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ETHICAL PLEA BARGAINING UNDER THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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As the Supreme Court has observed, plea bargaining is such "an essential component of the administration of justice" that "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."[1] Despite the fact that 95% of felony criminal cases nationwide are resolved by plea bargain,[2] however, there are no specific ethical rules that govern the practice.[3] There is, of course,

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1. Santobello v. New York, 404 U.S. 257, 260–61 (1971); *see also* State v. Moore, 240 S.W.3d 248, 250 (Tex. Crim. App. 2007) ("Plea agreements continue to be a vital part of our criminal-justice system."); Cruz v. State, 530 S.W.2d 817, 821 (Tex. Crim. App. 1975) ("We recognize that negotiated pleas are an integral and essential part of our system of criminal justice.").

2. U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS Table 4.1 (2004), http://www.ojp.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm; *see also Moore*, 240 S.W.3d at 250 ("[A]s much as ninety percent of all criminal cases [are] resolved via plea agreements.").

3. *See* Perkins v. Third Court of Appeals, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987) (en banc) (orig. proceeding) (defining plea bargaining).

> "Plea bargaining is [usually defined as] a process which implies a preconviction bargain between the State and the accused whereby the accused agrees to plead guilty or nolo contendere in exchange for a reduction in the charge, a promise of sentencing

the general exhortation in article 2.01 of the Texas Code of Criminal Procedure that "[i]t shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done."[4] The no less general admonition of Article 2.03(b) provides that "the duty of the trial court, the attorney representing the accused, [and] the attorney representing the state . . . [is] to so conduct themselves as to insure a fair trial for both the state and the defendant, [and] not impair the presumption of innocence."[5] But neither article directly addresses plea bargaining nor provides concrete rules under which plea bargaining may be conducted.

In order to determine the ethical boundaries of plea bargaining, prosecutors and defense counsel must rely instead on general constitutional principles, disciplinary rules aimed more at controlling trial rather than pretrial conduct, and ethical provisions more useful in regulating negotiations between business entities than providing the ethical context for settlement of criminal litigation. This article examines the constitutional duties imposed upon prosecutors and defense attorneys, and those rules of professional conduct that are implicated in the plea bargaining process.[6] The interplay between constitutional and ethical rules

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leniency, a promise of a recommendation from the prosecutor to the trial judge as to punishment, or some other concession by the prosecutor that he will not seek to have the trial judge invoke his full, maximum implementation of the conviction and sentencing authority he has," i.e., it is the process where a defendant who is accused of a particular criminal offense, and his attorney, if he has one, and the prosecutor enter into an agreement which provides that the trial on that particular charge not occur or that it will be disposed of pursuant to the agreement between the parties, subject to the approval of the trial judge. Put another way, "plea bargaining is the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence."

Perkins, 738 S.W.2d at 282 (quoting MILTON HEUMAN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 1 (1978 ed.)). The process has four requirements: "(1) that an offer be made or promised, (2) by an agent of the State in authority, (3) to promise a recommendation of sentence or some other concession such as a reduced charge in the case, (4) subject to the approval of the trial judge." Wayne v. State, 756 S.W.2d 724, 728 (Tex. Crim. App. 1988).

4. TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005).

5. *Id.* art. 2.03(b).

6. Plea bargaining is implicitly approved by statute. *Id.* art. 26.13(a)(2) (Vernon 1989 & Supp. 2007). Article 26.13 outlines the admonishments a court must give to a defendant before accepting a plea and the circumstances under which it must reject one. *Id.* art. 26.13(a), (b). It also explicitly permits the court to reject any plea agreement between the parties and provides "that the recommendation of the prosecuting attorney as to punishment is not binding on the court." *Id.* art. 26.13(a)(2). Because the statute

provides the boundaries within which both parties must conduct themselves during plea bargaining.

I. CONSTITUTIONALITY OF PLEA BARGAINING

Although much criticized by commentators,[7] the process of plea bargaining has nevertheless held up under repeated constitutional attack. The Supreme Court has held that threatening a defendant with a greater charge in the course of plea bargaining does not violate due process,[8] nor does plea bargaining to avoid a more severe punishment violate the Fifth Amendment.[9] Additionally, a prosecutor does not have a due process obligation to forego a plea bargain if the defendant pleads guilty but simultaneously attests his innocence;[10] defense counsel's incorrect assessment of the strength of the case against the defendant will not invalidate an otherwise proper plea;[11] and a plea is not constitutionally invalid merely because the defendant may have made a bad bargain.[12]

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specifically controls only the court's conduct, it influences the ethical behavior of the parties only indirectly. Thus, Article 26.13 will be addressed where appropriate but not as a separate consideration in assessing the scope of ethical practice in plea bargaining.

7. *See* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599 (2005) (analyzing and critiquing the current plea bargaining system); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 723–32 (2006) (detailing the criticisms and controversy over plea bargaining); Renada Williams-Fisher, *Plea Bargaining Negotiations*, 33 S.U. L. REV. 237, 245–46 (2005) (discussing the justifications and criticisms of plea bargaining). Articles attacking plea bargaining in general or various aspects of the procedure are too numerous to mention. Indeed, even commentators who favor the practice are highly critical of its present form. *See, e.g.*, Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2302–13 (2006) (discussing the advantages and disadvantages of plea bargaining to both the defendant and the prosecutor); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037–42 (2006) (examining various proposals for changing the plea bargaining process).

8. Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

9. *See* Brady v. United States, 397 U.S. 742, 754–55 (1970) (holding the defendant's plea was not compelled simply because he sought to avoid a possible death sentence); *see also* Schnautz v. Beto, 416 F.2d 214, 216 (5th Cir. 1969) ("[A] plea is not rendered involuntary solely because it was induced as a result of a plea bargaining situation.").

10. *See* North Carolina v. Alford, 400 U.S. 25, 37–39 (1970) (holding that there is no constitutional bar to imposing a prison sentence on a defendant who voluntarily agrees to plead guilty but denies guilt). *But see* Davis v. State, 686 S.W.2d 287, 290 (Tex. App.—Houston [14th Dist.] 1985) (declaring a plea involuntary where the court suggested that it would not order a presentence-investigation (PSI) report unless the defendant pleaded *nolo contendere* and continued to maintain his innocence even during the punishment phase).

11. Parker v. North Carolina, 397 U.S. 790, 797–98 (1970).

12. Bradshaw v. Stumpf, 545 U.S. 175, 186 (2005).

While the practice in general has withstood constitutional attack, there nevertheless remain constitutional limits. A defendant is entitled to the assistance of counsel during plea negotiations.[13] Furthermore, a plea must not be the result of "actual or threatened physical harm or ... mental coercion overbearing the will of the defendant,"[14] so that any plea must "represent[] a voluntary and intelligent choice among the alternative courses of action."[15] The standard of guilty plea voluntariness is straightforward:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).[16]

Additionally, the record must reflect that the plea was knowingly and voluntarily made.[17]

Likewise, a prosecutor must keep his plea-bargained promise.[18] In the event the prosecutor fails to fulfill his side of the bargain, the defendant is entitled to specific performance or, where specific performance is impossible, withdrawal of his plea.[19] And although "[a] defendant ... does not have either a constitutional or statutory right to [a] plea bargain" offer,[20] the defendant does

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13. *See Brady*, 397 U.S. at 758 (deciding that courts are responsible for ensuring guilty pleas "are voluntarily and intelligently made ... with adequate advice of counsel").

14. *Id.* at 750.

15. *Alford*, 400 U.S. at 31.

16. Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958).

17. Boykin v. Alabama, 395 U.S. 238, 242–44 (1969).

18. Santobello v. New York, 404 U.S. 257, 262 (1971); *see also* Gibson v. State, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991) (citing several cases that support the proposition, including *Santobello*).

19. Perkins v. Third Court of Appeals, 738 S.W.2d 276, 283 (Tex. Crim. App. 1987) (en banc) (orig. proceeding); *accord In re* Gooch, 153 S.W.3d 690, 694 (Tex. App.—Tyler 2005, orig. proceeding) (applying *Perkins*); *see also Santobello*, 404 U.S. at 263 (leaving to the state court's discretion whether to order specific performance or to allow withdrawal of plea).

20. *Perkins*, 738 S.W.2d at 282 ("A defendant in Texas ... does not have either a constitutional or statutory right to plea bargain with a prosecutor for a particular punishment or for a reduced charge."); *accord* Weatherford v. Bursey, 429 U.S. 545, 561

enjoy the Sixth Amendment right to effective assistance of counsel—that is, to have any plea bargain offer from the State conveyed and explained to him by his attorney.[21] Finally, an accused enjoys the constitutional and statutory right to accept or reject any plea offer made by the State.[22]

II. CHARGING AS PART OF THE PLEA BARGAIN PROCESS

A. *"Overcharging"*

As the Supreme Court has observed, "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted."[23] The very nature of a plea bargain—where the accused gives up the right to trial in exchange for a reduced charge or sentence[24]—has

(1977) ("[T]here is no constitutional right to plea bargain."); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) ("[A] defendant has no right to demand that the State enter into a plea bargain."); Morano v. State, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978) ("The defendant does not have an absolute right to enter into a plea bargain."); *cf.* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon 1989 & Supp. 2007) (instructing the court to inquire whether a plea bargain exists and, if so, to indicate its acceptance or rejection of the plea).

