

1998

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### Recommended Citation

Joseph W. Vanover, *Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice*, 1998 J. Disp. Resol. (1998)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1998/iss2/4>

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# Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice

## I. INTRODUCTION

Plea bargaining has been described as an "essential component of the administration of justice . . . . If every criminal charge was subjected to a full-scale trial, the states and federal government would need to multiply by many times the number of judges and court facilities."<sup>1</sup> Categorizing plea bargaining as a form of "alternative" dispute resolution may seem awkward to many practitioners because plea bargaining is more common than going to trial. Negotiating an agreement on a defendant's plea, however, is similar in many ways to civil suit arbitration, mediation, or negotiation and should be studied as a subset of dispute resolution techniques.

The primary similarity of criminal plea negotiating and civil dispute resolution is that a trial is obviated, which saves time and expense and eliminates the uncertainty of a verdict. Further, in both situations parties participate in the process voluntarily. The voluntary nature of a plea agreement makes satisfaction with the outcome more likely. Since appeals are usually avoided, final resolution can be reached more quickly, however, as with some other forms of civil dispute resolution, the plea agreement must be approved by a court.

This article examines the repercussions of choosing a negotiating style for the present criminal case on the actions of opposing counsel in future cases. It scrutinizes the criminal plea negotiating process from the perspective of both a prosecuting attorney and a defense attorney. It analyzes this process using two philosophical theories: act utilitarianism and rule utilitarianism.

This article asserts that the result of a negotiation employing the strategy that is the optimal strategy for that particular negotiation will, by definition, result in the optimal outcome for that negotiation. Nevertheless, the aggregate result of a series of negotiations employing the strategy that is optimal for each individual negotiation may not result in the optimal aggregate outcome after a series of negotiations. The decision of which strategy to use becomes complicated when the optimal outcome of a series of negotiations results from the use of the optimal series strategy and not the use of the optimal strategy for a singular negotiation. In this situation defense lawyers face an ethical dilemma: should a defense attorney employ the optimal negotiation strategy for the present plea negotiation knowing that it will be detrimental to his ability to negotiate in the future with a particular prosecutor or in a particular jurisdiction? In other words, should a defense attorney sacrifice his ability to serve future clients by vigorously serving the interests of his present client?

The same dilemma confronts prosecutors who are on the other side of the negotiation process. Prosecutors may neglect the interests of the public if they lose

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1. Santobello v. New York, 404 U.S. 257, 260 (1971).

sight of the effect a particular negotiation will have on future negotiations by submitting to caseload pressure and granting concessions to defense lawyers when threatened with a costly, hard-fought court battle. Similarly, prosecutors, at times, should make an apparently irrational decision to spend an excessive amount of time and effort on a case to favorably adjust defense bar expectations.

## II. PLEA BARGAINING AS ALTERNATIVE DISPUTE RESOLUTION

Negotiation strategy is "the negotiator's planned and systematic attempt to move the negotiation process toward a resolution favorable to his client's interests."<sup>2</sup> As with all negotiation situations, there are several strategies from which to choose.

### A. Negotiation Strategies

The competitive strategy "seeks to force the opposing party to a settlement favorable to the negotiator by convincing the opponent that his case is not as strong as previously thought and that he should settle the case."<sup>3</sup> One tactic employed by such negotiators is to open with a high initial demand.<sup>4</sup> In the criminal setting, this is most apparent when a prosecutor "throws the book" at a defendant by charging crimes more severe than a reasonable jury would support and crimes so trivial and numerous that defense counsel knows the prosecutor will not pursue them to conviction. Throughout the negotiations on a single case, competitive negotiators limit the disclosure of information on the facts of the case and do not reveal their preference and expectation of an outcome.<sup>5</sup> Because the primary objective is to "win" and to force the opponent to "lose," the few concessions that are made are minor.<sup>6</sup> Further, threats and arguments are often used to reach a favorable settlement.<sup>7</sup> Finally, a competitive negotiator will employ false issues and feign commitment to positions that may be compromised without consequence.<sup>8</sup>

In contrast to competitive negotiators, cooperative negotiators "make concessions to build trust in the other party and encourage further concession on his part."<sup>9</sup> Such negotiators open with a moderate bid that is barely acceptable to the opponent.<sup>10</sup> When the opponent opens with such a bid, the two negotiators "should determine the midpoint between the two opening bids and regard it as a fair and equitable outcome."<sup>11</sup>

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2. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 47 (1985).

