

PLEA BARGAINING: A FORECAST FOR THE FUTURE

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There can be little doubt that some plea bargaining exists in Australian courts. It may not be very widespread, it may be done in subtle and unannounced ways, and it may lack official sanction, but it does exist in some degree. Furthermore, conditions exist which have the potential to increase the pressure on the criminal justice agencies to resort to plea bargaining to expedite the criminal processes. The first part of this article focuses on these conditions and their potential pressure.

In the United States this pressure became intolerable many years ago. As a result, over 90% of accused persons plead guilty to some criminal charge—a good many of these defendants strike some form of plea bargain. As a further result, the legal institutions which touch on the criminal process have reckoned with the phenomenon of plea bargaining and created some official guidelines to control it. The second part of this article focuses on the American experience.

The final part of this article suggests that since the American experience has not been all good perhaps Australia can learn from the American experience and develop guidelines and procedures relatively early on, so as to anticipate the pressures and prepare to meet the challenge.

Australia: The Growing Pressure

All of Australia is seized up in the throes of the great legal aid wave of the 1970's. The federal government, the state governments, the law societies, and various special interest groups are providing schemes to provide legal counsel to worthy applicants.¹ Nowhere is this more pronounced than in the criminal law area. Perhaps the prime thrust of current legal aid is to see that all persons charged with crimes have legal representation.² This is bound to have irreversible repercussions on many aspects of the legal justice system. There is a very large number of guilty pleas at petty sessions courts for summary offences; many factors influence this. In particular, lower sentences are the rule, and non-custodial sentences are most frequently meted out. Additionally, legal aid has not generally been provided for summary offenses. While it is deplorable that little legal aid is available in Courts of Petty Sessions for summary offences, there is a great increase in representation for

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¹ See, generally, "Legal Aid in Australia", a discussion paper prepared by the Australian Commission of Enquiry into Poverty (Nov. 1974); S. D. Ross & M. J. Mossman, "Legal Aid in New South Wales—Politics and Policies", 47 *Australian Quarterly* 6 (1975).

² See T. Vinson & R. Homel, "Legal Representation and Outcome", 47 *A.L.J.* 132 (1973) for documentation of the need to provide legal assistance in criminal cases.

indictable offences. Custodial sentences are frequent, and larger fines are likely upon conviction of indictable offences. The Public Solicitor's office in New South Wales now devotes most of their staff to advice and representation in criminal matters. In the midst of this exists a phenomenon of great interest to an outside observer—approximately 80% of all persons charged with indictable offences in New South Wales plead guilty to the charge in the Court of Petty Sessions.³ Their cases are then transferred to the appropriate District Court or Supreme Court for sentencing.⁴ In the past, many of these pleas came from persons who had no legal representation; now representation is increasing.⁵ By virtue of their guilty plea, the state is saved the trouble of presenting witnesses before the magistrate to establish a *prima facie* case, and the Court of Petty Sessions is saved the time of a committal hearing.

This is not to suggest that any or all of these pleas of guilty were improper, or that justice was not fully done by this procedure. But the fact remains that for the defendant little is lost by demanding a committal hearing and being bound over to the superior court for trial. In fact, some things may be gained. The accused and his counsel have the chance to hear the witnesses for the prosecution; those witnesses have their recollection and observation tested by cross-examination; potential discrepancies may occur between the information presented to the constable at the scene of a crime and the evidence presented in court under oath days or weeks later. All of these factors will aid counsel and the defendant in evaluating their case. Of course, these same factors will aid the prosecutor in evaluating his case as well. Evidence may even be forthcoming which supports a more serious charge, or which aggravates the pending charge. Therefore the individual case must be scrutinized by the accused and his counsel in deciding on their tactics. Nevertheless, use of the preliminary examination as a discovery device is much-practiced.

