probation. If I said five years or eight years, he's not going to get it. He's going to get two or three years. And is this guilty plea really a negotiation? Deja meets with me and asks if I am going to do something extraordinary. Am I going to push for four years? Is that going to happen? She wants to be alert to that. I want to know if she's going to do anything special. I tell her that I'll recommend two or three years. We both know, perhaps without even articulating it, that that's what the judge is going to give this defendant. So is that really a plea negotiation? Is there really a trade-off there where we realistically know that no matter what we do, this is probably how the judge will sentence her client. I don't look at that really as a bargain because there isn't a real trade-off there.

I've felt where there's potential for abuse is within the charging decision itself. What's the standard for charging? In our office, basically the standard was proof beyond a reasonable doubt. Is the proof strong enough to result in a jury verdict? Sometimes, however, you can't demand that level of proof. In a fast-breaking armed robbery case you may be identifying off pictures. That isn't, in my opinion, proof beyond a reasonable doubt, but you need an arrest warrant to take people into custody. So the potential for abuse turns on the charging standard and the practices within a jurisdiction, such as an open files protocol. I did not prize prosecutors who were “head-crackers,” guys that went for maximum sentences, because that isn't just. The people I prized as assistant district attorneys brought judgment and experience to the charging decision, a sense of fair play, a sense of justice, and that's a difficult challenge for all of us. Nor is charging a science that yields one correct answer. There are a hundred people gathered here today. We all think of ourselves as just people. Yet if I presented the case of that
three-time burglary, there would be a wide range of recommendations here.

DANIEL BLINKA: Thanks Mike. And I want to return to some of those points later. Deja, you heard Mike indicate that the official policy in Milwaukee prohibited overcharging, particularly to extort a plea bargain. As a member of the Office of the Public Defender, what’s your perception?

DEJA VISHNY: What Mike has said is generally true of the Milwaukee County District Attorney’s Office. As a person who also does office-wide training for the State Public Defender, I’ve spoken with defenders from across the state and I’ve had an opportunity to observe different charging practices in other counties. There are other counties that are going to be more likely to load up the charges, so to speak. When I say it’s generally true (of Milwaukee), I’m also saying it’s not true in each individual case. For example, there was a time when there was a tax stamp law on the books of Wisconsin that was frequently prosecuted by the Milwaukee DA’s drug unit. This law required anyone selling illegal drugs to purchase a tax stamp and thus pay the state taxes on the sale of unlawful controlled substances. It was a give-away charge; the prosecutor would dismiss the charge for not having a tax stamp in order to make it easier to obtain a guilty plea to the primary drug charge. The same kind of wheeling and dealing, so to speak, occurred with the penalty enhancer for selling drugs within 1,000 feet of a school. So in the drug unit, I think I did see more charging policies that were plea driven.

Another area where one sees this is in the domestic violence prosecution area. There are a lot of prosecutors who will really charge every possible crime in these cases. They know that domestic violence cases are more difficult to prove because the complaining witness, the victim, isn’t likely to show up in court. There are a lot of bail jumping charges issued in order to get an easy plea or secure a conviction in a case where they’re less likely to get it.

But one of the things I just want to add is there are a lot of constituent groups that people don’t always think about that influence both charging and negotiating decisions. They’re unofficial, but they’re important to people. For example, victims. Since the passage of the Victims’ Rights Act, there’s more concern about the victim. For

example, the prosecutor may think a case should be settled because it isn’t very strong, but is the victim going to make a big stink with the boss and go to the press? Is the prosecutor going to spend more hours dealing with this than she would trying the case? I’ve seen that happen.

