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CONTINGENT REWARDS FOR PROSECUTORS

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Contingent Rewards for Prosecutors?

BY PETER A. JOY AND KEVIN C. MCMUNIGAL

Criminal defense lawyers are not allowed to use contingent fees. What about prosecutors? Joan Illuzzi-Orbon, the lead prosecutor in the Dominic Strauss-Kahn rape case recently explained, "We're doing our job. We don't get paid by indictment. We don't get paid by convictions. We get paid to do the right thing." But a district attorney in Colorado recently paid prosecutors bonuses averaging \$1,100 for achieving at least 70 percent convictions in five or more felony trials during the year. In Texas, another district attorney announced trial competitions for prosecutors in the office's misdemeanor division. The "Trial Dawg Award" promised the first assistant prosecutor to take 12 cases to jury trials and achieve a conviction rate above 50 percent the prize of sitting second chair on a murder case. Can we trust a prosecutor to do the right thing when motivated by contingent rewards such as conviction bonuses and prizes? Consider the following reward plans.

Plan 1. A chief prosecutor implements a bonus system. A formula determines bonuses, giving one point for taking a case to trial and two points for a guilty verdict for each offense charged. Guilty pleas receive no points. The chief prosecutor randomly assigns cases and ensures that each prosecutor receives the same number and types of cases, so each has an equal opportunity to earn a bonus. The chief prosecutor reasons that the office appropriately charges offenses, and more defendants should be convicted of the charged offenses instead of receiving a "discount" through



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plea bargains. The chief prosecutor believes that by rewarding prosecutors who take cases to trial, prosecutors will hone and maintain trial skills and more defendants will plead guilty to or be convicted at trial of the charged offenses, thereby serving justice by convicting the guilty of appropriate offenses and protecting the community.

Plan 2. Another chief prosecutor creates a series of prizes. Increased responsibilities and opportunities for advancement are based on the number of cases prosecutors try and the success rates in those trials. Like the bonuses in Plan 1, the prizes are based on a formula that gives one point for taking a case to trial and two points for a guilty verdict. Again, no points are awarded for guilty pleas. The chief prosecutor equitably distributes cases and ensures that each prosecutor has an equal opportunity to win. The chief prosecutor believes that the prize system measures and rewards ability and helps identify the better prosecutors in the office.

Are these plans ethical? This column explores that question.

Current Law

One way to assess the appropriateness of the contingent rewards in these plans is through the lens of contingent fees. The bonuses in Plan 1 are monetary compensation contingent on the outcomes of cases, just like civil contingent fees. The advancement opportunities in Plan 2 are similarly contingent on case outcomes. While these opportunities are not in themselves monetary compensation, they are likely to be closely linked to pay increases. Model Rule 1.5(d)(2) specifically prohibits a lawyer from receiving "a contingent fee for representing a defendant in a criminal case" (emphasis added). But Model Rule 1.5 is silent on contingent fees for prosecutors.

In contrast to Model Rule 1.5, the *Restatement (Third) of the Law Governing Lawyers* explicitly bans contingent fees for both defense counsel and prosecutors. The *Restatement's* section 35 states that a fee arrangement that is "contingent on success in prosecuting or defending a criminal proceeding" is prohibited. (emphasis added). In support of this conclusion, the *Restatement* cites cases that conclude that public policy prohibits hiring lawyers on a contingent fee basis to prosecute cases. For example, in *Baca v. Padilla*, 190 P. 730 (N.M. 1920), the New Mexico Supreme Court invalidated a contract for a lawyer to pros-

ecute a criminal case in which the lawyer would receive a reasonable fee if the defendants were acquitted and a "big fee" for a guilty verdict. The court stated that the contingent fee created a conflict of interest between the private prosecutor's personal interest in "the size of his fee" and "seeing that justice" is done. (*Id.* at 731–32.) The court reasoned that the prosecutor must be a "disinterested person, interested only in seeing that justice is administered and the guilty persons punished." (*Id.* at 732.)

Plan 1's bonuses raise the same concerns as the contingent fee in *Baca*. They create a potential tension between the prosecutor's personal interest in higher compensation and the obligation to seek justice, which in certain cases may mandate acceptance of a guilty plea to a reduced charge or dismissal. Plan 2's prizes, though not in themselves monetary compensation, create a similar tension between the prosecutor's personal interest in career advancement and the obligation to seek justice.

We could find no ethics opinions or cases that have considered bonuses or prizes for conviction rates at trial. Thus their ethical permissibility may be debated. What arguments are likely to be raised in that debate?