21. *Ex parte* Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000) (stating that failure to inform client of plea offer "falls below an objective standard of professional reasonableness"); *Ex parte* Wilson, 724 S.W.2d 72, 73–74 (Tex. Crim. App. 1987) (en banc) (indicating that counsel has a duty to fully advise his client regarding plea bargain offers from the State); State v. Williams, 83 S.W.3d 371, 374 (Tex. App.—Corpus Christi 2002, no pet.) (agreeing that counsel has a duty to "fully explain[] any plea offers").

22. *Cf.* TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon 2005) (providing that a defendant has the right to waive trial by jury); *id.* art. 26.13(a) (Vernon 1989 & Supp. 2007) (permitting a defendant to withdraw a guilty or *nolo contendere* plea if the court rejects his plea bargain); Bitterman v. State, 180 S.W.3d 139, 141 (Tex. Crim. App. 2005) (observing that defendant's waiver of rights pursuant to plea bargain must be voluntary); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) ("A lawyer shall abide by a client's decisions . . . as to a plea to be entered . . . .").

23. Brady v. United States, 397 U.S. 742, 756 (1970).

24. *Perkins*, 738 S.W.2d at 282; *see also* 43 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE § 34.101 (2d ed. 2001) (defining the parameters of plea bargains).

> Broadly, there are three types of plea bargains—(1) charge reduction, in which the defendant pleads guilty to a less-serious offense—either a lesser included offense or a lesser related but not included offense—than that with which he or she is charged; (2) charge dismissal, in which the defendant pleads guilty to an offense in exchange for dismissal of other charges, taking other pending charges into account under the Texas

prompted the fear that the prosecutor will "overcharge" a defendant with additional weak or baseless charges or unnecessary sentencing enhancements in an effort to gain leverage in subsequent plea negotiations.[25]

Rule 3.09(a) of the Texas Disciplinary Rules of Professional Conduct, however, requires that a prosecutor "refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause."[26] The rule thus prohibits "overcharging" in its simplest and most direct form.[27] The rule is silent as to how or when a prosecutor "knows" that a charge "is not supported by probable cause."[28] The terminology section of the Rules offers little guidance, as "knows" is defined simply and unhelpfully as "actual knowledge of the fact in question."[29] The definition further observes that "[a] person's

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Penal Code, or a promise not to bring specified additional charges; and (3) sentence recommendation, in which the defendant pleads guilty in exchange for a promise by the State to make some specified type of punishment recommendation.

Of course, any particular plea agreement may involve two or even all three of these types of plea bargains.

Id. (footnote omitted).

25. ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 228 (7th ed. 2007); *see also* WASH. REV. CODE ANN. § 9.94A.411(a)(ii) (West 2003) ("The prosecutor should not overcharge to obtain a guilty plea."); State v. Korum, 141 P.3d 13, 19 (Wash. 2006) (en banc) (finding that the prosecutor did not overcharge in bringing additional charges after plea negotiations broke down); Roehl v. State, 253 N.W.2d 210, 216 (Wis. 1977) (concluding that no evidence showed that prosecutor brought charges to obtain a plea bargain); Bruce A. Greene, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1590 (2003) (calling for a limit on the prosecutor's ability to bring disproportionate charges against defendants); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 286–91 (2006) (describing overcharging as coercive); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 868–69 (1995) (addressing reasons why prosecutors overcharge); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963–66 (1992) (noting that prosecutors have unchecked opportunities to game the bargaining process by overcharging).

26. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a).

27. *Cf.* People v. Pelchat, 464 N.E.2d 447, 452 (N.Y. 1984) (reversing a conviction and dismissing an indictment where the prosecutor knew that the sole witness before a grand jury who linked the defendant to possession of drugs "had not observed [the] defendant engag[ing] in criminal conduct" and had misunderstood the grand jury question).

28. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a).

29. *Id.* terminology.

knowledge may be inferred from circumstances,"[30] but it is unclear whether this refers to how an attorney might conclude that he knows a fact or how knowledge may be later proven at a disciplinary hearing.

The terminology section additionally provides that "'[b]elief' or '[b]elieves' denotes that the person involved actually supposed the fact in question to be true."[31] Assuming that belief is something less than knowing, as the terminology suggests, a prosecutor may ethically pursue charges that he nevertheless "believes" may lack merit, so long as he does not "know" that the accusation is false.[32] Such a conclusion, however, does not aid counsel in determining whether or not he "knows" a fact.

Comment 2 to Rule 3.09 clarifies the rule's application only insofar as it defines when a prosecutor may "know" when a charge *is* supported by probable cause:

> Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.[33]

Under the rule and comment, even if a prosecutor harbors doubt about the case she will not violate her ethical duty not to "prosecut[e] or threaten[] to prosecute"[34] if the cause has been presented to a grand jury and subsequently "true billed."[35] Confusingly, under the comment, if the prosecutor believes—not knows, as in the rule itself—that the inculpatory information presented to the grand jury was false, she may not rely upon the

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30. *Id.*

31. *Id.*

32. *In re* Disciplinary Proceedings Against Lucareli, 2000 WI 55, ¶¶ 29–31, 235 Wis. 2d 557, ¶¶ 29–31, 611 N.W.2d 754, ¶¶ 29–31 (holding that even if the prosecutor *reasonably should have known* the charges were baseless, there was no violation where the prosecutor did not *know* that fact).

33. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09 cmt. 2.

34. *Id.* 3.09(a).

35. *Id.* 3.09 cmt. 2.

true bill to insulate her from the obligations of the rule.[36]

The comment does not explain why the differing standard of "believes" applies to information submitted to the grand jury. This probably represents an attempt by the drafters to curtail prosecutors' attempts to circumvent the application of Rule 3.09(a) by submitting questionable evidence to a grand jury and then relying on the comment to insulate them from responsibility. On the other hand, several other disciplinary rules better address such conduct.[37]

Though the obvious intent of Rule 3.09(a) is to reduce vexatious or abusive prosecutions grounded upon baseless charges, or threats of such prosecutions, the rule has been applied in Texas to situations properly characterized as overcharging. In *Lehman v. State*,[38] the Texas Court of Criminal Appeals noted that Rule 3.09(a) applies to a prosecutor's inclusion of unfounded charges within an otherwise valid indictment.[39] The court opined that "[a] prosecutor is not free to put unfounded allegations in an indictment in the hope that a plenitude of accusations will make the defendant look like a criminal."[40] That specific abuse, however, is more properly addressed by Rule 3.04(c)(2), which cautions an attorney appearing before a "tribunal" not to "state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence."[41] Nevertheless, the thrust of the court's conclusion in *Lehman* is plain: a prosecutor may not add allegations he cannot prove to an otherwise valid indictment or information simply to gain an advantage in the resolution of the

36. *Id.* 3.09 cmt. 1.

37. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(5), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (prohibiting the "offer or use [of] evidence that the lawyer knows to be false"); *id.* 3.04(b) ("A lawyer shall not . . . counsel or assist a witness to testify falsely . . . .").

38. Lehman v. State, 792 S.W.2d 82 (Tex. Crim. App. 1990) (en banc).

39. *Id.* at 85 n.2.

40. *Id.*

41. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(2); *see also* Roehl v. State, 253 N.W.2d 210, 216–17 (Wis. 1977) (holding that a prosecutor's failure to dismiss several counts during trial after it became evident that the State would be unable to prove the charges did not violate a rule against overcharging but did violate prohibition against commenting upon evidence for which there was not "a good faith and reasonable basis for believing that such evidence [would] be tendered and admitted in evidence").

primary charge.[42]

In addition to violating Rule 3.09(a), the practice of including unsupported allegations in an otherwise valid indictment or information might also violate Rule 3.03(a)(1). Under Rule 3.03(a)(1), counsel is prohibited from "knowingly ... mak[ing] a false statement of material fact or law to a tribunal," which could conceivably include allegations contained in a formal charge.[43] Comment 2 suggests that the stricture of Rule 3.03(a)(1) does not apply to "pleadings and other documents prepared for litigation" because a lawyer "is usually not required to have personal knowledge of matters asserted therein," since "litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer."[44] But the rule cautions:

> [A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.[45]

Thus, an information or indictment actually signed by a prosecutor appears to be subject to the rule.

The comment's implied substitution of "a reasonably diligent inquiry" for "knowingly," as actually stated in the rule, undoubtedly constitutes an acknowledgment of the practicalities of motion practice. However, the confusion is largely unnecessary

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42. *Cf. Lehman*, 792 S.W.2d at 85 n.2 (disagreeing with appellant's argument that the court's holding would allow the State to add charges in hopes that something would eventually stick); State v. Korum, 141 P.3d 13, 19–20 (Wash. 2006) (en banc) (overturning the lower court's conclusion that the prosecutor had overcharged the defendant, and holding that additional charges were based upon the evidence and strengthened the State's primary charge); *Roehl*, 253 N.W.2d at 216 (finding no evidence that the prosecutor brought additional charges only for the purpose of obtaining a plea bargain).

43. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1); *see also* Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239, 244 (W. Va. 2000) (holding that a lawyer's reference to a witnesses' purported polygraph examinations, where the witnesses had never submitted to a polygraph, violated the rule against making a false statement of material fact).

44. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2.

