

Strategies For Conducting More Effective Plea Negotiations

By **Kalia Coleman, Andrew Patton and Edward Casmere** (July 24, 2023, 4:04 PM EDT)

To plea bargain, or not to plea bargain: That is the question criminal defendants almost always face.

Plea negotiations unquestionably play a crucial role in encouraging the prompt disposition of cases, preserving the criminal justice system's finite resources.

The reality is that, today, most criminal cases end in negotiated plea agreements.[1] That is partly because plea deals provide a level of certainty for both the government and the defendant, but also because the risks of going to trial in a criminal case are profound for both sides.

In fact, when a defendant is convicted at trial, it is likely that the prosecutor will seek, and the judge will impose, a longer custodial sentence than a defendant might have received under a plea bargain.[2]

Recent prominent indictments related to a Massachusetts National Guard airman's alleged theft of classified documents from the Pentagon,[3] and the alleged mishandling of confidential documents by former President Donald Trump[4] — as well as the plea deal struck by Hunter Biden on federal gun and tax charges[5] — have reignited interest in the plea bargain process.[6]

Given the magnitude of the stakes, understanding how to effectively negotiate a plea deal is critical for both prosecutors and defense lawyers. This article provides a short primer on ways to conduct more effective plea negotiations, with some insights gleaned from a high-profile plea bargain in the federal "Varsity Blues" college admissions scandal earlier this year.

Different Pleas in Different Places

Plea bargain negotiations are necessarily unique endeavors dictated by the facts and circumstances of each individual case.

While the process is functionally similar in state and federal court, the different forums have some significant structural differences.



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At the state level, prosecutors generally have broad discretion in plea bargaining as long as the ultimate sentence negotiated is authorized by law.[7] Thus, negotiating pleas at the state level will be localized and prosecutor-driven.

At the federal level, U.S. Department of Justice policy imposes requirements that a plea agreement must satisfy.[8] Federal prosecutors are also limited by the dictates of the federal sentencing guidelines, and are required to negotiate sentence recommendations that reflect an appropriate balance of the factors set forth in Title 18 of the U.S. Code, Section 3553(a).[9]

Consequently, federal prosecutors operate within stricter parameters than state prosecutors when negotiating plea bargains. These structural differences can dramatically alter the outcome of plea negotiations.

Plea Negotiation Lessons From a Recent High-Profile Case

The prosecution and plea agreement of William "Rick" Singer in the "Varsity Blues" college admission scandal provides an excellent case study on plea negotiations in cases involving front-page news.

From 2011 to 2019, Singer was alleged to have "conspired with dozens of parents, athletic coaches, a university athletics administrator, and others, to use bribery and other forms of fraud to secure the admission of students to colleges and universities," including Georgetown University, Stanford University, UCLA, the University of Southern California, the University of Texas, Wake Forest University and Yale University.

In total, Singer is said to have received more than \$25 million from clients, of which he paid more than \$7 million in bribes, and transferred, spent or otherwise used more than \$15 million for his own benefit.

The scandal was high-profile, involving dozens of defendants, including celebrities, and prestigious institutions.

Despite strong evidence against him, Singer had significant leverage in plea bargaining, and ultimately struck a favorable deal. As stated at Singer's sentencing hearing, "the eyes of the country are on this courtroom," evidencing the immense political and social pressure on the prosecution.

Singer, as the alleged mastermind of the scheme, was the best, and sometimes only, source of information that could be used against co-conspirators.

When Singer was initially approached by law enforcement agents, he agreed to cooperate, but did so reluctantly.

During the early stages of his cooperation, Singer attempted to covertly warn co-conspirators to cease their criminal activity. But Singer also provided information on dozens of targets, and used a wire to record hundreds of phone calls and face-to-face meetings.

Singer's cooperation, according to the government, allowed for the prosecution of "dozens of parents and other co-conspirators who otherwise would have escaped charges."

The government's sentencing memorandum and motion for downward departure pursuant to Section 5k1.1[10] describes "Singer's cooperation [as] unprecedented."

When all was said and done, the government requested a sentence of six years imprisonment — a sentence that was well below the maximum statutory range, and below the advisory sentencing guidelines, which, according to the government, was 188 to 235 months.[11]

Ultimately, in a show of judicial discretion, Singer was sentenced to 42 months.

Singer's case brings to mind three key negotiation concepts that both prosecutors and defense counsel should manage during the plea-bargaining process:

Leverage

Leverage is about the perception of the power each side has in the negotiation — both the other side's power, as well as their own. Whether the other side actually has that perceived power is often never revealed.

While it may seem counterintuitive, defense counsel often have significant leverage when negotiating a plea agreement in a criminal prosecution — if, for example, the government perceives it has a bigger target to go after and thinks a defendant is the only potential source of necessary evidence.

