Structured Plea Negotiations Test Design

U.S. Department of Justice
Law Enforcement Assistance Administration
National Institute of Law Enforcement and Criminal Justice

Program Test Design documents are developed by design groups composed of representatives of the National Institute of Law Enforcement and Criminal Justice and various other LEAA and Department of Justice program offices. The documents are prepared with contractual assistance, and are reviewed by a panel of experts conversant with the critical research and operational issues in the topic area.

The design group for the Structured Plea Negotiation Test Design consisted of the following individuals:

National Institute of Law Enforcement and Criminal Justice, LEAA

Anthony Pasciuto, Chairman
G. Martin Lively
Linda James McKay
C. James Scheirer
Ben Shapiro
Frank Vaccarella

Consultant support was provided by Robert Spangenberg, Kenneth Mathews, Jr. and Deborah Day; Abt Associates, Cambridge, Massachusetts.

Advisory Committee members were:

William Bauer, Judge. 7th Circuit Court of Appeals, Chicago, Illinois
William Delahunt, District Attorney, Norfolk County, Massachusetts
Wayne Kerstetter, Professor, University of Chicago Law School, Center for Studies in Criminal Justice, Chicago, Illinois
Arthur Lemann, Professor, Loyola University Law School, New Orleans, Louisiana
William McDonald, Institute Deputy Director, Georgetown University Law Center, Institute of Criminal Law and Procedure, Washington, D.C.
Norval Morris, Professor, University of Chicago Law School, Chicago, Illinois

May 1979

Henry S. Dogin
Administrator
Law Enforcement Assistance Administration

Harry M. Bratt
Acting Director
National Institute of Law Enforcement and Criminal Justice

Preface

The National Institute of Law Enforcement and Criminal Justice, the research arm of the Law Enforcement Assistance Administration, is sponsoring a field test of the concept of structured plea negotiations which has been proposed as a means of:

- implementing a process of plea negotiations that is equitable to all parties such as the victim and the defendant by making the process more explicit and open;
- implementing a procedure which is efficient and benefits the court system as a whole by reducing processing time and delays;
- developing an effective plea negotiation system which increases the victim's and the defendant's perception of legitimacy and fairness in the process.

The basis for the field test is a Program Test Design, a document with detailed specifications of selected program elements. The goals of each field test effort are to determine the effectiveness of these elements or program strategies in multiple settings and to examine their transferability to other jurisdictions.

A number of single, local court systems of general trial jurisdiction have experimented with the development and implementation of various forms of structured plea negotiations. In order to assess the feasibility of the concept, the National Institute has devised a test design which will involve selected courts within one jurisdiction in three different states. Both processes of development and implementation as well as their outcomes will be evaluated by the Institute.

Table of Contents

I. INTRODUCTION

For many years, guilty pleas have played a significant part in the processing of cases through the criminal justice system. Surveys conducted during the 1920's indicated that over three-fourths of the felony cases in major cities such as Chicago, Detroit, Los Angeles and Denver were terminated by plea rather than trial.[1] Although guilty pleas were numerous, there was little activity visible to the casual observer that described the operations of the decision-making process that resulted in these pleas. In some instances, the very existence of any process to resolve cases before trial has been denied.

Although terminology varies considerably between and within jurisdictions, the phrase "plea bargaining" has been used to indicate the process through which an agreement to plead guilty is made in return for some consideration by the government.[2] Two forms of plea bargaining--explicit and implicit--were identified by Donald Newman in 1966.[3] An explicit plea bargain is one that occurs after negotiations between the defendant (through an attorney) and the prosecution. The type of concession which is sought can vary widely but frequently involves a charge reduction, a sentence recommendation, a

---

1 Albert Alschuler, "Plea Bargaining and Its History," conference discussion paper presented at the Special National Workshop on Plea Bargaining, French Lick, Indiana, June 15-17, 1978.

2 Herbert S. Miller, William F. McDonald, James A. Cramer, Plea Bargaining in the United States, Georgetown University Law Center, (Washington, D.C., Government Printing Office, 1978) p. 4.

3 Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, (Boston: Little, Brown & Co., 1966).

promise not to oppose a request for leniency or other specific considerations. Implicit bargaining does not involve direct negotiations for concessions. Defendants plead guilty in these situations because they have observed or have actually been informed that the punishment will be more severe if they are convicted after trial.[4]

Whether plea bargaining is primarily explicit or implict in any particular jurisdiction, it is frequently conducted behind the scenes, away from any public or judicial scrutiny. Plea bargaining has generally been a secretive process that has led many citizens to doubt the integrity of the judicial system since it appeared that "deals" were being made daily at the expense of the victims of crime and society as a whole. Not only was plea bargaining conducted in private, but the participants were not guided by any recognized standards nor was there any form of appellate review of the negotiating process.

In the 1960's, national attention began to focus on the issues raised by plea bargaining. In 1967, the President's Commission on Law Enforcement and Administration of Justice supported the concept of plea bargaining but pointed out the need for standards.[5] The next year the American Bar Association recommended standards to make the plea bargaining process more subject to judicial scrutiny and to lessen the secretive nature of negotiations.[6]

The National Advisory Commission on Criminal Justice Standards and Goals did not accept the view of plea bargaining as a necessary component of the criminal justice process. In 1973,

---

4 Miller et al, pp. 6-7.

5 President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: Government Printing Office, 1967).

6 American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Approved Draft (Chicago: 1968).

this Commission targeted 1978 as the year by which all plea bargaining would be eliminated.[7] Although some jurisdictions are currently involved in efforts to eliminate plea bargaining or at least certain categories of it, this goal has generally not been adopted on a wide scale. The notes accompanying the proposed amendments to the Federal Rules of Criminal Procedure in 1974 typified the more common attitude towards plea bargaining and gave some insight into the lack of response to the NAC goal. The notes spoke of the "increasing acknowledgment of both the inevitability and the propriety of plea agreements" and referenced recent court decisions describing plea bargaining as "an essential component of the administration of justice. Properly administered, it is to be encouraged." Santobello v. New York 404 U.S. 257, 260 (1971). Chief Justice Warren Burger has estimated that, since 90 percent of all felony cases are resolved by guilty pleas, a 10 percent reduction would double court costs and an additional 10 percent decrease would triple the workload of the courts.[8]

In 1975, recognizing that little empirical research on plea bargaining existed, the National Institute of Law Enforcement and Criminal Justice of LEAA (NILECJ) undertook several efforts to begin to build a solid base of knowledge. NILECJ commissioned Georgetown University Law Center to conduct a study focusing on the nature and extent of plea bargaining throughout the United States. For purposes of the study the researchers developed a sufficiently broad definition to encompass the variations of plea bargains: plea bargaining involved "the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state."[9] Twenty-five counties and the state of Alaska were visited as part of this research. The major findings of this study were that plea bargaining occurred in some form in almost every jurisdiction studied, that overt negotiations were the most frequent type of plea bargaining and that, in many jurisdictions, judges were actively involved in the negotiation process.

