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TRAINING FOR BARGAINING

JENNY ROBERTS* & RONALD F. WRIGHT**

ABSTRACT

While plea bargaining dominates the practice of criminal law, preparation for trial remains central to defense attorneys' training. Negotiation is still peripheral to that training. Defense lawyers enter practice with little exposure to negotiation techniques and strategies in the plea bargaining context, the most significant skills they will use every day.

Empirical research on plea negotiations has concentrated on outcomes of negotiations rather than the process itself. Our multiphase field study examines the negotiation techniques that attorneys use during plea bargaining as well as their preparation and training for negotiation. This Article explores the data on the training aspects of our research. It then discusses implications of the failure to train for bargaining by noting a variety of areas in which training might improve case outcomes for defendants.

Surveys, interviews, and training agendas confirm our intuition about the lack of training for bargaining: public defenders receive far less training in negotiation skills and strategies than they do in trial techniques. Some defenders receive limited training on negotiation

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skills in addition to trial skills, particularly when they first enter their offices. The topic of negotiation, however, almost disappears from the agenda for later training, even as trial skills remain front and center.

Leaders in public defender offices allow this training gap to continue when they view negotiation as more an art than a science and not susceptible to rigorous analysis or systematic training. The position that negotiation cannot be taught is demonstrably false and theoretically naïve. Formal negotiation learning has proven effective in actual negotiations. Negotiation theory also offers more concrete and comprehensive insights about sound practices than one can find in case law related to constitutional ineffective assistance of counsel, court rules and state statutes, or professional standards.

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INTRODUCTION

There is no novelty in placing guilty plea negotiations at the center of criminal justice in the United States. These days, only a tiny fraction of convictions come after a trial.¹ Word has even reached the U.S. Supreme Court. After decades of embarrassed and backhanded discussion of plea bargains, the Court now confirms what has long been obvious to system insiders: plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”² Indeed, the Court now squarely recognizes defense counsel’s constitutional duty to function effectively in the plea bargaining context,³ and ethics rules, professional standards, and other norms of practice apply directly or indirectly to negotiation in criminal cases.⁴

Yet plea bargaining is an underappreciated skill, particularly given its central role in the criminal justice system. Consider this scenario: A new criminal defense attorney approaches a prosecutor in the hallway to discuss an ongoing assault case. Defense counsel knows that the complaining witness is interested in restitution for medical bills and an order that will keep the defendant away from his workplace. The witness does not seem particularly interested in having the defendant go to jail because he knows that then he will never get compensated. But he has not told this to the prosecutor yet because the prosecutor has not been in touch. Defense counsel has heard that the prosecutor is a tough negotiator, and because she really has no training on how to deal with a tough negotiator, she

1. See *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (“Pleas account for nearly 95% of all criminal convictions.”).

2. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

3. *Id.* at 1407-08 (“[C]riminal defendants require effective counsel during plea negotiations.”); see also *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (“During plea negotiations defendants are ‘entitled to the effective assistance of competent counsel.’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))); *Padilla*, 559 U.S. at 373 (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

4. See *infra* Part III.D.2; see also Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 319-22 (2013); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2665-69 (2013).

decides to match the toughness by threatening to take the case to trial and file a lot of motions if the prosecutor does not agree to an acceptable plea bargain.

Some interesting research shows that fostering a positive mood in a negotiation through tone can make the parties more creative and more likely to use negotiation strategies that try to meet both parties' interests—a “win-win” approach.⁵ What if negotiation training had taught counsel that setting a positive mood could help achieve the desired outcome, particularly given the opportunities for “problem-solving” or “integrative” bargaining⁶ in the particular circumstances?

Although plea negotiations now dominate the practice of criminal law, skills relating only to *trial* remain central to the way defense attorneys are trained for their work.⁷ Negotiation-specific skills are still peripheral to that training.

The ability to try cases effectively will undoubtedly enhance the ability to negotiate effectively. Further, many aspects of preparation for trial, such as witness interviews and legal research, also prepare the attorney for plea bargaining. However, there is some preparation that relates solely to bargaining, such as determining—*before* entering the negotiation—what information to share and what to

5. See Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POLY 13, 32 (2012) (citing various studies and noting how “[t]he converse is also true—negotiators in bad moods are more likely to be competitive”); see also Robert J. Condlin, *Bargaining Without Law*, 56 N.Y.L. SCH. L. REV. 281, 310 (2012) (“Dispute bargaining argument works best when it is conversational and not oratorical. The private, personal, and face-to-face nature of the bargaining interaction makes it inappropriate for parties to make speeches, score debater’s points, or rely on the mannerisms and maneuvers of public oratory to influence one another.”) (footnote omitted).

6. Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1790 (2000) [hereinafter Korobkin, *A Positive Theory of Legal Negotiation*] (“[N]egotiators use integrative tactics to ‘create value’—that is, identify tradeoffs and options that will simultaneously make both parties better off.”); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794 (1984) (“Problem solving is an orientation to negotiation which focuses on finding solutions to the parties’ sets of underlying needs and objectives. The problem-solving conception subordinates strategies and tactics to the process of identifying possible solutions and therefore allows a broader range of outcomes to negotiation problems.”). The converse is distributive bargaining, which is “the division of resources in a way that makes one party worse off to the same extent that the other party is made better off.” Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1324 (2008).

7. See *infra* Part II.B.

withhold during the actual bargaining session.⁸ In short, defense lawyers are training to operate in a trial-based world that does not exist.⁹ A common explanation for this lack of negotiation training is that some lawyers are innately good bargainers and others are not. Though it is possible to pick up some tips by watching those gifted in the art of bargaining, many believe that there is really no systematic way to think about—and thus to teach—plea bargaining.

The result is that criminal defense lawyers enter practice with little exposure to negotiation techniques and strategies in the plea bargaining context. While defenders quickly gain negotiation experience, particularly in a high-volume indigent defense practice, they often do not reflect upon that experience in a systematic manner that is designed to improve bargaining outcomes for clients. Defenders also do not integrate intentional preparation for a specific negotiation session into their routine practice. The training gap directly affects defendants, who are represented by lawyers without formal training in the negotiation process that produces the great majority of convictions.¹⁰ As one scholar has described the problem, “the vast majority of lawyers have not received any training in the most significant skill they use every day.”¹¹

While it is easy to see that a problem exists with a near exclusive focus on trial-based attorney training, it is more difficult to know the precise extent of that problem. Empirical research has so far concentrated on the *outcomes* of plea negotiations rather than the

8. See *infra* Part III.C.2.

9. One former public defender noted: “I was repeatedly told that the fastest road to promotion was through establishing that I was not ‘afraid’ to go to trial. Public defenders who worked in courts with lower trial rates and/or who were master negotiators were not rewarded for their good negotiating skills.” Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 610 n.302 (2014).

10. The data show only that most convictions come after a guilty plea, but it is safe to assume that some type of negotiation precedes most guilty pleas. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (discussing guilty plea statistics and noting that, “[t]hough it is impossible to be sure, most of these pleas probably resulted from plea bargains”).

11. Charles B. Craver, *Sharpening Your Legal Negotiating Skills*, 56 PRAC. LAW. 61, 61 (2010) (“Public and private professional development groups try to fill this void through half-day and full-day negotiation programs, but most attorneys prefer to obtain their professional development credits through more traditional courses.”).

negotiation process itself.¹² When it comes to discussions between defense counsel and the prosecution, along with the preparation and training that led up to that bargaining, the empirical research is thin. In particular, we have discovered no empirical studies of defender training for negotiation.¹³

This Article reports the first data from a long-term empirical study of the “bargaining” part of plea bargains. Our field study attempts to map the negotiation practices that happen during criminal plea bargaining in light of well-established insights from negotiation theory. Several different sources contribute to this study, including field interviews of public defenders, responses to an online survey (relevant portions of which are attached as an Appendix to this Article), and a content analysis of the training agendas for programs typically available to assistant public defenders in the different jurisdictions surveyed.

In this Article, we explore the training, if any, that public defenders receive on actual negotiation skills, compared to the training they receive on trial skills. In Part I, we summarize some of the negotiation literature, focusing on the small body of work that applies negotiation theory to the plea-bargaining context. Part II reports on the survey and other data from our field study that relates to negotiation training and preparation. The results show how some public defenders do receive limited training in negotiation skills in addition to trial skills, particularly when they first enter their offices.¹⁴ The topic of negotiation, however, almost disappears from the agenda for public defenders in their continuing legal education, even as trial skills remain front and center.¹⁵ The mutually rein-

12. See, e.g., HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf [<https://perma.cc/TQV6-MS6J>]; Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005).

13. See *infra* note 31 and accompanying text.

14. See *infra* Part II.B.1. Private and assigned counsel in criminal cases may get even less training than public defenders and would surely also benefit from negotiation training. While this phase of the study does not include those other groups, the claims about training apply to them as well as to public defenders. Further, while it is certainly worthwhile to study prosecutor training for bargaining, and we may undertake that more challenging data collection in the future, this first phase of our empirical inquiry focuses solely on public defenders.

15. See *infra* Part II.B.2.

forcing sources from this field study confirm that public defenders receive far less training in negotiation skills and strategies than they do in trial techniques, despite the dominance of negotiation in practice.

In Part III, we argue that this training deficit matters in practice. The attorneys' survey responses reveal various defense practices that could improve after training based on mainstream insights from negotiation theory.¹⁶ Improved defense attorney performance during the preparation phase and during the negotiation process itself could change outcomes for some defendants.¹⁷ Part III also offers several examples of negotiation-specific training, drawn from widely accepted and studied techniques and practices in negotiation literature. These include training about negotiation strategies and styles, understanding the concepts of "Best Alternative to a Negotiated Agreement" (BATNA) and anchoring, and using data to establish objective negotiation criteria.¹⁸

Leaders in public defender offices allow the gap in training to continue when they believe that negotiation is more an art than a science and not susceptible to rigorous analysis or systematic learning.¹⁹ The position that negotiation cannot be taught is demonstrably false and theoretically naïve. There is an entire world of formal negotiation learning, a discipline that has developed now for generations.²⁰ The theory has proven effective in actual negotiations.²¹

16. Later publications will examine defender responses to survey questions about actual bargaining practices (a section that makes up the bulk of the survey). That analysis will address the extent to which defense attorney bargaining practices in different court and crime settings reflect the insights of negotiation theory. An abbreviated discussion of some responses in that section of the survey is included in this Article, because those responses illustrate how inadequate training might affect actual bargaining practices. *See infra* Parts III.A-C.

17. Another way to analyze whether negotiation training (and thus lack of it) matters is to determine if it leads to more client satisfaction with the plea bargaining process. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 412 (2008) ("The social psychology research indicates that implementing procedural justice norms ... may increase defendant satisfaction with plea-bargained outcomes."); *cf.* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 6-7 (2006) (describing how procedural justice, or fair process, leads to greater satisfaction among those involved in the process, regardless of outcome).

18. *See infra* Parts III.A-C.

19. *See infra* Part II.B.4.

20. *See* Andrea Kupfer Schneider, *Pracademics: Making Negotiation Theory Implemented, Interdisciplinary, and International*, 1 INT'L J. CONFLICT ENGAGEMENT & RESOL. 188, 189 (2013); *see also infra* notes 25-30 and accompanying text.

21. *See, e.g.*, Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence*

Negotiation theory also offers more concrete and comprehensive insights about sound practices than one can find in case law related to constitutional ineffective assistance of counsel, court rules and state statutes, ethical rules, and professional standards.²²

One of the few surveys of defense counsel's views on effective negotiation skills opined that "good relations with the prosecutor are not nearly as important as many believe."²³ The authors concluded that "defense lawyers with good negotiation skills can obtain favorable plea bargains even if they do not get along well with their opponents."²⁴ This insight reveals the transferable and generalizable nature of negotiation skills. They are not limited to just a few personality types and do not assume an unusually receptive prosecutor as a negotiating partner. Although public defenders may be dealt a weak hand in many cases, training focused on negotiation skills could help them get the best results from those cards.

I. THEORY AND EMPIRICAL TESTING OF PLEA NEGOTIATION

Negotiation is a relatively new field for academic inquiry. The topic is interdisciplinary, drawing on fields ranging from economics to anthropology.²⁵ The study of negotiation finds its roots in studies of labor markets in the 1920s and other business markets in the 1960s, but beginning in the late 1970s, legal and other academics turned their attention to the topic.²⁶

In 1978, Gary Bellow and Bea Moulton published *The Lawyering Process: Materials for Clinical Instruction in Advocacy*, which

on the Effectiveness of Negotiation Style, 7 HARV. NEGOT. L. REV. 143, 148-49 (2002). See generally GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

22. See, e.g., MD. R. 4-242(f) (stating that "the court, the State's Attorney, the attorney for the defendant, or any combination thereof" must advise the defendant about immigration and sex offender consequences of a conviction before the court accepts a guilty plea); N.Y. CRIM. PROC. LAW § 220.50 (McKinney 2015) (governing entry of guilty pleas); Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (describing Sixth Amendment duty to advise client about written offer from prosecution); MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2014); STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY §§ 14-1.1 to 14-1.4 (AM. BAR ASS'N 1999).

23. Robert L. Doyel, *The National College-Mercer Criminal Defense Survey: Some Preliminary Observations About Interviewing, Counseling, and Plea Negotiations*, 37 MERCER L. REV. 1019, 1024 (1986).

24. *Id.*

25. See Schneider, *supra* note 20, at 193.

26. See *id.* at 189.

included a thorough exploration of negotiation literature.²⁷ In 1981, Roger Fisher and William Ury published *Getting to Yes*, a best-selling book that introduced generations of students to the concept of principled negotiation through nonadversarial bargaining.²⁸ Within law schools, Harvard Law School's Program on Negotiation was founded in 1983,²⁹ and the *Ohio State Journal on Dispute Resolution* is now in its thirty-first year of publication.³⁰

Like any other subject of social science inquiry, the field of negotiation operates through a dialogue between theory and empirical testing. General theoretical accounts grow first from preliminary observations about the field, and empirical testing confirms or refutes different aspects of the theory. That empirical evidence makes it possible to refine the general theoretical accounts of the topic.

