



I, Too, Have Seen Big Foot

BY ANTHONY A. JOSEPH

I saw Big Foot. I spotted him deep in the wooded area behind the courthouse. I have documented proof of this sighting. Now, before you think I have completely lost my mind (and start impeachment proceedings), let me explain: In criminal law, Big Foot is plea negotiating, the process by which we resolve almost all of our criminal cases. It can be seen stomping through the criminal system clumsily achieving justice or sometimes stamping it out. Big Foot has always lurked in the shadows, but it is time to call a press conference and turn on the lights.

Plea Bargains “an Essential Component of the Administration of Justice”

A recent estimate indicated that guilty pleas accounted for the disposition of as many as 95 percent of all criminal cases. Shedding light on this dominance, the Supreme Court in *Santobello v. New York*, acknowledged that plea bargaining is an “essential component of the administration of Justice.” Consequently, it seems important to focus on the plea negotiating process to ensure that it continues to uphold the constitutional principles of the criminal justice system.

To have constitutional and procedural benefits, the process must be fair, reasonable, protect the

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rights of the accused, support the needs of victims, and serve the overall ends of justice. The responsibility does not rest on one side of the table but with all of the key players within the criminal justice system—prosecutors, defense counsel, probation officers, and judges.

As a general rule, the plea bargaining process operates on the premise that plea bargains are universally beneficial. Indeed, without the infusion of guilty pleas, our criminal justice system would hit critical mass, and be in a state of crisis. Pleas allow cases to move through the system with deliberate speed and finality. But expediency alone should not be the driving force in the process. Fairness, honesty, transparency, and good faith should be the hallmark from start to finish.

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Truth-in-Negotiations: Mutuality of Consideration

In a true negotiation, both sides must have a stake in the outcome. True negotiations only take place when there is some give and take, and both sides are willing to make concessions with the goal of reaching a fair and just result. The government benefits by moving cases through the system and preserving resources. The defendant avoids extended pretrial stays, financial strains, personal stress, family turmoil, and the anxiety and uncertainty of trial. The court, as a direct result, moves and reduces an already overcrowded docket.

In a real world, without blemishes, pleas serve the common good and are mutually beneficial to the system as a whole. Plea negotiations infected, how-

ever, with distrust, dishonesty, misrepresentation, coercion, hiding the ball, and lack of candor, operate as a disservice and hamper a fair and just result. Both prosecutors and defense counsel have a responsibility to make sure these factors do not enter into plea negotiations.

Time and space do not allow for a full discussion of the ABA Standards regarding plea discussions and plea agreements, but it is important in our focus to be reminded, even in cursory fashion, of the general guidance that the Standards provide.

Prosecutorial Standards

In summary:

- The prosecutor should provide full disclosure of office policies regarding pleas and diversion.
- The prosecutor may agree to one or more of the following:
 - make or not oppose a favorable recommendation;
 - dismiss or not oppose the dismissal of the offense at issue, other charges or potential charges;
 - where appropriate, make certain agreements with respect to a related civil matter;
 - in lieu of a plea agreement, enter into a pretrial diversion agreement.
- Most importantly, the prosecutor should not knowingly make any false statements or representations to the law or the facts; nor because of the pendency of plea negotiations, delay any discovery disclosures required to be produced.

Overall, the Standards require a spirit of good faith. This Standard, in particular, recognizes the prosecutor's obligation not to bring or threaten charges where admissible evidence does not exist. The Standard also recognizes the coercive nature of threatening prosecution of family members or forfeiture of property where no legitimate basis exists.

Defense Standards

In summary:

- It is the general responsibility of defense counsel to keep his/her client fully advised of the plea discussions.
- It is also defense counsel's responsibility to properly investigate and advise the client of alternatives, recognizing that the ultimate decision rests with the client.
- Like the prosecutor, defense counsel should not knowingly make any false statements or misrepresentation as to the law or fact, and should, as part of his/her responsibility, explore possible alternatives,

such as diversion of the case from the criminal process.

- Defense counsel should also discuss the possible collateral consequences that may occur as a result of the potential plea.

Consultation with the client should not be conducted in a vacuum. Specific individual consideration should be taken into account when discussing the pros and cons of the plea with the defendant, such as the specific offense(s), and the defendant's education and experience in the system. At the end of the day, it is important and critical that the defendant be able to make an informed decision based on the advice of counsel.

Diversion and Other Alternative Resolutions

The Standards also raise the proposition that pretrial diversion and other alternative resolutions can also promote the ends of justice. Diversion agreements or other alternative resolutions are designed to keep a defendant out of the criminal process or to avoid incarceration. These noncriminal resolutions in appropriate cases are encouraged, and should be part of the consideration wherever practical. The commentary further notes that diversion agreements offer the potential for speedy, just, and cost-efficient resolution of criminal cases.

In exploring alternative resolutions, defense counsel, prosecutors and judges have a real opportunity to collaborate and make a real difference in changing lives, and as an additional benefit, reducing the exploding prison population. Drug courts, as an example, are "problem-solving" venues designed to address a societal problem, reduce the need for incarceration, provide needed treatment and counseling, and restore the violators to productive lives in their communities.

We, as a criminal justice community, should continue to explore creative, alternative noncriminal resolutions, such as drug courts, as an essential component of the plea discussions.

Responsibilities of the Court

It is the responsibility of the court to ensure:

- that the defendant fully understand his/her rights;
- that the defendant is entering into the agreement freely, voluntarily, and not as a result of any promises, threats or coercion;
- that the plea agreement (preferably in writing) fully identifies *all* of the terms and conditions of the agreement; and
- that the defendant recognizes the constitutional rights that are being waived as a result of the guilty plea.

Let the Discussions Continue

Although the Standards rest on solid principles, discussion will continue as the law changes, and as we strive to continually improve. The Criminal Justice Section lies at the intersection of these discussions.

CLE Fall 2007

During the fall of 2007, the Criminal Justice Section sponsored a symposium entitled “Ethics and Professionalism in Plea Negotiations,” which provided a day-long forum focused solely on the plea-bargaining process, with thought-provoking exchanges and practical tips from practitioners, judges, and academics on the “Best and Worst Negotiating Practices” and “How Prosecutors and Defense Lawyers Can Make Good Decisions About Plea Bargaining.” This CLE was a resounding success.

Criminal Justice Magazine—Fall 2008

This issue of *Criminal Justice* magazine capitalizes on last year’s CLE by tackling a spectrum of issues involving the plea bargaining process. The issues range from waiver of constitutional rights, including what is truly “voluntary” in this process; the impact of the *Gall* decision in negotiating federal pleas; the decision behind and the impact of corporate deferred prosecution agreements; and ethics and the importance of discovery in the plea negotiation process.

It is my hope that this issue of *Criminal Justice* will inform, enlighten, and spur greater discussion within our Section about how to improve the plea-bargaining process and make it more reasonable, transparent, ethical, and fair to all.

Now, back to Big Foot. . . . ■