Note: identified as Article 6 but Pleadings and Related Procedures is Article 9 in Final Draft and Report - Nov. 1972

CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Pleadings of Defendant; Plea Discussions and Agreements

Preliminary Draft No. 1; January 1972

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Subcommittee No. 3

INTRODUCTORY NOTE:

During the last few years the plea bargaining process and its concomitant product, the guilty plea, have been subjected to increased scrutiny and discussion by the bench, the bar and the public.

The McCarthy, Boykin and Santobello decisions, while recognizing the necessity for and the propriety of the guilty plea system, have imposed new obligations upon the courts to determine for the record that certain basic requirements have been met. The ABA Project on Minimum Standards for Criminal Justice included, as a high priority area, a proposed set of guidelines for guilty plea disposition of criminal cases.

The proposed draft is based largely on the ABA recommendations. Your reporter realizes that some, if not most, of the sections would be better suited for court rules than statutory law; however, it is hoped that this first draft will serve as a vehicle for discussion of the important issues involved and the policy decisions related thereto.

ARTICLE 6. ARRAIGNMENT AND RELATED PROCEDURES

Pleadings of Defendant; Plea Discussions and Agreements

Preliminary Draft No. 1; January 1972

Existing Law: ORS 135.820

Section 1. Pleading by defendant; alternatives. The kinds of plea to an indictment, information or complaint are:

(1) Guilty.

(2) Not guilty.

(3) A former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of not guilty.

COMMENTARY

This section is almost identical to ORS 135.820 and continues to provide for three kinds of plea. The existing statute refers only to pleas to an indictment, whereas the proposed section includes the additional charging instruments of informations and complaints.

Section 2. Time of entering plea; aid of counsel.

Existing Law
ORS 135.410 135.810

(1) A defendant shall not be required to plead to an offense punishable by imprisonment, until he is represented by counsel, unless the defendant knowingly waives his right to counsel.

(2) If a defendant with counsel requires it, he shall be allowed until the next regular arraignment day or such additional time as the court considers reasonable to enter a plea.

(3) A defendant without counsel shall not be required to plead to a felony until at least 48 hours after the date of arraignment. The court shall not accept a plea of guilty to a felony from a defendant without counsel unless the plea is reaffirmed after a period of 48 hours following the date the defendant received the advice from the court required in section 3 of this Article.

COMMENTARY

A. Summary

This section establishes a timetable for entering pleas to criminal charges. Four basic rules are contained within this timetable: (1) A defendant who faces the possibility of imprisonment shall not be required to enter a plea without the assistance of a lawyer, unless the defendant knowingly waives his right to counsel. (2) A defendant's lawyer should be afforded a reasonable time to confer with and advise the defendant before a plea is entered. (3) A defendant without counsel should be allowed a minimum of 48 hours after being arraigned on a felony charge before being required to plead to the charge. (4) If the defendant without a lawyer pleads guilty, he is allowed an additional 48 hours for deliberation before the court can accept a plea of guilty to a felony.

The purpose of the section is to try to provide for the efficient and expeditious handling of pleas by the courts, while also protecting the rights of the individual defendant during a "critical stage" of the criminal proceedings against him.

B. Derivation

The section is based on ABA Standards Relating to Pleas of Guilty s. 1.3 (Approved Draft, 1968).

C. Relationship to Existing Law

Two existing statutes deal generally with the time allowed for answering or pleading to an indictment:

> 135.410. If on the arraignment the defendant requires it, he shall be allowed until the next day, or until such further time as the court deems reasonable, to answer the indictment.
>
> 135.810. The plea shall be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

Pleading to a complaint in district or justice court is in the same manner as pleading to an indictment, by operation of ORS 156.080 and 156.610. Any delay in pleading contemplated by the statutes presumably is for the purpose of providing the defendant with sufficient time in which to consult with his attorney and otherwise decide how he wants to plead. This is, of course, a necessary and desirable provision which is continued in the draft section. However, the section is designed also to allow the defendant's lawyer an adequate opportunity to engage in plea discussions with the district attorney.

The ABA reporter makes the point that "because it is seldom possible to engage in effective negotiations minutes before the defendant is to be called upon to plead, this means that some reasonable interval must elapse between appointment of counsel and the pleading stage." (Commentary, p. 22). In practice, the usual procedure followed is to enter a plea of "not guilty" to the crime charged, and to

later change the plea if it becomes necessary. Nevertheless, the section and the ABA Standards do permit additional time for pleading at the initial arraignment stage.

No attempt is made in the ABA Standards or in this draft to set forth the kinds of cases for which counsel must be made available to an indigent defendant and the procedures for appointment in advance of the time for pleading, or to indicate what is necessary for effective waiver of counsel. These matters will be dealt with elsewhere in the Criminal Procedure Code.

The section does not require appointment of counsel against his wishes simply because of the nature of his plea. A defendant can waive his right to counsel if he does so understandingly and intelligently. Johnson v. Zerbst, 304 US 458 (1938). It has been held that if a defendant pleads guilty, or the record shows that an offer of counsel was made and refused by the defendant, the burden is on the defendant to show that he did not understandingly and intelligently waive his right to counsel. Moore v. Michigan, 355 US 155 (1957).