3. *Id.* at 46.

4. *Id.* at 48-49.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 46.

10. *Id.* at 53.

11. *Id.*

A third type of negotiator is the integrative negotiator. This type "seeks to find solutions to the conflict which satisfy the interests of both parties."<sup>12</sup> Integrative strategies are most useful when the parties have interests that are not directly opposed.<sup>13</sup> They are least useful in zero-sum game type situations where the parties are dividing a set amount of resources.<sup>14</sup> There are several keys to proper integrative negotiations. Negotiators try to separate themselves from the problem and focus more on the interest involved than the positions held.<sup>15</sup> A variety of possible outcomes are generated by the parties before the final decision is reached.<sup>16</sup>

Integrative negotiators use tactics that differ greatly from competitive negotiators but which are similar to cooperative negotiators. For example, integrative negotiators freely exchange information on their motives, goals, and values.<sup>17</sup> They also brainstorm to invent options for mutual gains<sup>18</sup> and make concessions on some issues to prompt the other negotiator to concede others.<sup>19</sup> Integrative negotiators also seek to diminish the costs of their opponents' concessions.<sup>20</sup>

### B. Plea Negotiation Process

The plea negotiation process, for present purposes, begins when the prosecutor files charges against a defendant. "The initial charge is usually a high demand both because the prosecutor has overcharged and because legislatively defined criminal sentences are generally unrealistically lengthy."<sup>21</sup> The initial charge also serves as a threat that if the defendant does not enter a plea agreement, he risks being convicted on more serious charges and receiving a longer sentence.<sup>22</sup> The prosecutor is able to make a high initial demand because he "is vested with virtually unfettered charging discretion."<sup>23</sup> Usually the opening demand "mirrors what would be expected from a negotiator [sic] who follows the competitive strategy: a high, but credible, demand."<sup>24</sup>

At some point either just before or after the charge is filed, the defendant usually procures legal counsel. Following defense counsel's investigation of the facts of the case, he suggests a plea agreement. Where an agreement is reached, the prosecutor makes a recommendation to the court, with which courts rarely

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12. *Id.* at 46.

13. *Id.* at 54.

14. *Id.* at 69.

15. *Id.* at 55.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 56.

21. *Id.* at 74-75.

22. *Id.* at 75.

23. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach* 2 CLINICAL L. REV. 73, 89 (1995).

24. Gifford, *supra* note 2, at 74.

disagree.<sup>25</sup> Although there is no constitutional right to plea bargain,<sup>26</sup> a defendant may enter a guilty plea,<sup>27</sup> and by entering a guilty plea, effectively admitting all of the elements of the crime charged.<sup>28</sup>

Plea negotiation is quite common. According to one criminal defense attorney, plea negotiation is attempted in all cases with the "vast majority" of criminal cases being resolved through plea negotiation.<sup>29</sup> It has been estimated that over ninety percent of all state court criminal convictions are based on negotiated pleas.<sup>30</sup> National statistics indicate that 92 percent of all felony state court convictions result from guilty pleas.<sup>31</sup>

The effects of plea negotiating are as widespread as the breadth of its use. Plea agreements relieve pressure on the judicial system, eliminate the uncertainty of the outcome, and save time and money. The defendant accepts responsibility by admitting his wrongdoing but receives less punishment than what he would have likely received if found guilty.

