Plea bargaining recommendations by criminal defense attorneys: Legal, psychological, and substance abuse rehabilitative influences

A Thesis
Submitted to the Faculty
of
Drexel University
by
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in partial fulfillment of the requirements for the degree of
Doctor of Philosophy
June 2005
# Table of Contents

List of Tables .................................................................................................................. iii  
List of Figures .............................................................................................................. iv  
List of Figures .............................................................................................................. iv  
Abstract ......................................................................................................................... v  
Introduction ................................................................................................................... 1  
  Nature of Plea Bargaining ........................................................................................... 2  
  Social Psychological Studies of Plea Bargaining ....................................................... 7  
  Studies of Defense Attorneys ..................................................................................... 10  
  Legal Theory and Scholarship ................................................................................... 11  
  Therapeutic Jurisprudence ......................................................................................... 14  
  Drug Courts ............................................................................................................. 16  
  Substance Abuse Treatment ....................................................................................... 21  
  Summary: Research Questions and Variables ........................................................ 24  
Hypotheses .................................................................................................................. 30  
Method ........................................................................................................................ 32  
  Participants .............................................................................................................. 32  
  Design ...................................................................................................................... 32  
  Procedures ............................................................................................................... 34  
Analyses ......................................................................................................................... 34  
Results ......................................................................................................................... 35  
  Sample characteristics ............................................................................................. 35  
  Vignette characteristics .......................................................................................... 42  
  Analysis of Plea Recommendations in the Criminal Case ...................................... 42  
  Hypotheses for Vignette 1 (plea recommendations in a regular criminal case) ...... 45  
  Analysis of Plea Recommendations in a Drug Court Scenario ................................ 48  
  Hypotheses for Vignette 2 (plea recommendations in a drug court scenario) ......... 50  
Self-report Ratings and Gender ............................................................................... 54  
Self-report Ratings and Attorney Type .................................................................... 56  
Discussion ................................................................................................................... 58  
  Implications ............................................................................................................. 61  
Limitations ................................................................................................................... 70  
Future Research ........................................................................................................... 72  
References .................................................................................................................. 76  
Appendix A: Vignette 1 .............................................................................................. 81  
Appendix C: Survey Questionnaire ............................................................................. 89
List of Tables

Table 1: Attorneys Responding to Survey, by Gender and Practice Status .......... 36
Table 2: Total Responses for Each Vignette............................................................... 42
Table 3: Means of the 3-way Interaction between Strength of Evidence, Potential Sentence, and Defendant’s Wishes ................................................................. 44
Table 4: Means of the 2-way Interaction between Potential Sentence and Defendant’s Wish ................................................................................................. 45
Table 5: Means of 2-way Interaction between Strength of Evidence and Defendant’s Rehabilitative History ........................................................................ 50
Table 6: Attorney Self-Report Ratings of Importance in Plea Recommendations .... 52
Table 7: Mean Gender Differences of Ten Factors..................................................... 56
Table 8: Mean Attorney Type Differences of Ten Factors ........................................ 57
List of Figures

1. Respondents (N=184) Reported Years of Practice ................................................ 37
2. Respondents’ (N=163) Number of Criminal Cases Handled Last Year ............. 38
3. Respondents’ (N=167) Percentage of Criminal Cases Plea Bargained Last Year.. 39
4. Respondents’ (N=179) Percentage of Criminal Defendants Represented with Substance Abuse Problems ................................................................. 40
5. Respondents’ (N=129) Percentage of Clients with Substance Abuse Problems Diverted to Drug Court ................................................................. 41
6. Strength of Evidence and Potential Sentence When Defendant States a Preference To Go To Trial ................................................................. 46
7. Strength of Evidence and Potential Sentence When Defendant States a Preference To Plea ................................................................. 47
8. 2-Way Interaction Between Length of Sentence and Defendant’s Wishes ......... 48
9. 2-Way Interaction Between Strength of Evidence and Rehabilitation History ...... 51
Most criminal cases are disposed of through the process of plea bargaining. However, almost no research has focused on this process. This study examined the plea bargaining process from the perspective of the criminal defense attorney. Attorney participants responded to a survey containing two vignettes presented in a 2 x 2 x 2 between-subjects design. The first vignette systematically manipulated the variables likelihood of conviction based on the strength of the evidence, the defendant’s wishes on whether to plead guilty or go to trial, and the potential sentence if convicted. The second vignette systematically manipulated the variables likelihood of conviction based on the strength of the evidence, the defendant’s acknowledgement or denial of a substance abuse problem, and defendant’s substance abuse rehabilitative history. Attorney participants answered additional questions included on all versions of the survey on the legal, psychological, and substance abuse rehabilitative influences that may affect their decision making when advising plea bargains to their clients. As hypothesized, there were statistically significant differences between how criminal defense attorneys rated the likelihood of recommending a plea bargain to a criminal defendant in both vignettes. For the first vignette, a significant 3-way interaction and other significant results suggested that strong evidence was a most influential variable with respect to attorney recommendations, particularly when the potential sentence was high and
(paradoxically) when the client wished to go to trial. For the second vignette, a significant 2-way interaction and significant main effect findings lend some further support that strong evidence is a most influential variable with respect to attorney recommendations regardless of type of case, and some limited support that a criminal defendant’s acknowledgement of a substance abuse problem is an influential variable with respect to attorney recommendations when diversion to drug court is a viable plea option. The implications of these results are discussed using prominent theories in mental health law such as therapeutic jurisprudence and procedural justice.
Introduction

Understanding the process by which criminal charges are resolved is very important to the larger appreciation of the operation of the United States criminal justice system. There has been a great deal of research focusing on jury proceedings as one means of promoting such understanding (see, e.g., Devine, Clayton, Dunford, Seying, & Price, 2001; Gerbasi, Zuckerman, & Reis, 1977; Greene et al., 2002; and Saks, 1997). However, the vast majority of criminal cases are not resolved through jury trials. According to Bureau of Justice Statistics, in the year 2000, there were 69,283 cases disposed of in federal district court by trial or plea (excluding dismissals); of these 64,558 (93%) were disposed of by a guilty plea (Sourcebook of Criminal Justice Statistics, 2002). In addition, although the number of acquittals was not recorded, of the 924,700 felony convictions in state court, 879,200 (95%) were resolved by guilty plea (Sourcebook of Criminal Justice Statistics, 2002). All of these guilty pleas may not have resulted from plea bargains, as a defendant may choose to plead guilty even in the absence of a plea bargain. Thus, the exact percentage of plea bargains is unknown. However, legal scholars agree that the vast majority of criminal cases are resolved by guilty pleas from the plea bargaining process (Clarke, 2001; Guidorizzi, 1998; Hessick & Saujani, 2002; Lynch, 2003). Since the plea bargaining process is the most frequently used method for disposing of criminal cases, one would expect a great deal of empirical research on the topic. Surprisingly, however, there has been little empirical research to date on this process (see, e.g., Bordens, 1984; Bordens & Bassett, 1985; Gregory, Mowen, & Linder, 1978; and McAllister & Bregman, 1986 for the exception), and no recent research on this topic.
Nature of Plea Bargaining

According to Black’s Law Dictionary (2004), a plea bargain is defined as follows:

A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges (Retrieved October 6, 2004 from http://www.lawschool.westlaw.com).

In simple terms, a plea bargain is an agreement between the defense and the prosecution in which a criminal defendant forgoes a trial, and instead pleads guilty to a less severe charge (or fewer charges) in order to avoid a potential lengthier sentence that may result if convicted at trial from the original charge or charges. There are various types of plea bargains, and what constitutes a plea bargain may differ from attorney to attorney, judge to judge, and jurisdiction to jurisdiction. Generally, however, there are two types of plea bargains: a charge bargain and a sentence bargain. A charge bargain involves reducing the charge to a less serious offense in exchange for either a plea of guilty or no contest (Black’s Law Dictionary, 2004; Guidorizzi, 1998). A sentence bargain involves the prosecutor agreeing to recommend a lighter sentence in exchange for either a plea of guilty or no contest (Black’s Law Dictionary). A diversion may also be considered a plea bargain. A diversion (which will be discussed later in the context of drug courts) allows a defendant to consent to a probation that involves some sort of rehabilitation. If the
defendant successfully completes the rehabilitation, the charges are dropped or
substantially reduced.

How a plea bargain works may also differ from jurisdiction to jurisdiction, but
there are several important elements. Essentially a plea bargain is a negotiation.
Either side may begin the negotiation, but it is within the prosecutor’s discretion
whether to offer a plea bargain. Absent a guilty plea or other detrimental reliance on
the part of the defendant, the prosecutor may withdraw a plea offer at any time
(Corpus Juris Secundum, 2004; U.S. v. Pleasant, 1984). A plea agreement is between
the accused and the prosecutor, and as such, the ultimate decision on whether to
accept a plea bargain rests with the accused (Johnson v. Duckworth, 1986). However,
according to Rule 1.4 of the ABA Model Rules of Professional Conduct (2003), an
attorney must inform and consult with their client on any offered plea bargain. It is
considered a sixth amendment injury for an attorney to fail to communicate a plea
offer to his client (Pham v. U.S., 2003).

Many plea bargains are subject to court approval, but some are not such as
when a prosecutor independently drops charges in exchange for a guilty plea to a
lesser offense (Guidorizzi, 1998). Another type of plea bargain not subject to court
approval is “implicit plea bargaining,” in which defendants are informed that if they
go to trial and are convicted, they will be punished more severely (Guidorizzi). This
can occur as a result of pressure from the prosecutor or the judge. Lynch (1999)
described trial hostile environments where judges discourage trials and punish
defendants more severely if convicted at trial than if they had accepted a plea. There
is no constitutional right to plea bargain, and the government has no duty to plea
bargain (Corpus Juris Secundum § 365, 2004). Thus, while the prosecutor cannot
coeerce or threaten the defendant to plead guilty, the prosecutor can exert pressure and
encourage a guilty plea by informing the defendant of the strength of the evidence,
the likelihood of conviction, the consequences of a guilty plea, and the prosecutor’s
recommendation based on their knowledge, judgment, and experience (American
Jurisprudence § 686, 2004; see, e.g., Nguyen v. U.S., 1997, stating that a government
did not coerce a defendant into pleading guilty by accurately describing what the
prosecutor might have done if the defendant went to trial; U.S. v. Messino, 1995).
And while there is potential for prosecutorial abuse in terms of bargaining power, this
does not foreclose the possibility of voluntary and knowing plea bargaining (U.S. v.
Mezzanatto, 1995) simply because an offer of a plea bargain may encourage a
defendant to forgo the right to a trial (U.S. v. Villasenor-Cesar, 1997)

Plea bargaining has become accepted within the legal community within the
past decade (Palmer, 1999). Although plea bargaining has existed since before the
Civil War, its initial prominence emerged in the 1920s when several states surveyed
their criminal justice systems and found a steady increase in guilty pleas (Palmer).
According to Palmer, plea bargaining emerged again in the 1960s as a result of the
rise of drug use crimes. Then in 1967, both the American Bar Association and the
President’s Commission on Law Enforcement sanctioned plea bargaining. The U.S.
Supreme Court, in holding that a court can require performance of a plea bargain
when the prosecution does not fulfill its end of the bargain, stated that plea bargaining
is “an essential component of the administration of justice” and “is not only an
essential part of the process but a highly desired part” (Santobello v. New York, 1971,
In 1978, the Court rejected the notion that plea bargaining was a violation of due process, since both prosecution and defendants have equal bargaining power (*Bordenkircher v. Hayes*). The Court found that defendants advised by competent counsel are “presumptively capable of intelligent choice in response to prosecutorial persuasion,” given the procedural safeguards surrounding the plea (*Bordenkircher v. Hayes*, p. 363). According to one scholar, this ruling specifically accepted plea bargaining as part of the criminal justice process (Palmer, 1999).

Subsequent to the Supreme Court’s commentary regarding the plea bargain process, there has been a significant debate on the constitutionality and propriety of plea bargaining (Guidorizzi, 1998). The advantages of plea bargaining as described by legal scholars include: (a) greater flexibility and more efficient allocation of resources in the criminal justice system by allowing judges, prosecutors, and defense attorneys to reduce caseload; (b) allowing the defendant to acknowledge guilt, and in so doing both assume responsibility for their act and avoid maximum penalties; and (c) allowing victims to gain a sense of closure through knowing the defendant will be punished, while simultaneously allowing victims to avoid going through a trial (Guidorizzi, Palmer, 1999). The criticisms of plea bargaining, by contrast, include the following: (a) innocent defendants may plead guilty in order to avoid risking a long prison term that can result from a trial; (b) it undermines the values of the criminal justice system, specifically the presumption of innocence and the right to a trial; (c) many defendants may get less severe sentences; and (d) it creates concerns over the motivations of the legal actors and the amount of coercion that may result (Guidorizzi, Palmer).
Despite criticisms of the plea bargaining process (Guidorizzi, 1998; Schulhofer, 1992) and calls for plea bargain reform (Alschuler, 1983; Palmer, 1999; Scott & Stuntz, 1992), both critics and supporters agree that plea bargaining remains an integral part of the practice of criminal law (Hollander-Blumhoff, 1997). It affects most criminal defendants, as well as the relationship between the defendant and the defense attorney. However, the influences that affect the decision making process of criminal defense attorneys on whether to pursue or recommend plea bargains to their clients are largely unknown. In addition, the proliferation of drug courts, mental health courts, and judicial discretion to offer downward sentencing departures for rehabilitative programs in certain cases have created additional opportunities for criminal defense attorneys to play a more therapeutic role in crafting solutions to their clients’ problems (Winick, 1999).