The section subscribes to the ABA position that even if the defendant has effectively waived counsel, he nonetheless should not be hurried through the plea of guilty process without sufficient time to consider his decision.

Section 3. Defendant to be advised by court. (1) The court shall not accept a plea of guilty from a defendant without first addressing the defendant personally and determining that the defendant understands the nature of the charge.

(2) The court shall inform the defendant:

(a) That by his plea of guilty he waives his right to trial by jury;

(b) Of the maximum possible sentence on the charge, including that possible from consecutive sentences; and

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant may be adjudged a dangerous offender, that this fact may be established after his plea in the present action, thereby subjecting him to different or additional penalty.

COMMENTARY

A. Summary

This section requires the court to address the defendant personally and to determine that the defendant understands the true nature of the charge against him. Subsection (1) sets forth this requirement. Subsection (2) (a) requires that the judge undertake to ensure that the defendant understands his right to a jury trial and that he waives the right by his guilty plea. Subsections (2) (a) and (b) require the court to warn the defendant of the "consequences" of his plea.

B. Derivation

Section 3 is based on ABA Standards Relating to Pleas of Guilty s. 1.4 (Approved Draft, 1968).

C. Relationship to Existing Law

Subsection (1). "[R]eal notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process . . . . " Smith v. O'Grady, 312 US 334 (1941). The ABA Commentary notes that the standard as set out in this subsection accords with what is said to be required of the judge under Federal Rule 11, which provides:

> "A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In McCarthy v. United States, 394 US 459 (1968), the U. S. Supreme Court said:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege.' (Citing Johnson v. Zerbst). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

The subsection requires no specific procedure, as is true in Rule 11. As the ABA Commentary states, "The most appropriate procedure for the judge will vary from case to

case. While in some instances he can do this best by reading the indictment, . . . [i]n many cases the indictment, which is usually couched in technical language, is more understandable to the defendant if the charge is explained to the defendant by the judge in simple everyday language." There are no existing Oregon statutes that deal with this matter and no Oregon cases that discuss it.

Subsection (2) (a). This paragraph adopts the ABA view that the right to a jury trial is "sufficiently important to warrant a requirement that the judge undertake to ensure that the defendant does in fact understand this right and that he waives it by pleading guilty." There is no counterpart to this provision in present Oregon law.

Subsection (2) (b). Advising the defendant of the "consequences of the plea" is the fundamental reason for section 3. No distinction is made between the defendant with counsel and the one who is not represented. This follows Federal Rule 11 and the ABA Standards. The Oregon cases hold that there is a constitutional right to be advised of the basic legal consequences of a guilty plea, although the court is not specifically required to give this advice, and a record that shows that the defendant's counsel has advised him appears to suffice.

The Oregon Court of Appeals held in Lay v. Cupp, 1 Or App 296, 462 P2d 443 (1969):

> "A defendant accused of crime has a constitutional right to be advised before a guilty plea of the basic legal consequences of the plea, including the maximum penalty assessable under the charge . . . . "

Cf., Fletcher v. Cupp, 1 Or App 467, 463 P2d 365 (1969); Dixon v. Gladden, 250 Or 580, 444 P2d 11 (1968); Jones v. Cupp, 93 Adv Sh 1247, ___ Or App ___ (1971).

One of the possible consequences could be the imposition of consecutive sentences and, where necessary, the court would be required to warn the defendant of this possibility.

Subsection (2) (c). Under the Oregon Criminal Code of 1971 there is the possibility in certain felony convictions of being sentenced to an increased penalty as a dangerous offender. In any case in which this could occur, the warning would be required. The ABA Standards, s. 1.4 (c) (iii) use the following language:

> "[W]hen the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment."

The Oregon dangerous offender provisions might be applied to either first time or repeated offenders, so the language of the statute should be broad enough to cover either eventuality.

There is basis for this requirement in Oregon case law. In Nealy v. Cupp, 2 Or App 240, 467 P2d 649 (1970), the defendant pleaded guilty to sodomy. At the time he entered his plea he was told by the court that the maximum possible sentence was 15 years. Apparently, the defendant's attorney had also so advised him. Defendant was then ordered to have a psychiatric examination under ORS 137.112, and as a result received an indeterminate life sentence as a sexual offender. The Court of Appeals affirmed the post-conviction court's relief, which was vacation of the guilty plea, saying:

> " . . . [T]he information regarding the maximum sentence must be accurate. If the defendant is not fully informed, as here, he cannot be said to understand the true legal consequences of his guilty plea." At 242.

Section 4. Determining voluntariness of plea. (1) The court shall not accept a plea of guilty without first determining that the plea is voluntarily and intelligently made.

(2) The court shall determine whether the plea is the result of prior plea discussions and a plea agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the agreement.

(3) If the district attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court shall advise the defendant personally that the recommendations of the district attorney are not binding on the court.

COMMENTARY

A. Summary

This section requires an in-court inquiry into the voluntariness and intelligence of the plea, and an examination of the plea discussions, if any, that brought about the plea.

B. Derivation

Source of the section is ABA Standards Relating to Pleas of Guilty s. 1.5 (Approved Draft, 1968) and Boykin v. Alabama, 395 US 238 (1969).

