Judicial Participation in Plea Negotiations: The Elephant in Chambers

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JUDICIAL PARTICIPATION IN PLEA NEGOTIATIONS: THE ELEPHANT IN CHAMBERS

The Hon. Isaac Borenstein (ret.)* & Erin J. Anderson**

I. INTRODUCTION.................................................................................................................. 1

II. THE STATE OF THE LAW ON JUDICIAL INVOLVEMENT IN PLEA NEGOTIATIONS: OUTSIDE MASSACHUSETTS......................................................... 4

III. THE STATE OF THE LAW IN MASSACHUSETTS.......................................................... 11

   A. Coercion ............................................................................................................................ 11

   B. Vindictiveness .................................................................................................................. 17

III. OFF-THE-RECORD CONFERENCES.............................................................................. 24

   A. Right to Confrontation ................................................................................................. 27

   B. Prematurely Indicating Sentence with Inadequate Information ................................. 28

IV. RECOMMENDATIONS........................................................................................................ 29

   A. Before a Conference in Chambers............................................................................... 29

   B. During a Conference in Chambers.............................................................................. 30

   C. After the Conference in Chambers............................................................................... 31

   D. Trial or Motion Session................................................................................................. 31

   E. Prohibited Acts............................................................................................................... 32

V. CONCLUSION...................................................................................................................... 33

APPENDIX A .................................................................................................................................. 34

I. INTRODUCTION

This article is written, first, as a result of our interest in the resolution of criminal cases fairly, including short of trial, and the proper role of judges in that process. Rather than assume a “neutral” posture, we readily admit our bias that there is a useful and just place for judges in the plea bargaining process. Second, it is our hope to begin a more open and

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ongoing discussion between judges, attorneys, journalists, victims’ rights organizations, and others affiliated with or interested in the justice system regarding judicial participation in plea negotiations. It is our strong belief that such dialogue will lead to a more predictable and consistent process in Massachusetts.

It is our view that judicial participation in plea negotiations can benefit everyone, particularly if handled properly. Discussion of these issues has often been relegated to dicta, judicial conferences, off-the-record conversations, infrequent continuing legal education seminars, and an occasional mention in the media. Perhaps there is no more powerful showing of the need to openly acknowledge this than the recent and highly-publicized case of Murphy v. Boston Herald Inc.\textsuperscript{1} where the Supreme Judicial Court forcefully made clear that,

If there ever was a case that demonstrates the need for lobby conferences, where cases or other court matters are discussed, to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference . . . had been transcribed. We trust that the lesson learned here will be applied by trial judges to prevent unnecessary problems that often arise from unrecorded lobby conferences.\textsuperscript{2}

This article is structured as follows. First, we explain the state of the law regarding judicial participation in plea negotiations as it exists nationally. Next follows a discussion on the benefits and dangers of the practice. Third, suggestions are presented for how best to allow judges to assume a role in the attainment of either a plea agreement or a defendant’s decision to plead guilty, even absent an agreement with the government (a so-called guilty plea with an un-agreed recommendation). Finally, we discuss what a proposed rule would include, as the means for resolving cases with a judge’s participation, but in ways that are transparent and fair to all involved.

An overwhelming percentage of criminal cases are resolved with the defendant pleading guilty.\textsuperscript{3} There is minimal information available

\begin{itemize}
\item \textsuperscript{1} 865 N.E.2d 746 (Mass. 2007).
\item \textsuperscript{2} Id. at 758 n.15.
\item \textsuperscript{3} See U.S. Department of Justice, \textit{State Court Sentencing of Convicted Felons 2004 - Statistical Tables}, available at http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401.tab.htm. In 2004, of the felony convictions in a nationally representative sample of state courts in three-hundred counties, just five percent of defendants exercised their right to either a jury or
telling us what role a judge has played, if any, in a defendant’s decision to plead guilty, and specifically whether the judge participated at all in any negotiations; in how many cases a judge participated; and, in those cases where the judge did participate, whether the case ended in a guilty plea or a trial. A number of reasons may motivate a defendant to plead guilty. It is not the aim of this article to explore all of these, but rather to focus on the role that a judge may play in that decision.

The apparent reluctance in Massachusetts to discuss openly and develop clear rules about judges participating in plea bargaining, along with what changes need to be made and guidelines enacted, may well be the understandable tension created between serious concerns raised by judges engaging in such activities and the administrative necessity to not have every defendant go to trial. It has often been said that without guilty pleas the criminal justice system would collapse.  

Judicial participation in plea negotiations is by no means a revolutionary idea or practice. Judges are participating in plea negotiations across the country and using various methods to do so. The scope of the issue is illustrated by the number of states that directly and specifically address it through a rule or case law. Our goal here is, in part, to openly recognize that judges are participating, show how widely the practice has been addressed, and make recommendations about how judges can fairly, beneficially, and effectively exercise a role in the process. By involving themselves in plea negotiations, judges have the unique opportunity to even the playing field between the parties during discussions and serve as a neutral arbiter, listening to the parties’ respective arguments for their proposed sentences, reacting to these requests, giving the parties

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4 See Santobello v. New York, 404 U.S. 257, 260 (1971) (describing plea bargaining as “essential component of the administration of justice”). The Court went on to state, “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” Id. But see Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969) (stating this argument relies on assumption and not actual evidence).

5 See infra notes 25-49 and accompanying text.


7 See infra notes 12-49 and accompanying text.
insight into the ultimate decision-maker's opinion, and often increasing the likelihood that they will come to an agreement. In some cases, this will avoid a victim or victim's family having to go through a trial, or a defendant not being able to accept responsibility for his crime over a minor misunderstanding between the parties regarding guilty pleas, a lack of knowledge about the criminal justice system, the inability of the attorneys to communicate, or the unreasonableness of one of the parties. This article advocates for judges' reactive, not active, participation; meaning, judges should not assume a dominant or directive role in discussions between counsel, but should use their involvement to absorb information, listen to arguments by counsel, comment on their sentencing requests, and, where appropriate, request more information, take time to deliberate on, and perhaps indicate a possible sentence.

II. THE STATE OF THE LAW ON JUDICIAL INVOLVEMENT IN PLEA NEGOTIATIONS: OUTSIDE MASSACHUSETTS

Notwithstanding a perceived unwillingness to openly discuss this issue, and with no specific, detailed rules and guidelines about its practice in Massachusetts, many jurisdictions have attempted to grapple more clearly and definitively with whether to allow judicial participation in plea negotiations, and if permitted, how judges can do so appropriately. In this section, we provide examples of jurisdictions that expressly prohibit judicial participation in plea negotiations and those that allow it, but with

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8 See Jay Folberg, Dwight Golann, Lisa Kloppenberg & Thomas Stipanowich, Resolving Disputes 372 (Aspen Publishers 2005) (discussing use of mediation in criminal cases). “One of the most controversial uses of mediation is in criminal cases. The vast majority of criminal charges, ranging from small misdemeanors to capital cases, are plea bargained—that is, negotiated by prosecutors and defense counsel—rather than tried. Mediation has not, however, been used with any frequency to assist the process of plea bargaining.” Id.

9 See Cripps v. State, 137 P.3d 1187, 1190-91 (Nev. 2006) (reiterating state's argument in favor of court creating guidelines for the practice). The state not only asked that the court create a set of guidelines governing judicial participation in plea negotiations and allow the judge to tell the defendant whether the parties' sentencing recommendations would be followed, but also suggested that if the judge informed the defendant of a potential sentence, a reluctant defendant would have more information available to aid him in the decision of whether to plead guilty. Id.

10 See Commonwealth v. Gordon, 574 N.E.2d 974, 976 n.3 (Mass. 1991) (prohibiting judges' active participation in plea negotiations). In a footnote, the court stated, “We take this opportunity to remind judges that they are not to participate as active negotiators in plea bargaining discussions.” Id. at 976 n.3. See also Commonwealth v. Bowen, 827 N.E.2d 751, 753 n.3 (Mass. App. Ct. 2005) (reiterating principles in Gordon). The Bowen court stated, “The text of rule 12 does not include an express prohibition against judicial involvement in plea bargaining, but 'judges . . . are not to participate as active negotiators in plea bargaining discussions.'” Id.
limitations or conditions attached. In the subsequent section, we describe the state of the law in Massachusetts. The fact that the majority of jurisdictions take no clear position may reflect the ambivalence about the importance of judicial participation in plea negotiations and the concerns they raise.

In the federal courts, judicial involvement in plea negotiations is expressly prohibited. Several states follow the Federal Rules and exclude judges from being involved in plea negotiations, mostly by prohibiting it in their court rules, but also in court decisions. Colorado exemplifies the view that it is inappropriate for judges to engage with counsel and/or the parties in these discussions. The Colorado Rules of Criminal Procedure explicitly state, "The trial judge shall not participate in plea discussions." Colorado case law outlines the reasoning for not allowing such participation:

[A trial judge's] participation in plea bargaining is fundamentally unfair and brings to bear the full force and majesty of the court on a defendant. Moreover, when the trial judge couples his intervention with threats of a longer sentence if the defendant goes to trial and is found guilty, he has attempted to use his office to force the defendant to

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11 FED. R. CRIM. P. 11(c)(1).

