

## FEATURES

### 4 **The Guilty Plea State**

By Andrew E. Taslitz

In this introduction to the magazine's symposium on plea negotiations, issue editor Andrew Taslitz explains how plea bargaining has transformed our criminal justice system from a "due process state" to a "guilty plea state." He summarizes each of the major articles and indicates why he believes an examination of this topic is beneficial to the practice of both prosecutors and defenders.

### 8 **Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements after *Mezzanatto***

By David P. Leonard

Federal Rule of Evidence 410 protects the defendant during plea negotiations by making inadmissible certain information that may be divulged during the discussion. But some prosecutors refuse to play "let's make a deal" unless the defendant agrees to waive FRE 410 rights. Professor Leonard, Loyola Law School, discusses the ramifications of the 1995 Supreme Court decision in *Mezzanatto* that sanctioned this prosecutorial tactic and advises defense attorneys on how to address such a situation.

### 14 **Prosecutorial Preconditions to Plea Negotiations**

"VOLUNTARY" WAIVERS OF CONSTITUTIONAL RIGHTS

By Andrew E. Taslitz

An expansive exploration of the practice of prosecutors to seek waivers of an array of constitutional rights as a precondition to plea bargaining. Professor Taslitz, Howard University Law School, looks to case law, psychology, and behavioral economics to argue against the assumption that as long as the deal is "between equals" it is beneficial to society. Instead, he makes the case for the premise that constitutional rights are "special" and deserve the most rigorous protection.

### 28 **Ethics and Plea Bargaining**

WHAT'S DISCOVERY GOT TO DO WITH IT?

By Ellen Yaroshefsky

Although many prosecutors provide defendants with exculpatory evidence before plea negotiations, there is no constitutional obligation to do so, according to Professor Yaroshefsky, Cardozo School of Law, so some prosecutors do not. This, she maintains, leads to a widespread problem of factually innocent defendants entering guilty pleas. The applicable ethics rules are ambiguous and inconsistent, and the author proposes changes to the law that would fill the loopholes and offer clear guidance to prosecutors and promote more informed decision making on the part of defense attorneys.

### 34 **Back Against the Wall**

CORPORATE DEFERRED PROSECUTION THROUGH THE LENS OF CONTRACT "POLICING"

By Candace Zierdt and Ellen S. Podgor

Post-Enron and in light of the Arthur Andersen disaster, many corporations are willing to accept provisions within a deferred prosecution agreement that undermine the elements needed for a fair and competent defense, according to these authors. Such provisions include the waiver of attorney-client and work-product privileges, the right of prosecutors (with no judicial oversight) to be the arbiters of whether or not an agreement has been breached, and the bar against corporations paying their employees' legal fees. The authors, both professors at Stetson University School of Law, hold that the basic contract principles that govern plea agreements should as well apply to corporate deferred prosecution agreements.

**40 A Guide to Negotiating Federal Guilty Pleas  
in a Post-Gall Sentencing World**

By Laurie L. Levenson

“The Guidelines are dead. Long live the Guidelines,” writes the author, a professor at Loyola Law School. After the Court held in *Booker* that the sentencing guidelines were not mandatory, many practitioners as well as judges were left in a void. *Gall* and *Kimbrough* filled in the gaps, making it clear that judges have significant discretion to depart upward and downward. In this article, Levenson counsels both defenders and prosecutors that knowledge of the law and strategies of sentencing improve their bargaining power.

**DEPARTMENTS****1 Chair’s Counsel**

I, TOO, HAVE SEEN BIG FOOT

**47 Trial Tactics**

RULE 404(b) AND REVERSAL ON APPEAL

**52 Criminal justice Matters**

PLEAD NOW OR FOREVER HOLD YOUR PEACE

**54 Scientific Evidence**

DUKE LACROSSE RAPE CASE

**57 Ethics**

CONCEDING GUILT

**60 Federal Sentencing**

BOP DESIGNATIONS BASED ON MEDICAL NEED

**61 Juvenile Justice**

PLEA BARGAINING IN JUVENILE COURT

**64 Cert Alert**

HIGH COURT TO REVIEW 19 CASES OF INTEREST TO CRIMINAL LAWYERS

**76 Book Review**

TRIAL TACTICS: A BOOKSHELF LAW PARTNER

**78 Section News**

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