
FAIR AND EFFECTIVE ADMINISTRATION OF JUSTICE: AMENDING RULE 11(c)(1) TO ALLOW FOR JUDICIAL PARTICIPATION IN PLEA NEGOTIATIONS*

I. INTRODUCTION

The Supreme Court of the United States has observed, “[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.”¹ In federal courts, Rule 11 of the Federal Rules of Criminal Procedure governs criminal pleas.² Rule 11(c)(1) reads: “The court *must* not participate in . . . [plea agreement] discussions.”³ Only a defendant’s attorney or a pro se defendant may negotiate a plea agreement with the government.⁴ Rule 11(c)(1) has attracted the attention of the bar for decades, receiving the attention of proposed amendments and fervent academic commentary. It has, however, never been amended. The American Bar Association’s (ABA) adamant opposition to judicial participation in plea negotiations has had tremendous influence, as is reflected in the rule’s unchanged language.

Until recently, some federal district courts had implemented local rules permitting a judge who was not trying the case to participate in the plea negotiations.⁵ Under this model, the judge would hear both sides of the case and make an unbiased assessment.⁶ In 2013, the Supreme Court sent a message in *United States v. Davila*⁷ that Rule 11(c)(1) bars *all* judicial participation in plea negotiations, even by a judge who is not the trial judge. The *Davila* decision invalidated all local rules used by federal district courts that allowed judicial participation in plea negotiations. Many states still allow judicial participation

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1. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).
2. FED. R. CRIM. P. 11.
3. *Id.* 11(c)(1) (emphasis added).
4. *Id.*
5. See *infra* notes 193–99 and accompanying text for a discussion of local rules that allowed judicial participation.
6. See *infra* notes 216–24 and accompanying text for further discussion of what judicial participation in a plea negotiation looks like.
7. 133 S. Ct. 2139, 2141, 2147–50 (2013) (holding that judicial participation in a plea negotiation does not require vacation of the plea if the record shows no prejudice to the defendant’s decision). The Court focused its discussion on the consequences of a Rule 11(c)(1) violation, and not on whether a judge should be permitted to participate in the plea negotiations. *Davila*, 133 S. Ct. 2139.

through state procedural rules⁸ or the common law.⁹

In response to *Davila*, Chief Judge Claudia Wilken of the Northern District of California proposed an amendment to Rule 11(c)(1) to the Advisory Committee on the Federal Rules of Criminal Procedure in April of 2014.¹⁰ The Northern District's local rule had interpreted Rule 11(c)(1) to bar participation of the trial judge in plea negotiations, but not participation of another judge.¹¹ Judge Wilken suggested an amendment to Rule 11(c)(1) that would allow a federal trial judge to refer plea negotiations, "upon consent and with appropriate safeguards," to another judge.¹² A subcommittee considered the proposal in October 2014 but declined to take action.¹³ This Comment calls for the ABA to reconsider its position on judicial participation in plea negotiations and advocates for an amendment that allows for this participation. Because virtually all federal criminal cases result in pleas, judges should be permitted to participate in negotiations to (1) check prosecutorial power, (2) monitor defense attorney practice, (3) match the practices of state judge counterparts, and (4) reflect pre-*Davila* district court practices.

II. OVERVIEW

This Comment focuses on the history of the Rule 11(c)(1) debate and the issues raised by an amendment. Section II of this Comment is divided into four Parts. Part II.A explains the federal rule amendment process. Part II.B highlights the significance of the ABA's position on Rule 11. The discussion in Part II.C focuses on the concerns associated with judicial participation in plea negotiating. Part II.D concludes by delineating the advantages to be gained by permitting judicial participation in plea negotiations.

A. *The Amendment Process*

A variety of individuals or groups (including judges, practicing attorneys, government agencies, academics, and bar associations) can propose an amendment to a federal rule.¹⁴ The proposed amendment then must make its

8. *E.g.*, FLA. R. CRIM. P. 3.171(d). State rules remain unaffected because *Davila* applies to only federal courts.

9. *E.g.*, *State v. Revelo*, 775 A.2d 260 (Conn. App. Ct. 2002). State common law rules remain unaffected because *Davila* applies to only federal courts.

10. Letter from Judge Claudia Wilken, Chief Judge, N. Dist. of Cal., to Judge Reena Raggi, Chair, Advisory Comm. on Criminal Rules (Apr. 10, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/cr-suggestions-2014/14-CR-C-Suggestion.pdf> [hereinafter Rule Suggestion].

11. N. DIST. CAL. CRIM. LOCAL R. 11-1(b) (2013). See *infra* note 193 for further discussion of the Northern District's pre-*Davila* rule.

12. Rule Suggestion, *supra* note 10.

13. 2014 *Criminal Rules Suggestions*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/archives/suggestions/hon-claudia-wilken-14-cr-c> (last visited Feb. 1, 2016).

14. *How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Feb. 1, 2016). For more information on how to propose a rule, see generally BRYAN A. GARNER, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES* (5th ed. 2007), www.uscourts.gov/file/guidepdf.

way through a series of approvals. First, the proposal is recommended to an advisory committee on the rules.¹⁵ If that advisory committee pursues a proposal, it may ask the Committee on Rules of Practice and Procedure (Standing Committee) for permission to publish a draft of the proposed amendment. The advisory committee then invites comments from the bench, bar, and public.¹⁶ The advisory committee may then adjust the proposed amendment according to those comments.¹⁷ The Standing Committee then independently reviews the proposed amendment and the advisory committee's findings, and if satisfied, the Standing Committee recommends changes to the Judicial Conference.¹⁸ The Judicial Conference recommends its own changes to the Supreme Court.¹⁹ If the Supreme Court concurs in the proposal, it promulgates the amended rule by order before May 1, to take effect no earlier than December 1 of the same year.²⁰ Finally, Congress must approve the amendment.²¹

The Federal Rules of Criminal Procedure (Rules) took effect in 1946.²² The purpose of the Rules is to ensure the “just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”²³ Rule 11 governs plea procedure and fairness in the administration of plea agreements.²⁴ Rule 11 was first amended in 1966 and twelve times afterwards, yet never to allow judicial participation in plea negotiations.²⁵

In conjunction with each set of amendments to the Rules, the Advisory Committee on the Federal Rules of Criminal Procedure (the Advisory Committee) publishes its notes to the Standing Committee.²⁶ The Advisory Committee has addressed judicial participation on three occasions. First, in 1972, the Advisory Committee acknowledged it was “common practice” for a judge to participate in a plea bargain, and in response, formally amended Rule 11 to mandate that “the court shall not participate in [the plea negotiation] discussions.”²⁷ The 1972 commentary lists risks associated with judicial

15. *How the Rulemaking Process Works*, *supra* note 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Inaction on Congress's part is the equivalent to an approval.

22. COMM. ON THE JUDICIARY, 113TH CONG., FEDERAL RULES OF CRIMINAL PROCEDURE xiv (Comm. Print 2015), www.uscourts.gov/file/document/rules-criminal-procedure [hereinafter COMM. PRINT].

23. FED. R. CRIM. P. 2.

24. *Id.* 11.

25. See COMM. PRINT, *supra* note 22, at 18.

26. See *How the Rulemaking Process Works*, *supra* note 14, for the main page housing the reports. The Advisory Committee publishes notes on all proposed amendments. *Id.*

27. ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, REPORT TO STANDING COMMITTEE proposed R. 11(e)(1) (1972), <http://www.uscourts.gov/file/14752/download> [hereinafter 1972 REPORT TO STANDING COMMITTEE].

involvement, specifically pointing to those raised in the first edition of the ABA Standards: a defendant may believe he will not receive a fair trial if the trial were before the same judge, that belief may result in the defendant pleading guilty even though he is innocent, and the judge may have difficulty “objectively assess[ing] the voluntariness of the plea.”²⁸ The Advisory Committee underscored Rule 11(c)(1)’s clear bar to judicial participation, but “contemplated” a judge could participate in the negotiations “when the plea agreement is disclosed in open court.”²⁹

In 1995, discussion regarding judicial participation in plea negotiations surfaced again. Judge D. Lowell Jensen, then the Chair of the Advisory Committee, had attended a Ninth Circuit judicial conference and learned that courts in the Southern District of California were allowing trial judges to refer criminal cases to other judges for settlement negotiations.³⁰ At the 1995 meeting of the Advisory Committee, Judge Lowell raised the question, “[W]hat is meant by the term ‘court?’”—indicating a lack of clarity as to whether Rule 11(c)(1) referred to the trial judge or *all* judges.³¹ The Advisory Committee appointed a subcommittee, but later unanimously voted to accept the subcommittee’s recommendation to retain the status quo.³²

In 1999, the Advisory Committee commenced a general revision of Rule 11 and, again, considered judicial participation in plea negotiations.³³ Referencing Rule 11’s “court” language, the Advisory Committee acknowledged that “[s]ome courts . . . believe that that language acts as a limitation only upon the judge taking the defendant’s plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant.”³⁴ The Advisory Committee ultimately left the Rule “as is,” but noted it was not “approv[ing] or disapprov[ing] [of] the existing law interpreting that provision.”³⁵

In 2014, Judge Wilken proposed an amendment, which went to a subcommittee for consideration. The subcommittee declined to take action.³⁶ In

28. *Id.* advisory committee’s note to proposed amendments to Rule 11.

29. *Id.*

30. Memorandum from Sara Beale & Nancy King, Reporters, to the Rule 11 Subcomm. 8 (Aug. 27, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2014-11.pdf> (discussing the 1995 meeting).

