

NDAAs Response to the American Bar Association's 2023 Plea Bargain Task Force Report

Earlier this year, the American Bar Association (ABA) Criminal Justice Section Plea Bargain Task Force issued a report critical of the practice of plea negotiation in American courtrooms as "impermissibly" coercive, insufficiently transparent, and subject to manipulation by allegedly unethical prosecutors practicing in front of complacent judges, all to the detriment of public faith in the legal system. Because we believe that the report does not accurately portray what is happening in America's halls of justice, the National District Attorneys Association (NDAAs), as the voice of America's prosecutors, provides this response. We value collaboration and communication and stand ready to work with the ABA on improving the quality of justice. Unfortunately, this report, as well-intentioned as it may be, does not serve the interests of criminal defendants, crime victims, or community safety.

While the task force's criticisms are broken down into 14 "principles," it is fair to categorize them as resting on one of two alleged flaws with the plea negotiation process:

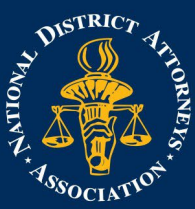
- (1) In the process of plea negotiation, the state has impermissible leverage; and
- (2) There is a lack of oversight and transparency that permits abuses of that leverage.

As to the first alleged flaw, the presumption that the prosecutor holds all the cards in a plea negotiation is not accurate. A prosecutor is not the final determinator of a plea result. It is critically important to acknowledge the role of the defendant's attorney in the evaluation and negotiation process. Equally important are the prosecutor's dual burdens of both proof and persuasion and the duty to disclose in advance all witnesses and evidence in a case whether or not that evidence is admissible at trial. The evidence can point both to guilt or to innocence, and it frequently contains elements of both. The plea is a result of a negotiation between both parties, with each side taking into account the potential risk of a poor result. *In sum, there is nothing impermissible about plea negotiations.*

Nevertheless, the report concludes that a substantial difference between a plea offer and a post-trial sentence must "reflect a penalty for exercising one's right to trial." The notion of a trial penalty is based on a false assumption. It assumes that the accused's constitutional rights to silence, assistance of counsel, due process, cross-examination, an impartial jury, and other elements of a fair trial have not been honored; *but only if the result is a conviction.* In this false scenario, all convictions become a penalty while all acquittals are justice for the accused. The assumption that a trial penalty exists also fails where the jury returns a mix of convictions and acquittals, which frequently happens in tried cases.

The false "trial penalty" argument ignores the fact that the greatest discrepancies between the offered plea and the post-trial sentence frequently manifest where the defendant had the greatest power and control: those cases where a key witness is "in the wind;" where a victim is reluctant to endure the horror of reliving her trauma by testifying in front of twelve strangers; or where there were real grounds for both sides to anticipate an unfavorable jury verdict.





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In a rational world where the decision is to go to trial, there is no penalty for an acquittal. It logically follows that there is no penalty for conviction. The only remorse comes when the outcome at trial produces a result that the accused considers worse than the lost opportunity to negotiate a better offer.

In addition, the report also ignores the fact that the prosecutor has no more than persuasive influence on a post-trial sentence. The defendant's counsel has equal influence. Judges alone decide the appropriate sentence.

As to the second alleged flaw, the idea that a plea agreement is not transparent is false. While a guilty plea is negotiated outside the public view, it is put forward as an agreement of both parties, and it is reviewed and accepted or rejected by a judge. By law or by practice, it is communicated to victims, who have the opportunity to express their opinions to the prosecutor and the judge. It is subject to scrutiny by the public, the press, and the voters. It is recited in open court and supported by a factual basis. It has consequences for the State and the defendant and sets informal precedence within the prosecutor's office and the jurisdiction's state bar.

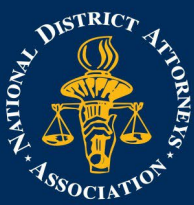
Having already referenced the oversight of courts, victims, and the public, it is important to note that there are robust practical and ethical requirements for a prosecutor who contemplates extending a plea offer, which are set forth in [NDAA's National Prosecution Standards](#) §5-3.1. Those standards are ignored by the task force.

The task force's report also omits any discussion of the real values of the plea process. By failing to call for the abolition of plea agreements, it implicitly recognizes the practical necessity of resolving some cases by means other than a trial. But there are other values to the plea system, notably:

- (1) A plea is often an instrument of leniency. There is perhaps no more striking answer to the "trial tax" accusation than prosecutor-led diversion. All across the nation, prosecutors have taken the lead in offering criminal defendants a way out of the criminal justice system.
- (2) A plea provides certainty for a defendant. The report nowhere mentions the legions of defense attorneys who daily seek and receive plea offers for their clients for a wide variety of reasons, not least of which is a more certain outcome.
- (3) A plea provides finality to the legal process. For the community as a whole, not to mention victims in particular, there is a value to the legal process coming to an end. A fair and just disposition is also a vibrant and transparent part to justice.
- (4) A system in which any sizable percentage of cases is tried would be massively more expensive and would overwhelm the criminal justice system. Taken seriously, the task force's recommendations would require spending on the criminal justice system never seen in the history of the nation and not likely to be politically feasible in the future.

Any human system is subject to criticism. Prosecutors who misuse the plea process and act with malice make up only isolated incidents across a very broad spectrum of successful negotiations. There is no mass





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abuse of a voluntary negotiation process. In fact, NDAA has provided the standards by which to judge them, not to mention the disciplinary processes available through state bar associations. The report pays little attention to those processes, to the judges who oversee them, to Bar associations that may impose disciplinary action, and to the zeal and expertise of the defense attorneys who participate in this process every day. Prosecutors are committed to serving their communities by providing fair and equal justice for all and allowing defendants the opportunity to accept responsibility, with the advice of their counsel and the oversight of a neutral judge who is integral to an effective and just system.

The task force, lacking local prosecutor representation, missed the opportunity to engage with the broader prosecution community and, as a result, failed to perceive the realities on the ground that certainly do not call for sweeping change to the nation's system of plea negotiation.

About the National District Attorneys Association:

Formed in 1950, NDAA is the oldest and largest national organization representing state and local prosecutors in the country. With more than 5,500 members representing over two-thirds of the state and local prosecutors' offices, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. NDAA's mission is to provide state and local prosecutors with the knowledge, skills, and support they need to ensure that justice is done and that public safety rights are protected.

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