While that dialogue has proceeded for the field of negotiation as a whole, the special context of plea bargaining in criminal cases has not yet attracted much attention. The empirical literature on the

27. GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 445-64 (1978). Three years later, the authors drew on that work and reorganized the negotiation sections "to be used in a separate course on negotiation or as one piece of a broader examination of lawyering skills, whether in a clinical context or elsewhere in the law school curriculum." GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION*, at xvii (1981). For a similarly notable early work on legal negotiation, see Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 72 (1982) ("This Article is intended as a beginning step in legal analysis of the negotiation process, the behavior of lawyer negotiators, and society's efforts to regulate the rules by which we bargain.").

28. See ROGER FISHER & WILLIAM R. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1st ed. 1981); see also Leslie Kaufman, *Roger D. Fisher, Expert at 'Getting to Yes,' Dies at 90*, N.Y. TIMES (Aug. 27, 2012), http://www.nytimes.com/2012/08/28/world/americas/roger-d-fisher-expert-in-getting-to-yes-dies-at-90.html?_r=0 [<https://perma.cc/BK8M-KLLN>] (noting that *Getting to Yes* has sold millions of copies, been translated into thirty-six languages, and been used by business and government leaders). In 1984, Carrie Menkel-Meadow published her influential academic article, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*. See Menkel-Meadow, *supra* note 6.

29. *Welcome to the Program on Negotiation*, HARV. L. SCH., <http://www.pon.harvard.edu/about/> [<https://perma.cc/RLV7-NMV2>] (last visited Feb. 21, 2016).

30. See *Ohio State Journal on Dispute Resolution, About Us*, OHIO ST. U. MORITZ C. L., <http://moritzlaw.osu.edu/students/groups/osjdr/about-the-jdr/news-announcements/> [<https://perma.cc/T6GL-5CFR>] (last visited Feb. 21, 2016); see also Conklin, *supra* note 5, at 282 ("The last three decades have been fertile ones for legal dispute bargaining theory.") (footnote omitted); Schneider, *supra* note 20, at 189 ("Negotiation theory as a separate field really started in the late 1980s, when negotiation classes became stand-alone classes at many law and business schools.").

topic is particularly thin.³¹ For instance, the training and preparation of defense lawyers for plea bargaining remain unmapped territory. Likewise, the actual practices of defense lawyers during plea negotiations have generated mostly anecdotal observations rather than systematic academic study.³² Our understanding of guilty plea negotiations, therefore, must extrapolate from an established literature on negotiation more generally. The most promising designs for training programs for defense lawyers begin with a few scholarly explorations of teaching and training about negotiation generally.

The theoretical literature, applying insights about negotiation to plea bargaining, has progressed a bit further than the empirical work in the field. Nevertheless, it is recent and remains underdeveloped. In 1997, one author noted that, “no legal scholar has yet to explicitly apply bargaining analysis to the field of criminal law.”³³ Ten years later, there was still “remarkably little cross-fertilization between the fields.”³⁴ Major negotiation textbooks pay little to no attention to plea bargaining. For example, Russell Korobkin’s well-respected *Negotiation Theory and Strategy* has two references to “Criminal cases” in the Index (with a total discussion of roughly five pages relating to those references) and one reference to “plea bargaining” (with a half-page discussion on “The Power of Patience in Plea Bargaining”).³⁵

31. For some early efforts in plea bargaining empiricism, see MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1977) (discussing the bargaining process and concessions as bureaucratic in the misdemeanor context, with more offers and counteroffers in felony cases), and ARTHUR ROSETT & DONALD CRESSY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 85-144 (1976).

32. One early survey in the field examined negotiation practices. See Doyel, *supra* note 23. Pamela Utz studied bargaining practices in the 1970s in two California counties: San Diego and Alameda. See PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978); cf. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

33. Rebecca Hollander-Blumoff, Note, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 118 n.18 (1997). *But see* Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 73-82 (1985) (applying his context-based theory of negotiation to several illustrative contexts, including plea bargaining).

34. Michael M. O’Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1, 1 (2007) (noting that “plea bargaining would seem a natural area for collaboration and dialogue between students of criminal law and dispute resolution”).

35. RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 161, 480 (3d ed. 2014).

One early theoretical work came from Donald Gifford, who placed guilty plea negotiations into an overall framework for analyzing negotiation. He argued in 1985 that the context of a negotiation can determine which strategy—competitive, cooperative, integrative, or a combination—a negotiator should choose.³⁶ He applied this theory to several different contexts, one of which was plea bargaining.³⁷

Ten years later, Rodney Uphoff published the most comprehensive examination of negotiation practices in criminal plea bargaining.³⁸ Uphoff noted the dearth of materials for teaching plea bargaining and undertook to examine “the skill of negotiating or plea bargaining from the perspective of the criminal defense lawyer.”³⁹ His goal was to offer an approach to plea bargaining that was grounded both in the theoretical literature about negotiation strategy and “in the realities of criminal practice, client behavior and other salient aspects of the criminal justice system.”⁴⁰ He argued that plea negotiations take place within a tension between the rational interests of the players—including the defendant, the prosecutor, the judge, and the defense attorney—and the ethical obligations of the defense lawyer.⁴¹

The theoretical framework for plea negotiations began to shift in the late 1990s and 2000s, as scholars incorporated insights from behavioral law and economics to identify relevant influences on actors in the plea bargaining process.⁴² Influenced by social psychology, this literature generally does not undertake empirical

36. Gifford, *supra* note 33, at 44.

37. *See id.* at 73-82.

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

39. *Id.* at 73. In its current catalogue of teaching materials, the Harvard Law School's Project on Negotiation includes several plea bargaining simulations. *See Program on Negotiation, Teaching Materials & Publications: Law / Courts Negotiation*, HARV. L. SCH., <http://www.pon.harvard.edu/shop/category/law-courts-negotiation/> [<https://perma.cc/PN26-NCTS>] (last visited Mar 20, 2016).

40. Uphoff, *supra* note 38, at 75.

41. *Id.* at 75-76. Shortly after the publication of Uphoff's work, a Note in the *Harvard Negotiation Law Review* explored the intersection of plea bargaining with three main concepts from negotiation theory: practitioner evaluation of options and alternatives, the influence of attorney incentives and motivations, and how relationships of the parties affect plea outcomes and dynamics. *See Hollander-Blumoff, supra* note 33, at 121, 147.

42. *Cf. Bibas, supra* note 10, at 2467, 2496 & n.133, 2497-98, 2499 & n.138, 2500-12, 2530 & n.296, 2547 (relating bargaining to behavioral law and economics theory, and discussing the evolution of the doctrine in this context).

examination of bargaining. Instead, it offers a framework for future empirical work to move beyond earlier studies that viewed plea bargaining through a rational actor lens.⁴³ This lens led researchers to focus too heavily on factors such as strength of evidence and likelihood of conviction. The social psychological approach, by contrast, explains “perception and decision making as a function of myriad individual and social factors.”⁴⁴ This more recent literature applies that decision-making frame to the plea bargaining process at the theoretical level.⁴⁵

This recent shift in the theoretical framework for plea negotiations has little corresponding empirical literature to test and refine its contours.⁴⁶ We found no recent empirical inquiry into defender negotiation training and little exploration of defender preparation for specific bargaining sessions.⁴⁷

43. See, e.g., *id.* at 2496; Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 219; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1605, 1632 (2006); cf. Chad Oldfather, *Heuristics, Biases, and Criminal Defendants*, 91 MARQ. L. REV. 249, 249-50 (2007) (cautioning that behavioral economics research may not apply in the same manner to individuals facing criminal charges as it does to individuals in other situations).

44. Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007).

45. In 2007, Marquette Law School organized a Conference on Plea Bargaining. The *Marquette Law Review* dedicated its first issue in Volume 91 to the topic, with a number of articles applying insights from behavioral law and economics and negotiation theory to plea bargaining. See Symposium, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1 (2007); see also O’Hear & Schneider, *supra* note 34, at 1 (describing conference and resulting articles); *Dispute Resolution in Criminal Law 2007*, MARQ. L. REV., http://scholarship.law.marquette.edu/mulr_conferences/disputeresolutionincriminallaw2007/ [<https://perma.cc/2CEU-DJTT>] (last visited Mar. 20, 2016).

46. See, e.g., Hollander-Blumoff, *supra* note 44, at 174 (“Because there is no empirical data on the way that the particular factors I consider below actually affect the behavior of prosecutors and defense attorneys in the plea bargaining setting, what follows are hypotheses that prior literature supports, but that no data has verified.”). For two of the few recent empirical studies to apply negotiation theory to plea bargaining, see Deirdre Bowen, *Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization*, 26 JUST. Q. 2, 7 (2009) (examining plea negotiations in forty-two felony cases using ethnographic method, including interviews), and Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 MARQ. L. REV. 145, 160 (2007).

47. Studies of defender preparation for bargaining are quite dated. See, e.g., Doyel, *supra* note 23; Marty Lieberman, Note, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 561, 568 tbl.1 (“The interviewers asked the attorneys specific questions concerning preparation for their most recent felony or misdemeanor cases that went to trial or resulted in guilty pleas.”).

Why does plea bargaining get so little attention as a matter of negotiation theory? Some negotiation scholars suggest that negotiation in criminal proceedings is so different from negotiation in civil litigation that general observations might not apply to that context.⁴⁸ The power imbalance between the prosecutor and the defense attorney make the insights from civil litigation suspect in this setting. Negotiations in criminal cases, in this view, are completely distributive—dividing the pie into pieces rather than making the pie larger. However, a closer look at plea bargaining reveals more variety and more room for defense counsel to make an impact.⁴⁹

II. A NATIONAL SURVEY OF PUBLIC DEFENDER NEGOTIATION METHODS

The field study we designed for this project documents current practices of defense attorneys related to plea negotiations. We focus on aspects of practice that could test current theories of negotiation in the plea-bargaining context and suggest new areas for empirical study. This survey data can also inform the conversation about closer regulation of plea bargaining currently taking place among courts, bar associations, national organizations that draft standards, and practitioners.

48. See Alkon, *supra* note 9, at 608 (“Plea bargaining is all too often not much of a negotiation.”); cf. Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What Are We Bargaining For?*, in 7 *LAW AND POPULAR CULTURE* 583, 591-92 (Michael Freeman ed., 2005) (“Negotiation in the criminal context is regarded as a weaker, selling-out sort of justice, not the real thing of contested and dramatic trials and not the same use of power, tricks and manipulations of depicted civil negotiations.”) (footnote omitted). *But see* Batra, *supra* note 4, at 323 (“While it may seem strange to apply general negotiation theory to plea bargains, courts themselves consider a plea as a bargain struck by two independent parties, treat the plea agreement as a contract, and see the bargaining as a type of contractual transaction. Legal scholars have also viewed plea agreements as another form of negotiated dispute resolution.”) (footnotes omitted); Hollander-Blumoff, *supra* note 33, at 121 (“Although negotiation in the criminal context is fraught with legal constraints and power imbalances, case law and legal scholarship support the notion that plea agreements represent mutually beneficial negotiated outcomes.”).

49. See *infra* Part II.B.5.

A. Methods

This field study involves several mutually reinforcing sources of evidence. First, we conducted fifteen interviews of public defenders who work in eight offices in four different states. Before conducting the interviews, we obtained the permission of the chief public defender for the jurisdiction. These field interviews lasted thirty to sixty minutes; we recorded and transcribed them for qualitative analysis. We used the interviews to refine survey questions in light of typical office policies, any informal rules of bargaining, and local norms of sentencing.

After completing the interviews, we developed an online survey for public defenders. We pretested the instrument with academic colleagues who are former defenders. Again with the permission of the chief public defender in each relevant jurisdiction, we distributed the survey to 1137 attorneys, working in twenty-six offices in nine states. An attorney from the leadership in each office sent an e-mail to staff attorneys just before the arrival of the survey link, saying that the leadership encouraged but did not require completion of the survey. Our survey was anonymous.

Responses came from 314 attorneys, for a response rate of 28%. Of those responding attorneys, 45% were female. Among those who indicated race or ethnicity, 83% were Caucasian, 9% African American, 5% Asian, 5% Hispanic, 2% Native American or Pacific Islander, and 5% "Other."⁵⁰

In terms of seniority, 33% of the respondents had less than five years of experience as defense attorneys. One quarter had experience between five and ten years, 21% had between eleven and twenty years, and 20% had more than twenty years of experience. A handful (11%) worked as prosecutors at some point before taking their current positions as a public defender.

As for their current assignments, we asked the attorneys to estimate the percentage of their caseloads devoted to misdemeanor matters, general felony matters, specialized felonies such as homicide or sex offenses, and other matters such as juvenile or appellate work. We categorized attorneys by the predominant type of cases

50. These categories total more than 100% because the survey allowed respondents to indicate more than one race.

they carry, placing into a caseload category any attorneys who spend more than half of their efforts on that type of case. This process gave us a breakdown of 27% misdemeanor attorneys, 35% general felony attorneys, 11% specialized felony attorneys, and 28% with some other type of caseload.

The participating offices employed as many as two hundred ninety and as few as three attorneys; eight of the twenty-six offices were larger offices that employed twenty-five or more attorneys. We also selected seven offices that were funded and controlled at the local level, while nineteen others were funded and controlled at the state level.⁵¹ The local offices tended to be larger offices in major urban areas.

In addition to our semistructured interviews and the survey instrument, we also collected the published (and, in some instances, unpublished) agendas for attorney training sessions in the jurisdictions where we distributed the survey. We looked to these training agendas for insight about how much training occurs in a formalized setting and how much occurs through informal discussion or observation. The agendas also allowed us to check the accuracy of attorney answers to questions about the amount and nature of training available to them.

B. The Absence of Formal Training

The interviews, surveys, and training agendas all pointed in a single direction: public defenders receive far more training about trial techniques than they do about negotiation techniques. The same rationales that support training in trial techniques should apply at least as much to negotiation skills and strategies, but public defenders currently do not benefit from much formal training on the latter subjects. This deficit between trial training and negotiation training holds true for both new and veteran attorneys. In this Part, we review the formal training available to attorneys—as

51. See generally DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS [BJS], U.S. DEP'T OF JUSTICE [DOJ], NCJ 231175, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf> [<https://perma.cc/TD4P-RFNS>]; LYNN LANGTON & DONALD J. FAROLE, JR., BJS, DOJ, NCJ 228229, STATE PUBLIC DEFENDER PROGRAMS, 2007 (2010), <http://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/WP6D-E4QE>].

reflected in survey responses and in published training agendas—along with the limited efforts at preparation for negotiation that public defenders report. Finally, we consider the reasons why training and preparation for bargaining receive so little attention during the formation of defense attorneys as competent professionals.