31. *Id.* at 8–9 (citing Mins. of the Advisory Comm. on the Fed. Rules of Criminal Procedure 5–6 (Apr. 29, 1996)). In the Advisory Committee reporter’s memo to the Advisory Committee, he cited *United States v. Torres*, 999 F.2d 376 (9th Cir. 1993), in which the Ninth Circuit had held it permissible for a judge to participate in plea negotiations, provided it was not the trial judge participating. Memorandum from Dave Schlueter, Reporter, to Members, Criminal Rules Advisory Comm. (Sept. 7, 1995), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR1995-10.pdf>.

32. Memorandum from Dave Schlueter, *supra* note 31.

33. ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, REPORT TO STANDING COMMITTEE advisory committee’s note to proposed amendments to Rule 11 (1999), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR12-1999.pdf>.

34. *Id.*

35. *Id.*

36. ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, REPORT TO STANDING

its report to the Standing Committee, the subcommittee wrote that “after extended discussion” and a “divided vote,” it would not pursue the proposed amendment.³⁷ The subcommittee acknowledged six districts using the practice, but it was “not persuaded there was an urgent need for an amendment.”³⁸

B. *The ABA Standards*

The Advisory Committee’s 1972 discussion of Rule 11(c)(1) cited to the ABA’s standards for guilty pleas.³⁹ Beginning in 1968, the ABA created and published various sets of standards (collectively, “Standards”) intended to guide jurisdictions in the criminal justice system.⁴⁰ The ABA’s Standards are intended to reflect agreed-upon views shared by different groups within the criminal justice system, and are thus considered “balanced” and “practical.”⁴¹ Jurisdictions use the Standards as both “sources of authority” and persuasive reasoning to adopt or reform their rules of criminal procedure.⁴² In general, the Standards have been enormously influential and have proven particularly significant in conversations surrounding Rule 11(c)(1).⁴³

The ABA amended its Standards related to guilty pleas twice, once in 1982,⁴⁴ and again in 1999.⁴⁵ In the original edition of the Standards, the ABA explicitly stated that “[t]he trial judge should not participate in plea discussions.”⁴⁶ The ABA’s commentary did advocate permitting a judge to

COMMITTEE 2 (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR12-2014.pdf> [hereinafter 2014 REPORT TO STANDING COMMITTEE].

37. *Id.*

38. *Id.* The Advisory Committee wrote that because guilty plea rates exceed ninety-five percent, courts are not overwhelmed by trials (and thus, allowing judicial participation in plea negotiations would not affect the federal court docket). *Id.* The counter argument to this one is, of course, that guilty rates exceed ninety-five percent and therefore judges are currently not present for over ninety-five percent of federal criminal cases.

39. 1972 REPORT TO STANDING COMMITTEE, *supra* note 27, advisory committee’s note to proposed amendments to Rule 11 (citing STANDARDS RELATING TO PLEAS OF GUILTY § 1.1(b) cmt., at 16–18 (AM. BAR ASS’N, Approved Draft 1968)).

40. Martin Marcus, *The Making of the ABA Criminal Justice Standards*, 23 CRIM. JUST., no. 4, Winter 2009, at 1. Though the first edition of the Standards was drafted in 1968, it was not published until 1974. *Id.*

41. *Id.* at 2 (quoting Chief Justice Burger).

42. *Id.*

43. In the 1972 Advisory Committee’s notes, the Advisory Committee referenced the Standards as a reason for leaving the rule as is. 1972 REPORT TO STANDING COMMITTEE, *supra* note 27, advisory committee’s note to proposed amendments to Rule 11. Additionally, in a memo to the current subcommittee, opponents of the amendment put forward the Standards as evidence that the proposed amendment should not be adopted. Memorandum from Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, to Morrison C. England, Jr., Chief Judge, E. Dist. of Cal. 157–60 (Aug. 29, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2014-11.pdf>.

44. 3 STANDARDS FOR CRIMINAL JUSTICE § 14-3.3(c), (f) (AM. BAR ASS’N, 2d ed. 1982) [hereinafter 3 ABA STANDARDS 2d ed.].

45. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.3(c)–(d) (AM. BAR ASS’N, 3d ed. 1999) [hereinafter ABA STANDARDS 3d ed.].

46. AM. BAR ASS’N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS

advise parties whether he would concur in the tentative plea, but distinguished this act from active judicial involvement with the procedure.⁴⁷

In 1982, the ABA published its third volume of the second edition of the Standards related to guilty pleas.⁴⁸ This edition provided a very different perspective on judicial participation in plea negotiations, allowing a judge to serve as a “moderator” if the prosecution and defense counsel agreed.⁴⁹ It said a judge should “listen[] to the[] respective presentations [of the prosecution and defense counsel] concerning appropriate charge or sentence concessions,” and then “indicate what charge or sentence concessions would be acceptable or whether [he] wishes to have a preplea report before rendering a decision.”⁵⁰ The edition did limit the moderating judge, precluding him from telling the defendant or defense counsel “through word or demeanor” to accept a plea agreement.⁵¹

In 1999, the ABA published its third edition of the Standards and abandoned the second edition’s “moderator” language.⁵² Instead, the ABA reverted to its original position that judicial participation in plea negotiations is undesirable, thus making the third edition more similar to the first.

1999 is the last year the ABA published any commentary on judicial participation in plea negotiations. Since then it has maintained its opposition, and the Advisory Committee continues to base its position on that of the ABA.⁵³ Accordingly, the concerns expressed in the ABA’s 1972 commentary continue to underlie opposition to judicial participation in plea negotiations.

C. *Why Judges Should Not Be Permitted to Participate in Plea Negotiations*

The ABA has explained that despite state court practices permitting judicial participation in plea negotiations, its Standards “reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.”⁵⁴ Concerns about judicial participation fall into three

RELATING TO PLEAS OF GUILTY § 3.3(a), at 71 (Approved Draft, 1968). The ABA noted four reasons for excluding the trial judge from negotiations:

- (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to the trial before this judge;
- (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered;
- (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and
- (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

Id. cmt. to § 3.3(a), at 73.

47. *Id.*

48. 3 ABA STANDARDS 2d ed., *supra* note 44.

49. *Id.* § 14-3.3(c).

50. *Id.*

51. *Id.* § 14-3.3(f).

52. ABA STANDARDS 3d ed., *supra* note 45, § 14-3.3(c), (d).

53. See Memorandum to Chief Judge Morrison C. England, Jr., *supra* note 43, for a discussion on how the ABA maintains its opposition to judicial participation in plea negotiations.

54. ABA STANDARDS 3d ed., *supra* note 45, § 14-3.3(b) presentence report, at 134–35.

main categories: (1) judicial coercion, (2) the integrity of the judicial process, and (3) the potential for unfair punishment if a plea is not accepted.⁵⁵

1. Coercion

The most-cited concern, and that which the court in *United States ex rel Elksnis v. Gilligan* underscored,⁵⁶ is judicial coercion. In *Gilligan*, the court focused on “[t]he unequal positions of the judge and the accused,” which, according to the court, made judicial participation in negotiations “a question of fundamental fairness.”⁵⁷ The court used strong language, contending a judge would “bring[] to bear the full force and majesty of his office” in negotiations because “[h]is awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.”⁵⁸

The underlying concern is that defendants will feel compelled to accept plea agreements, rendering the plea involuntary.⁵⁹ Such concern manifested in the Supreme Court’s *United States v. Brady*⁶⁰ decision, in which the Court conditioned the constitutionality of plea agreements on the voluntariness of the plea.⁶¹ Courts have consistently found judges to be in violation of Rule 11(c)(1) when their participation was interpreted as coercive in nature.⁶² For example, in *United States v. Bradley*,⁶³ the Fourth Circuit concluded that a district court

55. See *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993) (citing three concerns: (1) “the possibility of judicial coercion,” (2) the possibility of creating a misleading role for the judge in proceedings, and (3) the possibility of “impair[ing] the trial court’s impartiality”). In a memo to the current Rule 11 subcommittee, Professors Sara Sun Beale and Nancy King, the subcommittee reporters, presented disadvantages associated with judicial participation. Memorandum from Sara Beale & Nancy King, *supra* note 30, at 153–54. These disadvantages include (1) the risk that participation will have a coercive effect, (2) the difficulty of reconciling the judge’s participation in the process with his role as an arbiter, (3) the risk that the judge may not know enough about the case to be effective, (4) the risk that the court may “sacrifice fairness” to efficiency, and (5) the risk that the judge “may interfere with prosecutorial functions.” *Id.*

56. 256 F. Supp. 244 (S.D.N.Y. 1966).

57. *Gilligan*, 256 F. Supp. at 254.

58. *Id.* This language is quoted in the Advisory Committee’s 1972 notes. 1972 REPORT TO STANDING COMMITTEE, *supra* note 27, advisory committee’s note to proposed amendments to Rule 11.

59. Rule 11 requires that the judge accepting the plea agreement ensure the voluntariness of the defendant’s decision to plead. FED. R. CRIM. P. 11(b)(2).

60. 397 U.S. 742 (1970).

61. See *Brady*, 397 U.S. at 756–57 (finding the defendant’s plea “voluntarily” and “intelligently” made despite a possible motivation to avoid the death penalty).

62. See, e.g., *United States v. Bruce*, 976 F.2d 552, 555 (9th Cir. 1992) (invalidating a plea where the judge urged the defendants to “think carefully” about the fact that they faced life sentences, noted that the penalty under the Sentencing Guidelines was “so heavy, so very, very heavy,” and requested the prosecution leave the offer open to allow for additional time); *State v. Bouie*, 817 So. 2d 48 (La. 2002) (invalidating a plea due to coercion where the judge told the defendant that in twenty years he had seen only two acquittals in felony cases, and that the defendant was going to be convicted and sentenced to as much as one hundred years in prison).