---

7 National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on the Courts (Washington, D.C.: Government Printing Office, 1973).

8 Miller et al, p. 23.

9 Miller et al, p. 4.

Another Institute-funded research project involved the implementation and evaluation of a pretrial settlement conference in Dade County, Florida conducted by researchers from the University of Chicago Center for Studies in Criminal Justice.[10] The design of this conference was based on the proposals of Norval Morris in The Future of Imprisonment.[11] Morris recommended a pretrial conference to discuss the settlement of a case in which both the victim and defendant would be permitted to participate. In the Dade County project, victims, defendants and the police were given the opportunity to attend the conference. The project studied the impact of the test procedure on case processing and measured the satisfaction of the participants with the process and the outcome. The results of this evaluation were in part inconclusive, due to a variety of factors, including low rates of attendance by the lay participants and the existence of a similar pretrial process before the test was implemented. The research did, however, serve to dispel several common misconceptions about structured plea negotiations. There were no emotional outbursts between victim and defendant that disrupted the proceedings. The presence of lay participants did not hinder the development of realistic outcomes as had been feared. Defendants did not report feeling that they were coerced into an agreement by the presence of a judge. Basically, the Dade County experiment proved that structured plea negotiations can work but left open questions relating to the impact of such a procedure.

A later study of plea bargaining in the District of Columbia Superior Court system was conducted by the Institute for Law and Social Research,[12] again with NILECJ funding. The

---

10 Wayne A. Kerstetter, Anne M. Heinz, Pretrial Settlement Conference: An Evaluation Report, Center for Studies in Criminal Justice, the University of Chicago, December 1978.

11 Norval Morris, The Future of Imprisonment, (Chicago: University of Chicago Press, 1974).

12 William M. Rhodes, Plea Bargaining: Who Gains? Who Loses?, Draft Report, PROMIS Research Project Publication 14, Institute for Law and Social Research, May, 1978 (not yet published).

study examined probable outcomes if cases went to trial rather than being settled by plea bargains. An analysis of gains and losses by the prosecutor, the defendant and the public was developed. The researchers were able to predict that a fairly significant chance of acquittal existed if in fact the defendant had gone to trial. Sentencing concessions for most types of cases were relatively infrequent so the defendant did not gain lenient treatment by his plea. A plea bargain was less costly than a trial on the resources of the prosecutor.

Finally, in the summer of 1978, NILECJ funded Stanford University to conduct a conference reviewing the current research on plea bargaining and identifying future research needs. Leading authorities in the field held discussions at French Lick, Indiana. The proceedings of this conference will be published in the near future.

All of the research that has been done on the subject of plea bargaining indicates that it is likely to remain part of the processing of criminal cases in most jurisdictions for the predictable future. In order to obtain additional information concerning the impact of this process on the system and society, the National Institute in 1979 and 1980 will conduct a carefully designed test of a structured plea negotiation conference in several selected jurisdictions. The following material describes the purpose and design of this structured conference and the method of evaluation.

II. PURPOSE OF THE STRUCTURED PLEA NEGOTIATIONS TEST

The Dade County pretrial settlement conference was developed to test the feasibility and impact of a particular type of structured plea negotiations. Although many of the concerns that were raised about the feasibility of this project proved to be unfounded, it was very difficult to measure the benefits of the pretrial conference. Research results were mixed in all categories of analysis. Since the experiment was conducted in only one jurisdiction, it is hard to generalize the findings to other sites. Conclusions about the effect of the process within Dade County itself are also difficult to draw due to the court's occasional use of a pretrial conference involving the judge, prosecutor, defense counsel and sometimes the victim, prior to the experimental project.

The experience in Dade County emphasizes the need to test structured plea negotiations in several additional jurisdictions. This will allow an analysis of the concept in multiple environments and will provide additional insight into the effects resulting from a plea negotiation conference.

There are three goals to be assessed in the structured plea negotiations test design. These goals are to increase the equity, the efficiency, and the effectiveness of plea bargaining. The test of the proposed design will allow each jurisdiction to determine whether the structured plea negotiation conference achieves the desired goals and objectives.

The first goal of structured plea negotiations is to implement a process of plea negotiation that is equitable to all parties concerned. Specific objectives related to this goal are:

- to produce plea agreements that are more consistent by making the process more explicit, open, and subject to judicial review.

- To produce agreements that are fair to all parties by providing victims and defendants the opportunity to present their views, needs, and knowledge of the case within the plea negotiation process.

The second goal of the program is to implement a procedure that is efficient and effects the court system as a whole. Associated objectives of this goal are:

- To reduce the average time between initial indictment and final case disposition.

- To reduce delays and minimize disruption of court scheduling caused by plea negotiations.

The third program goal, to develop an effective plea negotiation system, incorporates the following objectives:

- To increase victim perception of legitimacy and fairness of plea negotiations by involveing victims in the process.

- To increase defendant perception of legitimacy and fairness of plea negotiations by involving defendants in the process.

By implementing and evaluating structured plea negotiations in a variety of jurisdictions, the impact of these objectives can be assessed. Other jurisdictions can then use this research to develop a formal approach to plea negotiations that is best suited to their needs.

III. PRE-CONFERENCE PROCEDURE

A. Introduction

In order to maximize the proposed objectives of the structured plea negotiation conference it is necessary to spell out the step-by-step procedures leading up to the conference itself.

