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## How to be a Better Plea Bargainer

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## HOW TO BE A BETTER PLEA BARGAINER

Cynthia Alkon\* and Andrea Kupfer Schneider\*\*

### INTRODUCTION

You are a public defender or a prosecutor and have a pile of cases to handle in court today. All of the parties involved, including the judge, expect most of these cases to settle. You have done hundreds, maybe thousands of plea bargains over the years. But, every day when you have to negotiate, you have that feeling in the back of your mind (maybe in the pit of your stomach) that you could do better. You never got to take a negotiation class in law school, and you have never attended a CLE or in-house training on how to negotiate a plea bargain. On the other hand, you are a very skilled trial lawyer. You know how to evaluate a case and how to prepare for trial. You know how to interview, examine, and cross-examine witnesses. In addition to your practice experience, you have had training in these skills. Moreover, you have had training on forensic evidence, on specialized types of cases like driving while intoxicated or child sexual assault, and lots of trainings on trial practice.

You know that there are excellent negotiators in your office and that they often get amazing deals. While you feel pretty competent at negotiation, you would not consider yourself excellent. Can that change? Can a highly skilled criminal trial lawyer learn how to be a highly skilled negotiator? Of course. Highly experienced lawyers and new lawyers alike can improve their negotiation skills (just as they improve their trial skills). But, without specialized CLE or in-house training, what can you do?

This Article will focus on a relatively easy strategy to increase your effectiveness immediately, even as you wait for more negotiation training (which we discuss below). Lawyers are often given checklists as part of learning how to handle certain types of cases or defenses.<sup>1</sup> This Article is

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1. See, e.g., Emily LaGratta et al., *Defender Checklists: A Toolkit for Practitioners*, CTR.

going to focus on one key way that you can become a better plea bargainer: you can improve how you prepare for negotiation through having a negotiation checklist.

The first part of this Article will focus on why preparation matters in negotiation and how a systemic model can be used. Plea bargaining is, by definition, a negotiation to reach agreement between the defense and prosecution to settle a criminal case.<sup>2</sup> Criminal law scholars are increasingly recognizing the importance of negotiation and training for negotiation in criminal practice.<sup>3</sup> We will then turn to explaining our plea bargaining preparation sheet in detail, noting how each element of the prep sheet is important in negotiation in general and how this specifically applies in a plea bargaining context.

## I. WHY PREPARATION MATTERS IN NEGOTIATION

Negotiation is a learned behavior much like communication overall. By the time we are negotiating on behalf of clients, we likely have many of these communication behaviors ingrained in us. Perhaps through our family dynamics, perhaps through professional training, perhaps through socialization, or perhaps through other expectations, each of us has learned to communicate in one way or another.

And yet we know that, like any other communication skill, negotiation skills can improve with careful thinking, practice, and reflection.<sup>4</sup> While development of several negotiation skills is directly linked to personality traits that might need to be adjusted (i.e. developing more of an ability to ask questions and listen carefully or increasing flexibility or even understanding how cognitive psychology might influence your behavior), other aspects of negotiation, like preparation, are more often developed through devotion of time and energy. In fact, we regularly tell our students that preparation is the easiest way to improve your negotiation skills, since

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FOR CT. INNOVATION, <http://sfpublicdefender.org/wp-content/uploads/sites/2/2018/05/Toolkit-San-Francisco-Defender-Checklist-FINAL.pdf> [<https://perma.cc/SSR5-FWZW>].

2. G. NICHOLAS HERMAN, PLEA BARGAINING (3d ed. 2012).

3. See, e.g., Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WILLIAM & MARY L. REV. 1445 (2016).

4. Michael Moffit & Scott Peppet, *Learning How to Learn to Negotiate*, in 1 THE NEGOTIATOR'S DESK REFERENCE, 13, (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

everything else can require a more challenging behavioral change.<sup>5</sup>

Plea bargaining is the primary form of criminal case settlement. The vast majority of cases, both state and federal, are resolved through plea bargaining.<sup>6</sup> Some have argued that we should plea bargain fewer cases,<sup>7</sup> and we ourselves have argued that the practice of plea bargaining has significant flaws in terms of fairness.<sup>8</sup> Some have argued that plea bargaining, supported by draconian minimum sentences and with little oversight by judges, has led to the mass incarceration crisis.<sup>9</sup> These negotiations between unfettered prosecutors and underfunded defense attorneys are, in fact, a highly suspect and troubled aspect of our legal system.<sup>10</sup> All of these allegations are worth investigation and attention as we continue to reform the criminal legal system.

In the meantime, plea bargaining will continue to be a criminal lawyer's primary activity. Despite this fact, law schools and continuing legal education programs for attorneys still discount the value of focusing on plea bargaining skills. Remarkably few law schools have specialized classes on plea bargaining. For example, Professor Jennifer Reynolds posted a query on the AALS dispute resolution list serve in November 2019, asking professors to respond if they (or a colleague) were teaching a stand-alone plea bargaining course. Eight professors responded that they taught plea bargaining, but not all were doing so as a regular course offered every year.<sup>11</sup> In addition, the ABA Directory of ADR Classes does not list any plea bargaining courses.<sup>12</sup> Trainings for prosecutors and public defenders primarily focus on honing trial skills.<sup>13</sup> It has struck us (and others) that this

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5. See, e.g., Carrie Menkel-Meadow et al., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 107 (3d ed. 2019); Riskin et al., DISPUTE RESOLUTION AND LAWYERS, 160-62 (5th ed. 2014); Russell Korobkin, NEGOTIATION 5-7 (2d ed. 2009).

6. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

7. Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987 (1995).

8. Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark*, 22 NEW CRIM L. REV. 434 (2019).

9. See, e.g., Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 191 (2015).

10. For classic articles see, e.g., John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 8 (1978); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979).

11. Email on File from Professor Jennifer Reynolds, June 7, 2021.

12. *ABA Directory Search*, University of Oregon, last updated Jan. 2021, <https://mylaw.uoregon.edu/aba-search/> [<https://perma.cc/329J-LCD5>]

13. See, e.g., the *Texas Criminal Defense Lawyers Association list of Continuing Legal*

approach is flawed.<sup>14</sup> As Jenny Roberts and Ron Wright have put it, “In short, . . . lawyers are training to operate in a trial-based world that does not exist.”<sup>15</sup>

Part of this gap may well come from the belief that plea bargaining is not really negotiation. One might assume that negotiation in legal practice is either civil case settlement (where the numbers of cases that are settled through either negotiation or mediation also constitute a vast majority of the total caseload) or deal-making, in which lawyers assist their clients in some kind of business transaction and help negotiate the terms. This hesitation to include plea bargaining in the definition of negotiation comes from both traditional dispute resolution scholars and criminal scholars, neither of whom necessarily see their scholarship reflected in the other field’s work. Dispute resolution theorists worry, correctly, that plea bargaining has constraints and elements that are more complex than those seen in typical civil cases.<sup>16</sup> Similarly, what little time criminal law professors spend discussing plea bargaining is often focused on the outcomes of the plea bargaining system rather than drilling down into the skills needed by lawyers on the front line.<sup>17</sup>

With all of the negotiation books on the market and the explosion of negotiation classes in law school, one might wonder why any additional attention is needed to this subject. Every student and practitioner has long heard that preparation for negotiation is necessary, yet classes in negotiation often fail to cover plea bargaining at all. Similarly, criminal law, criminal

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*Education Programs for 2021*, which includes cross examination training, training for DWI cases, fourth amendment practice, and mindfulness, but, no dedicated program on plea bargaining. TEX. CRIM. DEF. LAWS. ASS’N, [https://www.tcdla.com/TCDLA/CLE\\_and\\_Events/CLE\\_Events/TCDLA/Events/Event\\_Main.aspx?InitialArea=82BAE9D2-BBF2-4341-AF96-D280EA988D1D&hkey=d68eda32-707c-4688-9c5b-42e04c014cf2](https://www.tcdla.com/TCDLA/CLE_and_Events/CLE_Events/TCDLA/Events/Event_Main.aspx?InitialArea=82BAE9D2-BBF2-4341-AF96-D280EA988D1D&hkey=d68eda32-707c-4688-9c5b-42e04c014cf2) [<https://perma.cc/9TWQ-VURJ>].

14. Roberts & Wright, *supra* note 3.

15. *Id.* at 1450.

16. For a discussion of these constraints, see, Cynthia Alkon, *How to Negotiate with Constraints: Lessons from Plea Bargaining*, in NEGOTIATION ESSENTIALS FOR LAWYERS 231, (Andrea Kupfer Schneider & Chris Honeyman, eds., 2019).

17. See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*]; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) [hereinafter Bibas, *Plea Bargaining Outside the Shadow of Trial*]; Michael O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008); Ronald F. Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561 (2014) [hereinafter Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining*].

practice, criminal clinics, and externship placements in prosecutors and public defenders' offices abound. Couldn't plea bargaining be well-covered in these classes? Law school criminal practice clinics often tout the trial skills or motion practice experience students will gain and do not focus on, or mention, plea bargaining experience.<sup>18</sup> Even more commonly, criminal law and practice classes fail to incorporate negotiation theory to inform best practices. Our goal in this Article is to bring these academic silos together to bring the advantages of negotiation theory into the criminal practice arena. Already, some of these self-imposed barriers are starting to fall as scholars realize that negotiation theory and concepts can be illuminating and prescriptively helpful.<sup>19</sup>

The fact that plea bargaining is a form of negotiation with significant constraints is exactly why negotiation skills matter.<sup>20</sup>

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18. See, e.g., description of the Stanford Law School Criminal Prosecution Clinic: "Students formulate case strategy, identify and interview witnesses, and conduct evidentiary motions, preliminary hearings, and occasional nonjury trials." *Criminal Prosecution Clinic: Clinical Methods*, STANFORD LAW SCHOOL, <https://law.stanford.edu/courses/criminal-prosecution-clinic-clinical-methods/> [<https://perma.cc/YQ8W-BN3C>]. See also description Tulane University School of Law Criminal Justice Clinic: "Representing Louisiana's most vulnerable defendants at all stages of their criminal cases – investigation, pre-trial motions, trial, appeal, state post-conviction, and federal habeas – Clinic students have opportunities to brief and argue cases in appellate courts including the Louisiana Supreme Court, the Federal District Court, and the Federal Fifth Circuit Court of Appeals." *Criminal Justice Clinic*, TULANE LAW SCHOOL, <https://law.tulane.edu/clinics/criminal> [<https://perma.cc/K5AL-PHAN>].

19. Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 17; Roberts & Wright, *supra* note 3; Rebecca Hollander-Blumoff, *Getting To "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997); Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205 (1999); CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT 197-98, 235-45 (2019); Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401 (2017) [hereinafter Alkon, *Hard Bargaining*]; Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV., 377 (2016) [hereinafter Alkon, *Plea Bargain Negotiations: Defining Competence*]; Alkon, *supra* note 9; Cynthia Alkon, *What's Law Got to Do With It? Plea Bargaining Reform after Lafler and Frye*, 7 Y.B. ARB. & MEDIATION 1 (2015); Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland*, 38 NYU REV. L. & SOC. CHANGE 407 (2014) [hereinafter Alkon, *The Right to Defense Discovery in Plea Bargaining*]; Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining*, *supra* note 17; O'Hear, *supra* note 17; Michael O'Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1 (2007); Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?* 91 MARQ. L. REV. 145 (2007); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Russell Covey, *Reconsidering the Relationship between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213 (2007); Chad M. Oldfather, *Heuristics, Biases, and Criminal Defendants*, 91 MARQ. L. REV. 249 (2007).

20. Alkon, *supra* note 16.

Strong negotiation skills are what can help both prosecutors and defense lawyers move beyond the constraints. Prosecutors are constrained by office policies, which are sometimes political, since the local district attorney is usually an elected official.<sup>21</sup> There may be mandatory minimums or prosecutors may have office policies preventing them from reducing certain charges or dropping enhancements, such as gun enhancements.<sup>22</sup> Defense lawyers are often constrained by the existing laws that leave them with few options for their clients.<sup>23</sup>

By focusing on negotiating skills, lawyers can move beyond these constraints. However, mastering the skills of assertiveness, empathy, flexibility, social intuition, and ethicality is predicated on going into each negotiation prepared.<sup>24</sup> For example, a defense lawyer who has fully investigated their case and knows that the evidence is weak on a key element (for example, that the witness to the crime has recanted), can use the skill of assertiveness with the prosecutor to explain why the case, or the particular charge, should be dropped.<sup>25</sup> A well prepared defense lawyer will also know what the standard offers are for particular charges so they will know if, or when, to be assertive about negotiating a better offer.<sup>26</sup> Our preparation sheet illuminates each of these skills by helping lawyers prepare to be flexible, to ask good questions, and to pay attention to communication choices. Each of these elements on the preparation sheet helps to build negotiation effectiveness.

Attention to preparation in advance of a negotiation would seem to be an easy place to start to improve one's negotiation skills. In other areas of leadership, we regularly hear adages on the wisdom of preparation and, in fact, the likelihood of failure when we do not.<sup>27</sup> Unfortunately, in the U.S. criminal legal system, the simple calculus of taking time to prepare is often lost, or difficult due to the heavy caseloads, lack of resources, and

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21. Cynthia Alkon, *Plea Bargaining: An Example of Negotiating with Constraints*, in 1 THE NEGOT.'S DESK REF. 683, 689 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

22. *Id.* at 689.

23. *Id.* at 691.

24. See generally Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13 (2012).

25. Alkon, *supra* note 21, at 694.

26. *Id.*

27. See, e.g., the saying "Failing to prepare is preparing to fail" is often attributed to Coach John Wooden.

surrounding institutional culture.<sup>28</sup>

This lack of preparation is evidenced to some degree by empirical studies on defense attorneys, showing that many of them do not engage in comprehensive interviewing of defense and prosecution witnesses.<sup>29</sup> This is true even though defense attorneys recognize that weaknesses in the prosecution's case are some of the main leverage points in a plea bargain.

#### *A. Goals for the Preparations Sheet*

We have several goals in the preparation sheet. First, a prep sheet organizes our thinking. Whether or not you fill out each box, it helps a negotiator conceptualize the major pieces that are needed prior to sitting down for a negotiation. As the late Public Defender of San Francisco, Jeff Adachi, observed, “checklists combat complexity” and “checklists prevent mistakes.” Adachi said, “in most cases, our missteps and oversights could have been avoided by using checklists.”<sup>30</sup> Good negotiation requires good preparation. The plea preparation sheet is a checklist to make sure that the lawyers (or students in the role of a lawyer) go into the negotiation as prepared as possible. Ineffective negotiation comes from winging it—using the plea preparation sheet helps to prevent this.

Second, this prep sheet in particular brings together both typical negotiation training prep sheets,<sup>31</sup> with the particular elements of plea bargaining preparation. There have been attempts at plea bargaining preparation aids before, but these often miss the nuances of negotiation theory and focus only on facts or law without really forcing negotiators to think about how these elements get used in a negotiation.<sup>32</sup> As we walk

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28. See, e.g., Neena Satija, *How Judicial Conflicts of Interest are Denying Poor Texans Their Right to an Effective Lawyer*, TEXAS TRIB. (Aug. 19, 2019), <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/> [<https://perma.cc/RBU3-BBUD>] (detailing examples where defense lawyers when judges prevented defense lawyers from investigating cases or denied funding after the fact).

29. Robert L. Doyel, *The National College-Mercer Criminal Defense Survey: Preliminary Observations about Interviewing, Counseling, and Plea Negotiations*, 37 MERCER L. REV. 1019, 1021 (1986).

30. Emily LaGratta et al., *supra* note 1, at 1.

31. See, e.g., ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE* (1995) (providing multiple tools for negotiation preparation based on the model in *Getting to Yes*).

32. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995) (See pg. 133, Post Plea Bargain Checklist focused on reflective practices after each negotiation to improve lawyer skills in plea bargaining). See also, Zach



through each element below and how we have already used this in classes, we hope that negotiators can see the benefit of merging these perspectives.

Third, this prep sheet is created to be used by both prosecutors and defense attorneys. The skills that you need to be a good negotiator, as a prosecutor or defense lawyer, cut across these professional identities. For example, delivering a strong closing argument is a skill that both types of lawyers need, and the skill is not fundamentally different between prosecutors and defense lawyers. It is the same with negotiation skills—they are not fundamentally different for prosecutors and defense lawyers. We think that it is important for both sides to recognize more clearly that there are often shared interests and goals, perhaps shared gaps in knowledge or facts, shared mistakes that can be made, and shared concerns as one proceeds through the negotiation process. While prosecutors and defense lawyers could use the same checklist in a variety of areas, such as driving under the influence of alcohol cases, this is not the norm in practice. CLE programs, how-to manuals, and training programs are more commonly divided by role. Prosecutors train with prosecutors and defense lawyers with defense lawyers.

The plea prep sheet intentionally is *not* divided by professional role. We believe that what matters in plea negotiation is good preparation. The answers to the questions, the information filled in, will be different. Needing to understand the underlying interests and setting goals for the negotiation, however, are not different.

Finally, like all good prep sheets, this is designed so that each negotiator learns from this prep sheet and then makes it their own. If one creates muscle memory from practice, each negotiator will note the things that they do on autopilot versus the elements that need more work. The best prep sheets become individualized over time to the negotiator's strengths and weaknesses, to the particular cases they are handling, and to their particular jurisdictions.

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Wavrusa, *A Plea Negotiation Primer*, TDCCA: THE TEXAS PROSECUTOR (Jan.-Feb. 2021), <https://www.tdcaa.com/journal/a-plea-negotiation-primer/> [https://perma.cc/26PY-7YUD] (A prosecutor's perspective on how to prepare for and negotiate a plea bargain).

*B. How We Have Used This Prep Sheet Already*

We have used the plea preparation sheet in our negotiation classes and in specialized criminal classes, including criminal clinics. We also think it will work well as part of a training program for lawyers in both prosecutor and defense offices.

As discussed above, plea bargaining is a unique form of negotiation. It includes serious power imbalances and constraints. This makes preparation all the more important, particularly for defense lawyers who are more often in the less powerful position. The preparation sheet helps to drive this point home when used as a part of a class or training.

The first step in using the plea preparation sheet in training or classes is to have students fill it out with facts from the simulation. Even those who have more of a background in criminal practice will quickly see that there are a variety of things that they may not have been thinking about or informed about.

For example, we regularly see students focusing on their individual interests and needs and not thinking about their counterpart. The plea preparation sheet discourages this approach and demands that students consider the interests of their counterpart. We often find that students have a hard time filing this part out and thinking about other's interests. This is a key point for discussion as we emphasize the value of understanding what matters to your counterpart in order to come to a negotiated agreement.<sup>33</sup> This is no less true in the context of negotiating criminal cases. Defense lawyers who focus only on their clients' interests and do not understand that the prosecutor cannot plead out certain cases to lower offenses without the approval of their boss, will be unlikely to figure out what they might need to do to get that approval. Does the defense attorney need to talk to the prosecutor's boss directly? Does their client have certain kinds of mitigating circumstances that will be more likely to convince the prosecutor's boss that this case is an exception to the policy?

Prosecutors and defense lawyers should be thinking about what the good or bad facts in their case are. What is the defendant's criminal history? What are the laws and policies that influence this case? Are there minimum sentences? If you have bad (or challenging facts) your zone of possible

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33. ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 19-41 (1996).

agreement is different. The zone of possible agreement is also different in different jurisdictions. Even within the same state, or county, there can be vast differences in how individual cases are treated, what standard offers are, and therefore, what the zone of possible agreement is in that court or county or state.<sup>34</sup>

Past the facts, the prep sheet can help consider next steps. For example, defense lawyers are supposed to consider collateral consequences. The U.S. Supreme Court demands that lawyers advise about immigration consequences in any plea deal.<sup>35</sup> However, defense lawyers may not take the time to find out if pleading to a certain case will mean the defendant will be evicted, or lose their job, or lose their professional license.<sup>36</sup> This may be even more true with less serious cases, like misdemeanors, which can still carry significant collateral consequences.<sup>37</sup> The preparation sheet flags the importance of asking about these consequences for defense lawyers. It also flags that these things may be points of impasse to prosecutors. One of us did her first jury trial, a misdemeanor petty theft, entirely due to her client's concerns about immigration consequences.<sup>38</sup> This concern was mentioned during plea negotiations, but the prosecutor seemed to reject it without serious consideration of other possible options. It matters for both prosecutors and defense lawyers to think about collateral consequences and to consider whether another outcome, without the collateral consequence, is an option.