63. 455 F.3d 453 (4th Cir. 2006).

judge had coerced a defendant by repeatedly questioning the defendant's reasons for proceeding with trial, criticizing the defendant's decision to reject the plea offer, and advising the defendant to plead guilty.⁶⁴

An embedded coercion issue grows from the concern that plea negotiations implicitly pressure innocent defendants to plead in order to avoid the risks of trial.⁶⁵ Those worried about innocent defendants pleading guilty claim that the plea negotiation system has “engulf[ed] almost everyone.”⁶⁶ They might point to the 2014 statistic reporting that 97.1% of federal cases were resolved by guilty pleas.⁶⁷ They also may argue that the addition of a judge will only increase the possibility that innocent defendants will plead guilty because a judge has the incentive to reduce his caseload.⁶⁸ In theory, innocent defendants plead guilty for a number of reasons: “the evidence they expect the state to offer at trial . . . would likely be compelling to neutral jurors and judges”; “the offer is too good to refuse”; or they “perceive . . . that they will not receive a fair and unbiased hearing.”⁶⁹

2. Integrity of the Judicial Process

The second-cited concern is the tainted integrity of the judicial process. In *Gilligan*, the court wrote that “a bargain agreement between a judge and a defendant . . . impairs the judge's objectivity” and suggests the judge is actually an advocate for the agreement, rather than a neutral mediator.⁷⁰ This judicial integrity concern encompasses a variety of possibilities, including (1) a judge will be unable to remain objective at trial once he has heard facts in plea negotiations, (2) a judge will have difficulty objectively evaluating the

64. *Bradley*, 455 F.3d at 465.

65. Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 56 (2012); see also Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992) (arguing innocent defendants are only better off going to trial if doing so means winning).

66. See, e.g., Dervan, *supra* note 65, at 56, 97 (finding the plea bargaining system has a significant “innocence problem,” meaning innocent defendants plead guilty to avoid the risks associated with going to trial).

67. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-source-books/2014/FigureC.pdf>.

68. See, e.g., F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 232–33 (2002) (arguing judges have an incentive to reduce their caseload and that their sanctioning of plea bargains implies that “due process is too costly for society”).

69. 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, 603 (2014) (citing Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 DUQ. L. REV. 595, 616–17 (2013)). *Contra* Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952 (1983) (writing that “[a]ny waiver of legal rights that these procedures induce will be an inevitable by-product of an appropriate adjudicative process, and a defendant who cares too little about his case to fight conviction through appropriate procedures probably should not be forced to do so”).

70. 256 F. Supp. 244, 255 (S.D.N.Y. 1966).

voluntariness of a plea if he participated in its negotiations, (3) a judge will not appear impartial in the greater eyes of the public, and (4) a defendant will perceive that a judge prefers a certain outcome of a plea negotiation and make a decision in line with that perceived preference.⁷¹ Further, if a judge were to provide a timeline by which a defendant must decide whether to accept a guilty plea, this could suggest judicial manipulation of the bargaining process and create the perception of partiality.⁷² Finally, even if plea negotiations were referred to a magistrate judge or another Article III judge, a referral itself still “constitutes judicial action” that could compromise the court’s neutral image.⁷³ A referral confers a connotation of encouragement that makes a defendant and the government think the referring judge wants them to come to an agreement.⁷⁴

3. Judicial Retaliation

The final-cited reason for barring judicial participation in plea negotiations—fear of judicial retaliation—was illustrated in *People v. Dennis*,⁷⁵ where the judge sentenced the defendant to forty to eighty years after the defendant rejected a plea offering a mere two to four year term.⁷⁶ This retaliation fear stems from the larger reality that those who go to trial often receive higher sentences than defendants who plead.⁷⁷

D. Why Judges Should Be Permitted to Participate in Plea Negotiations

Reasons to permit judicial participation in federal criminal plea negotiations are to (1) temper prosecutorial power, (2) monitor the performance of defense attorneys, (3) reflect state practices, and (4) build on successful district court practices that were in place pre-*Davila*.

71. See Jennifer Marquis, Note, State of Connecticut v. D’Antonio: *An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 477–85 (2006) (opining the inherent risks of bias in judicial participation in plea negotiations).

72. See, e.g., U.S. v. Corbitt, 996 F.2d 1132 (11th Cir. 1993) (finding the district court judge violated Rule 11 when he gave the defendant a deadline by which to enter a plea); Barnes v. State, 523 A.2d 635 (Md. Ct. Spec. App. 1987) (finding the judge violated Rule 11 when he said the plea would hold for only two minutes and would then be withdrawn “forever”).

73. Memorandum to Chief Judge Morrison C. England, Jr., *supra* note 43, at 157.

74. *Id.*

75. 328 N.E.2d 135, 138 (Ill. App. Ct. 1975) (focusing on the unconstitutionality of a judge punishing a defendant for exercising his right to go to trial).

76. *Dennis*, 328 N.E.2d at 138. In reducing the sentence assigned by the trial judge, the appellate court limited its finding to the case at hand and noted: “We do not intend [this decision] to erode the well established principle that a mere disparity between the sentence offered during plea bargaining and that ultimately imposed, of itself, does not warrant the use of our power to reduce a term of imprisonment imposed by the trial court.” *Id.*

77. According to Judge Jed Rakoff of the Southern District of New York, the average sentence for a federal narcotics defendant in 2012 who pled was five years and four months, while the average sentence for that same defendant who went to trial was sixteen years. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

1. Check on Prosecutorial Power

In his 1976 comprehensive commentary on plea bargaining, Professor Albert Alschuler observed, “To the extent that judges yield to prosecutors in order to make the guilty-plea system work smoothly, they sacrifice their independence.”⁷⁸ He noted judges sacrifice their power to prosecutors, and “defendant[s] can see that the prosecutor does have the power to bind the court in the overwhelming majority of cases.”⁷⁹ Professor Alschuler warned that eventually, trial judges’ review of prosecutorial sentencing determinations may be done in a cursory manner.⁸⁰ Even in 1976, when plea rates were lower than today, Professor Alschuler advocated for a return of judicial power to judges, pointing to the lack of safeguards against the increasingly powerful prosecutor.⁸¹

More recently, scholars contend that prosecutors, unfettered by judicial constraint, “extract pleas in exchange for subcompetitive prices” and in the process, “discriminate against certain classes of defendants.”⁸² This practice is evidenced in a prosecutor’s power to dictate the “price” of the plea agreement, especially in light of the institution of the Sentencing Guidelines.⁸³ The Sentencing Guidelines give prosecutors the discretion to establish parameters in plea negotiations, as it is prosecutors who choose with which crimes to charge defendants.⁸⁴ Each crime triggers a mandatory minimum sentence.⁸⁵ Also, greater access to information not only provides prosecutors with a significant advantage over defense counsel, but also confers a level of confidence not felt by the opposing side.⁸⁶ Further, prosecutors have a variety of powerful choices as to which “bargaining chips” to use in the negotiation process.⁸⁷ Examples of such

78. Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1067 (1976).

79. *Id.* at 1068–69.

80. *See id.* at 1076 (“In time, trial judges may be instructed that they should review prosecutorial sentence determinations with no greater vigor than they review, say, the rate determinations of regulatory agencies.”).

81. *Id.*; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470 (2004) (discussing the personal and professional incentives prosecutors have to resolve a case in a plea agreement). Plea agreements are certain, compared to trials, and take less time than going to trial. *Id.* at 2471. Prosecutors are therefore more likely to take a very strong case to trial and try to work out weaker cases in plea negotiations. *Id.*

82. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477 (1993).

83. *See id.* at 1478 (purporting that judges no longer control sentences, prosecutors do). The Sentencing Guidelines were promulgated in 1984 and deemed constitutional in *United States v. Booker*, 543 U.S. 220 (2005).

84. Standen, *supra* note 82, at 1505 (citing Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 462 (1988)).

85. *Id.*

86. Rakoff, *supra* note 77. Unlike a defense attorney, a prosecutor may have any of the following items: a full police report, witness interviews, other evidence, grand jury testimony, forensic test reports, and follow-up investigations. *Id.*

87. Alkon, *supra* note 69, at 587. Perhaps the largest chip a prosecutor holds is the decision over which crimes to charge. As of 2007, the United States Code contained at least 4,450 crimes. BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL

bargaining chips include decisions to charge a crime as a felony or misdemeanor, add an enhancement, add a prior conviction, or claim the crime occurred in a location that would alter the potential penalty.⁸⁸ Additionally, prosecutors can condition a plea by forcing a defendant to waive his Rule 410⁸⁹ rights at trial, or by allowing plea-related statements to be used for impeachment or as substantive evidence.⁹⁰ Finally, prosecutors can force defendants to waive their appellate rights before agreeing to pleas.⁹¹

As part of their plea negotiation “performance,” prosecutors put on what Alschuler has called a “good cop” act, where they purport to be the person standing between a defendant and the Sentencing Commission (the “bad cop”).⁹² Applying this technique, prosecutors leverage their perceived position as a defendant’s protector to convince the defendant to cooperate and take the plea.⁹³

Prosecutors also strategically negotiate by making very high opening offers, which are rejected, and then making more reasonable offers.⁹⁴ By the time they come down to a number more in line with the Sentencing Guidelines (or perhaps a bit below), their offer seems reasonable, and the defendant takes the deal.⁹⁵ This technique is what Professor Colin Miller has called the “anchoring effect.”⁹⁶ Generally, this effect is described as a cognitive bias by which people—in this case, defendants—adjust their decision making based on an initial reference point (the “anchor”).⁹⁷ This effect is particularly dangerous in the criminal world, where more than ninety-seven percent of criminal cases are resolved by plea bargains.⁹⁸ Prosecutors often make the first move, anchoring a defendant,

INTENT REQUIREMENT IN FEDERAL LAW 6 (2010), http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf. Brian Walsh and Tiffany Joslyn of the National Association of Criminal Defense Lawyers write that “the proliferation of poorly drafted criminal offenses that are vague and overbroad, and . . . the expanded federal criminal law becomes a broad template for the misuse and abuse of governmental power.” *Id.* at 10.