We review below a number of arguments that can be made for and against giving prosecutors incentives based on trial convictions, such as bonuses, prizes, and outright contingent fees. In assessing these arguments two points should be kept in mind about the special obligation of a prosecutor to justice and the critical role negotiated guilty pleas play in our current criminal justice system.

It is well recognized that a prosecutor has a special commitment to justice. Comment 1 to Model Rule of Professional Conduct 3.8 describes the prosecutor's responsibility as that of a "minister of justice and not simply that of an advocate." The Supreme Court explains the prosecutor's role in *Berger v. United States*, 295 U.S. 78, 88 (1935), as requiring "in a criminal prosecution . . . not that it shall win a case, but that justice shall be done." The prosecutor's duty to seek justice and not simply win convictions is also found in the ABA Standards for Criminal Justice relating to the Prosecution Function Standard, which many jurisdictions have adopted. Standard 3-1.2 explains that the "prosecutor is an administrator of justice" who "must exercise sound discretion in the performance of his or her functions" and whose

duty "is to seek justice, not merely to convict."

Negotiated guilty pleas play an important role in our criminal justice system. Judges and prosecutors were once reluctant to accept or even acknowledge a legitimate role for negotiated guilty pleas. Indeed, the term "plea bargain" is often used as a pejorative term in news reports and popular culture. Though still the subject of debate, our criminal justice system for many decades has viewed negotiated guilty pleas as both desirable and necessary. In *Santobello v. New York*, 404 U.S. 257, 261 (1971), the court explained that disposing of cases with plea bargains "is not only an essential part of the process but a highly desirable" part because it leads to prompt and usually final dispositions, protects the public from those prone to criminal conduct, and shortens the time between charges and dispositions, thereby enhancing whatever rehabilitative effects sentencing may produce. Many argue that negotiated guilty pleas are efficient and can achieve the same results as trials in terms of sentencing while consuming less time and fewer other resources.

Arguments Against Rewards for Convictions

Perverse Incentives. Perhaps the primary concern with the bonuses and prizes described in Plans 1 and 2 is that they create perverse incentives that tempt prosecutors to exercise judgment in ways that advance their financial and career interests and disserve the interests of both their client—the government—and the criminal justice system. For example, in order to increase the number of cases the prosecutor tries, a prosecutor might refuse to negotiate a guilty plea to a reduced charge in a case in which the reduction in charge is warranted. Prosecutors have complained that evaluations based on the number of trials or convictions fail to recognize the value of resolving cases through guilty pleas. They argue that justice may be better served when a prosecutor tries fewer cases.

Benchmarks. Some critical of rewards for convictions argue that convictions alone are poor benchmarks of performance. The Denver district attorney, for example, feared bonuses based on conviction rates could lead some prosecutors to avoid trying hard cases simply because they might not result in guilty verdicts. The Boulder district attorney said he didn't want ADAs "distracted by some kind of bonus or award," and a state public defender argued that the plan interfered with

the prosecutor's ethical duty to seek and exercise discretion in seeking reasonable dispositions in cases.

The Interests of Victims. A children's advocacy group weighed in against the bonus plan based on fear that prosecutors would force abused children to testify at trials in cases that could have been resolved through negotiated guilty pleas. This concern highlights the interest a crime victim may have in resolving a criminal case without trial to avoid the possible trauma of being a witness.

Efficient Use of Resources. Encouraging prosecutors to take more cases to trial will also put greater demands on the resources of the prosecutor's office, the police, and the court system, resources that many view as already overextended. In a world of limited resources, using more resources to try cases ultimately means that fewer worthy cases can be pursued.

Misconduct. The prohibition against defense contingent fees in criminal cases is rooted in a concern that they would tempt the defense lawyer to engage in illegal and unethical conduct to secure an acquittal. The same argument may be advanced regarding prosecutors. Rewards such as those that would arise under Plans 1 and 2 might induce some prosecutors to engage in misconduct, such as withholding *Brady* material or introducing questionable evidence. Many critics of current prosecutorial practices believe that prosecutors are already too concerned about conviction track records, leading to misconduct. If a prosecutor engages in unethical behavior, the prosecutor will be rewarded under contingent reward plans long before the case is likely to be reversed on appeal.

Symmetry. Finally, one can make an argument based on symmetry. Model Rule 1.5 prohibits the defense lawyer from taking a case on a contingent fee. One can argue, then, that simple fairness mandates a similar prohibition should apply to the prosecutor.