And then there’s the role of law enforcement. I’ll just give you a very small story. I represented a young man on a drug charge. This wasn’t a big case. It wasn’t a homicide, but rather a very run-of-the-mill drug delivery to a police officer. A warrant went out for the defendant’s arrest, yet he wasn’t picked up for an entire year. When he got picked up, during the interim, the Wisconsin Supreme Court decided a case that basically made it impermissible to use a single photo identification procedure (known as a show-up); now the courts require that there be a photo or in-person lineup used to make an identification. There had been a single photo identification in this case. After the police officer had bought the drugs, he’d gone to the Sheriff’s Department, pulled the picture of the person named by the confidential informant, looked at the picture, said “that’s the guy,” and the warrant went out. Based on the new identification case, I brought a motion to suppress the identification because of the single photo that was used. I brought it to the attention of the prosecutor. He and I both knew that I was going to prevail on that motion unless the judge wasn’t going to follow the law. There was really no question about it at this particular point. We were also in front of a judge who did follow the law. But the prosecutor didn’t want to negotiate. The case was a felony. There was some other evidence that the state had besides the police officer’s testimony, so my client was willing to take a misdemeanor. The prosecutor involved in that case would not offer a misdemeanor until one day when we were in court on something other than the motion hearing. Why? Because he didn’t want to get into an argument with the police officer who had bought the drugs. The police officer was going to be angry and upset. He was from a small suburban jurisdiction. This was a big case to this police officer, and he was going to feel disrespected and unhappy with what occurred. Eventually one day, when we were just in court for a scheduling matter, the police officer wasn’t there, the misdemeanor was on the table, the client wanted it, the case settled. So, I think that does give you a little bit of a flavor about how things that you don’t necessarily think about come into play in these kinds of cases.

DANIEL BLINKA: Michelle, from the perspective of the Eastern
District of Wisconsin, to what extent are charging decisions affected by plea bargaining considerations?

MICHELLE JACOBS: In the Eastern District of Wisconsin, and I think in most federal jurisdictions, prosecutors have a lot of involvement in the cases well before the cases are indicted. We are working with the agencies and with the agents on investigations, often times really from the outset. It's not that we don't do any reactive cases, some gun work, bank robberies, things like that, but most of the time we've been involved in the case well before it's ready for charging. We're not necessarily reviewing the case, as Mike [McCann] said, on paper. Not that that doesn't happen, we get a lot of paper, but we've really been involved from the outset.

Now the standard for charging is dictated by the Department of Justice. And just like Mike said, in federal court, we're going to charge based on what we believe we can prove beyond a reasonable doubt. We're not going to be presenting cases to the grand jury when we think we can just get past the probable cause standard, which is the standard used in the grand jury. In terms of how the charges and charging decisions are impacted by plea negotiations, federal prosecutors, like the state, in most instances, have an open file policy. We know that any charging decisions that we make are going to be reviewed by the defense, in terms of reviewing pretty much every piece of paper we have from law enforcement. So we are going to seek charges, and the Department of Justice requires us to seek charges that are the most serious readily provable offenses. But when I say that, what I mean is the most serious charge that we believe, that we're confident we can prove beyond a reasonable doubt.

When I craft an indictment, just as an example, let's say in a wire fraud case, I may be charging ten counts of wire fraud in order to encompass a scheme to defraud that’s lasted over five years. I choose a variety of counts so that I can adequately and completely describe that scheme to defraud. Do I think if the defendant decides to plead guilty that I'm going to require them to plead guilty to all ten counts? No. But I'm also charging in order to ensure that if the case proceeds to trial, that I have again adequately described that scheme and I'm going to be able to present my evidence of the entirety of the scheme. In terms of a plea bargain or a plea negotiation, I don't really think of those dismissed charges as a “bargain.” Suppose I dismiss nine of those ten counts, in the federal system the sentencing exposure for defendants most often will be virtually identical to the sentencing exposure when they plead guilty to all ten of those counts.
In short, I have two things in mind. I have plea negotiations in mind, but I also have trial in mind. I’m trying to craft an indictment so that I will be seeking a plea to the most serious, readily provable offense for which I’ve got an adequate factual basis and that is going to resolve the case and which reflects all of the things that the sentence is supposed to reflect, including a restitution order for the victim.

So when I’m thinking through charging decisions, I am considering plea negotiations and trial. I’m trying to charge in a way that’s consistent with Department of Justice policy, but also those considerations down the road, depending on which way the case goes.

DANIEL BLINKA: Thank you. Nathan, you represent white-collar clients, and given your background in the Justice Department, at what point do you become involved in trying to influence the prosecutors’ perception of the case?