In the above case, it might have helped if there were a range of possible other charges, without the immigration consequences. And the negotiation prep sheet pushes us to consider these options as well. Penal codes in the United States are written with a full range of possible options and ways to

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34. ALKON & SCHNEIDER, *supra* note 19, at 129-30.

35. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

36. Sarah Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NATIONAL INSTITUTE OF JUSTICE (Feb. 26, 2013), <https://nij.ojp.gov/topics/articles/beyond-sentence-understanding-collateral-consequences> [<https://perma.cc/DS4T-HHHU?type=image>] (“Although these consequences can have a profound impact on the lives of those convicted, until recently, judges, prosecutors or defense counsel seldom discussed or considered collateral consequences.”) *See also*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES ON CRIM. CONVICTION, <https://niccc.nationalreentryresourcecenter.org/> [<https://perma.cc/69V3-49U2>].

37. *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

38. Unfortunately, the trial ended in a guilty verdict as not wanting the collateral consequence of deportation was not a defense to the criminal charges.

charge the same acts.<sup>39</sup> It is useful, before starting a negotiation, to have a list of what those options are. What are lesser offenses? What are enhancements that can be charged or dropped? And, what are the alternative processes? Does one charge or another qualify for a drug court? Lawyers can often overlook the full range of options without recognizing that option generation can be an important part of any negotiation. One of the reasons plea bargaining is often thought of as a highly constrained negotiation is the concern that there are few options. Defense lawyers and prosecutors are often trapped into thinking about every case with the same charge in the same way. This section reminds them to not think so narrowly. It is not possible to have a unique outcome for every drug sales case, but when it is possible, it is more likely to happen if the lawyers have other options to propose during the negotiation.

### *C. How to Use a Prep Sheet*

The plea preparation sheet is a starting point and tool to help learn how to prepare for a plea negotiation. Using the plea preparation sheet regularly can help to develop standard routines for cases—so students (and then lawyers) are thinking expansively about what matters, what they know, and what they need to know, before starting a plea negotiation. It helps to create good habits in preparation.

## II. THE ELEMENTS OF THE PREP SHEET

This next section of the Article runs through the elements of the plea bargaining preparation sheet that we created to understand two primary concepts. First, we will explain why each element is important to negotiation in general using both negotiation theory and empirical studies to demonstrate the significance of this preparation. Second, we will review how these elements are manifested in plea bargaining negotiation in

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39. Alkon, *supra* note 9 (proposing legislative change to reduce prosecutorial power in plea bargaining); Cynthia Alkon, *What's Law Got to Do With It? Plea Bargaining Reform after Lafler and Frye*, 7 Y.B. ARB. & MEDIATION 1, 22-26 (2015) (discussing reform to penal codes to reform plea bargaining practice); Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining* at 582-588 (discussing how the variety of charging options gives prosecutors extraordinary power in the plea bargaining).

particular and how both the defense attorney and prosecutor will be better served—and more effective—if they have prepared on these elements in advance.

*A. Interests & Goals*

It is usually logical to start the preparation for a negotiation by considering what is important—needs, motivations, and interests—and then setting a goal for measuring those accomplishments. Effective negotiators—and lawyers negotiating on behalf of clients—recognize that, while intuitive, clear specific thinking about interests and goals make it far more likely that they will be achieved.

Case Name \_\_\_\_\_

Charge \_\_\_\_\_

Sentence Minimum/Maximum \_\_\_\_\_

	<b>Interests &amp; Goals</b>			
	Defendant	Defense Attorney	Prosecutor	Victim/Public/Press
<b>Interests</b>				
<b>Goals</b>				

*1. Interests*

The first thing to think about in every negotiation is the interests of the parties.<sup>40</sup> We might imagine that this is pretty simple—the prosecutor wants to punish the perpetrator and the defendant wants to avoid that. And yet understanding the real interests of the parties—versus their opening offers or assumed positions—is crucial in terms of meeting their needs. In negotiation theory, the difference between positions and interests is often

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40. ROGER FISHER, WILLIAM L. URY, & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 42-57 (3d. ed., 2011); David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 NEGOT. J. 73 (1986).

highlighted as the crux of more effective negotiations,<sup>41</sup> and the skills to prepare those—interviewing, gathering facts, active listening—are highlighted as necessary for client-centered counseling.<sup>42</sup> In two-party negotiations, where lawyers represent single clients, lawyers are expected to help clients recognize their own interests beyond positions (i.e. the client wants to sue and the interest is financial security or precedent or getting the job back). Lawyers can then assist their client in prioritizing their interests, giving the lawyers a road map for more successful negotiations.

Note that the prep sheet does include all sides in the negotiation. We want to be clear—it is not enough to understand your own interests and that of your client's. In order to better persuade your counterpart, it is quite useful to understand (or make a good guess about) their interests. You might be wrong and miss something completely. At the same time, given the amount of repeat play in the legal field and what experience can teach us, working hypotheses of the counterpart's respective interests can be useful. These hypotheses can form the basis of conversation and information gathering, will then likely help frame potential elements of the agreement, and can also serve as persuasive tools themselves (i.e. “both of us want what is best for this family” or “let's talk about how we keep this neighborhood safe while getting treatment for the mentally ill”).

In sophisticated negotiation training for lawyers, we often note that the lawyers themselves might have interests in the negotiation—perhaps getting it done quickly or looking good to the senior partner—that are in addition to the client's interests. Being aware of these sometimes common interests can also help move the negotiation along efficiently. (“We both would prefer to minimize discovery costs. Can we agree on a limit of two depositions?”).

Yet plea bargaining is already more complicated on its face and our prep sheet reflects that. The defense attorney and prosecutor each have their own interests (perhaps the shared one of managing their case load) as does the defendant. We have also added a column for victim interests or the press or the public, which might align, but often do not. Each case, each victim, and each jurisdiction will play out differently as to how impactful the interests

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41. FISHER ET AL., *supra* note 40, at 42-57.

42. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010); STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 21-32 (2015).

are on the actual negotiation. The pressure of the press or public to be tough or to drop charges should be considered. Similarly, some victims will desire more involvement while others will not. Their interests—and cooperation—should also be prepared for in a negotiation so that the prosecutor is not blind-sided, having not considered this.

In the plea negotiation context, interests include those that may be beyond the case itself.<sup>43</sup> For example, both defense lawyers and prosecutors have an interest in managing their caseloads. Prosecutors may have an interest in career advancement.<sup>44</sup> Prosecutors have office policies to which they need to adhere. Defendants may be concerned about collateral consequences (will they lose housing, jobs, custody of their children?)<sup>45</sup> Defense lawyers that understand the underlying interest of the prosecutor with whom they are working are in a better position to frame their arguments in more persuasive ways. Prosecutors are often less concerned about what a defendant wants than how they can explain or justify a particular deal to their boss. Defense lawyers that understand those interests are better able to pull out facts that support making an exception to an office policy, such as dropping a school zone enhancement, or mandatory jail time. Why is this case different? Why should a prosecutor look at this case differently?

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43. ALKON & SCHNEIDER, *supra* note 19, at 73-74 (underlying interests can include case management, career advancement, reelection (for judges and district attorneys), reputation, and maintaining good working relationships).

44. See Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005) (reporting higher trial rates in jurisdictions where prosecutors would make more money in private practice, after leaving the prosecutor's office).

45. See, e.g., NAT'L INVENTORY OF COLLATERAL CONSEQUENCES ON CRIM. CONVICTION, *supra* note 36.

## 2. Goals

Having clarified and prioritized the interests of the parties, it is now time to turn to setting goals. Negotiation literature (as well as business literature) has repeatedly demonstrated that setting specific, optimistic and realistic goals will be most successful.<sup>46</sup> First, goals should be specific—as in, the defendant should be locked up for 3 years or the charges should be dropped. When goals are vague (let’s just hope for the best or let’s see what they have to say), negotiators are less likely to work toward their achievement. It is the difference between a new year’s resolution to be “more healthy” and a commitment to stop smoking or walk for twenty minutes a day. While vague pledges to change behavior make us feel better in the moment, they are completely ineffective in actually changing behavior. Similarly, setting negotiation goals that are specific are needed to engage our own incentive structure. With specific goals, negotiators are willing to go back and forth more often, be patient while negotiating (rather than prematurely accepting a less optimal outcome), and work harder to reach that goal.<sup>47</sup>

Second, goals need to be optimistic or aspirational. An easily achievable goal might sound safe (I know that I can get the prosecutor to drop the gun charge) but shortchanges the client in terms of what you might achieve. These aspirational goals help frame our first offer (few of us get *more* than what we ask) and triggers the patience and effort that are needed to succeed. Jennifer Brown calls this the satiation theory of hope.<sup>48</sup> One can plan to drop back to a “safe” offer as a second or third bid (we will discuss concession management later in the article) but there is no good reason to start with the “safe” first bid. The aspirational goal also serves to “anchor”

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46. Andrea Kupfer Schneider, *Aspirations in Negotiation*, 87 MARQ. L. REV. 675 (2004) (“Negotiators should establish optimistic aspirations because empirical evidence has shown negotiators with higher aspirations tend to achieve better bargaining results.”); Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661, 1669-70 (1997); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 34 (2d ed. 2006) (“Research has repeatedly shown that people who have higher aspirations in negotiations perform better and get more than people who have modest or ‘I’ll do my best’ goals.”).

47. Korobkin, *supra* note 46; Brown *supra* note 46, at 1670.; Sally Blount White & Margaret A. Neale, *The Role of Negotiation Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 303 (1994).

48. Brown, *supra* note 46.



the negotiator to hold onto these goals as long as possible.<sup>49</sup>

Finally, goals do need to be justifiable and realistic. This takes research in understanding what the typical range of outcomes have been.<sup>50</sup> Perhaps the outcomes might be different in various neighboring jurisdictions or with different judges. As we will discuss in the next section, having a grounding in law and policy is crucial for understanding what is fair and just. Similarly, as you set your goals, this understanding of fairness will inform your thinking. If no one has ever been released after a sixth DUI, asking for this will make a defense attorney look ill-informed and naïve. On the other hand, demanding that this driver be sentenced to life in prison could make the prosecutor look equally disconnected from reality.<sup>51</sup>

There are cases that lend themselves to standard deals, like driving under the influence or possession of drugs. To agree to a deal that is outside the norm requires that there is something different about the case (e.g., are there problems with the evidence? Is the defendant in a unique situation?). In these types of cases, lawyers should know what the standard deals are and should be able to decide if there is some reason to set a different goal for a plea outcome.