88. Alkon, *supra* note 69, at 587.

89. See FED. R. EVID. 410(a) (explaining that evidence of withdrawn guilty pleas is inadmissible in federal prosecutions).

90. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1672 (2013).

91. *Id.* Relatedly, federal defendants can also be asked to waive the right to claim ineffective assistance of counsel. See generally J. Peter Viloski, Comment, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargain Waivers of Collateral Relief*, 86 TEMP. L. REV. 429 (2014) (discussing the conflict of interest presented by this type of waiver).

92. Interview by WHYY with Albert Alschuler, Professor of Law and Criminology, Univ. of Chi. (Jan. 16, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/alschuler.html>.

93. *Id.*

94. Bibas, *supra* note 81, at 2517–18. Professor Bibas also suggests that innocent defendants will be “anchored” because, though the prosecutor’s opening argument will seem unfair, the final offer will seem reasonable in comparison. *Id.*

95. *Id.*

96. Miller, *supra* note 90, at 1667.

97. *Id.*

98. See Rakoff, *supra* note 77.

so that a later offer seems more reasonable.⁹⁹ This process engenders a system in which the ability to successfully negotiate is dependent upon “the power to grant sentence concessions”—a judicial power now in the hands of already advantaged prosecutors.¹⁰⁰

2. Check on Defense Attorney Practices

Prosecutorial power is sometimes complemented by defense attorney weakness, and often by defense attorney motivation to resolve cases.¹⁰¹ The issue of inadequate defense attorney representation during plea negotiations came to a head in 2012 when the Supreme Court decided *Missouri v. Frye*¹⁰² and *Lafler v. Cooper*.¹⁰³ In *Frye*, the Court found the defense attorney provided inadequate representation when he failed to communicate a plea offer before it expired.¹⁰⁴ In *Lafler*, the Court found the defense attorney provided inadequate representation when he misunderstood the law and then urged his client to forgo a plea deal and instead go to trial, where the client was convicted.¹⁰⁵ The Court explained that the Sixth Amendment guarantees a defendant the right to effective assistance of counsel in the plea bargaining process.¹⁰⁶

Because of inadequate resources, defense attorney representation is extremely “variable and vulnerable to skewing.”¹⁰⁷ Defense attorneys may be public defenders with fixed salaries and a large number of indigent clients.¹⁰⁸ They may also be private, appointed attorneys who are paid fixed fees or hourly rates that are typically low and sometimes capped.¹⁰⁹ Others are private attorneys retained by the client who are paid according to the client’s financial situation.¹¹⁰ Defense attorneys receiving fixed salaries or fees may have little motivation to take a case to trial.¹¹¹ Rather, they may have a greater incentive to get their clients to plead so that they can carry more cases.¹¹² Because of underfunded and underresourced offices, public defenders are complex players

99. Miller, *supra* note 90, at 1667.

100. Alschuler, *supra* note 78, at 1076.

101. Bibas, *supra* note 81, at 2476.

102. 132 S. Ct. 1399 (2012).

103. 132 S. Ct. 1376 (2012).

104. *Frye*, 132 S. Ct. at 1410.

105. *Lafler*, 132 S. Ct. at 1390–91.

106. *Id.* at 1384 (applying the *Strickland* test to determine whether the defense attorney’s assistance was ineffective); see *Strickland v. Washington*, 466 U.S. 668 (1984). The Court explained the Sixth Amendment’s protection applies to pretrial stages that are part of the entire proceeding because “defendants cannot be presumed to make critical decisions without counsel’s advice.” *Lafler*, 132 S. Ct. at 1385.

107. Bibas, *supra* note 81, at 2476.

108. *Id.*

109. *Id.*

110. *Id.*

111. See *id.* at 2477 (arguing that lawyers have the incentive to push clients to plead because they can make more money by spending less time on individual cases, which allows them to take on more cases).

112. *Id.*

in the plea negotiation arena.¹¹³ Underfunding may lead to a more “passive” and “reactive” approach to plea bargaining, whereby public defenders encourage their clients to plead in order to manage their heavy caseloads.¹¹⁴ Additionally, defense attorneys may have limited time to acquire information from defendants before trials (or plea negotiations).¹¹⁵ Defense attorneys may be able to interview their clients during prison visits only, putting them at a “considerable informational disadvantage [compared] to the prosecutor[s].”¹¹⁶ Critically, defense attorneys often lack access to resources such as investigative and expert witness services.¹¹⁷ Thus, the combination of high numbers of clients, low funding, and few resources may result in inadequate defense attorney performance at plea negotiations.

3. Judicial Participation is Already Happening

Twenty-one states and Washington, D.C. bar judicial participation in plea negotiations.¹¹⁸ Twenty states now permit judicial participation in plea negotiations by either procedural rule or the common law.¹¹⁹ Two states eliminated absolute bans and permit judicial participation in limited situations.¹²⁰ Three states discourage judicial participation.¹²¹ Additionally, at least seven district courts permitted judicial participation by local rules until the *Davila* decision.¹²²

113. Miller, *supra* note 90, at 1688.

114. *Id.* (discussing underfunded public defenders and their incentive to encourage plea agreements); see also Alkon, *supra* note 69, at 580–81 (discussing how limited budgets and high caseloads can affect defense attorney practices in plea negotiations). Despite lack of funding and other resources, public defenders often achieve better results for their clients than private defense attorneys. In an article analyzing a recent study on Philadelphia murder cases, Jeffrey Bellin reports, “[W]ith more of their ultimately convicted clients pleading guilty, as opposed to being found guilty after trial, PDs predictably have: fewer clients convicted of the top line charge of murder, and fewer clients serving lengthy sentences, including life sentences.” Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 157 (2014).

115. Rakoff, *supra* note 77.

116. *Id.*

117. Alkon, *supra* note 69, at 576 (discussing resources a defense attorney needs in order to provide competent representation).

118. See *infra* notes 125–46 and accompanying text for a discussion of states that do not permit judicial participation.

119. See *infra* notes 151–69 and accompanying text for a discussion of states that permit judicial participation. Three states are highlighted in this Part, demonstrating both procedural rule and common-law-sanctioned judicial participation.

120. See *infra* notes 170–71 and accompanying text for a discussion of states that eliminated absolute bans.

121. See *infra* notes 148–50 and accompanying text for a discussion of states that discourage judicial participation. As of the publishing of this Comment, there is no statutory or case law on point in Alabama, Iowa, New Hampshire, or Rhode Island.

122. See *infra* notes 196–202 and accompanying text for a discussion of instances in which district courts permitted judicial participation.

a. *State Practice*

States that prohibit judicial participation in plea negotiations through procedural rule or the common law are Alaska,¹²³ Arkansas,¹²⁴ Colorado,¹²⁵ Delaware,¹²⁶ Georgia,¹²⁷ Mississippi,¹²⁸ Missouri,¹²⁹ Nevada,¹³⁰ New Jersey,¹³¹ New Mexico,¹³² North Carolina,¹³³ North Dakota,¹³⁴ South Dakota,¹³⁵ Tennessee,¹³⁶ Texas,¹³⁷ Utah,¹³⁸ Virginia,¹³⁹ Washington,¹⁴⁰ West Virginia,¹⁴¹ Wisconsin,¹⁴² Wyoming,¹⁴³ and Washington, D.C.¹⁴⁴ States that do not explicitly

123. *State v. Buckalew*, 561 P.2d 289, 292 (Alaska 1977) (“Alaska’s trial judges shall be totally barred from engaging in either charge or sentencing bargaining.”).

124. ARK. R. CRIM. P. 25.3(a) (“The [trial] judge shall not participate in plea discussions.”).

125. CO. ST. CRIM. P. R. 11(f)(4) (“The trial judge shall not participate in plea discussions.”).

126. Delaware does not explicitly bar judicial participation by procedural rule. *See* DEL. SUPER. CT. CRIM. P. 11. There is little case law addressing the issue, but *Butler v. State* suggests that Delaware does not permit judicial participation in plea bargaining. 95 A.3d 21, 35–36 (Del. 2014) (quoting language from the Standards and finding that the trial judge impermissibly participated in plea negotiations).

127. GA. R. UNIF. MUN. CT. 25.5(a) (“The trial judge shall not participate in plea discussions.”).

128. MS. R. UNIF. CIR. AND CTY. CT. 8.04(B)(4) (“The trial judge shall not participate in any plea discussion.”).

129. MO. R. ORD. AND TRAF. VIOL. R. 37.58(e) (“The judge shall not participate in any plea agreement discussions . . .”).

130. *See* *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006) (prohibiting “any judicial participation in the formulation or discussions of a potential plea agreement with one narrow, limited exception: the judge may indicate on the record whether the judge is inclined to follow a particular sentencing recommendation of the parties”).

131. N.J. CT. R. 3:9-3(a) (“[T]he judge shall take no part in such discussions.”).

132. N.M. R. MUN. CT. P. 8-502(D)(1) (“The court shall not participate in any such discussions.”).

133. N.C. GEN. STAT. ANN. § 15A-1021(a) (West 2015) (“The trial judge may participate in the discussions.”). The commentary to this rule, however, explains that the judge is not allowed to take “an active role in the actual striking of any bargain.”

134. N.D. R. CRIM. P. 11(c)(1) (“The court must not participate in these discussions.”).

135. S.D. CODIFIED LAWS § 23A-7-8 (2015) (“A court shall not participate in such discussions.”).

136. TENN. R. CRIM. P. 11(C)(1) (“The court shall not participate in these discussions.”).

137. *Maya v. State*, 932 S.W.2d 633, 637 n.7 (Tex. Ct. App. 1996) (“A trial judge cannot participate in any plea bargain discussions until agreement has been reached between prosecutor and defendant.”).