Some slight modification of this procedure may be necessary in some sites. These modifications, however, should be made only to comply with the local rules of criminal procedure and in no case should changes be made in a way that would negate any of the stated objectives of the program. Since procedure varies from one jurisdiction to another, reference should be made to the definitions contained in Chapter VIII, page 32.

B. Step-by-Step Sequence of Events

(1) Following the initial court appearance of the defendant in which a plea is entered, test and control cases will be randomly selected. Cases in which defendants are charged with capital crimes will be excluded from the selection process.

This initial court appearance is the one made by the defendant in the court of general trial jurisdiction and not one made in a lower court for purposes such as a preliminary hearing.

(2) Immediately following selection, a staff member will notify the test judge that a case has been selected for inclusion in the test group.

(3) For all test cases, the participating judge will notify the prosecutor, defense counsel and the defendant that the case has been selected for inclusion in the test group. Explanatory documents will be presented to the defendant and defense counsel at this point.

(4) At an early stage in the process, the judge will inform both defense counsel and the prosecutor that any request for postponement of the conference must be presented to the trial judge at least 14 days before the scheduled date. In addition, if the defense decides to cancel the conference, defense counsel must inform the judge and the prosecutor at least 14 days in advance of the scheduled date. It will be presumed that the conference will convene on schedule if it is not specifically cancelled.

(5) It shall be the responsibility of the prosecutor in all test cases to contact the victim (where there is one) at least 14 days before the conference. A standardized procedure must be developed by the Chief Prosecutor for this purpose. The procedure shall insure that:

(a) The victim is consulted about the facts of the case and possible alternative dispositions;

(b) The victim is invited, but not required, to attend the conference;

(c) The victim is provided information about the conference and its purposes including the fact that the victim has no authority or control over the terms of the final plea agreement.

(6) Immediately before the conference, the staff of the project will contact the prosecutor's office to obtain assurance that the victim has been notified and has received all necessary information. Where this has not occurred, the staff will be required to perform this function.

(7) Between the period of arraignment and the structured plea negotiation conference all pretrial motions shall be filed and discovery completed.

(8) For those cases assigned to a conference the prosecutor must agree not to enter into plea negotiations except within the conference structure.

(9) It will be the responsibility of the prosecutor to have available at the conference a full, complete and official police report for inspection and discussion by all parties. In only one case will a police officer be permitted to attend the conference. This is in the case of a victimless crime; the police may appear in their capacity as the complaining witness since there is no individual victim.

(10) If the conference is going to be held and the defendant is in custody, the prosecutor will assist in having the defendant brought from jail to the conference.

(11) If the defendant is out on bail, it will be the responsibility of the defense counsel to notify the defendant of the time and place of the conference.

(12) Both the prosecutor and defense counsel who appear at the structured plea negotiation conference must come to the meeting with sufficient authority to institute closure on the case.

This does not mean that a final agreement cannot be subject to approval by the Chief Prosecutor or the defendant. It means that the prosecutor and defense counsel must come to the conference with authority to resolve the case and are not to use the proceedings principally for the purpose of gathering information which they were not able to obtain through formal discovery procedures.

(13) A formal written record shall be permitted which will consist of a list of the participants, the final disposition, the terms of the agreement and other information that the parties and judge agree upon.

(14) It is recommended that as a general rule, the structured plea negotiation conference not be held in open court. This is necessary in order to assure that the parties and counsel are as open and candid as possible.

IV. STRUCTURE OF THE CONFERENCE

The direction of the proceedings of the conference itself will depend largely on issues in the individual case and the stylistic differences of the judges. For example, the Dade County study found that some conferences were relatively unstructured whereas others were more controlled. These differences and the individual characteristics will influence the process of the settlement conference in any jurisdiction. Due to the very nature of negotiations as spontaneous exchanges of ideas, it is impossible to set forth a detailed outline of the proceedings in a plea negotiation conference.

However, it is critical to note that the design developed for this program must contain all necessary and required procedures to safeguard the constitutional rights of the defendant. The test design is in no way intended to affect any of the existing rights of the defendant. Many of these rights are spelled out in the following sections describing the roles of the various participants.

It is useful, however, to indicate the range of topics that can be expected to be discussed in conferences. Not every item will be covered in every session, of course. On the average, each conference in the Dade County project lasted approximately ten minutes. These are potential topics for discussion in conferences and include those issues raised during project observations in Dade County:

- factual situation of the case
- prior record of the defendant
- personal/family/social information on the defendant
- impact of the crime on the victim or society

- social services/treatment received by the defendant
- special programs currently available
- extent of the defendant's cooperation with law enforcement
- statutory sentencing requirements (mandatory minimum, allowable range of sentence)
- reduction in number or severity of charges
- previous trial dispositions in similar cases
- predictions as to outcome of trial
  - possibility of new, exacerbating evidence being introduced and resulting in more severe sentence or, on the other hand, mitigating evidence that might result in a less severe sentence.
  - possibility of no difference in severity of penalty
  - possibility of maximum sentence
  - possibility of acquittal

Any participant can present or raise any of the above issues or other topics of relevance during the course of the deliberations. Generally, however, there are typical patterns of participation that can be expected of each party to the conference. The roles and responsibilities of each participant will be discussed in this section as the key elements in the program design. The judge, prosecutor and defense attorney are required to be present at every conference. The impact of the victim and the defendant, who will participate at their own option, will be discussed in light of both their attendance and non-attendance. Finally, the role of the police officer, for those limited circumstances under which police participation is allowed, will be studied.

A. Role of the Judge

It will be the responsibility of the judge to schedule the conference and notify both counsel as would be done for other types of hearings. Immediately upon convening the conference, the judge will reiterate the purpose of the conference. He must explicitly announce that, for purposes of the conference, the defendant's participation in negotiations does not constitute an admission of guilt. The defendant will be informed that he is not required to make any statement, but that any statement that is made at the conference will be inadmissible at a subsequent trial. The judge will also inform the defendant of his right to terminate the conference at any time.