1. Training for New Attorneys

Our survey asked several questions about the training that public defenders received on negotiation techniques or strategies. The responses suggest that more training opportunities are available for new public defenders than for more experienced attorneys.⁵²

About 26% of the attorneys reported that they received no training at all as newcomers to the public defender's office. The median number of days devoted to training for new attorneys was five. Attorneys with below-median days of new attorney training were just as likely to work in large offices as they were to work in small offices. The same is true of state-run offices compared to locally-run offices: there were no statistically significant differences between these types of offices.

Among the public defenders who received any training upon arrival in their offices, 41% said that *none* of the training for new attorneys related to negotiation skills and preparation for bargaining, while 58% reported five or fewer hours related to those topics.⁵³ The new attorneys who engaged in training spent some of that training time observing more experienced attorneys during plea negotiations,⁵⁴ but that observation time was minimal. Although 39% of the new attorneys who received training spent no time observing

52. See Interview with Public Defender A [hereinafter Interview with A] (“[W]e had a specific training called ‘pleas and sentencing’ which kind of discussed the negotiation process and the sentencing process.... [New attorney training] does have a formal plea negotiating session.”).

53. Because only 74% of the attorneys received some training at the time of arrival, a total of 69% of all attorneys received between zero and five hours of negotiation training.

54. See Interview with Public Defender B [hereinafter Interview with B] (“So part of my training entails telling them that it’s not because I do it one way that they have to do it the same way. But they witness my conversations with state’s attorneys prior to court dates, on the court dates, and how I continue negotiating pleas in the middle of the docket because plea negotiations is an on-going process ... up until you get whatever you want. So that can take a long time.”).

experienced attorneys negotiating, those who did observe negotiations spent a median of two hours doing so. Attorneys working in small public defender offices reported longer hours of observing negotiations: sixteen hours on average, as opposed to seven hours for larger offices.⁵⁵

Our interviewees confirmed that training specifically for negotiation is not common. Referring to one statewide training program, an interviewee reported that five years ago there was “zero training on negotiation, nothing on plea bargains, nothing at all.”⁵⁶ Another suggested that trials interfere with training for bargaining: “Well, one of the problems we have in [this county] is we don’t get to go to a lot of those [statewide training programs on plea bargaining] because we’re in trial.”⁵⁷ The limited training on guilty pleas tends to be crime-specific rather than more general training about negotiation techniques:

The misdemeanor [training] is in the fall and the felony is in the spring and they put on our PD’s conference every year. That usually doesn’t talk about plea-bargaining very much, there may be one topic about that.... It’s usually like, “plea-bargaining in domestic violence cases.” You know how do you address the specific issues of domestic violence when you’re talking to a prosecutor who knows all about domestic violence cases. You know or plea-bargaining in mental health cases where there is [a] real mental health issue.... So it’s probably more focused on the topic rather than actual plea-bargaining.⁵⁸

55. We hypothesize that the case volume demands in larger offices make the shorter observation periods necessary. This difference between larger and smaller offices is statistically significant using the t-test for significance at the $p = 0.05$ level. All other differences between groups reported in this Article are also statistically significant according to this measure.

56. See Interview with B, *supra* note 54; see also Interview with Public Defender C (“I’ve been to the new misdemeanor defender training. I don’t think it did [cover any negotiation topics.]”); Interview with Public Defender D [hereinafter Interview with D] (“I actually did one or two trainings where I talked about negotiation and just an informal [discussion] because I was never trained. So we did do that about five or six years ago but I don’t think it’s been done since then.”).

57. Interview with D, *supra* note 56.

58. Interview with Public Defender E.

2. *Formal Training After Orientation*

After the initial period of orientation for new attorneys, the amount of training devoted to negotiation skills drops even lower. More than half of all attorneys in every type of office reported zero hours of training about negotiation skills in a typical year after their arrival in the office. On average, more experienced attorneys received three hours of training per year directed toward negotiation.⁵⁹

Again, the interviews confirmed that negotiation is not a prominent topic in the formal training sessions for veteran attorneys. As one public defender put it, there is “not specific training in our office ... because I think a lot of negotiation is learned just in district [court because] you’re handling so many more cases.... And by the time you get to you know doing superior court cases, you kind of got that part of [it] down.”⁶⁰

The survey also asked if attorneys received any written training materials that related specifically to negotiation skills or plea bargaining. Just under half of the attorneys (44%) responded “yes,” and there were no meaningful differences between state-run or local-run offices, or between large and small offices. Of the 44% who received these materials, about half (49%) reported that they never consulted those materials at any point after the time of the training.

As a supplement to these survey results and interviews, we reviewed training program agendas from seven of the jurisdictions we surveyed.⁶¹ We requested copies of the training agendas from all of the offices; only one office sent a complete set of documents, while others provided several agendas that were readily accessible, and still others did not respond to our request for documents. We

59. The responses from a few attorneys appear to be unreliable. One attorney replied that he or she spent 100 hours each year in training on negotiation skills; one attorney each responded to this question with an answer of 70, 60, 50, 40, and 30 hours. We doubt the accuracy of these six responses, which leads us to emphasize median rather than mean responses.

60. Interview with Public Defender F [hereinafter Interview with F]; *see also* Interview with Public Defender G [hereinafter Interview with G] (“I don’t think that we’ve had in office training on negotiations or the plea bargaining process. Not that I can recall.”).

61. The training agendas came from California, Florida, Iowa, New York, North Carolina, Virginia, and Washington. We also reviewed agendas from two training sessions for a national audience.

supplemented these responses with online searches for training materials from the last three years that were posted and available to the public. In all, we collected the agendas for fifty-one distinct training events.

With those documents in hand, we analyzed their content. Based on the title of each topic during the training event and any summary of the material to be covered during that time slot, we estimated the percentage of the total event that was devoted to negotiation topics, guilty pleas, or trial topics.⁶² Many of these published training agendas indicated that no formal training relating to plea negotiations took place in the program; about half of the agendas addressed no topics that directly related to negotiation. A few more agendas listed topics related to guilty pleas, with indirect connections to negotiation (such as a generic reference to “plea bargaining”) but even these topics do not receive sustained attention in the training session. One typical program of eight weeks of training for a major metropolitan public defender office offered a pronounced focus on trial skills but only two short sessions on “pleas and sentences.”

The important feature of these training agendas is the comparison between negotiation topics and trial topics. These programs devoted an average of 12% of time or pages to negotiation topics, whereas they devoted 44% to trial and evidence topics.

We do not believe that the published training agendas available to us reflect the full range of training opportunities available to public defenders in these jurisdictions. There are bound to be some shorter, informal training sessions (perhaps scheduled for the lunch hour in a single office) that were not documented with a written agenda. And some training agendas were not available to us. Nevertheless, we have no reason to believe that the agendas we analyzed were unusual in the topics they addressed. The agendas we gathered from a number of jurisdictions appear to show even less negotiation training than reported in the surveys.

62. The “negotiation” category included any topics related explicitly to negotiation skills, negotiation theory, or bargaining techniques. The “guilty plea” category covered topics related to guilty pleas but not explicitly dealing with negotiation theory or practices. The “trial” category reached topics related to trial techniques and evidence to be used at trial. Some training topics did not fall into any of these categories.

The surveys, interviews, and content analysis of the available training agendas all confirm that current formal training programs do not often address negotiation skills or strategies. The emphasis instead is on performance at trial and the preparation necessary to be ready for effective representation at trial. Any opportunities for reflection and learning about negotiation topics, therefore, are likely to happen informally, in the untracked and random interactions between attorneys in the office.⁶³

3. Routine Preparation

Just as negotiation skills remain at the periphery of formal training for new attorneys and for veteran public defenders, intentional *preparation* for negotiation remains the exception for public defenders during their routine practice of law. Defense attorneys might give some thought to negotiation before they interact with prosecutors in a case.⁶⁴ They do not, however, devote the same level of preparation to negotiation that they give to trial preparation in their cases.

According to responses from one question in our survey, 38% of the attorneys discuss or moot their upcoming negotiations with a colleague or supervisor “often” or “always.”⁶⁵ However, this discussion normally happens in informal settings with colleagues.⁶⁶ When asked how often they prepare for negotiation through a pre-negotiation meeting with a supervisor (a practice that often applies to trial

63. See Interview with Public Defender H [hereinafter Interview with H] (“[W]hen you mentioned the question before about mooting, we don’t have anything formal where somebody is going to come in and we’re going to sit down and this is how you should negotiate this. We will sometimes have somebody sit down and say, ‘so I have this case and ... I’m looking to try to get that, what might be things I could tell the prosecutor that might help persuade them?’”); Interview with Public Defender I (“[C]ertainly it’s subject matter that comes up when ... you’re saying, ‘should I take up this offer or not’ and everybody is peppering you with a million questions.”).

64. The potential content of this negotiation-specific preparation is discussed in more detail below. See *infra* Part III.B.

65. The frequency score for this question was 3.2, with no meaningful differences among types of offices or attorneys with different types of caseloads.

66. See Interview with B, *supra* note 54 (“[W]e have an informal team meeting in the office where we meet once a week, and we talk about cases, and we talk about—it could be issues for trials, but it could also be about negotiations and what should I be looking out in this case for this client.”).

preparation), only 4% of the respondents said that they follow this practice “often” or “always.”⁶⁷

Most of the attorney preparation for negotiation instead appear to be solitary activities. These activities are indistinguishable from the activities of an attorney who is preparing for a trial. Table 1 summarizes the average frequency score we assigned to the relevant answers, with 1 meaning “never,” 2 meaning “infrequently,” 3 meaning “sometimes,” 4 meaning “often,” and 5 meaning “always.”

Table 1. Frequency of Preparation Activities in Anticipation of Negotiation

| Preparation Activity | Average Frequency |
|--|-------------------|
| Asking how client feels about potential outcomes | 4.7 |
| Exploring collateral consequences | 4.0 |
| Conducting legal research | 3.8 |
| Interviewing defense witnesses | 3.6 |
| Interviewing prosecution witnesses | 3.1 |
| Investigation of crime scene | 2.8 |

The lack of attention specifically devoted to training about negotiation skills and techniques finds a parallel in office practice. Attorneys do less preparation with their peers and supervisors prior to a negotiation than they do prior to a trial. Their individual preparations for negotiation overlap entirely with trial preparations. When it comes to negotiations, public defenders prepare and perform their work using the same framework as they do for the trial; they do not devote separate thought or preparation to the very different context of a negotiation.

4. Why the Reluctance to Train?

Why would the offices provide so little formal training related to negotiation techniques? The survey itself does not pursue this question, but our hour-long interviews on the subject did offer some insight.

67. The frequency score for this question was 1.9; there were no meaningful differences among types of offices or attorneys with different types of caseloads.

The attorneys who talked with us explained the lack of formal training about negotiation by pointing to the nature of the knowledge an attorney must hold to succeed at negotiation. In their view, that knowledge is too complex and too dependent on individual personalities and specific relationships among the negotiators to be amenable to systematic study or theoretical insight. The lack of training, therefore, does not reflect the idea that effective negotiation is unimportant to the work of a defense attorney. Rather, negotiation does not receive direct attention in the training regime because it is viewed as an “art” rather “than a science.”⁶⁸

We heard in most interviews that—in the words of one public defender—“negotiation is such a nebulous thing.”⁶⁹ Put another way, it is hard to do any deliberate and systematic preparation for or training about negotiation. That same public defender elaborated on the point:

[P]lea-bargaining is ... more an art than a science. I don't know that there will ever be a set of instructions for how to do it and I don't think there should be.... [Y]ou kind of learn your way around in the little cases and you get the gist of it or you don't.... [Y]ou couldn't just sit down with somebody—at a CLE. “Here's how we do this, you got this”—it's one of these stages where you got to feel your way through I just don't think it's something that can be taught, I mean, here's—and it's one of the things you really got to do, it's like trying to tell somebody how to—I don't know, fly a jet or something.⁷⁰

The analogy to flying a jet is interesting. The speaker argues that complex tasks like flying a jet cannot be taught; they have to be learned by just jumping in and doing it. Yet, in the authors' experiences, in the setting of a law school classroom, students almost always stumble when they moot a negotiation exercise; their learning curve is steeper here than for simulated cross-examinations of a police officer or closing arguments to a jury. And they do get better

68. Interview with Public Defender J [hereinafter Interview with J].

69. *Id.*; see also Interview with Public Defender K (“[I]t's not like in law school, you don't know what's reasonable until you practice a little bit.”).

70. Interview with J, *supra* note 68. The same attorney offered another description for the intuitive nature of plea negotiation skill: “I mean this isn't rocket science but it's more of the art form of rocket science. Some people just don't get it.” *Id.*

at the task after practice and reflection on what they can learn from that practice.

Another common theme among public defenders was that negotiation cannot be taught because it depends so much on individual personality or the unique interaction between the individual defense attorney and prosecutor.⁷¹ The skill is highly individualized, defenders argue, making it pointless to generalize about the topic or to transfer the skill from one attorney to another.⁷² As one attorney explained:

[N]egotiation I guess is more about style But no I can't say we have had any real formal training on tips and tricks in negotiating plea bargaining.... [M]ost of the training, the vast majority of CLEs we do are substantive about, you know, suppression issues, we can talk sentencing structure, sentencing schemes But the nuances of plea-bargaining not so much. It's kind of an art form.⁷³

Similarly, some defenders argued that prosecutor office policies differ so radically from one another that defense attorneys in one district could not offer much guidance on negotiation to defenders in other jurisdictions. One attorney put it this way: “[I]t would be tough for someone within our organization to put on something that’s really useful to everyone ... to even like a broad sort of swath among offices. Because the practice of the [prosecutor’s] offices in

71. Some attorneys argue on this basis that defense attorney training for negotiation is pointless in some jurisdictions where the prosecutor’s office policy prohibits any meaningful bargain. See Interview with Public Defender L (“[P]art of the problem is you’ve got people from all over the state [at the training]. And I do know in some parts [of] the state that there were district attorneys who would not give anybody, any sort of plea offer in child sex offense cases particularly when they were up for re-election.”).