There are also a wide variety of cases, such as crimes of violence (ranging from misdemeanor assault to first degree murder), that are very fact specific. In these cases, it is arguably even more important to set clear goals for the negotiation. In many jurisdictions, standard cases have first offers at arraignment. This puts defense attorneys in the position of having to make a counter offer, if the first offer is not acceptable. By contrast, cases that don't lend themselves to standard deals often don't receive early offers by the prosecutor. In some cases, particularly more serious cases, the prosecutor may never make an offer.<sup>52</sup> In death penalty cases the plea

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49. See *infra* Section D for a further discussion of negotiation errors and how to prepare to minimize them.

50. Doing this kind of research can be a challenge because of the lack of data. See generally, Schneider & Alkon, *supra* note 8, at 447.

51. We recognize that there might be circumstances where the law would allow for such a sentence and where defendants are sentenced to long terms over offenses that do not seem to deserve such terms. If the law allows for absurdly long sentences, and if these kinds of sentences are routine in a particular jurisdiction, it might not, in fact, be disconnected from reality.

52. Not every case has a plea offer and plea bargaining rates vary by the type of charge. For example, in Texas, 94% of all criminal convictions in district courts were due to a guilty plea in 2017. However, 62.5% of capital murder and murder convictions were due to a guilty plea, and over 95% of drug convictions were due to a guilty plea. See, *Annual Statistical Report for the Texas Judiciary, Fiscal Year 2017*, OFF. OF CT. ADM'R 111, 112 (2018), <https://www.txcourts.gov/media/1441397/ar-fy-17->

negotiation may be around whether the prosecution will agree to life in prison without parole—as any sentence less than death may be the goal of the negotiation.<sup>53</sup> In other factually unique cases, prosecutors may not make an offer at arraignment as they may want to gather more information about the case, such as the extent of injuries, and to be sure about the defendant’s prior record. Setting a clear goal can make all the difference in these kinds of cases. From the defense perspective, these cases can be some of the few cases where they may be able to set the anchor with a clearly articulated first offer (based on setting a clear goal).<sup>54</sup>

### *B. Investigation & Criteria*

In many of the articles on plea bargaining skills, authors noted how little time both defense attorneys and prosecutors have per case—and how hard it is to perform the needed research for a particular defendant.<sup>55</sup> From a negotiation perspective, this is damning.<sup>56</sup> Few would disagree with the proposition that assertiveness is one of the key skills in negotiation. Yet, without having the facts, assertiveness starts to represent the old adage that when you don’t have the law, argue the facts. And when you don’t have the facts, pound the table. Effective negotiators save pounding the table for selected cases and do not rely on it as a regular feature of their skillset. To turn to the other part of this adage, understanding the law is also crucial in negotiation for setting the criteria and understanding what is a fair outcome.

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final.pdf [https://perma.cc/GZ9C-W8M7].

53. See, e.g., Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 483 (2013) (“[T]he threat of the death penalty increases the likelihood of reaching a plea agreement by approximately 20 percentage points. In practical terms, the death penalty increases the plea-bargaining rate from approximately 40% to 60%. In other words, the threat of capital punishment deters roughly two out of every ten death-noticed defendants from pursuing a trial.”); Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 678-80 (2009) (concluding that “Plea bargaining perverts the role of counsel as it trivializes the purposes of the death penalty.”).

54. See *infra* Section II.D.5. (discussing negotiation errors and strategies regarding anchoring).

55. Doyel, *supra* note 29, at 1026-27.

56. Doyel, *supra* note 29; see also Roberts & Wright, *supra* note 3.

<b>Investigation &amp; Criteria</b>	
<b>Facts</b>	
Good/Bad	
Defendant's Priors	
Defendant's Personal History	
Defendant's Confidential Information?	
Prosecutor Exculpatory Information?	

### *1. Knowing the Case*

For beginning negotiators, understanding the facts of the case is often the easiest way to start to improve your skills. With knowledge comes confidence, and with confidence comes the ability to speak calmly about one's interests and goals. Each lawyer should be their own expert about the facts of their case, what actually happened, and reports from the scene. In criminal law, more so than in other areas, this knowledge of the facts should also extend to the defendant and the broader context as punishment and rehabilitation often depend on the judge's or prosecutor's personal judgment about the individual defendant.<sup>57</sup> Will this defendant be a danger? Will this defendant commit another crime? Does this defendant have a supportive family, job, or other reason to believe that the accused behavior is an anomaly? Without knowledge of defendant's family or history,

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57. See generally HERMAN, *supra* note 2 (background information to know about the defendant as part of preparation for plea bargaining). In an effort to move beyond personal judgements, a number of states and jurisdictions are using risk assessment tools, which have their own challenges in terms of bias. See Rick Jones, *The Siren Song of Objectivity: Risk Assessment Tools and Racial Disparity*, CHAMPION, Apr. 2018. Risk assessment tools are being used at sentencing, which arguably is not their intended use. See, e.g., Erin Collins, *Punishing Risk*, 107 GEO L.J. 57 (2018) (arguing that risk assessment tools not designed to be used in sentencing); see also Megan Stevenson, *Assessing Risk Assessment in Action*, 103, MINN. L. REV. 303, 314-16 (2018) (describing the type of information collected).

defense attorneys have less ammunition with which to argue. Similarly, prosecutors may end up sending to jail (and spending taxpayer dollars) on defendants who do not warrant that punishment (and then potentially facing press and community criticism for doing so). It would seem that this is an easy fix—preparation is “just” a matter of spending the time. And yet we know, for many practicing criminal lawyers, this is no easy fix at all.

Defense lawyers often have high caseloads<sup>58</sup> and, if they are paid by the case, their pay may be so low that they cannot afford to spend any serious time on each case.<sup>59</sup> The combined impact of high caseloads and inadequate pay often means that the structure is such that defense lawyers cannot adequately prepare. But, putting aside that important issue for now, good lawyering demands that we train lawyers to prepare fully, by knowing at least the facts and the law for their cases.<sup>60</sup> The plea preparation sheet reminds the preparer to make sure they know the elements of the offense, that they have the facts to support each element, or to highlight a lack of evidence to support a particular element as a possible area for negotiation. For example, if a defendant is charged with possession for sale of a controlled substance, and the only facts in the case are that the defendant was found with a controlled substance, in an amount that is small enough to be for personal use, it may be difficult for the prosecution to prove that it was possessed for sale. The lack of evidence could support reducing the charge to a simple possession.

Finally, good facts for either side or the law itself may give that side leverage in the plea negotiation. Prosecutors more often have this advantage. For example, if a case has been charged without possible enhancements, that can be leverage in the plea negotiation, threatening the

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58. See generally Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, THE GUARDIAN (Sept. 7, 2016, 6:55 AM), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system> [https://perma.cc/F7C9-4NZC] (reporting on high caseloads for public defenders); see also Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [https://perma.cc/SJF4-67FV]. For an article detailing the problem in Texas, see Satija, *supra* note 28.

59. See Alkon, *Plea Bargain Negotiations: Defining Competence*, *supra* note 19, at 394 (discussing the problem of the “meet and plead” defense in the context of plea negotiations); see also *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

60. See Alkon, *Plea Bargain Negotiations: Defining Competence*, *supra* note 19, at 391 (discussing three basic questions competent defense lawyers should answer in plea preparation: are there any possible defenses to the charges; are there any possible pre-trial motions, and are there possible additional charges or sentencing enhancements.)

defendant that if they reject the deal, that the enhancement will be added.<sup>61</sup>

## 2. Law/Policy/Criteria

<b>Law &amp; Policy</b>	
Min/Max/Standard offers?	
Collateral Consequences (Immigration, Family Court, Professional Licensing, etc.)	
Motions/Procedure?	
Prosecutorial Policies?	
Court History/Judge	

Every negotiation textbook, and almost every popular negotiation book as well, discusses the importance of standards or criteria as a way of grounding the negotiation in fairness.<sup>62</sup> Finding standards help negotiators in a myriad of ways. First, it helps the negotiator set their own parameters—what appears reasonable? What seems to be an excellent outcome comparatively (and therefore might be the optimistic goal) and what seems absolutely terrible (in which it would be worth it to proceed to trial)? By understanding the range of outcomes, negotiators can anchor themselves, knowing that what they propose is reasonable and justifiable. Moreover, these standards can be used to persuade the negotiation counterpart.<sup>63</sup> The

61. *Brady v. United States*, 397 U.S. 742 (1970) (holding that the threat to seek death if the defendant did not accept the guilty plea did not make the plea involuntarily and unintelligently made); see also Alkon, *Hard Bargaining*, *supra* note 19 (recommending better regulation of prosecutors to prevent threats in plea bargaining).

62. Even the most popular negotiation books devote whole chapters to criteria. For example, scholar Richard Shell includes a chapter entitled “Third Foundation of Negotiation Effectiveness,” and *Getting to Yes* has an entire chapter devoted to fairness, “Insist on Using Objective Criteria.” See SHELL, *supra* note 46, at 40; FISHER ET AL., *supra* note 40, at 82-95; see also MENKEL-MEADOW ET AL., *supra* note 5, at 116-19; RISKIN ET AL., *supra* note 5, at 166-67.

63. Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 72-73 (2015). Using objective criteria is a critical part of negotiation

counterpart will also want to feel fairly treated—that the deal they are getting for their defendant or on behalf of the state and, in some cases, the victim, is within the range of what other outcomes have been. Few lawyers will come into a negotiation claiming they want or expect “more than is fair,” so a full comprehension of these criteria is needed to persuade them.

In plea bargaining, one might assume that the only standards are trial outcomes and that researching these would be sufficient. Yet, when 97% of criminal convictions come without a trial, one needs to understand how those cases were resolved. This is why the prep sheet we have created forces both sides to fully understand all the different elements that go into creating criteria and the ways in which “fairness” can change based on the defendant, the court, the prosecutors, or evolving policies.