138. UTAH R. CRIM. P. 11(i)(1) (“The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.”).

139. VA. SUP. CT. R. 3A:8(c) (“In any such discussions under this Rule, the court shall not participate.”).

140. *State v. Pouncey*, 630 P.2d 932, 937 (Wash. 1981). *Pouncey* was decided before the third edition of the Standards came out, so seems to adhere to the “moderator” language in the second edition. There is no case law suggesting Washington now follows the third edition, but there is also no case law suggesting there is a bright-line rule. Rather, based on *Pouncey*, it seems that Washington looks to whether the plea was coerced and thus involuntary. *Id.* at 637.

141. W. VA. R. CRIM. P. 11(e)(1) (“The court shall not participate in any such discussions.”).

142. *State v. Williams*, 666 N.W.2d 58, 67 (Wis. Ct. App. 2003) (“[W]e adopt a bright-line rule barring any form of judicial participation . . . before a plea agreement has been reached.”).

prohibit judicial participation in plea negotiations but discourage it are Minnesota,¹⁴⁵ Nebraska,¹⁴⁶ and Ohio.¹⁴⁷

A number of states permit judicial participation in plea negotiations, but to varying degrees and with varying safeguards. States that allow judicial participation in plea negotiations through procedural rule are Arizona,¹⁴⁸ Florida,¹⁴⁹ Hawaii,¹⁵⁰ Idaho,¹⁵¹ Illinois,¹⁵² Maine,¹⁵³ Massachusetts,¹⁵⁴ Montana,¹⁵⁵ and Oregon.¹⁵⁶ States that allow judicial participation in plea negotiations through the common law are California,¹⁵⁷ Connecticut,¹⁵⁸

143. WYO. R. CRIM. P. 11(e)(1) (“The court shall not participate in any such discussions.”).

144. D.C. SUPER. CT. R. CRIM. P. 11(e)(1) (2015) (“The Court shall not participate in any discussions between the parties concerning any such plea agreement.”).

145. Minnesota does not explicitly permit or bar judicial participation, but courts considering the issue have discouraged the practice. *See, e.g.*, *State v. Johnson*, 156 N.W.2d 218, 223 (Minn. 1968) (“[T]he court should neither usurp the responsibility of counsel nor participate in the plea bargaining negotiation itself . . .”).

146. *See State v. Jennings*, No. A-08-248, 2008 WL 4443803, at *4 (Neb. Ct. App. 2008) (“The Nebraska Supreme Court has strongly discouraged judicial participation in the plea bargaining process, but has not held that such participation renders the plea invalid per se.”).

147. *See State v. Byrd*, 407 N.E.2d 1384, 1388 (Ohio 1980) (stating that “this court strongly discourages judge participation in plea negotiations”).

148. ARIZ. R. CRIM. P. 17.4(a) (“The trial judge shall only participate in settlement discussions with the consent of the parties.”).

149. FLA. R. CRIM. P. 3.171(d); *see also State v. Warner*, 762 So. 2d 507, 513–15 (Fla. 2000).

150. HAW. R. PENAL P. 11(f)(1) (“The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.”).

151. IDAHO CRIM. R. 11(f)(1) (“The court may participate in any such [plea] discussions.”).

152. ILL. R. S. CT. 402(d)(1) (“The trial judge shall not initiate plea discussions. Upon request by the defendant and with the agreement of the prosecutor, the trial judge may participate in plea discussions.”)

153. ME. R. U. CRIM. P. 11A(a) (“At any stage of the proceedings, the court may participate in the negotiation of the specific terms of the plea agreement in the manner set forth in Rule 18 relating to dispositional conferences.”); *see id.* 18(b) (“The court shall have broad discretion in the conduct of the dispositional conference. Counsel and unrepresented defendants must be prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution. The court may participate in such discussions and may facilitate a plea agreement by suggesting or addressing a specific aspect of the matters under consideration.”).

154. MASS. R. CRIM. P. 12 (“The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.”).

155. MONT. CODE ANN. § 46-12-211 cmt. (West 2015) (“Subsection (1) identifies the parties involved in the plea agreement process. The Commission recognized that the 1987 statute precluded judicial participation in the plea negotiations, *but the new statute neither prohibits nor authorizes judicial involvement*. The Commission believed that circumstances sometimes warrant judicial participation in such discussions.” (emphasis added)).

156. OR. REV. STAT. ANN. § 135.432(1)(a)–(b) (West 2015) (allowing other judges, not the trial judge to participate at the request of both parties).

157. In *People v. Weaver*, the court wrote that “[w]hile some jurisdictions totally foreclose judicial participation in plea bargaining, California does not. Judges can, in appropriate cases and in a reserved manner, play a useful part in that process.” 118 Cal. App. 4th 131, 150 (Cal. Ct. App. 2004) (finding the judge’s participation improper where he abandoned his role and had a less-than-neutral attitude).

158. *State v. Niblack*, 596 A.2d 407, 412 (Conn. 1991) (approving of a process by which a judge

Indiana,¹⁵⁹ Kansas,¹⁶⁰ Kentucky,¹⁶¹ Louisiana,¹⁶² Maryland,¹⁶³ Michigan,¹⁶⁴ New York,¹⁶⁵ Oklahoma,¹⁶⁶ and South Carolina.¹⁶⁷ Pennsylvania does not explicitly permit judicial participation, although it deleted its statutory provision banning judicial participation in 1995 “in order to align the rule with the realities of current practice.”¹⁶⁸ Vermont bars judicial participation, “unless the proceedings are taken down by a court reporter or recording equipment.”¹⁶⁹

Florida allows judges to be used as sources of information, but only if the parties request a judge’s participation.¹⁷⁰ Under Florida law, after parties have

conducts the plea negotiation and if in such cases the negotiation does not result in a plea, it goes to a different judge).

159. See *Williams v. State*, 449 N.E.2d 1080, 1083 (Ind. 1983) (finding that judicial participation did not lead to an involuntary plea agreement and therefore was not impermissible).

160. *State v. McCray*, 87 P.3d 369, 372 (Kan. Ct. App. 2004) (stating that Kansas has no rule barring judicial participation and finding that the judge’s participation in the case before it had no determinative influence on the defendant’s decision and did not violate due process).

161. There is no statutory provision prohibiting judicial participation, nor is there any case law that prohibits it. Rather, there is case law analyzing the level of participation in the given case, impliedly allowing participation in some situations. See, e.g., *Johnson v. Commonwealth*, 412 S.W.3d 157, 165, 170 (Ky. 2013) (explaining that a trial judge’s participation is enough to render a plea involuntary only when the judge is “deeply involved in the process of plea negotiations” and “risks misleading the parties,” which was not true in the present case (quoting *Haight v. Commonwealth*, 760 S.W.2d 84, 89 (Ky. 1988))).

162. *State v. Bouie*, 817 So. 2d 48, 54 (La. 2002) (declining to adopt a rule prohibiting judges from participating in plea negotiations); *State v. Waffer*, 47 So. 3d 533, 539 (La. Ct. App. 2010) (stating that state judges are not held to Rule 11 and finding judicial participation permissible in the case before it).

163. *Barnes v. State*, 523 A.2d 635, 640 (Md. Ct. Spec. App. 1987) (rejecting the notion that any judicial participation would result in an involuntary plea and noting the state’s rule “does not expressly prohibit judicial participation in plea bargaining”).

164. *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) (expanding the role of the judge in plea negotiations and finding that, at the request of a party, the judge may state on the record the length of sentence that appears to be appropriate for the charged offense). *Cobbs* was a reconsideration of the rule as stated in *People v. Killebrew*. *People v. Killebrew*, 330 N.W.2d 834, 836 (Mich. 1982) (“[T]he judge’s role in plea negotiations, sentence bargaining included, is limited to consideration of the bargain between the defendant and the prosecutor. The judge may not become involved in the negotiation of the bargain.”).

165. *McMahon v. Hodges*, 382 F.3d 284, 289 n.5 (2d Cir. 2004) (explaining that Rule 11 does not apply to state judges and finding “a judge is permitted to discuss the possible sentencing repercussions of a defendant’s choice to go to trial rather than plead guilty”).

166. *Ryder v. State*, 83 P.3d 856, 863 (Okla. Crim. App. 2004) (stating “Oklahoma has no . . . provision” prohibiting judicial participation in plea negotiations).

167. *Medlin v. State*, 280 S.E.2d 648, 648 (S.C. 1981) (“[A] trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion.”).

168. PA. R. CRIM. P. 590(C) cmt. (“The 1995 amendment deleting former paragraph (B)(1) eliminates the absolute prohibition against any judicial involvement in plea discussions *in order to align the rule with the realities of current practice*. . . . Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.” (emphasis added)).