Both sides having evaluated their cases, the defendant appears in the superior trial court. Now if he wishes to plead guilty he may do so in the same way he could weeks earlier in the Court of Petty Sessions. But by now he may be able to present a favourable picture to the sentencing judge through a new job, restitution, character references and the like. These factors may be taken into account by the judge and the ultimate result, the sentence, may be more favourable to the accused. On the other hand, after the defendant has evaluated his case, he may desire to stand trial. Now he is equipped to make that decision with a greater understanding of just what the likely result will be. Surely if full and fair disclosure aids litigants in civil cases to reach out-of-court settlements, the same may be true in criminal cases.

But look what happens in the meantime. If even half of the 80% who currently plead guilty in Petty Sessions were to demand a preliminary hearing the magistrates would be well and truly swamped. But a preliminary hearing is usually a short matter compared to a trial. The accused rarely presents evidence. There is no jury to select, posture before, and sum up to. The magistrate routinely decides the committal issue from the bench with little deliberation. If half of the 80% who currently plead guilty in Petty Sessions were not only to demand this preliminary hearing, but also to demand a trial

³ The exact figure is not available. The approximate figure of 80% is the one most often cited to the author by persons regularly engaged in the criminal justice process. The Australian Commission of Enquiry into Poverty terms the number "a substantial proportion." *Supra*, 297, n. 6.

⁴ Justices Act, 1902-1974 (N.S.W.) s. 51A(1)(c).

⁵ Australian Commission of Enquiry into Poverty, *supra* 283, para. 5.6, n. 1.

in the superior court, those superior courts would not be just swamped, they would be sunk.

It has been suggested thus far that the diligent lawyer who represents a criminal defendant will be likely to insist on a preliminary examination because of the factual discovery tool it provides, and because the information thus gained may be turned to tactical advantage in deciding trial strategy, or even deciding whether to eventually plead guilty. But there is an additional factor to be considered as well.

The primary role of the lawyer in the criminal process is to assist the client to achieve the best possible result from the criminal process. This role is exemplified in the ethical duty the lawyer owes to his client.⁶ The best possible result, of course, is a dismissal or an acquittal. But sometimes this is just not possible. Therefore, the best possible result in a great many cases may be a finding of guilty on a lesser charge, or, moving one step further in the proceedings, a less severe sentence from the judge after the finding of guilty. With this ethical duty in mind, the lawyer is practically bound to consider the circumstances which the court and the prosecutor are faced with, and, in an appropriate case, use those circumstances to his client's advantage. Counsel is not criticized for making a technical, although valid, objection to proffered evidence. He is not criticized for demanding that the prosecution prove its case beyond a reasonable doubt, even though he has no defence to offer, and even though he may know for a fact that his client is guilty. Why, then, should we expect him to voluntarily forego the procedural framework established for the trial of indictable offences? If he can use this framework to extract some concession from the prosecutor or the judge, he is fulfilling his duty to his client.

Painful as it may be, the procedure whereby some concession is extracted in the criminal context is called "plea bargaining". Plea bargaining has a nasty connotation in Australian legal circles, and has been termed a "vexed question" and a "deplorable practice" in England.⁷ But this is not universally so. *The United States: Some Examples*

The early advent of mandatory legal aid for all persons accused of crime and the pressure of case load on the criminal courts gave plea bargaining an early boost in the United States. Plea bargaining has been recognized practice for many years and has received approval from the bench and the bar.⁸ It is reliably estimated that around 90% of criminal cases in the United States are disposed of without a trial; most of these are pleas of guilty. Of those pleas of guilty the vast majority of them are plea bargains in one sense or

⁶ A lawyer should represent a client zealously within the bounds of the law. American Bar Association, *Code of Professional Responsibility, Canon 7*; see also EC 7-19, *id.*; R. C. Teece, *The Law: Conduct of the Legal Profession in New South Wales*, (2 ed. 1963) 56-57.

⁷ Per Lord Parker in *R. v. Turner* (1970) 2 All E.R. 281, 285, and Lord Ritchie-Calder in *Parliamentary Debates (Hansard)*, House of Lords, 14 Feb. 1973, 1619-20.