Once these ground rules have been outlined, the conference will be opened for discussion of the issues. During the actual negotiations, the judge's role will be that of a facilitator of the process. The judge will function somewhat as a moderator or chairperson--maintaining the flow of dialogue, eliciting information from all participants, pointing out possible areas of agreement. The judge may also be providing information concerning likely sentences if a plea of guilty is entered under varying circumstances depending upon the evidence. He may also give examples of his past sentencing practices in simimlar cases involving trial and conviction. Throughout the discussion, the judge will exercise his discretion to ensure that the appropriate limits of pretrial discovery are not exceeded.

The judge must very carefully balance the requirement that he sometimes urge the parties to reach an agreement or make them aware of weaknesses in their position and the need to avoid even the appearance of coercion. However, where appropriate, he should point out to the defendant the possibility that a trial might elicit additional evidence resulting in the possibility of a more severe sentence, or that mitigating evidence could lessen the severity of the sentence. To minimize any potential coerciveness, the judge should refrain from offering his own version of an agreement unless it reflects ideas already proposed by the parties. Likewise, the judge should only facilitate the course of negotiations and not independently steer the parties towards a solution he may favor.

B. Role of the Prosecutor

The prosecutor must come to the plea negotiation conference with the full authority to bind the state to an agreement. A decision must already have been made as to how far the state can justifiably reduce or drop charges or what sentence recommendations are acceptable. To make the plea bargaining meaningful, it is important that the prosecutor's office have a procedure by which all cases are screened as to the appropriateness of the charges.

At the conference itself, the prosecutor should provide the police reports as needed and present information on the impact of the crime on the victim if he or she chooses not to attend the conference. The prosecutor should be realistic concerning the likelihood of each witness being available to testify if the case goes to trial. Depending on the system used to compile criminal record information in a particular jurisdiction, the prosecutor may be in the best position to present an up-to-date, accurate copy of the defendant's prior criminal record. Since the prior record is commonly raised in settlement conferences, the party that has the responsibility to produce this information should ensure that it is as current and accurate as possible.

The burden of carrying on the negotiations rests largely on the prosecutor and the defense attorney in this model since the judge acts only as a facilitator rather than actively participating in the negotiations. It is the responsibility of these two primary parties to propose elements of a possible agreement on their own initiative. Each side must actively negotiate in good faith within the limits of what each believes to be justifiable, equitable and fair to all those involved in the case.

In no case should a prosecutor be permitted to negotiate or discuss the case with the defendant without the presence of counsel either before, during or after the structured plea negotiation conference.

C. Role of the Defense Attorney

Like the prosecutor, the defense attorney must arrive at the settlement conference with sufficient knowledge of the case to negotiate effectively and with the authority to make a binding agreement. To reach this point, the attorney must have conducted an investigation, advised the defendant of all available alternatives and summarized issues that he or his client consider important. The defendant must give his consent to enter into any plea negotiations. Only with this consent is the defense attorney permitted to negotiate.

At the conference, counsel may expect the judge to indicate his sentencing intentions if a plea is offered and may also inquire about the probable sentence if the defendant is convicted after the trial. It is the obligation of the defense attorney to present all factors that are favorable to his client and to ensure that he is treated with fairness throughout the proceeding. The defense attorney should seek out any social service programs that could benefit his client and incorporate them into the proposed disposition, if appropriate.

In every case, in order to aid the defendant in reaching a decision, defense counsel should advise the defendant of all alternatives available and of considerations deemed important by him in reaching a decision. Defense counsel should conclude a plea agreement only with the consent of the defendant and should ensure that the ultimate decision is made by the defendant.

If a tentative agreement is proposed, the defense attorney may request that the conference be briefly adjourned so that he may confer with the defendant. Such requests should be honored and the judge should designate a specific time for the attorney to report the defendant's decision. Whether the conference is formally reconvened or written notice is sent to all parties depends on the status of the negotiations at the time the conference adjourned. If the defendant accepts a proposed agreement, it is likely that written notice will suffice. If further negotiations are called for, the conference should be reconvened.

D. Role of the Defendant

The defendant's role in the negotiations will depend on the circumstances of the case, and factors such as the defendant's attorney's assessment of the capability of the defendant to express himself and the potential reaction of the judge to the defendant.

All negotiations conducted on behalf of the defendant should include direct involvement by the defendant's attorney. The major purpose of the defendant's appearance, other than for his own knowledge, is to increase the court's awareness of his individual situation and needs. The presence of the defendant is unlikely to change the subject matter of the negotiations but may serve to make the other participants more sensitive to all the issues in the case.

E. Role of the Victim

The victim may attend the pretrial plea negotiation conference if he or she wishes. The victim's presence may help the judge by providing access to information that the prosecutor may not have in sufficient detail to answer the judge's inquiries.

While in a number of cases the role of the victim may not be active, he will be observing the process and available to respond to requests for information or an opinion as the need arises. The victim will not be able to dictate a particular outcome or to veto any agreement reached by the prosecutor and the defense attorney. Whenever appropriate, such as cases where the question of identification remains an issue, arrangements should be made for the judge, prosecutor and defense attorney to meet separately with the victim and the defendant, if each desires such consultation, so that their input is obtained without jeopardizing a subsequent trial.

The police will be involved in the structured plea negotiations program only in certain limited circumstances. If the offense that the defendant is charged with is a victimless crime, the police will be given the option to attend the conference. If they decide to participate, they will be regarded as witnesses

who can further the negotiations with the information they possess. The police will not be treated as substitute victims in these cases. They will not have any authority to veto an agreement.

V. POST-CONFERENCE REQUIREMENTS

In order for the structured plea negotiation conference to be effective, the case and the parties must be prepared for trial as spelled out in Section III and in addition, certain post-conference measures must be taken to assure that the whole procedure is not obviated. If, for example, there is another opportunity to engage in extensive plea negotiations following the structured conference, counsel may choose to use the conference for purposes of discovery and an idea of "what the case is worth."

Consequently, post-conference requirements for the test design must include:

- Absent intervening events which substantially alter the facts upon which the negotiations were based, there should be a prohibition against further plea negotiations for charge reductions.

- There should be provision for immediate entry of the plea before the judge with all the required elements of procedural due process when a bargain has been agreed upon at the structured plea negotiation conference.