C. Relationship to Existing Law

Subsection (1) codifies the Boykin requirements. Subsections (2) and (3) adopt the ABA recommendation that plea discussions and plea agreements be given "visibility" by court inquiry.

In Boykin the defendant, represented by court-appointed counsel, pleaded guilty to five counts of robbery and was sentenced to death. So far as the record showed, the judge

asked no questions of the defendant about his plea, and the defendant made no statement to the court. The U. S. Supreme Court reversed the judgment, holding that "it was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

The Boykin opinion, delivered by Mr. Justice Douglas, notes that several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial: the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one's accusers.

Boykin thus imposed on state trial courts the duty of interrogating defendants who enter guilty pleas so that the waiver of their constitutional rights will affirmatively appear in the record. McCarthy was given prospective application only by the Court in Halliday v. U. S., 394 US 381 (1969), and most federal circuits and many state courts have followed the Halliday case and denied retroactivity of the Boykin rule. The Oregon Court denied retroactive application in the case of Endsley v. Cupp, 1 Or App 169, 459 P2d 448 (1969), petit. for rev. den. (1970).

The Oregon Court of Appeals stated, however:

> "Boykin illustrates the necessity for a trial court to make careful inquiry into the knowledge and state of mind of an accused person who pleads guilty. The case does not specify precise rules of procedure for state trial courts to follow, but does require that a court ascertain whether the accused is aware of his constitutional rights and whether he knowingly waives those rights." Endsley v. Cupp at 174-75.

OTHER OREGON CASES:

A plea of guilty waives all defenses that could have been made at the trial. Barnett v. Gladden, 237 Or 76, 390 P2d 614, cert. den. 379 US 947 (1964).

When an involuntary confession was secured from defendant and he later pleaded guilty to the crime confessed, the plea will be presumed tainted by the confession and considered involuntary until the state has overcome such presumption. Dorsciak v. Gladden, 246 Or 233, 425 P2d 177 (1967).

Section 5. Determining accuracy of plea. After accepting a plea of guilty, the court shall not enter a judgment upon the plea without making such inquiry as may satisfy the court that there is a factual basis for the plea.

COMMENTARY

A. Summary

This section requires a determination by the judge accepting a plea into the accuracy of the plea. It does not state specifically a particular "probability of guilt" standard, which is left to the discretion of the judge. As the ABA commentator observes, the circumstances of the case will often dictate the kind and amount of inquiry which is necessary. The court would be free to use any appropriate procedure which seems best suited to the court and for the kind of case involved.

The ABA Commentary points out that although inquiry into the accuracy of guilty pleas deprives the guilty plea process of some of its efficiency, these inquiries take far less time and are far less demanding of criminal justice resources than full-scale trials. The benefits derived for defendants and for the system far outweigh the loss in efficiency. Primarily, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Furthermore, investigation into the factual basis of guilty pleas helps to increase the visibility of charge reduction practices, a common form of plea agreement. Also, inquiries provide a more adequate record of the conviction process and minimize the chances of a defendant successfully challenging his conviction later. Finally, increased knowledge about the circumstances of the defendant's crime allows the court to better evaluate his competency, his willingness to plead guilty, and his understanding of the charges against him.

B. Derivation

The section is based on ABA Standards Relating to Pleas of Guilty s. 1.6 (Approved Draft,1968).

C. Relationship to Existing Law

There is no such general provision regarding accuracy of guilty pleas in Oregon law; however, Federal Rule 11 so provides. The kind and amount of inquiry would be left to the judge's discretion as in the federal rule and probably would not change the current practice of most Oregon trial courts.

Section 6. Plea discussions and plea agreements. (1) In cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served, and in accordance with the criteria set forth in section 7 of this Article, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement.

(2) The district attorney shall engage in plea discussions or reach a plea agreement with a defendant only through defense counsel, except when, as a matter of record, the defendant has effectively waived his right to counsel or, if the defendant is not eligible for court-appointed counsel, has not retained counsel.

(3) The district attorney, in reaching a plea agreement, may agree to one or more of the following, as required by the circumstances of the individual case:

(a) To make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty to the offense charged;

(b) To seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty to another offense reasonably related to the defendant's conduct; or

(c) To seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty to the offense charged.

(4) Similarly situated defendants shall be afforded equal plea agreement opportunities.

COMMENTARY

A. Summary

This section adopts the ABA recommendation that the plea negotiation process should be formally recognized and controlled. Subsection (1) is a general provision regarding the district attorney's authority to engage in plea discussions. Subsection (2) requires negotiation through defense counsel except when the defendant is not represented by his own voluntary choice. Subsection (3) sets forth the types of concessions that the district attorney may make in reaching a plea agreement. Subsection (4) requires equal plea agreement opportunities for similarly situated defendants.

B. Derivation

The section is derived from ABA Standards Relating to Pleas of Guilty s. 3.1 (Approved Draft, 1968).

C. Relationship to Existing Law

In Oregon criminal justice administration, as elsewhere in this country, the practice known as "plea negotiation," "plea bargaining," "cop out" or "deal" is regularly engaged in by prosecutors and defense lawyers. The Oregon Criminal Law Handbook recognizes that the negotiated plea serves a useful public purpose and suggests that the terms employed in connection with the practice should be stripped of their anti-social implications. See, Oregon State Bar Criminal Law Handbook, ch. 6 (1969).