12 See N.M. DIST. CT. R. CRIM. P. 5-304(A)(1) (2008) (attorneys can discuss guilty pleas but court shall not participate in discussions.) Additional commentary for this New Mexico rule indicates that before the adoption of paragraph (A), a judge's involvement in plea negotiations "varied with the interest of the individual district court judges." Id. at cmt. More than forty years ago, the New Mexico Supreme Court, however, questioned the propriety of such involvement. See State v. Scarborough, 410 P.2d 732, 736 (N.M. 1966). As a result, the rule completely eliminated judicial involvement and allowed judges only to accept or reject the plea agreement. N.M. DIST. CT. R. CRIM. P. 5-304(A)(1) (2008) cmt. Several other states take a similar approach. W. VA. R. CRIM. P. 11(e) (bright line rule that judges cannot participate in the plea bargaining process); State v. Sugg, 456 S.E.2d 469, 487 (W. Va. 1995) ("absolute bar" on trial judge's participation in plea bargaining); N.D. R. CRIM. P. 11(c)(1) (2008) (North Dakota rule prohibiting court's participation in plea negotiations); State v. Wolfe, 175 N.W.2d 216, 221(Wis. 1970) (strongly recommending that trial judge not participate in plea negotiations); TENN. R. CRIM. P. 11(c)(1) (2008) (court shall not participate in plea discussions in Tennessee); State v. McDonald, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983) (following ABA standards and prohibiting judicial involvement in plea negotiations). The Texas court gave four reasons for not allowing judicial participation in plea negotiations: (1) the trial court's role as a neutral arbiter is compromised when the court attempts to persuade the defendant to accept a plea; (2) if the defendant rejects the plea offer there is a possibility of prejudice on the part of the court; (3) the court has power over the defendant, giving it an advantage in negotiations and causing the defendant to consider unhappy consequences if he rejects the court's offer; and (4) during such negotiations, the defendant may make admissions or confessions that would otherwise not be admissible before the court. Id.

waive his right to a jury trial or be penalized for exercising a constitutionally guaranteed right. In our view, participation by the trial judge in the plea bargaining process must be condemned.\textsuperscript{14}

In some jurisdictions that bar the practice, courts have gone out of their way to clearly separate a judge’s participation in negotiations from the parties presenting a tentatively reached plea agreement and then allowing the judge to react to that.\textsuperscript{15} For instance, in Georgia, the Superior Court Rules indicate, “The trial judge should not participate in plea discussions.”\textsuperscript{16} The case law, however, allows the parties to present a judge with a provisional plea agreement: “If the parties negotiate a tentative plea agreement, the trial court may indicate whether it will concur with the agreement, but that review is separate from the plea negotiation process itself.”\textsuperscript{17} Later Georgia cases further outline the limits of the rule,

\textsuperscript{14} People v. Clark, 515 P.2d 1242, 1243 (Colo. 1973) (emphasis added).

\textsuperscript{15} See OR. REV. STAT. § 135.432(1)(a) (2008) (prohibiting judicial participation). The Oregon statute goes on to provide exceptions to barring judicial involvement, one of which is participating in tentative plea agreements. \textit{Id.} The manner in which the judge is permitted to participate once a tentative plea agreement has been reached is specifically outlined in sections (2)-(4) of the statute. \textit{Id.} Missouri has a similar rule. MO. SUP. CT. R.24.02(d) (court shall not participate in plea agreement procedure). The rule in Missouri goes on to state that “after a plea agreement has been reached, the court may discuss the agreement with the attorneys including any alternatives that would be acceptable.” \textit{Id; see also} MO. SUP. CT. R.37.58 (2008) (stating similar rule as 24.02 regarding pleas generally). The rule in Arkansas is comparable. ARK. R. CRIM. P. 25.3(a) (2008) (prohibiting judicial participation in plea negotiations). Similar to the rules previously cited, the Arkansas rule allows the trial judge to participate once a tentative plea agreement has been reached and to concur with the agreement if he so chooses. ARK. R. CRIM. P.25.3(b) (2008). The same holds true in Minnesota courts. 49 MINN. R. CRIM. P. 15.04(1) (2008) (stating prosecution can only discuss pleas and reach agreement with defendant through defense counsel). The Minnesota rule then outlines the role of the trial judge, which begins once a plea agreement has been reached between the parties. 49 MINN. R. CRIM. P. 15.04(3) (2008); see also Miles v. State, 512 N.W.2d 601, 604 (Minn. 1994) (Foley, J., concurring) (reiterating principle that trial judges are not permitted to participate in plea negotiations). Justice Foley went out of his way to write separately and remind trial judges of this principle. \textit{Id.} Utah courts support the same view. UT. R. CRIM. P. 11(i)(1) (2008) (prohibiting judge from participating in plea discussions before plea agreement made by prosecution). New Jersey employs a comparable rule. 1A N.J. CT. R. 3:9-3 (2008) (prohibiting judge’s participation except (emphasis added) after tentative plea agreement reached and at request of both parties). Nevada courts also limit judicial participation until after the parties themselves come to a conclusion. See Cripps v. State, 137 P.3d 1187, 1190 ( Nev. 2006) (allowing judge to indicate sentence preference \textit{after} (emphasis added) parties present recommendation).

\textsuperscript{16} GA. SUPER. CT. R. 33.5(A) (2008) (prohibiting trial judge from initiating plea discussions).

\textsuperscript{17} McDaniel v. State, 522 S.E.2d 648, 650 (Ga. 1999). In \textit{McDaniel}, after the preliminary voir dire of the jurors during the trial, the judge called for a conference to discuss the possibility of the defendant pleading guilty. \textit{Id.} at 649. The trial judge summarized its discussion with counsel in chambers on the record. \textit{Id.} In the summary, the judge indicated his reluctance to
indicating that judicial participation is prohibited "when it becomes so
great as to render the plea involuntary," including when a trial judge makes
comments to the defendant indicating that if he rejects a plea offer and goes
to trial, he will face a greater sentence. 18

Illinois offers another example of this distinction. The Illinois Supreme Court Rules make clear that, "The trial judge shall not initiate plea discussions." 19 This rule also outlines how the judge shall permissibly participate once a tentative plea agreement has been reached. 20 The rule allows the trial judge to not only hear the tentative plea agreement with the permission of both parties, but also, "evidence in aggravation or mitigation." 21 If the judge does not hear such evidence, he can concur with the agreement conditionally on hearing the representations made to him in open court. 22 Should the judge withdraw his conditional concurrence and the defendant withdraw his guilty plea, the trial judge is required to recuse himself. 23 Commentary on the rule in the Illinois Practice series cites the reasoning of the Federal Rules as to why that state prohibits judicial involvement in plea negotiations. 24

A number of other states have either adopted rules or have established case law that hold differently than the Federal Rules and allow for limited judicial participation in plea negotiations or participation with "conditions" attached. 25 Oregon has developed a unique and interesting
approach to judicial involvement in plea discussions. In a statute specifically devoted to “Trial judge participation and duties,” any judge other than the presiding judge, at the request of the prosecution and the defense, or at the direction of the presiding judge, is allowed to participate in plea negotiations. The relevant section of the statute further states,

Participation by [a judge other than the presiding judge] in the plea discussion process shall be advisory, and shall in no way bind the parties. If no plea is entered pursuant to these discussions, the advice of the participating judge shall not be reported to the trial judge. If the discussion results in a plea of guilty or no contest, the parties, if they both agree to do so, may proceed with the plea before a judge involved in the discussion. This plea may be entered pursuant to a tentative plea agreement as provided in subsection (2) to (4) of this section.

Montana, like a number of states, neither expressly allows nor prohibits trial judges’ involvement in plea negotiations. Montana’s Commission Comments on the rule recognize that there are situations in which such participation is warranted. New York shows a similar “lack of a clear position” with regard to judicial participation in plea negotiations. Pennsylvania, previously having prohibited judges’ participation in plea discussions, amended its rules of criminal procedure in 1995 to permit the practice, noting that it was amended to “align the rule with the realities of current practice.”

Previously having prohibited judicial participation in plea negotiations, Michigan permits it, but with safeguards in place. In People v. Cobbs, the Michigan Supreme Court created a narrowly tailored set of participation in plea negotiations). See also ARIZ. R. CRIM. P. 17.4(a) (2008) (allowing for judicial participation in plea negotiations with permission of both parties).

27 Id.
28 MONT. CODE ANN. § 46-12-211 (1) (2007); see also People v. Weaver, 12 Cal. Rptr. 3d 742, 755 (Cal. Ct. App. 2004) (stating degree of participation varies among judges). There is no rule in California that prohibits judicial involvement in plea discussions. Id. The courts, however, have cautioned against it, expressing concerns about coercion and lack of neutrality. Id. See also State v. Byrd, 407 N.E.2d 1384, 1388 (Ohio 1980) (discouraging judicial participation and requiring it be “carefully scrutinized” for effect on voluntariness of plea).
30 N.Y. CRIM. PROC. LAW § 220.50 (2008) (neglecting to neither allow nor prohibit judicial involvement). The commentary goes on to state that New York is more flexible than the federal rules of criminal procedure with regard to judicial involvement in plea negotiations and the decision is left to the individual judge. Preiser, Peter, Supp. Prac. Cmt. (2002).
rules that a judge participating in plea negotiations must follow.\(^\text{34}\) The judge cannot initiate participation in the plea discussions; rather, he must do so at the request of a party involved.\(^\text{35}\) On the record, the judge must state the length of the sentence he believes is appropriate given the information available to him at the time.\(^\text{36}\) The judge is not permitted to provide alternative sentencing possibilities based on future procedural choices by the defendant, such as the defendant exercising his right to a trial by jury.\(^\text{37}\) An initial sentencing assessment does not bind the judge in any way, and, in turn, the judge’s decision not to sentence the defendant in accordance with an initial sentencing assessment is not grounds for automatic recusal.\(^\text{38}\) Florida, having refused to condemn judicial participation in plea negotiations in 1975 in the case of \textit{Davis v. State},\(^\text{39}\) followed Michigan’s example and adopted similar, narrowly-tailored rules to govern the practice.\(^\text{40}\)

In Vermont, the state rules of criminal procedure provide that, “The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment.”\(^\text{41}\)

In the case of \textit{State v. Davis},\(^\text{42}\) the Supreme Court of the State explained that:

Vermont is almost unique in allowing judges to participate in plea bargaining, taking a position different from both the federal rule and from the ABA Standards because it has

\(^{34}\) \textit{Id.}

\(^{35}\) \textit{Id.} at 212.