45. *Id.*; *see also* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 525, 528 (5th Cir. 1992) (affirming the sanctioning of lawyers who represented to the court that affidavits had been signed when the affiants had only orally agreed to the contents and had not yet executed the documents).

and stems from the drafters' attempt to cast the comment in the affirmative. Instead of simply restating the rule's requirement that a lawyer not knowingly make a *false* statement of material fact, the comment transforms the duty into a requirement that counsel may only knowingly make *true* statements to the court, a very different thing. Having thus created a non-existent, if laudable, ethical obligation, the comment then must create an exception for those not infrequent instances in which an attorney may not know a fact but has every reason to believe in its existence.[46]

The definitions in the terminology section are actually more consistent with the spirit and letter of Rule 3.03(a)(1) than the comment. Under the terminology, a lawyer knows a fact when he has "actual knowledge of the fact in question."[47] In contrast, a lawyer believes a fact when he does not have actual knowledge but "suppose[s] the fact in question to be true."[48] As applied to pleadings and other documents, a lawyer does not violate the proscription that he not knowingly make a false statement unless he has actual knowledge that the statement is false.[49] On the other hand, if the lawyer only supposes a fact to be true—or even if he supposes the fact to be untrue—but has no actual knowledge that it is not true, he does not violate the proscription that he not knowingly make a false statement of fact.[50] To put it another way, under a strict reading of the rule and the terminology, a lawyer who relies upon the assertions of his client or a complainant in preparing a pleading does not violate Rule 3.03(a)(1) unless the lawyer has actual knowledge that the assertions are not true.[51] This is consistent with the underlying premise in all litigation that the trial court or jury, as it may be, is invested with the discretion and obligation to make credibility determinations.[52]

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46. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2.

47. *Id.* terminology.

48. *Id.*

49. *Id.* 3.03(a)(1) & terminology.

50. *See id.* (explaining that in order to act knowingly within the meaning of the rules, one must have actual knowledge of the fact).

51. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) & terminology, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

52. *See* Adelman v. State, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992) (en banc) (asserting that the fact finder is free to believe or disbelieve the testimony of any witness); *see also* Smith v. Thigpen, 689 F. Supp. 644, 651 (S.D. Miss. 1988), *aff'd sub nom.* Smith v. Black, 904 F.2d 950 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992)

The fact that Rule 3.03(a)(1) allows an attorney some room for doubt in relying upon the factual representations of others does not mean that a prosecutor is free to pursue even the most outlandish accusations. A State attorney's reliance upon the comment's suggestion that the attorney need not worry about making a false statement of material fact in a pleading must be tempered by the prosecutor's special responsibility under Rule 3.09(a)[53] and the prosecutor's obligation under Article 2.01 "not to convict, but to see that justice is done."[54]

B. *"Undercharging"*

On the opposite extreme from "overcharging" is what might, for lack of a better phrase, be termed "undercharging." Just as a prosecutor should not charge an offense for which she does not have probable cause, she should not plead a case down to a charge that is inconsistent with the known facts.[55] Entering into a plea bargain to a lesser charge that the prosecutor knows is unsupported by the facts, even if the plea benefits the defendant, would violate Rule 3.09(a).[56]

(reaffirming that the purpose of the adversarial system is to allow the fact finder to draw conclusions about witnesses' truthfulness).

53. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a) ("The prosecutor in a criminal case shall ... refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause ....").

54. TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005) ("It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done.").

55. *See* Iowa Supreme Court Attorney Disciplinary Bd. v. Zenor, 707 N.W.2d 176, 179–80 (Iowa 2005) (deciding that the county attorney violated DR 7-103(A) in permitting assistants to plea down misdemeanor offenses to non-moving traffic violations for which there was no factual basis); Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706 N.W.2d 360, 371 (Iowa 2005) (concluding that the assistant city prosecutor violated the rules of ethics by amending misdemeanor charges down to non-moving traffic violations for which there was no factual basis in exchange for a guilty pleas).

56. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a); *see also Zenor*, 707 N.W.2d at 180 (concluding that plea bargains are not exempt from the ethical requirement not to bring charges unsupported by probable cause); *Howe*, 706 N.W.2d at 371 (noting that "the requirement that any charge—original or reduced—be supported by probable cause" applies to plea bargains for reduced charges). In addition to a possible ethical violation, a prosecutor who agrees to accept a plea to a lesser charge not supported by the evidence runs the risk of eventually losing the conviction anyway, since a defendant who has pled guilty may nevertheless later attack his conviction on the grounds of actual innocence. *See Ex parte* Brown, 205 S.W.3d 538, 544 (Tex. Crim. App. 2006) (recognizing that a defendant may attack a conviction based on an actual innocence claim regardless of whether or not he pled guilty).

Furthermore, a prosecutor or defense counsel who submits such a plea to the court would also violate Rule 3.03(a)(1), which prohibits a lawyer from "knowingly . . . mak[ing] a false statement of material fact or law to a tribunal."[57] Although Rule 3.03(a)(1) expressly prohibits *making* a false statement to a court, Comment 2 suggests that the rule may be interpreted broadly to include statements made by implication or even silence, which might include counsel's *failure* to advise the court that a plea bargain does not conform to the known facts of the case.[58] The comment warns that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative representation" but does not specify what constitutes such circumstances.[59]

The Texas Committee on Professional Ethics has addressed the issue of whether silence may constitute a statement for the purposes of Rule 3.03(a)(1).[60] The facts outlined in Opinion 504 were straightforward. During a punishment hearing, the State mistakenly answered the court that there were no prior convictions on record for the defendant, implying that he was eligible for probation.[61] The prosecutor then "turned to the defendant and asked, 'Right?'"[62] Neither the defendant nor his counsel replied, even though the defendant had previously told his attorney of his prior convictions.[63] The court subsequently granted the defendant probation.[64]

In reviewing the history of ethics opinions addressing attorney silence on prior convictions,[65] the committee concluded that a lawyer is prohibited under Rule 3.03(a)(1) from making a false statement to a court if asked specifically about a fact.[66] The committee further speculated that "[i]f the question by the court to

57. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1).

58. *See id.* 3.03 cmt. 2 (stating that failure to disclose can be the same as an affirmative misrepresentation).

59. *Id.*

60. Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718 (1995).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718 (1995).

66. *Id.* at 719 ("[I]f a judge specifically asks the defendant's lawyer whether his client has any prior criminal convictions, the lawyer may not make any false statements of fact to the court.").

the defendant's lawyer follows an inaccurate statement in court by another person ... the lawyer must correct the inaccurate information ... or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement."[67] In the alternative, "the lawyer may ask the court to excuse him from answering the question" so that "the court is at least alerted to a problem and presumably will inquire further to discover the truth."[68] Since the question directly addressed to defense counsel was posed by the prosecutor, not the court, and because neither the defendant nor his counsel "used" evidence as contemplated by Rule 3.03(a)(5), the committee concluded that Rule 3.03(a) had not been violated.[69]

Opinion 504, therefore, outlines the circumstances under which the "failure to make a disclosure is the equivalent of an affirmative representation."[70] A failure to disclose will violate Rule 3.03(a)(1) when the failure occurs during examination—either direct or indirect—by the court.[71] Silence in any other situation does not appear to run afoul of the rule.[72] Untrue or misleading representations made during a plea colloquy in order to secure judicial approval of the agreement would thus appear to violate the rule.[73]

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67. *Id.*

68. *Id.*

69. *Id.*

70. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

71. *See* Tex. Comm. on Prof'l Ethics, Op. 504, 58 TEX. B.J. 718 (1995) (concluding there was no violation because the false statement made to the court was not made by either the defendant or his lawyer).

72. *See* United States v. Yeje-Cabrera, 430 F.3d 1, 28 (1st Cir. 2005) (acknowledging that the prosecutor and defense counsel made no misrepresentation when they did not inform the court of evidence of a gun enhancement after agreeing to drop it as part of a plea bargain). *But see* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 936–37 (1990) (expressing concern that parties may bargain down offenses and not inform the court of specific circumstances relevant to sentencing guidelines).

73. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (Vernon 1989 & Supp. 2007) (providing that a plea recommendation "is not binding on the court" and that the court must "inform the defendant whether it will follow or reject such agreement").

III. PROSECUTORIAL DISCRIMINATION AND VINDICTIVENESS IN PLEA BARGAINING

A. *Prosecutorial Discrimination in Plea Bargaining*

While prosecutorial discretion is broad, it is not wholly exempt from constitutional restraints.[74] The Supreme Court has held that the exercise of prosecutorial discretion "based upon an unjustifiable standard such as race, religion, or other arbitrary classification," such as the exercise of free speech, is prohibited.[75] The refusal to engage in bargaining, or an offer that is grossly disproportionate to offers made to similarly situated defendants, based solely upon the defendant's race, religion, or some other arbitrary basis would violate the Equal Protection Clause.[76]

A presumption of regularity supports State's counsels' decisions to prosecute cases; therefore, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[77] Thus, to succeed on a claim of an abuse of prosecutorial discretion, a defendant must present exceptionally clear proof of "purposeful discrimination [that] 'had a

74. Wayte v. United States, 470 U.S. 598, 608 (1985); *accord* County v. State, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989) (en banc) (citing *Wayte*).

75. Oyler v. Boles, 368 U.S. 448, 456 (1962); *see also* Falls v. Town of Dyer, Ind., 875 F.2d 146, 148–49 (7th Cir. 1989) (declaring that a statute enforced only against the defendant is equivalent to a statute naming the defendant as a unique class, which would be irrational); *County*, 812 S.W.2d at 308 (quoting *Wayte*).