- There should be no postponement of the trial date when the conference does not result in a settlement. This procedure is essential so that the parties will be clearly aware that their choices are either settlement or trial.

- The victim in each case is to be informed about the final disposition in the case, whether or not they attended the conference.

VI. DESIGN ISSUES

Several design issues exist that will have implications for implementing the structured plea negotiation program. Some of the issues will be raised regardless of site characteristics while others will vary in importance depending upon specific characteristics of selected jurisdictions. These issues and the extent to which they are likely to be present for all sites are discussed below.

A. Evaluation Design

Because of the importance of the program being studied and its potential impact upon defendants and victims, it is necessary that the evaluation results yield definitive conclusions about program effects. This is best insured through the use of an experimental design in which potential cases are screened for eligibility and then randomly assigned to experimental (structured plea negotiation conference) or control conditions. Random assignment will occur within individual participating judges' caseloads so that differences in caseloads, judicial procedures, or other factors are not confused with program effects.

An important distinction regarding random assignment is that it is the opportunity, not the requirement, to participate in a structured plea negotiation hearing that is assigned. If a case is assigned to the experimental condition, there is no intent to force plea negotiations.

The evaluation design will need to take into account the fact that not all judges within a judicial system may be willing to allow random assignment of cases to experimental and control conditions within their caseload. Therefore, separate design provisions for participating and non-participating judges

should be included./ (See site selection criteria #4 and #6, pages 36 and 37.)

B. Analytic Framework

The analytic framework will need to address two levels of program effects.

- Long-term trends or the ability of the program to either change or complement pre-existing system trends.
- Immediate program effects or the impact of structured plea negotiations on program objectives.

The ability to conclusively assess both immediate and long-term changes requires that comparisons of treated and control cases differ only because of treatment and not other factors.

1. Long Term Trends

Evaluating structured plea negotiation's effect on pre-program trends will require controlling for historical changes unrelated to the program. That is, comparisons of pre-existing trends with trends following program implementation will need to be free of influence from changes in such factors as:

- new criminal codes or new rules of criminal procedure
- revised charging policy
- staffing levels
- number of cases presented for prosecution
- type and mixture of cases presented
- social, demographic, or prior criminal history characteristics of defendants

A second issue affecting comparisons of pre- and post-program implementation is the manner of case assignment to judges. A comparison of pre-cases with those post-cases eligible for program involvement (cases assigned to participating judges) will be valid if case assignment to judges occurs on a random basis. If case assignment is not random, the results of the pre-post comparison may reflect the difference between all cases received prior to the program, and a subset of cases assigned to participating judges after implementation rather than program effects.

One other issue that will need to be taken into account in pre-post comparisons are cases not eligible for structured plea negotiation conferences. To obtain a valid comparison, the type of cases screened out as ineligible will need to be excluded from determination of pre-program rates.

2. Immediate Program Effects

As mentioned previously, the evaluation design for assessing immediate program effects requires that cases be randomly assigned to the structured plea negotiation condition or the control condition. This should occur as soon as possible after a case is scheduled to appear within a participating judge's court.

Following random assignment but preceding the holding of a structured plea negotiation conference several events may occur that will make a straightforward comparison of experimental and control cases difficult. Experimental cases may be diverted from a conference either because a plea agreement has already been reached or because one of the actors has decided that plea bargaining is not appropriate. If experimental cases going to conference are compared with control cases, this may introduce a potential source of bias. The possibility of a statistical bias exists because the initial equivalence introduced by randomization is compromised. That is, experimental cases not going to conference may be different from those going to the plea negotiation conference. Then when conference cases are compared with control cases, the differences may be due to the attrition of experimental cases (i.e., only some of the cases assigned to the experimental condition receive the treatment) rather than program effects.

An additional and related problem in making valid comparisons exists for assessing reactions of individual actors. For example, if a comparison of victim's satisfaction is to be performed, the same sort of attrition of experimental cases can be expected. A contrasting of victim satisfaction in control cases with experimental cases at which victims were sufficiently interested to be present for structured plea negotiations may represent two quite different types of cases.

The analytic framework and evaluation design of the structured plea negotiation program will have to take into account the likely problems identified above.

C. Number of Cases To Be Studied

Rather than identify the total number of cases to be processed through the program, a statement of the minimum number of cases within the smallest unit for analysis is appropriate. Since the experimental design requires voluntary actions at several points, the number of cases available for some analyses will be less than the number originally assigned on a random basis. Specifically, not all cases randomly assigned to structured plea negotiation conditions will be presented in such hearings. Further, in those cases going to the structured plea negotiation hearing, not all will involve all the actors (victim and defendant).

Based on the evaluation objectives and measures, the smallest study condition, in terms of likely number of cases, would be structured plea negotiation hearings at which victims were present. Based on the experience in a similar project, 24 percent of the randomly assigned cases would involve victim presence (percentage of hearings actually held, 76 percent, times percentage with victim attending, 32 percent).

The suggested number for this particular condition would be a minimum of 100 cases. Assuming an initial 50 percent likelihood of being assigned to the structured plea negotiation condition, this would suggest a minimum of 833 eligible cases for randomization, or approximately 8-1/3 cases for each one desired condition of victim present at a structured plea negotiation hearing.

D. Data Requirements

Site selection review will require that information be available for many different aspects of court operation and case processing. The review will include both an examination for appropriateness of a structured plea negotiation program and for eventual program evaluation. While site selection requirements are stated in Section IX, page 36 specific data requirements for evaluation will be identified by the general types of data and data elements that will need to be available for evaluation. Specific data requirements for evaluation will be identified by the national program evaluator to be selected later. However, evaluation data should include, but not be limited to the following:

- System level: information on all cases whether or not they are within experimental or control groups.
- Case level: information on how individual cases are processed through both the prosecutorial and the court systems.
- Individual level: information about how various actors become involved and respond to the program.