The criminal defense attorney is typically the first and most influential advocate for the criminal defendant. As such, the defense attorney is in a unique position to recognize substance abuse problems in a criminal defendant, and to advise and advocate for dispositions to a criminal case that can address these substance abuse problems. Given the nature of the criminal process, these solutions are most likely to be addressed as part of a plea bargaining process. However, the criminal process and particularly the plea bargain process involve far more than the substance abuse needs of some defendants. A variety of factors can influence the disposition of a criminal case, including variables such as the number and seriousness of the charges, the potential sentence if convicted, the existence of mandatory sentencing laws, the defendant’s prior convictions, and the strength of the evidence. In addition, there
Plea Bargaining

may be additional influences that can affect the decision making of a criminal defense attorney in deciding the best manner to dispose of a case – the prosecutor assigned to the case, the judge assigned to the case, the wishes of the criminal defendant, the defendant’s capacity for understanding and reasoning about plea, clinical problems such as intellectual deficits, severe mental illness, substance abuse problems, the size of the attorney’s caseload, and the impact on professional reputation if the case is won or lost at trial. For defendants with substance abuse problems, there are added considerations of identifying this problem, having the individual acknowledge it and decide if he/she needs or wants treatment, and whether treatment is a consideration in case disposition options. Despite this array of possible influences, we have little empirical data describing whether and to what extent each may affect the plea bargaining process. Thus, it is particularly important to investigate the influences that affect plea bargaining; the most widely used approach to disposition of charges in the criminal justice system.

Social Psychological Studies of Plea Bargaining

There are apparently only a few empirical studies on the nature of the plea bargaining process. Social psychological research examining the plea bargaining process has generally used undergraduates to examine mock plea bargaining decisions. Most of these studies have used students to role play criminal defendants. Gregory, Mowen, and Linder (1978) recruited psychology students to role play either innocent or guilty defendants. Participants were asked to imagine being charged with armed robbery, and were provided with information concerning the evidence, the charges (four versus one) and the potential sentence (10 to 15 years in prison versus 1
to 2 years in prison) (Gregory et al., 1978). Participants were then told they had been offered a plea bargain for first time offenders, involving a sentence of three months in jail, and were asked whether they wanted to accept the plea bargain. Eighteen percent of the participants who role played innocent defendants accepted the plea bargain, while 83% of the guilty defendants accepted the plea. Gregory et al. reported that participants were more likely to accept a plea when faced with more charges, and/or when the severity of punishment upon conviction was greater (10 to 15 years in prison versus 1 to 2 years in prison). Gregory et al. found these main effects for those playing the guilty defendants, but not for those playing the innocent defendants.

In another study (Bordens 1984), psychology students were assigned to a guilty or innocent condition, with the following variables manipulated: the sentence a defendant would receive upon acceptance of a plea (probation, 6 months in prison, 1 year in prison, or 3 years in prison), the sentence they would receive if the plea was rejected and they were convicted at trial (one or five years greater than the proffered sentence), and the defense attorney’s estimate of the likelihood of conviction at trial (10%, 50%, or 90%). Like Gregory et al. (1978), Bordens found that guilty defendants were more likely to accept a plea than innocent ones, but also reported that under the condition of almost certain conviction (90%), innocent subjects were inclined to accept a plea bargain if the proffered sentence involved probation rather than incarceration. Guilty subjects were just as likely to accept a plea when the probability of conviction was 50% or 90%, but less likely to accept a plea when the likelihood of conviction was 10% (Bordens, 1984).
McAllister and Bregman (1986) used students to play the roles of defendants and defense lawyers, respectively, to study the impact of severity of sentence and probability of conviction on the plea bargaining process. Using 2 versus 5 years for severity of sentence and probability of conviction as 20%, 50%, or 80%, the investigators asked mock defendants whether they would accept a plea of a one year sentence or go to trial. They replicated the Gregory et al. (1978) finding that as severity of sentence increased and as the probability of conviction increased, so did the likelihood that the mock defendants would accept the plea (McAllister & Bregman). They also hypothesized that mock defense attorneys would also use seriousness of the charge and strength of the evidence in discussing plea options with a defendant. Participants playing the role of defense attorney were asked whether they would recommend a plea bargain involving a one year sentence for their defendant client. Participants playing the role of defense attorney were influenced by probability of conviction, but not severity of sentence in their recommendations.

In a study of actual criminal defendants, Bordens and Bassett (1985) questioned 67 convicted criminal defendants who had plea bargained their cases. The investigators found seven significant factors that affected defendants’ decisions to accept a plea: 1) pressure from the prosecutor; 2) indirect pressure (including concern over how the case will affect one’s family, fear of severe punishment if a plea is refused, and accepting a plea to secure the lest severe punishment possible); 3) expediency (accepting the plea bargain because it was the fastest or easiest disposition); 4) likelihood of conviction; 5) remorse for the crime; 6) acquiescence (a combination of defendant perceptions that the defense attorney’s input was minimal,
their best deal was mediocre, and their treatment was less than fair); and 7) sentence severity (plea sentence or potential sentence if plea was rejected).

While this research is somewhat helpful in generating hypotheses about the influences that might affect criminal defendants’ decision making regarding a plea, these studies are also quite limited. Only one used real criminal defendants. None used real attorneys; only one even considered mock attorneys. Consequently, they add little to any understanding of the factors influencing criminal defense attorneys in making decisions about recommending acceptance of pleas offered to their clients.

Studies of Defense Attorneys

A few studies have focused on criminal defense attorneys as participants. These studies generally examined the characteristics of criminal defense attorneys, although not factors related to their decision making during the plea bargaining process. Lynch (1999) surveyed public defenders and examined their potential stressors, and in particular the effect of encountering the judicial practice of excessively punishing defendants who were convicted by way of trial rather than through a guilty plea (what he refers to as a “no-trial” option). Lynch reported that encountering this type of judicial practice was one of the greatest stressors on public defenders and affected their relationship with prosecutors and their clients. Another study (Lynch and Evans 2002) examined the attributes of highly effective criminal defense negotiators in negotiating plea bargains. The investigators reported that a cooperative negotiating style and strong emotional stability were the most important characteristics as rated by district attorneys.
Another study (Poythress, Bonnie, Hoge, Monahan, & Oberlander, 1994) examined attorney-client decision making in a public defender office from the perspective of both the client and the public defender. They measured the degree to which attorneys doubted the competence of clients and reported that attorneys doubted the competence of 8%-15% of clients charged with felonies and 3%-8% of the clients charged with misdemeanors. They also examined the functional abilities of criminal defendants, such as assisting the attorney in developing facts, accepting the advice of counsel, and the amount of client participation. The investigators reported that when attorneys doubted the competence of a client, attorneys viewed those clients as less helpful and less actively involved in their case, but more involved in decision making. The investigators also reported that the perceptions of attorneys and their clients on many measures (degree of client helpfulness, degree of client involvement) were in substantial agreement, but that attorneys may rate their clients’ participation as being somewhat more active than the clients’ perception. Poythress et al. concluded that the difference that did occur did not appear to the authors to result from systematic bias on the part of the attorneys to conform to expected legal norms.

_Legal Theory and Scholarship_

The law review literature contains theoretical articles on various aspects of the plea bargaining process. The particular focus in this section is on the various factors that affect the decision making of the criminal defense attorney in the plea bargain process. Hessick and Saujani (2002) described the respective roles of the prosecutor, defense counsel, and judge in plea bargaining and enumerated various motivations
and influences. They argued that several factors affected the process from the perspective of defense counsel. These include (a) the nature of the relationship with the prosecutor (arguing that many defense attorneys engage in plea negotiations because of longstanding negotiating relationships with prosecutors), (b) the enormous caseload of public defenders (and the associated pressure from managing a heavy caseload), (c) the limited capacity of the judicial system to accommodate many lengthy trials, (d) the fee structure for private attorneys (creating financial incentives for court-appointed defense attorneys to settle cases without going to trial), (e) pressure from prosecutors and judges to move cases along (including at times threats of harsher sentences if the case goes to trial), and (f) lack of confidence in the outcome at trial. Hessick and Saujani also suggested that defense counsel considers risk of conviction at trial, which can include the defendant’s record, the facts of the case, the prosecutor’s personality and willingness to go to trial, the personality and characteristics of the judge to sentence certain types of crimes, and the attorney’s “gut feeling.” Finally, they cite the extra work involved in preparing a case for trial, and the belief that most of their defendants are guilty.

Bibas (2004) focused on the manner in which plea bargains are struck, and argued that the conventional model for explaining plea bargains (the shadow-of-trial model) is too simplistic, as multiple influences affect the decision to plea bargain. The shadow-of-trial model was apparently first described by Robert Mnookin and Lewis Kornhauser (1979), who argued that litigants in civil cases bargain "in the shadow of the law." Under the shadow-of-trial model, plea bargaining in a criminal trial should reflect the likelihood of conviction at trial (strength of the evidence) and
the likely post-trial sentence (expected sentence) (Bibas, 2004). However, Bibas suggests a variety of additional influences, including (a) pressure from the prosecutor (who may be motivated to lighten their workload, ensure a certain number of convictions, or protect a professional reputation for trying and winning certain cases), (b) financial incentives for defense attorneys (no monetary incentive to try a case with a flat fee or fixed salary), (c) reducing workload, (d) pressure from judges, (e) limited experience of the defense attorney, (f) continuing to foster relationships with prosecutors and judges, (g) applicable sentencing guidelines, and (h) bail and pre-trial detention (which can influence a defendant to accept a plea offer if they are currently in jail, and/or have an offer that would limit subsequent incarceration by incorporating credit for time already served).

In discussing how plea bargaining works as a means of negotiation, Hollander-Blumhoff (1997) noted that defense counsel determine the best course of action in a given case by assessing the minimum penalty if convicted and the strength of the government’s case. She added that if an attorney chooses plea bargaining, that attorney is weighing additional factors such as (a) the defendant’s record, (b) the facts of the case, (c) the prosecutor’s personality and willingness to go to trial, (d) the judge’s precedent in terms of prior dispositions, (e) the wish to get trial experience, (f) fear of going to trial, (g) and the establishment of a particular reputation. Hollander-Blumhoff also noted that the role of a good defense counsel involves understanding the defendant’s wishes and being able to advise a course of action based on those wishes, on the penalty if convicted, and on the strength of the government’s case.
Emmelman (1997) collected data though direct observation and interviews with fifteen private attorneys of a non-profit corporation who were court-appointed as defense counsel in criminal cases. She reported that prior to plea bargaining, these attorneys evaluate the strength of the evidence in three stages: (a) assessing the prosecutor’s case (the information the prosecutor will present during hearings); (b) developing the potential defense against the prosecutor’s case; and (c) weighing the evidence. As a result of this process, defenders then decide how strong a case appears. As may be seen, there is some agreement by legal scholars regarding the kinds of influences that may affect the plea bargaining process.

Therapeutic Jurisprudence

An entire body of scholarly literature in mental health law now exists reflecting the influence of the theory of *therapeutic jurisprudence*, which was developed by David Wexler and Bruce Winick more than a decade ago to examine the role of law and its potential application as a therapeutic agent to those involved in the legal system. Therapeutic jurisprudence has been described as the study of the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences for individuals involved in the legal process (Wexler & Winick, 1991, 1996). Using a therapeutic jurisprudence model in the criminal context, Wexler and Winick describe how the law and its applications can have consequences for the psychological well-being of criminal defendants. It is based on the assumption that the law can potentially have a positive or negative effect on such well-being, and the law should be designed and implemented to increase it (Astrid & Ward, 2003). As such, therapeutic
jurisprudence incorporates psychology and other social sciences to consider how they might interact with law to enhance the psychological well-being of those involved in criminal litigation. Psychological knowledge can be applied under a therapeutic jurisprudence framework to consider the role of the law and its therapeutic or antitherapeutic effects, as well as the therapeutic or antitherapeutic roles and behaviors of the legal actors such as judges and attorneys (Wexler, 1990).

Therapeutic jurisprudence has expanded to include the therapeutic and antitherapeutic effects of a wide variety of forensic issues, such as the insanity defense and civil commitment (Daicoff, 1999). According to Daicoff, practical principles of therapeutic jurisprudence are currently being used by a number of judges. One example (to be discussed at greater length in the next section) is drug courts, which are specialized courts for handling cases of defendants with substance abuse problems. Therapeutic jurisprudence also emphasizes that the attorney can play a significant role in yielding therapeutic and antitherapeutic effects from the legal process by attempting to create the most emotionally satisfactory and beneficial solution for their clients based on the client’s particular circumstances and characteristics (Schneider, 1999).