\(^{36}\) \textit{Id.} (emphasis added).

\(^{37}\) \textit{Id.}

\(^{38}\) \textit{Cobbs}, 505 N.W.2d at 212.

\(^{39}\) 308 So.2d 27 (Fla. 1975).

\(^{40}\) See State v. Warner, 762 So.2d 507, 513-514 (Fla. 2000) (providing guidelines for judicial participation in plea negotiations). The court stated that judicial participation must be limited to minimize the possibility of coercing the defendant, to ensure that the judge remains neutral, and to make certain that the public also sees the judge as an impartial party. \textit{Id.} at 513. The court went on to state that the judge cannot initiate plea discussions, but can only participate upon the request of a party. \textit{Id.} Once a party requests such involvement from the judge, the judge may discuss sentencing possibilities and comment on those sentences that are proposed. \textit{Id.} Furthermore, the judge must inform the defendant that in determining a sentence, the court will consider victim input along with any other applicable information, emphasizing that such information may alter the sentence. \textit{Id.} A record of the plea discussions involving the court must be kept. \textit{Id.} at 514. If, after all these steps are taken, the defendant withdraws his guilty plea, the judge that participated in the plea bargaining is subject to recusal. \textit{Id.} The court noted that it is important to emphasize that participation in plea negotiations is left to the discretion of the trial judge. \textit{Id.}


\(^{42}\) 584 A.2d 1146 (Vt. 1990).
recognized that defendants derive benefits from judges’ input. In difficult cases, where the parties are deadlocked, the judge may be able to help fashion a compromise.\textsuperscript{43}

The commentary on the Vermont rule acknowledges the criticism that allowing participation may cause the defendant to call into question the judge’s role as a neutral decision-maker before a hearing, trial, or sentencing has occurred, perhaps inducing an innocent defendant to plead guilty.\textsuperscript{44} It also acknowledges that such participation may influence the judge in his later decisions.\textsuperscript{45} The commentary, however, goes on to state that there are advantages to the practice, and that the rule rightfully leaves the decision of whether to participate up to the judge.\textsuperscript{46} By requiring that a judge’s participation be on the record, there is a later opportunity for a review of anyone’s challenges, including a defendant’s claims of prejudice or unfair influence.\textsuperscript{47}

The State of Maine, effective January 1, 2008, amended its Rules of Criminal Procedure from prohibiting the practice, to now expressly allowing it: “The court may participate in the negotiation of the specific terms of the plea agreement at the request of or with the agreement of the parties.”\textsuperscript{48} The advisory note for the rule states that the purposes for such a change are to:

1) avoid confusion with Me. R. Crim. P. 11A(e) in which the court is required to disclose its view of an appropriate sentence in certain negotiated pleas, and 2) promote sound policy and good judicial case management practice, while retaining the protection of the due process rights of the defendant and the prosecutorial role of the attorney for the State as a member of the Executive Department.\textsuperscript{49}

The variety of ways that other jurisdictions directly address judicial participation in plea negotiations can serve as a model for Massachusetts to confront the issue more publicly, and perhaps take a more consistent, detailed approach, with clear guidelines. Looking at other jurisdictions can also promote a better understanding of the many issues that arise when a

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} at 1148 (internal citations omitted).
\item \textsuperscript{44} VT. R. CRIM. P. 11(e)(1) cmt. (2008).
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} ME. R. CRIM. P. 11A(a) (2008).
\item \textsuperscript{49} ME. R. CRIM. P. 11A(a), advisory note (2008).
\end{itemize}
judge participates in plea negotiations, and can educate us about how to best permit it in Massachusetts courts.

III. THE STATE OF THE LAW IN MASSACHUSETTS

In Massachusetts, Rule 12 of the Massachusetts Rules of Criminal Procedure leaves open whether judges are permitted to participate in plea negotiations. The rule states, in relevant part,

The defendant and defense counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense.

The case law has offered some interpretation and insight regarding the practice, particularly addressing areas that raise concerns.

A. Coercion

If the trial or motion judge is actively involved in the plea negotiations, it may be difficult for the judge to determine the voluntariness of the defendant's guilty plea. A defendant, particularly in a motion and/or trial session, may feel an overwhelming amount of pressure to accept what the trial or motion judge offers as a sentence in exchange for a plea of guilty. Rejecting an offer of a sentence from the decision-maker can easily be perceived as a veiled "threat," even where not intended. As

52 See infra note 62 and accompanying text.
53 See infra note 84-86 and accompanying text.
54 See Commonwealth v. Bowen, 827 N.E.2d 751, 756 n.4 (Mass. App. Ct. 2005) (describing principle of coercion). "We wish to emphasize that what is prohibited is punishing a defendant because he insisted on his right to trial, as opposed to as award of a greater sentence after trial because the offenses, and the evidence presented at trial, warrant it. There is an important distinction between what a judge will as opposed to could, award as a sentence, given the statutory range of sentences." Id. See also Letters v. Commonwealth, 193 N.E.2d 578, 581 (Mass. 1963) (voiding guilty plea induced by judge's threat of increased punishment for exercising right to trial). The trial judge told defense counsel that the defendant would receive two life sentences to be served consecutively if he was found guilty of rape charges, but that only one life sentence would be imposed if the defendant pleaded guilty. Id. at 579. The court further stated that the defendant's "constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty... To impose upon a defendant such alternatives amounts to coercion as a matter of law." Id. at 580 (quoting States v. Tateo, 214 F. Supp. 560, 567 (S.D.N.Y. 1963)). See also infra note 74 and accompanying text.
stated in Commonwealth v. Carter,55 "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated."56 A reviewing court will find a due process violation "only by objective proof that a judge forced a guilty plea by putting the defendant on notice that he could expect more severe punishment if he insisted on a trial by jury."57

Criticism of judicial involvement certainly revolves around coercion and also includes related concerns: 1) that there is a "high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty;"58 2) that a prohibition on judges' participation would "protect the integrity of the judicial process;"59 3) that "a ban preserves the judge's impartiality after negotiations are completed;"60 4) that a judge's participation could create the impression in the defendant that he would not receive a fair trial or hearing if he were to go before that judge;61 5) that "judicial participation makes it more difficult for the judge to objectively determine the voluntariness of the plea;"62 6) that the judge's "promising" a sentence is inconsistent with the purpose of requiring a pre-sentence investigation report,63 and 7) that it does not honor a victim's right to be heard before a disposition is determined.64

In Commonwealth v. Carter, the Massachusetts Court of Appeals held that a guilty plea was induced by the presiding judge's improper threat.65 The trial judge informed the defendant that if he entered a guilty plea, he would receive a sentence of six years imprisonment, but if he was

56 Id. at 583.
58 U.S. v. Bierd, 217 F.3d 15, 19 (1st Cir. 2000) (quoting U.S. v. Bruce, 976 F.2d 552, 556 (9th Cir. 1992)).
60 Id.
61 Damiano, 441 N.E.2d at 1050 n.7.
62 See id.
63 See id.
65 See Commonwealth v. Carter, 733 N.E.2d 582, 584 (Mass. App. Ct. 2000). See also Commonwealth v. Bowen, 827 N.E.2d 751, 754 (Mass. App. Ct. 2005) (describing defendant's support for his allegation that his guilty plea was coerced). The defendant, eight months after pleading guilty, claimed that his guilty plea was coerced. Id. He claimed this after his attorney informed him that during a conference in chambers, the judge stated that if the defendant pleaded guilty he would be sentenced to eight to ten years in prison, while if he went to trial and was convicted he would receive a prison sentence of twenty-five to thirty years. Id.
The court held that this made the plea involuntary and voidable. Although a trial judge is permitted to inform defendants of their options and the ramifications of a decision to enter a guilty plea or proceed to trial, the trial judge in Carter went beyond merely informing the defendant of his options.

In Commonwealth v. Lebon, although not involving a guilty plea, the Massachusetts Court of Appeals reversed a conviction following a jury-waived trial after it determined that the defendant’s waiver of his right to a jury trial was coerced. The trial judge stated in a conference in chambers before the start of a jury trial that if the jury should return a verdict of guilty, he would sentence the defendant to committed incarceration, but if the defendant chose a jury-waived trial and was found guilty, he would not impose a committed sentence. Lebon then chose to waive his right to be tried by a jury, the judge found him guilty, and the defendant was given a suspended sentence of six months in a house of correction with a period of probation. On appeal, Lebon claimed the judge coerced him into giving up his right to a jury trial. The court held that “the judge, by offering substantially lighter punishment in return for the defendant not electing a jury trial so dampened the defendant’s right to a trial by jury as to deprive him of it,” and reversed the conviction.