Arguments in Favor of Rewards for Convictions

Positive Incentives. All attorney fees, whether hourly, flat, or contingent, create both positive and perverse incentives for lawyers. Contingent rewards for prosecutors similarly create both good and bad incentives. For example, an incentive structure that encourages prosecutors to try more cases reduces the temptation to overcharge a defendant at the outset of a case in order to gain

bargaining leverage. The greater the likelihood a prosecutor will have to prove charges at trial beyond reasonable doubt, the less the likelihood the prosecutor will add charges unsupported by the evidence.

A contingent reward system could also help motivate lazy or underachieving prosecutors. The incentives such a system creates could motivate the "underzealous" prosecutor—the one who wants to leave work every day at 4:30 p.m. and won't take cases other than "slam dunks" that lead to guilty pleas and involve little work. In other words, like any bonus system contingent rewards motivate employees to work harder.

Perverse incentives are inherent in all fee and salary arrangements. Rather than looking only at perverse incentives when deciding whether to ban a particular fee or reward arrangement, we should assess both its perverse and positive incentives before making such a judgment. The same is true for contingent fees and rewards for prosecutors. We should ask whether the risks in bonus or prize plans are significantly greater or significantly less justifiable than other fee arrangements such as hourly fees for civil lawyers or flat fees for criminal defense lawyers.

A Convenient Benchmark. While admittedly not precise measures of productivity, conviction rates at trial are easy to determine and send clear signals, factors that may be important in prosecutor offices that are too overburdened to provide more insightful supervision and feedback. A Colorado district attorney, for example, explained that performance bonuses advanced the goals of her office—trying cases and getting convictions. She said that it was hard to find performance measures for trial attorneys, and that these were ones that the lawyers in her office know and can target.

Trial Skills. Incentives based on convictions will likely increase the number of cases prosecutors try. Regularly trying cases could help maintain and enhance the overall trial skills of the lawyers in the office by providing trial experience and by encouraging prosecutors to work on their trial skills through courses and study.

Symmetry. In response to the symmetry argument described above, that contingent fees and incentives should be banned for prosecutors because contingent fees are banned for criminal defense lawyers, one might argue that the prohibition of contingent fees in criminal cases—whether for

defense counsel or prosecutors—is an unjustifiable anachronism. As Charles Wolfram explains, the prohibition on defense contingent fees is a historical accident, and a carry-over from a time when all contingent fees were suspect. While contingent fees in civil cases became more accepted by the early part of the 20th century, there was lingering suspicion that contingent fees in criminal cases could have a corrupting influence. Wolfram points out that there is no reason to view the criminal defense bar as more susceptible to the corrupting influence of contingent fees than civil litigators. (CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4.3 (1986).) If there is insufficient justification for banning contingent fees for the defense, one might argue that we should abandon that ban rather than extending it to prosecutors.

Conclusion

On balance we agree with the *Restatement's* position that contingent fees should be banned for prosecutors. Similarly, we think that the better view is that rewards for prosecutors contingent on trial convictions are unsound.

The decision whether to offer a negotiated guilty plea or take a case to trial is a complicated and nuanced question with many variables. The reward systems in both plans described at the outset of this column are based on the assumption that negotiated guilty pleas are always bad and always involve inappropriate discounting of charges or sentences. This is not a valid general assumption. The monetary rewards created by these incentive systems overly simplify what is and should be treated as a complicated and nu-

anced calculus for a prosecutor.

Second, we believe that there is insufficient justification for the risks such contingent rewards create. At common law, contingent fees were not tolerated in either the civil or criminal context. Eventually all jurisdictions rejected that approach in civil cases on the ground of necessity, reasoning that without contingent fees poor persons with meritorious claims would be denied access to the courts because they were too poor to pay counsel. In sum, the acceptance of contingent fees in the civil context is supported by the powerful justification that it promotes access to counsel for those who otherwise cannot afford to retain counsel. There is no such justification when the government pays the prosecutor.

In addition, there are ways to mentor and monitor prosecutors that are far preferable to relying simply on the number or rate of trial convictions. Case file reviews, guilty plea reviews, and observing prosecutors in hearings and trials are more precise ways to evaluate and mentor prosecutors. These methods for assessing performance are more nuanced and fine-tuned than trial and conviction rates, which seem very crude proxies for the qualities we seek in prosecutors.

When good performance is reduced to the percentage of wins in a specified number of trials, the incentive structure fails to recognize that winning or losing a case is not solely dependent on the prosecutor's performance. The outcome of a case depends on the quality of evidence, the work of the police investigating the case, and how witnesses do on the stand. Win-loss records fail to take account of such factors. ■

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