⁸ *Santobello v. New York*, 404 U.S. 257 (1971); *Brady v. United States*, 397 U.S. 742 (1970); *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970) *People v. West* 91 Cal. Rptr. 385, 477 P.2d 409 (1970); American Bar Association, *Standards, Pleas of Guilty* (1968) (hereinafter cited A.B.A. *Standards*), President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, (1967) 9-13 (hereinafter cited *Task Force Report*); American Law Institute, *Model Code of Pre-Arrest Procedure, Tentative Draft No. 5*, (1972) s. 350.3 and notes pp. 67-69 and 101-08; Advisory Committee Note to proposed rule 11 of the Federal Rules of Criminal Procedure, see n. 19 *infra*, *contra*, National Advisory Commission on Criminal Justice Standards and Goals (hereinafter cited National Advisory Commission); *Courts*, (1973) Standard 3-1. For an excellent collection of United States' materials, including academic comment, see Note, "Restructuring the Plea Bargain", 82 *Yale L. J.* 286, (1972):

another.⁹

What are the various forms of plea bargains recognized by United States' courts?

First, there is the plea to one count of a multiple count indictment or information. Typically where a defendant is charged with three counts of burglary, robbery, theft, or narcotic offences the prosecution will be willing to accept a plea of guilty to one count. The other part of the "bargain" in these cases is that the remaining counts will be dismissed on motion of the prosecutor.

Second, there is the plea to one count in a multiple count indictment where the counts charge crimes of varying degrees of severity. A typical indictment would be for murder, robbery and assault. There the prosecutor would routinely accept a plea of guilty to the most serious of the crimes charged in return for the "bargain" of dismissing the lesser counts.

These first two types are closely related and have two very practical effects. The defendant has a record of conviction on only one charge. This may be helpful in the future with respect to employment or even subsequent criminal convictions. The prosecution is likely to achieve the same result in terms of specific punishment from a conviction on one count as they would on several counts. It is a rare case in which a sentencing judge will impose consecutive terms of imprisonment on an offender for multiple convictions of the same type; it is most unlikely that a defendant will be sentenced more severely for a conviction of both murder and robbery than he would be for simply murder. In accepting a plea of guilty to one count, the prosecutor is achieving as much protection for society as is likely by proceeding to trial and obtaining conviction on all counts.

Third, there is the case where the prosecution accepts a plea of guilty to a lesser charge. This may occur through a lesser-included offence such as a plea of guilty to unlawful carnal knowledge instead of the crime of rape as charged, or a plea of guilty to manslaughter instead of the crime of murder as charged. It may also occur through a plea to one count of a multiple count indictment, but not the most serious crime in the indictment. An example of this is a plea of guilty to simple assault instead of aggravated assault. The justification for this type of "bargain" may be less convincing. Generally it is uncertainty about result at trial. Often it is mere expediency. It is common knowledge among defence attorneys that a plea of guilty to a less serious charge is more likely to be accepted by the prosecutor on a day when there are ten cases waiting to go to trial than on a day when there is only one or two.¹⁰ Less common motivations for this plea to a lesser charge may be to gain the co-operation of the defendant where that is needed for another investigation, to mitigate a severe mandatory sentence, or to save witnesses the ordeal of testifying in particularly difficult cases—such as where the witness is in poor health or the charge is forceable rape. These latter situations are not unusual, but make up a small percentage of the whole picture.¹¹

Fourth, there is the plea of guilty as charged, or in any of the above

⁹ *Brady v. United States*, 397 U.S. 742, 752 (1970); D. J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966), 3-6; A.B.A. *Standards*, 299-300; National Advisory Commission, 42 and 47; *Task Force Report*, 9; Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas", 112 *U. Pennsylvania L.R.* 865, 865-69 (1964).