Leverage is generally not binary — i.e., one side has it and the other side does not — but is typically multifaceted and usually fluid, i.e., a negotiation's leverage mosaic changes throughout a negotiation.

Despite being the target in the Varsity Blues investigation, Singer clearly had significant leverage in his negotiations with prosecutors as his cooperation was critical, and perhaps necessary, to the successful prosecution of numerous other individuals.

Best Alternative to a Negotiated Agreement

Related to leverage is the concept of best alternative to a negotiated agreement, or BATNA. Coined by Harvard professors Roger Fisher and William Ury in their landmark 1981 book, "Getting to Yes," BATNA essentially means that the side with the better options can afford to press harder for a more favorable deal.

Conducting a BATNA analysis is just as relevant to a plea negotiation as to a business dispute. While the common perception is that the government has the better BATNA — going to trial — defense counsel may have a better alternative in situations where, for example, the evidence is weak, good appellate issues exist, or the government or prosecutor is under political or social pressure.

In the Singer case, his BATNA was not great — going to trial and facing a significant prison sentence. But it was better than the government's BATNA, i.e., trying Singer and then trying a number of other defendants without the help of a critical cooperating witness who could easily deliver guilty verdicts — all under the watchful eye of a very interested media.

The Sunk Cost Fallacy

The sunk cost fallacy occurs when a person continues a course of action because they have already invested a significant amount of time or energy in it — "I've come this far, so I might as well just keep going." Starting a plea negotiation doesn't mean that it has to end with an agreement.

Sometimes you negotiate knowing the prospects of a deal are low, but by engaging in negotiations you have an opportunity to apply pressure, send messages, get information or shift the other side's perspective, which affects leverage.

There's nothing wrong with — in shark-like fashion — taking an investigatory bite and then swimming away when you realize that was not the deal you were looking for.

While the details of the Singer negotiations are not public, reading between the lines of the information that is, it seems pretty clear that both Singer and the government negotiated hard to get and held out for the best deal, while always maintaining a posture of being able to walk away from the negotiations.

7 Strategies for Criminal Defendants to Get the Best Bargain

Of course, most plea negotiations are not as high-profile as the Singer case, nor do they always have so many variables.

Zeroing in on the best strategy requires significant preparation. While defense counsel must tailor their plea-bargaining strategy to the specific court, charges, prosecutor, facts and judge involved, below are seven strategies defense attorneys can use to put their client in the best position for the plea negotiations.

1. Take advantage of pretrial diversion programs where available.

In rare circumstances, at both the federal and state levels, a defendant may be eligible for pretrial diversion programs.

Where available, successful completion of a pretrial diversion program can result in a favorable outcome, including the declination, dismissal or reduction of charges, or a more favorable recommendation at sentencing, among other outcomes.

2. Consider a charge agreement.

When a defendant can be charged with multiple crimes, a charge agreement can be particularly useful, especially at the federal level.

While the court does not have to follow the recommendations within a plea agreement, negotiating the charge can lock the court into a statutory range or prevent the judge from imposing a statutory minimum sentence.

3. Perform your own investigation.

Defense counsel should always perform an independent investigation of the alleged crime. As part of this investigation, counsel should consider hiring an investigator to interview prosecution witnesses to develop a defense theory of the case and expose potential credibility issues.

A thorough investigation allows defense counsel to identify weaknesses in the prosecutor's case and request dismissal, pretrial diversion, a reduced charge and/or a lesser sentence.

For example, in the Singer case, the alleged scheme was complicated and involved many players. By performing an independent investigation, Singer's attorneys would have been able to identify favorable witnesses and facts to bolster Singer's negotiation leverage and BATNA.

Additionally, had Singer's attorneys found anything unfavorable that the government was yet to discover, they would be positioned to mitigate the potential harm.

4. Study your judge.

At both the federal and state levels, judges have discretion to accept or reject a plea. This is especially true in federal court, where judges have broad discretion in interpreting the federal sentencing guidelines.[12]

Defense counsel should study the judge's sentencing patterns and practices prior to negotiating a plea agreement to guide the requests for the prosecutor to make certain concessions and exclude extraneous facts.

Knowledge of a judge's sentencing practices can provide valuable information that will affect leverage and BATNA analyses.

5. Seek judicial involvement.

Some states allow for judicial involvement in plea negotiations.[13]

Where available, judicial involvement can provide the opportunity to highlight the weaknesses in the prosecution's case; personalize the defendant by providing mitigating evidence, e.g., educational and employment accomplishments, mental and physical health issues, personal or familial issues that affected the defendant's decision making, etc.; and serve as a counterbalance to an overzealous prosecutor.