NATHAN FISHBACH: First of all, I’m not a criminal defense attorney. I’m a member of a corporate law firm. We do not provide criminal defense. I represent people who have misunderstandings with the government. [Laughter]

Generally, it’s a proceeding driven by bad manners as opposed to any type of crime. [Laughter]

To answer your question, I become involved at a very early stage, before the charge is even issued. This is because the government’s actions before the charge is issued are critical. The law enforcement process is so front-end loaded that you want to become involved at an early stage to participate in the crafting of a possible resolution. The type of white-collar cases described by Michelle [Jacobs] would bear this out. The question is not so much whether there’s a bank robbery and whether your client did it. Rather, it’s something quite different. Is this a crime or is this a regulatory matter? If it is a regulatory matter, should it be charged? Did this person have criminal intent? These are the types of issues that have to be answered early on.

My concern is that many of the federal agencies who investigate these cases devote a substantial amount of time and resources to the matters. Some investigations take eighteen months, two, two-and-a-half years. Naturally, many agents become quite attached to the cases because they have worked so hard on them. It’s very important for the defense lawyer to discuss the matter with the prosecutor at an early stage. The more time the investigators devote to a case and the more momentum the case gains, then the government becomes less inclined to decline prosecution.
What is my strategy? Very often, at an early stage, I prepare what is known as an “anti-prosecution memorandum.” A number of former prosecutors have written about what this is. In many U.S. Attorney's Offices, including Milwaukee, the prosecutor prepares a “prosecution memorandum,” describing the possible charges, the evidence supporting the charges, and the possible defenses. I prepare something different—an “anti-prosecution memorandum.” This is because in white-collar cases, it is not unusual for everyone to agree upon the facts. The issue becomes whether the events constitute a crime, so I bring that issue forward right away.

We talked a few moments ago about who is involved in the charging process. The most important people are the line attorneys because they will prepare the prosecution memorandum. This is the government's version of the events at issue, which often becomes “the bible” of the case for the prosecution.

There are supervisors who review the matter prior to the issuance of the charges. I would like the supervisors to review the anti-prosecution memorandum as a part of their consideration of whether charges should be issued.

I recall that when I was working on a criminal tax case as a prosecutor, the defense lawyer delivered a detailed oral presentation as to why his client should not be charged. I later reviewed the section of the IRS Special Agent’s Report which listed “anticipated defenses” and it said, “none known.” I want to make sure that the officials in the client agency and the prosecutors know what the defenses are. This is accomplished through the anti-prosecution memorandum.

Frequently, the supervisors in the client agency and in the Department of Justice in Washington do not advocate an aggressive charge. This is because they are concerned about this case’s impact upon other similar cases in the agencies around the country. If they believe adverse case law might be created through this prosecution, perhaps they will not proceed with the charge.

I think Professor Burke’s article is really helpful because she talks about the prosecutor’s motivations. You think about the line attorney, you think about the supervisors, and you think about the client agencies when informing the government of your defense through the anti-prosecution memorandum.

DANIEL BLINKA: Erik, from the perspective of a federal

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prosecutor with over ten years in a state system, how have you found the charging decisions come into play in affecting plea bargaining considerations?

ERIK PETERSON: In the federal system, I really don’t have a lot to add to what Michelle said. I think the Western District of Wisconsin is very similar to the Eastern District of Wisconsin. We charge the most serious readily provable offense. It happens all across the country. And really, in response to your question, “How does the charging affect your thoughts of the plea later on down the road?” we expect a plea or a resolution to the most serious readily provable offense, whether that means a plea or that means trial and whatever happens at trial. The federal system just isn’t made to handle what happens sometimes in the state system, where a felony is dropped down to a misdemeanor. It just doesn’t work that way in the federal system, especially with the sentencing guidelines. But I don’t have a lot to add to what Michelle said.

DANIEL BLINKA: What about your experience at the state side?

ERIK PETERSON: On the state side, again, I really agree with what Mike [McCann] said—the benefit of going last, I guess. You never want to see overcharging. Having been an elected DA and also an assistant DA, you never want to see overcharging to gain some advantage.

DANIEL BLINKA: Erik, let me just stop you. This is the teacher in me. What do you mean by overcharging?

ERIK PETERSON: Take the tax stamp example [used by Deja Vishny]. I mean, if you really don’t need it, if there’s no point in adding the charge, if the thought process—and who knows, you can never get into an assistant DA’s head—is “I’m going to throw this in to get a plea but I have no intention of proving this up at trial,” then you have a real problem. You should only charge what you intend to go through with later on down the road.