In Commonwealth v. Damiano, the Massachusetts Court of Appeals reviewed the trial judge’s involvement in plea negotiations in a case in which the judge accepted the defendant’s guilty pleas to twenty-three indictments and sentenced him to twenty-three concurrent life sentences. The prosecution had participated in recommending and

66 Carter, 733 N.E.2d at 584.
67 Id. at 583.
68 Id.
70 Id. at 47.
71 Id. at 46-47.
72 Id. at 46 (describing case proceedings). After the defendant decided to waive his right to a trial by jury, the judge engaged in a colloquy with the defendant, asking him whether anyone forced him to give up his right to trial by jury, to which he answered, “No.” Id. at 47. The court considered whether, as the dissent stated, in doing so, the defendant gave up his right to argue that he was coerced. Id. The court decided that the defendant had not given up this right, disagreeing with the dissent’s statement that, “a deal is a deal,” and responding, “A deal is not always a deal when one side has all the cards.” Id.
73 Id. at 46.
74 Lebon, 643 N.E.2d at 46.
76 Id. at 1048.
obtaining a reduced sentence for Damiano’s co-defendant in exchange for cooperation with the police and offered to agree to a similar sentence for Damiano. Following this offer from the prosecution, during an unrecorded conference in chambers, the trial judge expressed his appreciation for the co-defendant’s cooperation and indicated that the defendant may be given similar consideration if he cooperated with police. The trial judge further stated that an eighteen to twenty-year sentence could be imposed pending the defendant’s cooperation. Damiano refused to cooperate, pled guilty, and was sentenced to twenty-three concurrent life terms in prison. The defendant filed a motion challenging his conviction and sentence on the grounds that the trial judge coerced his pleas.

The Court of Appeals held that it was permissible for the trial judge to discuss sentencing alternatives, and that he did nothing inappropriate in not committing himself to a particular sentence in advance. Therefore, there was no basis for concluding that the trial judge had coerced the defendant’s guilty plea. The court noted that a certain degree of coercion, in the form of psychological or emotional pressure, is inherent to any system that asks a person to forego certain rights in order to be spared certain penalties, but that “the possibility that a greater penalty will result from a jury trial than from the entry of a guilty plea has not been found to infringe impermissibly on the right to a jury trial.” Courts have interpreted the “impermissible” line of coercion when a defendant is “so gripped by fear . . . or hope of leniency that he does not, or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.” The Damiano court reasoned that the defendant was not subject to anything more than the “normal pressures

77 Id.
78 Id. at 1049.
79 Id.
80 Damiano, 441 N.E.2d at 1049.
81 Id.
82 Id. at 1051. See also Commonwealth v. Carrasco, No. 07-P-1024, 2008 WL 5047686, at *2 (Mass. App. Ct. Nov. 26, 2008) (describing appropriate judicial participation in plea negotiations). In Carrasco, the appeals court found that the trial judge retained his role as a neutral arbiter in his involvement in plea discussions. Id. During discussions with attorneys, the judge allowed counsel to present their respective sentencing requests and their arguments in support of such requests. Id. at n.2. The judge informed the defendant of his options, and of the potential effects on sentencing of his decision whether to plead guilty. Id.
83 Id.
84 Id. (quoting Commonwealth v. LeRoy, 380 N.E.2d 128 (Mass. 1978)).
85 Damiano, 441 N.E.2d at 1051 (quoting Commonwealth v. Tirrell, 416 N.E.2d 1357 (Mass. 1981)).
intrinsic to the plea bargaining process." Additionally, the court referenced further support for its conclusion in the trial judge's recorded hearing, which made it possible to ascertain whether the defendant's pleas were made knowingly and voluntarily.

In a footnote, however, the court made it clear that it did not wish its opinion to be construed as encouraging a judge's participation in plea negotiations: "While the record demonstrates that the defendant's pleas were voluntary, we hasten to add that nothing in this opinion should be construed as encouraging judicial participation in plea negotiations." In the same footnote, the court cited to United States v. Werker, emphasizing that by not participating, a judge will: 1) avoid claims by a defendant that he was coerced into guilty pleas, 2) not negotiate the terms of a sentence that the judge himself proposed, 3) prevent motions for recusal because the judge had too much information regarding the defendant's guilt and expressed an opinion about punishment, and 4) discourage the defendant from recanting his plea through a collateral attack. The court concluded that there was no presumption of coercion based on a likelihood of vindictiveness because of the possibility of greater punishment after a jury trial or failing to cooperate with police. The footnote, however, demonstrates the reluctance of courts to place clear and predictable limits on the practice.

Other state courts have voiced concerns in their opinions about coercion of defendants. These have led some jurisdictions to completely eliminate judicial participation in plea negotiations, while others, like Massachusetts, have allowed it, but cautioned against its use where it may result in coercion. Illinois courts, for example, make clear their distaste for any variation on the procedure outlined in their rules prohibiting judicial participation in plea negotiations:

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86 Damiano, 441 N.E.2d at 1051.
87 Id. at 1051-52. (citing record for reasons showing that the defendant was not coerced). Damiano's age and mental capacity were addressed. Id. The court quoted various points at which the defendant acknowledged his participation in the crime and the range of the judge's sentencing power. Id.
88 Id. at 1052 n.13.
89 535 F.2d 198 (2d Cir. 1976).
90 Damiano, 441 N.E.2d at 1052 n.13.
91 Id. at 1052.
92 Id. at 1052 n.13.
93 See State v. McCray, 87 P.3d 369, 372 (Kan. App. Ct. 2004) (permitting judicial involvement in plea negotiations). Allowing such participation, the court stated, was conditional upon there being no coercion of the defendant. Id. The court stated in dicta, however, that the better practice is for a judge not to participate in plea negotiations. Id.
94 See infra note 95 and accompanying text.
In the acceptable procedure, petitioner makes his decision before the trial judge makes his; hence, no influence is being exerted on petitioner by the trial judge at the time petitioner is making his decision. On the other hand, in the procedure in the instant case, the trial judge made his decision before petitioner made his, and that sequence created an inherent coercion on petitioner in making his decision. The inherent coercion consists of this: since the participating judge is the trial judge, petitioner fears what will happen to him sentence-wise, should he refuse the judge’s own recommendation and persist in being tried on his plea of not guilty, whether by jury or in a bench trial.\(^5\)

Maine, even though expressly allowing for judicial participation in plea negotiations, cautions against coercion as their primary concern in the advisory notes to their criminal rules.\(^6\) To mitigate against the risks of coercion, the advisory note recommends that during plea negotiations the judge should:

1) avoid suggestions to defendants or defense counsel that the refusal to enter a plea may lead to a higher sentence than otherwise may be appropriate if there is a conviction after trial, and 2) avoid suggestions to prosecutors that failure to agree to a plea may result in dismissal of a

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\(^5\) People v. Bannister, 309 N.E.2d 279, 283 (Ill. App. Ct. 1974) (describing issues with judicial participation in plea negotiations). In Bannister, the trial judge followed a routine practice when plea negotiations were sought on the day of trial, to meet in chambers with the prosecutor and defense counsel, look at the evidence against the defendant, listen to the prosecutor’s recommended sentence, consider matters in aggravation and mitigation, defense counsel’s recommended sentence, and then the judge would make his own recommendation as to sentence, should the defendant plead guilty. Id. at 281-82. See also Gordon v. State, 577 P.2d 701 (Alaska 1978) (stating purpose of prohibition on judicial participation is to avoid coercion); State v. Sugg, 456 S.E.2d 469, 487 (W. Va. 1995) (listing primary reason for prohibiting participation as coercion); State v. Dimmit, 665 N.W.2d 692, 696 (N.D. 2003) (giving coercion as first reason for absolute prohibition).

\(^6\) See Matter of Cox, 553 A.2d 1255, 1257 (Me. 1989) (reiterating former rule prohibiting judicial involvement in plea negotiations). The opinion in this case issued when the Maine Rules of Criminal Procedure prohibited judicial involvement in plea negotiations. Id. The court stated that, “four interests may be compromised when a judge assumes the role of a plea negotiator—those of the defendant, the system of justice, the prosecutor and the judiciary.” Id. See also ARIZ. R. CRIM. P. 17.4(a) court comment to 1999 amendment (cautioning judges to avoid coercive behavior of any kind); State v. Jordan, 672 P.2d 169, 174 (Ariz. 1983) (citing reasons for prohibiting judicial involvement in plea negotiations). The opinion in this case was written prior to Arizona’s amendment to its rules of criminal procedure. Id. The court specifically cited coercion by the judge as support for the state’s not allowing judicial participation in plea negotiations. Id.
charge, a lower sentence than otherwise may be appropriate if there is a conviction after trial, or adverse consequences in other cases.\(^97\)

**B. Vindictiveness**

The concepts of coercion and vindictiveness differ. As explained in a footnote in *Damiano*:

Vindictiveness is retaliation for rightful action taken in the past (e.g., the imposition of a heavier sentence upon a verdict of guilt than would have been imposed upon a plea of guilty). Coercion is the use of a threat to induce action. The two concepts have at least one feature in common, since one may attempt coercion by threatening to take action which, if taken, would be vindictive.\(^98\)

Vindictiveness is not implicated in a sentencing decision unless a defendant is punished for doing something he had a right to do.\(^99\) For example, it is fundamental that a defendant may not be punished for exercising his right to a trial.\(^100\) A judge’s involvement in the plea bargaining process, however, is not a *per se* violation of a defendant’s rights.\(^101\)

The analysis to determine whether a judge has acted in a vindictive manner is set forth in the Supreme Court case of *Alabama v. Smith*\(^102\) which overruled a more broadly-stated presumption of judicial vindictiveness established originally in *North Carolina v. Pearce*.\(^103\) The

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99 See supra note 98 and accompanying text.