Another therapeutic approach to legal practice that attempts to avoid legal problems through “creative lawyering” is known as preventive law (Brown & Dauer, 1977; Hardaway, 1997). Winick (1999) describes a preventive law approach in which the criminal defense lawyer is a planner who, with periodic legal checkups and monitoring of client activities, can attempt to avoid or minimize the risk of litigation. Under an integrated therapeutic jurisprudence and preventive law approach, a
criminal defense attorney who is attentive to the emotional aspects of dealing with clients’ rehabilitative needs can function as a therapeutic agent in helping clients deal with problems that, if not addressed, could lead to greater legal difficulties in the future (Stolle, Wexler, Winick, & Dauer, 1997). Winick (1999) stressed the need for the criminal defense lawyer to (a) understand that they are potentially functioning as therapeutic agents in their interactions with their clients; (b) understand the range and availability of rehabilitative opportunities; and (c) develop techniques for dealing with their clients on rehabilitative issues with a higher degree of psychological sensitivity. He pointed out that the techniques and skills involved in addressing rehabilitative needs in the attorney-client relationship is a greatly understudied aspect of the attorney-client process. Winick urged social scientists to explore how criminal defense attorneys conduct conversations with their clients in matters concerning the advisability of diversion from the criminal process into a drug court or other form of treatment, versus accepting a guilty plea. Researchers could employ empirical strategies such as surveying attorneys to determine whether an anticipated psychological problem materialized or whether a particular solution worked (Stolle et al., 1997).

**Drug Courts**

One particular place where psychological problems are considered prominently, and where there is considerable opportunity to craft a therapeutic solution, is drug courts. Also known as drug treatment courts, drug courts are a relatively recent phenomenon. Under the heavy burden of dealing with court dockets overloaded with drug offenders as a result of the “war on drugs” in the 1980s, initiatives were taken to
create specialized courts to handle only drug offenses (Hora, Schma, & Rosenthal, 1999; Quinn, 2000-2001). As a result, according to Quinn, what was considered the first drug treatment court was established in Miami, Florida in 1989. According to Quinn, the concept of this first drug treatment court in Miami was to target first-time, low-level felony drug offenders, and (if they agreed to participate in outpatient drug treatment) have their cases diverted from traditional adjudication and eventually dismissed if they successfully completed treatment. After the creation of the Miami drug court, interest in drug treatment courts grew greatly (Quinn) and many jurisdictions throughout the country have begun to embrace the drug treatment court concept (Hora et al.). As of May, 2004, according to the Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project, there are 1,160 drug courts currently operating in all 50 states, plus the District of Columbia, Puerto Rico, Guam, and two federal districts, with another 517 planned. According to Hora et al., this proliferation of drug courts can be attributed to a variety of factors, such as more effective case load management, reduced costs and reduced jail crowding, and decreased rates of recidivism among drug treatment court participants. It is clear that the drug treatment court movement and concept has exploded. So what exactly is a drug treatment court, how does it work, and what does it do?

The various drug courts throughout the United States have differences in criteria for admission and operation, but most share some general principles. One type of drug court, according to Hora et al. (1999) is an “Expedited Drug Case Management” type of court that still focuses on punishment for drug offenders and emphasizes case management and quick disposition of drug cases to eliminate or cope
with the increases in drug cases. The other type of drug court, called “drug treatment courts” by Hora et al. have embraced a new paradigm shift away from a predominantly punitive orientation to one that focuses on treatment and rehabilitation (Burns & Peyrot, 2003; Goldkamp, White, & Robinson, 2001). Instead of working on the symptoms of the increase in drug offenses (i.e., crowding of court dockets), drug treatment courts are aimed at curing the underlying problem of drug crimes (Hora, et al.). As such, the drug treatment court’s focus is not on disposition of the case, but on correcting the addictive behavior of drug offenders through therapeutic treatment remedies (Goldkamp, White, & Robinson; Hora et al.). And while all drug treatment courts have developed separately and implemented their own version of a treatment-based model, most espouse the ten key components outlined by the U.S. Department of Justice’s Drug Courts Program Office. These ten components as outlined in a 1997 report are:

(1) Drug courts integrate alcohol and other drug treatment services with justice system case processing.

(2) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

(3) Eligible participants are identified early and promptly placed in the drug court program.

(4) Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

(5) Abstinence is monitored by frequent alcohol and other drug testing.
(6) A coordinated strategy governs drug court responses to participants' compliance.

(7) Ongoing judicial interaction with each drug court participant is essential.

(8) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

(9) Continuing interdisciplinary education promotes effective drug court planning, implementation, and operation.

(10) Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness. (Drug Courts Program Office, 1997).

Using these principles, most drug treatment courts share some important essential elements in common. One is that the environment is less adversarial and more therapeutic in nature as compared to traditional criminal courts (Burns & Peyrot, 2003; Hora, et al., 1999). Another is that the judge takes a more hands-on approach in supervising and monitoring the lives, treatment, and recovery of defendants (Burns & Peyrot; Hora et al.). Also, in general, drug treatment courts view addiction as a biopsychosocial disease that should be addressed therapeutically (Hora et al.). Thus, the roles of prosecutor and defense are also shifted to a more therapeutic and collaborative role and less of an adversarial role.

How drug treatment courts are structured to follow through on these principles and how they do so in practice varies from jurisdiction to jurisdiction. Generally, a defendant either starts out in a drug treatment court or is diverted to one from a traditional court. In either case, the defendant in a drug treatment court finds him or
herself before the judge much quicker than in a traditional court, generally within a few days after arrest (Hora et al., 1999). Generally, there are a set of criteria for admission to drug treatment court that vary from jurisdiction to jurisdiction. A survey of 212 drug courts found that most drug courts targeted eligibility based on offense and criminal history, rather than on type or severity of substance abusing behavior (Taxman & Bouffard, 2002).

Once the criteria are met, the defendant must agree to the terms of drug treatment court and all parties (the prosecutor, judge, defense counsel) must also agree to the diversion into drug treatment court. Most also require that the defendant enter a guilty plea as a condition of entering the drug treatment program. If the offender successfully completes the drug court treatment program, the offender is then able to withdraw the guilty plea, and either pleads guilty to a lesser charge or the charges are dismissed entirely. One common element is that the judge is the central figure in the process in that the judge, through frequent mandatory court appearances, monitors the progress of the individual and can apply sanctions if the person is not doing well (Hora et al.). Both the prosecutor and defense counsel also play a more collaborative and therapeutic role in that they screen potential participants and decide which candidates are appropriate for drug treatment court, and in some cases, they jointly determine eligibility (Hora et al.). All parties, according to Hora et al. work to further the “best interest” of defendants, which in drug treatment courts is sobriety. Hora et al. describe the defense counsel’s more therapeutic role as one in which the attorney tries to ensure that the addicted defendant stays in treatment and success is viewed as a drug-free client who is less likely to recidivate.
However, not all agree with this rosy, therapeutic picture of drug treatment courts painted by Hora et al. (1999). For example, Quinn (2000-2001), a staff attorney with the Bronx Defenders, believes that the collaborative “team” concept as outlined by Hora et al. and others is overemphasized as prosecutors have the more dominant power. In addition, Quinn believes that this therapeutic concept may in fact place some defendants’ rights in jeopardy at various stages in the process, and that as a by-product of the organization of drug treatment court, “case dumping” may occur. Quinn describes an example of case dumping where a weak or potentially “winnable” case by defense counsel may be brought to drug treatment court by the prosecutor because it is more difficult for defense counsel to convince a prosecutor to dismiss a case or to convince a defendant to go to trial when the “freedom” of treatment is presented. How likely a defense counsel is to advise a defendant to accept a diversionary plea such as this is one scenario that I tested in this research.

Substance Abuse Treatment

In order to choose important variables for investigating substance abuse rehabilitative need scenarios, the substance abuse treatment literature was consulted. Of course, since there is a vast amount of substance abuse treatment literature, I focused on two areas that I felt were important as representative of scenarios that might frequently occur in most criminal contexts with defendants with substance abuse problems. These two areas are an individual’s denial or acknowledgement of their substance abuse problem and an individual’s past rehabilitative history. I will briefly summarize some of the literature on these two areas and their potential impact.
on treatment success, since that should be an important consideration for an attorney in a more therapeutically oriented venue such as drug court.

According to Miller (1989), an individual who enters treatment before recognizing their substance abuse as a problem is unlikely to be open to therapeutic intervention. Traditional views of substance abuse characterized denial or poor motivation as a character trait that explained negative treatment outcomes (Donovan & Rosengren, 1999). And although the notion that it is difficult to treat those that deny wanting or needing treatment has not changed, there has been a more recent conceptual shift from characterizing an individual’s motivation or denial as a character trait that could lead to poor treatment outcome to an emphasis on an individual’s readiness for change (Donovan & Rosengren). The most prevalent model of readiness to change in substance abuse literature today is the Transtheoretical Model of Change (Prochaska, DiClemente, & Norcross, 1992). This model describes several stages of change that individuals cycle back and forth through. The first stage, known as precontemplation, includes individuals who are either unaware of their substance abuse problem or if aware, are not thinking about making any changes in their substance use (Connors, Donovan, & DiClemente, 2001). The “stage of change” literature suggests that treatment is most important for patients who are ready or at least somewhat motivated to receive it (Shen, McClellan, & Merrill, 2000). In a study of the client’s perceived need for treatment and its impact on treatment outcome, Shen et al. found similarly to others such as Prochaska et al. that those in the precontemplation stage (defined as those who reported no need for treatment), made less improvement following treatment than those who said
treatment was even slightly important. Shen et al. also found that patient’s motivation was more determined by their recent problems than by lifetime problems. This suggests that where an individual is now in terms of recognition of a substance abuse problem is an important predictor of treatment outcome. Any individual who does not acknowledge a substance abuse problem and any individual who does not intend to modify their behavior are in this precontemplation stage. Usually individuals who are in this stage and find themselves in substance abuse treatment have had some level of coercion and as long as they remain in this stage, they are unlikely to benefit from the treatment (Gregoire & Burke, 2004).

Although there is strong support for the notion that individuals who deny their problem may be more difficult to treat and may have poorer treatment outcome than those that acknowledge their problems, the impact of legal coercion on both treatment outcome and on motivation to change is less clear. Farabee, Prendergast, and Anglin (1998) reviewed 11 published studies involving the relationship between legal coercion and substance abuse treatment and found that five found a positive relationship between criminal justice referral and treatment outcome, four found no difference, and two studies showed a negative relationship. In a recent study on the relationship between legal coercion and readiness to change, Gregoire and Burke (2004) found support for the notion that legal coercion was associated with increased readiness to change. Based on their findings, they theorized that legal coercion into treatment may enhance readiness to change (Gregoire & Burke). There is some evidence, therefore, that the acknowledgement of a substance abuse problem is an important variable to consider in treatment readiness.
Surprisingly, the only studies on the effectiveness of current treatment based on past treatment history compare those who never received treatment with those who had. Theoretically, past treatment success can be viewed as associated with future treatment success. Merrill, Alterman, Cacciola, and Rutherford (1999) hypothesized that the number of times that an individual has been in treatment may be an accurate predictor of current treatment effectiveness, but that this has largely been ignored in both research and policy. Merrill et al. argue this position in the context of Prochaska and DiClemente’s (1986) theory that each treatment episode can be viewed as a building block that increases the patient’s readiness for treatment. As a result, collective effect of past treatments produces a cumulative effect of enhancing the most recent treatment (Merrill et al.). Merrill et al. examined the number of times in previous treatment relative to recidivism, and found that those who have been through more treatment were less likely to be rearrested than those who have not had as much—or any—prior treatment. Merrill et al. view this finding as support for their notion that past treatments have a cumulative effect that can improve current intervention effectiveness. It is logical to assume that a defendant who has had prior success with substance abuse treatment has a higher probability of succeeding in subsequent treatment than another who does not.

Summary: Research Questions and Variables

This research focused on the plea bargaining process by considering the legal, psychological, and substance abuse rehabilitative variables that criminal defense attorneys may consider when advising a defendant regarding a particular plea bargain possibility. This research did not directly address the techniques and skills employed
by lawyers in this process, but rather focused on attorney’s self-reported attitudes and values. It used the empirical strategy suggested by Stolle et al. (1997): surveying attorneys; and it focused on their decision making as a means of identifying relevant factors that affect the plea bargaining process. In consideration of the theory of therapeutic jurisprudence and one particular manifestation – drug courts – this research also examined substance abuse rehabilitative scenarios to explore how attorney decision making in plea bargaining is affected by therapeutic options in the context of a potential therapeutic diversion, such as drug court.

Two broad research questions were addressed in the proposed study.

1) What are the some of the legal and psychological variables that affect the self-reported decision making process of a criminal defense attorney in advising clients on potential plea bargains in criminal cases?

2) What are the some of the legal and substance abuse rehabilitative need variables that affect the decision making process of a criminal defense attorney in advising clients on potential “therapeutic” plea bargains, such as diversion to drug court, in criminal cases?

In order to address these questions, I examined several variables that the sparse literature suggests may be most promising. The empirical literature and the legal commentary on plea bargain decision making both support the notion that likelihood of conviction, based on the strength of the evidence, is an important variable for defense attorneys. Indeed, this variable appears from the scant empirical literature and from legal commentary to be the most important legal variable. On this basis, the
likelihood of conviction, based on the strength of the evidence, was chosen as a variable to include in addressing both research questions.

To answer the first research question, another legal variable – the potential sentence if convicted – was chosen because legal theory suggests that criminal defense attorneys will examine potential sentence and its value in relation to the plea offered in deciding whether to recommend plea bargains. Although the empirical literature has suggested that potential sentence might be more important to criminal defendants than to criminal defense attorneys, the single study reaching that conclusion used students to role play criminal defense attorneys. It is important, therefore, to consider the impact of this variable from the perspective of actual criminal defense attorneys to determine whether it is as important as legal theory suggests. Since the literature review revealed two legal factors in particular that may affect plea bargaining decision making from the perspective of the criminal defense attorney, both variables have been included in the research design.