As discussed earlier, competent assistance of counsel requires that defense attorneys advise their clients of any immigration consequences if they plead guilty.<sup>64</sup> Beyond that, good lawyering demands that defense lawyers advise their clients about other collateral consequences such as concerns about losing professional licensing, public housing, impacts on family law cases, etc.<sup>65</sup>

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strategy in terms of setting one’s goals, and it also helps to frame persuasive arguments to the negotiation counterpart. As Professors Batra and Oliver write:

One less obvious advantage of raising criteria to justify offers is simply that raising criteria provides a justification for defense counsel to make a demand. Research has shown that the simple step of providing a justification for a demand, even a frivolous one, has the power to induce compliance. Defense counsel, then, may find themselves at an advantage by using norms for judicial exercise of prosecutorial discretion. They will be able to better justify their offer and thus increase the likelihood that prosecutors will not reject the offer out of hand. By saying, “I think this offer is acceptable because . . .,” defense attorneys can bolster their bargaining position and induce the same psychological effect on their negotiation partners—prosecutors—as in any other negotiation context. *Id.*

64. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

65. *Criminal Justice Standards for the Defense Function*, ABA (4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/\[https://perma.cc/BZ85-MYC6\]](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/[https://perma.cc/BZ85-MYC6]) (ABA Standard 4-1.3(h) for the Defense Function indicates that defense lawyers have “a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.”). Holistic defense means assisting the client beyond the single criminal case and considering (and assisting) in a variety of ways to minimize or decrease collateral consequences of convictions and addressing problems that may contribute to criminal behavior (such as homelessness, poverty, mental illness, and addiction), *see e.g.*, the Bronx Defenders definition of Holistic Defense available at <https://www.bronxdefenders.org/holistic-defense/>. *See also* NAT’L INVENTORY OF COLLATERAL CONSEQUENCES ON CRIM. CONVICTION, *supra* note 36 (providing a state-by-state listing of collateral consequences of criminal convictions).

Prosecutors and defense attorneys alike should also know whether the facts in a case give rise to particular motions. For example, was the search one that will give rise to a motion to suppress the evidence?<sup>66</sup> There may be times when the prosecutor recognizes that the search was problematic, or otherwise doesn't want to risk a particular motion succeeding. In those situations, a prosecutor may want to make a better plea offer. Defense lawyers know that simply having a motion to run, doesn't mean it will be granted in their client's favor. It may, however, be useful leverage in the plea negotiation.<sup>67</sup>

Finally, location matters in plea negotiations. The single most important fact in what happens on a criminal case is where it happens. Who is the prosecutor? What are the prosecutor's office policies? What judge will the case go in front of? What is the history and culture of the particular courthouse and courtroom? If a judge is harsher on drug cases, it may make it more difficult to resolve a case in that court.<sup>68</sup> Judges must approve the plea bargain, so understanding if a particular judge has had issues with certain kinds of plea deals is important. It may be possible to get the case out of a particular courtroom and into another to resolve it. For example, in more crowded jurisdictions, the calendar court may not be the trial court. In such a jurisdiction (and situation) it is not unusual for prosecutors and defense lawyers to agree to send the case out to trial so it would go in front of another judge who would accept the plea deal.

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66. See Alkon, *Plea Bargain Negotiations: Defining Competence*, *supra* note 19, at 396-97.

67. *Id.* at 391.

68. For an extreme example, see *Very Tough Love*, THIS AMERICAN LIFE (Mar. 25, 2011), <https://www.thisamericanlife.org/430/very-tough-love> [<https://perma.cc/JN35-LBAU>] (discussing a judge in a small town in Georgia whose strong views about drugs and drug addiction change how she handles these cases both in terms of pressuring defendants to do her version of drug court and how she treats the defendants in her drug court).

*C. Elements of an Agreement*

Once negotiators have figured out their interests, priorities, goals and criteria, they can start to consider the elements of the agreement. This includes both the particular pieces of the potential agreement—in negotiation scholarship, these are called options—and what happens if the negotiation fails. Both are crucial to consider in advance of the negotiation.

<b>Element of Agreement/Plea Bargaining Options/BATNA</b>	
Charge(s) (Minimum/Maximum)	
Possible Other Charges?	
Enhancements?	
Leverage (Law? Facts? Procedural? Jurisdictional?)	
Alternative Processes Available? (diversion, problem solving courts, restorative justice process, other?)	
Dismiss?	



### 1. BATNA

BATNA is perhaps the most ubiquitous term in negotiation literature, discussed everywhere since its coinage in *Getting to Yes* forty years ago.<sup>69</sup> It literally translates as Best Alternative to a Negotiated Agreement. The concept is that a negotiator should know at what point she would walk away from this negotiation and go to her “best alternative.” This prevents the negotiator from making a bad deal, a deal that would be worse than the alternative.<sup>70</sup> In negotiating the rent for an apartment, for example, one might prefer an apartment with a nice view but, if the price is not lowered sufficiently, determine that the second-choice apartment with less sunlight makes more sense for her budget. The BATNA is the action one would take (rent the other apartment) without needing the agreement of the negotiation counterpart. In plea bargaining, if a negotiation is not successful, the BATNA for the defense attorney will almost always be going to trial (the prosecutor would have no choice but to proceed). The prosecutor, on the other hand, might determine that the BATNA would also be going to trial or that the BATNA might be dropping the charges completely (and yet is unlikely to signal that during the negotiation).

The second part of the BATNA analysis is knowing when to proceed to that BATNA—a concept that the negotiation literature often refers to as the reservation point or the walk-away point.<sup>71</sup> Understanding the point at which to go to the BATNA also takes separate preparation. In plea bargaining, it might be easy to figure out that going to trial is the BATNA, but then one should predict what will happen in trial. Looking at recent outcomes in this court, by this judge, with this jury pool, will help. And yet, with the paucity of cases going to trial, it is often hard to predict—and therein lies one of the challenges of plea bargaining.<sup>72</sup>

BATNA may be, therefore, a less important concept in plea negotiations. Depending on the case, the facts, the particular prosecutor and judge, a defendant may be left with two choices: take a bad deal or go to

69. FISHER ET AL., *supra* note 40, at 99-108.

70. Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO L. J. 1789 (2000); Jeffrey Senger, *Decisionmaking Under Uncertainty*, in 1 THE NEGOTIATOR'S DESK REFERENCE 379 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

71. See, e.g., CARRIE J. MENKEL-MEADOW ET AL., NEGOTIATION: PROCESS FOR PROBLEM SOLVING at 97-98 (3d ed. 2020).

72. Hollander-Blumoff, *supra* note 19; Roberts & Wright, *supra* note 3.

trial and risk an even worse outcome. In these situations, the defendant may simply have a WATNA, worst alternative to a negotiated agreement.<sup>73</sup> Prosecutors, by contrast, may think of trial as a BATNA. If their facts are strong, and the law supports them, they can often expect a much tougher sentence after trial, due to the trial penalty.<sup>74</sup>

## 2. Options

Another part of negotiation preparation is to consider elements of the agreement, recognizing that each plea bargain can comprise more than time and jail. Particularly in the midst of the COVID-19 pandemic, both prosecutors and defense attorneys may be, at times, getting more creative with individualized responses to each particular case due to the increasing recognition that mass incarceration is disproportional to the goal it purports to serve.<sup>75</sup> The core of problem-solving negotiation literature focuses on creativity and flexibility—how the pareto optimal solutions in negotiation will only be achieved with more fluid and dynamic thinking. While some of this can (and does) occur at the table with the negotiation counterpart, it is also worth the time to prepare in advance so that you can demonstrate your openness and flexibility at the table. Taking different perspectives, considering various designs and structures, and thinking about analogous situations can help open a negotiator's mind to creativity.<sup>76</sup> Moreover, the

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73. Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining*, *supra* note 19.

74. See, e.g., NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 17–18 (2018), available at <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct> [<https://perma.cc/2M6E-7F99>] (“because plea negotiations are off the record and because most cases plead out, data regarding plea offers is largely unavailable, so there is no way to accurately calculate the full extent of the trial penalty . . . a combination of anecdotal evidence and an analysis of prosecutorial practices, sentencing laws, and judicial decisions, strongly suggests that coercion plays a major role in the ever-increasing percentage of defendants who forego their right to a trial.”). For a general discussion of coercion in plea bargaining, see Alkon, *Hard Bargaining*, *supra* note 19, at 413–15; see also ALKON & SCHNEIDER, *supra* note 19, at 129–33.

75. For example, problem solving courts developed due to the creativity plea bargaining allows. Cynthia Alkon, *Have Problem-Solving Courts Changed the Practice of Law*, 21 *CARDOZO J. CONFLICT RESOL.* 597, 612 (2020).

76. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 *HARV. NEGOT. L. REV.* 97, 97 (2001); Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 *MARQ. L. REV.* 697, 697 (2004); Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 *CLINICAL L. REV.* 835 (2003).

process of being creative—giving oneself time and space to be creative, consulting with others and brainstorming, wordplay or other activities—need to be built into negotiation preparation so that a negotiator can mull over different ideas. Lawyers are not necessarily trained or particularly skilled in this type of thinking and, yet, as a society moving away from incarceration as an only option, this is an area where skilled lawyering can quickly make a difference.

Different court processes and sentencing options are now common. Drug courts are widely available, both in large urban areas and in rural areas.<sup>77</sup> Mental health courts and veterans' courts are also widely available.<sup>78</sup> In some jurisdictions restorative justice may be an option.<sup>79</sup> In most jurisdictions there is some kind of diversion program—with problem solving courts being more widely available in some communities.<sup>80</sup>

Prosecutors and defense lawyers need to know the full array of options in terms of alternative processes to handle criminal cases in their jurisdiction. In addition to the threshold question of whether a particular defendant qualifies for an alternative process, defense lawyers also need to understand how those processes work in their jurisdiction and whether it is a good option for their particular client on that particular case.

Well prepared lawyers know not only the charges that have been filed on a particular case but also what could be filed. Are there additional enhancements that could be added (or threatened)? For example, if a defendant has a prior conviction, can that be added as an enhancement to increase the amount of possible prison time? Was there a weapon used in the case? Are there other possible charges? Lawyers should know what could be added, what lesser charges might possibly fit with the facts, and what the minimum and maximum sentences could be. Sentencing can be

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77. There are over 3,000 drug courts in the United States. *See, e.g., Drug Courts*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS (Nov. 2020), <https://www.ojp.gov/pdffiles1/nij/238527.pdf> [<https://perma.cc/8K5E-RJFX>].