100 See Commonwealth v. Ravenell, 612 N.E.2d 1142, 1143 (Mass. 1993) (describing defendant’s right to trial in context of vindictiveness allegations against judge). The court stated, “Plainly, a defendant . . . may not be punished for exercising his right to trial and, therefore, the fact that he has done so should be given no weight in determining his sentence.” Id. See also Commonwealth v. Johnson, 543 N.E.2d 22, 24 (Mass. App. Ct. 1989) (stating that when defendant is punished for exercising right to trial “error enters the picture”).


Court distinguished *Smith* from *Pearce*, making it clear that *Pearce* addressed the issue of vindictiveness when a defendant is granted a retrial and, following that conviction, receives a longer sentence than in the first trial.\(^{104}\) *Smith*, on the other hand, addressed vindictiveness specifically when a judge issues a harsher sentence following trial than originally imposed on a guilty plea that was vacated.\(^{105}\) The *Smith* Court resolved the differences between the two circumstances by pointing out that with a reconviction after the two trials, a similar set of facts will be available to a judge imposing a requirement for the judge to show why a harsher sentence was imposed after the second trial.\(^{106}\) A trial following a vacated guilty plea, however, will reveal additional evidence and circumstances about the case to the judge that were never developed during negotiations or the guilty plea process, as they would in a trial, and, therefore, a harsher sentence alone does not raise a presumption of vindictiveness.\(^{107}\)

*Smith* narrowed the presumption of vindictiveness in *Pearce*, establishing a more refined rule for determining whether judicial vindictiveness exists after a vacated guilty plea and trial.\(^{108}\) A presumption of vindictiveness will only exist in circumstances in which there is a “reasonable likelihood” that the harsher sentence is a result of judicial vindictiveness.\(^{109}\) In the cases where this condition is met, the burden of proof shifts to the government to show the absence of vindictiveness.\(^{110}\) If a reasonable likelihood is not established, however, then the burden of proof remains on the defendant to establish that actual vindictiveness occurred.\(^{111}\) This is unlike a circumstance in which a defendant claims he was *coerced* into giving up a right, as the burden always remains on the defendant to prove as much.\(^{112}\)

A “reasonable likelihood” that harsher sentences were the result of vindictiveness does not exist in cases in which *de novo* review by a different judge or jury occurred.\(^{113}\) Cases in which *de novo* review

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\(^{104}\) *Id.* at 799.

\(^{105}\) *Id.* at 797.

\(^{106}\) *Id.* at 802.

\(^{107}\) *Id.* at 801.

\(^{108}\) *Smith*, 490 U.S. at 799.

\(^{109}\) *Id.*

\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) Commonwealth v. Damiano, 441 N.E.2d 1046, 1050 (Mass. App. Ct. 1982) (requiring “objective proof” that judge threatened defendant with higher sentence if he did not plead guilty).

\(^{113}\) See Colten v. Kentucky, 407 U.S. 104, 116-17 (1972) (refusing to apply presumption when harsher sentence imposed by higher court reviewing evidence for first time); Chaffin v. Stynchcombe, 412 U.S. 17, 26 (1973) (declining to apply presumption when higher sentence imposed by second jury).
occurred can, according to the Smith Court, be reconciled with those in which a greater sentence was imposed after a trial that followed a vacated guilty plea. ¹¹⁴

Massachusetts has further explained this rule and applied it to cases in which the judge’s involvement in plea negotiations raised the issue of vindictiveness. ¹¹⁵ In Commonwealth v. Johnson, ¹¹⁶ the trial judge stated on the record, after closing arguments, that the defendant rejected an offer of a six to nine-year prison sentence if he pleaded guilty. ¹¹⁷ The jury convicted Johnson, who then received a nine to fifteen-year sentence from the same judge. ¹¹⁸

¹¹⁴ Smith, 490 U.S. at 801.
¹¹⁵ See Commonwealth v. Ford, 626 N.E.2d 1, 4 (Mass. App. Ct. 1994) (finding no “reasonable likelihood” of vindictiveness established). In Ford, during the conference in chambers the judge suggested that the defendant had a “wicked” record and that going to trial would be a “waste of time” and an “academic exercise.” Id. The judge indicated that if the defendant pleaded guilty he would likely be sentenced to “twelve years or something,” however, if he chose to go to trial the defendant would likely be sentenced to twenty to forty years. Id. The judge “mitigated” the vindictive effects of these statements by saying that he was not “twisting any arms” and had “nothing better to do than try this case.” Id. The defendant was convicted after a trial and sentenced to fifteen-twenty years. Id. See also Commonwealth v. Ravenell, 612 N.E.2d 1142, 1144 (Mass. 1993) (holding no presumption of vindictiveness). In Ravenell, the judge stated in a conference in chambers that her sentence after trial would be approximately twelve to fifteen years, and the sentence she would impose after a guilty plea would be nine to twelve years. Id. at 1143. The reviewing court found that this did not establish a presumption of vindictiveness. Id. at 1144; Commonwealth v. Carney, 576 N.E.2d 691, 695 (Mass. App. Ct. 1991) (finding no presumption of vindictiveness). The defendant claimed that the judge’s comment – “you might do a lot better with me before the trial than after” – constituted a threat to punish the defendant for exercising his right to trial. Id. at 695. The reviewing court, however, found no other evidence in support of the defendant’s argument. Id. Additional factors the court considered in support of its ruling that the judge was not punishing the defendant for going to trial were that the judge: 1) postponed sentencing to await a pre-sentence report “to effect full and fair arguments thereon and to allow the tensions of trial to abate”, and 2) imposed sentences that were significantly more lenient than what the prosecutor recommended. Id.

¹¹⁷ Id. at 24 (describing defendant’s allegations of judicial vindictiveness in sentencing). In Johnson, the relevant conference in chambers between the judge and the attorneys, some of which was off the record, did not occur until after the close of all evidence and the attorneys’ final arguments were heard. Id. Before his charge to the jury, the judge stated on the record, “All right, I just want to put on the record that I made an offer to you, to your client relative to numbers six to nine. Six to nine is the number, and we’ll put this on the record, and your client’s rejected that.” Id. The jury convicted the defendant on all six of his indictments and the judge sentenced him to concurrent nine to fifteen years in prison. Id. In finding that there was no vindictiveness in the judge's sentencing, the court considered, among other things, that the judge did not indicate in any way that the defendant would be punished more severely for choosing to exercise his right to trial, or express any disapproval with the defendant not pleading guilty. Id. at 25. The court further stated, “We think the indicia of objective and legally acceptable sentencing criteria far outweigh the one indicator of vindictive sentencing, i.e., that the sentence imposed was greater than the one offered for a plea.” Id.

¹¹⁸ Id. at 24.
Following unsuccessful appeals in the Massachusetts courts, Johnson petitioned for a writ of habeas corpus in the United States District Court, which was denied. On appeal from this denial, Johnson claimed that the *Pearce* presumption of vindictiveness should apply and that his due process rights were violated. The United States Court of Appeals for the First Circuit held that the *Pearce* presumption was not triggered, reasoning that the timing of the judge's statement at the conclusion of the trial and the fact that the judge did not express displeasure with Johnson's refusal to accept the plea dispelled any need for a presumption of vindictiveness. The court further reasoned that a guilty plea may permissibly be a consideration resulting in leniency in sentencing.

Affirming the denial of the writ of habeas corpus, the court also held that Johnson did not meet his burden of showing actual vindictiveness. The court in *Johnson* set out factors to consider on the issue of vindictiveness, including: (1) evidence of pressure on the defendant to accept a plea, or of the judge's displeasure in the defendant's refusal of the offer; (2) the severity of the sentence in relation to the sentence authorized by statute; and (3) the Commonwealth's recommended sentence.

