

Plea Bargaining in Juvenile Court

BY ROBERT E. SHEPHERD, JR.

Although the appropriateness of plea bargaining has long been controversial in the juvenile justice system, the *IJA-ABA Juvenile Justice Standards Relating to Adjudication* released in 1980 recognize the practice, legitimize it, and urge that it be conducted pursuant to strict guidelines. (Standards 3.3, 3.4, 3.8) Likewise, the *IJA-ABA Juvenile Justice Standards Relating to Counsel for Private Parties* caution defense counsel to be careful in engaging in plea negotiations. (Standard 7.1) Historically, plea bargaining was frowned upon because the customary use of indeterminate commitments to youth correctional agencies was not as dependent on the gravity or number of the charges as it was on the characteristics of the youth. Indeed, the three earliest sets of standards concerning the juvenile justice system all opposed the use of plea bargaining in the court. (See Robert E. Shepherd, Jr., *Juvenile Justice: Pleading Guilty in Delinquency Cases*, 16:3 CRIM. JUST. 46 (Fall 2001).) However, as the gap between the juvenile system and the adult criminal process has narrowed, the use of determinate commitments has become more common; transfers of juvenile to adult courts has increased; there is greater access of the public and outside agencies to juveniles court records; and there is a growing use of juvenile adjudications as predicates for adult sentences or other collateral consequences. Consequently, plea bargaining has become ever more important. The growth in caseloads for juvenile public defenders and prosecutors has also contributed to the increasing number of plea bargains.

Investigating and Analyzing the Case

The starting point for any effective representation of a juvenile client is to conduct a thorough and timely investigation of the case, beginning with the initial interview of the young person. (Robert E. Shepherd,



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Jr., *Establishing the Attorney-Client Relationship with the Juvenile Client: Part I*," 4:1 CRIM. JUST. 26 (Spring 1989), Part II, 4:2 CRIM. JUST. 31 (Summer 1989), Part III, 4:3 CRIM. JUST. 33 (Fall 1989).) All the possible witnesses should be interviewed, including the known prosecution witnesses, possible defense witnesses, and any independent witnesses. The existence of any client statements to the police should be explored and the presence of any evidence in the hands of the police and prosecution ascertained, through discovery if necessary. Defense counsel should review the statutory elements of the crimes alleged and any law applicable to the offenses. All possible defenses should be examined and researched thoroughly, including the possibility of suppressing any of the evidence the prosecution might introduce at trial. After a thorough investigation, counsel should assess the strengths and weaknesses of both the juvenile's case and the prosecution's case, including the availability and credibility of witnesses, the viability of any affirmative defenses, and the likely success of any defense motions you might credibly make. (Robert E. Shepherd, Jr., *Juvenile Justice: Pretrial Strategy and Motion Practice*, 3:1 CRIM. JUST. 29 (Spring 1988).) What is the client's prior record, the harm caused by the alleged offense, and the status of any codefendant's cases, including whether they are also juveniles or adults? The defense lawyer also needs to assess the skills and tendencies of the prosecutor handling the case and the history of the judge assigned to it. How has the juvenile's family reacted to the arrest and charging and how available is favorable evidence regarding the juvenile's conduct in school and the community? In other words, how would the case likely play out if it were contested zealously and effectively in court? An excellent primer for the role of the defense lawyer in plea negotiations may be found in Chapter 9 of the invaluable publication *Juvenile Defender Delinquency Notebook* (2d ed. 2006) by Elizabeth Calvin, Sarah Marcus, George Oleyer, and Mary Ann Scali and available from the National Juvenile Defender Center in Washington, D.C.

Counseling the Client

Regardless how counsel might assess the case, the decision about the plea to be entered is solely the client's. During the investigation there should have been ongoing discussion with the client and her or his family. After the completion of the investigation and the candid assessment of the case, there should be an equally honest conversation with the client fo-

cused on whether to initiate plea discussions with the prosecutor. Whenever the prosecution extends a plea offer to defense counsel, that offer must be communicated to the client regardless of counsel's judgment regarding the sufficiency of the offer. The conversation with the client should be thorough, and it should be conducted in terms clearly understandable by the juvenile. The youth should be asked to restate what you have communicated in her or his own words so that you can judge whether the client completely comprehends what you have said. The lawyer should review all the factors she or he considered in assessing the case with the client and explain in age-appropriate language the pluses and minuses of entering into a plea agreement. Any concerns the client has should be thoroughly addressed, along with counsel's judgment about whether the youth will be better off after successful plea negotiations or adjudication following a trial. The client must know what rights are surrendered by entering a plea and what the implications are for waiving those rights. The client also needs to know what her or his obligations will be if the plea offer is accepted and what the collateral consequences will be from the bargained adjudication and disposition.