169. VT. R. CRIM. P. 11(e)(1).

170. See FLA. R. CRIM. P. 3.171(d). The three states discussed in this section were selected to demonstrate statutory and common law allowance of judicial participation.

reached an agreement, a judge may be advised of the agreement itself and the reasons for it.¹⁷¹ Then the judge “shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.”¹⁷² In *State v. Warner*,¹⁷³ the Florida Supreme Court held judges may provide information about ultimate sentences, but not as mediators, and judges may reevaluate the sentence at trial if new material facts emerge.¹⁷⁴ The Florida Supreme Court also created safeguards in light of the fear of coercion: judges may not initiate plea negotiations, all communication between a judge and the parties must be entered on the record, and a judge must not indicate that there are other sentencing possibilities tied to future procedural choices (like going to trial).¹⁷⁵ In practice, Florida judges vary in their degree of participation.¹⁷⁶ There is increased participation when the case is “politically sensitive,” when the judge is concerned about the defense attorney’s competence, when the defendant is unrepresented, and in urban districts where the judge is said to have more discretion.¹⁷⁷

Michigan’s judicial participation rule was established through the common law.¹⁷⁸ In 1993, the Michigan Supreme Court held in *People v. Cobbs*¹⁷⁹ that judges may participate in plea negotiations, but only upon the request of the parties.¹⁸⁰ The *Cobbs* court imposed a safeguard against coercion: the judge may not indicate there are other sentencing possibilities on the basis of the defendant’s decision to plead guilty or not.¹⁸¹ The court also determined that a judge’s evaluation of how a case appears at an early stage does not prevent that judge from fairly deciding the case at a later date when more facts are known, thus allowing the plea judge and the trial judge to be one in the same.¹⁸² Following *Cobbs*, this kind of voluntary plea agreement with judicial involvement became known as a “*Cobbs* agreement” in Michigan.¹⁸³ In *People v. McKay*,¹⁸⁴ the court described a *Cobbs* agreement as one that is “voluntary [and]

171. *Id.*

172. *Id.*

173. 762 So. 2d 507, 514 (Fla. 2000).

174. *Warner*, 762 So. 2d at 514.

175. *Id.*

176. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 240–41 (2006) (stating that the level of participation “varies from judge to judge,” with “some never participat[ing] in plea negotiations” and others sometimes overstepping their role).

177. *Id.* at 241.

178. See *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993).

179. 505 N.W.2d 208 (Mich. 1993).

180. *Cobbs*, 505 N.W.2d at 212.

181. See *id.* at 212. The court noted that the judge is always subject to the state’s general rule providing the grounds on which a judge may be disqualified. *Id.* (citing MICH. COMP. LAWS § 2.003(c) (1993)).

182. *Id.*

183. E.g., *People v. McKay*, 706 N.W.2d 832, 832 (Mich. 2005) (referring to the “*Cobbs* agreement”).

184. 706 N.W.2d 832 (Mich. 2005).

noncoercive,” requested by the parties, and always subject to future revision.¹⁸⁵

Connecticut allows for a more active judicial role in plea negotiations through the common law.¹⁸⁶ Connecticut endorsed judicial participation in *State v. Niblack*¹⁸⁷ and again in *State v. Revelo*.¹⁸⁸ In *Revelo*, the court noted a defendant’s rights are “fully vindicated by the opportunity to either withdraw his . . . plea or to be resentenced on that plea.”¹⁸⁹ Connecticut permits judges to offer a view on a plea agreement’s merits,¹⁹⁰ but they must refrain from “assum[ing] a position of advocacy.”¹⁹¹ They may not push for a plea by suggesting a defendant will receive a more severe sentence at trial.¹⁹² As a safeguard, Connecticut requires that a case be transferred to a second judge if the plea negotiations do not result in an agreement.¹⁹³ Motions to suppress are also assigned to a judge different from the one handling the plea negotiations.¹⁹⁴ Connecticut’s rule aims to prevent both judicial retaliation if plea negotiations fail and the exposure of incriminating concessions in negotiations.¹⁹⁵

State practices suggest that judges are participating in plea negotiations without coercing defendants into accepting plea deals, without tainting the integrity of the process, and without threatening a more severe sentence at trial.

b. District Court Local Rules that Allowed for Judicial Participation Before Davila

At least seven district courts had local rules permitting judicial participation in plea negotiations until *Davila*: the Northern District of California,¹⁹⁶ the

185. *McKay*, 706 N.W.2d at 833.

186. *See State v. Revelo*, 775 A.2d 260, 268 n.25 (Conn. 2001) (“It is a common practice in this state for the presiding criminal judge to conduct plea negotiations with the parties.”); *State v. Niblack*, 596 A.2d 407, 412 (Conn. 1991) (permitting judicial participation in plea negotiations).

187. 596 A.2d 407, 412 (Conn. 1991).

188. 775 A.2d 260, 273 (Conn. 2001) (stating it is not improper for a judge to inform a defendant of the possibility of a greater sentence in the event the defendant’s motion to suppress is denied).

189. *Revelo*, 775 A.2d at 273–74.

190. Turner, *supra* note 176, at 201. Accordingly, Connecticut’s rule is similar to the ABA’s second edition of the Standards. *See supra* notes 48–51 and accompanying text for a discussion of the ABA’s second edition of the Standards.

191. *State v. Delarosa*, 547 A.2d 47, 51 (Conn. App. Ct. 1988).

192. *Revelo*, 775 A.2d at 271.

193. *Id.* at 268 n.25.

194. Turner, *supra* note 176, at 249.

195. *Id.*

196. N.D. CAL. CRIM. L.R. 11-1 (2013). The rule provided for a voluntary settlement conference, through one of two options: joint request for referral to another judge or magistrate judge, or case referral to another judge or magistrate judge by the trial judge. *Id.* 11-1(a). The settlement judge could request and review a report of the defendant’s prior criminal proceedings. *Id.* 11-1(b). Only the prosecutor and defense attorney could attend the negotiation. *Id.* 11-1(c). The defendant did not need to attend, but was required to be present in the courthouse for consultation unless otherwise excused. *Id.* The negotiations were not reported unless the parties agreed they would be on the record. *Id.* The assigned trial judge was not informed of the substance of the negotiations. *Id.* No statement made in negotiations was admissible at trial. *Id.* Any party could unilaterally withdraw from the negotiations. *Id.* 11-1(d).

Central District of California,¹⁹⁷ the District of Montana,¹⁹⁸ the Western District of Washington,¹⁹⁹ the District of Oregon,²⁰⁰ the District of Arizona,²⁰¹ and the District of Idaho.²⁰² Though federal district courts are bound by the Rules, each may issue its own rules to govern local practice, granted the local rules are consistent with the Rules.²⁰³ These local rules supplement the Federal Rules and often focus on operations of the court.²⁰⁴ In her proposal to the Advisory Committee, Judge Wilken alluded to the Northern District of California's pre-*Davila* local rule and to a consensus within the district that judicial participation in plea negotiations is desirable.²⁰⁵ She explained that defendants in her district "valued" the opportunity to hear the possible outcomes of their cases from the perspective of a judge and to express their concerns to a judge.²⁰⁶ She also referred to situations where defendants do not trust their defense counsel and seek the court's reassurance regarding the accuracy of what defense counsel has told them.²⁰⁷ Judge Wilken also mentioned the time and resources courts, the United States Attorney's Office, and the Federal Defender's Office could save.²⁰⁸ She ended her proposal with a list of other federal district courts that permitted judicial participation in plea negotiations and offered an example of

197. C.D. CAL. CRIM. L.R. 57-3.1 (2013). In complex criminal cases, upon the request of both parties, the Central District of California allowed the presiding judge to assign another judge to handle settlement negotiations. *Id.* The negotiations had to be voluntary and requested. *Id.* 57-3.1-2. Either party could withdraw its request at any time. *Id.* 57-3.3.4. The judge participating in negotiations had a limited role and could not be involved in any other aspect of the case. *Id.* 57-3.4. The defendant's criminal history was provided if requested, and the negotiation was not recorded. *Id.* 57-3.5.2-3.

198. D. MONT. CRIM. L.R. 17.1.2 (2013). The District of Montana allowed the court to facilitate complex criminal cases—cases expected to require more than sixteen trial days. *Id.* The trial judge could not participate, the negotiations were voluntary, and the parties had to request the negotiations. *Id.* Importantly, the trial judge designated another Article III judge to preside over the negotiations. *Id.* 17.1.2(f). The defendant could not be present in the negotiation (unless the settlement judge ordered otherwise), but had to be on the premises, unless their availability was waived. *Id.* 17.1.2(g)(1).

199. The Western District of Washington allowed "the United States magistrate judge [to] conduct the proceedings required by Fed. R. Crim. P. 11." W.D. WASH. CRIM. L.R. 11(i) (2013).

200. Judge Wilken mentioned this set of local rules in her proposal. Rule Suggestion, *supra* note 10, at 2.

201. Judge Wilken mentioned this set of local rules in her proposal. *Id.*

202. Judge Wilken mentioned this set of local rules in her proposal. *Id.*

203. Federal Rule of Civil Procedure 83 allows a district court to adopt and amend rules governing practice. "Local rules must be consistent" with federal rules and statutes, but need not "duplicate" them. FED. R. CIV. P. 83(a)(1).

204. J. MICHAEL GOODSON LAW LIBRARY, DUKE UNIV. SCH. OF LAW, RESEARCH GUIDES: COURT RULES 3 (2012), <http://law.duke.edu/sites/default/files/lib/courtrules.pdf>.

205. Rule Suggestion, *supra* note 10, at 1 (describing the benefits of the Northern District's pre-*Davila* local rule, and including a former Advisory Committee member, a senior judge serving on the Federal Sentencing Commission, and the Director of the Federal Judicial Center as members of the consensus favoring a federal rule permitting judicial participation in plea negotiations). See *supra* note 196 for a more detailed description of the Northern District's pre-*Davila* local rule.

206. Rule Suggestion, *supra* note 10, at 2.

207. *Id.*

208. *Id.*

language that the Committee could use.²⁰⁹

III. DISCUSSION

As *Davila* demonstrated, federal judges *are* participating in plea negotiations, and are doing so in such a way that does not lead to the kind of prejudice that would require a new trial.²¹⁰ There is no constitutional barrier to judicial participation in plea conferences for federal cases.²¹¹ The only barriers are the ABA Standards and Rule 11(c)(1). Although the concerns discussed are relevant,²¹² they are reflexively cited to bar judicial participation.