The legal scholarly literature also suggested several other variables as potentially important in affecting the decision making of a criminal defense attorney in plea bargaining. These include a high current caseload, the impact on the attorney’s professional reputation if the case were lost at trial, the prosecutor assigned to the case, and the judge assigned to the case. These variables involve the perceptions and motivations of defense attorneys, including their views regarding clients’ wishes to plead. These are called “psychological” variables, therefore, in contrast with the variables that are directly related to the charges (strength of evidence and duration of possible sentence).
In addition, several other psychological variables were chosen to investigate: attorney perception of the defendant’s guilt, the attorney’s assessment that the defendant will not present well at trial, and the defendant’s wishes in terms of desire to plea bargain or desire to go to trial. Perception of the defendant’s guilt was chosen because it is believed that it is a common scenario that presents an interesting dilemma. Some attorneys may feel the emotional impact of representing an individual who they believe is guilty. While criminal defense attorneys have chosen their particular line of work, and should be willing to manage this dilemma, it will be interesting to consider whether they are able to ignore its psychological impact when recommending a plea bargain to a guilty defendant that does involve jail time. The attorney’s assessment of how well the defendant would present as a witness if the case were to go to trial was chosen based on conversations with criminal defense attorneys.

For a variety of reasons, the defendant’s wishes on whether to plead guilty or to go to trial is an important variable to investigate when considering the psychological influences on attorney decision making. This variable reflects attorneys’ respect for their clients’ autonomy and wishes. The American Bar Association’s Model Rules of Professional Conduct (2003) specifically state that in criminal cases, a “lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered. . . “ (Rule 1.2). In addition the ABA Model Rules of Professional Conduct indicates that in the role of advisor, an attorney may refer “not only to law but to other considerations . . . .”(Rule 2.1). It is important to investigate whether attorneys
report being as influenced by client preferences in their recommendations for plea as this rule suggests they should be.

“Procedural justice” is another theory relevant to this study. It has guided studies of involuntary patient hospitalization, and centers around the patient’s perception that he or she is being listened to and being treated with respect, and that his or her opinions are being recognized and considered (Lidz et al., 1995). Lidz et al. found that patients’ feelings of being coerced could be minimized if clinicians attended more closely to procedural justice issues. Those associated with developing the related theory of therapeutic jurisprudence – Wexler (1993) and Winick (1992) – have addressed the issue of procedural justice within the legal system in particular by studying the impact of the role of the legal professional in a commitment hearing. They have commented that the perception of free will has psychological benefits, and thus, individual autonomy should be safeguarded. Therapeutic jurisprudence suggests that attorneys should respond to their clients’ emotional concerns in a way consistent with the clients’ therapeutic interests. So, for example, if a client is emotionally distressed about a current charge and wants to plead quickly to reduce this distress, and to begin rehabilitation, the attorney should consider this in advising the client about the plea. Conversely, if a client wants to prove their innocence at trial, an attorney should recognize that state of mind. Accordingly, the attorney should be more likely to recommend going to trial in recognition of the client’s emotional state and wanting to prove their innocence. In the context of a regular criminal case, one can see how notions of therapeutic jurisprudence and procedural justice would be consistent with attorneys providing advice that reflects their client’s
stated preference. Thus, the variable of the defendant’s wishes was chosen to investigate to answer the first research question for its importance to various ethical and theoretical sources in psychology and law.

To address the second research question on substance abuse and rehabilitation, two variables were selected: (1) defendant’s rehabilitative history, and (2) defendant’s acknowledgement of having a substance abuse problem. Both may affect the plea bargaining process in a criminal case when a therapeutic option, such as diversion to drug court is presented. These variables were chosen for their ecological validity; it is likely that they are both frequently considered in attorney decision making regarding drug courts. The theory of therapeutic jurisprudence and its application to drug courts underscores the need for empirical investigation. The treatment literature in substance abuse is clear that overcoming denial of a genuine problem is an initial and important step in overcoming treatment barriers. Since entry into drug court treatment is voluntary, an attorney wishing to advise a defendant who denies a substance abuse problem to enter a plea associated with mandatory drug treatment may also have to convince that defendant that treatment is in his or her best interest. In some cases, the attorney may even have to convince the defendant to admit that he or she has a substance abuse problem before the judge will agree to the defendant’s diversion into drug treatment court. Therapeutic jurisprudence seeks to understand how attorneys may negotiate such a role. Using acknowledgement of a substance abuse problem as a variable allows measurement of its impact on attorney decision making in this possibly “therapeutic” role.
Rehabilitative history is especially important when considered in the context of legal decision making, risk of treatment failure, and advocacy for the best interests of a client. An attorney should be more likely to advise a plea allowing diversion to drug court and mandatory drug treatment for a client whom that attorney considers more likely to succeed in the treatment. That is particularly true in the context of drug court, where failure to complete the treatment could result in more severe criminal sanctions (including incarceration). It seems logical that an attorney will view a defendant with a favorable rehabilitation history as a lower risk for treatment failure than a defendant with a poor rehabilitation history.

The proposed research apparently involved the first empirical investigation of self reported attorney decision making in the plea bargaining process, particularly as influenced by the relevant legal and psychological variables described in this section. This is timely, considering the recent growth of legally mandated rehabilitative remedies such as drug court. Due to the general paucity of research relevant to the plea bargaining process, this study is, in some important respects, exploratory rather than testing of established hypotheses.

Hypotheses

It is hypothesized that when presented with a vignette and the variables of (a) likelihood of conviction (based on the strength of the evidence), (b) the defendant’s wishes on whether to plead guilty or to go to trial, and (c) the potential sentence if convicted are manipulated, there will be statistically significant differences between how criminal defense attorneys rate the likelihood of recommending a plea bargain to a criminal defendant.
More specifically, it is hypothesized that a survey of practicing criminal attorneys will result in the following based on their self report.

**Vignette 1**

1. Greater likelihood of conviction/strong evidence of guilt will be associated with a higher probability that a criminal defense attorney will recommend a plea bargain to a defendant.

2. A criminal defendant’s stated preference to plea bargain will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain than when a defendant states a preference to go to trial.

3. A criminal defense attorney will be more likely to recommend a plea bargain to a defendant when the defendant is facing a longer period of incarceration if convicted.

**Vignette 2**

When presented with a vignette in which the variables of (a) likelihood of conviction (based on the strength of the evidence), (b) the defendant’s acknowledgement or denial of a substance abuse problem, and (c) defendant’s substance abuse rehabilitative history are systematically manipulated, there will be statistically significant differences between how criminal defense attorneys will rate the likelihood of recommending a plea bargain to a criminal defendant that consists of mandatory substance abuse treatment. In particular:

1. Greater likelihood of conviction/strong evidence of guilt will be associated with a higher probability that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment as a consequence.
2. A favorable substance abuse rehabilitative history will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment as a consequence.

3. A criminal defendant’s acknowledgement of a substance abuse problem will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment as a consequence.

Method

Participants

Participants were criminal defense attorneys in the Philadelphia area. Both private criminal defense attorneys and attorneys with the Philadelphia Defender Association were surveyed. A power analysis conducted using a power of .81 and a medium effect size of .25 indicated that 136 participants were needed (17 for each cell of the 2 x 2 x 2 between subjects design).

Design

Eight versions of each of two vignettes were written, systematically manipulating three dichotomous independent variables in a 2 x 2 x 2 between subjects designs (see Appendix A and Appendix B, respectively). Scenarios were selected to represent actual criminal cases. In the first vignette, the three variables are (1) the potential sentence if the defendant were convicted of all charges, (2) the defendant’s wishes, and (3) the likelihood of conviction based on the strength of the evidence. Each variable is dichotomous. The two conditions for the first variable are high potential sentence and low potential sentence. The two conditions for the second
variable are the defendant’s desire to plead guilty versus the wish to plead not guilty and go to trial. The two conditions for the third variable are poor chance of acquittal/strong evidence of guilt versus good chance of acquittal/weak evidence. The use of language reflecting qualitative descriptions (e.g., “poor chance of acquittal”) rather than a quantitative (e.g., 10% chance of acquittal”) was guided by the anecdotal observation that attorneys tend to think in qualitative rather than quantitative terms.

In the second vignette, the variables are (1) the defendant’s acknowledgement of his substance abuse problem, (2) the defendant’s past rehabilitation history, and (3) the likelihood of conviction based on the strength of the evidence. Each variable is dichotomous. The two conditions for the first variable are the defendant denies having a current substance abuse problem versus the defendant acknowledges a current substance abuse problem. The two conditions for the second variable are the defendant has a poor rehabilitation history versus a good rehabilitation history. The two conditions for the third variable are poor chance of acquittal/strong evidence of guilt versus good chance of acquittal/weak evidence.

In the first vignette, the dependent variable is the likelihood of an attorney recommending a plea bargain. In the second vignette, the dependent variable is the likelihood of recommending a negotiated plea of diversion to substance abuse treatment. For both vignettes, attorneys rated the likelihood of recommending a plea on a five point scale: very likely, unlikely, possible, likely, and very unlikely.

The survey was also designed to ask criminal defense attorneys whether additional variables are important in their decision making in recommending plea
bargains. These other variables and the questions that were asked are provided in Appendix C. The survey was distributed by mail to practicing criminal attorneys in the Philadelphia area. Approximately half of those surveyed were in private practice, and the other half were employed by the Defender Association.

**Procedures**

The survey was mailed to participants with a self-addressed stamped return envelope enclosed to facilitate responding. The cover letter included a brief description of the research, and described its purpose and importance. The letter clearly indicated that participation is voluntary, and informed each attorney that it should take about 5 minutes to complete. Each attorney received one of eight vignettes from Vignette 1 and one of eight vignettes from Vignette 2. One of eight vignettes from Vignette 1 (the regular criminal case vignette) was randomly paired with one of eight vignettes from Vignette 2 (the drug court vignette). Five hundred and sixty attorneys (320 private attorneys and 240 public defenders) were sent surveys to obtain the targeted number of responses (N=135 or 17 for each cell of the 2 x 2 x 2 between subjects design) number of respondents for power = .81 with an effect size = .25. The order of the vignettes was counterbalanced so that half of the surveys began with a vignette from Vignette 1 and half began with a vignette from Vignette 2.

**Analyses**

The first statistical analysis was a 2 x 2 x 2 Analysis of Variance (ANOVA), conducted separately for each vignette. ANOVA is the proper analytic tool when analyzing a factorial design of three independent variables and two levels of each
independent variable, and when the dependent variable is continuous. Attorneys rated the dependent variable (likelihood of recommending a plea) on a five point scale: very likely, unlikely, possible, likely, and very unlikely. For statistical analysis, these responses were treated as continuous. The ten additional potential influences were analyzed using a repeated measure ANOVA to investigate significant differences in the importance ratings within the ten factors. Two of the relevant demographic and professional variables of interest – gender and type of attorney (public defender vs. private attorney)--were chosen to analyze against the ten additional factors using two separate mixed between-within subject ANOVAs (one for gender and one for attorney type) to determine whether there was a difference in importance ratings depending on the attorney’s gender or private/public practice status. When appropriate, post hoc and follow up tests were conducted and examined to further investigate differences.

Results

**Sample characteristics**

A total of 186 attorneys (33%) responded to the survey. The majority of respondents were male (62.4%, n = 116), while 26.9% were female (n = 50), and 10.8% (n = 20) did not record their gender. There was an approximately even split between respondents who identified themselves as public defenders (51.6%, n = 96) versus private attorneys (47.3%, n = 88), while 2 attorneys did not specify (1.1%) (see Table 1).
Table 1: Attorneys Responding to Survey, by Gender and Practice Status

<table>
<thead>
<tr>
<th>Gender</th>
<th>Attorney Status</th>
<th>Public Defender</th>
<th>Private Attorney</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td></td>
<td>39</td>
<td>76</td>
<td>115</td>
</tr>
<tr>
<td>Female</td>
<td></td>
<td>44</td>
<td>6</td>
<td>50</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>83</td>
<td>82</td>
<td>165</td>
</tr>
</tbody>
</table>

A total of 74.2% of respondents reported that there was a drug court in their jurisdiction of primary practice \((n = 138)\), 22.6% reported that there was not a drug court \((n = 42)\), and 3.2% reported that they did not know \((n = 6)\). There was a wide range of years of practice reported from attorneys who have only been practicing a few years to more experienced attorneys who have been practicing for many years (see Figure 1). The mean number of years of practice reported was 15.72. The median number of years of practice reported was 13.00 and there were several modes (3 years, 4 years, and 12 years).
There was a large range in the number of criminal cases handled last year (see Figure 2). The mean number of criminal cases handled last year reported was 361.33. The median number of criminal cases handled last year reported was 100.00 and the mode was 100.00.
There was also a broad range in the percentage of criminal cases plea bargained last year by respondents (see Figure 3). The mean percentage of criminal cases plea bargained last year reported was 54.53. Both the median and mode percentage of criminal cases plea bargained last year reported was 50%.