72. Interview with D, *supra* note 56 (“[W]hen it comes down to negotiation and plea, [it] really is about the individuals. It’s about individuals: your client, the attorney, and the prosecutor.”).

73. Interview with Public Defender M [hereinafter Interview with M]; see also Interview with F, *supra* note 60 (“[I]t just depends ... on your personality type because just the way I operate—you know it’s ... like nice guy, ‘Hey let’s do this.’ And ... I’ve seen that work for some people [Others] would call for trial, every case is a trial, ... and I think that would probably work for some people. Like, ‘[O]h this guy I was going to call for trial, let me offer him something he’d take.’ So it’s kind of a [sic] hard to teach those different styles because you don’t—it’s hard to teach that because ... that’s what the ... specific personality type is.”).

terms of plea bargaining ... is just entirely different ... office to office.”⁷⁴

The same observations about individual “style” and treating negotiation as a nuanced “art form” might apply equally to effective cross-examination of a witness or to opening statements at trial. Yet educators and scholars treat these trial preparation and trial performance skills as proper subjects for systematic study and theory-based instruction.

A few of our interviewees treated negotiation itself as a frivolous topic, providing less value than the attorney might gain from understanding the sentencing options available to the judge. As one attorney put it:

[I]t feels like a used car sale[] ... they’re offering [a] high number, you are offering a low number and then meet in the middle. But a lot of that is ... knowing what else you can plea to [and] convince the DA ... that’s a proper thing to do. And then knowing the kind of programs that you can get a person into that kind of build[s] your credibility that this person is not going to do the same thing again.⁷⁵

5. *Change on the Horizon*

Although training on the topic of negotiation technique is not commonplace for public defenders,⁷⁶ there are some signs of change. Some of our interviewees showed an awareness of negotiation as a topic for potential training, one that has begun to catch the attention of office supervisors. One interviewee, after saying that “zero” training on negotiation was available to her as a new attorney, said, “[t]hat has changed recently.”⁷⁷ An attorney interviewed in another state reported that “an effort of late to include plea-negotiations as part of the training ... [is] an important component ... just like you would have for—how to do a cross-examination.”⁷⁸

Which topics would appear in plea negotiation training? So far, the answer remains fuzzy for attorneys, even for those who believe

74. Interview with Public Defender N.

75. Interview with F, *supra* note 60.

76. See *supra* Sections II.B.1-2.

77. Interview with B, *supra* note 54.

78. Interview with H, *supra* note 63.

the topic is worthwhile to address in training. One interviewee described a training program that approached the topic through the lens of sentencing law: “There is a negotiation specific training at the state level right now, when we conducted most of the training here, we had a specific training called ‘pleas and sentencing’ which kind of discussed the negotiation process and the sentencing process as part of one presentation.”⁷⁹ Training materials from some of the jurisdictions in which we conducted interviews did list new attorney trainings on collateral consequences, along with training on the use of immigration, employment, and housing consequences as part of the bargaining and counseling process.

One office supervisor declared negotiation techniques to be a new area of emphasis for training and speculated about the potential topics for these sessions. He said that negotiation training in his office would not only include the basics as embodied in the Sixth Amendment and the law of legal ethics. It would also include “nuanced” questions:

Most of the training that has occurred on plea-bargaining is, yeah, you give them basics. You give the real basics, how do you do a plea, how you do a regular plea, what are the *Boykin* rights, what’s the waiver plea, when is it appropriate, what are the sentencing schemes, blah, blah, blah. But also the ethics involved and especially after the recent case that came down ... and obviously you’re going to take every plea to your client. But ... it’s a lot more nuanced than that. You know ... when do you arm twist, when you don’t arm twist, when is one arm twist too much, when is one not enough. ... These are the things that you try to discuss with the attorneys about plea-bargaining.⁸⁰

In an especially promising trend, several national organizations that promote the professional development of public defenders—such as Gideon’s Promise and the National Association of Criminal Defense Lawyers—now include units on negotiation strategies and skills in their model training programs.⁸¹

79. See Interview with A, *supra* note 52.

80. Interview with M, *supra* note 73.

81. The Gideon’s Promise program includes two-and-a-half to three hours of negotiation training, which includes simulations, resource lists, and articles on negotiation theory. See E-mail from Sean M. Maher, Faculty, Gideon’s Promise, to author (July 8, 2015, 3:44 PM) (on

In the next Part of this Article, we move beyond these preliminary suggestions for content. Based on survey responses about current negotiation practices and insights that are well established in the study of negotiation outside the plea-bargaining context, we describe some components of a comprehensive training program in negotiation skills and strategies. In particular, we focus on training that goes beyond the client counseling phase of the plea bargaining process. That phase has received significant and deserved attention in the wake of several Supreme Court cases considering attorney failures to counsel clients effectively about plea offers.⁸² But training about basic negotiation skills during bargaining between lawyers is not the same as training about client counseling relating to plea offers.⁸³

III. TRAINING DEFENDERS TO NEGOTIATE FOR BETTER OUTCOMES

There is no empirical study of whether negotiation training for defense attorneys would lead to better outcomes for defendants in the plea bargaining process—in part because so little training actually happens.⁸⁴ However, studies about the effectiveness of using particular elements from negotiation theory more generally support the claim that training matters.⁸⁵ There is good reason to believe

file with authors). Similarly, the National Association of Criminal Defense Lawyers included negotiation lectures and sessions at all three of the training programs it held for indigent defense providers in 2015 through a grant it received from the Bureau of Justice Assistance. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, CLIENTS, NOT CASES: SKILLS FOR OUTSTANDING REPRESENTATION—AUSTIN, TEXAS AGENDA (2015); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, CLIENTS, NOT CASES: SKILLS FOR OUTSTANDING REPRESENTATION—DELAWARE AGENDA (2015); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, CLIENTS, NOT CASES: SKILLS FOR OUTSTANDING REPRESENTATION—WASHINGTON AGENDA (2015).

82. See *infra* Part III.D.2.

83. See Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, AM. CRIM. L. REV. (forthcoming 2016) (manuscript at 4) (on file with authors) (“Plea bargaining is the negotiation of a criminal case and therefore includes the three basic phases in any lawyer-assisted negotiation: the preparation phase, the negotiation phase, and the client counseling phase.”).

84. See Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 90 (2007) (noting the “significant task of definitively measuring” his theory about grassroots plea bargaining, and stating that “it may be that the wide range of distinct influences on real-world bargaining is unknowable and the strength of any isolated identified influence ‘unquantifiable’” (quoting Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 171 (2005))).

85. See generally WILLIAMS, *supra* note 21; Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM.

that training would improve plea bargaining outcomes⁸⁶ because most professional decisions involve a mix of technical components that are amenable to training and intuitive components that are not.⁸⁷ Further, given the realities of the criminal justice system, “[i]t seemingly would follow ... that criminal defense lawyers interested in obtaining the best results possible for their clients would concentrate on becoming effective negotiators.”⁸⁸ Although a full description of a comprehensive training program for plea negotiations is beyond the scope of this Article, this Part briefly describes several major areas in which negotiation theory can and should inform attorney training in plea bargaining.

Local culture, state sentencing law and policy, office policies, and other factors will vary from jurisdiction to jurisdiction and will influence how to negotiate most effectively and thus how to train defenders in plea bargaining.⁸⁹ Similarly, systemic issues unique to criminal cases—such as defendants who are often incarcerated, defense counsel with high workloads, and prosecutors who overcharge many cases—must be taken into account.⁹⁰ But this does not

L. REV. 509 (1994); Schneider, *supra* note 21 (citing various game theory and other studies testing particular elements from negotiation theory).

86. See Doyel, *supra* note 23, at 1021 (“[R]espondents were asked to evaluate the importance for effective *pretrial* criminal representation of various abilities, areas of knowledge, and character traits.”); *id.* at 1024 (analyzing survey responses and concluding that “it appears that defense lawyers with good negotiation skills can obtain favorable plea bargains even if they do not get along well with their opponents”); Lieberman, *supra* note 47, at 574 (“[T]he survey indicates that defense attorneys who interview victims have a better chance of obtaining charge reduction as part of the plea agreement than defense lawyers who do not interview victims.”); cf. Gary T. Lowenthal, *Theoretical Notes on Lawyer Competency and an Overview of the Phoenix Criminal Lawyer Study*, 1981 ARIZ. ST. L.J. 451, 462 (“Although the development of necessary skills should be a goal of any program to train professionals, prolonged experience will improve most skills as much or more than concentrated instruction. On the other hand, without law school instruction covering theoretical matters such as negotiation process, principles of rhetoric, and the dynamics of a lawyer-client relationship, attorneys may never master such concepts.”).

87. See KENNETH R. HAMMOND, HUMAN JUDGMENT AND SOCIAL POLICY: IRREDUCIBLE UNCERTAINTY, INEVITABLE ERROR, UNAVOIDABLE INJUSTICE 147-50 (1996); Sidney A. Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 486-91 (2012).

88. Uphoff, *supra* note 38, at 74.

89. Cf. O’Hear & Schneider, *supra* note 34, at 2 (“[P]lea bargaining is undoubtedly a unique form of dispute resolution, and any attempt to apply the generic lessons of negotiation theory to criminal law must be undertaken with great care.”).

90. See Alkon, *supra* note 9, at 576-88; Bibas, *supra* note 10, at 2476-86; Uphoff, *supra* note 38, at 77-95.

mean that training for effective plea bargaining is not possible; it simply means that training should be locally-calibrated and sensitive to the norms, personalities, and systemic pressures involved. Different defender offices train in different ways about things like jury selection, opening statements, and cross-examination; there is no one-size-fits-all approach, particularly against a backdrop of a local jury as a potential factfinder. At the same time, there are certainly many common elements to all training in trial practice areas, such as the “rule” that a trial lawyer should never ask a witness on the stand a question without knowing the answer. Negotiation training should operate in a similar way.

Just as there are general rules for training about trial practice or witness interviewing, negotiation literature agrees on the basic tenets. At a gathering of scholars and practitioners a decade ago, intended to develop a “canon” of negotiation theory that cuts across disciplines, there was broad agreement on six core topics that were already taught in, and included in the leading textbooks for, all of those disciplines:

- (1) the idea of personal style or strategy or personality in a negotiation (including the concepts of competitive or adversarial v. interest based or principled or problem-solving);⁹¹
- (2) the use of communication skills—both listening and talking—in negotiation;⁹²
- (3) the concept of integrative v. distributive negotiations;⁹³
- (4) the concept of a “bargaining zone” between the parties as well as the concepts of BATNA and reservation prices;⁹⁴
- (5) the use of brainstorming and option creation in a negotiation; and
- (6) the importance of preparation to negotiation.⁹⁵

91. For a discussion of different negotiation styles and strategies, see *infra* Part III.A.

92. See *infra* notes 107-12 and accompanying text.

93. For definitions of integrative and distributive bargaining, see *supra* note 6.

94. For a discussion of BATNA, see *infra* Part III.B.

95. Christopher Honeyman & Andrea Kupfer Schneider, *Catching Up with the Major-General: The Need for a “Canon of Negotiation.”* 87 MARQ. L. REV. 637, 643-44 (2004); see also Howard Gadlin et al., *Of Babies and Bathwater: Innovation and Continuity in Negotiation Pedagogy*, in EDUCATING NEGOTIATORS FOR A CONNECTED WORLD 47, 53 (Christopher Honeyman et al. eds., 2013) (repeating the six core concepts in the canon, but cautioning that this is only a “sharply limited list of items then taught [in 2004] across all negotiation classes”). While this list does not explicitly include the substantive rights at stake, see Condlin, *supra*

The survey data reported in Part II suggests that the failure to train defense attorneys about even these basic concepts can cause real problems.

We direct our proposals for negotiation training in this Part to defense attorneys, without addressing the prospect of training for prosecutors. Is the benefit of training for defendants therefore temporary, a competitive advantage that disappears as soon as prosecutors also learn more about negotiation theory and strategy?

There is no rigorous empirical investigation of this question in the criminal context. We imagine, however, that at least some training benefits for the defense would survive even after both parties upgrade their negotiation skills. As we explain below, some negotiation environments lend themselves to a cooperative strategy or style that can benefit both parties. Even in more competitive zero-sum contexts, one party might use training better than the other. When it comes to trial techniques, we do not give up on training defense attorneys for better cross-examinations just because prosecutors might receive the same training. The same line of thought applies to negotiation training for defense attorneys.

A. Training About Negotiation Strategies and Styles

One early article calling for legal scholars to study negotiation noted how, “[i]n all negotiations, regardless of the context, certain strategic decisions must be made by each party,” and stated that “such decisions can and should be planned systematically, according to general principles applicable to all negotiations.”⁹⁶ Negotiation theory offers various names for different strategies and styles, but as a general matter, the current legal negotiation literature distinguishes between a cooperative/problem-solving/integrative approach

note 5, at 296 (“It is as if proponents of [New Legal Bargaining Theory] think it does not matter who has the stronger case in a legal dispute and that all that counts is who is the most psychologically adept and sociable bargainer.”), the legal merits of the case are central to any determination of (4) and (5), and represent a core research and analysis task in (6). *Cf.* Bowers, *supra* note 84, at 86 (noting, in the misdemeanor context, how “[p]olice, prosecutors, defense attorneys, and defendants pay little attention to what the law is; they pay attention, instead, to past practices that serve as precedents for parties’ future expectations and performances”) (footnote omitted).