6. Consider a Rule 11(c)(1)(C) plea.

It is also important to understand the plea options provided by Federal Rule of Criminal Procedure 11. Under most federal plea agreements, the parties recommend a punishment to the court, but the court is not bound by the recommendation, and the defendant is not allowed to withdraw their guilty plea should the court deviate.

However, a Rule 11(c)(1)(C) plea allows the parties to agree on a specific sentence, sentencing range and sentencing factors.

If the court accepts the plea, then the court must follow the parties' agreements. If the court rejects the plea, then the defendant is allowed to withdraw their guilty plea.

7. Tailor the factual-basis language.

Federal plea bargains must include a written factual basis for the charges when a guilty plea is entered.[14] Tailoring the language of the factual basis to reflect relevant factors from the federal sentencing guidelines can encourage the judge to interpret the offense seriousness and base offense level favorably to the defendant.

In Singer's case, the 42-month sentence is probative of the impact of the written factual basis discussed above. Here, the factual basis laid out both Singer's unprecedented level of cooperation and his attempts to obstruct justice by warning co-conspirators.

The factual basis provided in the sentencing memo, however, describes Singer's cooperation as "hugely significant," "unquestionably [leading] to the guilty pleas of many parents," and "[warranting] a significant downward departure from the low end of the Sentencing Guidelines range."

The 42-month sentence strongly suggests that the judge found his cooperation extremely compelling.

Conclusion

As Singer's case demonstrates, negotiating a plea deal is a dynamic and fact-specific endeavor. Given that 98% of criminal cases in federal courts end with a plea bargain,^[15] understanding how to conduct more effective plea negotiations is a critical skill for all practitioners.

Taking the time to adequately prepare for, understand and react to different negotiation principles is key to successfully negotiating a better plea agreement — which is crucial for both prosecutors and defense attorneys to secure the best result for their client.

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[1] See e.g., ABA 2023 Plea Bargain Task Force Report at n.2 (citing a Pew Research Center study finding that of nearly 80,000 defendants who faced charges in the federal system in fiscal year 2018, fewer than 2% went to trial).

[2] See In the Shadows: A Review of the Research on Plea Bargain, <https://www.vera.org/publications/in-the-shadows-plea-bargaining> (finding sentences imposed at trial to be on average 64% longer than those imposed through plea bargains).

[3] <https://www.msn.com/en-us/news/us/pentagon-leak-suspect-jack-teixeira-indicted-on-charges-that-he-kept-and-shared-classified-documents/ar-AA1cBOYu> (last accessed June 18, 2023).

[4] <https://www.nytimes.com/2023/06/09/us/politics/trump-indictment-charges-classified-documents.html> (last accessed June 18, 2023).

[5] <https://apnews.com/article/hunter-biden-charges-what-to-know->

31ad4a0df292754131e799de2c089fd1 (last accessed June 25, 2023)

[6] <https://www.forbes.com/advisor/legal/criminal-defense/plea-bargain/> (last accessed June 18, 2023).

[7] See e.g., *People v. White*, 2011 IL 109616, ¶ 20 (a court is responsible for enforcing the statutory requirements and cannot give a sentence if it is not authorized by law).

[8] See e.g., DOJ Manual § 9-27.420 (setting forth considerations for the Government attorney to consider when determining whether it would be appropriate to enter into a plea agreement); *id.* at § 9-27.430 (in negotiating a plea bargain, "a prosecutor must pursue the most serious, readily provable charge consistent with the nature and extent of the defendant's criminal conduct.").

[9] 18 U.S.C. § 3553(a) provides that the court shall impose a sentence based upon the following factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, to promote respect for law, provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with effective correctional treatment; (3) the kinds of sentences available; and (4) the kinds of sentences and the sentencing ranges available for the applicable category of offense committed by the applicable category of defendant and in the case of violation of probation or supervised release.

[10] *US v. Singer*, Docket No. 1:19-cr-10078 (D. Mass. Mar 05, 2019) at ECF No. 91.

[11] The government's sentencing calculation was disputed by probation, who recommended 78 to 97 months. Throughout the Varsity Blues cases, the government and probation consistently reached different conclusions as to their sentencing recommendations because of a disagreement over the application of an offense-level enhancement for gain as an alternative measure of loss.

[12] Under *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, the Federal Sentencing guidelines are advisory and not mandatory.

[13] See e.g., Ill. R. 402 (d)(1) (allowing for judicial involvement in plea negotiations upon request by the defendant, agreement by the prosecutor, and after the court admonishes the defendant of the associated risks and receives their consent).

[14] DOJ Manual, § 9-27.430 (The written factual basis "is intended to assure against conviction after a guilty plea of a person who is not in fact guilty.")

[15] <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice> (last accessed June 18, 2023).