While some of these data will be available from existing court and prosecutors' records, it is presumed that much of the information will be collected either by structured plea negotiation program staff or the national evaluator. These data will be used to examine both program process and impact issues. Likely process issues to be evaluated would include assessing the effect of offense severity and case strength on conference disposition, the effect of the level of judicial involvement on conference disposition, and the effect of early versus late scheduling of a conference on disposition. Impact issues would include but not be limited to evaluating conference effects on speed of case processing, equity and satisfaction with case disposition, and protection of due process rights.

The types of data to evaluate these and other process and impact issues should include but not be limited to the following:

- Case identifiers: for each case within the study, the following would need to either be available or obtainable:

  docket number, or other unique system identifier
  names of all attorneys involved in the case (both defense and prosecution)
  name of judge
  name of defendant
  name of victim

- Offense data (as represented by initial charge):

  type of offense
  date of offense
  offense seriousness (e.g., degree of injury, property loss or damage)
  relationship between defendant and victim

- Case strength or likelihood of conviction if tried:

  absence or presence of eyewitness(es)
  whether arrested at scene
  availability of witnesses, victim to appear in court
  physical evidence

- Individual data (to be obtained from existing records, from observation within plea negotiation conferences, and from interviews of all actors):

  extent of active involvement in plea negotiation conference
  nature of conference involvement
  attitude towards conference involvement
  perception of usefulness of plea negotiation conference
  judgment of equity produced by conference
  attitude toward criminal justice system
  background and demographic data (age, race, sex, socio-economic status, prior criminal record, occupation, etc.)

- Conference data:

  length of conference
  conference outcome
  number of actors attending
  number of days between initial charge
    and hearing

- Case disposition:

  initial charge
  charge at disposition
  method of disposition (plea, dismissal,
    trial)
  sentence

VII. EVALUATION

Introduction

The purpose of this section is to identify the objectives of this test and some of the evaluation activities considered necessary for their examination. Additional information on the evaluation effort is set forth in the NILECJ solicitation for the evaluation of this test. An independent organization will be chosen by the Institute to conduct an evaluation of each of the sites selected to develop and implement structured plea negotiation guidelines. The major objectives of the evaluation are:

- To test the effectiveness of structured plea negotiations as a method to reduce case processing time and delay.
- To examine the impact of the structured plea negotiation conference on the consistency of case outcome and disposition.
- To assess the impact of structured plea negotiations on the perceptions of counsel, defendants and victims regarding the process and outcome of their cases.

These three objectives address both the outcomes and the processes of the project. The evaluator will be expected to work closely with project staff in order to collect the qualitative and quantitative data needed to address these objectives. The evaluation period will be 26 months beginning with the start of the project in each site.

The evaluation approach outlined herein is designed to produce not only knowledge of the impact of the test for the evaluation/ research community and for jurisdictions considering the

development of the test, but also technical descriptions of the test development process for use by those undertaking this process. The analytical approaches described are in no way definitive or exhaustive of the possible methodologies and data which might be fruitfully employed to address these objectives.

Evaluation of the structured plea negotiation program will require a carefully designed and strictly implemented evaluation plan. Because of the nature of plea bargaining and its prior status within most courts (e.g., no official recording of plea agreements, etc.) there are a number of questions that will need to be addressed before definitive conclusions may be reached.

Evaluation Goals

The evaluation of the structured plea negotiation program will examine the impact of a formal plea negotiation procedure on the process of felony case disposition. To accomplish this, the evaluation will need to address both process evaluation and impact assessment questions in order to examine the program's goals and objectives. As indicated on pages 6 and 7, the program goals are:

- To implement a process of plea negotiation that is equitable to all parties concerned.
- To implement a plea negotiation procedure that is efficient and benefits the court system.
- To develop an effective plea negotiation system.

A. Measures of Equitable Plea Negotiation

To assess the change in equity of plea negotiation produced by the program, two objectives will be evaluated. The first objective is:

- To produce plea agreements that are more consistent by making the process more explicit, open, and subject to judicial review.

Measurement of this objective will require that the evaluator deal with the issue of consistency with whatever indices are feasible. To quantify the extent to which the process is more explicit, open and subject to review, the following indices could be used:

1) Proportion and number of guilty plea cases in which there is any record in the court docket or prosecutor's file that the entered plea was part of a plea agreement;

2) Proportion and number of guilty plea cases in which the official docket or prosecutor's file addresses due process concerns in relation to plea bargaining;

3) Proportion and number of guilty plea cases which are judged to have legally sufficient due process protections on record within the official docket or prosecutor's file.

The second objective to assess changes in equity produced by the program is:

- To produce agreements that are fair to all parties by providing victims and defendants the opportunity to present their views, needs and knowledge of the case within the plea negotiation process.

This object can be measured by determining:

1) The number and proportion of cases in which victims attended plea negotiation conferences;

2) The number and proportion of victims who actively participated in conferences, and the nature of their participation.

3) The number and proportion of cases in which defendants attended plea negotiation conferences.

4) The number and proportion of cases in which defendants actively participated in conferences, and the nature of their participation.

In addition, the evaluator may wish to consider the effect of differential rates of sentencing for cases that are not negotiated at conference by comparing the last best offer at the conference with the final sentence at trial.

B. Measures of Efficient Plea Negotiation

Two objectives are specified to measure the ability of the program to produce more efficient case processing. The first objective is:

- To reduce the average time between initial indictment and final case disposition.

This might be measured either by:

1) Total time between initial indictment/ information and final disposition; or

2) Total time in which formal court hearings are occurring; or,

3) Total participant time, or the time that court officials and all parties involved in a case actually spend in formal hearings.

The second objective to measure efficient case processing is:

- To reduce delays and minimize disruption of court scheduling caused by plea negotiations.

This objective might be measured by such indices as:

1) Average number of continuances or postponements requested and/or granted;

2) The number of times that granted continuances and/or postponements result in non-use of courtroom or court officials time;

3) The number of times that "last-minute" plea bargain agreements result in non-use of courtroom or court officials time.

C. Measures of Effective Plea Negotiation

The goal of an effective plea negotiation program will be assessed by two objectives. The first objective dealing with effective plea negotiation is:

- To increase victim perception of legitimacy and fairness of plea negotiations by involving victims in the process.

This objective could be measured by interviewing victims with regard to such fairness and legitimacy issues as:

1) Satisfaction with the outcome of the case.