Comparing state to federal practice, the biggest difference I’m seeing, Michelle alluded to it, is the early involvement of the federal prosecutor in the investigative stage of the case. A prosecutor can help shape and craft the case; you know it pretty well. You don’t necessarily know the defense perspective but you know it fairly well early on. As a state prosecutor, I’d get a stack of reports with a bow wrapped around them dropped on my desk. You read them and you charge the case. You have hundreds of these things and you run through them. As a prosecutor, you haven’t been involved in the investigative process, you
haven't grand juried witnesses, and you haven't evaluated them yourself. While a defense lawyer is very valuable in a federal case, in a state case, the defense can open your eyes to things that you had no idea about unless it was contained in the police reports. You really don't have any other knowledge of the case. So it's a little different in that regard, based on our early involvement on the federal side.

DANIEL BLINKA: Thank you. Dean [Strang], as one who has defended both high visibility state and federal cases, in terms of overcharging, what are your perceptions of how prosecutors exercise their discretion?

DEAN STRANG: Overcharging is common, but commonly unintended. I think in federal court, when I say unintended, in the cases that Michelle [Jacobs] is going to charge as mail fraud or wire fraud, functionally she has unlimited discretion. The unit of prosecution is so flexible by design in many offenses in the United States Code, that she really can do almost anything she wants. You also have, in federal court, a heavy reliance—obviously I'm not saying anything you folks don't know—on conspiracy charges, which broaden as a practical matter the evidentiary scope that she'll enjoy at trial. She also has much latitude in picking and choosing to some extent—albeit with Main Justice looking over her shoulder—but picking and choosing among mandatory minimum sentences that may apply.

I see these things as a defense lawyer. I see cases as almost routinely overcharged at least when one looks at what the client probably really intended, what his station in life has been and the difficulty of a conversation with a client in which I say, "You don't understand, to win this we need to run the board. For the prosecutor to win it, she needs to win one count and so when this jury compromises, the defense just loses, we flat out lose."

In state court, at least my experience has been that these things also usually are overcharged, although probably unintentionally. It's a function typically in state court of the prosecutor either misapprehending the probable state of mind of the defendant and charging intent when it really ought to be recklessness, for example, or the prosecutor working off paper, as people have described, rather than working off people.

THE ROLE OF DEFENSE COUNSEL IN PLEA BARGAINING

DANIEL BLINKA: What I'd like to do is turn to the other side of
the plea bargaining or plea negotiation equation, which is the role of the defendant. I think that there’s a tendency in this literature to focus on criminal codes, sentencing, the role of the prosecutor, all very understandable and important, but the other side of it is the role of defense counsel. Professor Bibas as well as Professor Covey this morning talked about the role of the defendant and making “the right call” or “the right decision.”

When a prosecutor makes an offer to you, ethically you are obligated to take that to the client because it’s the client’s decision. What factors do you take into account in deciding what you’re going to say to your client or how hard you’re going to push the client to accept the negotiation? My assumption is that most of the time, good lawyers as you are, the client is going to follow your advice.

DEAN STRANG: And that’s my starting point. I can dress this up so that you don’t all think I’m violating the Wisconsin Rules of Professional Conduct, but I decide whether the client is taking this plea agreement. I decide it nearly 100% of the time. That’s even true in private practice, although that’s where the fractional difference would come in. I was a public defender backwards in the sense that I was fifteen years in private practice before I took my first job as a public defender. It was humbling to see just how completely I was the decision maker for that client base. But even with retained clients, I try to practice law empathetically; I’m avoiding a buzz word like holistic practice because I don’t subscribe to it entirely. But if I’m trying to practice with empathy, as I am, I also think it’s my responsibility to interpose myself between sovereign and client and to shoulder a good deal of the responsibility for whether that plea agreement is made. Now, if I’ve developed a relationship of trust with the client, he never is going to—almost never—is going to second-guess me. So I’ve got to get it right. Certainly, I take every offer to the client; it never requires a hard sell, and—“never” is too strong—it almost never requires a hard sell for the client either to take it or to decline it when that makes more sense. Again, I could dress it up, but that’s the truth.