¹⁰ See F. L. Bailey and H. B. Rothbeatt, *Fundamentals of Criminal Advocacy* (1974) 13; A. W. Alschuler, "The Prosecutor's Role in Plea Bargaining", 36 *U. Chicago*

¹¹ R. L. Misner, "Plea Bargaining: Boon or Boggle?" 1 *Tipstaff* 18, 18-19 (1974).

situations, where the defendant requires an indication from the judge as to what the sentence will be. This type of plea bargain has posed the most difficulty, historically, because it necessarily involves the judge in the bargaining process. On one hand, the role of the judge in civil settlement conferences has been analogized to the criminal arena. On the other hand, there are considerable ethical objections.

Where it exists, the common procedure is for counsel to confer with the judge in chambers, explain the nature of the case, the proposed plea, and the extent and nature of the defendant's prior criminal record. If there are other factors which might influence the judge in his sentencing decision these are frequently explained at this time. The judge will then state, if he can on the basis of that information, what his sentence would be. Sometimes all the defendant wants to know is whether there will be a jail sentence, or in jurisdictions where there is a separate jail and prison system, whether there will be a prison sentence. Where incarceration is a certainty, the length of the sentence will be a factor. Where probation reports are routinely prepared in sentencing matters, the judge may set a maximum but await the probation investigation before making a final decision. Obviously, if the judge feels at the time of sentencing that he cannot abide by his agreed maximum, he must allow the defendant to withdraw the plea of guilty and either transfer the case to another court or proceed to trial on the case. In other cases, the amount of the fine, or the nature and duration of a probationary period may be influential. Any agreement thus reached is then repeated in open court and a record preserved. Some judges will insist that the entire discussion be held in open court.

These four situations cover the most significant forms of plea bargaining. Almost any plea bargaining situation can fit into one or another of these rubrics; sometimes a given bargain will fall into two or more categories. In particular, it is not uncommon for a conference with the judge, and an indication from him of potential maximum sentences, to go along with one of the other reductions.

The American Bar Association has recognized that there are many reasons for a plea of guilty other than court congestion, and has sanctioned judicial consideration of those factors.

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

- (i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;
- (ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;
- (iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
- (iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
- (v) that the defendant has given or offered co-operation when such co-operation has resulted or may result in the successful prosecution of

other offenders engaged in equally serious or more serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.¹²

The Association adds a caveat, however:

The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or *nolo contendere*.¹³

There are, of course, many dangers associated with plea bargaining. Defence counsel may develop too friendly a working relationship with the prosecutor, police or judge. An accused may be coerced into a plea of guilty because the "bargain" is just too good to pass up. The prosecutor may "over charge" the defendant in order to have a better bargaining position. These abuses, and others, have been catalogued and criticized in Commonwealth jurisdictions¹⁴ and in the United States.¹⁵ The National Advisory Commission on Criminal Justice Standards and Goals has even recommended total abolition of plea bargaining, viewing it as "inherently undesirable".¹⁶ Short of that extreme measure, a number of proposals for formalizing the bargaining transaction have been made, most frequently in academic journals. In a practical application, the New York County, Los Angeles County and Harris County (Houston, Texas) District Attorney's Offices have formal guidelines for acceptable bargains, and official approval from a supervisor is required to deviate from these guidelines.¹⁷ In smaller offices these guidelines may be less formal.

An important control on the bargaining process is the trial judge. To him falls the duty of policing the bargain to see that justice is not flouted. He must determine the voluntariness of the plea of guilty, must be convinced that undue pressure has not been applied, and be the watchdog for the community so that an inadequate sentence is not applied in a serious case. "Only if the judge is satisfied that these criteria have been met should he indicate that the disposition is acceptable to him."¹⁸ This "watchdog" function of the

¹² A.B.A. *Standards*, standard 1.8. This and other A.B.A. recommendations have produced statutory equivalents in several jurisdictions, e.g., Illinois Supreme Court Rule 402 (1970), Ill. Rev. Stat. 1973, ch. 110A, s. 403, Ore. Rev. Stat. 1973, s. 135. 415.

¹³ *Ibid.*

¹⁴ See, e.g., G. A. Ferguson & D. W. Roberts, "Plea Bargaining: Directions for Canadian Reform", 52 *Can. Bar Rev.* 497 (1974); A. Davis, "Sentences for Sale: A New Look at Plea Bargaining in England and America", (1971) *Crim. L.R.* 150 and 218; and the references contained in these articles.