During the past few years the subject of plea bargaining has been more closely scrutinized than ever before. The President's Commission on Law Enforcement and Administration of Justice, realizing the importance of it in this time of overloaded court dockets, stated in its report:

> "The negotiated guilty plea serves important functions. As a practical matter, many courts could not sustain the burden of having to try all cases coming before them. The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials. Tremendous investments of time, talent, and money, all of which are in short supply and can be better used elsewhere, would be necessary if all cases were tried. It would be a serious

> mistake, however, to assume that the guilty plea is no more than a means of disposing of criminal cases at minimal cost. It relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system." Challenge of Crime in a Free Society 135 (1967).

The extent to which plea bargaining is used seems to vary greatly from county to county in Oregon. A survey of district attorneys detailed in a recent law review article stated that "estimates of the number of cases resolved by a plea of guilty as a result of negotiations range all the way from 0 percent in one county to 95 percent in another." Klonoski, Mitchell and Gallagher, "Plea Bargaining in Oregon: An Exploratory Study," 50 Or L Rev 114, 118 (1971). At pages 136 - 137 the authors, after evaluating their data, make several recommendations that should be considered in connection with this draft:

> "(1) We recommend attempts to increase the general public's awareness of plea bargaining for the following reasons:
>
> "(a) The idea of a bargain in relation to justice gives the average citizen the idea that underhanded, unethical dealings take place. Although such practices appear to be rare, increased public knowledge would provide a safeguard against such abuses.
>
> "(b) The ever increasing caseload in our courts heightens the probability of mistakes, especially in the plea-bargaining process. By making the general public more aware of the operation of the judicial system and of the possibilities for injustice through neglect, the public might support additional financial resources for our court systems.
>
> "(c) To free prosecutors from unfounded criticism and to improve the image of the legal system, a full and honest disclosure of its workings is essential.

> "(2) We recommend reforms in the handling of indigents' cases to minimize the effect of financial pressures tempting the established attorney to bargain quickly and the marginal attorney to bargain not at all. This could be done either through careful screening by the courts of attorneys available for the handling of indigent cases or through a public defender system.
>
> "(3) We recommend that prior to sentencing, the presiding judge be given a detailed report of what occurred in the bargaining process and an account of the factors that influenced both defense counsel and the district attorney to reach agreement. This should be done in writing. Included in this report at the request of any concerned party should be a psychological evaluation of the defendant's competence to distinguish a guilty from a not guilty plea. This examination might be requested by the prosecutor for protection from subsequent appeals or by a friend of the defendant who believes him to be mentally incapable of comprehending the legal questions confronting him. Hopefully, the 'bargaining report' would reduce the possibility of excessive leniency, bring to light errors of an attorney, and reduce the possibility of a defendant misunderstanding. Though we are sensitive to the wish of a majority of the district attorneys that these statements should be confidential to protect both the accused and the victim from unnecessary publicity, on balance we would favor Oregon following California and New York in making the statements part of the public record. This gives the greatest assurance that we could 'exhume the process from stale obscurantism and let [in] the fresh light of open analysis.'" (Footnotes omitted).

In an opinion just handed down the U. S. Supreme Court put its stamp of approval on the negotiated plea practice, with the Chief Justice saying:

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be

encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." Santobello v. New York, 10 Cr L 3017 (Dec. 20, 1971).

The Oregon application for a federal grant under the Omnibus Crime Control and Safe Streets Act of 1968 observes that "plea bargaining necessarily occurs frequently in Oregon, but courts remain detached from the process, thus causing later judicial distrust and withdrawals of guilty pleas." The application contains the recommendation that "plea bargaining should be made a matter of record subject to judicial scrutiny." State of Oregon, Priorities for Law Enforcement A-17 (Executive Department 1970).

Section 7. Criteria to be considered in plea discussions and plea agreements. In determining whether to engage in plea discussions for the purpose of reaching a plea agreement, the district attorney may take into account any of the following considerations:

(1) The defendant by his plea has aided in ensuring the prompt and certain applications of correctional measures to him.

(2) The defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct.

(3) The concessions made by the state will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction.

(4) The defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial.

(5) The defendant has given or offered cooperation when the cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(6) The defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

COMMENTARY

A. Summary

Section 7 sets forth six different considerations, any of which may justify the district attorney in reaching a plea agreement and the court in granting charge or sentence concessions. As the ABA acknowledges, it is clear that no single consideration serves to explain or justify all concessions which are granted.

B. Derivation

The section is patterned after ABA Standards Relating to Pleas of Guilty s. 1.8 (Approved Draft, 1968). Its placement in the draft is different, however, from the ABA proposal. Their comment notes:

> "The Advisory Committee deliberately placed the . . . standard in Part I . . . entitled 'Receiving and Acting upon the Plea,' rather than in Part III, 'Plea Discussions and Plea Agreements.' Although it is probable that the plea will be tendered only after plea discussions and plea agreement with the prosecutor, there is no basis for limiting concessions to those situations."

This is a sound observation, but it seems that the criteria more properly belongs in a section dealing with plea discussions. The court, in any event, would take the same considerations into account if a guilty plea were tendered without prior discussions with the district attorney.