Figure 2: Respondents’ (N=163) Number of Criminal Cases Handled Last Year
Most attorneys (76%) reported that the percentage of criminal defendants with substance abuse problems that they represented was 50% or greater (see Figure 4). The mean percentage of criminal defendants represented with substance abuse problems reported was 55.60%. The median percentage of criminal defendants represented with substance abuse problems reported was 60% and the mode was 50%.
There was a wide range in the reported percentage of clients with substance abuse problems diverted to drug court (see Figure 5). The mean percentage of clients with substance abuse problems diverted to drug court reported was 32.92%. The median percentage of clients with substance abuse problems diverted to drug court reported was 20% and the mode was 0%. That many attorneys reported practicing in areas without drug courts probably accounts for 0% being the mode. The counties
surveyed in this research included Bucks, Chester, Montgomery, Delaware, and Berks counties in Pennsylvania, as well as Camden and Mercer counties in New Jersey. As reported by the respondents, not all of these counties have drug courts. A total of 74.2% of the respondents \( (n=138) \) reported that they did have a drug court in their jurisdiction, while 22.6% reported that they did not have drug court in their jurisdiction \( (n=42) \). Six attorneys (3.2%) reported that it was unknown whether they had a drug court in their jurisdiction.

![Figure 5: Respondents’ \( (N=129) \) Percentage of Clients with Substance Abuse Problems Diverted to Drug Court](image-url)
Vignette characteristics

As is seen Table 2, the minimum number of completed vignettes (17, with a power of .81 assuming an effect size = .25) was received for each of the 8 respective variations of vignettes 1 and 2. See Appendix A and Appendix B for details of the specific variables manipulated in each type of vignette.

Table 2: Total Responses for Each Vignette

<table>
<thead>
<tr>
<th>Vignette no.</th>
<th>N</th>
<th>Vignette no.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1A</td>
<td>25</td>
<td>2A</td>
<td>26</td>
</tr>
<tr>
<td>1B</td>
<td>21</td>
<td>2B</td>
<td>25</td>
</tr>
<tr>
<td>1C</td>
<td>26</td>
<td>2C</td>
<td>20</td>
</tr>
<tr>
<td>1D</td>
<td>27</td>
<td>2D</td>
<td>25</td>
</tr>
<tr>
<td>1E</td>
<td>23</td>
<td>2E</td>
<td>27</td>
</tr>
<tr>
<td>1F</td>
<td>20</td>
<td>2F</td>
<td>18</td>
</tr>
<tr>
<td>1G</td>
<td>17</td>
<td>2G</td>
<td>23</td>
</tr>
<tr>
<td>1H</td>
<td>26</td>
<td>2H</td>
<td>21</td>
</tr>
</tbody>
</table>

Among the responses received, the criminal case vignette had appeared first 98 times and the drug court vignette appeared first 88 times.

Analysis of Plea Recommendations in the Criminal Case

For the criminal case (“vignette 1”), a between subjects analyses of variance (2 x 2 x 2), using “rated likelihood of recommending a plea bargain” as the dependent
variable, was conducted using three independent variables: (a) the likelihood of conviction based on the strength of the evidence, (b) the defendant’s wishes on whether to plead guilty or go to trial, and (c) potential sentence if the defendant were convicted of all charges. As hypothesized, there were statistically significant differences between how criminal defense attorneys rated the likelihood of recommending a plea bargain to a criminal defendant. A significant main effect was found for the likelihood of conviction based on the strength of the evidence variable \([F(1, 177) = 21.21, p < .001]\). The effect size, calculated using eta squared, was .107. 

To interpret the strength of this and all other effect sizes, I used guidelines for interpreting eta squared set by Cohen: where .01 = small effect, .06 = moderate effect, and .14 = a large effect. Two significant interactions were found. The first was a 2-way interaction between potential sentence and the defendant’s wishes \([F(1, 177) = 20.30, p < .001]\). The effect size for this interaction, calculated using partial eta squared, was .103. The second was a 3-way interaction between the potential sentence, the defendant’s wishes, and the likelihood of conviction based on the strength of the evidence \([F(1, 177) = 4.14, p = .043]\). The effect size for this interaction, calculated using partial eta squared, was .023.

Post hoc comparisons were made using Tukey's HSD test with \(p\) set at .05 to further interpret both interactions. For the three-way interaction, using Tukey's HSD (HSD = .40), significant differences were found in the 3-way interaction between the following conditions: the strong evidence/high sentence/go to trial condition was significantly different from all other conditions; the weak evidence/low sentence/go to trial condition was significantly different from all other conditions, and weak
evidence/high sentence/plea condition was significantly different than all other conditions. Although there were differences between the other conditions, none were significantly different from each other (see Table 3).

Table 3: Means of the 3-way Interaction between Strength of Evidence, Potential Sentence, and Defendant’s Wishes

<table>
<thead>
<tr>
<th>Strength of evidence</th>
<th>Potential sentence</th>
<th>Defendant’s wishes</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong high</td>
<td>Trial</td>
<td>4.392*</td>
<td></td>
</tr>
<tr>
<td>Strong low</td>
<td>Trial</td>
<td>3.791</td>
<td></td>
</tr>
<tr>
<td>Strong low</td>
<td>Plea</td>
<td>3.702</td>
<td></td>
</tr>
<tr>
<td>Weak high</td>
<td>Trial</td>
<td>3.595</td>
<td></td>
</tr>
<tr>
<td>Strong high</td>
<td>Plea</td>
<td>3.501</td>
<td></td>
</tr>
<tr>
<td>Weak low</td>
<td>Plea</td>
<td>3.402</td>
<td></td>
</tr>
<tr>
<td>Weak high</td>
<td>Plea</td>
<td>2.593*</td>
<td></td>
</tr>
<tr>
<td>Weak low</td>
<td>Trial</td>
<td>2.066*</td>
<td></td>
</tr>
</tbody>
</table>

* significantly different from all other conditions using Tukey’s HSD

Using Tukey’s HSD (HSD = .34), significant differences were found in the 2-way interaction (potential sentence and defendant's wishes) between all of the separate conditions (see Table 4) with one exception: the high sentence/plea guilty condition ($M = 3.047$) was not significantly different from the low sentence/go to trial condition ($M = 2.928$, $SD = .12$).
Table 4: Means of the 2-way Interaction between Potential Sentence and Defendant’s Wish

<table>
<thead>
<tr>
<th>Potential sentence</th>
<th>Defendant’s wishes</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>High sentence</td>
<td>go to trial</td>
<td>3.994</td>
</tr>
<tr>
<td>Low sentence</td>
<td>plea guilty</td>
<td>3.553</td>
</tr>
<tr>
<td>High sentence</td>
<td>plea guilty</td>
<td>3.047</td>
</tr>
<tr>
<td>Low sentence</td>
<td>go to trial</td>
<td>2.928</td>
</tr>
</tbody>
</table>

Hypotheses for Vignette 1 (plea recommendations in a regular criminal case)

The hypothesis that greater likelihood of conviction/strong evidence of guilt will be associated with a higher probability that a criminal defense attorney will recommend a plea bargain to a defendant was supported. The 3-way interaction suggests that strong evidence was most influential with respect to attorney recommendations, particularly when the potential sentence was high and (paradoxically) when the client wished to go to trial (see Figures 6 and 7).
Figure 6: Strength of Evidence and Potential Sentence When Defendant States a Preference To Go To Trial
The hypothesis that a criminal defendant’s stated preference to plea bargain will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain was not supported, however. Indeed, under certain conditions a criminal defendant’s stated preference to go to trial was associated with a greater likelihood that a criminal defense attorney would recommend a plea bargain.

The 3-way interaction suggests that defendant's stated preference to go to trial was most influential with respect to attorney recommendations, particularly when the potential sentence was high and when the likelihood of conviction, based on the strength of the evidence was strong (see Figures 6 and 7 above).

The hypothesis that a criminal defense attorney will be more likely to recommend a plea bargain to a defendant when the defendant is facing a longer period of incarceration if convicted was partly supported. The 3-way interaction suggests that a high potential sentence was most influential with respect to attorney recommendations, particularly when defendant's stated preference was to go to trial and the likelihood of conviction, based on the strength of the evidence was strong (see Figures 6 and 7). In addition, when this variable interacted with a defendant’s wish to go to trial in the 2-way interaction, high potential sentence was most influential with respect to attorney recommendations (see Figure 8). When the defendant stated a preference to plea, however, the opposite was true: attorneys were more likely to recommend a plea if the defendant was facing a low potential sentence.
For the drug court scenario (“vignette 2”), a between subjects analyses of variance (2 x 2 x 2) for the dependent variable of likelihood of recommending a negotiated plea of diversion to substance abuse treatment was conducted using the following independent variables: (a) the likelihood of conviction based on the strength of the evidence, (b) defendant’s acknowledgement of his substance abuse problem, and (c) the defendant’s past rehabilitation history. As hypothesized, there
were significant differences in attorney ratings of plea recommendation likelihood when evidence strength, the defendant’s acknowledgement of a substance abuse problem, and the defendant’s substance abuse rehabilitative history across were manipulated across different conditions. There were significant main effects for evidence strength \( F(1, 177) = 11.38, p = .001 \) and denial/acknowledgement of substance abuse problem \( F(1, 177) = 25.56, p < .001 \). The respective effect sizes, calculated using partial eta squared, were .060 for likelihood of conviction based on the strength of the evidence and .126 for denial/acknowledgement of substance abuse problem. In addition, a significant 2-way interaction was observed between strength of the evidence and defendant's rehabilitative history \( F(1, 177) = 7.53, p = .007 \). The effect size, using partial eta squared was .041.

Post hoc comparisons were made using Tukey's HSD test with \( p \) set at .05 to further interpret the interaction. Using Tukey's HSD (HSD = .34), significant differences were found between the strong evidence/good rehabilitation history condition and all other conditions, and between the weak evidence/good rehabilitation history condition and all other conditions (see Table 5).
Table 5: Means of 2-way Interaction between Strength of Evidence and Defendant’s Rehabilitative History

<table>
<thead>
<tr>
<th>Strength of evidence</th>
<th>Defendant’s rehab.</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong</td>
<td>Good</td>
<td>3.946</td>
</tr>
<tr>
<td>Strong</td>
<td>Poor</td>
<td>3.530</td>
</tr>
<tr>
<td>Weak</td>
<td>Poor</td>
<td>3.414</td>
</tr>
<tr>
<td>Weak</td>
<td>Good</td>
<td>2.814</td>
</tr>
</tbody>
</table>

Hypotheses for Vignette 2 (plea recommendations in a drug court scenario)

The hypothesis that stronger evidence will be associated with a higher probability that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment as a consequence was supported when interacting with defendant’s rehabilitative history (see Figure 9). When the defendant's rehabilitative history was good, attorneys were more likely to recommend plea bargains when the likelihood of conviction, based on the strength of the evidence was strong. This was not necessarily the case when the defendant’s rehabilitation history was poor, however.
Figure 9: 2-Way Interaction Between Strength of Evidence and Rehabilitation History

The hypothesis that a favorable substance abuse rehabilitative history will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment was minimally supported in that attorneys were more likely to recommend a plea of diversion to drug court for defendant’s with a good rehabilitation history only when the strength of the evidence was strong.
The hypothesis that a criminal defendant’s acknowledgement of a substance abuse problem will be associated with a greater likelihood that a criminal defense attorney will recommend a plea bargain that includes mandatory drug treatment was supported by a significant main effect \[ F(1, 177) = 25.56, \ p < .001 \]. The effect size observed for this effect, calculated using partial eta squared, was .126.

Acknowledgement of a substance abuse problem (\( M = 3.89 \)) was associated with a higher rating of likelihood of recommending a plea than when the defendant denied having a substance abuse problem (\( M = 2.96 \)).

**Attorney Ratings of Importance of Other Factors for Plea Recommendations**

As would be suggested by the impact of strength of evidence in vignettes 1 and 2, the factor rated by attorneys as most important for their plea recommendations to clients was strength of the evidence (see Table 6).

**Table 6: Attorney Self-Report Ratings of Importance in Plea Recommendations**

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Mean</th>
<th>Mode</th>
<th>Std. Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The likelihood of the defendant's conviction based on the strength of the evidence</td>
<td>186</td>
<td>4.74</td>
<td>5.00</td>
<td>.64</td>
</tr>
<tr>
<td>The value of the negotiated plea based on the potential sentence if convicted at trial</td>
<td>184</td>
<td>4.51</td>
<td>5.00</td>
<td>.80</td>
</tr>
<tr>
<td>The defendant's wishes in terms of desire to plea bargain or go to trial</td>
<td>186</td>
<td>4.29</td>
<td>4.00</td>
<td>.83</td>
</tr>
</tbody>
</table>
A repeated measures ANOVA was run to assess whether there were statistically significant differences between these variables. ANOVA results indicated that these means differed significantly \( F(9, 167) = 294.50, p < .001, \) multivariate partial eta squared = .941. Of particular interest, examining the pairwise comparisons of these ten factors on a post-hoc basis revealed that likelihood of conviction based on the strength of the evidence was significantly different from all of the other factors, and was the highest rated factor in terms of overall importance.

Examining the results overall from a descriptive basis, the three variables chosen to manipulate in the regular criminal case vignette were generally three of the highest rated in terms of importance, with likelihood of conviction based on the
strength of the evidence being rated close to extremely important, the value of the negotiated plea based on the potential sentence if convicted at trial being rated between important and extremely important, and the defendant’s wishes in terms of wanting to plea or wanting to go to trial being rated slightly above important overall. In addition, the judge assigned to the case was rated important overall. The prosecutor assigned to the case was rated overall as somewhat important. Your assessment that the defendant will not present well as a witness if the case goes to trial and the defendant has substance abuse rehabilitative needs that might benefit from treatment were both rated overall between somewhat important and important. Factors that the law review literature suggested might be important in plea recommendations that were considered unimportant overall in plea recommendations included the belief that defendant is guilty of the crimes, impact on professional reputation if you were to lose at trial, and currently having a high caseload.