76. *See* United States v. Estrada-Plata, 57 F.3d 757, 760–61 (9th Cir. 1995) (applying equal protection analysis to defendant's claim that he was not provided as much time as similarly situated defendants to consider the government's plea bargain offer); Moody v. State, 93–KA–00998–SCT (¶ 10), 716 So. 2d 562, 565 (Miss. 1998) (holding that the prosecutor's practice of requiring defendants to agree to a fine as a condition of dismissal of a bad check charge violated equal protection rights of indigent defendants); Gray v. State, 650 P.2d 880, 882–84 (Okla. Crim. App. 1982) (applying equal protection analysis to defendant's assertion that he was effectively denied a plea bargain based on his indigence); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962) (second alteration in *Bordenkircher*))).

77. United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926); *see also* Garcia v. State, 172 S.W.3d 270, 274 (Tex. App.—El Paso 2005, no pet.) (presuming good faith prosecutions in the absence of "exceptionally clear evidence" of improper motivation); Hall v. State, 137 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (noting a presumption of good faith prosecution and the defendant's heavy burden to establish otherwise).

discriminatory effect' on him."[78] The defendant "must [also establish] that the decision makers in *his* case acted with discriminatory purpose"[79] unless the selective "prosecution is based on an overtly discriminatory classification."[80]

"'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" or individual.[81]

Therefore, to succeed in a claim of prosecutorial discrimination in plea bargaining, a defendant would have to prove that the prosecutors in his case acted with a discriminatory purpose that had a demonstrable effect on him.[82] That is, defendants would be required to establish that the prosecutor intentionally refused to plea bargain or offered a disproportionately more severe bargain to the defendant based solely upon the defendant's race, color, or some other arbitrary classification.

As well as violating a defendant's equal protection rights, discrimination in plea bargaining based upon an arbitrary or invidious classification would subject counsel to discipline under Rule 5.08(a) of the Texas Disciplinary Rules of Professional Conduct. Rule 5.08 mandates that an attorney in an adjudicatory proceeding "shall not willfully ... manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person

78. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (quoting *Wayte*, 470 U.S. at 608); Green v. State, 934 S.W.2d 92, 103 (Tex. Crim. App. 1996); *County*, 812 S.W.2d at 308; Nelloms v. State, 63 S.W.3d 887, 893 (Tex. App.—Fort Worth 2001, pet. ref'd).

79. *McCleskey*, 481 U.S. at 292; *see also* United States v. Lawrence, 179 F.3d 343, 349–50 (5th Cir. 1999) (acknowledging disparate treatment of codefendants, not selective prosecution, where defendant failed to allege or prove any particular animus by prosecutor).

80. *Wayte*, 470 U.S. at 608 n.10; *see also* Garcia v. State, 172 S.W.3d 270, 273–74 (Tex. App.—El Paso 2005, no pet.) (noting that one element of a defendant's claim of prosecutorial discrimination is proving that the government's decision to prosecute the defendant "has been invidious or in bad faith"); Hall v. State, 137 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (listing the same elements as *Garcia*).

81. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979), *aff'd*, 445 U.S. 901 (1980).

82. *See Wayte*, 470 U.S. at 608 n.10 (discussing the lower court's reliance on a "discriminatory effect and purpose" test); *Garcia*, 172 S.W.3d at 273–74 (listing the prima facie test that satisfies the discriminatory purpose and effect requirements); *Hall*, 137 S.W.3d at 855 (outlining the same prima facie test used in *Garcia*).

involved in th[e] proceeding in any capacity."[83] Since "the prohibited conduct only must occur 'in connection with' an adjudicatory proceeding" in order to violate the rule,[84] a refusal to plea bargain a case or a disproportionate plea offer based solely upon the defendant's "race, color, national origin, religion, disability, age, sex, or sexual orientation" would constitute a willful manifestation of bias or prejudice and be cause for professional discipline.[85]

B. *Prosecutorial Vindictiveness in Plea Bargaining*

Analogous to the claim of selective prosecution, which is based on equal protection principles, is a complaint of vindictive prosecution, which implicates due process.[86] Generally, due process prohibits the State from increasing the severity of the charges against a defendant who has exercised a procedural right.[87] "A person [charged and] convicted of an offense is entitled to pursue his . . . right[s] . . . without apprehension that the State will retaliate by substituting a more serious charge for the original one . . . ."[88] A presumption of vindictiveness will arise if circumstances create "a realistic likelihood of 'vindictiveness.'"[89]

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83. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.08(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

84. *Id.* 5.08 cmt. 1.

85. *Id.* 5.08(a).

86. *Compare Wayte*, 470 U.S. at 608, (illustrating that selective prosecution is based on equal protection), *with* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (discussing how a probability of prosecutorial vindictiveness violates due process).

87. *See Blackledge*, 417 U.S. at 28–29 (stating that individuals are allowed their procedural rights without fear that they will be subject to a more severe penalty as a consequence of pursuing those rights).

88. *Id.*; *see also* Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) (reaffirming that retaliation by a prosecutor simply because the defendant exercised a statutory or constitutional right is forbidden).

89. *See* United States v. Goodwin, 457 U.S. 368, 373 (1982) ("[I]n certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive."); *Blackledge,* 471 U.S. at 27 (stating that due process is offended only when a subsequent increase in punishment is combined with "a realistic likelihood of vindictiveness"); Neal v. State, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (opining that if circumstances create a "realistic likelihood" of vindictiveness, a rebuttable presumption of prosecutorial vindictiveness will arise); Watson v. State, 760 S.W.2d 756, 759 (Tex. App.—Amarillo 1988, writ ref'd) ("A presumption of improper prosecutorial motive is applicable only where a reasonable likelihood of vindictiveness exists." (citing *Goodwin*, 457 U.S. at 373)); *cf.* Chaffin v. Stynchcombe, 412 U.S. 17, 26–27 (1973) (deciding that the likelihood of

Vindictiveness will be presumed only in rare instances, principally where a prosecutor increases the charges against a defendant after the defendant has successfully appealed his conviction for a lesser crime.[90]

Since the prohibition against vindictive prosecution seeks to prevent defendants from being punished for exercising their rights, no presumption arises in situations where the defendant has not affirmatively exercised constitutional rights, such as when additional charges are filed after a mistrial or an acquittal.[91]

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vindictiveness is *de minimis* where a defendant is re-sentenced by a second jury after successful appeal of the first jury verdict).

90. *Compare* Thigpen v. Roberts, 468 U.S. 27, 31–33 (1984) (ruling that vindictiveness is presumed where a defendant is charged with felony manslaughter after appealing a misdemeanor DWI conviction, despite involvement with two separate prosecutorial agencies), *with Blackledge*, 417 U.S. at 27–28 (showing that vindictive prosecution is presumed where a prosecutor increased the charge after the defendant appealed a misdemeanor conviction to a trial de novo), *and* Bouie v. State, 565 S.W.2d 543, 546–47 (Tex. Crim. App. 1978) (en banc) (noting a presumption of prosecutorial vindictiveness where a prosecutor added habitual enhancement to the indictment after the defendant successfully appealed his first conviction), *overruled by* Hood v. State, 185 S.W.3d 445 (Tex. Crim. App. 2006), *and* Doherty v. State, 892 S.W.2d 13, 15–16 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd) (disallowing the prosecutor's charge of capital murder after the defendant successfully appealed his conviction for murder). *But cf.* Borenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (deciding that there was no presumption of vindictive prosecution where a prosecutor re-indicted a defendant after the defendant refused a plea bargain offer for a lower charge); Lopez v. State, 928 S.W.2d 528, 532–33 (Tex. Crim. App. 1996) (en banc) (determining no presumption of vindictiveness where the prosecutor sought a deadly weapon finding after the defendant successfully appealed his conviction for murder); Godsey v. State, 989 S.W.2d 482, 494–95 (Tex. App.—Waco 1999, pet. ref'd) (concluding that there is no presumption of vindictiveness where a prosecutor re-files after the defendant successfully appeals a negotiated plea to a lesser charge); Cover v. State, 913 S.W.2d 611, 614 (Tex. App.—Tyler 1995, writ ref'd) (ruling no presumption of vindictiveness where a prosecutor pursues a charge of retaliation against the defendant after the defendant filed post-trial writs of habeas corpus accusing the prosecutor of suborning perjury where the victim and the sheriff's office were responsible for the charge); *Watson*, 760 S.W.2d at 757–59 (noting that there is no presumption of vindictiveness where a prosecutor increases the charge after the defendant successfully withdraws from a plea agreement on a motion for new trial).

91. *See* United States v. King, 126 F.3d 394, 400 (2d Cir. 1997) (noting no presumption of vindictiveness after a mistrial); United States v. Contreras, 108 F.3d 1255, 1263 (10th Cir. 1997) (stating there is no presumption of vindictiveness after a mistrial); United States v. McAllister, 29 F.3d 1180, 1185–86 (7th Cir. 1994) (determining there is no presumption of vindictiveness after a mistrial); *cf.* United States v. Sattar, 314 F. Supp. 2d 279, 311–12 (S.D.N.Y. 2004) (finding no presumption of vindictiveness nor evidence of actual vindictiveness where a defendant successfully moved to quash charges and the prosecution re-filed with additional counts). *But see* United States v. Motley, 655 F.2d 186, 187–89 (9th Cir. 1981) (declaring there is a presumption of vindictiveness when enhanced charges are added after a mistrial is declared over the government's objection).