¹⁵ D. J. Newman, *supra*, n. 9; W. S. White, "A Proposal for Reform of the Plea Bargaining Process", 119 *U. Pennsylvania L.R.* 439 (1971); D. J. Newman & E. C. NeMoyer, "Issues of Propriety in Negotiated Justice", 47 *Denver L.J.* 367 (1970); A. Enker, "Perspectives on Plea Bargaining", *Task Force Report*, Appendix A, 108 (1967); Note, "Restructuring the Plea Bargain", 82 *Yale L.J.* 286 (1972); Note, "The Unconstitutionality of Plea Bargaining", 83 *Harv. L.R.* 1387 (1970); Comment, 66 *Yale L.J.* 204 (1956).

¹⁶ National Advisory Commission, Standard 3.1 and commentary pp. 46-49; Accord, Note, "The Unconstitutionality of Plea Bargaining", 83 *Harv. L.R.* 1387 (1970).

¹⁷ Kuh, "Plea Bargaining: Guidelines for the Manhattan District Attorney's Office", 11 *Crim. L. Bull.* 48 (1975). The author worked as a Deputy District Attorney for Los Angeles County, 1969-71, and saw these formal guidelines in action. C. Vance, *The Prosecutors' Discretion: A Statement of Policy of the Office of District Attorney of Harris County* (1974) 14-24; E. J. Younger, Memorandum of 1 February, 1966, 2-9.

¹⁸ *Task Force Report*, 13.

judge is quite separate and distinct from the issue of his active participation in the bargaining process.

Even this supervisory function may be fettered. The Federal Rules of Criminal Procedure provide, *inter alia*:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.¹⁹

In *United States v. Ammindown*²⁰ the accused was charged with first degree murder. At trial, the United States Attorney and the defence agreed to a guilty plea of second degree murder. The district court judge refused to accept the plea. On appeal the Court of Appeals for the District of Columbia held the actions of the trial judge to be improper under the Rule quoted.

One of the most distressing dangers associated with plea bargaining is a diminution in respect for the criminal justice system. H. Richard Uviller, a former prosecutor and now Professor of Law at Columbia University, says:

Practitioners of many jurisdictions will attest that the core of the criminal process as they know it is the guilty plea. . . . As in civil cases, settlement has become the rule, adjudication by trial the exception. . . . With some dismay, people are beginning to sense a displacement of images; for the cherished image of robed judge and solemn jury seeking the truth and imposing judgment "according to law", a vision is substituted of "deals" secretly concluded in dim anterooms between lawyers bargaining away the rights of the accused and of the public, according to the law of the marketplace.²¹

The recent events involving prominent political figures in the United States have done more to bring plea bargaining under public scrutiny than all the judgments, advisory commissions and legal articles put together. And the dismay that has been voiced is not confined to the United States.

Australian Response

These forms of plea bargaining in the United States at present portend the future of plea bargaining in Australia. It is logical to conclude that the nature of the lawyer's duty to his client, combined with the increase in the number of accused who will have access to legal assistance, will produce an increased pressure for plea bargaining in Australian courts. This pressure must be recognized and dealt with in a realistic fashion. To maintain the old ethic that holds plea bargaining anathema to the judicial process will produce either chaos or hypocrisy.

Above-board acceptance of plea bargaining as part of the criminal justice process will ease the pressure of court congestion. Acceptance requires the earnest efforts of the bar and bench, and perhaps of the parliament and the public, to set realistic guidelines for the case of the participants in the criminal

¹⁹ Fed. Rules Cr. Proc. rule 11, 18 U.S.C.A. This rule now appears in an expanded form in the proposed rule 11 which goes into effect 1 December, 1975. See 17 Crim. L.Rptr. 3215 (1975).