C. Relationship to Existing Law

The Klonoski Study of plea bargaining in Oregon shows that of district attorneys responding to his questionnaire (58 percent), the factors taken into account when they considered charge reduction were, in order of importance: (1) Strength of case. (2) Nature of crime. (3) Past record of defendant. (4) Personal impression of defendant. (5) Caseload. Klonoski, Mitchell and Gallagher, "Plea Bargaining in Oregon: An Exploratory Study," 50 Or L Rev 114, 119 (1971).

It would appear that the above listed factors bear little resemblance to the criteria proposed in section 7. However, it should be noted that factors listed on the questionnaire are very specific reasons for agreeing to a charge reduction. In contrast, the draft proposal sets forth general criteria to be followed by both the district attorney and the trial judge (see s. 9 infra) and are in language broad enough to include the more specific factors.

The rationale behind each criterion, as stated in the ABA Standards, is as follows:

Subsection (1): Promptness and certainty in punishment are both important in accomplishing the goals of the criminal justice system. The swift and certain punishment of a given defendant aids in the deterrence of others and in accomplishing rehabilitation of that defendant. A defendant who pleads guilty may substantially contribute to both the promptness and the certainty of his punishment.

Subsection (2): This factor recognizes the defendant's acknowledgment of guilt and willingness to assume responsibility for his conduct as a valid consideration in dealing with the guilty plea defendant. It is consistent with prevailing and accepted sentencing criteria, which emphasize the relevance of the "attitudes of the defendant" and his willingness to assume responsibility for his actions.

Subsection (3): In view of the wide range of sentencing options that Oregon judges have for most crimes, the main purpose in including this standard is to recognize that in many cases a plea to a reduced charge is to avoid a felony conviction, or conviction of a crime that carries a particularly reprehensible label.

Subsection (4): In some cases there may be good reasons for avoiding a public trial. This is particularly true in certain sex offenses where the victim would be required to appear in court and repeat the details of what occurred. Or there may be other types of cases, such as coercion or theft by extortion, in which the protection of the victim from public trial would be a valid consideration.

Subsection (5): This factor gives formal recognition to the "deal." Circuit Judge Edwin E. Allen, writing in the Oregon Criminal Law Handbook, observes:

> "The 'deal' generally implies that there is some type of quasi-consideration which the state receives in exchange for the defendant's being allowed to plead guilty to one of several offenses or to a lesser offense." Sec. 6.2.

The state's objective is obvious -- to convict an offender who, without the cooperation of the defendant, would go unpunished. The ABA states that the Advisory Committee believed that whatever is lost by the reduced punishment of one offender is gained by the resulting conviction of one or more other offenders.

Subsection (6): In commenting upon this factor, the ABA notes:

> "[I]n localities with a significant court congestion problem, guilty plea defendants as a class do make a meaningful contribution toward the attainment of the objectives of the criminal justice system. If a substantial number of cases are disposed of without trial, then those cases requiring trial may be reached without excessively long delays. In this way, the imposition of punishment on all guilty defendants occurs much more promptly than otherwise would be the case. The certainty of punishment is likewise increased, as the chances of conviction at trial appear to decrease as time passes and witnesses forget or disappear. Inasmuch as prompt and certain punishment increases the effectiveness of the criminal justice system, it is not inappropriate to grant concessions to those defendants who by their plea increase both the proximity and probability of punishment for other guilty defendants. Such concessions are consistent with and aid in attaining the rehabilitative, preventive, and deterrent objectives of the criminal law." ABA Standards, Commentary, s. 1.8 (a) (vi).

The Klonoski Study reported that when asked how the administration of justice is aided by the plea bargaining process, over half of the responding district attorneys indicated that it saved time, money and reduced the caseload of the courts. 50 Or L Rev supra at 131.

The Standard set out in this subsection is consistent with the above observations and recognizes that avoiding delay in the disposition of other cases is a proper matter to be taken into account by a district attorney or trial judge in determining whether to agree to a "bargained for" guilty plea.

Section 8. Responsibilities of defense counsel. (1) Defense counsel shall conclude a plea agreement only with the consent of the defendant, and shall ensure that the decision whether to enter a plea of guilty is ultimately made by the defendant.

(2) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by him or the defendant in reaching a decision.

COMMENTARY

A. Summary

This section provides that the plea agreement process must have the consent of the defendant, and that any decision whether to enter a guilty plea is made by the defendant. The decision of the defendant, in order to be an informed one, must be based on the kind of advice of counsel required by the section.

B. Derivation

This section is taken from ABA Standards Relating to Pleas of Guilty s. 3.2 (Approved Draft, 1968).

C. Relationship to Existing Law

The section embodies established professional ethics regarding the role of defense counsel in negotiated pleas. Commentary in the ABA Standards make the obvious point that although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received, this is not a complete substitute for advice by counsel.

There may be important considerations besides those which the judge is required to cover in his discussion with the defendant. The defendant needs to know the probability of being convicted should he decide to stand trial. He also needs whatever information is available upon which it can be predicted what consequences would follow a plea of guilty as compared to those which would follow conviction at trial.

Therefore, the defendant should be informed fully regarding concessions offered by or agreeable to the district attorney. Defense counsel is the person best able to evaluate the concessions offered by the prosecutor and the probable effect of the ultimate disposition of the case.