Similarly, prosecution for the same offense by two separate entities does not raise the presumption of prosecutorial vindictiveness, so prosecution by a second entity after the defendant has refused a plea offer from the first entity is not unconstitutional.[92]

The presumption of vindictiveness is not absolute and may "be overcome by objective evidence justifying the prosecutor's action."[93] Sufficient circumstances to justify the prosecutor's decision may include a showing that the greater charges could not have been pursued from the outset, or that the greater charges or enhancement had been omitted through mistake or oversight.[94] In addition, a prosecutor may establish "that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion."[95]

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92. *See* United States v. Raymer, 941 F.2d 1031, 1042–43 (10th Cir. 1991) (concluding there is no presumption of vindictiveness even where the prosecutor was the same in both state and federal actions); United States v. Schenk, 299 F. Supp. 2d 1192, 1195 (D. Kan. 2003) (finding no presumption of vindictiveness where the defendant rejected a plea offer from the state prosecutor and was later prosecuted by federal authorities).

93. *See Goodwin*, 457 U.S. at 376 n.8, (observing that a presumption of vindictiveness may be overcome "by objective evidence justifying the prosecutor's action"); *see also* Hood v. State, 185 S.W.3d 445, 449–50 (Tex. Crim. App. 2006) (examining the difference between objective and subjective explanations of presumed vindictiveness); *Neal*, 150 S.W.3d at 173–74 (requiring objective evidence to rebut presumption of vindictiveness); *cf.* Texas v. McCullough, 475 U.S. 134, 141 (1986) (holding that a presumption of judicial vindictiveness may be rebutted).

94. *See Blackledge*, 417 U.S. at 29 n.7 (discussing *Diaz v. United States*, 223 U.S. 442, 448–49 (1912), where the defendant initially pled guilty to misdemeanor assault and later was found guilty of murder after the victim died); Byrd v. McKaskle, 733 F.2d 1133, 1138 (5th Cir. 1984) (deciding that an intervening change in the Texas Penal Code that equalized penalties under the original and subsequent charge was a sufficiently objective reason for change to overcome the presumption of vindictiveness); *Hood*, 185 S.W.3d at 450 (deciding that a "mistake or oversight" was a sufficient objective explanation for adding enhancements after the initial conviction was reversed); *see also* Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) (noting that a presumption of vindictiveness can be overcome by showing that it was impossible to bring greater charges earlier or that a mistake or an oversight occurred).

95. United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983) (en banc); *see* Raetzsch v. State, 709 S.W.2d 39, 41 (Tex. App.—Corpus Christi 1986, writ ref'd) (allowing the prosecutor to rebut the presumption of vindictiveness by explaining that new enhancement was based upon State's receipt of defendant's pen-packet, which the State did not have at the time of the first trial); *cf. McCullough*, 475 U.S. at 143–44 (concluding that there was no judicial vindictiveness where additional evidence was discovered after the first trial which caused the judge in the second trial to increase the defendant's punishment). *But see* United States v. King, 126 F.3d 394, 399 (2d Cir. 1997) (stating that a prosecutor can also rebut the "presumption of vindictiveness . . . with a showing of

The Supreme Court has twice declined to presume vindictiveness where a prosecutor increased the charges against a defendant after he refused a plea bargain offer. In *Bordenkircher v. Hayes*,[96] the Court observed that while due process prohibits the State from punishing a person "because he has done what the law plainly allows him to do," in the "'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[97] Thus, "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"[98] The Court concluded that under the circumstances the prosecutor did "no more than openly present[] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution"; therefore, the prosecutor's attempt to seek the death penalty upon the breakdown of plea negotiations did not violate due process.[99]

Similarly, in *United States v. Goodwin*,[100] the defendant complained that the prosecutor's increase of an initial misdemeanor charge to a felony after the defendant demanded a jury trial warranted a presumption of vindictiveness.[101] Although the Fourth Circuit agreed with the defendant, the Supreme Court reversed the lower court.[102] The Court observed that "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness.'"[103] "The possibility," the Court concluded, "that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could

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'legitimate, articulable, objective reasons' for the superseding indictment," rather than relying upon a showing of subsequent intervening events (quoting United States v. Contreras, 108 F.3d 1255, 1263 (10th Cir. 1997))).

96. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

97. *Id.* at 363.

98. *Id.* at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

99. *Id.* at 365.

100. United States v. Goodwin, 457 U.S. 368 (1982).

101. *See id.* at 371 (relating the facts that led to the increased charges against the defendant and the subsequent claim of prosecutorial vindictiveness).

102. *Id.* at 372–84.

103. *Id.* at 384 (quoting Blackledge v. Perry, 417 U.S. 21, 27 (1974)).

be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted."[104]

The Texas courts, following the Supreme Court's lead, have rejected a presumption of vindictiveness where a prosecutor has added charges or increased the possible punishment after a defendant has rejected a plea bargain offer.[105] Other state and federal courts have similarly ruled that increasing the charge or possible punishment following the breakdown of plea negotiations does not constitute prosecutorial vindictiveness.[106]

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104. *Id.*

105. *See* Christiansen v. State, 575 S.W.2d 42, 46 (Tex. Crim. App. [Panel Op.] 1979) (rejecting a presumption of vindictiveness where the prosecutor re-indicted the defendant after the defendant refused a plea bargain offer); Cowan v. State, 562 S.W.2d 236, 238–39 (Tex. Crim. App. [Panel Op.] 1978) (rejecting a presumption of vindictiveness where, following the defendant's rejection of a plea, the prosecutor added enhancements to the indictment); Sterling v. State, 791 S.W.2d 274, 278 (Tex. App.—Corpus Christi 1990, writ ref'd) (rejecting a presumption of vindictiveness based on the prosecutor's motion to stack sentences after the defendant successfully withdrew from an agreed plea bargain). *But see* Bouie v. State, 565 S.W.2d 543, 546–47 (Tex. Crim. App. 1978) (en banc) (ordering enhancement allegations to be dismissed when the prosecutor alleged an extra prior conviction for enhancement purposes in the second indictment even though the defendant entered a guilty plea on the second indictment).

106. *See* United States v. DeJohn, 368 F.3d 533, 545 (6th Cir. 2004) ("This circuit has consistently indicated that when the right asserted by the defendant is simply the right to go to trial, an additional charge entered after a failed plea bargain cannot . . . form the substance of a viable vindictive prosecution claim."); United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000) ("[I]n the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right." (citing United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982))); United States v. Raymer, 941 F.2d 1031, 1042–43 (10th Cir. 1991) (concluding that the prosecutor did not act vindictively by bringing more serious charges through a federal indictment when the defendant asserted a procedural right of extradition and refused to comply with a plea bargain); *Gallegos-Curiel*, 681 F.2d at 1169 (declining to presume vindictiveness where the prosecutor increased a misdemeanor to a felony several days after the defendant entered a preliminary plea of not guilty); United States v. Schenk, 299 F. Supp. 2d 1192, 1194–96 (D. Kan. 2003) (refusing to find a presumption of vindictiveness where a defendant was prosecuted in federal court after rejecting plea bargain offer made on state charges); Moore v. State, 938 So. 2d 1254, 1264–65 (Miss. Ct. App. 2006), *cert. denied*, 939 So. 2d 805 (Miss. 2006) (declining to find a reasonable likelihood that vindictiveness existed when the defendant was sentenced to a punishment more severe than that contained in the plea bargain which he declined by refusing to testify for the State); State v. Miller, 981 S.W.2d 623, 629 (Mo. Ct. App. 1998) (determining that the prosecutor's amendment of the indictment to include recidivist charges was within prosecutorial discretion after defendant rejected a plea bargain); State v. Bethel, 110 Ohio St. 3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶ 79 (declining to hold that there was prosecutorial vindictiveness when the

The only exception to the general rule that increasing a charge after a defendant has rejected a plea offer does not constitute vindictiveness occurs when a defendant pleads guilty to a charge, successfully attacks the guilty plea on the basis that the terms of the plea have not been kept, and the prosecutor subsequently increases the charge or enhancement.[107]

In the absence of a presumption of vindictiveness, a defendant must prove actual vindictiveness in order to prevail on a claim of vindictive prosecution.[108] In proving actual vindictiveness, a defendant need not establish that the prosecutor acted in bad faith or maliciously.[109] Actual retaliatory motivation must not inevitably exist; rather, due process requires that a person convicted of an offense be entitled to pursue his rights "without apprehension that the State will retaliate by substituting a more

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prosecutor reinstated the original charge after the defendant violated the terms of the plea deal by refusing to testify); State v. Dawkins, 377 S.E.2d 298, 300 (S.C. 1989) (declining to find vindictiveness where a prosecutor brought four additional indictments following the defendant's motion to quash the original indictment for lack of specificity); State v. Korum, 141 P.3d 13, 23–24 (Wash. 2006) (concluding there was no prosecutorial vindictiveness where the prosecutor added charges after the defendant rejected a plea offer); *cf.* Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Michelson, 345 N.W.2d 112, 116 (Iowa 1984) (concluding that the attorney's due process rights were not violated when the disciplinary committee filed a complaint with the state supreme court because he had sufficient notice).

107. *See* Palm v. State, 656 S.W.2d 429, 436–37 (Tex. Crim. App. [Panel Op.] 1981) (refusing to affirm an enhancement of the defendant's punishment following a guilty plea when the record did not demonstrate that the defendant rejected the prosecution's plea offer); *Bouie*, 565 S.W.2d at 546–47 (applying a presumption of vindictiveness when the prosecution enhanced the defendant's punishment at a retrial in which the defendant had again entered a plea of guilty).

