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ABA group issues 14 guiding principles to improve plea bargaining system

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An ABA task force that spent three years examining problems in plea bargaining has released recommendations that judges, lawyers, lawmakers and other stakeholders can follow to create a fairer, more transparent process.

In a new report published Wednesday, the ABA Criminal Justice Section's Plea Bargain Task Force provides 14 principles that outline how plea bargaining should operate within the larger criminal justice system. These principles are based on testimony from criminal justice experts and people impacted by plea bargaining, as well as scholarly and legal reports on the process, state and federal rules of criminal procedure, and other materials.

A Feb. 22 ABA press release is [here](#).

“Plea bargaining developed in the shadows of the American criminal justice system without being well understood or appropriately regulated,” says Lucian Dervan, the co-chair of the Plea Bargain Task Force and a professor at the Belmont University College of Law in Nashville, Tennessee. “As we all know, it eventually grew to dominate, and for some time, upwards of 98% of convictions come not from a trial but from a plea of guilty. By the late 2010s, we also knew more about the potentially coercive impact of plea bargaining on innocent defendants from a growing body of exoneration data and academic research.”

In that environment, there emerged a dire need to critically examine the role of plea bargaining today and how to create a better system for the future, adds Dervan, who created the task force after he became chair of the Criminal Justice Section in 2018. It includes a diverse group of prosecutors, defense attorneys, judges, law professors and members of think tanks and advocacy organizations, including the Cato Institute and the Southern Poverty Law Center.

The task force found that the current plea bargaining system offers several benefits, including efficiency, cost savings and a mechanism to incentivize defendants to accept responsibility for their crimes, according to the report. However, it also found that these benefits often come at a high price.

“At times, efficiency and finality trump truth-seeking,” the report says. “Furthermore, many benefits of plea bargaining are, when viewed in a different light, a means to mitigate the excessive harshness of the modern American criminal system. In this sense, plea bargaining is not so much providing a benefit as it is a safety valve for quotidian injustice.”

The task force additionally noted in its report that plea bargaining can lead innocent defendants to plead guilty, allow police and government misconduct to go untested, and exacerbate existing racial inequalities in the criminal justice system.

“The task force collected testimony from experts in the field who demonstrated that throughout the plea process, similarly situated defendants of color fare worse than white defendants,” the report says. “Black defendants in drug cases, for instance, are less likely to receive favorable plea offers that avoid mandatory minimum sentences and, as a result, receive higher sentences for the same charges as white defendants.”

For these reasons and others, Dervan says task force members wanted “to look at this issue critically and not just to identify where we had concerns about the way the system operates today but also to sit down and collaboratively craft 14 principles that we think can be a guide for how we move forward.”

The Plea Bargain Task Force includes the following principles in its report:

- A vibrant and active docket of criminal trials and pretrial and post-trial litigation is essential to promote transparency, accountability, justice and legitimacy in the criminal justice system.
- Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of a defendant.
- In general, while some difference between the sentence offered prior to trial and the sentence received after trial is permissible, a substantial difference undermines the integrity of the criminal system and reflects a penalty for exercising someone’s right to trial. This differential, often referred to as the trial penalty, should be eliminated.
- The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes that they did not commit.
- The use of bail or pretrial detention to induce guilty pleas should be eliminated.
- Law students, lawyers and judges should receive training on the use and practice of plea bargaining consistent with the findings and recommendations of this report.
- Court systems, sentencing commissions and other criminal justice stakeholders, including prosecutor offices and public defenders, should collect data about the plea process and each individual plea, including the history of plea offers in a case. Data collection should be used to assess and monitor racial and other biases in the plea process.

Dervan points out that the task force’s recommendations are broad and could be embraced by prosecutors, defense attorneys, courts, administrators and advocacy organizations.

“We hope to see all corners of the system carefully review our findings and recommendations and use the principles to guide reform efforts,” he says. “That might include things such as new ethics opinions, amending office policies, creating new legislation and seeking court rulings that

establish the importance of protecting our Sixth Amendment right to trial. We don't see this as singularly directed.”

The complete list of principles can be found in the *2023 Plea Bargain Task Force Report*.