The ABA notes that defense counsel cannot predict many of the matters involved with certainty, but the defendant is nevertheless entitled to his best professional judgment.

The standard suggested by the ABA recognizes the need for counsel to advise the defendant on "considerations deemed important" by him or the defendant. The draft uses the language, "factors considered important." Collateral consequences that may follow conviction, such as loss of civil rights, ineligibility for certain licenses granted by the state and ineligibility to engage in certain callings should be made known to the defendant by counsel.

Section 9. Responsibilities of trial judge. (1) The trial judge shall not participate in plea discussions.

(2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty in the expectation that other charges before the court will be dismissed or that sentence concessions will be granted, the trial judge, upon request of the parties, may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. The trial judge may then advise the district attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report or other information available at the time for sentencing is consistent with the representations made to him.

(3) If the trial judge concurs, but later decides that the final disposition of the case should not include the sentence concessions contemplated by the plea agreement, he shall so advise the defendant and allow the defendant a reasonable period of time in which to either affirm or withdraw his plea of guilty.

(4) When a plea of guilty is tendered or received as a result of a prior plea agreement, the trial judge shall give the agreement due consideration, but notwithstanding its existence, he is not bound by it, and may reach an independent decision on whether to grant sentence concessions under the criteria set forth in section 7 of this Article.

COMMENTARY

A. Summary

Subsection (1) subscribes to the ABA view that the judge should not participate in plea discussions and is

consistent with the prevailing attitude and practice in Oregon trial courts.

Subsection (2) provides, however, that the judge may permit disclosure of the tentative agreement before the plea is tendered and advise the parties whether he will concur in the proposed disposition if the information regarding the defendant at time for sentencing is consistent with the representations made to him.

Subsection (3) provides that if the trial judge later changes his mind, he shall advise the defendant and allow him a reasonable time in which to affirm or withdraw his guilty plea.

Subsection (4) provides that the trial judge is not expected to automatically approve every plea agreement and grant the concessions contemplated by it. He, as Oregon trial judges have done in the past, is to reach an independent decision on whether to grant the sentencing concessions contemplated by the agreement.

B. Derivation

This section is based on ABA Standards Relating to Pleas of Guilty, amended s. 3.3 (Approved Draft, 1968).

C. Relationship to Existing Law

(1) This will not change the approach to plea bargaining by Oregon trial judges. The judge usually is aware of the fact that a guilty plea is the result of a prior agreement, although he may not be apprised of all of the details thereto. In fact, it is not uncommon for the court to be advised by the district attorney and defense counsel in open court of the agreement, e.g., State v. Scharbrough, 245 Or 328, 421 P2d 976 (1966).

Actually participating in the plea discussions is a different matter, though, and is not favored in the profession. Informal Opinion No. 779, ABA Professional Ethics Committee declares: "A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilty based on proof."

The ABA Standards suggest several reasons for keeping the trial judge out of plea discussions, including:

(a) Judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge.

(b) Judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered.

(c) Judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report.

(d) The risk of not going along with the disposition desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

The Klonoski Study makes the observation that the issue of who should be the legitimate participants in the process is an uncertain aspect of it. Prosecutors were asked the question, "Who is involved in the actual bargaining besides yourself?" The results of the responses were tabulated as follows:

Who is involved in the actual bargaining besides yourself?

Who is involved in plea bargaining -- number of times mentioned	Population of County			
	0-10,000	10-40,000	40-80,000	80,000+
Defense attorney	4	7	5	3
Defendant	3	3	2	2
Magistrate	1	1	1	2
Other	0	0	1	2

The authors state that their aim in asking the question was to determine who are the active participants in achieving a bargain, but that in retrospect they recognize the question

is ambiguous because it does not distinguish between a situation in which the judge meets with the prosecutor and defense to achieve a bargain and one in which the judge simply concurs in a tentative agreement already reached by the respective parties. See, 50 Or L Rev, supra, 122. It is submitted that Oregon trial judges ordinarily don't participate in plea discussions, but as Judge Allen notes, "the court will seldom inquire when the district attorney is disposed to dismiss a pending case." (Oregon Criminal Law Handbook, s. 6.10).

(2) This is a new provision wholly compatible with the position taken in subsection (1). The judge only becomes involved after the parties have reached agreement. It recognizes that it is proper for the judge, when requested by the parties, to permit certain procedures that will allow a greater degree of certainty when the proposed concessions involve the sentence or the dismissal of other charges before the court.

The ABA emphasizes that the Standard does not compel the trial judge to receive advance notice of the agreement and the reasons therefor or to make any advance indication of the probable disposition.

(3) This provision continues the rationale of permitting utmost latitude by the court while at the same time protecting the interests of the defendant who has pleaded guilty on the expectation that he will be granted certain concessions. Certainly, the court should not be bound in advance to concur in an agreement that it may later decide is inadvisable.

The subsection would permit the judge to indicate precisely in what respect he does not now concur in the plea agreement, but he would not be required to do so.