²⁰ 497 F.2d 615 (C.A.D.C. 1973). Compare, *R. v. Soanes* (1948), 32 Cr. App. R. 136 and Crimes Act, 1900-1974 (N.S.W.), s. 394A.

²¹ H. R. Uviller, *The Processes of Criminal Justice: Adjudication*, 335 (1975).

process. Attorneys and judges must have certain knowledge of which forms of plea bargaining are acceptable and which are not. Perhaps the development of different forms of plea bargaining is required to suit local conditions. The crucial decision must be whether the judiciary will be an active participant in the process. It is crucial because judicial integrity is at stake. The "cherished image" of the impartial arbiter in the battle between the Crown and the accused may be tarnished when the judge descends into the ruck. The authority for accepting a lesser plea already exists, and at least in an Australian jurisdiction, the acquiescence of the judge is not required.²²

This article has been directed primarily at the situation surrounding indictable offences because it is there that the potential pressures appear greatest. But in time Courts of Petty Session will have to reckon with the problem as well.

Some participation by the trial judge is probably essential. The limits of this participation are quite vague. The President's Task Force reports:

Inevitably the judge plays a part in the negotiated guilty plea. His role is a delicate one, for it is important that he carefully examine the propriety of the agreement without undermining his judicial role by becoming excessively involved in the negotiations. The judge's function is to ensure the appropriateness of the correctional disposition reached by the parties and to guard against overcharging by the prosecutor or an agreed sentence that is inappropriately light in view of the crime or so lenient as to constitute an irresistible inducement to the defendant to plead guilty. The judge's role is not that of one of the parties to the negotiation, but that of an independent examiner to verify that the defendant's plea is the result of an intelligent and knowing choice. The judge should make every effort to limit his participation to avoid formulating the terms of the bargain. His power to impose a more severe sentence than the one proposed as part of the negotiation presents so great a risk that defendants may feel compelled to accept his proposal.²³

Despite these suggested limits some judges do take an active role in negotiations in the United States. If the judge is overactive in his participation he may be corrected by an appellate court. A plea of guilty induced by the judge may be later withdrawn on the grounds of involuntariness. The fact that so far guilty pleas result in few such appeals or withdrawal motions is some indication of the general acceptance of judicial participation in plea bargaining.

It may be that in Australia the judge's role is not inevitable. That remains to be seen. What is certain, however, is that whatever part he plays must be a visible one. At the very least the plea must be taken in open court, the bargain exposed and certified, and a record of the proceedings must be made and preserved.

The negotiations should be freed from their present irregular status so that the participants can frankly acknowledge the negotiations and their agreement can be reviewed by the judge and made a matter of record.

Upon the plea of guilty in open court the terms of the agreement should

²² Crimes Act, 1900-1974 (N.S.W.) s. 394A and commentary thereon in R. A. Watson & H. Purnell, 1 *Criminal Law in New South Wales* (1971), 360-61, para. 1093.

²³ *Task Force Report*, 12-13 (footnotes omitted). Compare the position taken by Kaufman, J. in *United States ex rel. McGrath v. La Vallee*, 348 F. 2d 373 (2d Cir. 1965), with that of Weinfeld, J. in *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966).

be fully stated on the record and, at least in serious or complicated cases, reduced to writing.²⁴

If the judge is to abstain from the proceedings he must do so scrupulously and avoid even the appearance of participation.

An early recognition of the pressures building up on all the courts, as well as the logical and ethical factors which will influence the growth of these pressures, will hopefully aid courts, legislatures, lawyers and law associations throughout Australia to respond quickly and efficiently before the "breaking point" is actually reached. Thus the "cherished image" in the Australian judicial system may be preserved.

²⁴ *Id.* 12. Accord, National Advisory Commission, Standard 3.2, p. 50. This recommendation has resulted in some codifications, e.g., Fed. Rules Cr. Proc. rule 11, 18 U.S.C.A., see n. 19 *supra*; Illinois Supreme Court Rule 402, n. 12 *supra*; Ore. Rev. Stat. 1973, ss. 135. 385 to 445.