Attorneys involved in criminal plea negotiations are under several ethical duties specific to plea negotiation. As with attorneys in general, "neither defense counsel nor the prosecutor may lie during negotiations."<sup>32</sup> More specific to plea negotiations, defense attorneys are ethically obligated to refrain from compromising the representation of one client in order to serve the interests of other clients.<sup>33</sup> Defense attorneys are also ethically bound to fight zealously on behalf of their clients even though their stance and efforts may irritate or offend a prosecutor who has the power to affect the disposition of the defense attorney's other cases.<sup>34</sup> In other words, defense attorneys must seek to secure the best result for the present client even though it may harm their ability to secure favorable plea agreements for future clients.<sup>35</sup> Criminal defense attorneys are not representing a cause or other present or potential clients, but the defendant they happen to be representing at that particular moment.<sup>36</sup> Prosecutors, on the other hand, owe their first duty to justice.<sup>37</sup>

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25. Uphoff, *supra* note 23, at 89.

26. Ray Hasu & Patrick Curran, *Twenty-Sixth Annual Review of Criminal Procedure*, 85 GEO. L.J. 1136 (1997).

27. *Id.* at 1144.

28. *Id.* at 1145.

29. Uphoff, *supra* note 23, at 77.

30. James A. Cramer et al., *The Judicial Role in Plea Bargaining*, in PLEA BARGAINING 139, 139 (William F. McDonald & James A. Cramer eds., 1980).

31. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE BULLETIN: FELONY SENTENCES IN STATE COURT 1992 9 (1995).

32. Uphoff, *supra* note 23, at 123.

33. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9 (1995).

34. Uphoff, *supra* note 23, at 90.

35. *Id.* at 130.

36. *Id.*

37. G. NICHOLAS HERMAN, PLEA BARGAINING 14 (1997).

### III. UTILITARIANISM: ACT AND RULE

Defense attorneys are occasionally confronted with the dilemma of whether they should negotiate in such a way as to best advance a present client's interests even though it will impair the lawyer's ability to negotiate favorable plea agreements for future clients. As a result of an overly competitive style an otherwise cooperative prosecutor may be pushed into a competitive position in future plea negotiations and thus increase the aggregate level of punishment doled out to criminal defendants.

This ethical issue is best analyzed using two variants of the philosophical theory of utilitarianism. Utilitarianism holds that the correct answer to a problem is the one that maximizes "utility."<sup>38</sup> Utility of a defense attorney is generally the lessening of the amount of punishment to which a defendant must submit in order to convince a prosecutor to enter a plea agreement. The correct choice is the one that will result in the least amount of punishment. However, the question posed here is, whose punishment? Is the punishment of the present defendant the sole concern of the defense attorney or is punishment of other defendants, both present and future, the sole concern of the defense attorney? One may think that these two interests do not conflict, and this may well be true in most instances, but in some cases acting to maximize utility for the present client may not be the act that maximizes the aggregate utility of all defendants. The distinction between the act that maximizes utility presently and the act that will maximize utility in the aggregate is the subject of the debate between what is known as act utilitarianism and rule utilitarianism.

Act utilitarianism asserts that "[a] voluntary action is right, whenever and only when no other action possible to the agent under the circumstances would have caused more pleasure; in all other cases, it is wrong."<sup>39</sup> This statement of the theory assumes that utility is pleasure instead of pain. For the purposes of this Article, "pleasure," in the case of a defense lawyer, can be thought of as lessening the amount of punishment that is received pursuant to a plea agreement, and in the case of a prosecutor, "pleasure" can be read as the accomplishment of justice.

Rule utilitarianism asserts that "the rightness of an act is fixed, not by its relative utility, but by the utility of having a relevant moral rule, or of most or all members of a certain class of acts being performed."<sup>40</sup> In other words, a decision maker should determine a rule that, when applied in all similar circumstances, maximizes utility, whatever it may be, and then act accordingly in the present situation.

### IV. PROSECUTING ATTORNEY AND DEFENSE LAWYER UTILITY

Utility differs in the criminal plea negotiation context depending on whether one is a prosecutor or a defense lawyer. As the circumstances of each case differ, so does the "utility." The discussion below centers around the various forms that utility may take.

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38. G.E. MOORE, *ETHICS* (1912).