DANIEL BLINKA: Deja [Vishny], as a public defender representing indigents, is it your experience as well that clients make you the decision maker by default or otherwise?

DEJA VISHNY: It’s not really by default, but I agree that I’m mostly the decision maker. I don’t think it’s 100% of the time. In other

words, I have had clients decline to do what I thought probably would have been a better outcome for them. But one of the things that I have found is that although I may be the decision maker, it's done by empowering the client to come to the best decision for their case. In other words, the more they are informed about their case—reading the discovery, being present when motions are litigated, reviewing the jury instructions and the law in their case—the more they are empowered. Going through this process enables the lawyer to hear what the client wants, what their concerns are and what's really important to them in the case. The better a lawyer understands what the client wants, the better the lawyer will perform as a negotiator.

I have to tell you that unfortunately I've seen a lot of lawyers yelling at their clients in the bullpens, trying to pressure their clients into plea negotiations. It is just the wrong thing to do. Even if the lawyer is correct in his judgment that the client is going to get more time if he or she has a trial, or that it is in the client’s best interest to take the negotiation, the more the lawyer really empowers that person and helps them to make the decision, the better off the client is going to be and the better off one is as a lawyer.

A client has to have confidence in his or her lawyer. In general, clients have less confidence in public defenders because we’re appointed and they see us as a part of the state. I think it’s very important that the public defender goes and sells herself to the client and makes it really clear to the client that—not that you have me and you have no choice but to have me—but that you want to have me as your lawyer. I think that really ultimately helps a lawyer in negotiations with clients. Clients need the benefit of our opinions, though we may put them in a subtle way as to whether negotiations should be accepted.

DANIEL BLINKA: Nathan?

NATHAN FISHBACH: By the time that the client reaches the decision of whether to agree to a proposed resolution short of trial, the client’s life has changed. For a corporation under investigation, the corporation must be concerned about its different stakeholders, such as lenders, customers, vendors, licensing boards, etc. These stakeholders have an impact upon a corporation even before the corporation decides to plead guilty or not guilty.

And so, after you review the evidence, you say to the client, “Well, do you want certainty?” I state: “Everyone wants an Act Two. So the question is do you want certainty or do you want to roll the dice?” And that really is what the decision comes to. At this point in the client’s life, he or she will never be the same. The question becomes: How does the
client pick up from the ashes and move on?

**THE ROLE OF THE VICTIM AND THE IMPACT OF VICTIMS' RIGHTS**

DANIEL BLINKA: What I’d like to turn to now is something that was adverted to earlier, which is the very different role of the victim in the criminal justice system today. Mike, let me start with you. From the vantage point of thirty-eight years of experience, how has the involvement of victims or victims’ families changed over those decades?

E. MICHAEL MCCANN: Very dramatically. I recommend that you read an article out of the *Notre Dame Law Review* from about the early 1970s.\(^{10}\) The formal subpoena used in Milwaukee County employed ancient English, to the effect that, “be ye, therefore, setting aside all your affairs, come to the courtroom” and so on. Citizens were treated like chunks of meat that were jerked back and forth by the prosecutor. We were all taught in law school that the state is the victim in the case, that these people are only witnesses. That was the ancient idea, of course. Once, a woman in a hearing stood up and said, as things began to change, “The state wasn’t raped, I was raped!” And it was changing—really they were abused.

I remember it very well because [the Milwaukee County District Attorney’s office] got one of the two largest grants in the country. When Donald Santerelli was chosen to head the LEAA\(^{11}\) at the start of Nixon’s second term in 1972, Santarelli later told me that he didn’t know what to do. He was afraid of the serious conservative right wing agenda and so came up with the idea of promoting victims’ rights. And he announced that publicly. I read about it in the newspaper. Mike Ash had written the article I described earlier. He was on my staff and we had a friend about half-way up the hierarchy at LEAA. We called and made an appointment and put together about a five-page package requesting $75,000 to advance a victims’ rights program in Milwaukee County. I flew down to DC to meet this chap, but he was ill that day, which usually meant you’d be bumped down. Instead, I was bumped up, which surprised the hell out of me. And then there’s a chap, already he’s got the file, going over it, shaking his head back and forth, and he finally said to me, “This is way too small, we want something big.” We came back and got a $1.2 million dollar grant, one of the first large

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11. Law Enforcement Assistance Administration
national grants to promote victims' rights. I became active in the ABA in that regard, served as the chair of the victims' committee of the ABA Criminal Justice Section.