Further analysis was conducted to investigate additional questions of interest. No hypotheses were made with respect to these analyses. One question was whether there were significant differences in self-report scores as a function of attorney gender. Another concerned whether there were significant differences in self-report scores related to attorney practice type (public defender versus private). Separate mixed within-between ANOVA designs were conducted to investigate gender and attorney type.

Self-report Ratings and Gender

A mixed within-between repeated measures ANOVA was run with gender as the between subjects factor and self-reported importance ratings on the ten
exploratory factors as a within subjects factor (with ten levels). A significant multivariate, within-subjects main effect was found for the ten factor condition [Wilks’ Lambda=.061, $F(9, 147) = 251.90$, $p < .001$, multivariate partial eta squared=.939]. This suggests that there were differences in importance scores across the ten factors. A significant multivariate, within-subjects interaction was found for the interaction between the 10-factor condition and gender [Wilks’ Lambda =. 89, $F(9, 147) = 2.04$, $p = .039$, multivariate partial eta squared = .111]. This suggests that there were gender differences in importance scores across the ten factors. That is, male and female attorneys differed in how they rated the importance of some of these 10 factors. To explore where these difference might lie, post hoc comparisons using Tukey’s HSD were used to explore where the gender differences within the ten factors existed. Statistically significant differences in gender were found after computing Tukey’s HSD and comparing it against the mean differences (see Table 8 for the means). Using Tukey’s HSD at an alpha = .05 (HSD = .41), significant differences were found between males and females for you believe that the defendant is guilty of the crimes ($M_{males-females}=.41$), and the defendant has substance abuse rehabilitative needs that might benefit from treatment ($M_{males-females}=.46$). For both items, males rated it as more important than females in terms of plea recommendation decisions. For the belief that the defendant is guilty of the crime, males tended to rate it as unimportant, while females tended to rate it between unimportant and extremely unimportant. For the defendant has substance abuse rehabilitative needs that might benefit from treatment, males tended to rate it between important and somewhat important, while females tended to rate it as somewhat important.
## Table 7: Mean Gender Differences of Ten Factors

<table>
<thead>
<tr>
<th>Factor Number</th>
<th>Male</th>
<th>Female</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4.52</td>
<td>4.53</td>
<td>.01</td>
</tr>
<tr>
<td>2</td>
<td>3.55</td>
<td>3.09</td>
<td>.46</td>
</tr>
<tr>
<td>3</td>
<td>1.48</td>
<td>1.26</td>
<td>.22</td>
</tr>
<tr>
<td>4</td>
<td>3.95</td>
<td>4.23</td>
<td>.28</td>
</tr>
<tr>
<td>5</td>
<td>3.05</td>
<td>2.85</td>
<td>.20</td>
</tr>
<tr>
<td>6</td>
<td>3.68</td>
<td>3.62</td>
<td>.06</td>
</tr>
<tr>
<td>7</td>
<td>1.90</td>
<td>1.49</td>
<td>.41</td>
</tr>
<tr>
<td>8</td>
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<td>.11</td>
</tr>
<tr>
<td>9</td>
<td>4.71</td>
<td>4.85</td>
<td>.14</td>
</tr>
<tr>
<td>10</td>
<td>4.32</td>
<td>4.21</td>
<td>.11</td>
</tr>
</tbody>
</table>

1=The value of the negotiated plea…
2=The defendant has substance abuse…
3=The impact on…
4=The judge assigned…
5=The prosecutor assigned…
6=Your assessment that the defendant will not present well…
7=You believe that the defendant is guilty…
8=Your current caseload…
9=The likelihood of the defendant’s conviction…
10=The defendant’s wishes…

### Self-report Ratings and Attorney Type

A mixed within-between repeated measures ANOVA was run with attorney type (public defender versus private attorney) as the between subjects factor and self-reported importance ratings on the ten exploratory factors as a within subjects factor (with ten levels). A significant main effect was found for the importance rating factor [Wilks’ Lambda=.058, $F(9, 164) = 269.71, p < .001$, multivariate partial eta squared=.942], reflecting differences in rated importance across the ten exploratory factors. A significant main effect was also seen for attorney type [$F(1, 172) = 15.57,$
p < .001, partial eta squared=.083], indicating differences between private attorneys and public defenders. An interaction was also found between factors and attorney type [Wilks’ Lambda=.764, F(9, 164) = 5.62, p = .039, multivariate partial eta squared=.236], indicating that there were differences in the pattern of importance assigned to these factors by private attorneys versus public defenders. To explore where these difference might lie, post hoc comparisons using Tukey’s HSD were used to explore where the attorney type differences within the ten factors existed. Statistically significant differences in attorney type ratings were found after computing Tukey’s HSD and comparing it against the mean differences (see Table 9 for the means).

Table 8: Mean Attorney Type Differences of Ten Factors

<table>
<thead>
<tr>
<th>Factor Number</th>
<th>Private Attorney</th>
<th>Mean Public Defender</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4.49</td>
<td>4.51</td>
<td>.02</td>
</tr>
<tr>
<td>2</td>
<td>3.76</td>
<td>2.98</td>
<td>.78</td>
</tr>
<tr>
<td>3</td>
<td>1.62</td>
<td>1.23</td>
<td>.39</td>
</tr>
<tr>
<td>4</td>
<td>3.81</td>
<td>4.25</td>
<td>.44</td>
</tr>
<tr>
<td>5</td>
<td>3.05</td>
<td>2.92</td>
<td>.13</td>
</tr>
<tr>
<td>6</td>
<td>3.78</td>
<td>3.50</td>
<td>.28</td>
</tr>
<tr>
<td>7</td>
<td>2.14</td>
<td>1.43</td>
<td>.71</td>
</tr>
<tr>
<td>8</td>
<td>1.52</td>
<td>1.27</td>
<td>.25</td>
</tr>
<tr>
<td>9</td>
<td>4.76</td>
<td>4.70</td>
<td>.06</td>
</tr>
<tr>
<td>10</td>
<td>4.35</td>
<td>4.26</td>
<td>.09</td>
</tr>
</tbody>
</table>

1=The value of the negotiated plea…
2=The defendant has substance abuse…
3=The impact on…
4=The judge assigned…
5=The prosecutor assigned…
6=Your assessment that the defendant will not present well…
7=You believe that the defendant is guilty…
8=Your current caseload…
9=The likelihood of the defendant’s conviction…
Using Tukey’s HSD at an alpha = .05 (HSD = .40), significant differences were found between (a) the defendant has substance abuse rehabilitative needs that might benefit from treatment ($M_{priv-pd} = .78$), (b) the judge assigned to the case ($M_{priv-pd} = .44$) and (c) you believe that the defendant is guilty of the crimes ($M_{priv-pd} = .71$). For the judge assigned to the case, public defenders rated this factor as more important than private attorneys. More specifically, for the judge assigned to the case, public defenders tended to rate it higher than “important” and private attorneys tended to rate it in between “important” and “somewhat important.” For the other two significant factors, private attorneys tended to rate them higher than public defenders. For belief that the defendant is guilty of the crimes, private attorneys tended to rate it slightly above “unimportant” overall and public defenders tended to rate it closer to “extremely unimportant” than to “unimportant.” For the defendant has substance abuse rehabilitative needs that might benefit from treatment, public defenders tended to rate this as “somewhat important” overall and private attorneys tended to rate it closer to “important” overall than to “somewhat important”.

Discussion

The present data suggest that when criminal defense attorneys make plea bargain recommendations to their clients, one of the most important factors they consider is the likelihood of the client’s conviction based on the strength of the evidence. This is consistent with the available literature on legal theory, and the (very scant) empirical evidence available. The present findings suggest that criminal
defense attorneys are more likely to recommend a plea to a defendant when the likelihood of conviction based on the strength of the evidence is “strong,” as opposed to “weak.” This makes sense, as a plea bargain should be considered a more favorable option when there is less chance of winning the case if it were to go to trial. So when the evidence is strong and the attorney anticipates that a defendant would lose if the case went to trial, recommending a plea bargain does appear to be a legal “bargain,” and thus the proper recommendation.

Another factor they consider important to extremely important under certain circumstances is the potential sentence if convicted. Legal theory uniformly considered this factor important in the plea bargaining process as applied to both defendants and criminal defense attorneys, while the empirical literature suggested that potential sentence was an important factor in the plea bargaining process, as applied to mock and actual criminal defendants, but not to criminal defense attorneys. The findings from the present study are consistent with a fairly complex picture of the importance of potential sentence, suggesting that criminal defense attorneys sometimes consider the defendant’s potential sentence if convicted, but do so in combination with other factors. In particular, criminal defense attorneys most strongly considered the potential sentence in plea recommendations when the defendant has stated a desire to go to trial: the attorney was more likely to recommend a plea when the defendant was facing a longer sentence. When a defendant prefers to go to trial, attorneys also indicated that they consider both potential sentence and strength of evidence, so that the attorney is most likely to
recommend a plea when the defendant is facing a longer period of incarceration if convicted and the evidence is strong.

Attorneys also appear to consider the defendant’s wishes as important when recommending a plea when that wish is to go to trial. When the defendant has stated a preference to go trial, attorneys advise in ways consistent with the legal situation; they most strongly recommend a plea when the legal situation dictates a plea is most advisable (high potential sentence and strong evidence) and least likely recommend a plea when the legal situation dictated a plea is least advisable (low potential sentence and weak evidence). These findings do not support that attorneys act the same way when a defendant has stated a preference to plea. What these findings suggest is that attorneys are acting, as perhaps they should, as expert legal advisors, and are more predictable in their plea recommendations only when the defendant has stated a preference to go against the plea bargaining process and take his or her chances at trial.

Overall, the findings from the drug court vignette suggest that when recommending a plea of diversion to mandatory treatment, attorneys consider at least one factor that they do in a regular criminal case (likelihood of conviction based on the strength of the evidence), and that at least one factor may be additional (the defendant’s acknowledgement or denial of a substance abuse problem). Just as in a regular criminal case, attorneys are more likely to recommend a plea of diversion to drug court when the likelihood of conviction based on the strength of the evidence is “strong” as opposed to “weak,” at least with defendants who have a good rehabilitation history. That this is so in a drug court scenario as well a regular
criminal case is not surprising. This suggests that no matter the type of criminal case, likelihood of conviction based on the strength of the evidence is an important factor that attorneys consider when recommending a plea to a defendant, and that changing the facts of the case do not diminish the importance of this factor to criminal defense attorneys.

Accordingly, it is not surprising that attorneys are more likely to recommend a plea of diversion to mandatory drug treatment for a defendant who has a good rehabilitation history when that defendant’s likelihood of conviction is strong. That is so because diversion represents the best legal “bargain” in that, theoretically, it both allows the best chance for the defendant to avoid the criminal charges, and at the same time possibly succeed in treatment, thus avoiding having to “fail” drug court and eventually face the charges. Why attorneys are also not differentially likely to recommend a plea of diversion to mandatory drug treatment based on the likelihood of conviction (based on the strength of the evidence) when the defendant has a poor rehabilitation history is less clear and is discussed further in the limitations.

Another limited finding from the drug court scenario suggests that a defendant’s acknowledgement of a substance abuse problem is associated with a higher rating of likelihood of recommending a plea than when the defendant denies having a substance abuse problem. The implication of this and other findings are discussed below.

**Implications**

The present findings have several implications for our understanding of attorney decision making during the plea bargaining process. First, they are
consistent with the notion that most attorneys consider likelihood of conviction based on the strength of the evidence as extremely important across all types of criminal cases. That attorneys are most likely to recommend a plea when the likelihood of conviction is strong suggests that attorneys recommend going to trial more often when there is a greater change of acquittal. The interpretation of this finding may vary, depending on how one views the plea bargaining process in general. The plea bargaining process has been described in positive terms because it allows (a) greater flexibility and more efficient allocation of resources in the criminal justice system by allowing judges, prosecutors, and defense attorneys to reduce caseload; (b) the defendant to acknowledge guilt, and in so doing both assume responsibility for their act and avoid maximum penalties; and (c) victims to gain a sense of closure through knowing the defendant will be punished, while simultaneously allowing victims to avoid going through a trial (Guidorizzi & Palmer, 1999). In these terms, one can view the present results as support for the idea that the plea bargaining process (as described by criminal defense attorneys) is probably achieving some of its goals. When there is stronger evidence of guilt, avoiding a trial facilitates achieving these goals. However, Guidorizzi and Palmer also cited criticisms of plea bargaining, including (a) innocent defendants may plead guilty in order to avoid risking a long prison term that can result from a trial; (b) it undermines the values of the criminal justice system, specifically the presumption of innocence and the right to a trial; (c) many defendants may get less severe sentences; and (d) it creates concerns over the motivations of the legal actors and the amount of coercion that may result. In the context of these criticisms, one might view the present results as describing a process
(recommending plea bargains and avoiding trials when the evidence is strong and the sentence is long) that perpetuates the inequities exacerbated by plea bargaining. Further, the plea bargaining system is designed to encourage plea bargaining. Thus, when a defendant has stated a preference to go along with that system, these findings suggest it is less defined how an attorney should and does advise in plea recommendation. Although it is assumed that an attorney plays the role of advocate equally in all cases, it is possible that an attorney plays the role of an advisor more predictably only when the defendant has stated a preference to go against the plea bargaining system. Going to trial has implications in terms of cost and resources that may more strongly impact the attorney’s decision making when recommending a plea to a client. Since those costs and resources are less at play when the defendant wants to enter a plea, the patterns of attorney plea recommendations are less defined.