2) Satisfaction with the process of case resolution.

3) Perceived legitimacy and appropriateness of both level and type of involvement of the judge, defense, prosecution and defendant.

4) Change in satisfaction with the entire criminal justice system as a result of their experience.

The second objective is much like the first, but concerns itself with the defendant. This objective is:

- To increase the defendant's perception of legitimacy and fairness of plea negotiation by involving defendants in the process.

As in the case of the first objective, defendants would be interviewed regarding the same fairness and legitimacy issues.

VIII. IMPLEMENTATION AND NILECJ SUPPORT

A. Implementation

The proposed test effort has been designed for implementation within one jurisdiction in each of three states. The jurisdiction must have a case filing of at least 3000 felonies each year. The test is designed in four stages over a twenty-six month period. (See Figure 1, page 33, for a detailed description of the stages and specific tasks that comprise each stage.) The initial stage will involve up to six months of pre-test data collection, training of program personnel and planning.

The second stage will involve twelve months and will consist of the implementation and periodic review of the plea negotiation process by the judges, prosecutors, public defender's office and project staff.

The final two months of site responsibilities will require preparation of the data for the national evaluator who will be measuring the impact of the design on the decision process during phase IV.

B. NILECJ Support

NILECJ support will be provided in the form of financial assistance and training. A consulting firm will be retained by the Institute to provide implementation assistance to the participating jurisdictions. Support will include training for key program participants, consultant services to aid program sites in the planning and implementation of the program elements to be tested, and various workshops and meetings to enable key personnel from each of the participating programs to discuss problems and issues of mutual concern. Funds will also be

Figure 1

Timetable and Tasks for Implementation*

Time Frame	Phase I (6 months)	Phase II (12 months)	Phase III (2 months)	Phase IV (6 months)
Stage	Start-Up	Conference Implementation	Close-out	Data Analysis by Evaluator
Tasks	• Recruit, hire and train staff • Collect and review statutes and court rules • Develop and plan operational guidelines • Establish data collection plan • Orientation of court personnel and attorneys • Collect pre-implementation data (base line) • Pre-test all procedures	• Conduct randomization of cases • Schedule conference • Monitor pre-conference progress • Contact appropriate parties • Notify victims not contacted by prosecutor • Coordinate conference • Attend conference • Monitor actors' involvement in conference • Establish baseline control data	• Conclude data collection • Provide project data to evaluator • Assist evaluator in interpretation of data • Conclude project operation • Final project site reports	

*The national evaluation contractor will have concurrent responsibilities during phase I through phase III, which will be identified in their work plan.

included to support research utilization efforts such as hosting visiting court and prosecutorial officials so they may observe program operations.

NILECJ will allocate approximately $175,000 per site for participation in the program. No local or state funds are required. The funds will cover the cost of a project director, research analyst, clerical assistance and associated expenses for data collection, processing and program operations. No funds for computer hardware will be provided by NILECJ. Evaluation resources will be provided by NILECJ under a separate contractual agreement. The recipient of the grant award will be the individual court. Staff will assist both the prosecutor's office and the court in the operation of the program. Their responsibilites will include planning and developing program guidelines; orientation of court personnel and attorneys; attending and monitoring the conference; notification of victims not contacted by the prosecutor; and the collection of data for the national evaluator.

C. Implementation Definitions

To assist grantees in the development of their program plan it is important that the following terms be understood:

1) A site is composed of all geographical areas within any local court of general trial jurisdiction;

2) The grantee should be the agency responsible for the superintendency and/or administration of the local court;

3) Explicit and acknowledged plea negotiation is defined as a process through which an agreement to plead guilty is made in return for some consideration by the government;

4) Felony cases should be interpreted as cases originally filed in the court of general trial jurisdiction. A case is measured in terms of defendants rather than charges or counts;

5) The judge as a moderator or chairperson is defined as one who assists in the flow of the dialogue, eliciting information from all participants, pointing out areas of agreement and providing information regarding likely sentences, if requested. (See page 14).

6) The term "make the process more . . . open . . ." as stated in goal number one on page 7 is to be defined in this document as making the plea process more open to the participants, i.e., victim, defendant, and not to the general public.

IX. SITE SELECTION

The site selection criteria are divided into two categories. Those which are considered essential for the successful development and implementation of the structured plea negotiation test and those which, while not essential, would materially add to the goal of effective development and implementation of the test.

A. Criteria Considered Essential to Program Development and Implementation

The following criteria are considered essential to the development and implementation of the structured plea negotiation test:

1) The prospective site must not have any statutory (state or local), administrative, or regulatory prohibitions against plea bargaining in general or against judicial involvement specifically.

2) Sites selected should currently engage in explicit and acknowledged plea bargaining with the judge permitted to play an active role. To ensure that it is in fact possible to test a structured plea negotiation program, proposed sites must not have procedures, either formal or informal, that appear to serve the same purposes as the experimental test design.

3) Sites selected should have no statutory or regulatory restrictions regarding privacy laws which would prohibit this experimental test.

4) There must be an indication of interest, cooperation and written commitment on the part of the judges of the particular court where the test will take place. At least 50 percent or a majority of the judges assigned to hearing felony

cases must express willingness to cooperate with the test. For example, if a jurisdiction has seven judges, at least four must agree to participate.

5) There must be an annual total of at least 3000 felony cases filed in the court of general trial jurisdiction requesting participation. This figure is to be measured in terms of defendants rather than charges or counts.

6) Selected sites must be willing to allow random assignment of cases to judges, and random assignment of cases to experimental and control conditions within participating judges' caseloads.

7) Written agreement of cooperation must be obtained from the prosecutor's office and from the public defender's office, where one exists.

B. Criteria Facilitating Program Development and Implementation

The following criteria while not considered essential are looked upon as helpful in facilitating the development and implementation of a structured plea negotiation process. They should be considered as second order criteria and will be applied if there are a number of candidates who meet the essential criteria spelled out above.

1) While not a basis for site selection, the method of case processing will have implications for program implementation and evaluation. Many jurisdictions are beginning to rely on vertical representation (the assignment of a prosecutor or appointed defense counsel who remains with the case from arraignment through trial). This is the preferred method for the test design rather than a system which involves different attorneys at various stages of the criminal process.