96. Lowenthal, *supra* note 27, at 69.

and a competitive/adversarial/distributive approach.⁹⁷ The former refers to a situation in which the parties can add value to the negotiation in a mutually beneficial manner,⁹⁸ whereas the latter describes a zero-sum situation in which one negotiator's concession is a loss that leads to the other side's gain.⁹⁹

Plea bargaining might seem to be a purely distributive situation calling for a highly competitive approach because it appears that one negotiator's concession is a loss that leads to the other side's gain.¹⁰⁰ In fact, the repeat-player nature of the relationships in criminal law practice—working together in one courthouse, over and over—may move some aspects of the negotiation away from competitive to a necessarily more cooperative strategy.¹⁰¹ Indeed, as Andrea Kupfer Schneider's important negotiation work demonstrates, "it is clear that extremely high levels of problem-solving behavior are exhibited between the prosecutor and the defendant's attorney."¹⁰²

97. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 38-40 (Bruce Patton ed., Penguin Books 3d ed. 2011); WILLIAMS, *supra* note 21, at 53-54 (1983) (describing cooperative strategy); Gifford, *supra* note 33, at 43 (outlining "three distinct negotiating strategies: competitive, cooperative, and integrative"); Menkel-Meadow, *supra* note 6, at 816 n.243 (describing four negotiation strategies: "1) conventional adversarial; 2) problem solving (meeting needs); 3) fair or objective negotiation (solutions mediated by outside standards where needs are not the only criteria); and 4) conventional cooperative (compromise)").

98. See FISHER & URY, *supra* note 97, at 72-75.

99. See Lowenthal, *supra* note 27, at 73 ("When the individual interests of two negotiating parties directly conflict with one another, and each seeks to enhance its own interests, the two parties normally adopt competitive strategies to 'win' the negotiation."); cf. Gifford, *supra* note 33, at 43 ("Although leading negotiation theorists share a common understanding of what constitutes the competitive strategy, there is little consistency in the descriptions and names of noncompetitive theories. Noncompetitive strategies are variously referred to as collaborative, cooperative, and problem-solving.") (footnotes omitted).

100. One commentator warned that even the most committed cooperative negotiators must be prepared for junctures in a particular negotiation that call for a competitive approach, as well as counterparts who will work in only an adversarial, zero-sum approach. See Jennifer Gerarda Brown, *Empowering Students to Create and Claim Value Through the Thomas-Kilmann Conflict Mode Instrument*, 28 *NEGOT. J.* 79, 80 (2012). In short, "[u]nderstanding distributional bargaining is, therefore, important as a defensive strategy." *Id.*

101. See ARTHUR ROSETT & DONALD R. CRESSY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 108 (1976) (stating that "the workday of the courthouse would be so crammed with bluffs, counter bluffs, and counter-counter bluffs, that there would be no time for dispositions" if plea bargaining followed a competitive strategy model); Menkel-Meadow, *supra* note 6, at 785-87 (questioning the wisdom of defining any particular context, including criminal cases, as "zero-sum").

102. Schneider, *supra* note 46, at 156-57 ("In criminal law, the geographic area of practice is narrow and the population of prosecutors and criminal lawyers is also limited. Criminal

Further, “results from [Schneider’s study] suggest that criminal law may be an unexpectedly fertile environment to maximize positive problem-solving methods.”¹⁰³ Another legal negotiation scholar, applying specific factors to choose a negotiation strategy for a particular context, concluded that criminal defense attorneys should adopt a “predominantly cooperative strategy coupled with some early competitive tactics and integrative solutions whenever feasible.”¹⁰⁴

Consider the following example of the potential to create win-win situations in plea bargaining. A nineteen-year-old defendant is charged with misdemeanor assault in an incident resulting in some injury to the victim. An assault conviction will mean the defendant will lose his job, but the charge of disorderly conduct (a different misdemeanor in the jurisdiction, carrying a lower potential sentence than assault) will not result in that outcome. The jurisdiction also has a mechanism for deferred judgment in which, after a guilty plea, entry of judgment is stayed while the defendant serves a period of probation; successful completion results in discharge without a judgment of conviction. Defense counsel interviews the victim and takes a statement from him that describes how payment of medical bills is a primary concern and how the victim is upset the defendant has neither offered to pay nor contacted the victim (an acquaintance) to apologize. The prosecution has an office policy requiring a memo to a supervisor when there is a plea offer made on an assault case. Defense counsel offers to share the victim’s statement with the prosecutor so the statement (once confirmed by the prosecutor) can form the basis for the memo to the supervisor (thus saving the prosecutor time and effort). Counsel also shares a letter from the defendant’s boss about how an assault conviction will result in job loss—and thus inability to pay the medical bills—and describes how the deferred judgment will allow the young defendant to continue to develop in the workplace and pay off the bills over time.

lawyers deal with each other repeatedly.”)

103. *Id.* at 152; *see also id.* at 156 (“No other group of lawyers appears to be so problem-solving. And this rating comes from the prosecutors with whom they are negotiating.”) (emphasis omitted). *But see* Alkon, *supra* note 9, at 608 (“Plea bargaining is all too often not much of a negotiation, but rather a take-it-or-leave-it conversation where the prosecutor holds all the cards, and the defendant can either decide to cut his losses, or compound them.”).

104. Gifford, *supra* note 33, at 79.

These opportunities for cooperative strategies, which may come as a surprise to some criminal law practitioners, deserve some place in a training focused on effective negotiation. One reason for the surprisingly noncompetitive dynamic in criminal case negotiations could be that clients are not in a position—as a matter of education, physical liberty, or accessibility—to push their state-funded lawyers to be more aggressive.¹⁰⁵ At the very least, defenders could learn to interview clients to get information they need to determine the most effective negotiation approach and to counsel clients in a manner that allows them to make a truly informed and uncoerced decision about whether to plead guilty.

Negotiation style and strategy often go hand in hand simply because, to take one example, someone with a competitive style will feel comfortable with competitive strategy. But separating personal style from negotiation strategies “yields new flexibility for the negotiator.... Further, a negotiator should often make competitive, cooperative, and integrative moves within a single negotiation.”¹⁰⁶ Consider a situation in which defense counsel has decided to adopt a competitive strategy but a cooperative style with respect to a certain aspect of the case—for example, the client is not incarcerated and will not plead guilty to anything involving jail or prison time. Counsel must then find a “nice” way to withhold information—such as an upcoming trial in another of the attorney’s cases—that would not undercut the planned cooperative style.

To be sure, negotiation theory is not easy or intuitive stuff. Indeed, the nuances that distinguish approach (strategy) from style “are often lost on students.”¹⁰⁷ Schneider notes how her teaching

105. See Schneider, *supra* note 46, at 160; see also Bibas, *supra* note 10, at 2511-12 (“[Defendants’] risk preferences vary with demographics, including sex; adolescence and age generally; wealth, social class, self-employment, and education; church attendance; and marital status.”) (footnotes omitted).

106. Gifford, *supra* note 33, at 48 (footnote omitted); see *id.* at 82 (“[N]egotiation theory suggests that the plea bargaining strategy most likely to succeed in a typical case is one which begins with a competitive approach and progresses to a cooperative approach as negotiations continue. To accomplish this strategy switch, the defense attorney should attempt to maintain a cordial and accommodative relationship with the prosecutor, even during the early phases of bargaining.”); see also Andrea Kupfer Schneider & Jennifer Gerarda Brown, *Negotiation Barometry: A Dynamic Measure of Conflict Management Style*, 28 OHIO ST. J. ON DISP. RESOL. 557, 557 (2013) (“Many negotiators find that they shift—they change their styles in one way or another—to adjust to the rising temperature of the conflict.”).

107. Schneider, *supra* note 5, at 20.

“focus is almost completely on skills that support the styles rather than on debating effective styles,” because “[a]dult professionals learn better by talking first about experiences and skills, and then focusing on framework or style selection.”¹⁰⁸ Thus, she teaches a “triangle of skills”¹⁰⁹—assertiveness (speaking), empathy (listening and inquiry), and flexibility (inventing and adapting)—on the theory that having effective skills allows negotiators to make informed and contextualized stylistic choices.¹¹⁰ In the context of client interviewing, active listening and open-ended questioning are well-accepted and commonly taught techniques, drawn from social science understandings of such things as memory and observation.¹¹¹ Similarly, negotiation training could include such information-gathering techniques. For example, active listening might elicit important information from opposing counsel during the bargaining session.¹¹²

Understanding how to implement a particular style or strategy is an undervalued skill in plea bargaining. Many defenders view themselves as simply begging or as needing to threaten to take everything to trial to get anything good out of a negotiation.¹¹³ Yet just as training can teach attorneys how to cross-examine or interview without antagonizing the witness—or to decide when one might want to antagonize the witness—training can be aimed at exploring different styles and strategies of negotiation. One negotiation

108. *Id.* at 14.

109. *Id.* at 26.

110. *See id.* at 26-27.

111. *See, e.g.*, STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS* 92, 97-100 (5th ed. 2015).

112. *See* G. NICHOLAS HERMAN, *PLEA BARGAINING* 59, 95-96 (3d ed. 2012) (including, among “the most useful techniques for obtaining information from your opponent ... (1) asking broad, open-ended questions when seeking maximum information; (2) using silence, encouragement, and questions that call for elaboration; [and] (3) listening intently and patiently”).

113. *See* Interview with G, *supra* note 60 (“[A]t the end of the day, if you come back with a counter offer and they’re aware that you’re willing to go to trial twice or you know, multiple times. Then, I notice that we get a lot better offers from them.”); Interview with H, *supra* note 63 (“[M]ost defense attorneys in most cases, feel as though they are [at] the disadvantage that they have less to leverage, they have less to work with.”); Interview with J, *supra* note 68 (“[T]he prime directive ... for this office and I would hope every public defender office I think [is that] it’s malpractice to plead guilty to any charge without any incentive, I don’t care how guilty the person is.”); *see also* Uphoff, *supra* note 38, at 95 n.80 (“Although the image of the advocate going hat in hand to beg for mercy for one’s client may be far-removed from the romanticized view of the criminal defense lawyer depicted in the movies, on television and in print, it is all too familiar to those who have represented many criminal defendants.”).

scholar (who also conducts trainings) described how lawyers may spend hours “gathering the factual, legal, economic, and political information” for a negotiation, but spend only 10-15 minutes preparing a negotiation strategy.¹¹⁴ This strategy usually focuses only on “[w]here they plan to begin; [w]here they hope to end up; and [t]heir bottom lines. In between the starting point and the conclusion of their interactions, they wing it, thinking of their encounters as wholly unstructured.”¹¹⁵ In short, a little training about particular negotiation strategies and styles, as well as the skills to implement them, could go a long way.

B. Training About Preparation: Understanding BATNA

The whole purpose of a negotiation is to get a more desirable outcome than you would get without the negotiation.¹¹⁶ To determine whether a deal is worth taking, a negotiator must figure out what would happen if the parties do not reach agreement.¹¹⁷ The Best Alternative To a Negotiated Agreement (BATNA) is a concept that gives a negotiator a reference point for knowing when to walk away from the negotiating table.¹¹⁸

At first impression, it seems that the BATNA for a plea agreement in a criminal case will either be a trial, a dispositive evidentiary hearing (especially in drug or weapon possession cases), or an open guilty plea to all charges.¹¹⁹ Those are certainly likely alternatives should negotiations fail, and thus defense counsel must determine the BATNA by carefully calculating: (1) the likelihood of

114. Craver, *supra* note 11, at 61-62. Based on our research, both of these estimates seem quite overoptimistic.

115. *Id.* at 62.

116. See FISHER & URY, *supra* note 97, at 102.

117. *See id.*

118. *See id.* at 102-06 (defining BATNA). For a contemporary (and fun) take on BATNAs, see Jennifer W. Reynolds, *Breaking BATNAs: Negotiation Lessons from Walter White*, 45 N.M. L. REV. 611, 622-26 (2015) (using *Breaking Bad* character Walter White's negotiation for his own life to illustrate his and his potential assassins' BATNAs). Negotiation theory also refers to the “reservation point,” meaning the bottom line or least favorable point at which one would settle. See Korobkin, *A Positive Theory of Legal Negotiation*, *supra* note 6, at 1791-94 (arguing that figuring out the best alternatives to agreement helps determine the reservation point).

119. See Alkon, *supra* note 9, at 606.

acquittal on each count in the charging document,¹²⁰ and (2) the likely sentence the particular judge would impose after (a) a plea to all charges or (b) a conviction after trial.¹²¹

While many defense attorneys may feel confident in their ability to determine quickly and intuitively the likelihood of success at trial,¹²² training to take a step back and more methodically determine a BATNA is likely to improve bargaining outcomes. Fisher and Ury, who coined the term, recommend a three-step process for determining a BATNA: brainstorming a list of actions to be taken if there is no agreement, converting the most promising ideas into tangible alternatives, and selecting the best alternative.¹²³

To give one example, consider a drug sale case in which the police officer will testify that he observed the defendant hand a small packet to another person in exchange for money. The police found cocaine on that person; they also found cash and several small baggies of cocaine on the defendant. Obvious potential actions if there is no plea agreement are to win at trial or to get the defendant a pre- or post-plea diversionary deal (success in drug treatment in exchange for eventual dismissal of the charges). Too many defenders will do a quick calculation of the likelihood of winning the trial or getting into the program and will then enter the actual negotiation.

However, more emphasis on Fisher and Ury's second step—making promising alternatives more tangible—could significantly improve the defendant's negotiation position. For example, even if the prosecution is unlikely to offer diversion, helping the client enter drug treatment may convince a judge to keep the defendant in that program even after a trial conviction or nonnegotiated guilty

120. As part of (1), defense counsel would predict the likelihood of suppression, given the particular judge (if known).

121. This calculation applies if the parties know the sentencing judge at the time of negotiation. If they do not, it is more complex—but certainly not impossible—to determine the BATNA.

122. See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 140-41, 142 fig.2 (2010).

123. FISHER & URY, *supra* note 97, at 105-06. *But see* Alkon, *supra* note 9, at 606 (“[For] the typical criminal defendant who has no real defense and no leverage except for the threat of forcing the case to trial... the ‘list of actions’ is usually limited to two: take the deal or go to trial.”); *id.* at 605 (“For most criminal defense lawyers, the concept of a BATNA, although a standard part of negotiation theory, is often not a helpful aid in their analysis of the case and the issues confronting the typical client during plea bargaining.”).

plea. Even if acquittal seems unlikely, a visit to the scene and an interview of the alleged buyer¹²⁴ might uncover facts that increase the likelihood of acquittal on the top count. These efforts might reveal poor lighting at the corner of the alleged transaction, or that the buyer had drugs in a red baggie while those on the defendant were in clear baggies. Though these steps are fairly typical for counsel to take as a case approaches trial, they are not always considered part of the preparation process for negotiation. Training about BATNAs would emphasize the importance of early investigation and planning to the negotiation process.¹²⁵ Using the BATNA method would lead to a different calculation of the best alternative to agreement, and thus a stronger position from which to negotiate, as well as a better sense of when to walk away from the negotiation.