Another implication of the findings is that they suggest that the attorney in recommending a plea plays the role of advisor as well as advocate. As an advisor, the attorney should recommend the “best choice” to the client based upon the law, even when the defendant has wants to do the opposite. More specifically, when a defendant wants to go trial, and the best legal choice based on the potential sentence is to plea bargain and avoid a long sentence, an attorney should more strongly recommend a plea than when a trial is a more viable option and the client prefers to go to trial. One explanation for these findings is that an attorney feels the need to more strongly advise a defendant to take a plea recommendation when the attorney considers that option clearly better, and is less likely to do so when the defendant’s wishes regarding trial are consistent with the viability of the trial option. So when the
potential sentence is high and the defendant wants to go to trial, the attorney should (and according to these findings, does) more strongly advise a plea in the attempt to avoid a longer prison sentence. This plea recommendation should, and according to these findings, does increase when considered along with a “strong” likelihood of conviction based on the strength of the evidence, and should and does decrease in the other extreme—when the potential sentence is low and the likelihood of conviction based on the strength of the evidence is “weak.”

Another aspect of the present findings that should be explored in future research involves the description of the factors that influence attorney decision making (“strong” vs. “weak” for likelihood of conviction based on the strength of the evidence, “high vs. low” for potential sentence). The use of language reflecting qualitative descriptions for the factors rather than a quantitative (e.g., 10% chance of acquittal”) was guided by the anecdotal observation that attorneys prefer to think in qualitative rather than quantitative terms. Might a similar pattern of findings emerge if the descriptions were more quantitative? If, for example, the probability of conviction were described as “90%” rather than “high,” would respondents have provided the same judgments? One might hypothesize, based on these findings, that criminal defense attorneys would respond in a similar way—but might also express a preference for more qualitative descriptive language.

The findings from this study may have implications for psychological theories such as procedural justice and therapeutic jurisprudence. Both theories suggest that there are psychological benefits when an individual feels they are being listened to and that their autonomy is being respected. Because of these theories, it was
hypothesized that attorney decision making in plea recommendations would respect defendant autonomy such that the attorney would be more likely to recommend a plea consistent with the defendant’s preference. The present findings do not support the notion that initial plea recommendations are much influenced by client preferences, and even provide some support for the opposite. However, these were attorneys’ recommendations to their clients. More than one respondent commented that the ultimate decision was up to the client, so we cannot describe these findings as reflecting a failure of attorneys to respect client autonomy. Indeed, they suggest that the attorneys are making their best recommendations, based on factors such as strength of evidence and length of possible sentence. Future research might explore the question of how attorneys respond when a client insists upon a choice that is at odds with the attorney’s recommendation.

This does not diminish the potential therapeutic role that an attorney can play in how they listen to a defendant’s stated preference and respond to a defendant’s stated concerns. The variable of the defendant’s stated wish was chosen in the hope that it would promote understanding of how the attorney may respond to a defendant’s emotional concerns. In terms of the present results, it is possible that the wording used in the regular criminal case to describe a defendant’s stated preference regarding plea was worded with insufficient emotional valence. The preference to plea in the present study involved wanting “to dispose of the case as quickly as possible because these criminal charges are very stressful to him and his family.” Under the preference for trial condition, the preference was worded as “would prefer to go to trial because he is innocent and wants to clear his name and does not care
how long it takes to resolve his case.” It is possible that if these preferences had been worded more strongly, or in more emotional terms, the attorneys might have been more influenced in their ratings of the importance of client preference. Further investigation is warranted on this point.

It is also possible that a regular criminal case is not the proper place to investigate how attorney decision making might incorporate a defendant’s emotional concerns in a way consistent with the clients’ therapeutic interests. For this and other reasons, a drug court scenario was chosen to investigate this issue. One particular finding from the drug court vignettes—that a criminal defense attorney is more likely to recommend a plea of diversion to mandatory substance abuse treatment for a defendant who acknowledges a substance abuse problem than one who denies it—has possible implications for procedural justice and therapeutic jurisprudence theories. In one sense, one can view this finding as supporting the notion that attorneys are responding to a defendant’s therapeutic concerns in acknowledging a substance abuse problem, and seeking help for the client by making plea recommendations that incorporate treatment under this condition. So, at least for those defendants who acknowledge their substance abuse problem, attorneys, when faced with a possible plea of mandatory drug treatment, may be responding to the defendant’s therapeutic needs in their recommendations.

Whether attorneys are doing this for therapeutic reasons (better chance for the defendant to rehabilitate and address the substance abuse problem) or legal reasons (easier to get the defendant “off” the charges by agreeing to drug court) is not clear from the present findings. But what are the therapeutic implications for the defendant
who has a substance abuse problem but denies that problem? What are the implications for the finding that under this condition, an attorney is less likely to recommend a plea of diversion that includes mandatory drug treatment? One way to consider this is as consistent with theories of procedural justice and therapeutic jurisprudence in that the attorney, if he or she were to recommend a plea under such a condition, could be seen as coercing the defendant into a solution that does not respect the defendant’s current wishes. Seen that way, the finding suggests respect for the current emotional state of the defendant who has a substance abuse problem but denies it. That the attorney may not feel the need to convince the defendant and more strongly advise a plea under such a condition can be seen as consistent with procedural justice and therapeutic jurisprudence, therefore.

Another finding that may have implications related to therapeutic jurisprudence is that a defendant’s acknowledgement of a substance abuse problem is associated with a higher rating of likelihood of recommending a plea than when the defendant denies having a substance abuse problem. One possible explanation for this finding is that, consistent with the realities of drug court, criminal defense attorneys recognize that only a defendant who acknowledges his or her substance abuse problem is likely to be approved for diversion by the judge. Under this explanation, the attorney’s recommendation may reflect the more likely (and thus, more advisable) course. It is easy to understand that an attorney might be less willing to recommend a plea of diversion to drug court if that attorney feels the diversion is less likely to be approved. Another consequence or possible explanation is that attorneys, in their drug court plea recommendations are acting in ways consistent with the substance abuse literature.
There is strong support in the substance abuse treatment literature for the notion that individuals who deny their problem may be more difficult to treat and may have poorer treatment outcome than those that acknowledge their problems. Whether attorneys are making such recommendations “therapeutically” because they know the substance abuse literature is unknown.

A final implication for theories of procedural justice and therapeutic jurisprudence within the context of criminal defense attorney decision making is the possibility that one could better investigate how attorney’s may play “therapeutic” roles and respond to defendant’s emotional concerns by focusing on attorney communication relevant to decision making. A focus on communication should provide valuable information on how attorneys respond to defendant’s emotional concerns. The findings suggest that criminal defense attorneys react to defendants who state a preference to go to trial (and have a high potential sentence and strong likelihood of conviction based on the evidence) by making stronger recommendations to plea bargain. Even under conditions such as the above where the attorney may consider going to trial an unadvisable option, therapeutic jurisprudence and procedural justice suggest that an attorney should still be careful in how he or she listens and responds to the defendant’s stated preference. These theories suggest that the attorney-client relationship could be improved if the defendant thought he or she was being listened to and respected. So when an attorney communicates with a client about an “unwinnable case” and the defendant initially states a preference to go to trial nonetheless, the attorney should listen to the defendant’s reasons for wanting to go to trial and attempt to understand their emotional state and concern related to this
wish. If the attorney did this first (before stating that the facts and the evidence point to the better option of plea bargaining), two additional possibilities might occur. One, under a therapeutic jurisprudence framework, the attorney, after listening to the defendant’s emotional concerns and state, may be able to fashion or seek a more potentially therapeutic plea option, such as diversion to drug court or other court mandated treatment. Two, under a procedural justice framework, the defendant may feel less coerced and accordingly, be less resistant in accepting the attorney’s recommendation to plea (and take the “best deal”) even when initially stating a preference to go to trial.

In terms of legal theory, the findings of this study have implications for the “shadow of the law” theory offered by Robert Mnookin and Lewis Kornhauser (1979). One interpretation of this theory as applied to criminal cases suggests that under the shadow-of-trial model, plea bargaining in a criminal trial should reflect the likelihood of conviction at trial (strength of the evidence) and the likely post-trial sentence (expected sentence) (Bibas, 2004). However, Bibas argues (and present results suggest) that attorney decision making in plea recommendations is more complex than under the shadow-of-trial model, and attorneys do consider additional factors (such as the defendant’s wishes and even the judge assigned to the case) when making recommendations to clients regarding plea. While present findings do provide some support for the importance of the factors in the theory, they also suggest that for criminal defense attorneys, plea recommendations can involve more influences. Thus, this theory can be seen as a useful starting point in understanding attorney decision making, but does not provide an adequate picture of the complexity
of influences on attorney recommendations. Whether this legal theory applies to other actors in the criminal process, such as the prosecutor and the defendant, would be interesting questions for further study.

Limitations

As this was apparently the first empirical study on criminal defense attorney decision making in recommending plea bargains, there are several limitations. First, only two types of criminal cases were depicted in the two vignettes. But two vignettes meant to capture two typical cases may not adequately operationalize the representative possibilities inherent in the plea bargaining process. Second, this study only focused on one aspect of the plea bargaining process: attorney decision making in plea recommendation. The nature of the plea bargaining process is that it involves the interaction of many actors, many situations, and many influences. This study could not and did not try to capture all these situations. Accordingly, the findings from this study are best viewed from the narrow focus of criminal defense attorney decision making in plea recommendation, and overall, the findings provide only a small snapshot of a very complex process.

Third, the response rate was 33%, only focused on criminal defense attorneys in the Philadelphia area, and included both public defenders and private attorneys. Since this was the first study of its type, a statistically significant result with even a small effect for the interaction of the three chosen variables is relevant but needs replication. Generalizability of results without such replication may be limited to attorneys in the geographic and socioeconomic areas comparable to those represented in the study. Also, the incentives to plea bargain may be different between public
defenders and private attorneys, and this may affect the nature of their plea
recommendations in different ways. For example, the nature of the relationship with
the judge and prosecutors may be different due to the greater number of trials and
interactions public defenders may have with prosecutors and judges. This may
account for the finding that public defenders rated the judge assigned to case as more
important than private attorneys. In addition, although many public defenders have
the pressure of heavy caseload, many private attorneys have the pressure of financial
incentives. Many private attorneys handle cases with flat fees, or handle cases in
which they are court-appointed (also with set fees). When this is this case, it creates
additional financial incentives for a court-appointed private defense attorney to enter
into a plea bargain rather than go to trial. It is also possible that more public
defenders may want to engage in more trials (and less plea bargains) in order to get
trial experience.

Fourth, the findings are limited on what factors influence attorney decision
making in recommending a plea of diversion to drug court. A possible reason for this
is that one of the factors used to examine this scenario, substance abuse rehabilitative
history, may not be relevant. Attorneys did consider a defendant’s good rehabilitative
history together with likelihood of conviction based on the strength of the evidence,
but did not appear to consider poor rehabilitative history in any comparable way.
One possibility suggested by the data is that attorneys simply do not consider a
defendant’s rehabilitative needs as important in plea recommendations, even when
the plea involves mandatory drug treatment. Attorneys were asked to rate the
importance of when he defendant has substance abuse rehabilitative needs that might
benefit from treatment in terms of recommending a plea. Attorneys tended to rate this factor in the middle group out of ten in terms of overall importance with an average rating of between somewhat important and important (closer to somewhat important). Although this is not exactly the same as rehabilitative history, it does suggest that attorneys may not consider rehabilitative needs or history as an important factor when trying to successfully divert a client to mandatory drug treatment.

Another possible explanation is that there was very limited empirical support for the inclusion of this factor. The only studies examined to justify its inclusion as a factor were studies on effectiveness of current treatment based on past treatment history that compared those who never received treatment with those who had. So although there is some theoretical support for the notion that an individual with a more favorable rehabilitative history is more likely to succeed in treatment than an individual with a poor rehabilitative history, more empirical support is needed.

_Future Research_

A number of questions raised by the present results could be addressed in future studies. This was one of the first studies to examine the plea bargaining process in general. It is hoped that since plea bargaining accounts for about 90% of all criminal dispositions, researchers will focus more attention on understanding this very important process.

As an initial step, this study focused on attorney decision making in recommending plea bargains. This study was able to isolate several relevant and important factors that go into attorney decision making in plea recommendation. Future research is needed both to provide more information on criminal defense
attorney decision making in plea recommendations, but also to investigate the
decision making of the other parties involved in plea bargaining. Future studies could
examine the plea bargaining process and identify important factors through the
decision making of judges, prosecutors, and especially defendants themselves. More
specifically, future research could examine such things as the amount of perceived
coercion in plea recommendations, the nature of attorney plea advice communication
in general (both in terms of how attorneys communicate plea advice and how
defendants view that communication), and the factors relevant to the interaction of all
parties.

This study used qualitative descriptions of the factors to describe attorney
decision making. If attorneys do think in qualitative terms when making decisions
about plea recommendations to defendants, it would be useful to know if they also
communicate such decisions in qualitative terms. This is just one small aspect to a
much larger picture worth investigating—that is, once attorneys make plea
recommendation decisions, how they communicate these decisions. The method and
nature of attorney plea communication is important and worth exploring, especially
when one considers theories of procedural justice and therapeutic jurisprudence.