39. *Id.*

40. RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 114 (1992).

### A. Prosecutors

A prosecutor is under a duty to seek justice, not to simply seek conviction.<sup>41</sup> Beyond this duty, a prosecutor's objectives and motives are mixed. "The prosecutor's goal is not to maximize the length of the defendant's sentence or even the severity of the crime to which the defendant pleads."<sup>42</sup> In many cases, however, they "are most interested in obtaining a conviction."<sup>43</sup>

A prosecutor's basic objective during a plea negotiation is to reach an agreement on punishment that approximates the result a judge or jury would reach if the defendant were convicted at trial.<sup>44</sup> Prosecutors view their role as one of trying to "individualize justice" by considering "the circumstances of the offense and the characteristics of the offender."<sup>45</sup>

Prosecutors generally begin negotiations from a starting point or "standard deal" that is based on the nature of the charge and the defendant's criminal record.<sup>46</sup>

The extent to which a prosecutor ultimately will be willing to deviate from that "standard deal" generally depends on a host of factors including: time and resources; defense counsel's ability, reputation and relationship with the prosecutor; evidentiary concerns; the victim's wishes; and the aggravating and the mitigating circumstances of the case.<sup>47</sup>

Empirical studies suggest that prosecutors attempt to individualize justice by taking several factors into account.<sup>48</sup> For example, they consider the circumstances of the offense, the characteristics of the offender (e.g. the youth of the defendant), prior criminal record, and whether there was provocation by the victim.<sup>49</sup> These factors provide the formula for a prosecutor to use in considering whether to make concessions during negotiations.<sup>50</sup> Prosecutors and judges also recognize the significance of substance abuse and mental health problems and, to varying degrees, attempt to respond to such circumstances in plea negotiating and sentencing.<sup>51</sup>

In addition to factors arising out of a particular case, prosecutors may consider the need for retribution, deterrence or rehabilitation. As with public defenders, prosecutors' offices lack sufficient resources to adequately investigate, prepare, and try many cases.<sup>52</sup> The expense of going to trial may factor into a prosecutor's decision on how hard to negotiate. Other factors include: "pressures from judges

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41. Herman, *supra* note 37, at 14.

42. Gifford, *supra* note 2, at 75.

43. *Id.* at 78.

44. Herman, *supra* note 37, at 5.

45. Gifford, *supra* note 2, at 81.

46. Uphoff, *supra* note 23, at 105.

47. *Id.*

48. Gifford, *supra* note 2, at 75.

49. *Id.*

50. *Id.*

51. Uphoff, *supra* note 23, at 106.

52. *Id.* at 88.

and large caseloads to reach agreement, . . . [a prosecutor's] continuing relationship with defense attorneys, . . . [and] the prevailing cooperative norms of plea bargaining."<sup>53</sup> A prosecutor may also receive pressure to more vigorously pursue a case from the victim of the crime or from the community if the case is well publicized. However, "in most cases the prosecutor can afford to adopt a noncompetitive rather than a competitive strategy because she is not highly accountable to a constituent."<sup>54</sup>

### *B. Criminal Defense Lawyers*

Defense lawyers, because they represent one client instead of the public at large, have, or should have, as their primary objective the interest of their client. As one commentator relays, defendants are most interested in reducing the sentence.<sup>55</sup> Criminal defense lawyers are aware that if a defendant's case goes to trial, their clients are likely to receive a more severe sentence if convicted than if the defendant had pleaded guilty.<sup>56</sup> The message that defendants who go to trial will get stiffer sentences if convicted is sent from trial judges.<sup>57</sup>

Defense lawyers may also be concerned with getting an appropriate punishment or treatment for clients with special problems such as drug addiction or aggressive tendencies. In the case of many clients, money is also a great concern. "Too few criminal defendants can really afford to pay the cost of mounting an effective defense."<sup>58</sup> As one criminal defense lawyer put it, "[m]any think, because O.J. Simpson was so rich, he could worm out of the charge. But his wealth merely allowed him to stand toe-to-toe with the state."<sup>59</sup> In cases with less well-to-do clients "economic pressures often eliminate the criminal defendant's right to trial as a viable option."<sup>60</sup>

Defense lawyers may become self-interested. The defense lawyer's plea negotiating style will frequently be affected by a desire to, "maintain good working relationships with the prosecutor and the judge."<sup>61</sup> It has been observed that prosecutors punish lawyers who are too adversarial in representing their clients by refusing to grant the standard plea bargaining concessions to these attorneys' clients.<sup>62</sup> Defense lawyers who aggressively fight for a client in one case may become concerned that the prosecutor will be more strict with their other clients.<sup>63</sup>

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53. *Id.*

54. *Id.* at 75-76.