This Comment acknowledges the legitimacy of concerns over the integrity of process, but argues the benefits flowing from judicial participation outweigh these concerns. Because judges have been effectively removed from over ninety-seven percent of federal criminal cases,²¹³ defendants are currently left to the mercy of a system characterized by all-powerful prosecutors and resource-strapped defense attorneys. Rather than resist judicial participation in plea negotiations for fear of damage to judicial integrity, the ABA and Advisory Committee should realize the potential for judges to *restore* integrity to the system. In a criminal system now defined by pleas rather than trials, Rule 11(c)(1) should reflect “the realities of current practice”²¹⁴ and borrow from state and previous local district rules that allow for better supervision of the process. The ABA should revisit its Standards and encourage the Advisory Committee to amend Rule 11(c)(1). Part III.A of this Section explains how a judge participating in a plea negotiation can temper prosecutorial power and provide a check on defense attorney practices.²¹⁵ Part III.B proposes the guidelines the ABA should adopt to spur an amendment to Rule 11(c)(1).²¹⁶

A. *Judicial Participation Can Ensure Clarity and Fairness*

Judicial participation in plea negotiations can allow judges to reduce prosecutorial power, modify the anchoring effect, and monitor defense attorney practices. The power to grant sentence concessions is a judicial power, a power that migrates from judges to prosecutors under the current rule.²¹⁷ If a judge is

209. *Id.* (mentioning the District of Arizona, the Central District of California, the District of Idaho, the District of Montana, the District of Oregon, and the Western District of Washington).

210. See *United States v. Davila*, 133 S. Ct. 2139, 2142 (2013) (invalidating district court local rules permitting judicial participation in federal plea negotiations, but noting that such participation does not warrant vacating the plea unless a defendant shows prejudice). Rule 11(h) states that absent affecting substantial rights, violating Rule 11(c)(1) is harmless error. FED. R. CRIM. P. 11(h).

211. *Davila*, 133 S. Ct. at 2142 (explaining Rule 11(c)(1) is not compelled by the Due Process Clause or anything else in the Constitution).

212. See *supra* Part II.C for a discussion of the concerns associated with judicial participation.

213. U.S. SENTENCING COMM’N, *supra* note 67.

214. PA. R. CRIM. P. 590 cmt. (explaining the legislature’s reasons for deleting former paragraph (B)(1) was “to align the rule with the realities of current practice”).

215. See *infra* notes 219–37 and accompanying text.

216. See *infra* notes 239–72 and accompanying text.

217. Alschuler, *supra* note 78, at 1076 n.60 (“Indisputably under our constitutional system the

involved in a negotiation, however, he can replace the prosecutor's offer with an expected sentence in the form of a fixed sentence, cap, or range.²¹⁸ The prosecutor and defense counsel both present their cases to the judge in this negotiation. After hearing from both sides, the judge proposes a fixed sentence somewhere in between the prosecutor and defense counsel's requests.²¹⁹ The judge considers both sides and determines a post-plea sentence that serves as the fixed sentence.²²⁰ This post-plea sentence reflects how the facts of the case fit with a sentence.²²¹

This fixed sentence serves as the anchor, which communicates an unbiased assessment of a case to a defendant. In theory, the power behind this anchor derives from a neutral party who is a judicial officer whom the lawyers in the room must appear before in the future.²²² The judge serves as the unbiased party to "hear both sides and decide who's telling the truth."²²³ Instead of just the prosecutor, all parties present are provided with the evidence and issues in the case for review.²²⁴ Then, before the prosecutor offers a plea bargain, the judge meets with the parties and makes one of the following evaluations: go to trial, enter a plea along the lines he suggests, or dismiss the case.²²⁵ The judge's evaluation of the case and suggested fixed sentence communicates how a defendant's trial would likely unfold in a courtroom based on the weight of the evidence.²²⁶ The defendant can then make a more informed decision about whether to plead or go to trial. Because this plea proposal will be a more accurate reflection of the case, a risk-averse defendant is less likely to take a plea just to avoid the uncertainty of a trial.²²⁷ An innocent defendant, who is said to

right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial" (quoting *Ex parte* United States, 242 U.S. 27, 41 (1916))).

218. See Miller, *supra* note 90, at 1712–13 (explaining that a fixed sentence is the judge's suggested sentence instead of the prosecutor's offer, a cap is the maximum acceptable sentence under a plea bargain, and a range is a span of years acceptable under a plea bargain).

219. See *id.* at 1710 (suggesting that, though a judge is also susceptible to the anchoring effect, hearing from both sides will ensure the judge fixes a sentence between the requests).

220. *Id.*

221. *Id.*

222. Rakoff, *supra* note 77. Future appearances before a judge is perhaps one of the "variety of legal and ethical concerns" the 2014 subcommittee contemplated. 2014 REPORT TO STANDING COMMITTEE, *supra* note 36, at 2. This Comment offers no solutions to this concern, but does acknowledge it.

223. Interview with Albert Alschuler, *supra* note 92 ("We don't care enough in the American criminal justice system to listen to the defendant's story. We do everything possible to avoid having an impartial party sit . . . and hear both sides and decide who's telling the truth.").

224. Rakoff, *supra* note 77.

225. *Id.* Judge Rakoff does not suggest the parties must be required to follow the judge's recommendation. *Id.*

226. See Turner, *supra* note 176, at 244 ("Judicial involvement may enhance the fairness of plea negotiations as well. As one defense attorney observed, more experienced judges have better judgment than . . . prosecutors who do not know where a particular case fits within the system and instead try to 'impress the world' by getting a tough sentence.").

227. See Miller, *supra* note 90, at 1706 (referencing the "arbitrary, random, or irrelevant" initial offers from prosecutors that produce an anchoring effect).

be less risk averse, could then feel more certain about an “adjudication’s capacity to vindicate false charges.”²²⁸ Thus, the judge tempers prosecutorial power and ensures the defendant is presented with the most accurate forecast of what his trial would be like, should he exercise his right to go to trial.

Judicial participation in plea negotiations can also allow judges to monitor defense counsel practices. Our justice system is “dependent on the quality of a defense lawyer.”²²⁹ The quality of a defense attorney is on display in plea negotiations, where a defendant’s ability to understand how sentences work depends largely on how well the defense attorney explains the system.²³⁰ Therefore it is critical to have a neutral party ensuring the quality of defense attorney practice. Current plea negotiations occur in back rooms, and there is no system in place to evaluate defense attorney practices in those negotiations.²³¹ Though defense attorney performance often suffers due to underfunding and high caseload, it nevertheless can result in inadequate representation and a push for pleas.²³² If judges are permitted to participate in the plea negotiation process, they can both monitor defense attorney performance in plea negotiations and serve as an extra voice to ensure that pleas are properly explained to defendants.²³³ Critically, they can check defense attorney practices in negotiations to ensure they satisfy the Sixth Amendment standard, as outlined in *Lafler and Frye*.

B. *An Amendment Will Reflect Current Practices and Provide Guidance*

Current practices in both state and federal courts establish that judges are already participating in plea negotiations. Twenty states allow judicial participation in plea negotiations,²³⁴ and at least seven federal district courts allowed judicial participation until *Davila*.²³⁵ Other federal courts bar judicial participation but then treat such participation as harmless error when it actually happens.²³⁶ The ABA should revisit its Standards as they relate to Rule 11(c)(1). It should advocate for an amendment to the rule. Further, the ABA should

228. *Id.* (quoting Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1612 (2005)).

229. Interview with Albert Alschuler, *supra* note 92.

230. *Id.*

231. *See id.*

232. *See supra* notes 101–17 and accompanying text for a discussion of defense attorney practices in plea negotiations.

233. This Comment does not suggest that judicial participation will solve the issues of underfunding and overwhelming workloads faced by defense attorneys; however, participation can add an extra layer of insurance for an individual defendant.

234. *See supra* notes 149–95 and accompanying text for a discussion of the twenty states that allow judicial participation.

235. *See supra* notes 196–202 for a list of federal district courts that previously allowed judicial participation in plea negotiations.

236. *E.g.*, *United States v. Davila*, 133 S. Ct. 2139, 2142 (2013) (explaining that “[n]othing in Rule 11’s text, however, indicates that the ban on judicial involvement in plea discussions, if dishonored, demands automatic vacatur of the plea” and thereby permitting a finding of harmless error despite a Rule 11 violation).

provide guidelines that participating judges must follow to minimize the risks of coercion, tainted integrity of the judicial process, and severe sentencing as punishment for forgoing a plea agreement. These guidelines should draw on the pre-*Davila* local rules,²³⁷ suggestions from commentators,²³⁸ and practices from state rules.²³⁹

First, a judge should not offer his services. Rather, a judge's participation should hinge on a request from both parties. This rule is reflected in the former local rules of the Northern District of California²⁴⁰ and the District of Montana,²⁴¹ as well as the current rule in Florida.²⁴² This requirement would counter concerns about voluntariness because the parties would be proactively seeking judicial involvement in their plea negotiations.²⁴³

Second, the judge participating in the plea negotiations should be different from the judge who would hear the case at trial. Both the pre-*Davila* Northern California local rule²⁴⁴ and the Connecticut state rule²⁴⁵ require that a different judge must try a defendant who chooses not to plead guilty or withdraws his plea. The presiding judge could refer plea negotiations to another district judge. Another option, which this author finds particularly attractive, would give the responsibility to magistrate judges. Federal magistrate judges already supervise civil settlement conferences, handle a number of pretrial tasks for criminal cases,²⁴⁶ and, with a defendant's consent, may take guilty pleas and recommend they be accepted by the district court.²⁴⁷ Magistrate judges have the skills to fairly supervise plea negotiations, and instituting this practice would be consistent with legislative history encouraging the use of magistrate judges to improve efficient administration of dockets.²⁴⁸ Using magistrate judges for plea

237. See *supra* notes 196–209 and accompanying text for a discussion of local rules.

238. *E.g.*, Turner, *supra* note 176, at 256.