78. There are over 300 Mental Health Courts in the United States. *See Mental Health Courts*, COUNCIL OF STATE GOV'TS JUST. CTR., <https://csgjusticecenter.org/projects/mental-health-courts/> [<https://perma.cc/U5EE-9MAG>]. There are 461 Veterans Courts in the United States as of June 30, 2016. *Veterans Courts*, NAT'L CTR. FOR STATE CTS., [<https://perma.cc/KSK7-T8WM>].

79. Shannon M. Silva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, J. OF POL'Y PRAC., 77, 85 (2015) ("32 states had statutory support for the use of restorative justice or specific restorative justice practices in their criminal or juvenile justice codes.").

80. ALKON & SCHNEIDER, *supra* note 19, at 53-58 (describing diversion and concerns about how it prosecutors use this common option).

highly complicated on its own. Competent lawyering requires that defense counsel accurately advise clients on what is the possible maximum under the existing charges, as well as any possible additional charges and enhancements.<sup>81</sup>

#### *D. Approach & Communication*

This last segment of the preparation sheet focuses on how negotiators interact with one another before and during the negotiation, understanding that everything from the previous relationship to the mode and timing of the communication all impact the substantive outcome of the negotiation. Effective negotiators consider these elements in advance rather than passively letting them happen.

<b>Approach/Communications</b>	
Reputation & Relationship between lawyers	
Negotiation Style (yours & counterpart)	
Timing (What stage? How close to trial?)	
Concession Management (1 <sup>st</sup> offer, 2 <sup>nd</sup> offer, etc.)	
Potential Negotiation Errors?	
Communication Mode (email, face-to-face, phone, etc.)	

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81. The Supreme Court has not yet held that this is required. *See generally* Alkon, *Plea Bargain Negotiations: Defining Competence*, *supra* note 19 (discussing what competence standards could be and that minimal competence includes requiring that defense lawyers adequately advise their clients about possible additional charges and enhancements).

### 1. Relationship

There is so much analyzed under the concept of relationship in negotiation that entire books have been written on how to build the relationship,<sup>82</sup> how to manage it, how to rebuild trust that has been broken,<sup>83</sup> and so forth. A short exposition to this element of negotiation is woefully inadequate so let us just note here that there is much more to explore. Why have relationships been the focus of so much negotiation literature? The relationship often sets the tone for how much information is exchanged, whether the parties trust each other to bargain in good faith and consider fairly the information shared by the other side, if the parties are willing to be creative with each other and problem-solve solutions, and even the extent to which negotiators trust each other to comply with the terms of the agreement. Building rapport within the negotiation has shown to lessen the likelihood of duplicity,<sup>84</sup> increase the likelihood of integrative agreements, and leave the parties feeling like they were treated fairly.<sup>85</sup> Particularly in repeat interactions, in which so many criminal lawyers are engaged, the relationship that prosecutors and defense attorneys have with each other can impact every element of negotiation we have already discussed.<sup>86</sup>

In advance of the negotiation, one should consider the relationship between the negotiators and if there is any way to improve that beforehand. For example, as we will discuss below, how does the negotiation communication commence? Are there ways to build rapport before exchanging substantive information or offers? Additionally, during the negotiation, it is helpful to consider the relationship of the future recognizing that behavior now sets the reputation and relationship for the next interaction.<sup>87</sup>

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82. Rebecca Hollander-Blumoff, *Building Relationships as Negotiation Strategy*, in 1 THE NEGOTIATOR'S DESK REFERENCE 295 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* (1989); DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2d ed. 2010).

83. See e.g. Roy Lewicki, *Repairing Trust*, in 1 THE NEGOTIATION DESK REFERENCE 217 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

84. Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 Ohio St. J. on Disp. Resol. 481, 527-28 (2009).

85. Nancy Welsh, *Perceptions of Fairness in Negotiation*, in 2 THE NEGOT. DESK REF. 516-31 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

86. Schneider, *supra* note 19.

87. ALKON & SCHNEIDER, *supra* note 19, at 235-38.

*Getting to Yes* encourages negotiators to “separate the people from the problem”<sup>88</sup> recognizing relationships separately from the roles adversaries can play. Defense lawyers and prosecutors often have long standing and close professional relationships. They may be assigned to the same court for several years. They may have worked together in different courts over decades. As lawyers, they are by definition repeat players.<sup>89</sup> Reputations are also well known and can impact how plea negotiations happen. Defense lawyers will share less information with prosecutors who have a reputation for withholding evidence, or otherwise not being ethical. Prosecutors may not have as much patience to negotiate with a defense lawyer who is known to be dishonest or who has a reputation as someone who is fighting all the time, regardless of whether the facts support the fight.

## 2. Negotiation Style

Another part of the interaction between the negotiators will be the negotiation style that each brings to the table. Psychologists and others have outlined five primary approaches to conflict across an x-y-z axis of empathy, assertiveness, and flexibility: competitive, compromising, accommodating, avoiding, and collaborative.<sup>90</sup> Effective negotiators understand that their style in negotiation should depend on the counterpart, client, and context and should recognize the advantages and disadvantages of each style in resolving a particular dispute.<sup>91</sup> Moreover, this style might shift within the negotiation based on the item being negotiated as well as the ongoing progress and emotional tenor of the negotiation. Overusing one style can be problematic. Too much competitive behavior leads to others responding with increasing competitiveness, a lack of creative ideas, and harm to the relationship. Too much accommodating behavior leads to a reputation as a doormat, also a lack of creative ideas, and a litany of unmet interests. Even too much collaboration can be exhausting if time and energy is always devoted regardless of the need or complexity of the case. Similarly, not having all styles in one’s repertoire can also be limiting.

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88. FISHER ET AL., *supra* note 40, at 99-108.

89. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97-101 (1974).

90. Schneider, *supra* note 24.

91. *Id.*

While lawyers cannot avoid conflicts for which they are hired forever, choosing how and when to engage can make an avoiding style the best temporary choice. Perhaps more factual research is needed. Perhaps more brainstorming about creative options would make sense. Perhaps you've already had a tough day and know that you need more energy to really engage.

Choosing an appropriate style also should reflect the likely or typical behavior of the negotiation counterpart—and, therefore, the ability to assess the other side also falls within this preparation.<sup>92</sup> How have they approached cases like this in the past? What is their reputation in the field and among your peers? Again, this is where reputation and repeat play can be advantageous to those negotiators who consider it carefully during the preparation phase and respond accordingly.<sup>93</sup>

As discussed above, defense lawyers and prosecutors often have long-standing work relationships. This means that they may know what style or styles to expect with a particular defense lawyer or prosecutor. We also encourage negotiators to recognize their own styles and how that might work with particular negotiating counterparts. For example, a defense attorney who prefers a more collaborative approach to negotiation, may have to be more competitive, at least initially, against a prosecutor who is highly competitive.<sup>94</sup>

Recognizing that you might be starting a long-standing relationship can also make a difference in the approach. For example, when one of us was a public defender in Los Angeles, the standard advice when moving to a new courthouse, was to do a jury trial as quickly as possible in the new posting. The idea was that it was important to quickly establish that you are a good trial lawyer and that you are not afraid of going to trial. This can help when negotiating against a more competitive prosecutor—so they know that this particular defense lawyer is not a push-over and is a worthy adversary. This can help to open up the possibility for more collaborative

92. *Id.*

93. Catherine Tinsley, Jack J. Cambria & Andrea Kupfer Schneider, *Reputation in Negotiation*, in 1 THE NEGOTIATOR'S DESK REFERENCE 249 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017); Catherine H. Tinsley et al., *Tough Guys Finish Last: The Perils of a Distributive Reputation* 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 621 (2002).

94. See Schneider, *supra* note 19. See also Schneider *supra* note 24; See also, Andrea Kupfer Schneider and Jennifer Gerarda Brown, *Negotiation Barometry: A Dynamic Measure of Conflict Management Style* 28 OHIO STATE UNIVERSITY JOURNAL OF DISPUTE RESOLUTION 557, 577-8 (2013).

negotiations down the road. Of course, ethics demand that defense lawyers not sacrifice one client for another—so the cases that go to trial should be those that would otherwise go to trial.

The timing of a negotiation is another element to track. We hear both anecdotally about settling on the courthouse steps and also know empirically that there is much pressure to settle cases when deadlines are set (even when these are “false” deadlines). So, it logically behooves negotiators to consider both when in the course of the interaction they first make contact, as well as when they first exchange offers and how patient the negotiators can be in going back and forth. If one considers negotiation to be linear, as Gerry Williams explained,<sup>95</sup> then each stage has a certain timing to it as well as cultural assumptions about how long each stage can last. The first stage of orientation might be the charging document or indictment in the criminal legal system. The second stage, argumentation, might be considered when the first plea offers are exchanged and then the back and forth of the offers, and explanations that each side gives. The third stage is the decision point—accepting the offer or not. And then the fourth stage is reaching that agreement—writing up the details of the plea or diversion. In particular, the length of the second stage of back-and-forth argumentation, has a lot of cultural and professional norms built into it. For example, in the Midwest, the back and forth on home buying might be expected to be much shorter than other regions of the country that tolerate or expect numerous exchanges. Similarly, in plea bargaining, jurisdictions, courthouses, and individual lawyers might each have different expectations or tolerances for this stage of negotiation.

One challenge in plea negotiations is that first offers are often made before discovery is complete. Lab reports on substances may not be back yet—so there is no confirmation that the white powdery substance is, in fact, a controlled substance.<sup>96</sup> In the absence of laws requiring discovery,<sup>97</sup>

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95. Gerald R. Williams, *LEGAL NEGOTIATION AND SETTLEMENT* 70-89 (1983).

96. Field tests of drugs can be highly unreliable, and defendants can plead guilty before more reliable lab testing is done. *See, e.g.*, Ryan Gabrielson, *Houston Police End Use of Drug Tests that Helped Produce Wrongful Convictions*, PROPUBLICA (July 14, 2017), <https://www.propublica.org/article/houston-police-end-drug-tests-that-helped-produce-wrongful-convictions> [https://perma.cc/29LQ-YE3Q]; *see also* Antonia Noori Farzan, *He Pleaded Guilty to Cocaine Possession and Was Sentenced to 15 Years in Prison. It Turned Out To Be Powdered Milk*, WASH. POST (Oct. 16, 2019, 3:42 AM), <https://www.washingtonpost.com/nation/2019/10/16/oklahoma-man-pleads-guilty-cocaine-possession-it-was-powdered-milk/> [https://perma.cc/ZH3M-SD4U].

