

#### ANSWER TO QUESTION NO. 4

##### **I. How should the court rule on the Prosecutor's motion?**

The trial court should deny the prosecutor's motion to set aside the plea and assign the matter to a different judge.

As a general principle, judicial involvement in the bargaining of a sentence should be limited. *People v Killebrew*, 419 Mich 189 (1982). A limit on judicial intervention is necessary "to minimize the potential coercive effect on the defendant, 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.* at 202. However, judicial involvement in pre-conviction negotiation of a sentence is not precluded as a matter of law. This is because the Legislature has vested sentencing authority and discretion with the court and the court "may not abdicate this function by allowing sentence agreements to control the sentencing process." *People v Cobbs*, 443 Mich 276, 281 (1993).

In *Cobbs*, the Michigan Supreme Court discussed the propriety of a trial court disclosing the court's thoughts on sentencing prior to the acceptance of a plea. The Supreme Court stated, "At the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Cobbs*, 443 Mich at 283 (emphasis in original, footnote omitted). The Supreme Court noted that the coercive position of the court is minimized where the court is not initiating the sentencing discussion but is merely responding to an inquiry regarding sentencing. Further, the court must take care to avoid express or implied alternative sentencing possibilities, such as sentencing variations that may arise from the exercise of the right to trial by jury. This is also necessary to avoid the potential of coercion. *Id.* The Supreme Court concluded that "[t]he judge's neutral and impartial role is enhanced when a judge provides a clear statement of information that is helpful to the parties." *Id.* at 284.

The Supreme Court also addressed the concerns that are at the root of the prosecutor's motion to set aside the plea. The Court stated, "Where a defendant pleads guilty or nolo contendere to the charged offense, there can be no infringement of the prosecutor's charging authority. Neither does this procedure limit the prosecutor's right to introduce additional facts at appropriate

points during the remaining pendency of the case, such as during allocution at sentencing." *Cobbs*, 443 Mich at 284 (footnote omitted). The prosecutor has wide latitude in the discretion to charge, but once a decision to charge is made, the prosecutor has no right to dictate the sentence. That right and duty vests exclusively with the court and the prosecutor's role in sentencing is limited to informing the court.

Here, the court did nothing improper. It is clear from the facts presented that the trial court did not initiate the discussion regarding sentencing. The court merely responded to defense counsel's inquiry. The judge further indicated that the sentence was based on the "limited knowledge of the case" then available to her. The court did not impose upon the prosecutor any obligation to reduce the charge or in any way impact or influence the discretion of the prosecutor. The prosecutor's motion to set aside the plea should be denied. After ruling on this motion, the trial court should refrain from sentencing defendant or taking any further action in this matter until after there has been a de novo review of the motion to reassign the case to a different judge. The motion is, in essence, a motion to disqualify the judge because of bias. Such motions are subject to de novo review by the chief judge of the circuit or a judge assigned by the State Court Administrator's Office. MCR 2.003(D)(3)(a).

**II. Describe and discuss Debbie's remedies, if any, to the trial court's refusal to sentence her to six months in the county jail.**

Although Debbie pled guilty with the expectation that she would be sentenced to six month's incarceration in the county jail, she has no right to force the trial court to impose such a sentence. *Cobbs*, 443 Mich at 283, make it very clear that "[t]he judge's preliminary evaluation of the case does not bind the judge's sentencing discretion." As the case proceeds it is likely that additional facts will become known to the court that impact sentencing determinations. *Id.* When the sentencing court expresses the inability to follow the preliminary sentence evaluation, a defendant who relied upon such evaluation to enter a plea of guilty has the "absolute right to withdraw the plea."

Additionally, to the extent the defendant wishes to withdraw a plea so offered and proceed to trial, the judge who has expressed opinions relating to sentencing remains subject to the disqualification rules under MCR 2.003. Debbie may conclude that the revised sentence offer shows an inability for the court to preside over her case as an impartial arbiter. However, a decision not to sentence a defendant consistent with a preliminary

sentencing evaluation is not a per se basis for recusal. "A judge's candid statement of how a case appears at an early stage of the proceedings does not prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known." *Id.*

Here, Debbie stated on the record that she was "pleased with the court's sentencing proposal and given the court's assessment, she would agree to plead guilty to the GBH charge." Thus it may fairly be said that Debbie relied upon the court's preliminary sentencing evaluation when she entered her plea. Accordingly, Debbie has two options, proceed with the sentence and accept the imposition of a 24 to 120 month sentence to be served in prison, or withdraw her plea. To the extent she wishes to withdraw her pleas, she may also seek disqualification of the judge, although unless Debbie waives her right to a jury such that the court is also the trier of fact, it is unlikely that disqualification would be granted. As a practical matter, Debbie would be well advised to remain with this judge and keep her plea of guilty. It is clear the prosecutor is seeking a penalty greater than that which the judge is now offering. Further, the facts indicate that the court's latest proposed sentence is at "the low end of the applicable sentencing guideline range." Thus, absent a finding she is not guilty, Debbie is not likely to achieve a better sentencing result.