239. See *supra* notes 149–95 and accompanying text for a discussion of practices from states that allow judicial participation in plea negotiations.

240. See *supra* note 196 for a discussion of the pre-*Davila* Northern District of California rule.

241. See *supra* note 198 for a discussion of the pre-*Davila* District of Montana rule.

242. *State v. Warner*, 762 So.2d 507, 513 (Fla. 2000).

243. See Turner, *supra* note 176, at 263.

244. See *supra* note 196 for a discussion of the pre-*Davila* Northern District of California rule.

245. See *supra* notes 186–95 and accompanying text for a discussion of Connecticut's plea negotiation procedure.

246. *E.g.*, *Peretz v. United States*, 501 U.S. 923, 934–35 (1991) (allowing a magistrate judge to conduct voir dire proceedings with a defendant's consent). The Rules explicitly allow for magistrate intervention in particular cases. See FED. R. CRIM. P. 58(a)(1) (allowing magistrate judges to preside over petty offenses and other misdemeanor cases); see also Daniel E. Hinde, Note, *Consensual Sentencing in the Magistrate Court*, 75 TEX. L. REV. 1161, 1167 (1997) (discussing Federal Rule 58).

247. *E.g.*, *United States v. Reyna-Tapia*, 328 F.3d 1114, 1119–21 (9th Cir. 2003); *United States v. Torres*, 258 F.3d 791, 795–97 (8th Cir. 2001); *United States v. Williams*, 23 F.3d 629, 632–33 (2d Cir. 1994).

248. H.R. REP. NO. 94-1609, at 12 (1976). In a 1983 report to Congress, the Comptroller General recommended an increase in the use of magistrate judges. U.S. GEN. ACCOUNTING OFFICE, GAO-121901, COMPTROLLER GENERAL'S REPORT TO THE CONGRESS: POTENTIAL BENEFITS OF FEDERAL MAGISTRATES SYSTEM CAN BE BETTER REALIZED 1 (1983), <http://www.gao.gov/assets/150/140337.pdf>. The report memorializes the purpose behind the Federal Magistrates Act of 1968:

negotiations satisfies the requirement that a different judge than the trial judge handle the plea negotiation, but also avoids burdening the dockets of already busy federal district judges.²⁴⁹

A judge participating in the plea negotiation should be permitted to accept the defendant's plea, but should not conduct further proceedings, such as the trial (even if the parties consent to it). It is critical that the plea negotiation process be kept separate from the trial. Accordingly, the trial judge must be barred from access to information about plea negotiations. Like in the pre-*Davila* Northern District of California rule, the rule should prohibit any communication of the substance of the plea negotiations to the trial judge.²⁵⁰ Additionally, the trial judge should not receive a record of the sentence offered and rejected in plea negotiations.²⁵¹ Barring the trial judge's access to information uncovered in plea negotiations makes it less likely that he will assign a severe sentence to punish a defendant for refusing to plead.²⁵²

Third, all plea negotiations that involve a judge should be on the record.²⁵³ Though this record should not be shared with the trial judge if the defendant chooses to go to trial, a verbatim record is critical for appeal purposes. In *Anderson v. State*,²⁵⁴ the Indiana Supreme Court could not determine whether the judge's participation induced an involuntary plea.²⁵⁵ The *Anderson* court expressed the need for "a sound record affirmatively showing voluntariness."²⁵⁶ By insisting that all plea negotiations with judicial involvement be recorded, and thus reviewable, the new rule would deter judicial coercion.

Fourth, victims need not be present at plea negotiations. The Northern District of California's pre-*Davila* rule did not require a defendant attend the conference, let alone a victim.²⁵⁷ It did, however, suggest that a defendant should

"[T]o improve the Federal judicial system by easing the workload on Federal judges and providing the public with a speedier resolution of litigative matters." *Id.* The report discusses magistrates' success in contributing to the movement of cases and the potential for greater ease of burden on district court judges. *Id.*

249. Turner, *supra* note 176, at 265–66.

250. N.D. CAL. CRIM. L.R. 11-1(c) (2013) ("Neither the settlement Judge, nor the parties nor their attorneys shall communicate any of the substance of the settlement discussions to the assigned Judge or to any other person.").

251. This limitation is in contrast to the rule in Detroit, where trial judges receive a record of the rejected plea offer, thereby practically assuring that the defendant will receive a higher sentence at trial. Stephanie Baron, Comment, *Pretrial Sentence Bargaining: A Cure for Crowded Dockets?*, 30 EMORY L.J. 853, 887–88 (1981).

252. See, e.g., *People v. Dennis*, 328 N.E.2d 135, 138 (Ill. App. Ct. 1975). See also *supra* notes 75–77 and accompanying text for a discussion of the fear that trial judges will give more severe sentences to defendants who choose to go to trial.

253. This Comment recognizes the logistical difficulty in accomplishing this piece of the proposal, but proposes it nonetheless.

254. 335 N.E.2d 225, 228 (Ind. 1975).

255. *Anderson*, 335 N.E.2d at 228.

256. *Id.*

257. See *supra* note 196 for a discussion of the Northern District's local rule.

be present in the courthouse for consultation.²⁵⁸ The same should be true of the victim. Requiring a victim's presence during a plea negotiation would result in a mini-trial. As Judge Wilken's proposal suggests, judicial participation should be a means by which judges save time, not one by which magistrate judges' schedules become bogged down by mini-trials.²⁵⁹

Fifth, the amendment should allow for preparation of portions of the presentence report before plea negotiations to ensure that a judge is properly prepared for the negotiations.²⁶⁰ The District of Montana's pre-*Davila* rule permitted preparation of a defendant's criminal history if requested.²⁶¹ Although Florida judges do not receive a presentence report, they learn information from a probable cause affidavit submitted by the prosecutor and an oral presentation of evidence by the attorneys.²⁶² The Florida process has been described as one lacking in information, thereby discouraging some judges from participating in plea negotiations.²⁶³ In Connecticut, most of the evidence is presented orally in plea negotiations.²⁶⁴ If, instead, portions of the presentence report were required before the negotiations, the judge could better understand the case and prepare for the negotiation. Familiarity with the case, knowledge of the defendant's background, and appropriate sentencing guidelines would aid the judge as he decides who is "telling the truth."²⁶⁵ Rather than relying on the information provided by prosecutors, who maintain a variety of resources that defense counsel lack, the judge would be better positioned to offer appropriate, balanced recommendations.²⁶⁶

Finally, the amendment should allow a judge to serve as a mediator, not just a provider of likely sentences under the Sentencing Guidelines. The addition of a judge is intended to provide protection from the powerful prosecutor and underresourced defense attorney, thus the judge must be permitted to assume an active role. A judge empowered to share only the sentences likely under the

258. *Anderson*, 335 N.E.2d at 228.

258. See N.D. CAL. CRIM. L.R. 11-1(c) (2013).

259. See *supra* note 208 and accompanying text for a discussion of the time saved by judicial participation.

260. Presentence reports are governed by Federal Rule of Criminal Procedure 32, which addresses sentencing guidelines, as well as additional information, such as (1) the defendant's history, record, and any circumstances affecting the defendant's behavior; (2) financial, social, psychological, and medical information; and (3) applicable nonprison programs or resources available. FED. R. CRIM. P. 32(d)(2)(A)(i)-(iii). A probation officer interviews the defendant before the report is issued. *Id.* 32(c)(2).

261. D. MONT. CRIM. L.R. 17.1.2 (2013).

262. Turner, *supra* note 176, at 245.

263. *Id.*

264. See *id.* at 249 (explaining that because the defense often does not have all the facts of a case, it is common for the judge to permit five to six pretrial continuances to give the defense an opportunity to "get up to speed").

265. See *supra* notes 222-28 and accompanying text for a discussion of how judges determine who is "telling the truth."

266. See *supra* notes 78-100 and accompanying text for a discussion of prosecutorial power. See *supra* notes 107-17 and accompanying text for a discussion of defense attorney resources.

Sentencing Guidelines would do very little to reduce prosecutorial power. Rather, he must be permitted to eliminate a prosecutor's high offer in order to prevent a defendant from being anchored. Furthermore, if a judge is to truly provide the essential information to a risk-averse defendant, mere sentence recital falls short of that level of transparency. A judge should be permitted to comment on the merits of a case as an impartial party to the negotiation. This participation would aid in the process of reaching a fair agreement. With the safeguard of a verbatim record to police conversation, a judge would be less likely to engage in overly aggressive or coercive moderation. To actually reflect "the realities of current practice,"²⁶⁷ the rule needs to acknowledge that judges are already serving as mediators. As such, Rule 11(c)(1) should be amended to provide guidance for judges so that they know what level of participation in negotiations is permissible.

IV. CONCLUSION

The ABA should update its position on judicial participation in federal criminal plea negotiations, providing guidelines to support an amendment to Rule 11(c)(1). The concerns associated with judicial participation—coercion, tainted integrity of process, and the potential for unfair punishment at trial—are legitimate concerns that can be addressed through carefully written guidelines. The ABA should provide these guidelines as encouragement for the Advisory Committee to reconsider an amendment to Rule 11(c)(1). Judicial participation has the potential to temper unfettered prosecutorial power and monitor defense attorney practices, all in an effort to make the plea negotiation process more fair and effective. Given the fact that virtually all criminal matters conclude in plea arrangements, judicial participation is critical if the criminal process envisioned by the U.S. Constitution, statutes, rules, and common law is to achieve the goal of promoting justice.

267. PA. R. CRIM. P. 590 cmt.