2) Prosecutorial standards relating to plea bargaining differ from site to site. The type of standards and degree of flexibility may have

implications for structured plea negotiation implementation. A preferred system is one where the prosecutor has written guidelines for plea bargaining that relate to both the type of offender and type of crime as well as the method of supervision and approval of a specific bargain.

3) Docket and case assignment to individual judges varies substantially from jurisdiction to jurisdiction. In many courts criminal cases are assigned to a specific judge at the preliminary hearing or arraignment and remain on his individual docket throughout the entire criminal process. In other courts these cases are assigned in a similar fashion, but only when judge action is necessary for the first time on a case. Finally, some courts operate with a central docket and different judges are available to perform specific functions as needed, e.g., arraignment, motions, pre-trial, trial. Docket and case assignment may be further modified in those court systems where judges are rotated either from county to county or from civil to criminal cases.

   Preference will be given to those sites where cases are permanently assigned to specific judges at the preliminary hearing or arraignment and where judges will be permanently assigned to adult criminal cases during the term of the individual cases.

4) It is desirable that sites have an existing victim witness notification program directed to adult criminal cases. This procedure will assist the program efforts to involve victims in structured plea negotiation hearings.

5) It is also desirable that sites selected have active and well-established prosecutorial intake screening programs for all felony cases. To ensure that structured plea negotiation effects are testable, it is important that a majority of sample cases are not plea bargained solely in response to routine police or prosecutor overcharging.

Source Material for Plea Negotiations Test Design

Books/Reports

Bond, James E. Plea Bargaining and Guilty Pleas. New York: Clark Boardman Co., 1975.

Casper, Jonathan D. American Criminal Justice: The Defendant's Perspective. Englewood Cliffs, N.J.: Prentice-Hall, 1972.

Heumann, Milton, Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys. Chicago: University of Chicago Press, 1978.

Neubauer, David W. Criminal Justice in Middle America. Morristown, N.J.: General Learning Press, 1974.

Rosett, Arthur and Cressey, Donald R. Justice by Consent: Plea Bargains in the American Courthouse. Philadelphia: J. B. Lippincott, 1976.

U.S. Department of Justice. Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Plea Bargaining in the United States. By H. S. Miller, W. F. McDonald and J. A. Cramer, Georgetown University. Washington, D.C.: Government Printing Office, 1978.

U.S. Department of Justice, Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Plea Bargaining: Who Gains? Who Loses? By William Rhodes, Institute for Law and Social Research. Draft Document: 1978.

U.S. Department of Justice, Law Enforcement Assistance Administration. National Institute of Law Enforcement and Criminal Justice. Pretrial Settlement Conference: An Evaluation Report. By Wayne Kerstetter and Anne Heinz, University of Chicago Center for Studies in Criminal Justice. Draft Document: 1978.

Articles

Alschuler, Albert W. "The Defense Attorney's Role in Plea Bargaining." 84 Yale L. J. 1179 (1975).

Alschuler, Albert W. "The Trial Judge's Role in Plea Bargaining, Part I." 76 Col. L. Rev. 1059 (1976).

Berger, Moise. "The Case Against Plea Bargaining." 62 A.B.A.J. 621 (1976).

Borrego, Theodore. "Criminal Law: Plea Negotiations--Legitimizing the Agreement Process." 27 Oklahoma L. Rev. 487 (1974).

Church, Thomas. "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment." 10 Law and Society Rev. 377 (1976).

Finkelstein, Michael. "A Statistical Analysis of Guilty Plea Practices in the Federal Courts." 89 Harv. L. Rev. 293 (1975).

Gallagher, Kathleen. "Judicial Participation in Plea Bargaining: A Search for New Standards." 9 Harv. Civ. Rights--Civ. Liberties L. Rev. 29 (1974).

Klein, Daniel. "Judicial Participation in Guilty Pleas--A Search for Standards." 33 U. of Pittsburgh L. Rev. 151 (1971).

Klonoski, James, Mitchell, Charles and Gallagher, Edward. "Plea Bargaining in Oregon: An Exploratory Study." 50 Ore. L. Rev. 114 (1971).

Koblenz, Michael and Strong, Charles. "Justice: A Word to Bargain--A Study in Plea Bargaining in the Prosecutor's Office." 8 The Prosecutor 388 (1972).

Marks, Paul R. "Effective Assistance of Counsel in Plea Bargaining: What is the Standard?" 12 Duquesne L. Rev. 321 (1973).

Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study." 60 Iowa L. Rev. 1053 (1975).

Note, "Plea Bargaining and the Transformation of the Criminal Process." 90 Harv. L. Rev. 564 (1976).

Rotenberg, Daniel. "The Progress of Plea Bargaining: The ABA Standards and Beyond." 8 Conn. L. Rev. 44 (1975).

White, Welsh S. "A Proposal for Reform of the Plea Bargaining Process." 119 U. of Penn. L. Rev. 439 (1971).

Conference Discussion Papers presented at the Special National Workshop on Plea Bargaining, French Lick, Indiana, June 1978, sponsored by the National Institute of Law Enforcement and Criminal Justice, LEAA.

"Plea Bargaining and Its History." Albert Alschuler.

"Plea Bargaining and Plea Negotiation in England." John Baldwin and Michael McConville.

"The Problem of Voluntariness and Coercion in the Negotiated Plea." Conrad Brunk.

"Plea Bargaining." Judge Sam Callen.

"In Defense of Bargain Justice." Thomas Church.

"Plea Bargaining in Historical Perspective." Lawerence Friedman.

"Plea Bargaining--the Alaska Experience." Avrum Gross.

"Plea Bargaining in the Prosecution of White and Blue-Collar Crime." Jack Katz.

"Pretrial Settlement Conference: An Evaluation." Wayne Kerstetter and Anne Heinz.

"From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept." William McDonald.

* U.S. GOVERNMENT PRINTING OFFICE: 1980- 311-379/1719

U.S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
WASHINGTON, D.C. 20531

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
U.S. DEPARTMENT OF JUSTICE
JUS-436

THIRD CLASS

END