In support of his argument that the judge's statement regarding sentencing was an implicit threat that he would receive a harsher sentence if he exercised his right to trial, Johnson cited *United States v. Crocker* and *Longval v. Meachum*, in which the respective courts determined that there was a reasonable likelihood of vindictiveness and applied the presumption. In *Crocker*, at the start of the second day of trial, the judge stated to defense counsel in chambers, "I think imposing upon the time and resources of the Court to try a case which should not have been tried is an imposition which deserves consideration when it comes time for me to sentence and I will do so." In *Longval*, near the close of the prosecution's case, the trial judge stated to defense counsel, "I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you

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120 *Id.* at 11.
121 *Id.* at 12.
122 *Id.* at 13 (quoting Alabama v. Smith, 490 U.S. 794, 801 (1989)).
123 *Johnson*, 927 F.2d at 14.
124 788 F.2d 802 (1st Cir. 1986).
125 693 F.2d 236 (1st Cir. 1982).
126 *Crocker*, 788 F.2d at 809; *Longval*, 693 F.2d at 237.
127 *Crocker*, 788 F.2d at 808.
know of the sentences in the previous trial.\textsuperscript{128} The court in \emph{Johnson}, however, did not accept the defendant’s argument and distinguished the circumstances in \emph{Johnson} from \emph{Longval} and \emph{Crocker} on the grounds that the judges’ comments in those cases were made in the middle of trial, as opposed to at the conclusion, and that the comments suggested the judges would be displeased if the defendants chose to continue with the trial, unlike in \emph{Johnson}.\textsuperscript{129}

The defendant in \emph{Johnson} also argued that because the judge had no new evidence or other information before him from the time of the comment until sentencing, the higher sentence imposed indicated a reasonable likelihood of vindictiveness and required that the court apply the \emph{Pearce} presumption.\textsuperscript{130} The court stated that, even assuming the judge had no new and relevant information, the defendant’s willingness to accept responsibility and admit guilt is a proper factor to be considered in sentencing.\textsuperscript{131} The court concluded that there was nothing in the record that indicated a “reasonable likelihood” of vindictiveness, the \emph{Pearce} presumption was not triggered, and the defendant failed to meet his burden to show actual vindictiveness.\textsuperscript{132} The court stated, “[w]here a shorter term of imprisonment was promised in exchange for a plea of guilty, without any indication of undue pressure or threats of retaliation, we think it more reasonable to view the lower sentence as an offer of leniency than to view the higher sentence as punishment for refusing to plead.”\textsuperscript{133}

Other states also have addressed the issue of judicial vindictiveness in sentencing.\textsuperscript{134} Florida courts have regularly considered this, specifically with regard to judicial involvement in plea negotiations.\textsuperscript{135} One of the ways that Florida addresses this issue is through restrictions on judicial

\textsuperscript{128} Longval, 693 F.2d at 237.
\textsuperscript{129} Johnson, 927 F.2d at 12.
\textsuperscript{130} Id. at 11-13.
\textsuperscript{131} Id. at 13.
\textsuperscript{132} Id. at 14.
\textsuperscript{133} Id. at 13.
participation in plea negotiations.\textsuperscript{136}

In describing the restriction that the trial judge could not initiate plea discussions but could only discuss potential plea agreements reached by and between the parties, the court in \textit{Warner} made clear that the question for the trial judge from the defendant’s perspective would be, “\textit{Knowing what you know today, what do you think the sentence would be if the defendant plead guilty, as charged?”}\textsuperscript{137} The emphasis on the evidence available to the judge at that particular time – that is, at the time the judge engaged in discussions about a guilty plea – would help the defendant understand that if additional incriminating or aggravating evidence and circumstances should arise at trial and a guilty verdict is returned, it could result in a higher sentence.\textsuperscript{138} This could help mitigate allegations of vindictiveness should a harsher sentence be imposed than was discussed surrounding a guilty plea. Another restriction on judicial participation in plea negotiations, as discussed in \textit{Warner}, is that the judge must “neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant’s right to trial.”\textsuperscript{139} Such a requirement, if followed, also avoids the risk, or even the perception, of judicial vindictiveness.

A good example of Florida courts minimizing the risk of vindictiveness is the case of \textit{Mitchell v. State},\textsuperscript{140} where the defendant rejected an offer of a sentence by the trial judge on a guilty plea and instead exercised his right to trial.\textsuperscript{141} The trial judge went on the record after the defendant rejected the plea stating, “The offer made was based upon entry of a plea at this time . . . Obviously, the court’s position would be – could very well be – entirely different at the conclusion of the trial should appropriate motions be filed.”\textsuperscript{142} When the defendant was convicted, the trial judge imposed a harsher sentence and provided written reasons for the variation in sentencing.\textsuperscript{143} When the defendant challenged the higher sentence, the reviewing court found no presumption of vindictiveness or actual vindictiveness.\textsuperscript{144}

In response to these rules and an interpretation by other Florida
cases indicating that Warner created a presumption of vindictiveness when a harsher sentence is imposed after the judge participates in plea negotiations, Wilson v. State\textsuperscript{145} held that such a presumption was not mandated.\textsuperscript{146} The court in Wilson went further, stating that a presumption of vindictiveness when a judge is involved in plea negotiations would “diminish the likelihood that the trial judge would participate in plea discussions at a defendant’s request,” potentially working to the detriment of the defendant.\textsuperscript{147} Wilson, while using the “reasonable likelihood” standard as employed in Massachusetts, went on to apply a totality of the circumstances test to determine whether the presumption of vindictiveness was established.\textsuperscript{148}

A number of conclusions can be drawn from these cases. Allegations of both coercion and vindictiveness often arise when judges’ comments, tone and/or posture during the course of plea negotiations are intended or could be interpreted as discouraging or punishing the defendant for exercising his constitutional right to trial.\textsuperscript{149} Timing can also be an important issue when a judge makes a statement regarding resolution of a case by way of a guilty plea.\textsuperscript{150} Additionally, certain circumstances create an increased likelihood of vindictiveness, and perhaps even a “reasonable likelihood” of vindictiveness, resulting in the presumption.\textsuperscript{151} These arise when the same judge who discussed the guilty plea then imposes a harsher sentence after hearing similar evidence and is unable to cite specific and justifiable reasons for doing so.\textsuperscript{152}

\textsuperscript{145} 845 So.2d 142 (Fla. 2003).
\textsuperscript{146} Id. at 152.
\textsuperscript{147} Id.
\textsuperscript{148} Id. (describing factors additional to those considered in Massachusetts). The court stated that other factors to be considered include: 1) whether the trial judge initiated plea discussions, 2) whether the trial judge failed to act as an impartial arbiter by encouraging the defendant to accept a plea, or by indicating that a harsher sentence could be imposed based on the defendant’s future procedural decisions. Id. at 156. See also supra note 115 (describing factors considered in Massachusetts case, Commonwealth v. Carney). See also Charles v. State, 816 So.2d 731, 735 (Fla. Dist. Ct. App. 2002) (describing factors considered in addressing whether presumption of vindictiveness was established). The court there considered: 1) whether the judge was involved in plea negotiations; 2) the discrepancies in the sentencing; 3) the information available to the judge at the time of the initial plea offer; and 4) whether there were factors allowing for the discrepancy in sentencing. Id.; State v. D’Antonio, 877 A.2d 696, 715-16 (Conn. 2005) (citing factors enumerated in Wilson).
\textsuperscript{149} See supra notes 126-129 and accompanying text.
\textsuperscript{150} Id.
\textsuperscript{151} See supra notes 105-111 and accompanying text.
\textsuperscript{152} See supra notes 105-111 and accompanying text.
III. OFF-THE-RECORD CONFERENCES

One of the most serious criticisms of judicial participation in the resolution of criminal cases short of trial is that conferences between counsel and a judge are often conducted in a judge’s chambers, away from public view and without being “on the record.” Persuasive criticism in cases, court rules, commentary, and scholarly publications make clear that discussions with the judge should generally be held in open court, or, with the defendant’s consent, in chambers, and always on the record. This helps avoid the appearance that the attorneys and the judge are hiding something, engaging in “backroom” horsetrading, or that the case is being “resolved” inappropriately; as importantly, it helps avoid disputes over what was discussed between counsel and the judge. If these discussions do not occur in open court or if they are off the record, then there is no control imposed by the public eye. When such negotiations are kept private, there is also the risk that the judge is not, or at least creates the appearance of not being, neutral and impartial.

If the discussions are not on the record, it would be difficult to establish with any certainty what was said in the conference, and invites a “swearing contest” – the proverbial “he said, she said” – between counsel and the judge. The ABA standards make clear that it is not enough to state for the record that a conference concerning plea negotiations was held off the record; rather, the substance of the discussion must also be stated.

153 See infra note 160 and accompanying text.
154 See infra note 157 and accompanying text.
156 See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007) (promoting confidence in the judiciary). The rule requires that a judge, “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Id. See also People v. Killebrew, 330 N.W.2d 834, 839 (Mich. 1982) (describing goals of court in limiting but allowing judicial participation in plea negotiations). The court in Killebrew stated that limits on judicial participation were necessary to “... retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice.” Id.
157 See Commonwealth v. Lebon, 643 N.E.2d 45 (Mass. App. Ct. 1994) (referring to alleged coercive statement by judge to defendant). The court stated, “There was no stenographic record of the lobby conference. The parties prepared an agreed statement of what had been said in the lobby conference ... Although the judge did not expressly ‘approve’ the agreed statement, he allowed a motion to expand the trial record to include the statement. We think that amounts to a de facto approval of the agreed statement.” Id. at 46 n.1. See also Cripps v. State, 137 P.3d 1187, 1191 (Nev. 2006) (stating court “unable to objectively analyze” judicial participation because of insufficient record); infra note 161 and accompanying text.
158 See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 14-3.3(d) (3d
Jurisdictions that openly discuss judicial involvement in plea negotiations have also addressed the recording of negotiations involving the trial judge. In cases where the trial judge was involved in negotiations that were recorded, state appellate courts have found the record of critical importance in reviewing defendants’ allegations, such as coercion or lack of impartiality. A number of states have made recording a requirement.