97. For examples of more comprehensive discovery laws, *see, e.g.*, N.Y. CRIM. PROC. LAW



prosecutors may make offers that are “good today only” to force defendants to accept the offer before full discovery is provided.<sup>98</sup> In many jurisdictions, it may be challenging for defense lawyers to get full discovery even if they are not rushed. Defendants may also not want to wait for any future court dates and discovery if they are in custody and will be released immediately if they accept the time-served guilty plea.

### 3. *Concession Management*

Linked to the timing of the negotiation is how a negotiator should decide counteroffers. We have already outlined the importance of an optimistic and justifiable goal. To be clear, the first offer should be at least that if not above it. In a settlement negotiation, if the plaintiff would like to settle for \$50,000 (for pain and suffering on top of expenses), would hope to settle for \$40,000 (covering expenses), and would walk away at \$30,000 (having calculated that trial would be worth it at that point), the first offer could well be \$60,000 with an optimistic reach and a justification of extreme pain and suffering. It is a rare negotiation where the counterpart will give even more than the first offer so that offer likely sets the upper limit of the negotiation. Because of anchoring, which we will explain further below, the first offer can set the stage for the negotiation in key ways, adjusting the counterpart’s goals and even their perceived alternatives. At the bottom end, the reservation point (here \$30,000) sets the lower limit of the negotiation range. Effective negotiators, therefore, will consider how many steps they will make between \$60,000 and \$30,000 and what the size of the concessions will be. Immediately lowering from \$60,000 to \$45,000, for example, sends a signal that the first number was not that realistic and that there are more concessions to come. Understanding the general timing expectations of the negotiation (How long do we have to negotiate? How many times should I plan to counter?) will help figure out the best way to counteroffer both in terms of how much to concede and how quickly to do so.

Yet many plea negotiations begin and end at the arraignment.<sup>99</sup> A

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§§ 245.10–.85 (McKinney 2020); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017).

98. See Alkon, *The Right to Defense Discovery in Plea Bargaining*, *supra* note 19, at 407.

99. But, it is hard to know how many as that data is not collected, see Schneider & Alkon, *supra* note 8, at 447.

significant percentage also likely plead out to the first offer without a counter offer being made. Not making a counter offer and accepting the first offer may be good negotiation, depending on the circumstances.<sup>100</sup> If, for example, a defense lawyer knows that their client has prior convictions that would increase the possible sentence, it might make good sense, and save years in prison, for their client to accept the first offer if the prosecutor doesn't know about those priors yet. It might also make good sense to accept the first offer if it is a standard offer, there are no particularly unique facts or arguments to persuade a prosecutor to treat this case differently, and the defendant wants the case resolved so they can get out of jail or stop having to come to court and take time off their job for the court appearances.<sup>101</sup>

However, there are also cases that demand more negotiation. It may be that once the lawyer has fully investigated the case, there is additional information that can encourage additional concessions by the prosecution. For example, if evidence or witnesses are discovered that support a self-defense claim, that can be used to encourage the prosecutor to make more concessions and reduce the offer. The reverse is probably more common: that prosecutors threaten to add charges or enhancements, to encourage taking the deal.<sup>102</sup> As one of us experienced, threats were not uncommon in three strikes cases in California, depending on the policies of the particular prosecutor office. Some prosecutors, on discovering a prior conviction, would offer the defendant to take the deal "today only" before the new strike was added.

Because plea negotiations often happen quickly, and because there are often only so many opportunities for the negotiation, an extended plan of concessions is less likely to work. But prosecutors and defense lawyers need to know where, when, and how concessions might work in their particular case.

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100. Alkon, *Plea Bargain Negotiations: Defining Competence*, *supra* note 19, at 403-04.

101. See, e.g., Alkon, *Hard Bargaining*, *supra* note 19, at 413-14; ALKON & SCHNEIDER, *supra* note 19, at 129-35, 197-209; MALCOM M. FEELY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992) (describing the problem of repeated court appearances and the hardships that can create for defendants).

102. See e.g., Alkon, *Hard Bargaining*, *supra* note 19, at 406-08.

#### 4. *Negotiation Errors*

In the last twenty years, negotiation textbooks have enthusiastically integrated behavioral economics and cognitive psychology into decision making to better understand the common mistakes that negotiators make. The first is the phenomenon called anchoring, referenced above, or the concept that the first number that negotiators encounter “anchors” our estimation of the value of the item. Even when these first numbers are not based on realistic criteria, they have a strong psychological pull. In research studying topics ranging from home buying to average temperature guessing, these criteria can anchor the range of the negotiation.<sup>103</sup> Within the legal context, things like statutory damage or insurance caps or opening offers serve this purpose as well. Negotiators need to recognize this psychological pull and be prepared to counter with their own anchor in order to set the range.

As noted above, in plea bargaining, defense attorneys might not have the option to create an anchor by making the first offer. Prosecutors often make the first offer when giving discovery. This may be at arraignment or in electronic discovery pre-arraignment, before the defense attorney has seen any information about the case and before the defense attorney could make a first offer. However, when there is no first offer, a defense lawyer may decide to wait for the prosecutor’s first offer, not recognizing the potential power of a first offer or that making the first offer might move the prosecutor lower in her own offer. It might not be rational, and yet it appears that these anchors can shift parties away from their goals and limits. When a defense attorney has those “good” facts, it may well behoove her to anchor the negotiation with a low first offer. It could help to establish that this case is different and should be handled differently. Similarly, prosecutors who want to scare defendants (and their attorneys) can use this phenomenon when making offers that include all sorts of added-on charges—or threats to add on charges.<sup>104</sup>

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103. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGEMENT AND DECISION MAKING* 146 (1993); see also MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 26-28 (1992).

104. One recent example is when federal prosecutors added charges to the case against actress Lori Loughlin, and other parents charged in the admissions bribery cases. Prosecutors added these charges after Loughlin and the others rejected the first plea offer. Ultimately Loughlin plead guilty. David Welna, *New Charges Against Lori Loughlin and 10 Other Parents in Admissions Case*, NPR

The challenge in plea negotiations is that the maximum sentence in a case, even if that is not the offer, can act as an anchor. This may happen due to the trial penalty (the likelihood that a sentence after losing at trial can be up to four times the length of sentence offered during a plea). Prosecutors and defense lawyers recognize that in some cases, judges may sentence defendants to much more time, including the maximum, if the defendant goes to trial and is convicted.<sup>105</sup> Understanding this, the trial penalty can serve as an anchor to all parties.

Defense lawyers should be aware of the variety of anchors that may impact plea negotiations in their cases. Making a first offer could help to set the anchor lower, but it depends on a variety of factors and can be complicated by existing laws and practices. In some places, such as the federal system, it may be hard to anchor lower than the sentencing guidelines (even though the guidelines are not mandatory)<sup>106</sup> and the guidelines may act as their own anchor. Defense attorneys should be aware of the pull of the anchor and prepare how to counter-balance it when they can.

A second phenomenon that can impact how negotiators view an offer is loss aversion—the fear of losing what one has (or changing the status quo). Loss aversion makes the current situation seem more attractive, even when that is unwarranted.<sup>107</sup> For example, fear of going to prison when one is not yet there might increase loss aversion for defendants.<sup>108</sup> Defense lawyers may fear worse consequences for their clients, based on previous cases

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(Oct. 22, 2019), <https://www.npr.org/2019/10/22/772443604/new-charges-against-lori-loughlin-and-10-other-parents-in-admissions-case> [<https://perma.cc/S6UG-CRL3>].

105. This is often referred to as the trial penalty. See e.g., Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining* *supra* note 17, 603-605 (2014); Alkon & Schneider, *supra* note 19 at 133-35; Nancy J. King et. al., *When Process Affects Punishment: Difference in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005).

106. *United States v. Booker*, 543 U.S. 220 (2005).

107. See Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective in Barriers to Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 44, 54-55 (Kenneth Arrow et al. eds., 1995)

108. *Id.*; Birke, *supra* note 19, at 247-54; Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 17, at 2507-13; Covey, *supra* note 19, at 229-30 (“However, where defendants are offered the opportunity to avoid a 600% trial penalty, even substantial variances in estimated probabilities fail to undermine the rational inducement to plead guilty. Rationality may be bounded, but it is not inoperative. Large sentencing differentials dramatically reduce ambiguity by exaggerating the penal consequences of the choice to contest a criminal charge, and thus make it easier for even boundedly-rational and loss-averse decision makers to make a utility-enhancing decision to plead guilty.”).

where they saw a client get a much worse sentence after not accepting a plea deal. Prosecutors generally have high conviction rates, yet they may fear losing a case and be willing to reduce charges or make a better offer if they are not confident that they have the facts needed to convict.<sup>109</sup>

A third error is reactive devaluation, the tendency to undervalue a proposal because it is offered by the negotiation counterpart.<sup>110</sup> Understanding that negotiators might not appreciate an offer from a counterpart, negotiators can test their own perceptions against the criteria for fairness that they have researched (as noted above).<sup>111</sup> Additionally, negotiators should recognize that their own offers can suffer from automatic discounting and consider carefully how to frame the offers as a more neutral proposition.<sup>112</sup>

Both defense attorneys and prosecutors could suffer from reactive devaluation. Prosecutors who do not like or respect a particular defense lawyer, may be less likely to listen to their counter offer and the reasons an exception should be made in a particular case. Defense lawyers may not trust a prosecutor who has previously withheld key discovery or has otherwise not been honest. In that situation, if a prosecutor makes an offer on a case that might seem like a good offer, their first instinct might be to distrust it and wonder what they don't know. Did a key witness die? Is there a problem with the evidence? Defendants themselves can also suffer from reactive devaluation. Often defendants do not have a good relationship or have not had time to build a good relationship, with their defense lawyer.<sup>113</sup> They may be influenced by others in the jail who speak of "public

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109. Prosecutors have an ethical duty to not prosecute cases they do not have facts to support. See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (AM. BAR ASS'N 2017) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice." Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges).

110. See e.g., Russell Korobkin, *Psychological impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 316 (2006) ("a negotiator might devalue an offer made by an adversary on the assumption that, if one's adversary is proposing a particular set of agreement terms, there is a good chance that those terms are good for the proposer and bad for the recipient."). For a discussion of reactive devaluation in a criminal context see, Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1703 (2013).