108. *See* United States v. Goodwin, 457 U.S. 368, 384 (1982) ("[W]e of course do not foreclose the possibility that the defendant in an appropriate case might prove objectively that the prosecutor's charging was motivated by a desire to punish him for something that the law plainly allowed him to do."); Neal v. State, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (en banc) (noting that the presumption that the prosecution is acting in good faith in bringing charges can be rebutted by "either a rebuttable presumption of prosecutorial vindictiveness or proof of actual vindictiveness").

109. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974) (finding a violation of defendant's due process rights when the prosecutor sought a felony indictment of the convicted individual awaiting appeal, even though there was no evidence that the prosecutor "acted in bad faith or maliciously"); Doherty v. State, 892 S.W.2d 13, 15–16 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd) (concluding that prosecutorial vindictiveness occurred when the prosecution increased the charge from murder to capital murder following the granting of a trial de novo, even though the prosecution waived the death penalty for the second trial).

serious charge for the original one."[110] In order to establish actual vindictiveness, a defendant must show "that the prosecutor's charging decision was a 'direct and unjustifiable penalty' that resulted 'solely from the defendant's exercise of a protected legal right.'"[111] "[T]he defendant shoulders the burden of both production and persuasion" when raising a claim of actual vindictiveness and is not afforded the aid of any legal presumption.[112]

Actual vindictiveness is difficult to prove. Mere "[h]ostility of a prosecutor towards a defendant is not, in and of itself, the constitutional equivalent of prosecutorial vindictiveness."[113] Nor is the mere "presence of a punitive motivation . . . an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity" sufficient to establish vindictiveness.[114] Generally, "[a] finding of actual vindictiveness [will] require[] 'direct' evidence, such as [a declaration] by the prosecutor, which is available 'only in a rare case.'"[115]

If a defendant properly raises the issue in a pre-trial hearing but "is unable to prove actual vindictiveness or a realistic likelihood of vindictiveness, [the] trial court need not reach the issue of [the prosecution's] justification"; in other words, "the State may stand mute unless and until the defendant carries his burden of proof."[116] Once a defendant carries his burden of proof, the

110. *Blackledge*, 417 U.S. at 28.

111. *See Neal*, 150 S.W.3d at 174 (quoting *Goodwin*, 457 U.S. at 384 n.19).

112. *Id.* at 174; *see* United States v. Sarracino, 340 F.3d 1148, 1177–79 (10th Cir. 2003) (holding that the defendant did not meet his burden of proving that the State violated a protected legal right); United States v. Moulder, 141 F.3d 568, 572 (5th Cir. 1998) ("The defendant must prove the claim by a preponderance of the evidence.").

113. Watson v. State, 760 S.W.2d 756, 759 (Tex. App.—Amarillo 1988, writ ref'd).

114. United States v. Goodwin, 457 U.S. 368, 372–73 (1982); *see also* United States v. Campbell, 410 F.3d 456, 461–62 (8th Cir. 2005) (refusing to find prosecutorial vindictiveness where the prosecutor indicted the defendant on a second count in a retrial because evidence was not discovered until the sentencing phase of the first trial); State v. Potts, 181 S.W.3d 228, 234 n.3 (Mo. Ct. App. 2005) (stating that the presence of objective evidence of actual vindictiveness is required for the defendant to overcome a presumption in favor of prosecutorial discretion).

115. United States v. Johnson, 171 F.3d 139, 140–41 (2d Cir. 1999) (quoting *Goodwin*, 457 U.S. at 384 n.19).

116. *Neal*, 150 S.W.3d at 175 (quoting United States v. Contreras, 108 F.3d 1255, 1262–63 (10th Cir. 1997)).

prosecution may respond with evidence of a lack of animus.[117] In the context of plea bargaining, such explanations might include a mistake in drafting the original charge, the discovery of additional evidence, or a defendant's refusal to comply with the terms of the original plea bargain.[118]

IV. NEGOTIATIONS

A. *Communication Between Prosecution and Defendant—the No-Contact Rule*

The basic rule governing communication with a person represented by counsel is straightforward:

> [A] lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[119]

The rule is obviously aimed at efforts to circumvent the

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117. *Id.* at 174; *see also* United States v. Johnson, 171 F.3d 139, 141–42 (2d Cir. 1999) (reversing a finding of prosecutorial vindictiveness because a presumption of vindictiveness was unwarranted since the prosecution demonstrated that they brought legitimate separate federal charges in the second trial); United States v. Amberslie, 312 F. Supp. 2d 570, 572 (S.D.N.Y. 2004) (ordering an evidentiary hearing to provide the prosecution with an opportunity to present witnesses to rebut a presumption of vindictiveness).

118. *See* Hood v. State, 185 S.W.3d 445, 450 (Tex. Crim. App. 2006) ("We decide that a 'mistake or oversight' explanation is an 'objective explanation' that may be sufficient to rebut a presumption of prosecutorial vindictiveness."); Castleberry v. State, 704 S.W.2d 21, 29 (Tex. Crim. App. 1984) (en banc) (determining that the defendant's withdrawal from a plea provided sufficient explanation for increased punishment); Sterling v. State, 791 S.W.2d 274, 278 (Tex. App.—Corpus Christi 1990, writ ref'd) (concluding that the discovery of additional evidence, particularly additional offenses the defendant had committed, was sufficient to rebut a vindictiveness allegation); *see also* United States v. Raymer, 941 F.2d 1031, 1042–43 (10th Cir. 1991) (determining that a defendant's refusal to agree to a plea bargain in a pretrial setting did not provide sufficient circumstances to warrant a presumption in favor of prosecutorial vindictiveness); United States v. Schenk, 299 F. Supp. 2d 1192, 1194–96 (D. Kan. 2003) (transferring the case to federal court after the defendant rejected a plea bargain offer in state court could have been prompted by lack of resources to pursue the case in state court; thus, the defendant failed to prove actual vindictiveness).

119. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

attorney-client relationship surrounding the subject of litigation.[120]

The rule against direct communication with a person represented by counsel has been "widely accepted"—all fifty states have adopted it in some form—and is of "venerable heritage."[121] Its roots can be traced to English common law[122] and early commentators.[123] By the turn of the century, the American Bar Association had adopted a form of the prohibition.[124] However, it was not until a half-century after its promulgation that defendants began to argue that the rule applied to criminal proceedings.[125] Even then, it was not until the late 1970s and early 1980s that courts began to hold that the rule actually applied

120. *See id.* 4.02 cmt. 1 (stating that the rule reflects efforts to circumvent the lawyer-client relationship between other persons, organizations, or entities of government and their counsel); *see also* United States v. Talao, 222 F.3d 1133, 1140 (9th Cir. 2000) (noting that the court is "keenly aware that assuring the proper functioning of the attorney-client relationship is an important rationale behind the rule"). By its wording, the rule does not prohibit communications with a represented person concerning subjects other than "the subject of representation." TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a). In theory, then, a prosecutor or defense attorney may contact a witness about an unrelated case for which the witness is not represented by counsel. Such a contact, however, will trigger counsel's responsibilities under Rule 4.03, which addresses a lawyer's dealing with unrepresented persons. *Id.* 4.03. A prosecutor who contacts a witness under such circumstance may in addition be governed by Rule 3.09 subsections (b) and (c), which cover a prosecutor's special duties concerning custodial interrogation and the waiver of rights of an accused. *Id.* 3.09(b)–(c).

121. United States v. Lopez, 4 F.3d 1455, 1458–59 (9th Cir. 1993); *In re* News Am. Publ'g, Inc., 974 S.W.2d 97, 100 n.3 (Tex. App.—San Antonio 1998) (orig. proceeding), *mand. granted*, *In re* Users Sys. Servs., Inc., 22 S.W.3d 331 (Tex. 1999).

122. *See Lopez*, 4 F.3d at 1459 (asserting that the rule prohibiting communication with represented parties without their counsel being present can be traced back to English common law).

123. *See In re News Am. Publ'g, Inc.*, 974 S.W.2d at 100 n.3 (quoting the author of an early treatise who stated that he would never enter a conversation with an opponent's client when counsel was not present).

124. *See* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 646–47 (2d Cir. 1995) (illustrating that the ABA adopted an early version of the rule in 1908); *Lopez*, 4 F.3d at 1458 (acknowledging that the ABA adopted a form of the prohibition in 1908).

125. *See Simels*, 48 F.3d at 647 (noting that the rule was not applied in criminal proceedings almost a half-century after it was promulgated); *see also In re* Chan, 271 F. Supp. 2d 539, 542 (S.D.N.Y. 2003) ("It is beyond dispute [that the no-contact rule] applies to criminal as well as civil actions."); Tex. Comm. on Prof'l Ethics, Op. 137, 19 TEX. B.J. 606 (1956) (opining that it is a violation of the Canons of Ethics for an assistant district attorney to attempt to elicit a confession from a defendant without consulting the defendant's counsel).

to criminal trials.[126]

Courts and commentators have advanced a number of reasons for the rule. The provision, it has been suggested, "protects a defendant from the danger of being tricked into giving his case away by opposing counsel's artfully crafted questions."[127] It has also been argued that the rule protects clients from disclosing privileged information or from being subject to unjust pressures, helps to settle disputes by channeling them through dispassionate experts, rescues lawyers from a conflict between their duty to advance their client's interests and their duty not to overreach an unprotected opposing party, and provides parties with a rule that most would choose anyway.[128]

Moreover, a defendant may not waive an attorney's obligation to notify opposing counsel under Rule 4.02(a).[129] "The rule

126. *See Simels*, 48 F.3d at 647 (stating that the rule prohibiting communication between a lawyer and another party represented by counsel did not apply to criminal cases until 1983); *see also* Suarez v. State, 481 So. 2d 1201, 1205 (Fla. 1985) (concluding that the no-contact rule applies in criminal cases); People v. Green, 274 N.W.2d 448, 453 (Mich. 1979) (applying the no-contact rule to criminal cases and citing other jurisdictions that have adopted the same approach); Gentry v. State, 770 S.W.2d 780, 791–92 (Tex. Crim. App. 1988) (deciding that when a post-indictment statement is made in violation of the rule, it will be subject to great scrutiny on appeal despite a waiver of rights).