Negotiating the Plea

If the client is amenable to the initiation of plea negotiations, defense counsel should have a clear plan in place for approaching the prosecutor. The lawyer must be prepared to advocate for the best possible deal consistent with the juvenile's goals and within the parameters of the authority the client has given her or him. Counsel must be thoroughly familiar with the local ethical and legal rules for the conduct of plea negotiations and the entry of guilty pleas, and she or he should continue to prepare the case for trial in case that becomes necessary. The defense lawyer should try to step into the shoes of the prosecutor and consider what reasons exist for accepting a guilty plea and agreeing to a more benign disposition or backing away from seeking transfer of the case to adult court. A guilty plea might very well be in the best interests of the state as well as the juvenile. Counsel should consider the value to the prosecutor of a willing client testifying against codefendants, especially adults or older juveniles who might be more culpable. Negotiating with the prosecutor is much like making your strongest possible argument to the judge during both adjudication and disposition. Without giving away the defense that would be offered in a contested case, counsel should

Editor's Note: After 21 years as author of *Criminal Justice* magazine's Juvenile Justice column, Professor Shepherd has decided to retire as a regular contributor. This marks his last column for the magazine. The editorial board of *Criminal Justice* expresses its appreciation for his excellent service to the Section and to the magazine in keeping its readers up-to-date on the important issues in the juvenile justice community.

emphasize the strengths in the defense case and the weaknesses in the state's case. Counsel should also emphasize the client's strongest points, including the lesser degree of culpability than the codefendants, school strengths, athletic accomplishments, church and community involvement, and any discipline that the parents have administered, including curfews and limitations on activities awaiting trial. The lawyer may need to remind the prosecutor of the rehabilitative nature of the juvenile court and the underlying goals of the juvenile justice system. Counsel should be creative and try to address the prosecutor's legitimate concerns by agreeing to community service or some other form of restorative justice.

The Prosecutor's Role

The National District Attorneys Association Prosecution Standard 19.2 Juvenile Delinquency, paragraph D, defines the prosecutor's role in plea negotiations in juvenile court as being "governed by both the interests of the state and those of the juvenile, although the primary concern of the prosecutor should be protection of the public interest as determined in the exercise of traditional prosecutorial discretion." (James Shine & Dwight Price, *Prosecutors and Juvenile Justice: New Roles and Perspectives*, in Ira M. Schwartz, ed., *JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA* 129-30 (1992).) This statement largely tracks Standard 5.1 of the IJA-ABA Juvenile Justice Standards, Standards Relating to Prosecution, although the commentary accompanying the ABA Standard expresses concern about plea bargaining giving prosecutors an incentive to "overcharge."

Entering the Plea

Any plea agreement should be memorialized in writing like any other important contract, and the defense lawyer should begin to prepare the client for entering the plea and engaging in the plea colloquy

that will take place at trial. Both the prosecution and the defense should be thoroughly familiar with the statutes, rules, and practices of the jurisdiction for presenting the plea agreement to the judge in court, and with the structure of the colloquy the judge will conduct in determining the voluntariness and intelligence of the plea. Many jurisdictions utilize a standardized plea colloquy that may be found in a judicial bench book, and that should be consulted when preparing the juvenile for court. Hopefully, the client has been kept informed throughout the plea negotiations and is fully prepared for the guilty plea. The court should engage in a meaningful dialogue with the juvenile and not simply ask leading questions or those that can be simply answered “yes” or “no.”

Evaluating the Consequences of the Plea

One effect of the toughening of the juvenile justice process over the past two decades has been a significant increase in the collateral consequences of a juvenile adjudication, and these consequences must be thoroughly evaluated by defense counsel and discussed in full with the client and the client’s parents. Some jurisdictions have extended “three strikes” legislation to juvenile court or to include juvenile adjudications, and juvenile records are now more widely available to the public and to governmental and private agencies. A juvenile adjudication is now

widely utilized in criminal sentencing guidelines and an adjudication for a sex offense may compel sex offender registration under the federal Adam Walsh Act or its state counterparts. If the youth is an immigrant, the juvenile conviction may lead to deportation, and a juvenile adjudication may result in the taking of a DNA sample and in a prohibition against possession of a firearm. Other collateral consequences may also exist in a particular jurisdiction. (See Robert E. Shepherd, Jr., *Juvenile Justice: Collateral Consequences of Juvenile Proceedings: Part I*, 15:2 CRIM. JUST. 59 (Summer 2000); Part II, 15:3 CRIM. JUST. 47 (Fall 2000).) All these consequences need to be considered in entering the plea negotiations and in discussing any possible agreement with the client and the client’s parents.

Enforcing the Agreement

If there is any problem created by the prosecutor renegeing on the agreement, defense counsel should be prepared to enforce the agreement, which should be in writing. The lawyer needs to be familiar with *Santobello v. New York*, 404 U.S. 257 (1971), and comparable state cases that address the enforcement of plea agreements. Both the defense lawyer and the prosecutor should be prepared to address what they will do if the judge is unwilling to accept either the plea or the proposed disposition that will accompany the plea. ■