111. See discussion *infra* Section II.B.2.

112. See e.g., Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 48-50 (1999).

113. Extreme examples of this are "meet them and plead them" lawyering, see Alkon, *Plea*

pretenders” and appointed counsel who are “dump trucks” and don’t fight for their clients.<sup>114</sup> This can create a situation where the defendant does not trust when his lawyer conveys the plea offer and advises that it is a good deal.<sup>115</sup>

A last mistake is overconfidence, a common phenomenon in which we overestimate the strengths of our case and underestimate the weaknesses.<sup>116</sup> Even in studying lawyers, where one might assume that expertise would prevent irrational optimism, lawyers on both sides assume they have a winning case. This can impact plea bargaining, obviously, if both sides think they will win at trial and make it less likely that they will find some middle ground. Experience and perspective tend to help in this area and so, to the extent that a lawyer (or the counterpart) is less experienced, consulting with others and getting a more realistic range of outcomes can be helpful.

In criminal practice, newer lawyers may be more prone to overconfidence. A defense attorney may not recognize the fact that juries are often biased against their clients (because of their race, or the charges, or that many juries are quick to make up their mind that the defendant is guilty).<sup>117</sup> Prosecutors are even more likely to suffer from overconfidence. They tend to enjoy high conviction rates and bias tends to work in their favor.<sup>118</sup> Particularly newer prosecutors may not recognize when they do

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*Bargain Negotiations: Defining Competence at 394-95 supra note 19.*

114. For a longer discussion of dump truck lawyers and how to avoid being one, see Peter Johnson, *You Might be a Dump Truck if...* CONTRA COSTA CNTY BAR ASS’N (Apr. 2019) <https://www.cccbba.org/article/you-might-be-a-dump-truck-if/> [<https://perma.cc/ZK6Q-A6X2>].

115. See *Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., and Marshall, J., concurring in the result) (“Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. . . . ‘Basic trust . . . is the cornerstone of the adversary system and effective assistance of counsel.’” (quoting ABA Standards for Criminal Justice Standard 4-3.1 cmt. (2d ed. 1980); *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981); See also, Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 54-(1998); Lynn Mather, *What do Clients Want? What Do Lawyers Do?* 52 EMORY L. J. 1065, 1072-1075 (2003) (discussing defense lawyers’ attitudes towards client counseling and decision making).

116. Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 17, at 2498-503; Burke, *supra* note 19; see also Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WILLIAM & MARY L. REV. 1587 (2006).

117. See, e.g., Tim Eigo, *Jurors, Lawyers and the Myth of The Open Mind*, 48 ARIZ. ATT’Y MAG., June 2012, at 28, 30 (“As our data show, 80 percent of them begin making up their mind during the opening statements.”).

118. Burke, *supra* note 19, at 186-87, 192, 194–203 (“A growing body of scholarship on prosecutorial decision making explores the ways that the biased assimilation of evidence can prevent prosecutors from believing defendants’ claims of innocence.”).

not have the evidence to support a conviction, at least not on all charges.<sup>119</sup> Defense attorneys can push young prosecutors to talk to others in the office to help mitigate this.<sup>120</sup> Defense lawyers who are sure they have a winning case, should talk to other defense lawyers who practice in the same jurisdiction to run the facts by them to get other views.

### 5. *Communication Modes*

The last element on our prep sheet is a focus on different types of communication and understanding the pros and cons of these choices. Even before the pandemic put everyone on videoconferences, lawyers have been using different ways to exchange offers from in person to text messaging to emails (and now on video). These choices matter in negotiation in general because each have their advantages and disadvantages over the course of a negotiation.<sup>121</sup> These modes are different in three ways: media richness (or how much you pick up in terms of social cues, mood, body language, tone, etc.); content (how formal or informal are the modes and what type of information is typically shared in that mode); and timing (is the communication synchronous or asynchronous and what are expectations for response time). While we understand this intuitively, it is useful to spell out that face to face (or videoconferencing) provides the most richness in terms of seeing and reading the other party, often includes both informal (how is the weather? How about that game yesterday?) and formal content and occurs simultaneously with parties going back and forth in terms of conversation. Every other technology is different in one way or another. Phone calls, for example also vary in content and have synchronous communication but do not provide visual cues. Email is different in all of these ways—we may or may not correctly read the tenor and tone of the email, we may or may not respond quickly (and can end up reading the email chain in reverse order), and we often consider it to be more formal communication. If there is any greeting at the beginning, it tends to be one or two lines and not the typical length of a face-to-face interaction. Text

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119. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065 (2014).

120. *Id.*

121. Noam Ebner, *Negotiating via Email*, in 2 THE NEGOT.'S DESK REF. 115 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

messages, which are now being used to exchange plea bargaining offers in some cases, may shift this yet again as they are even shorter (although people often assume the response time is faster).

Understanding all of these differences can help negotiators make wise choices given the advantages and disadvantages of these modes. Studies have found, for example, that trust is much harder to build over email.<sup>122</sup> We tend to read these literally, make assumptions about intentions, and fill in the blanks. Responses to emails are also more analytical, may send miscues about the tone, and may not share all of the information needed. On the other hand, emails can be excellent ways of keeping records, following up on details from a face-to-face conversation, and are easier to track than are text messages. Negotiators should also consider their own comfort level with each mode of communication, and which plays to his or her strengths as well as which is more likely to be persuasive.<sup>123</sup> Understanding how the counterpart negotiates can lead to more effective choices (i.e. ask for things face to face but immediately follow up with an email record or write out the arguments in an email to give the counterpart time to consider the ask and then make a call).

It is not always possible to pick the mode of communication in plea bargaining. There may be set practices, such as first offers being included in pre-arraignment electronic discovery. Some jurisdictions have settlement days, with prosecutors expecting defense lawyers to come into the court and talk with them, at one time and only on those days.<sup>124</sup> It is also common that plea negotiations happen in between cases being called for arraignment or other pre-trial appearances. These conversations may be rushed and there may not be any specific time set aside for negotiations. However, it may be possible to carve out different ways to negotiate particular cases. If the norm is to negotiate quickly, in court, on the day a case is called, it might be that a defense lawyer could let the prosecutor know in advance that there is a case that is more involved and that it might be good to find a few

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122. See, e.g., Noam Ebner, *ORD and Interpersonal Trust*, in *ONLINE DISP. RESOL.: THEORY AND PRAC.* 203 (Mohamed S. Abdel Wahab, et al. eds., 2012); Brian Farkas, *Old Problem, New Medium: Deception in Computer-Facilitated Negotiation and Dispute Resolution*, 14 *CARDOZO J. OF CONFLICT RESOL.* 161 (2012).

123. Andrea Kupfer Schneider & Sean McCarthy, *Choosing Among Modes of Communication*, in 2 *THE NEGOT.'S DESK REF.* 107 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

124. The pandemic has changed some of these practices and it is too early to know what will return once in person court appearances return to being the norm.



moments to talk about it in advance of the court date. Negotiating over the telephone is probably not the best approach.<sup>125</sup> But, it might work to do a video conference. Most prosecutors and defense lawyers are managing heavy caseloads. They don't tend to have the luxury of being able to do a long and extended settlement conferences. But, this does not mean that it should always be quick or always be done just like every other negotiation. The prep sheet encourages lawyers to think strategically about *how* they negotiate and *where* they negotiate to be more likely to get what they want. Prosecutors and defense lawyers should recognize that this is a strategic decision that could impact the outcome of the negotiation.

### CONCLUSION

For negotiation scholars, some of the explanation in the elements of preparation might be repetitive. Similarly, for criminal law experts, some of the elements of preparation might be obvious and seem automatic. Yet we hope by bringing these streams together, this prep sheet is a useful tool that helps lawyers, and future lawyers, to approach plea bargaining in a more comprehensive way. Plea bargaining *is* negotiation, albeit with constraints, and all negotiators can benefit from clear, organized thinking in advance. Preparing for negotiation is a key skill in negotiation. Moreover, this advance thinking needs to go further than typical law and facts to comprehend the elements of negotiation that make us more effective—from understanding the counterpart, to thinking creatively about options, to assessing whether to pursue trial, to recognizing that how and when we communicate impacts the relationship between the lawyers, and therefore, the outcome as well. We also hope that having a joint prep sheet continues to send the message that criminal lawyers are engaged in joint enterprise in which they often have more in common, in terms of interests, goals, and practice, than assumed. And, although there are key differences between prosecutors and defense lawyers, the same information matters (or should matter) in seeking justice. Finally, we hope that this is not the last word in plea bargaining preparation but rather part of an ongoing conversation with lawyers, other scholars and clinicians in which we continue to consider how to improve the practice of law for the benefit of all.

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125. Schneider & McCarthy, *supra* note 123.

APPENDIX  
**PLEA PREPARATION SHEET**<sup>126</sup>

Case Name \_\_\_\_\_

Charge \_\_\_\_\_

Sentence Minimum/Maximum \_\_\_\_\_

	<b>Interests &amp; Goals</b>			
	Defendant	Defense Attorney	Prosecutor	Victim/Public/Press
<b>Interests</b>				
<b>Goals</b>				

<b>Investigation &amp; Criteria</b>	
<b>Facts</b>	
Good/Bad	
Defendant's Priors	
Defendant's Personal History	
Defendant's Confidential Information?	
Prosecutor Exculpatory Information?	
<b>Law &amp; Policy</b>	
Min/Max/Standard offers?	
Collateral Consequences (Immigration, Family Court, Professional Licensing, etc.)	
Motions/Procedure?	
Prosecutorial Policies?	
Court History/Judge	

126. ALKON & SCHNEIDER, *supra* note 19, at 210-11.

<b>Element of Agreement/Plea Bargaining Options/BATNA</b>	
Charge(s) (Minimum/Maximum)	
Possible Other Charges?	
Enhancements?	
Leverage (Law? Facts? Procedural? Jurisdictional?)	
Alternative Processes Available? (diversion, problem solving courts, restorative justice process, other?)	
Dismiss?	

<b>Approach/Communications</b>	
Reputation & Relationship between lawyers	
Negotiation Style (yours & counterpart)	
Timing (What stage? How close to trial?)	
Concession Management (1 <sup>st</sup> offer, 2 <sup>nd</sup> offer, etc.)	
Potential Negotiation Errors?	
Communication Mode (email, face-to-face, phone, etc.)	