127. *Simels*, 48 F.3d at 647 (quoting United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983)); *see also* United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990) ("The rule appears to be intended 'to protect a defendant from the danger of being "tricked" into giving his case away by opposing counsel's artfully crafted questions.'" (quoting *Jamil*, 707 F.2d at 646)); State v. Miller, 600 N.W.2d 457, 463 (Minn. 1999) ("The purpose of a disciplinary 'no-contact rule' is generally considered to be to protect the represented individual from 'the supposed imbalance of legal skill and acumen between the lawyer and the party litigant.'" (quoting Massiah v. United States, 377 U.S. 201, 211 (1964) (White, J., dissenting))); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 259 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("The purpose of Rule 4.02(a) is 'to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer.'" (quoting *In re News Am. Publ'g, Inc.*, 974 S.W.2d at 100)); *In re* Disciplinary Proceeding Against Carmick, 48 P.3d 311, 319 (Wash. 2002) ("The rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel.").

128. *See Simels*, 48 F.3d at 647 (stating that the rule furthers other interests of the client, such as: protecting them from being pressured or disclosing privileged information; settling disputes; keeping lawyers from overstepping their bounds; and providing a rule that most lawyers would follow).

129. *See In re* News Am. Publ'g, Inc., 974 S.W.2d 97, 102 (Tex. App.—San Antonio 1998) (orig. proceeding), *mand. granted*, *In re* Users Sys. Servs., Inc., 22 S.W.3d 331 (Tex. 1999) (noting that a represented person cannot waive the rule because one major function of the rule is "to protect the effectiveness of the lawyer's representation"); *see also* United States v. Lopez, 4 F.3d 1455, 1462 (9th Cir. 1993) (stating that the rule is fundamentally

against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties."[130] "Consequently, . . . ethical obligations are personal, and may not be vicariously waived."[131]

Furthermore, communications with an accused after indictment regarding the charged offense are not only prohibited under the rule but implicate the Sixth Amendment.[132] The Texas Court of

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concerned with the duties of the attorney and not the rights of the party; thus, the rule cannot be vicariously waived); United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1972) (holding that once a defendant has an attorney, any interviews the defendant may obtain are not admissible into evidence unless his counsel was notified prior to the interview); United States v. Batchelor, 484 F. Supp. 812, 813 (D. Pa. 1980) (deciding that the premise of the rule does not contemplate waiver by the defendant); Suarez v. State, 481 So. 2d 1201, 1206 (Fla. 1985) (opining that regardless of whether a defendant agrees to an interview, it is a violation of ethics for an opposing attorney to interview that defendant without notifying his attorney); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) (stating that once the defendant has retained counsel, that counsel should be present when the opposing attorney speaks with the defendant); *cf.* State v. Clark, 738 N.W.2d 316, 339 (Minn. 2007) (holding that mere notice to the defendant's lawyer and an opportunity to be present do not satisfy the requirements of Rule 4.2).

130. *Lopez*, 4 F.3d at 1462, *quoted in In re News America Publ'g, Inc.*, 974 S.W.2d at 103.

131. *Id.*; *see also* State v. Miller, 600 N.W.2d 457, 464 (Minn. 1999) ("The right belongs to the party's attorney, not the party, and the party cannot waive the application of the no-contact rule—only the party's attorney can approve the direct contact and only the party's attorney can waive the attorney's right to be present during a communication between the attorney's client and opposing counsel.").

132. *See* Maine v. Moulton, 474 U.S. 159, 180 (1985) (determining that it would be a violation of the Sixth Amendment to admit evidence that was obtained by circumventing an accused's right to counsel); United States v. Morrison, 449 U.S. 364, 364 (1981) (suggesting that the assistance of counsel assures fairness in the criminal process and that any governmental interference could render counsel ineffective); United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (noting that the Sixth Amendment would be nullified if the lawyer-client relationship could be circumvented by a prosecutor attempting to pursue a criminal investigation); United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981) (agreeing with appellant's contention that it was highly unethical conduct for the government to remove the defendant from confinement and to question him without his counsel present); *see also* Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 260 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that communications with the plaintiff without her attorney's knowledge or permission violated Rule 4.02). Law enforcement personnel can constitutionally communicate with a defendant regarding unrelated offenses, however, as the Sixth Amendment right to counsel is "offense specific." *See* Texas v. Cobb, 532 U.S. 162, 167–68 (2001) ("[A] defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses."); *see also* Andrew Hanawalt, Note, *Investigation of Represented Defendants After* Texas v. Cobb, 81 TEX. L. REV. 895, 898–925 (2003) (discussing the scope of *Cobb* and recommending that

Criminal Appeals' interpretation of the Sixth Amendment is that once the Sixth Amendment right has attached and the accused is represented by counsel, police and other authorities may only initiate interrogation through notice to defense counsel.[133]

Of course, a defendant may no doubt waive his Sixth Amendment right.[134] However, a defendant represented by an attorney and whose Sixth Amendment right has attached cannot, as a matter of constitutional law, unilaterally waive his Sixth Amendment right to counsel if the State has initiated the interrogation.[135] A defendant may nevertheless discharge his attorney and represent himself pro se.[136] A lawyer is not

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Congress and state legislatures "enact laws that reduce opportunities for abuse under *Cobb*").

133. *See* Upton v. State, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993) (concluding that once the Sixth Amendment right to counsel attaches to a defendant, the police may only interrogate the defendant once his counsel has been notified).

134. *See* Gentry v. State, 770 S.W.2d 780, 790 (Tex. Crim. App. 1988) (deciding that appellant's statement made it clear that he did not want his court-appointed counsel present); *see also In re* Howes, 1997–NMSC–024, 123 N.M. 311, 319, 940 P.2d 159, 167 (disciplining the Assistant United States Attorney for "communicating" with a defendant who was represented by counsel after the prosecutor, who the defendant contacted, accepted the defendant's phone calls and listened to the defendant's statements, though he refrained from asking the defendant questions); Lawyer Disciplinary Bd. v. Jarrell, 523 S.E.2d 552, 555–56 (W. Va. 1999) (noting that the prosecutor violated the prohibition against communicating with the defendant, who was represented by counsel, when the prosecutor discussed the possibility of a plea bargain with the defendant after the defendant's counsel failed to appear for a hearing).

135. *See* Michigan v. Jackson, 475 U.S. 625, 636 (1986) (asserting that once a defendant is represented by counsel, any waiver of that right for police interrogation will be invalid); *Upton*, 853 S.W.2d at 553 (acknowledging that once the Sixth Amendment attaches, a defendant cannot unilaterally waive that right for police interrogation).

136. *See* Thompson v. State, 347 So. 2d 1371, 1376 (Ala. Crim. App. 1977) (deciding that the defendant had knowingly and intelligently waived his right to counsel); State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976) (determining that the law enforcement officer had no duty to contact defendant's counsel when the defendant had knowingly and voluntarily waived the right to counsel); Shreeves v. United States, 395 A.2d 774, 778 (D.C. 1978) (discussing the appellant's knowing and voluntary waiver of the presence of his attorney during his interrogation); State v. Ruth, 637 P.2d 415, 419 (Idaho 1981) (opining that the right to counsel may be voluntarily waived after it has attached so long as the waiver is made knowingly and intelligently); State v. Desnoyers, 2002-NMSC-031, ¶ 20, 132 N.M. 756, 55 P.3d 968 ("Defendant's waiver of his right to counsel was voluntary."); State v. Ford, 793 P.2d 397, 401 (Utah 1990) (stating that a defendant can voluntarily waive his right to counsel); *see also* United States v. Talao, 222 F.3d 1133, 1141 (9th Cir. 2000) (proclaiming that where the defendant-witness initiated contact and revealed that she wished to deal with the government but did not trust her attorney, who also represented the defendant corporation, "the U.S. Attorney ... did the right thing in advising [the defendant-witness] that she had the right to be represented by an attorney and giving her

obligated under Rule 4.02 to confirm that the defendant has in fact terminated counsel's representation where the lawyer has no reason to disbelieve a defendant's assurance that she has discharged counsel, though it may be a "sensible course" to do so in "many instances."[137]

While a person can terminate his attorney and communicate with the State pro se,[138] the communicating prosecutor should exercise extreme caution when a defendant represents that he is

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the opportunity to contact substitute counsel"). *But see* United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) ("[O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by the interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present."); People v. Hobson, 348 N.E.2d 894, 896 (N.Y. 1976) (determining that under the New York Constitution the right to counsel cannot be waived without notification of counsel).