One of the few empirical studies of defense counsel's actual preparation for plea negotiation stated that "[d]efense attorneys who interviewed prosecution witnesses and conducted extensive fact investigations would, ... in a great majority of cases, improve the bargaining position of their clients involved in plea negotiations."¹²⁶ This conclusion was based in part on surveying criminal defense attorneys about their most recent felony cases that went to trial, and learning that in three-fourths of those recent cases, respondents perceived the prosecution's evidence at trial to be weaker than the evidence in the police reports disclosed during discovery.¹²⁷ The conclusion about the likely effect of thorough preparation (in the form of investigation) before bargaining was also based on survey responses from about fifty-two felony cases involving violent crime victims.¹²⁸ Lawyers reported getting better outcomes in cases in which they interviewed victims than in cases without an interview.¹²⁹ In another study, despite rating the skill of negotiation as

124. Alternatively, defense counsel could review the court file if the buyer's case is still ongoing and he and his counsel do not agree to an interview.

125. There are obviously numerous systemic obstacles to such preparation, such as high workloads for public defenders, *see supra* note 90 and accompanying text, and lack of available treatment programs. Still, there are too many instances in which, even without clear obstacles, counsel fails to do even the most rudimentary investigation before beginning plea negotiations. *See, e.g., Doyel, supra* note 23, at 1025-27.

126. Lieberman, *supra* note 47, at 572.

127. *Id.* at 572 tbl.5.

128. *See id.* at 573.

129. *See id.* at 573, 574 & n.97 (noting, however, that although the statistical significance of the comparison "is questionable," the data is presented because of "logical reasons").

very important to pretrial practice, one half of respondents “did not conduct a thorough investigation, do legal research, or develop a theory of defense before plea negotiations.”¹³⁰ These studies offer strong support for the hypothesis that negotiation training can result in more effective negotiation, meaning better outcomes for defendants in criminal cases.

Although a defense attorney should not counsel accepting a deal that leaves the defendant worse off than if he went to trial, calculating the BATNA in a criminal case is more complicated than calculating the likelihood of conviction and likely sentence if convicted because failure to reach an agreement can lead to outcomes other than trial. Failing to agree can lead to an unexpectedly better bargain later in the process, or even dismissal of the charges.¹³¹ This is particularly true in misdemeanor cases, in which simply waiting until the trial date approaches can lead to a better outcome.¹³² Again, though these alternative outcomes to a failed negotiation may seem obvious, training can, at the very least, remind defenders about the various possible results in a criminal case and highlight that not all options surface in an initial negotiation.¹³³

130. Doyel, *supra* note 23, at 1026. Attorneys also listed creativity—meaning the ability to fashion sentencing alternatives—as important to effective bargaining. *Id.* at 1028.

131. See M. Clara Garcia Hernandez & Carole J. Powell, *Valuing Gideon's Gold: How Much Justice Can We Afford?*, 122 *YALE L.J.* 2358, 2368-69 (2013) (“In fiscal years 2011 and 2012, we obtained dismissals on almost a quarter of our felonies, more than a third of our misdemeanors, and a third of our juvenile cases. In prior years, I had only focused on trials and pleas, never on the best possible outcome, which is dismissal of charges.”) (footnote omitted).

132. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089, 1099 (2013); Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 *BROOK. L. REV.* 853, 867-82 (1996) (describing his analysis of clinic student representation, which showed that a significant number of clinic clients who declined to plead guilty at arraignment later got dismissals, deferred dismissals, or plea offers to reduced charges).

133. See Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking*, 30 *LAW & SOC'Y REV.* 335, 342 (1996) (describing ethnographic research showing how court-appointed defense attorneys, among other bargaining strategies, may receive a reasonable offer but still “consider whether [that] offer might get better further along in the adjudication process”).

C. Training About Communication Strategies and Information Exchange During the Bargaining Process

Negotiation texts often devote sections to strategies for communication or persuasion during the actual negotiation.¹³⁴ Studies confirm the effects of various communication techniques in a negotiation.¹³⁵ This Section details some of the negotiation skills that lawyers can learn to use effectively while bargaining, including anchoring, strategic information exchange, and the use of data to set objective criteria.

1. Anchoring

Anchoring describes a phenomenon in which the initial value given to a particular item strongly influences the ultimate valuation of that item.¹³⁶ The first offer in a negotiation serves as an anchor and can thus advantage the negotiator willing to make the initial move.¹³⁷ As one negotiation scholar put it, “[p]roficient negotiators generally attempt to develop the most extreme positions they can rationally defend.”¹³⁸

There are only a few studies on anchoring in criminal cases, but they demonstrate that anchoring does affect outcomes. For example, one study found that a prosecutor’s sentencing demand “clearly influences the defense attorney’s [subsequent] demand ... rather than working against the prosecutor’s initial demand, defense attorneys assimilate their own sentencing demand to it.”¹³⁹ Although this

134. See, e.g., KOROBKIN, *supra* note 35, at ch.3.

135. See, e.g., Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 621-22 (2006).

136. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974) (introducing anchoring).

137. Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 657 (2001) (“[W]e empirically demonstrate for the first time that simply making a first offer in an actual negotiation affords a distributive advantage because the first offer serves as an anchor.”); see also *id.* at 657-58 (noting how some types of perspective-taking and some types of self-focus can overcome the effect of anchoring by the first offer).

138. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 56 (2d ed. 1993).

139. Birte English et al., *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 712 (2005); see also *id.* at 716 (concluding that, in part because

study did not involve plea negotiations, the authors noted how defense counsel is likely to be exposed, and thus anchored, to the prosecution's sentencing demands during plea bargaining.¹⁴⁰ Former federal judge Nancy Gertner has described the federal sentencing guidelines as an anchor for judges,¹⁴¹ and in a recent Second Circuit Court of Appeals decision, Judges Calabresi and Raggi discussed (and disagreed about the effect of) anchoring in the case.¹⁴²

Stephanos Bibas has offered a theoretical account of anchoring during plea bargaining.¹⁴³ He described how overcharging, as well as prosecutors making initial offers with unreasonably high sentences, can lead a defendant to "jump at the deal" when the prosecutor then offers something lower but perhaps still unfavorable.¹⁴⁴ As Bibas noted, it is difficult for defenders to push back against their clients' and their own anchoring biases.¹⁴⁵ Studies have shown that being aware of a cognitive bias does not undo its effect, nor does concentrating on the bias or even offering money to resist the bias.¹⁴⁶ Most relevant to the training hypothesis in this Article: "Negotiators who simply learn on the job do not outgrow their biases and heuristics. But specific training can teach negotiators to be attentive to their own biases, to focus on actual gains and losses, and to resist framing and other manipulations."¹⁴⁷

defense attorneys adjust their sentencing demands to the prosecutor's initial demand, the defense's demand actually moves the judge closer to the prosecutor's demand).

140. *See id.* at 712; *see also* Jeff Greenberg et al., *Considering the Harshes Verdict First: Biasing Effects on Mock Juror Verdicts*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 41, 43-45 (1986) (describing an experiment in which mock jurors in a homicide case were biased towards harsher verdicts when they were instructed to consider various verdicts in a harsh-to-lenient order).

141. *See* Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006) ("In effect, the 300-odd page Guideline Manual provides ready-made anchors."); *see also* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 524 (2014).

142. *Compare* United States v. Ingram, 721 F.3d 35, 40-41 (2d Cir. 2013) (Calabresi, J., concurring) (arguing that anchoring influences judgments), *with id.* at 48-50 (Raggi, J., concurring) (respectfully disagreeing).

143. *See* Bibas, *supra* note 10.

144. *See id.* at 2518.

145. *See id.*

146. *Id.* at 2522.

147. *Id.* (footnote omitted)

The concept of anchoring—a commonplace tool of negotiation theory—thus suggests the advantages of making an initial offer and, from the defense perspective, setting that offer low. Even if the offer is unrealistically low, as long as it is defensible, it works in the client’s favor in terms of the ultimate outcome of the negotiation. This insight does not apply to every case. As a general matter, though, a practice of making first offers and low offers would tend to have negotiation advantages for a defense attorney. Further, studies show that negotiators who set specific, optimistic goals get better outcomes than negotiators with vague or less aspirational goals.¹⁴⁸

Responses to our surveys show that public defenders do not often try a first offer or a low offer. As Table 2 illustrates, when asked to characterize their own first offers in typical cases, defenders typically answered that their offers were closer to unfavorable than favorable for their own clients.

Table 2. Defense First Offer Characterized

| | Number of Responses |
|----------------------|---------------------|
| Very Unfavorable = 1 | 34 |
| Unfavorable = 2 | 88 |
| Reasonable = 3 | 54 |
| Favorable = 4 | 50 |
| Very Favorable = 5 | 41 |
| Average Rating | 2.9 |

There were no meaningful differences in the responses to this question based on the gender or race of the attorney or the type of caseload they carry. Across all of these groups, the less ambitious first offers were the most common. Indeed, the average offer from a defense attorney was less than one level higher than the typical first offer from the prosecutor (defense attorneys on average scored the prosecutor’s first offer at 2.0). The governance structure of the office

148. See Andrea Kupfer Schneider, *Aspirations in Negotiation*, 87 MARQ. L. REV. 675, 676-77 (2004) (discussing studies); see also G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 34-36 (2d ed. 2006).

in which the defenders work did matter in the response to this question. Attorneys working in state-operated offices rather than local offices were more likely to characterize their own offers as more favorable to their clients (at 2.7 for local offices and 3.1 for state offices).¹⁴⁹

The average rating for defenders' characterization of their own first offers is, surprisingly, just below "reasonable" for their clients. Training about anchoring would highlight how making a "very favorable" offer (made more reasonable by developing a sound BATNA) might be the better approach in many cases.

According to another set of our survey questions, defense attorneys often allow prosecutors to initiate the bargaining process and to make the first concrete offer. We assigned a frequency score to the answers, on a scale of 1 to 5, with 1 meaning "never," 2 meaning "infrequently," 3 meaning "sometimes," 4 meaning "usually," and 5 meaning "always." The survey respondents' estimates about the most common sequence of events during a negotiation are summarized in Table 3 below.

Table 3. Frequency of Offering Behaviors

| Event | Average Frequency |
|---|-------------------|
| Prosecutor initiates bargaining process | 3.1 |
| Prosecutor makes first concrete offer | 3.9 |
| Prosecutor makes take-it-or-leave-it offer | 3.2 |
| Client accepts first offer | 2.7 |
| Defense makes counteroffer if prosecutor offers first | 4.1 |

Misdemeanor attorneys answered the "Prosecutor makes first concrete offer" question at an average of 4.3, which is a statistically significant difference from all other attorneys at 3.9.¹⁵⁰ This

149. We hypothesize that state-run offices tend to benefit from more consistent and deliberate training regimes, because the leadership in such an organization is always aware of the training and support needed for attorneys working in small, geographically dispersed offices. This difference between state and local offices is statistically significant, using a t-test. The t-value = 2.61 and p = 0.0096.

150. The t-value = 4.927954 and p < 0.00001.

suggests that misdemeanor prosecutors are significantly more likely than prosecutors generally to make the first concrete offer.

It is worth noting that the prosecutor makes the first offer more often on average (3.9) than the prosecutor initiates the bargaining discussion (3.1). This discrepancy indicates that defense attorneys wait for a prosecutor's offer, even when they themselves initiate the discussion.¹⁵¹ In some cases, there may be a reason for such an approach, but in many others, waiting may simply indicate the defender's belief that the prosecutor holds more power in the negotiation. Given what we know about anchoring and first offers, defenders should not wait so often for the prosecution to make an offer and thus anchor the negotiation.

2. *Strategic Information Exchange*

Another aspect of communication during the actual negotiation is strategic information exchange—formulating a specific plan in advance of the bargaining session for what information to seek out, what information to share, and what information to withhold. Plea bargaining discussions offer an excellent opportunity to learn something about the state's evidence, case theory, and views on sentencing in the particular case.

While bargaining has the added benefit of providing discovery to defense counsel in the event the case goes to trial, it can also allow defense counsel to understand the underlying interests of the prosecution. This understanding is critical to an integrative bargaining approach, which “requires crafting proposals to take advantage of differences in interests and preferences between the negotiators.”¹⁵² Simply asking for such information in a straightforward manner might work in some instances, but there are more sophisticated ways to get information. Training can address how to accomplish this goal, just as training addresses different ways to get informa-

151. In some jurisdictions, the defense attorney's delay might reflect local discovery practices. When the prosecutor provides discovery at the same moment as the first plea offer, the defense attorney may have compelling reasons not to make the first offer.

152. KOROBKIN, *supra* note 35, at 123 (“Bargaining should therefore be seen as an opportunity to develop the knowledge about the opposing negotiator that can make such proposals possible.”).

tion during a witness interview¹⁵³ or cross-examination.¹⁵⁴ Indeed, G. Nicholas Herman's treatise, *Plea Bargaining*, recommends that practitioners prepare a "Plea Bargaining Preparation Outline" that includes lists of "Information 'To Find Out,' Information 'To Reveal,' and Information 'To Protect.'"¹⁵⁵ Discussing the actual bargaining session, Herman offers five methods for "dodging" questions that seek to elicit information on the "To Protect" list.¹⁵⁶

To offer just one example of the myriad ways in which defense counsel might prepare for negotiation by carefully planning for potential information exchange, consider a scenario in which the only prosecution witness is a police officer. The charges are drug possession and resisting arrest, and the defendant was released after arraignment and went immediately to the hospital for medical treatment relating to nonminor injuries sustained during the arrest. Planning for and then working to strategically elicit information about the particular police officer during the negotiation will shed some light on the government's underlying interests in the case. Does the prosecutor know or appear to know of any brutality complaints against this police officer? Does the prosecution or police officer know that the defendant visited the hospital? On the flip side, defense counsel must carefully consider what information to withhold in the bargaining session. What will counsel say if the prosecutor asks if her client was injured during the arrest? Is this information that would foreclose a good offer based on the government's desire to protect against the possibility of a civil lawsuit for injuries sustained during the arrest, or would it help facilitate such a plea on the theory that evidence of those injuries at trial would make a jury trial difficult to win in the particular jurisdiction and would lead to bad publicity for the police department? These are not easy decisions, and should not be made in the heat of the negotiation without careful advance preparation.