55. *Id.* at 78.

56. *Id.* at 76.

57. Uphoff, *supra* note 23, at 87.

58. *Id.* at 85.

59. Interview with Confidential Source, in Columbia, Mo. (Oct. 1997).

60. *Id.*

61. Gifford, *supra* note 2, at 76.

62. *Id.* at 78.

63. Uphoff, *supra* note 23, at 90.

Justice Brennan observed that:

a lawyer may have a strong interest in having judges and prosecutors think well of him, and if he is working for a flat fee -- a common arrangement for criminal defense attorneys -- or if his fees for court appointments are lower than he would receive for other work, he has an obvious financial incentive to conclude cases on his criminal docket swiftly.<sup>64</sup>

On occasion, defense lawyers may take publicized cases as advertising. In these cases, the incentive to swiftly conclude a case may be decreased because the attorney is rewarded for prolonging the case.

One motivation common to all businesses and professions is the goal of making a profit. "The temptation to undercut the quality of representation provided in order to maximize one's profits or 'to churn' cases to turn a quick fee, of course, is not unique to the criminal defense bar."<sup>65</sup>

## V. UTILITARIANISM APPLIED TO CRIMINAL PLEA NEGOTIATION

Any of the above-mentioned motivations and objectives can become "utility" depending on the circumstances of the case. The choice of negotiation style is determined by what maximizes utility. After the objectives are identified, prosecutors and defense counsel should consider how best to accomplish those objectives in the present case and how best to accomplish those objectives in all cases and decide what course of action will maximize present utility and what course of action will maximize aggregate utility.

Donald G. Gifford recommends that defense lawyers adopt a noncompetitive approach when the relationship between the negotiators is likely to continue because competitive strategies often generate "distrust and ill will."<sup>66</sup> This choice, however, may negatively impact their current clients' immediate interests. It could also cause the client to think the attorney's first thought is to "cop out" and may cause harm to the attorney-client relationship.<sup>67</sup> This ethical dilemma, whether to negotiate as if there were no tomorrow for the present client or to negotiate so as to get the most beneficial plea agreements for the present and future clients, presents an unsettling result. Surely a defense lawyer should not neglect to aggressively negotiate a present client's case for the benefit of other clients. But by doing what "should" be done, the defense attorney may ostracize himself from the congenial legal community and hamper his ability to effectively represent clients in the future.

The choice between present and future clients is not present for prosecutors who represent the state. However, prosecutors' choice of negotiating style may have unintended repercussions. For example, if a defense lawyer is aware that the

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64. *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).

65. Uphoff, *supra* note 23, at 79.

66. Gifford, *supra* note 2, at 65.

67. *Id.* at 77-78.

prosecutor is reluctant to go to trial and eager to dispose of a case, the defense lawyer will have more leverage than when facing a prosecutor who eagerly wants to try cases.<sup>68</sup> "Similarly, defense counsel's poor reputation -- especially as a lawyer who never goes to trial -- will severely diminish that lawyer's bargaining power."<sup>69</sup> "Heavy caseloads pressure many prosecutors to plea bargain most of their cases. Thus, caseload pressure may provide defense counsel important leverage."<sup>70</sup> Defense counsel may be able to win concessions by convincing the prosecutor that a trial will be a costly, hard-fought battle.<sup>71</sup> Thus, the prosecutor may decide that even though the state will win at trial, the victory may not be worth the time and effort expended.<sup>72</sup>

At first blush, it seems counter-intuitive to say that the prosecutor could lower his caseload pressure by pursuing cases to trial. If, however, the defense bar recognizes that a prosecutor is granting concessions when at trial because of caseload pressure, the prosecutor will have intensified the caseload problem. This will become apparent when more and more defense counsel threaten trial to gain plea concessions.