(4) Because the factors which justify plea discussion and a plea agreement (s. 7) are the same as those which justify the granting of charge or sentence concessions by the judge, the judge probably would concur in most cases. But the trial judge's assessment of these factors may not always correspond to the district attorney's or defense counsel's assessment. The court, as is now the case, is not expected to rubber stamp the plea agreement and automatically grant the concessions contemplated by the agreement. The court remains in a position to reach an independent decision.

Existing law, ORS 134.150, provides that the court may, either on its own motion or upon application of the district

attorney, and in furtherance of justice, order an action, after indictment, to be dismissed. The proposed section is consistent with the policy embodied in that statute and in ORS 134.160 which provides that the entry of nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except under ORS 134.150.

Section 10. Discussion and agreement not admissible. Unless the defendant subsequently enters a plea of guilty which is not withdrawn, the fact that the defendant or his counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence for or against the defendant in any criminal or civil action or administrative proceeding.

COMMENTARY

A. Summary

This section prohibits evidence of the use of an offer to plead guilty or participation in plea discussions from being used for or against the defendant in later proceedings, criminal or civil.

B. Derivation

The section is from ABA Standards Relating to Pleas of Guilty s. 3.4 (Approved Draft, 1968). The Standard is based upon Cal. Pen. Code s. 1192.4.

C. Relationship to Existing Law

There is a split of authority on the question of whether, in the absence of a statute, an offer to plead guilty or participation in plea discussions is admissible. The rationale behind an exclusionary rule is that neither defendant nor the state should be penalized for engaging in practices which are consistent with the objectives of the criminal justice system. See 4 Wigmore, Evidence ss. 1061, 1067.

No comparable Oregon statute exists and no reported Oregon cases on this point were found. However, State v. Thompson, 203 Or 1, 278 P2d 142 (1954), held that admission in evidence of a withdrawn plea of guilty was reversible error. The opinion observes that according to modern text writers, the majority rule is that such evidence is inadmissible, and quotes from 20 Am Jur 420, Evidence, s. 481:

> " * * * There is no doubt merit in the contention that the plea should be admitted, yet the majority rule seems to have the advantage of fairness and justice. As has been said, considerations of fairness forbid a court permitting a plea to be withdrawn for cause and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences as an admission or confession of guilt of the accused." At 6.

Although the situation of a withdrawn guilty plea is not identical to an offer to plead guilty or participation in plea discussion, it would seem that the latter would be no more admissible than the former because of the same "considerations of fairness."

Section 11. Withdrawn plea not admissible. A plea of guilty which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

COMMENTARY

This section is taken from ABA Standards Relating to Pleas of Guilty s. 2.2 (Approved Draft, 1968) and is consistent with the current Oregon position. See commentary under s. 10 supra.

SUPPLEMENTARY COMMENTARY

The ABA Standards Relating to Pleas of Guilty contain three additional sections not incorporated into this draft: section 1.2, providing for simultaneous pleading to other offenses that the defendant has committed within the state; section 1.7, providing for a verbatim record of proceedings; and section 2.1, establishing criteria for the court to follow in allowing plea withdrawals. The text of these sections is found infra at the end of this draft.

Related Oregon statutes which are not changed by this draft:

ORS 135.830 - Presentation of plea; entry in journal; form

135.840 - Special provisions relating to presentation of plea of guilty

135.850 - Withdrawal of plea of guilty

135.860 - Not guilty plea as denial of allegations of indictment

Related statutes in ORS ch. 138 regarding appeals and post-conviction relief will be dealt with in a separate draft.

OTHER RELATED OREGON CASES:

Defendant originally pleaded not guilty and went to trial. After hearing state's evidence, he withdrew plea and entered plea of guilty. On appeal argues that the court should not have permitted him to do so.

Held: On appeal from judgment entered on guilty plea the appellate court shall only consider the question whether an excessive fine or excessive, cruel or unusual punishment not proportionate to the offense has been imposed. (ORS 138.050). State v. Gardner, 91 Adv Sh 509, ___ Or App ___ (1970).

In State v. Wickenheiser, 91 Adv Sh 547, ___ Or App ___ (1970), defendant pled guilty to taking and using motor vehicle without permission and was sentenced to two years. At time of sentence, the judge, upon hearing that defendant had two prior felony convictions, informed the district attorney that habitual criminal proceedings were in order.

This was done. The former sentence was vacated and a sentence of four years was imposed. Defendant, on appeal, claimed that his guilty plea was the result of a plea bargaining agreement between himself, his lawyer and the district attorney. He further claimed that as a part of the bargain the district attorney agreed that the state would not seek the imposition of an enhanced penalty under the Habitual Criminal Act. Defendant's position was that he does not wish to withdraw his plea of guilty, but contends that he is entitled to the benefit of his bargain with the district attorney. The court held that the only issue on appeal is the nature of the sentence. Post-Conviction Relief Act is available to assert rights guaranteed by the state and federal Constitutions (citing ORS 138.050). The court quoted from State v. Jairl, 229 Or 533, 541-42, 368 P2d 323 (1962):

> "We believe that the legislature intended to prohibit appellate review of convictions based upon a plea of guilty except to the limited extent granted by ORS 138.050. The restrictive language of ORS 138.050 would have no effect if a defendant could appeal alternatively under ORS 138.040 and 138.050 or concurrently under both statutes. ORS 138.050 must be held to overrule by implication the interpretation which this court placed on ORS 138.040 in State v. Lewis.
>
> "We therefore construe ORS 138.050 to restrict the right of appeal of a defendant convicted upon a plea of guilty to the grounds specified in that section and no other. Whatever may have been the state of the law at the time ORS 138.050 was enacted, a defendant now has adequate means, provided by the Post-Conviction Hearing Act, by which to assert rights guaranteed by the state and federal constitutions. He is entitled to no more." Cf. State v. Mathewson, 91 Adv Sh 1015, ___ Or App ___ (1970).