The failure of trial judges to record judicial conferences has posed problems for reviewing courts. In Commonwealth v. Serino, the

ed. 1999) (indicating, unfortunately, in the authors’ view, judges’ participation in plea negotiations need not be recorded verbatim). The rule does, however, suggest that a record of the discussion must be made as soon after the discussion as possible. Id. See also VT. R. CRIM. P. 11(e)(1) (2008) (requiring that plea discussion involving a judge be recorded by a court reporter or recording equipment). Although some have argued that there may be practical reasons for holding conferences in chambers off the record, for example, that the court reporter, after lengthy proceedings, is unable to come into chambers with the judge and attorneys and not benefit from a break; indeed and understandably, court reporters rely on these recesses to “catch their breath” and gather their thoughts, and it would be detrimental to them to force them to go from trial to the judge’s chamber to record the conferences as well. They are, after all, the only court employees who must repeat every word everyone utters in the courtroom. As the applicable Vermont rule, for example, makes clear, however, judges could use recording equipment to ensure that conversation in chambers is recorded verbatim, and can then make the tape a part of the record in the case.

State v. D’Antonio, 877 A.2d 696, 713 (Conn. 2005) (judge’s recorded comments made it possible to determine whether judge lacked impartiality in plea discussions); State v. Niblack, 596 A.2d 407, 412 (Conn. 1991) (“available record” gave no indication that judge participating in negotiations coerced defendant).

Cripps v. State, 137 P.3d 1187, 1191 (Nev. 2006) (prohibiting all off-the-record discussion of plea negotiations between the parties and the judge). The Nevada Supreme Court, though limiting participation to a judge stating whether or not he agreed with the sentence recommendation presented to him by the parties, required that the judge place the conversation on the record and have it transcribed. Id; State v. Warner, 762 So.2d 507, 514 (Fla. 2000) (stating, “A record must be made of all plea discussions involving the court.”). The court indicates that the judge may state on the record the length of the sentence they feel is appropriate considering the information available to them at the time. Id. The court also made clear that if the prosecutor offers to reduce the charges against the defendant if he pleads guilty, the judge may state an appropriate sentence for the reduced charge on the record, and that any plea discussions involving the court should be recorded. Id.; VT. R. CRIM. P. 11(e)(1) (2008) (prohibiting judicial involvement in plea discussions unless discussions are taken down by a court reporter or recording equipment). It is interesting that now in Massachusetts, the Supreme Judicial Court has made clear that police officers should record custodial interrogations, in part to minimize questions about whether incriminating statements and confessions were obtained voluntarily. See Commonwealth v. DiGiambattista, 813 N.E.2d 516, 529 (Mass. 2004) (recognizing benefits to recording statements or confessions made by suspect to police during custodial interrogations). The court in DiGiambattista held that if incriminating statements or confessions were alleged by police but not recorded, the jury, at the defendant’s request, should be instructed by the court to evaluate the statement with caution. Id. at 532. The court noted that failure to record the interrogation resulted in “expenditure of significant judicial resources.” Id. at 529.

Supreme Judicial Court did not accept the Commonwealth's suggestion that the trial court had ruled on the voluntariness of the defendant's statements in an unrecorded conference in chambers. In pointed dicta, the court reiterated the court's comments in Commonwealth v. Fanelli, and recommended that conferences held in chambers be recorded:

The Commonwealth suggests that the judge may have done so in an unrecorded lobby conference. Neither the defendant nor the Commonwealth requested that the conference be recorded, and the Commonwealth may not now rely on any such suggestion. We again recommend that unrecorded lobby conferences be avoided.

In a more recent Massachusetts civil case arising out of a rape prosecution, Murphy v. Boston Herald, Inc., a failure to record conferences in chambers resulted in a trial judge filing a defamation suit against the Boston Herald for publishing reports of damaging comments about the victim, allegedly made by the judge during off-the-record conferences in chambers. This led the court to make a strong recommendation in favor of recording conferences.

An argument occasionally heard in favor of holding conferences in chambers off the record is that attorneys, and perhaps the judge, are thereby "free" to be more "candid" about the case and the parties; the attorneys may "feel free," behind closed doors and without a recording, to express,
for example, that the defendant or alleged victim is "stubborn," difficult, or unrealistic: that "they" do not really understand the criminal justice system and the case like "we do;" and, counsel may be more forthcoming about the weaknesses or strengths of their case. Probation officers may also be more candid about matters that affect the supervision of a defendant if the discussion occurs in chambers, off the record, and it is said that the "openness" of such discussion, in chambers and off the record, may aid the judge in his sentencing determination. The discussion in the courtroom may take a significantly longer amount of time, delaying other matters; and some argue it may be more efficient to have conferences in chambers because on the bench there needs to be a court reporter, other court personnel, and, in many cases, an interpreter for the defendant, victim, or their families. Moreover, claim these proponents, there may be issues that are better discussed not in public, but in the privacy of a judge's chambers; for example, sensitive cases involving minors.

It is inconceivable that such claims carry any weight today, if they ever did. The notion that in order to properly resolve a case, or that it is so critical that cases be disposed of by guilty pleas, that it is appropriate and essential for "free-wheeling" off-the-record, do-not-hold-back and say-almost-what-you-want conferences in chambers, is part of the reason the public loses faith, trust, and confidence in the justice system. Not only is such an approach unfair to the parties, it is also arguably unethical; and it is doubtful that it is effective or efficient.

A. Right to Confrontation

Furthering the concern about off-the-record conferences, defendants have, albeit infrequently, alleged that they were deprived of the right to confrontation. In Commonwealth v. Fanelli, the defendant claimed that his absence from a conference in chambers with the judge about a sentence violated his due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights, and violated his right "to be present at all critical stages of the proceedings" under Rule 18 of the Massachusetts Rules of

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167 Such so-called "candid" discussions could be considered violations of the Model Rules of Prof'l Conduct R. 1.6 (2009), regarding confidentiality of client information, and the Model Code of Judicial Conduct R. 1.2 (2007), requiring that a judge, "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

168 See U.S. v. Mercedes-Amparo, 980 F.2d 17, 18 (1st Cir. 1992) (discussing efficiency of plea bargaining, but need for safeguards because defendant waives constitutional rights).
Criminal Procedure. 169 Because the defendant had not objected at the time, the court did not have to reach the claim; nonetheless, the court went on to note that the defendant did not show that he was prejudiced by his absence from the conference. 170 The Supreme Judicial Court noted in dicta that “if a lobby conference is held, the better practice is to record it, and provide a copy of the recording to the defendant on request, so that the defendant may know what was said.” 171

B. Prematurely Indicating Sentence with Inadequate Information

Another criticism is that if a judge participates in plea bargaining, he may be prematurely committing himself to a sentence short of all necessary information. In a chambers conference, the judge is unlikely to hear the attorneys’ full arguments in support of their sentence recommendations. 172 The judge also may not have the benefit of a pre-sentence report from probation, police reports, psychiatric or other evaluations, grand jury minutes, or other information that may shed light on the defendant’s background and character, details of his role in the offenses, as well as the seriousness and nature of the crime, its impact on the victims, and other relevant considerations. 173

There are numerous circumstances in which the judge conferencing a case in chambers should step back and take the opportunity to see all relevant documents, as well as hear more comprehensive arguments regarding an appropriate sentence. 174 Even though, arguably, there may be

169 Commonwealth v. Fanelli, 590 N.E.2d 186, 189 (Mass. 1992); see also State v. Triplett, No. 69237, 1997 WL 64051, at *3 (Oh. Ct. App. Feb. 13, 1997) (indicating defendant should be present at resentencing). The court in Triplett made this statement after the trial judge, who participated in plea negotiations with counsel when the defendant was not present, wrongly did not honor plea agreement in sentencing. Id. at *1.

170 Fanelli, 590 N.E.2d at 189.

171 Id.

172 Commonwealth v. Gaumond, No. 98-2813-14-15, 2002 WL732152, at *4 n.2 (Mass. Super. Ct. April 19, 2002) (stating judges, no matter how knowledgeable and experienced, may not know enough about a case to make sentencing recommendation). See also MASS. GEN. LAWS ch. 258B § 3(p) (2008) (describing victims’ rights in Massachusetts). The statute, commonly referred to as the Massachusetts Victim Bill of Rights, states, in relevant part, that victims have the right, “to be heard through an oral and written victim impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence . . . and to be heard at any other time deemed appropriate by the court.” Id.

173 See supra note 172 and accompanying text.

174 See People v. Cobbs, 505 N.W.2d 208, 213 (Mich. 1993) (stating “judge’s final sentencing decision must await receipt of all the necessary information”). This statement, the court made clear, was made with the idea that the judge may indicate a sentence during plea
many matters that could lend themselves to "quick" sentencing determinations in chambers, a judge in haste may be assuming that he knows enough to make an informed decision, only to later regret the quick judgment without full information.

These cited examples of both successful and failed attempts at judicial participation in plea negotiations will, we hope, stimulate discussion on the topic. By analyzing nationwide court opinions and court rules, in Massachusetts we can work toward a process where judicial participation in plea negotiations can take place in appropriate, consistent, and fair ways. The following section of recommendations, including an appended "proposed" rule, is intended as a step toward that goal.

IV. RECOMMENDATIONS

The following recommendations are based upon case law, relevant literature, various standards, and discussion with many colleagues on the bench and bar. These are designed to aid in ensuring a fair and just resolution of criminal cases through plea agreements, with the appropriate participation of a judge.