Analyzed from a utilitarian perspective, the act of a prosecutor granting concessions to the present defendant to get a plea may maximize present utility because even though the defendant will receive less punishment the prosecutor will have more time to devote to other cases. Once the defense bar recognizes the prosecutor's reasoning, however, they will take advantage of the pressure on the prosecutor and threaten trial more often in order to receive concessions. Thus, the aggregate utility of the decision to grant concessions at the threat of trial to relieve caseload pressure will be less than the aggregate outcome if the prosecutor would have recognized the consequences of his act and instead formulated a response to the threat of trial in a time of caseload pressure that when applied to all such occasions would have maximized the aggregate outcome, i.e. to not grant concessions to relieve caseload pressure. In this scenario the decision that maximizes utility for the prosecutor in the present case, i.e. the decision act utilitarianism dictates, does not maximize aggregate utility when applied in all similar circumstances. By making the decision that rule utilitarianism dictates, the prosecutor relieves caseload pressure by pursuing a case despite the threat of a costly, hard-fought battle.

Similar to the scenario of acquiescing to caseload pressure, prosecutors may need to take seemingly irrational action to favorably adjust the expectations of the defense bar. When a prosecutor considers the costs and benefits of taking a case to trial or entering a plea agreement, the time required to win at trial may greatly outweigh the increased level of punishment received by the defendant. To gain better negotiating position, however, the prosecutor may follow through on what is believed by the defense bar as an idle and irrational threat to take a minor case to trial. As one prosecutor put it, "[i]f the defense lawyers think the prosecuting attorney is a little crazy and will spend a ton of money on a case, then the

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68. Uphoff, *supra* note 23, at 110.

69. *Id.* at 116.

70. *Id.* at 111.

71. *Id.* at 128.

72. *Id.*

prosecutor's threats won't be idle and the defense lawyers will agree to a settlement earlier."<sup>73</sup> If a prosecutor makes a habit of overcharging and always dismissing charges to reach plea agreements then word will get out. Once it becomes known that the prosecutor always overcharges, defense lawyers will treat the originally filed charges lightly and thus undermine the prosecutor's negotiating position.

Aggressively taking a case to trial as charged and not overcharging does not maximize a prosecutor's present utility. However, once these practices are known to the defense bar, initial posturing over the severity of the charges and the prosecutor's commitment to the case will be eliminated and plea negotiations will begin in earnest more quickly and thereby lessen the amount of time both defense and prosecution lawyers spend on a single case.

## VI. CONCLUSION

Although the result of a negotiation employing the strategy that maximizes utility for that particular negotiation will, by definition, result in the maximum utility for that negotiation, the aggregate utility resulting from a series of negotiations employing, in each case, the strategy that maximizes utility for each particular negotiation, may not result in the optimal aggregate outcome for the series of negotiations. Choosing the best strategy to use becomes complicated when the maximum utility resulting from a series of negotiations is not achieved through the use of the optimal strategy for each singular negotiation. In this situation defense lawyers face an ethical dilemma: should a defense attorney employ the optimal negotiation strategy for the present plea negotiation despite the fact that it will be detrimental to future negotiations with a particular prosecutor or in a particular jurisdiction? In other words, should a defense attorney sacrifice his ability to serve future clients by vigorously serving the interests of his present client?

On the other side of the negotiation process, prosecutors may neglect the interests of the public if they lose sight of the effect a particular negotiation will have on future negotiations by submitting to caseload pressure and granting concessions when threatened by defense counsel with a costly, hard-fought court battle. Similarly, prosecutors, at times, should make an apparently irrational decision to pursue a case by expending excessive amount of time and effort to favorably adjust defense bar expectations. Whatever the situation, it is important to understand that what appears to be a good decision today may turn out to be a bad decision tomorrow.

JOSEPH W. VANOVER

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73. Interview with Confidential Source, *supra* note 59.