Circuit judge may accept plea of guilty in county other than that in which indictment was returned. (ORS 135.840). Alexander v. Gladden, 205 Or 375, 288 P2d 219 (1955).

Subsection (2) of the statute was a confirmation, not a grant of power. Id.

Requirements of a written request and notice to the district attorney are not jurisdictional and can be waived by district attorney. Id.

The question whether defendant may withdraw his plea of guilty and plead not guilty rests in the judicial discretion of the trial court and will not be disturbed on review unless abused. (ORS 138.850). State v. Thomson, 203 Or 1, 278 P2d 142 (1954); State v. Little, 205 Or 659, 288 P2d 446 (1955), 290 P2d 802, cert. den. 350 US 975, 76 S Ct 454; State v. Boor, 229 Or 49, 365 P2d 103 (1961); State v. Burnett, 228 Or 556, 365 P2d 1060 (1961).

It is not error to refuse leave to withdraw the plea if defendant fully understood his rights, the nature of the charge against him and the consequence of such a plea. State v. Burnett, id.

The question whether defendant may withdraw his plea of guilty and plead not guilty rests in the judicial discretion of the trial court, which will not be disturbed on review unless abused. Curran v. State, 53 Or 154, 99 P 420 (1909); State v. Lewis, 113 Or 359, 230 P 543 (1925).

Motion for withdrawal of guilty plea should be supplemented by affidavit denying guilt or showing facts relied on by defendant. State v. Wiley, 144 Or 251, 24 P2d 1030 (1953).

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968)

PART I. RECEIVING AND ACTING UPON THE PLEA

1.1 Pleading by defendant; alternatives.

(a) A defendant may plead not guilty, guilty, or (when allowed under the law of the jurisdiction) nolo contendere. A plea of guilty or nolo contendere should be received only from the defendant himself in open court, except when the defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.

(b) A defendant may plead nolo contendere only with the consent of the court. Such a plea should be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

1.2 Pleading to other offenses.

Upon entry of a plea of guilty or nolo contendere or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty or nolo contendere as to other crimes he has committed which are within the jurisdiction of coordinate courts of that state. Upon written approval of the prosecuting attorney of the governmental unit in which these crimes are charged or could be charged, the defendant should be allowed to enter the plea (subject to the court's discretion to refuse a nolo contendere plea). Entry of such a plea constitutes a waiver of the following: (i) venue, as to crimes committed in other governmental units of the state; and (ii) formal charge, as to offenses not yet charged.

1.3 Aid of counsel; time for deliberation.

(a) A defendant should not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should not be required to enter a plea if his counsel makes a reasonable request for additional time to represent the defendant's interests.

(b) A defendant without counsel should not be called upon to plead to a serious offense until a reasonable time, set by rule or statute, following the date he was held to answer. When a defendant without counsel tenders a plea of guilty or nolo contendere to a serious offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, following the date the defendant received the advice from the court required in section 1.4.

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968) (Cont'd)

1.4 Defendant to be advised by court.

The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

(a) determining that he understands the nature of the charge;

(b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and

(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;

(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

1.5 Determining voluntariness of plea.

The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

1.6 Determining accuracy of plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968) (Cont'd)

1.7 Record of proceedings.

A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include (i) the court's advice to the defendant (as required in section 1.4), (ii) the inquiry into the voluntariness of the plea (as required in section 1.5), and (iii) the inquiry into the accuracy of the plea (as required in section 1.6).

1.8 Consideration of plea in final disposition.

(a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. Among the considerations which are appropriate in determining this question are:

(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;

(iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968) (Cont'd)

PART II. WITHDRAWAL OF THE PLEA*

2.1 Plea withdrawal.

(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.

(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; [or]

(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement[.]; or

(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

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*The standard is reproduced as originally proposed by the Advisory Committee. Material which it is now recommended should be deleted is placed in brackets, while the material it is proposed should be added is underlined.

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968) (Cont'd)

2.2 Withdrawn plea not admissible.

A plea of guilty or nolo contendere which is not accepted or has been withdrawn should not be received against the defendant in any criminal proceedings.

PART III. PLEA DISCUSSIONS AND PLEA AGREEMENTS

3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

3.2 Relationship between defense counsel and client.

(a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.

TEXT OF ABA STANDARDS RELATING TO PLEAS OF GUILTY

(APPROVED DRAFT, 1968) (Cont'd)

PART III. PLEA DISCUSSIONS AND PLEA AGREEMENTS* (Cont'd)

3.3 Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. [If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions.] If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

*The standard is reproduced as originally proposed by the Advisory Committee. Material which it is now recommended should be deleted is placed in brackets, while the material it is proposed should be added is underlined.

3.4 Discussion and agreement not admissible.

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.