153. See KRIEGER & NEUMANN, *supra* note 111, at ch. 9.

154. See THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS ch.6 (9th ed. 2013).

155. HERMAN, *supra* note 112, at 59, 95-96.

156. *Id.* at 78, 84-85 (listing the five methods: ignoring the question and changing the topic, ruling the question out of bounds, asking a question in response, reframing and answering a different question, and over- or underanswering).

3. Using Data to Establish Objective Criteria

One of the core techniques in problem-solving bargaining is to establish objective criteria by which to judge the fairness of the offer.¹⁵⁷ For example, if an attorney were advising a client about buying a piece of property, that attorney would look at several similar pieces of property to determine the market value before entering the negotiation. Criminal defense lawyers often perform this analysis in an informal manner by determining the standard offer for a particular type of charge given the client's criminal history.¹⁵⁸ But are defenders correct in their approximation of the average offer for a particular situation? And what if the standard offer changes over time, or from one prosecutor to another? Further, in many jurisdictions there are exceptions to the standard offer. What leads to these exceptions? What characteristics of the case, client, defense attorney, and prosecutor are associated with such exceptions?

Indigent defender offices—dealing with high workloads, low staffing, and constant underfunding—collect very little data.¹⁵⁹ State and federal criminal justice systems do not collect data that would reveal plea bargaining disparities in like cases, or on aspects of plea bargaining.¹⁶⁰ In particular, these systems' data collection on

157. FISHER & URY, *supra* note 97, at 83-86.

158. See Batra, *supra* note 4, at 326-27 (noting that "counsel has a responsibility to prepare herself with information on the going 'price' of bargains," but that such information "may not be readily available," although "public defenders will potentially have access to the collective institutional knowledge of their organization").

159. See generally Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015) (suggesting a systems approach to tracking and analyzing critical data to improve indigent defense services); Janet Moore, *Democracy Enhancement and the Sixth Amendment Right to Choose* (2015) (unpublished manuscript), works.bepress.com/janet_moore/3/ [<https://perma.cc/NA6Q-6KTM>] (explaining how the lack of data impacts the existence and enforcement of standards for attorney qualifications, training, workload, and performance, which are necessary to fulfill counsel's basic duties to communicate, investigate, and litigate). But see *The North Carolina Systems Evaluation Project (NCSEP)*, N.C. CT. SYS. OFF. INDIGENT DEF. SERVS., <http://www.ncids.org/Systems%20Evaluation%20Project/SEP%20HomePage.html?c=Research%20%20and%20%20Reports,%20Systems%20Evaluation%20Project> [<https://perma.cc/7SBH-S24F>] (last visited Mar. 20, 2016) ("[North Carolina] created NCSEP to develop performance measures that would evaluate system outcomes and enable defense agencies to assess, with empirical data, how well the indigent defense system meets the needs of our clients, the criminal justice system, and the community.").

160. See, e.g., MARK MOTIVANS, BJS, DOJ, NCJ 248493, *FEDERAL JUSTICE STATISTICS, 2011-2012*, at 18-20 (2015) <http://www.bjs.gov/content/pub/pdf/fjs1112.pdf> [<https://perma.cc/>

misdemeanors (the vast majority of criminal prosecutions) is woefully inadequate.¹⁶¹

As a threshold matter, defender offices need to collect—and, in many jurisdictions, start to collect—better data to support their plea negotiations. To decide which data to collect, defenders should ask themselves, among other things: What information would be most useful for plea bargaining purposes, and how would one gather that information? For example, attorneys within a jurisdiction will begin to know specific prosecutors, their concerns and interests, their pet peeves, and the circumstances under which they are more lenient. Offices might collect data about particular prosecutors' offers made to defendants with similar criminal histories for certain offenses.¹⁶² Offices might also acquire information about whether a particular prosecutor has a big trial day approaching. If defenders share this type of information, they have another tool in the plea-bargaining kit during that window. But information should not be shared simply on an individual, informal basis; indeed, that already happens to some degree.¹⁶³ Part of the challenge for data collection is establishing a set of routines for sharing information. For example, an office could use a single database with periodic briefings and constant access to disseminate the data. In short, data will be most effective if it is gathered and shared systematically.¹⁶⁴

After data collection begins, defenders need to be trained in how to use this data in negotiations. Use of this data is undoubtedly tricky for public defenders, as they are repeat players who often

4EX4-6BRN]; *Data and Product Finder*, BJS, <https://bjs.gov/latestreleases.cfm> [<https://perma.cc/A8FN-ZYGE>] (last visited Mar. 20, 2016); see also Bibas, *supra* note 10, at 2466 n.9 (discussing guilty plea statistics and noting that, “[t]hrough it is impossible to be sure, most of these pleas probably resulted from plea bargains”).

161. See ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 10-13 (2009) (indicating that there has been minimal research on misdemeanor courts, despite the fact that most prosecutions are for misdemeanors, and that there is a particular need for attentive defenders for misdemeanor defendants).

162. Cf. Batra, *supra* note 4, at 333 (“A database of past plea-bargaining options would give access to information that some lawyers may know, but overburdened or newer less experienced lawyers may not. It may also increase the efficiency of plea-bargaining, giving both prosecutors and defense counsel an easy starting point for particular negotiations.”) (footnotes omitted).

163. See *supra* notes 65-67 and accompanying text.

164. Cf. Metzger & Ferguson, *supra* note 159, at 1067-71.

negotiate with the same prosecutors.¹⁶⁵ Using offers in other clients' cases as a data point in a negotiation could backfire, making offers for everyone worse. Public defender offices would also have to grapple with whether attorneys should negotiate on behalf of individual clients or for all of the office's clients.¹⁶⁶ Of course, many of these issues also arise in sentencing advocacy and other areas of practice not only when communicating with prosecutors, but also when communicating with judges. Indeed, more systematic approaches to training and information-sharing about a particular judge's sentencing approaches—and about whether the judge pushes prosecutors to offer better bargains or punishes defendants who do not accept early offers—are also relevant to more effective plea bargaining. Too often, defenders share this information only anecdotally or incompletely.

D. Additional Training (and Hiring) Considerations

There are myriad other negotiation skills relevant to plea bargaining, all suggesting potential training topics. Although full exploration of those skills is beyond the scope of this Article, this final Section briefly sketches out a few additional areas worthy of training consideration and notes how negotiation skills could also be taken into account in the defender hiring process.

1. Negotiating in Person Versus Other Methods of Communication

“In negotiation, communication media influence not only what information is shared and how that information is communicated, but also how information is received and interpreted.”¹⁶⁷ About a quarter of the survey respondents reported that they “sometimes,” “often,” or “always” use text messages as their medium of communication for

165. See *supra* text accompanying note 101.

166. See John H. Blume, How the “Shackles” of Individual Ethics Prevents Structural Reform in the American Criminal Justice System 9-10, 16 (Jan. 26, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570383 [<https://perma.cc/7EQS-USK6>].

167. Noam Ebner et al., *You've Got Agreement: Negotiating via Email*, 31 *HAMLIN J. PUB. L. & POLY* 427, 429 (2010) (footnote omitted).

plea bargaining. While some of this change is inevitable given technological advances and generational shifts, defenders should not be blind to the potential effects on negotiation outcomes. For one obvious example, it is difficult to imagine how a defense attorney might inform the prosecutor about a defendant's individual circumstances by text message. But the mode of negotiation also has more subtle effects on the outcome of the negotiation, and training would heighten awareness of such effects and the need to account for them.

The study of texting in negotiations is at its inception. For example, one study looks at text messaging in crisis negotiations.¹⁶⁸ In the law enforcement context, "officers are increasingly being called upon to defuse violent, unpredictable situations through the typed word. Experts say it's happened enough in the last five years to warrant new, specialized training."¹⁶⁹

There is a more developed body of work on the effects of negotiating by e-mail.¹⁷⁰ Insight from this literature is relevant to texting. E-mail negotiation differs from face-to-face negotiation in a number of ways.¹⁷¹ For example, in e-negotiation:

[T]he social presence of others is reduced and the perceived social distance among negotiators increases. Thus, negotiators' social awareness of each other may be seriously diminished when communicating through email. This might explain why

168. Louise Almond & Marc Budden, *The Use of Text Messages Within a Crisis Negotiation: Help or Hindrance?*, 12 *J. POLICE CRISIS NEGOTS.* 1, 1 (2012) ("This exploratory study aims to examine the use of text messaging as a communication method within crisis negotiations and draws upon the knowledge and experiences of trained crisis negotiators from around the world.").

169. Carolyn Thompson, *Police: Texts OK in Crisis Negotiation*, *ALBUQUERQUE J.* (May 12, 2014, 12:05 AM), <http://www.abqjournal.com/398533/news/police-texts-ok-in-crisis-negotiation.html> [<https://perma.cc/BT52-RR9S>].

170. See, e.g., Leigh Thompson & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 *J. SOC. ISSUES* 109, 109 (2002) ("[We] examine how people negotiate via e-mail and in particular, how the process and outcomes of e-negotiations differ from those of traditional face-to-face bargaining."); cf. Aimee L. Drolet & Michael W. Morris, *Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts*, 36 *J. EXPERIMENTAL SOC. PSYCHOL.* 26 (2000) (comparing the rapport and cooperation found during in-person interactions with the more competitive, distrustful, and contentious atmosphere during telephone communication).

171. See, e.g., Drolet & Morris, *supra* note 170, at 46; Thompson & Nadler, *supra* note 170, at 155-20.

e-negotiators feel less bound by normatively appropriate behavior than face-to-face negotiators apparently do. This weakening of the normative fabric translates into an increased tendency to make threats and issue ultimata, to adopt contentious, “squeaky wheel” behavior, to lie or deceive, [and] to confront each other negatively.¹⁷²

These insights go well beyond the purely descriptive. One group of scholars outlined “a framework for understanding the specific elements of communication that are most altered in the shift from in-person conversation to exchange of email messages.”¹⁷³ They then explored “five major implications of these differences for negotiating via e-mail and suggest[ed] four basic skill sets that e-mail negotiators need to acquire in order to cope with these implications.”¹⁷⁴

As with other aspects of negotiation, there is training to be done on how the mode of communication can influence a plea negotiation. Only by understanding these effects can counsel make an informed decision about which mode—text, e-mail, phone call, or face-to-face—will help get the desired outcome in the negotiation.

2. Law and Ethics of Plea Bargaining

Perhaps the most obvious areas for training on negotiations in criminal cases, at least for lawyers, are the law and ethics of plea bargaining. Since these core areas include mandatory rules for attorneys—in theory, even if too often not in practice—it makes sense to train on them.

The Supreme Court instituted a new era of plea-bargaining regulation with its 2010 decision in *Padilla v. Kentucky*, followed by *Lafler v. Cooper* and *Missouri v. Frye* in 2012.¹⁷⁵ Yet this regulation

172. Ebner et al., *supra* note 167, at 436 (footnotes omitted); see also Matt Richtel, *The Mouth Is Mightier than the Pen*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/business/the-mouth-is-mightier-than-the-pen.html?_r=0 [<https://perma.cc/2JF6-9EVF>] (“New research shows that text-based communications may make individuals sound less intelligent and employable than when the same information is communicated orally. The findings imply that old-fashioned phone conversations or in-person visits may be more effective when trying to impress a prospective employer or, perhaps, close a deal.”).

173. Ebner et al., *supra* note 167, at 429.

174. *Id.*

175. See *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Padilla v. Kentucky*, 599 U.S. 356 (2010).

is still at the margins. It focuses largely on the flow of information between defendants and their lawyers, not the exchange between prosecutors and defenders during negotiations.¹⁷⁶ Although federal right-to-counsel norms mandate that defenders function effectively in the plea-bargaining context,¹⁷⁷ the Court has thus far only addressed relatively narrow instances of ineffectiveness: failing to communicate an offer to a client;¹⁷⁸ giving egregiously erroneous legal advice that led the defendant to reject a favorable plea offer;¹⁷⁹ and failing to properly advise a client that a guilty plea will lead to certain deportation.¹⁸⁰ Lower federal and state constitutional decisions address a broader range of alleged ineffectiveness scenarios, and may suggest other areas for training about plea-bargaining law. For example, Massachusetts imposes a duty to negotiate so as to avoid deportation consequences in some contexts,¹⁸¹ and several jurisdictions require counsel to advise clients about placement on a sex offender registration as a consequence of a guilty plea.¹⁸² State statutes, professional standards, and some court rules also address plea bargaining.¹⁸³

The ethics of plea bargaining is a wide-ranging, well-developed field that suggests a number of areas for potential training.¹⁸⁴ Consider Model Rule of Professional Conduct 4.1, “Truthfulness in Statements to Others,” which prohibits lawyers from “mak[ing] a false statement of material fact or law to a third person” during representation of a client.¹⁸⁵ As all law school students know from a basic ethics class, this rather general rule can be interpreted in a number of ways. For example, information like “a party’s intentions

176. See *Lafler*, 132 S. Ct. at 1384-91; *Frye*, 132 S. Ct. at 1407-11; *Padilla*, 599 U.S. at 374.

177. See *supra* note 3 and accompanying text; see also Alkon, *supra* note 9, at 594-98; Batra, *supra* note 4, at 319-22; Roberts, *supra* note 4, at 2665-69.

178. See *Frye*, 132 S. Ct. at 1408.

179. See *Lafler*, 132 S. Ct. at 1383-84, 1388.

180. See *Padilla*, 599 U.S. at 366, 376.

181. *Commonwealth v. Marinho*, 981 N.E.2d 648, 657 (Mass. 2013).

182. See, e.g., *United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012); *Taylor v. State*, 698 S.E.2d 384, 385 (Ga. Ct. App. 2010).

183. See *supra* note 22 and accompanying text.

184. See generally Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 185-86, 188-89 (1981); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 166-68 (1999).