That was the beginning, the early stages. Wisconsin was one of two states to adopt victims' rights programs. Victims are in a totally different situation now than they were then. Radical change began I'd say with Donald Santarelli's statement in 1972 or January of 1973. Money went into it. Victims' rights became a federal program across the nation. There were no victim-witness people in the courts at that time. The victims' rights idea hadn't yet been conceptualized. Go back and read the old literature. You don't see victims' rights spoken of before the early 1970s.

So it's been dramatic changes. Does it affect plea bargaining? Yes. By law, in our state, we have to notify the victim that he has a right to participate in plea negotiation, to express to the district attorney what his positions are, not to govern the process, a right to be notified of it and to express his position on it. Victims have a right to speak in court at sentencing. Judges are to listen to them. I think sometimes defendants consider what will happen if the victim comes into court and testifies and so on.

So victims have changed the process dramatically, properly and good. Some of them are vindictive. Some of them aren't looking for justice, they're looking for vengeance. And it's up to a district attorney to see that that doesn't happen, that you don't have the courts become instruments of excessive vindictiveness and improper and unjust sentencing because of that. But that's part of the DA's role and that's certainly the role of the judge. The role of the victim is definitely dramatically changed, unquestionably.

DANIEL BLINKA: Mike, do you find that the victim has become a de facto decision maker? In Wisconsin, state district attorneys are elected every four years. The reality of the politics is that you have to consider whether some victim is going to say, "I will not accept that deal. I will take it to the press. I will scream loud and long." To what extent do you grapple with those concerns?

E. MICHAEL MCCANN: Any district attorney who would be induced by that to recommend an unjust sentence is a pusillanimous individual who doesn't belong in the criminal justice system. There will be some of course who will be persuaded by that. It's sometimes difficult to educate the public. You see a victim aggressively victimized and there's understandably excitable sympathy. But that doesn't mean there should be an unjust sentence. There are pusillanimous judges who
will be influenced by that, no question about it. This is hard to believe and it's something you'll never read in the literature, but those of you who have practiced in the court, you know it's true. Some judges will give one sentence with a reporter in court and a different sentence if a newspaper reporter is not there. That's a tragedy of our system.

Are there DAs that will do that? Yes. Are most DAs rogues? No, I don't think they are. Do most DAs go for the longest sentence? I don't think they do. I have a son who's a lawyer and he's thirty-three years old. We're having a pizza one day in Chicago and I asked my son, "What's your salary?" Now I've been practicing for at least thirty years and consider myself a pretty damn good lawyer. Yet his salary already exceeds mine by many thousands of dollars. And I think to myself, "Why the hell am I picking up the bill for this pizza?"

But many DAs are in office because they're drawn for another reason. Those of you who practice know that. The lady that spoke about passionate DAs obviously has an affection in her heart for DAs. The depiction of DAs as rascals and rogues, as hard-fisted boobs such as in the Perry Mason series—you know, Mr. Burger, the last guy onto what's happening—is a stereotypical description. Are there DAs with excessive ambitions? Yes. But for the most part, I think they're decent honorable people. I graduated from two law schools. Every time I've seen a break-out of how economically the people in my class have done, I have always been in the bottom quartile. So the people that choose a public career for the most part are foregoing many advantages and are in my opinion, for the most part, decent people who are not hard-fisted skull crushers.

DANIEL BLINKA: Erik—and I don't mean that the last remark somehow implicated you, but the—

ERIK PETERSON: Thank you for that. I appreciate it.

DANIEL BLINKA: Erik, would you contrast your experience with the role of the victims in both the state and the federal system?

ERIK PETERSON: Sure. First I'll say that I'm realizing that Dean [Strang] and I are not that far apart. Maybe we should just switch jobs for a week. He talked about his role with his clients and making the decision. All that the victims' rights laws require, very simply, on both the state and federal sides, is consultation with the victims. It's not that prosecutors have to do what they [victims] want. Now pragmatically that can be difficult. I understand those concerns, but really it's about

education of victims. And this applies really at both the federal and state levels.