A. Before a Conference in Chambers

Before engaging in a conference with counsel, judges should hold a brief hearing on the record, with the defendant present. While on the record, judges should inquire of a defendant to determine they understand that the judge will be meeting alone with the attorneys, on the record, and whether the defendant has any objection or problem with the judge doing so. The judge should also inquire whether the defendant understands that the judge may, after hearing from counsel for both the defendant and the prosecution, indicate a sentence the judge would impose if the defendant were to plead guilty. The judge should also make clear, however, that he may decide not to make such a suggested sentence. The judge should also ensure that the defendant understands that if he pleads guilty, the judge will hear from the prosecutor and the victim and/or victim's family and may, based on that or other information, change his mind regarding any sentence previously indicated. The judge should then, consistent with the rules and practice, allow the defendant to withdraw his guilty plea, if one has been entered. It is imperative that the judge inform the defendant, on the record,

Id. The court reiterated the law in Michigan that a victim has the right to allocution at sentencing and to make a victim impact statement. Id. at 212-13.
that he has every right not to plead guilty, for any reason, including, but not limited to, disagreement with a sentence indicated by the court in the conference in chambers.

The judge should also explain to the defendant that should the judge indicate he will impose a particular sentence, and the defendant not “accept” it and instead go to trial, that after trial the judge is not bound by that sentence. The judge should explain carefully and in detail the reasons why a sentence may be different after a trial, than had the defendant pled guilty following a suggested sentencing recommendation from the judge after a conference with counsel.

B. **During a Conference in Chambers**

During an on-the-record conference with the attorneys in chambers, the judge (other than a trial judge) should inquire whether any other judge has previously discussed the possibility of a guilty plea in the case and whether the attorneys have discussed a possible resolution amongst themselves and with the judge. If this has happened, that should also be part of the discussion with the defendant. The judge should hear the positions of the attorneys regarding a resolution before indicating the sentence he might impose; that is, counsel should make their recommendations first, and thus make it clear the judge is responding to the attorneys, versus actively taking a role in suggesting a sentence. The court should also obtain from the attorneys and probation officer as much detail as necessary regarding the crime and the defendant. The judge ought to make clear that after getting further information during the sentencing hearing – including from the victim, police reports, and/or pre-sentence reports – he may change his mind on a sentence. The defendant would then have the opportunity to consult with his attorney and withdraw his plea. A judge who holds a chamber conference does not have to respond immediately – or at all – to the attorneys with a suggested sentence, and can certainly take more time to reflect on the possible sentence, including considering other information, such as grand jury minutes, police reports, the defendant’s background information, and whatever else is deemed relevant to a sentencing decision. The judge also has the discretion to not indicate any sentence and instead let the matter go forward, whether the defendant chooses to plead guilty or go to trial. It would be inappropriate for the judge to request the conference on his own initiative, as that would be a judge “actively” participating in plea bargaining, raising all the dangers already discussed.
C. After the Conference in Chambers

If the defendant decides to enter a guilty plea after a conference in chambers, several things should be placed on the record in the courtroom at the commencement of or during the guilty plea proceedings, in the defendant’s presence. The record should reflect those who were present during the conference, that the defendant had no objection to it taking place without his being present, and that the conference was on the record. The judge should describe the substance of what was discussed in chambers and inquire whether the defendant wishes to know more about the conference, and whether defendant’s counsel discussed it with him. The judge should make clear that during his conference with the attorneys, and after the judge heard from all parties, the judge indicated that if the defendant pleads guilty, he (the judge) was inclined to impose a particular sentence, and explain it in detail, including the reasoning behind it. The judge should make available to the defendant a recording or transcript of the chambers conference.

During the guilty plea colloquy, the judge who participates in negotiations should also explain that the sentence the judge may impose is subject to change based on any information the judge acquires during the plea process, including during the recitation of the facts the defendant is admitting to, as well as the evidence that comes forward at the sentencing hearing. This may include police reports, grand jury minutes, presentencing investigations, factual descriptions of the relevant incident(s), and victim impact statements. The judge should make clear to the defendant whether, if the judge changes his mind about the sentence, the defendant will have an opportunity to withdraw the plea.

D. Trial or Motion Session

If the negotiations with a judge about a change of plea take place in a trial and/or motion session, all of the relevant issues should be explained completely before the conference, and in open court on the record. It is also important to ask the defendant specifically if he is being coerced into pleading guilty because the case was pending in a trial or motion session. If the defendant ultimately decides to plead guilty, the judge should remind the defendant again that the conference in chambers took place with the judge’s participation, that the sentencing recommendation by the judge and requests from counsel were made without the defendant being present, and that the defendant did not feel any pressure to plead guilty because the judge was about to hear a motion or preside over a trial.
Following a judge’s participation in plea negotiations, if the defendant decides not to plead guilty, the judge should present the defendant with the option of having another judge preside over the trial or motion hearing, should the defendant decide to exercise that right. Conversely, the judge set to preside over the trial or motion hearing may want to consider sending the case to another judge for plea negotiations, and if a guilty plea does not result, the trial judge would not be made aware of what occurred during such negotiations.

If the defendant is before a judge and trial has already commenced, a more detailed colloquy, specifically related to all of these relevant issues, is appropriate. The defendant must understand that he should not plead guilty if he disagrees with the sentence the judge would impose or because he wants a trial. The defendant must also understand that the judge will not punish him for choosing his constitutional rights to a hearing and/or trial, but that the judge is also not bound to impose the sentence after a trial that he has indicated in chambers, and that the judge may increase or decrease the sentence subject to a number of factors, including but not limited to: aggravating or mitigating evidence heard by the jury; the impact on the victim(s) as a result of the crime(s), as heard at trial; the pre-sentence investigation; and a sentencing hearing.

The judge should indicate that in fashioning the sentence that is imposed after a guilty plea, rather than having those that go to trial possibly receive a higher sentence as punishment for the exercise of that right, the judge has considered that the defendant is entitled to some consideration, leniency and a reduced sentence for accepting responsibility for the crime(s) by pleading guilty. A reduced sentence is a “reward” for accepting responsibility; a higher sentence is not punishment for going to trial.

E. Prohibited Acts

There are actions that have proven to be detrimental to the process of judicial participation in plea negotiations and should be prohibited in order to make certain that the process is carried out fairly. The judge should not actively express any strong opinions on the strengths or weaknesses of either side’s case, on the defendant’s decision to go to trial, or on the victim’s decision to press forward with the case. When a judge expresses strong personal views about whether the defendant “should” plead guilty or go to trial, he loses—or appears to lose—his impartiality and neutrality, acts in a coercive manner, and deprives the defendant of fair treatment.

For similar reasons, the judge should not express any opinion about
whether the defendant should waive his right to a jury trial. The judge should not indicate that he would impose a different sentence if the defendant went to trial as opposed to pleading guilty, and should not take into account that a trial costs more money, takes extra or wastes time, or puts the victim and/or witnesses through unnecessary pain or trauma. Finally, a judge would render the process inappropriate if he referred to his proposed disposition in chambers as an offer and should not engage in bargaining down, or so-called "horsetrading."

V. CONCLUSION

We recognize the importance of judicial participation in plea negotiations, and believe it serves a useful role. It is our hope that this article will lead to more open and public debate on this topic. Many jurisdictions have addressed this issue more clearly, specifying rules and guidelines through the courts and/or rules. Some have drawn a hard line prohibiting it, and others have expressly allowed it, many of these with conditions. These jurisdictions have at least taken on the issue by imposing clear limits. A number of others find themselves as we do in Massachusetts—a full awareness that it takes place on a daily basis, but a reluctance to set forth clear and comprehensive rules, even where serious issues have arisen in a number of cases. There are certainly reasonable disagreements on these issues, and perhaps with some of our discussion in this article, some may wish that it be kept "under the radar," that we should "leave well enough alone." Perhaps, some might urge, let it all be worked out on a case by case basis, even though concrete experience suggests otherwise. In our view, the only way we can ensure that judicial participation in plea negotiations occurs in Massachusetts in a way that is fair to all involved, is to confront the practice head-on. We believe this is best accomplished by beginning with an open recognition and discussion amongst those on the bench and bar, and others interested, of all the issues. Furthermore, the creation of clear, predictable, and specific guidelines will lead to a consistent practice. The extremely large, friendly animal in the room, so familiar to all of us, so helpful in "moving business" for so long, has been stirring disquietly for some time. Before more lives are further affected, it is time we acknowledged its presence in the day to day functioning of our criminal justice system.
Suggested Rule for Massachusetts

Generally:

1) A judge may participate in plea discussions only at the request of the prosecution or the defense.

2) All plea discussions involving a judge must be recorded, and made part of the record.

3) A judge need not participate in plea negotiations and is never required, prior to a guilty plea, to indicate what sentence he may impose.

4) Once the judge has determined what he believes to be an appropriate sentence, he must state, on the record, the full term of that sentence and the information the sentencing assessment is based upon.

5) An initial sentencing assessment by the judge is not binding upon him and the judge must make clear to the defendant that such assessment is subject to change as additional information becomes available through proper channels.

6) If the judge concurs with a plea agreement, or indicates a sentence should the defendant plead guilty, but later, based on additional evidence or testimony, including as it became known during the plea colloquy, determines that the sentencing proposed was not appropriate, the judge must inform the defendant of his decision to abandon his earlier sentencing assessment, explaining his reasoning, and giving the defendant the opportunity to withdraw his plea.