185. MODEL RULES OF PROF’L CONDUCT r. 4.1(a) (AM. BAR ASS’N 2014).

as to an acceptable settlement” is excepted from the rule because it is not treated as a “fact.”¹⁸⁶ Beyond these basic understandings, there is much study and commentary about ethical considerations such as the line between lying—a prohibited misrepresentation¹⁸⁷—and “puffing.”¹⁸⁸

Some of these rules and norms are already part of defender training. There is clearly room for more training on the law and ethics of plea bargaining, but it should not come at the expense of much-needed training about other, less obvious (and less comfortable) negotiation skills.

3. *Hiring Better Negotiators*

In the hiring interview process, many public defender offices test applicants’ interviewing, counseling, issue spotting, and oral advocacy skills through simulations and hypotheticals.¹⁸⁹ These offices also routinely ask references about applicants’ abilities in these areas. Very few offices test or ask about negotiation skills.¹⁹⁰

Given defender offices’ scarce resources and limited time available for training, those offices might consider negotiation skills and exposure to negotiation in law school during the hiring process. This should not replace training because, after all, law schools do not offer many courses in the area,¹⁹¹ and many references will be unable to speak to this skill set. It is nonetheless worth inquiring and perhaps posing a hypothetical or conducting a simulation during the interview process. In addition to evaluating the applicant’s skill set, considering negotiation skills and exposure would send a message to future defenders that the ability to negotiate matters in effective defense representation.

186. *Id.* at cmt. 2.

187. *See id.* at cmt. 1.

188. *See, e.g.*, Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 183-84 (1989) (using an example scenario to draw distinctions between lying and “puffing”); *see also* Hazard, *supra* note 184, at 188-89, 196; Menkel-Meadow, *supra* note 184, at 166-68.

189. *See, e.g.*, Nicole Vikan & Jory H. Fisher, *The Criminal Hypothetical and Other Unique Aspects of the Criminal Law Interview Process*, NALP BULL. (2006).

190. *Cf. id.* (recommending several skills for public defender interviewees to focus on, which do not include negotiation).

191. *See infra* note 193 and accompanying text.

CONCLUSION

Although a business school student would be hard-pressed to graduate without studying negotiation in a variety of contexts,¹⁹² most law schools offer only a seminar or a few courses that touch on the topic.¹⁹³ As for the rightful place of negotiation in the criminal justice curriculum, legal academics wonder if the topic offers enough substance to support more than a few minutes of coverage.¹⁹⁴ These

192. See Ebner et al., *supra* note 167, at 427 (“Students of negotiation in business schools are trained to recognize and take part in a wide range of negotiation settings, including their own salary and benefits negotiations, intra-organizational negotiations ..., inter-organizational negotiations ..., and others.”); Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should Be Learning and Doing*, 45 MCGEORGE L. REV. 133, 136 n.18 (2013) (“When I was a visiting professor of law at Harvard ten years ago, I spent a good deal of my time looking at the more modern, adaptive, and internationalized curricula at the [Business] [S]chool, where I was privileged to participate in classes and faculty working groups in ethics, negotiation, and organizational development.”).

193. See CRAVER, *supra* note 138, at 61 (“Most attorneys have not had formal negotiation courses. For many years, most law schools refused to offer such skills courses. In recent years, most schools have added negotiation courses to their alternative dispute resolution curricula, but these tend to be limited enrollment classes that are only taken by a few students.”); see also Doyel, *supra* note 23, at 1023 (noting in a study examining defense counsels’ pretrial litigation skills that although “most law schools now have extensive trial practice offerings, fewer offer sufficient instruction in the so-called office skills”). A search of the course catalogues of four randomly chosen law schools from different regions supports this dearth of negotiation courses. The authors reviewed course catalogues from the law schools at the University of Arizona, the University of Oregon, the University of Pennsylvania, and Stetson University. In the broadest sense, these programs offered an average of only four courses covering negotiation theory, skills, and associated topics. See *Course Catalog*, U. OR. SCH. L., <https://law.uoregon.edu/course-catalog> [<https://perma.cc/ZXB9-ZNAD>] (last visited Mar. 20, 2016) (displaying courses for the 2015-2016 academic year, including five courses of note: ADR Strategies in Litigation, Negotiation, Mediation, Small Claims Mediation Clinic, and Criminal Adjudication); *Course Descriptions*, STETSON U., <http://www.stetson.edu/law/offices/registrar/course-descriptions.php> [<https://perma.cc/UA56-SP3N>] (last visited Mar. 20, 2016) (displaying all course listings, including seven courses of note: Comparative Negotiation and Mediation, Criminal Procedure—Adjudication, Family Law Litigation, Family Law Mediation, Florida Criminal Procedure, Mediation Skills Training, Negotiation and Mediation); *Course Finder: Browse Courses*, U. PA. L. SCH., <https://goat.law.upenn.edu/cf/coursefinder/browse/?page=2> [<https://perma.cc/ND8T-9KY8>] (last visited Mar. 20, 2016) (displaying courses for the 2015-2016 academic year, including three courses of note: Criminal Procedure: Prosecution and Adjudication, Mediation Clinic, and Negotiation and Dispute Resolution); *Course Schedule for Spring 2016*, U. ARIZ. JAMES E. ROGERS C. L., http://law2.arizona.edu/current_students/academic_programs/currentschedule.cfm?semester=s16 [<https://perma.cc/78PJ-MRQZ>] (last visited Nov. 16, 2015) (displaying courses for the Spring 2016 semester, including two courses of note: Negotiation of Employment Agreements and Separation Agreements, and Mediation).

194. See *supra* notes 46-49 and accompanying text.

attitudes mirror reactions that we encountered in a number of field interviews about plea bargaining preparation, training, and practice; attorneys repeatedly told us that you just cannot teach or learn how to be a good negotiator.

This poor educational foundation has consequences in the field, where defense attorneys remain blind to possible negotiation successes. One head public defender bemoaned the fact that “criminal defense training doggedly continues to focus on trial technique, to the exclusion of pretrial and plea practice. We, as criminal defense lawyers, doggedly continue to focus on trial performance as the ultimate measure of our lawyering skills.”¹⁹⁵

A few public defender offices have a perceived culture of reluctantly pleading cases and happily going to trial. A corollary of this fighting mentality, at times, is to celebrate acquittals but never good negotiation outcomes. Many other public defender offices have an unfortunate culture of pushing guilty pleas, probably due to high workloads. The former attitude devalues good case outcomes that are gained through skilled negotiations; the latter tends to hew to the negotiation-is-begging view¹⁹⁶ of the criminal defense lawyer’s role. For both prosecutors and defenders, and other system stakeholders, the mere fact of training in negotiation will highlight how negotiation is a skill that can be learned, and how utilizing negotiation techniques can lead to better outcomes.¹⁹⁷

Changing the cultural attitude to treat effective negotiation as a lawyering success is a long-term battle. It must start in legal education and continue in the design of training for public defenders and other criminal defense attorneys. As our field study data show, negotiation training is still generations behind. Training modules have not yet caught up to the reality that negotiation is at the center of criminal practice. The responses to the survey, combined with the interviews and published training agendas, reveal that public defenders receive only limited training on negotiation skills, as opposed to trial skills, when they first enter their offices. The

195. Hernandez & Powell, *supra* note 131, at 2365.

196. See *supra* note 113 and accompanying text.

197. The outcome might be better only for one side (perhaps the side that negotiates most effectively). But given opportunities for integrative bargaining, the outcome might be better for both the prosecution and defendant. See *supra* Part III.A; *supra* text accompanying notes 100-03.

topic of negotiation is even less prominent for public defenders in their continuing legal education, even as trial skills continue to receive attention.

The near invisibility of negotiation skills in public defenders' training appears to have an impact on their representation of clients. Defense attorneys normally do not engage in the sort of deliberate and consultative preparation for plea negotiations that is routine for cases that are headed for trial.¹⁹⁸ Moreover, defense attorney descriptions of the negotiation process suggest that they do not act on the insights of negotiation theory that produce measurable results in other contexts. For instance, defense attorneys appear to make relatively little use of anchoring through presenting first offers and low offers.¹⁹⁹

One theme we heard in our interviews is the defenders' awareness of prosecutor power, applicable across the board: "I think that the prosecutor certainly feels that they have the upper hand in most cases [M]ost defense attorneys in most cases, feel as though they are [at] the disadvantage that they have less to leverage, they have less to work with."²⁰⁰ However brutally realistic this view of the world, it saps the life from a vigorous defense. The grandest ambition for a training program that is savvy about negotiation theory and practice goes beyond better results in a few cases. Its deepest effects would be to celebrate negotiation successes and to turn around a defeatist mindset.

198. See *supra* Part II.B.3; *supra* note 114 and accompanying text.

199. See *supra* Part III.C.1.

200. Interview with H, *supra* note 63.

APPENDIX: SELECTED QUESTIONS FROM THE DEFENSE COUNSEL
SURVEY

Section 1: Background Questions

The following questions are about you and your background. Questions about your work history refer to *after* law school graduation only.

How long have you worked in this Public Defender's Office?
_____ years

How many years total have you worked as a criminal defense attorney?
_____ years

Before coming to this Public Defender's Office, did you ever work as a prosecutor?
A. Yes
B. No

What percentage of your current caseload falls into each of the following categories (adds up to 100)?
Misdemeanors _____
Juvenile _____
Traffic _____
General Felony _____
Specialized Felony Unit _____
Other _____

What is your gender?
Male
Female

Optional: What is your racial and ethnic background? (Check all that apply.):
African-American
Asian
Hispanic

White, not Hispanic
Native American or Pacific Islander
Other (including more than one race)

Section 2: Negotiation Practices

Frequency of Negotiated Pleas

In your estimation, how often do your clients get a higher sentence after trial than they probably would have received after a guilty plea, assuming the offense/s of conviction are the same at trial and after a plea?

[Never, Infrequently, Sometimes, Usually, Always]

Factors that Influence Negotiations

How important to the outcome of a negotiation are each of the following factors when you are discussing potential dispositions with a prosecutor?

[1 = not important at all, 2 = relatively unimportant, 3 = moderately important, 4 = relatively important, 5 = extremely important]

Category/type of case (e.g., drugs, property, robbery).

Your client's criminal history.

Strength or weakness of any suppression issues.

Probability of conviction on all charges if case were to go to trial.

Your knowledge of the relevant legal issues.

Your knowledge of the relevant facts.

The number of cases on the prosecutor's docket along with this case.

The number of cases you are defending at the same time as this case.

Relevant collateral consequences of a conviction for your client (e.g., immigration, public housing, occupational license).

Whether client is currently in custody.

What your client wants and needs.

Your knowledge of alternatives to incarceration.

Sentence range under state law for negotiated plea.

Law enforcement witness's wishes (in cases with law enforcement witness).

Victim's wishes (in cases involving victim).
Application of prosecutor office-wide policy related to this type of charge or defendant.
What the judge is likely to do at sentencing in cases like this.
Prosecutor's personality.
Prosecutor's reputation as a trial attorney.
Prosecutor's reputation as a negotiator.
Your personality.
Your reputation as a trial attorney.
Your reputation as a negotiator.
Your relationship with the prosecutor assigned to the case.

How often do the following statements about the *timing of negotiations* play out in plea bargaining?

[never, infrequently, sometimes, usually, always]

Prosecution initiates the bargaining process.
Prosecution makes the first concrete offer (as to either the count for a plea or the agreed-upon sentence).
Client accepts first offer from prosecutor.
In cases where prosecution makes first concrete offer, you make counter-offer.
In cases where you make first concrete offer, prosecutor makes counter-offer.
Prosecutor makes "take it or leave it" offer.
Prosecutor sets expiration date for offer (as opposed to leaving it open until trial or not mentioning any deadline).
You initiate the bargaining process.
There is no negotiation at all.

For the most common type of case that you handle, how would you characterize the prosecutor's typical first offer? (Check one.):

Highly unfavorable to the defendant.
Somewhat unfavorable to the defendant.
Reasonable.
Somewhat favorable to the defendant.
Highly favorable to the defendant.

For the most common type of case that you handle, how would you characterize your typical first offer? (Check one.):

- Highly unfavorable to the defendant.
- Somewhat unfavorable to the defendant.
- Reasonable.
- Somewhat favorable to the defendant.
- Highly favorable to the defendant.

Estimate the total time you spend on all bargaining discussions or exchanges with the prosecution in a typical case:

- ___ Less than 5 minutes.
- ___ 5-15 minutes.
- ___ 15-30 minutes.
- ___ 30-60 minutes.
- ___ More than 60 minutes.

How often do you use the following *channels of communication* with the prosecution during plea negotiations?

[Never, Infrequently, Sometimes, Usually, Always]

- Email (including offer letter attachment).
- Phone.
- In person, in the office.
- In person, in the courtroom.
- Text message.
- Letter (by fax or mail).
- Other: _____.

Section 3: Preparation for Bargaining

For the following questions related to preparation for bargaining, please answer with reference to the most common level of cases that you handle.

How often do you engage in the following activities as you prepare for any bargaining session in a typical case?

[Never, Infrequently, Sometimes, Usually, Always]

- File review.
- Interview defense witnesses.
- Interview prosecution witnesses.
- Investigation of crime scene.

Legal research.

Asking witnesses how they feel about particular plea outcomes.

Asking the client how he/she feels about various potential plea outcomes.

Discussing or mooting negotiation with colleague or supervisor.

Exploring relevant collateral consequences to structure pleas to avoid or minimize them.

How often do you meet with a supervisor before bargaining begins to review your preparations?

Never.

Infrequently.

In about half of my cases.

Frequently.

Always.

Section 4: Training about Negotiation

How many days of new attorney training did the office or affiliated organizations provide for you at the time you were first hired? _____

Of the training noted above, what percentage related specifically to negotiation skills and preparation for bargaining? _____

As part of your new attorney training, how many hours did you spend observing an experienced attorney engaged in plea negotiations? _____

After the period of new attorney training, in a typical year, how many hours of training (in-house or external) do you receive that focus on negotiation skills? _____

[If the answer to the previous question is > 0, this follow-up question appears:]

What percentage of those hours was provided during in-house training programs? _____

At any time while working in your current office, have you ever received any written training materials that relate specifically to negotiation skills or plea bargaining?

- A. Yes
- B. No

[If the answer to the previous question is Yes, this follow-up question appears:]

Have you ever consulted or referred to those materials after the time of the training?

- A. Yes
- B. No