The biggest problem for victims, if we’re talking about preconceived notions, is the word “bargain” in “plea bargain.” When victims come into the room, they usually haven’t met with the prosecutor first; rather, they’ve met with the Victim Witness Coordinator in the office. The phrase “plea bargain” is commonly used; it’s sometimes in letters sent to victims and it’s what the Victim Witness Coordinator says. When family members talk about it, they say, “Oh, you can’t take a plea bargain, that’s horrible.” Victims come in and think you’re giving away the store. I’d walk down the street—when I was DA in a small county—or get stopped in Wal-Mart and people asked, “Why did you do this plea bargain, you’re giving everything away?” This was ludicrous if you knew any of the facts of the case, but it’s all about the word “bargain” and what people seem to assume from watching television, news coverage, whatever else.

So that’s the biggest problem. I see that on both levels, state and federal prosecution. The prosecutor must educate victims, talk with them about what the process is, whatever I want to call it, pre-trial resolution, plea agreements, et cetera. We could talk about threats by victims saying “hey, I’m going to go to the press,” yet I don’t think that ever happened to me. And maybe I’m just lucky, but in eleven years, that hasn’t happened. Once I explain “here’s what I’m doing, here’s why, here are the difficulties of the case, here are the choices we have to make,” I really haven’t had problems. And there are huge differences at either level, the state or federal level, pragmatic differences and sentencing guidelines, et cetera. We can probably give victims, especially in the Western District of Wisconsin, a little better idea what a sentence is going to be with the sentencing guidelines, even post-

**Booker** in the Western District.

**DANIEL BLINKA:** Michelle, from the perspective of the Eastern District and as one who’s handled a variety of federal prosecutions, first, does the victim’s voice differ or become stronger in certain classes of cases than in other classes of cases? Second, when do you consult the victim? We know that these statutes require consultation. Is it when the decision is still dynamic and fluid or is it after you’ve decided what to do and then you take it to the victim and say this is what I recommend?

**MICHELLE JACOBS:** Well, with respect to what kinds of cases and is it different in different kinds of cases, of course we prosecute a lot of non-victim cases where we’re not dealing with this issue. But I think
that it resonates for me in different ways depending on the kind of case it is, depending on what I know my evidence to be or not to be, depending on what I think a trial is going to look like for that victim, and the likely outcome at trial. There are all kinds of considerations that I’m thinking about when I consult with the victim.

Just as an example, I prosecuted a case a couple of years ago involving the homicide of a father of four young boys. His wife had never worked outside the home and his fifteen-year-old boy was going to step up—and really did have to step up—and become the father of the household and that sort of thing. And when we were addressing potential plea offers and plea negotiations with that family, there were emotional considerations that I wanted to make sure that I could gently and appropriately relay to that family and to the mother of those children, the spouse of the victim, that are different than a white-collar case where my victim maybe is a bank or investors. And a lot of times, that’s different, too, depending on whether you have elderly investors who have lost their retirement income. Depending on the case, it seems to me so different in the way that it resonates and how I have to approach the consultation with the victim.

Now, I think that all prosecutors look at that consultation a little bit differently. For me personally, typically by the time I’m at a point in a case where I’m even starting to think about presenting a plea offer, I have in my own mind what I think the appropriate resolution from the government’s perspective is going to be or should be. So I can’t say that I go into a consultation with a victim with no idea what I’m going to offer or want to offer, but I certainly approach that consultation with the victim before I have made my mind up. If I’ve completely made up my mind, it seems like somewhat of a meaningless “consultation.” I think it is important for the prosecutor to appreciate what the impact of these cases are on victims. It could be very easy, I suppose, to step back and wall myself off from that, get my offer in mind, tell the victim okay, what do you think and tell me whatever they want to tell me and walk away. But I would not be doing my job—bottom line. And so when I go into those consultations, I’m going in listening, trying to understand and appreciate what kind of impact that case has had.

