



# Jury News

BY PAULA HANNAFORD-AGOR

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## Using Plea Cut-Off Policies to Improve Juror Utilization

There is nothing more frustrating for a jury manager than bringing in a panel of jurors for jury selection, spending the morning doing orientation and other routine administrative tasks, and then sending jurors home unused because the defendant decided to accept a plea offer on the day of trial. Did the defendant really need to see the whites of the jurors' eyes before deciding that the plea on the table looked better than the strong possibility of a conviction on a more serious charge? Wouldn't a room full of inflatable dolls accomplish the same thing? Or was the local district attorney really unaware that the prosecution's key witness was getting squirrely and most likely wouldn't show up for trial, leaving no choice but to offer a reduced plea arrangement? Isn't there something courts can do to force both sides to confirm their intent to try the case BEFORE jurors report for service?

The short answer is yes, there is something courts can do. A "plea cut-off policy" provides both prosecutors and defendants strong incentives to evaluate the merits of their respective positions and make informed and timely decisions about whether to negotiate a plea or try the case to a jury. In a nutshell, a plea cut-off policy establishes a "drop dead" date after which the court will not accept a negotiated plea agreement. (Constitutionally, the court is obligated to accept a plea to the full indictment at any time before.) Instead, if the defendant wishes to enter a guilty plea, he or she must plea to the full charges in the indictment. Typically, the plea cut-off date is the date of the final pretrial conference or at the very latest, the day before trial, which gives the jury manager the opportunity to tell jurors not to report for service. In states that permit it, the court can also impose an administrative fee equal to the full direct costs (e.g., juror fees, mileage, postage, printing, and administrative staff expenses) of bringing in

jurors unnecessarily. The fee can be imposed equally on the prosecutor and defendant, or fully on either party if the court finds that one is clearly responsible for the late plea agreement.

At first glance, the policy sounds unfair to the defendant, but in practice it operates as an incentive for both the defense and the prosecution to engage in meaningful plea negotiations. If the prosecution makes a reasonable plea offer, the defendant must accept it before the plea cut-off date or risk conviction on more serious charges. On the other hand, the prosecution cannot "play hardball" by refusing to negotiate a reasonable plea offer until the last possible minute. If the prosecution doesn't have sufficient evidence to prove the charges beyond a reasonable doubt, the defense has every incentive to try the case to a jury to secure an acquittal. In either event, the court, the jurors, and the justice system are the ultimate winners. The court can better manage its calendar, reserving trial days for actual trials and scheduling sufficient time for plea hearings. As case management improves, the jury manager can better estimate the number of jurors who will be needed on any given day and summons accordingly. Jurors are thus not brought in unnecessarily. If they are told to report, they get the opportunity to see the justice system operating effectively and efficiently. Some of them will even get to participate as trial jurors, which is a uniquely American experience. Regardless of whether the defendant enters a plea agreement or opts for trial, the justice system prevails as cases are disposed fairly and expeditiously.

## Constitutional Concerns

Plea cut-off policies do not, in and of themselves, violate constitutional protections for criminal defendants. They are in widespread use in many courts, including by statewide rule in New Jersey,<sup>1</sup> and have been repeatedly upheld by appellate courts. In *Michigan v. Grove*, for example, the Michigan Supreme Court held that the trial court's refusal to accept defendant's plea agreement one day before trial and over one month after the plea cut-off date was proper since defendant's procedural rights were "outweighed by judicial discretion to control the scheduling of trial procedures . . . plus the broad interests of docket control and effective utilization of jurors and witnesses."<sup>2</sup> Nevertheless, a poorly implemented policy can raise issues of constitutional significance, especially separation of powers between the executive and judicial branches and due process considerations for notice and "good cause" exceptions. Each of these issues can be addressed with careful planning and the sound exercise of judicial discretion.

Arguments concerning the separation of executive and judicial powers are based on the theory that the prosecution, as representative of the executive, has the discretion to bring charges and should therefore have the authority to reduce or dismiss charges during the plea process. In *Iowa v. Hager*,<sup>3</sup> for example, the Iowa Supreme Court ruled that the trial court's rejection of a plea agreement solely on grounds that it was presented after the plea cut-off deadline was unconstitutional. However, the court recognized that a trial judge might have had the discretion to reject the plea agreement if supported by other reasons that are "consistent with the fair administration of justice." Similarly, the Arizona Court of Appeals ruled in *Arizona v. Darelli* that the trial court's rejection of a plea agreement solely because the jury panel had already been assembled violated Rule 17.4 of the Arizona Rules of Criminal Procedure, which guarantees that the trial

court provide "individual consideration" of a proffered plea agreement.<sup>4</sup> Judges may have additional discretion to reject a plea agreement in cases in which the plea agreement includes a sentencing recommendation over which the court has considerably more discretion.<sup>5</sup>

Constitutional questions about plea cut-off policies also arise when trial judges refuse to provide an adequate opportunity for the defense or prosecutor to explain the failure to enter a timely plea agreement. The New Jersey Rule of Criminal Procedure, for example, provides a "good cause" exception to accept negotiated pleas "based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice." Of course, adequate notice of the plea cut-off policy — through local court rule, administrative order, or pretrial management order — is an essential condition for effective enforcement.

## Best Practices

For courts implementing and enforcing a plea cut-off policy, the following may eliminate the constitutional concerns and avoid time-consuming appeals and the risk of reversals.

- Provide adequate notice of the plea cut-off policy as early in the litigation process as possible (e.g., arraignment). If possible, make the policy part of the court's local rules or administrative policy. At the very least, make a formal record in the court file with proof of delivery to the prosecutor, defense counsel, and defendant. Take time to educate the local bar about the policy through meetings with prosecutors, public defenders, and local bar organizations.

- Set the plea cut-off date reasonably close to the trial date. Most successful plea cut-off policies set the plea cut-off date within one week of the scheduled trial date, often coinciding with the final pretrial conference. The short timeframe between the plea cut-off date and the trial date reasonably assumes that the parties will have already engaged in meaningful plea negotiations and have had adequate time to make an informed decision. To be most effective, however, the court needs sufficient time to communicate the defendant's intent to accept a plea offer to inform the calendaring and jury staff to cancel the scheduled jury trial.
- If the prosecution and defense request to enter a late plea offer, the court should provide a hearing for the parties to justify the late plea.
- If state law requires individualized consideration to the plea agreement, the court should include the late plea offer as one facet of its decision to accept or reject the plea agreement. The decision should state *all* relevant reasons for a denial of a plea agreement, including any findings that a sentencing recommendation was part of the plea rejection.
- If the parties fail to enter a timely plea agreement, the court should not require that they proceed to trial. Rather, the defendant should be required either to plea to the full indictment or proceed to trial.
- If state law permits, the court may also impose an administrative fee on the prosecutor, the defendant, or both, if the parties cannot provide a good cause explanation for the late plea agreement.

#### NOTES

1. N.J. CT. R. Rule 3:9-3(g)(2009) ("Plea Cut Off. After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice.").
2. *Michigan v. Grove*, 566 N.W.2d 547, 558-60 (Mich. 1997).
3. *State v. Hager*, 620 N.W.2d 828 (Iowa 2001).
4. *Arizona v. Darelli*, 72 P.3d 1277 (Ariz. App., Div. 1, 2003)
5. See, e.g., *U.S. v. Robertson*, 45 F.3d 1423 (10th Cir. 1995).

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#### ABOUT THE AUTHOR

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