

ELEMENTS OF A SUCCESSFUL “PLEA CUT-OFF” POLICY FOR CRIMINAL CASES¹

Introduction²

In view of the fact that about 95% of all criminal cases are disposed by plea or other non-trial means, criminal caseflow management should focus on ways to provide for meaningful plea discussions between prosecution and defense counsel, beginning at an early stage of proceedings. Prosecutors should be prepared to make realistic plea offers as early as possible. Defense counsel, in turn, should be prepared to negotiate, balancing the best interests and constitutional rights of their clients.

The court should establish and be prepared to enforce a “plea cut-off” policy. Under such a policy, the court in a scheduling order might establish a date for prosecution and defense counsel to meet to discuss the possibility of a plea, at which the prosecutor’s office would be prepared to make its best offer to the defendant. A plea cut-off date, perhaps a week after that conference and one or two weeks before the scheduled trial date, would be the last date on which the defendant could accept the prosecution’s best offer. If the defendant sought to plead guilty after that date, he or she would have to plead to the original charge filed by the prosecutor. There would be no benefit for the defendant to wait, since the prosecutor’s offer would not “get better” from a defense perspective.

Necessary Features

In order for a plea cut-off policy to be successful, there are certain features that must be present. They are the following:

- The court and the prosecutor’s office must both be committed to making the program work.
- The program must provide an opportunity for a “best-and-final” prosecution plea offer after defense counsel has (a) received sufficient discoverable evidence to assess the strength of the prosecution’s case, and (b) met the defendant enough to have attorney-client credibility in discussion of the prosecution offer.
- The prosecutor’s office must make a best-and-final plea offer that is really a “good offer” – that is, one that is credible based on the evidence and what a reasonable defense attorney would expect to happen if the case went to trial.
- There should be a plea cut-off date after which the prosecution’s best-and-final plea offer is no longer available.
- Even though the court cannot be expected to reject a defendant’s guilty plea, even on the day of trial, the court must be firm in its enforcement of the plea cut-off date. This means that in almost all circumstances, absent unforeseen developments, most or all of the criminal judges must require the defendant to “plead straight up” or “make a naked plea,” without the benefit of the best offer made by the prosecutor.

¹ This document was originally prepared by David Steelman, Principal Court Management Consultant, National Center for State Courts, on September 13, 2008, in response to a technical-assistance request from Suzanne H. James, Court Administrator for the Circuit Court for Howard County in Ellicott City, Maryland.

² David Steelman, with John Goerd and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC, 2004 edition), p. 33.

Other Features Promoting Success

The success of a plea cut-off policy requires that the above features be present. There are other features that can enhance the likelihood of success. These include the following:

- Court capacity to provide credible trial dates.
- Early prosecution screening of cases to assure that charges fit the evidence.
- Early determination of defendant's eligibility for representation by the public defender or otherwise at public expense.
- Early defense counsel contact with the client to develop a working attorney-client relationship.
- Early prosecution provision of a "discovery package" to defense counsel, with sufficient information to allow defense counsel (a) to identify any potential suppression issues, and (b) otherwise to assess the strength of the prosecution case.
- Timing of the final prosecution-defense plea discussion close enough to the trial date for the defendant to take the prosecution's best-and-final offer seriously, but enough in advance of the trial date to allow the court scheduling flexibility if the defendant decides to accept the prosecution offer and plead guilty on or before the plea cut-off date.