I also, though, agree that that consultation has to be an educational process with the victim, if you haven’t done that already. I’m prosecuting a case right now in the Northern District of Illinois. It’s one of these child support enforcement cases. There’s been a guilty plea, and the victim is out about $140,000 in past child support. The defendant has acknowledged through his plea that he has never made a
payment voluntarily in the child’s eighteen years. This is an autistic child, so there were a lot of considerations in working with that victim very early on, in educating her about the process, educating her about what the potential was in terms of restitution collection, what a trial would be like if we were to go to trial, whether a trial was going to make any real and significant difference in terms of sentence. There are a lot of considerations. But I worked with her early on in the case, before we got to the point where there was any interest shown by the defendant in a guilty plea. And if I’ve worked with the victim and they understand the system and they understand the likely outcome, then by the time we get to that point, their input can be much more meaningful. Just like Dean [Strang] was talking about regarding input with a client—in some ways I view that victim as a client.

**EXTERNAL FACTORS AFFECTING PLEA BARGAINING:**

**SENTENCING GUIDELINES**

**DANIEL BLINKA:** What I’d like to do in the short time we have remaining is turn to some more pointed questions, particularly the external factors that affect plea bargaining, such as the going rate. One of them, of course, has been the advent of sentencing guidelines, both before and after the *Booker* decision. And since we have Mr. Booker’s lawyer with us today, it seems that the best person to address this question first would be Dean Strang. Dean, have you seen the going rates change since the *Booker* decision came down?

**DEAN STRANG:** It depends radically where you are, in which district and within a district, in front of which judge. It really does because for instance, in Erik’s [Peterson] district, and there are a few like it I suspect in the country, *Booker* is nothing but a name. It has changed nothing in the sentences that the district court imposes. Now, in the Eastern District [of Wisconsin], which is a little bit different, you have a variation in how quickly the district judges have shaken off the habituation to the sentencing guidelines; here and there you have a judge who realizes he or she isn’t caged anymore and can sort of wing it around the room a little bit rather than just sitting on the perch without the cage. In the Eastern District and many others, the prosecutors’ ability to define and control the sentence unquestionably has been reduced. And part of what has happened, as a practical matter, is the defendant has been empowered to plead blind, to simply take his chances, so to speak, at sentencing. In these districts, *Booker* really has changed not only the ability of the prosecutors to dictate the sentence but to enforce appeal waivers, for example, or other collateral, onerous
terms of a plea bargain, because we can go in and just plead. So that's made a difference.

Again, though, in other places, not so. I mean, Freddy Booker's experience in the Western District of Wisconsin illustrates the point. The case came out of Beloit and was prosecuted in Madison, and its outcome captures the situation in the Western District [of Wisconsin] and some other districts. He came back for resentencing and got, to the very day, the same sentence he had gotten originally. So what he got out of that case is a certain rock-star quality in prison. [Laughter] People in federal prison want to come up and touch his shirt or something. But that was it.

DANIEL BLINKA: Erik, your response?

ERIK PETERSON: Dean's right. In the Western District of Wisconsin with the two judges we have, I think the figure—you may know—ninety-one percent—roughly ninety-some percent of all sentences are still within the guidelines. *Booker* pragmatically has not changed the practice of the judges in the district, so that's absolutely on point. I'm curious—and I'm just curious—I don't know the answer. You talked about the cage being removed. In other districts, is it always down, does it go up at some points?

DEAN STRANG: Yes.

ERIK PETERSON: I'm just curious, I don't know. I don't get to other districts.

DEAN STRANG: There are *Booker* losers just as there are *Booker* winners. To some extent all defendants, particularly on a plea agreement, are *Booker* losers in that what a client tends to value most—and this will resonate with what our social scientists were saying on the other panels—what the client tends to value most is predictability, is some certainty. You know, "If I do this, what will happen? I'll miss my kid's eighth grade graduation, but I'll see the high school graduation," or "I can bet my wife will stick around if it's three years in prison, but I'm not so sure she will if it's six," or whatever. And *Booker* has eroded that ability of defense counsel to say with a high degree of likelihood, look if you plead guilty, this is what's going to happen. After *Booker*, there certainly are sentences that are higher than the advisory range. I was practicing before the sentencing guidelines and *Booker* brings us back to the art of counseling as defense lawyers and attaches a premium to understanding the judge, where the guidelines discounted that experience and understanding.

DANIEL BLINKA: In the interest of predictability and certainty,
and as long as we’re on *Booker*, I’ve been instructed that we end this session on time. Please join me in thanking our panel.