In terms of the decision making of criminal defense attorneys in advising plea
recommendations, future research could further examine the factors found important
in this study. For likelihood of conviction based on the strength of the evidence, this
study only used dichotomous conditions (strong and weak). Future studies could
break down this factor further by adding additional conditions. The same could be
done with potential sentence and defendant’s wishes. In particular, in terms of
procedural justice and therapeutic jurisprudence, future research could examine how far attorneys might go with their advice in convincing defendants who have stated a preference for plea that is inconsistent with the attorney’s recommendation. Adding additional emotional valence to the variables employed might prove useful.

Future research might also investigate additional factors. In particular, the judge assigned to the case was rated as important overall by attorneys who responded to this survey. How this factor actually works is also worth investigating.

As an exploratory study, this study gathered data on sample characteristics, but did not generate any hypothesis on differences in sample characteristics. Accordingly, only limited statistical analysis was done on possible differences in decision making based on characteristics such as attorney type, gender, years of practice, number of criminal cases plea bargained, and the like. Since the analyses of some of this data did suggest that there might be some differences within and between these characteristics, future researchers may want to examine these differences further. One example that might be relevant is focusing future research on drug court plea options with attorneys who have experience with drug courts. It is possible that attorneys with drug court experience may have greater awareness of the nature of diversionary plea recommendations.

The main purpose of this study was to investigate some of the relevant factors that affect attorney decision making in plea bargain recommendations. This was considered important because the vast majority of criminal cases are disposed of by plea bargains and surprisingly, very little research to date has examined the plea bargaining process. There has been almost a twenty year void since researchers last
published social psychological studies on the plea bargaining process. Based on the
findings of the present study, that void can now begin to be filled. It is hoped that this
present study will stimulate more empirical investigation into the many factors that
affect the plea bargaining process so that we may come to better understand this
complex and important process.
References


U.S. v. Messino, 55 F.3d 1241 (7th Cir. 1995).


U.S. v. Villasenor-Cesar, 114 F.3d 970 (9th Cir. 1997).


Likelihood of Conviction Based on the Strength of the Evidence, the Defendant’s Preference for Plea, and the Potential Sentence if Convicted

1A

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 10 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to dispose of the case as quickly as possible because these charges are very stressful to him and his family. He added that he would prefer to quickly work out a plea, even if it includes some prison time, rather than risk prolonging this experience and possibly serving 10 years in prison. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 5 years in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a weak case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as good. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

1B

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 10 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to dispose of the case as quickly as possible because these criminal charges are very stressful to him and his family. He added that he would prefer to quickly work out a plea, even if it includes some prison time, rather than risk prolonging this experience and possibly serving 10 years in prison. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 5 years in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a strong case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as bad. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

1C
Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 3 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to dispose of the case as quickly as possible because these criminal charges are very stressful to him and his family. He added that he would prefer to quickly work out a plea, even if it includes some prison time, rather than risk prolonging this experience and possibly serving 3 years in prison. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 18 months in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a weak case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as good. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

1D

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 3 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to dispose of the case as quickly as possible because these criminal charges are very stressful to him and his family. He added that he would prefer to quickly work out a plea, even if it includes some prison time, rather than risk prolonging this experience and possibly serving 3 years in prison. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 18 months in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a weak case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as good. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

1E

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 10 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to go to trial because he is innocent and wants to clear his name and does not care how long it takes to resolve his case. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 5 years in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a weak case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as good. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.
Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 10 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to go to trial because he is innocent and wants to clear his name and does not care how long it takes to resolve his case. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 5 years in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a strong case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as bad. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 3 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to go to trial because he is innocent and wants to clear his name and does not care how long it takes to resolve his case. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 18 months in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a strong case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as bad. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.

Mr. A is a 30 year old male charged with several state criminal charges. If convicted of all of his charges, he could receive a prison sentence of up to 3 years. This is his first offense. Neither the prosecutor nor the judge has expressed any particular preference for a negotiated plea. However, Mr. A told you that he would prefer to go to trial because he is innocent and wants to clear his name and does not care how long it takes to resolve his case. Based on your experience and an initial conversation with the prosecutor, you are aware that the particular facts of Mr. A’s case would allow a plea bargain of up to 18 months in prison if the defendant were to plead guilty to a lesser charge. Based on the strength of the evidence, you believe that the prosecutor has a weak case, and you evaluate Mr. A’s chance of acquittal at trial on all charges as good. Neither the prosecutor nor the judge assigned to the case has any particular reputation that would affect your recommendation on plea bargaining in this case.
After each version of Vignette 1, the following question will be asked. In this case, how likely are you to recommend to Mr. A that he accept a negotiated plea?

(please check one)

- very unlikely
- unlikely
- possible
- likely
- very likely
Appendix B: Vignette 2

Likelihood of Conviction Based on the Strength of the Evidence, the Defendant’s Acknowledgement or Denial of a Substance Abuse Problem, and Defendant’s Substance Abuse Rehabilitative History

2A
Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has previously twice been in drug and alcohol treatment programs. Both times, he responded well to the treatment and except for one prior relapse and this current relapse, he has been clean for five years. The prosecutor and the judge believe that this defendant is a good candidate for diversion to a drug and alcohol treatment program if he is willing to engage in treatment. Based on an initial evaluation and conversations with the prosecutor, you are aware that the facts of Mr. B’s case would allow for a plea bargain associated with a diversion, such as drug court that would address his substance abuse problem, but would require him to engage in some form of mandatory drug and alcohol treatment in lieu of incarceration. Mr. B initially denies to you that he currently has a problem with drugs or alcohol and, therefore, has no further interest in drug and alcohol treatment. There is strong evidence of Mr. B’s guilt and you believe that Mr. B will probably lose if he goes to trial, and will receive several years in prison if convicted.

2B
Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has previously twice been in drug and alcohol treatment programs. Both times, he responded well to the treatment and except for one prior relapse and this current relapse, he has been clean for five years. The prosecutor and the judge believe that this defendant is a good candidate for diversion to a drug and alcohol treatment program if he is willing to engage in treatment. Based on an initial evaluation and conversations with the prosecutor, you are aware that the facts of Mr. B’s case would allow for a plea bargain associated with diversion, such as drug court that would address his substance abuse problem, but would require him to engage in some form of mandatory drug and alcohol treatment in lieu of incarceration. Mr. B initially denies to you that he currently has a problem with drugs or alcohol and, therefore, has no further interest in drug and alcohol treatment. There is weak evidence of Mr. B’s
guilt and you believe that Mr. B will probably win if he goes to trial and avoid a prison sentence.

2C
Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has previously twice been in drug and alcohol treatment programs. Both times, he responded well to the treatment and except for one prior relapse and this current relapse, he has been clean for five years. The prosecutor and the judge believe that this defendant is a good candidate for diversion to a drug and alcohol treatment program if he is willing to engage in treatment. Based on an initial evaluation and conversations with the prosecutor, you are aware that the facts of Mr. B’s case would allow for a plea bargain associated with a diversion, such as drug court that would address his substance abuse problem, but would require him to engage in some form of mandatory drug and alcohol treatment in lieu of incarceration. Mr. B acknowledges that he has relapsed as a result of recent stressful events and believes if he could get himself back into a drug and alcohol treatment program, he could once again stop using drugs and alcohol and avoid future criminal activity. There is strong evidence of Mr. B’s guilt and you believe that Mr. B will probably lose if he goes to trial, and will receive several years in prison if convicted.

2D
Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has previously twice been in drug and alcohol treatment programs. Both times, he responded well to the treatment and except for one prior relapse and this current relapse, he has been clean for five years. The prosecutor and the judge believe that this defendant is a good candidate for diversion to a drug and alcohol treatment program if he is willing to engage in treatment. Based on an initial evaluation and conversations with the prosecutor, you are aware that the facts of Mr. B’s case would allow for a plea bargain associated with a diversion, such as drug court that would address his substance abuse problem, but would require him to engage in some form of mandatory drug and alcohol treatment in lieu of incarceration. Mr. B acknowledges that he has relapsed as a result of recent stressful events and believes if he could get himself back into a drug and alcohol treatment program, he could once again stop using drugs and alcohol and avoid future criminal activity. There is weak evidence of Mr. B’s guilt and you believe that Mr. B will probably win if he goes to trial and avoid a prison sentence.

2E
Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has
previously twice been in drug and alcohol treatment programs. One time he
completed the program with sporadic attendance and went back to using soon after
completing the program. The other time he dropped out of the program before
completion and went back to using drugs and alcohol. Based on an initial evaluation
and conversations with the prosecutor, you are aware that despite his rehabilitative
history, the facts of Mr. B’s case would allow for a plea bargain associated with a
diversion, such as drug court that would address his substance abuse problem, but
would require him to engage in some form of mandatory drug and alcohol treatment
in lieu of incarceration. Mr. B acknowledges that he has relapsed as a result of recent
stressful events and believes if he could get himself into a drug and alcohol treatment
program, he could finally stop using drugs and alcohol and avoid future criminal
activity. There is weak evidence of Mr. B’s guilt and you believe that Mr. B will
probably win if he goes to trial and avoid a prison sentence.

2F
Mr. B is a 30 year old male charged with felony drug possession. This is his first
offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug
and alcohol problem and needs treatment. You also find out that Mr. B has
previously twice been in drug and alcohol treatment programs. One time he
completed the program with sporadic attendance and went back to using soon after
completing the program. The other time he dropped out of the program before
completion and went back to using drugs and alcohol. Based on an initial evaluation
and conversations with the prosecutor, you are aware that despite his rehabilitative
history, the facts of Mr. B’s case would allow for a plea bargain associated with a
diversion, such as drug court that would address his substance abuse problem, but
would require him to engage in some form of mandatory drug and alcohol treatment
in lieu of incarceration. Mr. B acknowledges that he has relapsed as a result of recent
stressful events and believes if he could get himself into a drug and alcohol treatment
program, he could finally stop using drugs and alcohol and avoid future criminal
activity. There is strong evidence of Mr. B’s guilt and you believe that Mr. B will
probably lose if he goes to trial, and will receive several years in prison if convicted.

2G
Mr. B is a 30 year old male charged with felony drug possession. This is his first
offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug
and alcohol problem and needs treatment. You also find out that Mr. B has
previously twice been in drug and alcohol treatment programs. One time he
completed the program with sporadic attendance and went back to using soon after
completing the program. The other time he dropped out of the program before
completion and went back to using drugs and alcohol. Based on an initial evaluation
and conversations with the prosecutor, you are aware that despite his past
rehabilitative history, the facts of Mr. B’s case would allow for a plea bargain
associated with a diversion, such as drug court that would address his substance abuse
problem, but would require him to engage in some form of mandatory drug and
alcohol treatment in lieu of incarceration. Mr. B initially denies that he currently has
a problem with drugs or alcohol and, therefore, has no further interest in drug and
Plea Bargaining

alcohol treatment. There is strong evidence of Mr. B’s guilt and you believe that Mr. B will probably lose if he goes to trial, and will receive several years in prison if convicted.

2H

Mr. B is a 30 year old male charged with felony drug possession. This is his first offense. Mr. B’s mother contacts your office and informs you that Mr. B has a drug and alcohol problem and needs treatment. You also find out that Mr. B has previously twice been in drug and alcohol treatment programs. One time he completed the program with sporadic attendance and went back to using soon after completing the program. The other time he dropped out of the program before completion and went back to using drugs and alcohol. Based on an initial evaluation and conversations with the prosecutor, you are aware that despite his rehabilitative history, the facts of Mr. B’s case would allow for a plea bargain associated with a diversion, such as drug court that would address his substance abuse problem, but would require him to engage in some form of mandatory drug and alcohol treatment in lieu of incarceration. Mr. B initially denies that he currently has a problem with drugs or alcohol and, therefore, has no further interest in drug and alcohol treatment. There is weak evidence of Mr. B’s guilt and you believe that Mr. B will probably win if he goes to trial and avoid a prison sentence.

After each version of Vignette 2, the following question will be asked. In this case, how likely are you to recommend to Mr. B that he accept a negotiated plea of diversion to substance abuse treatment (please check one)?

□ very unlikely □ unlikely □ possible □ likely □ very likely
Appendix C: Survey Questionnaire

How important do you consider each of the following in deciding whether to recommend a potential plea bargain to a criminal defendant you represent?

1) The value of the negotiated plea based on the potential sentence if convicted at trial.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

2) The defendant has substance abuse rehabilitative needs that might benefit from treatment.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

3) The impact on your professional reputation if you were to lose at trial.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

4) The judge assigned to the case.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

5) The prosecutor assigned to the case.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

6) Your assessment that the defendant will not present well as a witness if the case goes to trial.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

7) You believe that the defendant is guilty of the crimes.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

8) Your current caseload is high.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

9) The likelihood of the defendant’s conviction based on the strength of the evidence.
   - Extremely unimportant
   - Unimportant
   - Somewhat important
   - Important
   - Extremely important

10) The defendant’s wishes in terms of desire to plea bargain or go to trial.
    - Extremely unimportant
    - Unimportant
    - Somewhat important
    - Important
    - Extremely important

11) Are you a public defender?  
    - Yes
    - No
12) Gender: □ M  □ F
13) How many years have you practiced criminal law?____
14) Estimate the percentage of criminal defendants you represent who have substance abuse problems____
15) Of your clients with substance abuse problems, estimate the percentage you attempt to divert to drug court____
16) Estimate the number of criminal cases you handle per year____
17) Estimate the percentage of criminal cases you plea bargained last year____
18) Is there a drug court in the jurisdiction of your primary practice?
□ yes  □ no  □ unknown
Vita

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Publications