137. *In re* Users Sys. Servs., Inc., 22 S.W.3d 331, 334–36 (Tex. 1999) (orig. proceeding). *But see* State v. Yatman, 320 So. 2d 401, 403 (Fla. Dist. Ct. App. 1975) (declaring that while the prosecutor may not have known the defendant was represented by counsel, "it would behoove one in his position to make some reasonable inquiry to find out"); *In re* Capper, 757 N.E.2d 138, 139–40 (Ind. 2001) (reprimanding an attorney for relying upon his client's representation that the opposing party—the client's ex-wife—was not represented by counsel and contacting the opposing party without notifying opposing counsel); Iowa Supreme Court Attorney Disciplinary Bd. v. Box, 715 N.W.2d 758, 765 (Iowa 2006) ("We are not suggesting that [the no contact rule] serves to defeat the right of the party sought to be contacted by an attorney to discharge that party's own lawyer. It does, however, require verification that this has been done before the other lawyer makes contact with a previously represented party."); Gentry v. State, 770 S.W.2d 780, 790–92 (Tex. Crim. App. 1988) (stating that even though the defendant terminated defense counsel "without a doubt," the prosecutor violated Rule 4.02 by not contacting the defense attorney when the defendant informed him that he no longer wished to be represented by counsel and then confessed, but violation of the rule did not warrant reversal of defendant's conviction); *In re* News Am. Publ'g, Inc., 974 S.W.2d 97, 99–100, 103 (Tex. App.—San Antonio 1998) (orig. proceeding), *mand. granted*, *In re* Users Sys. Servs., Inc., 22 S.W.3d 331 (Tex. 1999) (deciding that the attorney violated Rule 4.02(a) by failing to contact the defendant's lawyer after the defendant informed him that he had discharged his attorney and by continuing to negotiate a settlement); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) (noting that counsel should not communicate with a person represented by counsel until the person's lawyer has withdrawn his appearance in the case).

138. *See* United States v. Lopez, 4 F.3d 1455, 1463 (9th Cir. 1993) ("[The rule] does not bar communications with persons who have waived their right to counsel, for by its express terms the rule only applies to 'communications with a *represented* party.'" (quoting CAL. RULES OF PROF'L CONDUCT R. 2-100 (1989), *available at* http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (follow "Rule 2-100" hyperlink under "Rules Operative–May 27, 1989"))).

acting pro se.[139] At the very least, a prudent prosecutor should contact the person's counsel and ascertain directly whether counsel has been terminated.[140] A State's attorney would also be wise to ascertain whether the defendant initiated the interrogation before determining whether a waiver of the right to counsel was valid.[141]

Rule 4.02 does not expressly prohibit communications with a represented person concerning subjects other than "the subject of the representation."[142] In theory, then, a prosecutor may contact a defendant about an unrelated case for which the defendant is not represented by counsel.[143] A prosecutor may not manipulate this exception, however, by negotiating a plea bargain under the guise of investigating other cases or criminal activity in general.[144] Moreover, contact under this exception will trigger counsel's responsibilities under Rule 4.03, which addresses a lawyer's

139. *See Gentry*, 770 S.W.2d at 790–92 (determining that although the prosecutor violated Rule 4.02 by not contacting the defendant's lawyer when the defendant informed him that he no longer wished to be represented by counsel, such a violation did not constitute harmful error); *In re News Am. Publ'g, Inc.*, 974 S.W.2d at 99, 103 (concluding that defense counsel violated Rule 4.02(a) by communicating with the plaintiff even though the plaintiff supplied defense counsel with a signed letter stating that he was "no longer represented by any attorney").

140. *See In re News Am. Publ'g, Inc.*, 974 S.W.2d at 106 (Green, J., dissenting) ("As a matter of professional courtesy, most lawyers would confirm with counsel that the attorney-client relationship had been severed before entering into discussions with an opposing party.").

141. *See* Upton v. State, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993) (noting that even if the accused did not invoke his Sixth Amendment rights, he did invoke his Fifth Amendment right to counsel, and thus, all interrogation should have ceased; for any subsequent waiver of counsel to be effective, it must have resulted from either communications initiated by the accused or in the presence of counsel).

142. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a) & cmt. 2, *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

143. *See* United States v. Gonzalez-Lopez, 399 F.3d 924, 931–32 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006) (explaining that the no-contact rule does not apply to an attorney with no involvement in the case for which the defendant is being represented by pre-existing counsel).

144. *See In re* Conduct of Burrows, 629 P.2d 820, 824–25 (Or. 1981) (concluding that the prosecutor violated Rule 4.02 by discussing undercover drug activities with the defendant without defense counsel's consent because the "activities were likely to, or at least were expected to, impact the pending criminal charges"); *In re* Disciplinary Proceedings Against Dumke, 489 N.W.2d 919, 922 (Wis. 1992) (determining that the prosecutor violated Rule 4.02 by initiating communications regarding reduction of the defendant's sentence on pending charges in exchange for assistance in drug investigations).

dealings with unrepresented persons.[145] A prosecutor who contacts a defendant under such circumstances may also be governed by Rules 3.09(b) and (c), which cover a prosecutor's special duties concerning custodial interrogation and the waiver of rights of an accused.[146]

B. *Negotiating with a Pro Se Defendant*

A prosecutor should take special care in dealing with a pro se defendant. The Texas Code of Criminal Procedure explicitly prohibits State's counsel "[i]n any adversary judicial proceeding that may result in punishment by confinement ... [from] communicat[ing] with a defendant who has requested the appointment of counsel, unless the court ... has denied the request" on the grounds that the defendant is not indigent *and* the defendant has either failed to retain counsel after being "given a reasonable opportunity" to do so "or has waived the opportunity."[147] Counsel is also prohibited from "initiat[ing] or encourag[ing] an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel."[148]

Furthermore, Rule 3.09(c) admonishes prosecutors "not [to] initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights."[149] The comment to the rule explains that it "does not apply to any person who has knowingly, intelligently and voluntarily waived [his] rights ... in open court."[150] The comment adds that the rule also does not "apply to any person appearing

145. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 4.03 (prohibiting a lawyer from stating or implying that he is disinterested when dealing with an unrepresented person on behalf of the lawyer's client).

146. *See id.* 3.09(b)–(c) (delineating a prosecutor's responsibilities regarding the interrogation of an accused when the accused's counsel is not present).

147. TEX. CODE CRIM. PROC. ANN. art. 1.051(f-1)(2) (Vernon Supp. 2007).

148. *Id.* art. 1.051(f-1)(1). Section (f-2) of the statute further provides that a "court may not direct or encourage [a] defendant to communicate with the attorney representing the state until the court advises the defendant of [his] right to counsel and the procedure for" the appointment of counsel. *Id.* art. 1.051(f-2). If the defendant requests appointed counsel, "the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court" has denied the appointment of counsel and subsequently provided the defendant the opportunity to secure counsel or the defendant has waived his right to counsel. *Id.*

149. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c).

150. *Id.* 3.09(c) cmt. 4.

pro se with the approval of the tribunal."[151] Thus, a prosecutor may, within the bounds of ethics, discuss waiving certain rights during plea negotiations with a pro se defendant.[152]

A prosecutor should ensure during negotiations that the pro se defendant understands the prosecutor's role in the proceedings. Rule 4.03 cautions that "[i]n dealing . . . with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."[153] As the comment explains, "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in [his] loyalties or is a disinterested authority on the law."[154] The rule therefore seeks to prevent an attorney from taking advantage of an unrepresented person's lack of sophistication or credulity. In an added effort to shield the unrepresented person, Rule 4.03 requires a lawyer to "make reasonable efforts to correct [any] misunderstanding" of his role in the matter "[w]hen the lawyer knows or reasonably should know that" a misunderstanding has developed.[155]

The spirit of the rule clearly intends to protect the unsophisticated against the experience and interest of attorneys preparing a case for litigation. The possibility that a defendant might misunderstand an attorney's role in a case is greater when the person is dealing with a prosecutor, whom the defendant might believe is acting, as a representative of the State, in a wholly disinterested capacity. Furthermore, advice by a prosecutor to a defendant may implicate Rules 3.09(b) and (c).[156]

Rule 4.03 does not prevent a lawyer from giving legal advice to an unrepresented person. The comment, however, after highlighting the possibility that an unrepresented person might misunderstand a lawyer's role in a matter, declares that counsel

151. *Id.*

152. *Id.* 3.09(c) & cmt. 4.

153. *Id.* 4.03.

154. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.03 & cmt.; *see also* N.C. State Bar Ethics Op. 189 (Oct. 21, 1994) (opining that prosecutors may not advise pro se defendants in traffic court on the advantages and disadvantages of possible plea bargain agreements, as defendants might believe that prosecutors are disinterested).

155. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.03, *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G App. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

156. *See id.* 3.09(b)–(c) (prohibiting prosecutors from undertaking certain acts with regard to unrepresented defendants).

"should not give advice to an unrepresented person other than the advice to obtain counsel."[157] The comments, as the preamble explains, "are [only] permissive, defining areas in which the lawyer has professional discretion."[158] Since "no disciplinary action may be taken" against a lawyer for exercising such discretion, a prosecutor ethically may offer advice to a pro se defendant without running afoul of the rule once it is clear that the defendant does not misunderstand that the lawyer is not disinterested.[159] Any advice outside that recommended by the comment, however, might affect whether any subsequent plea may be determined voluntary or knowing by a court accepting the plea.[160] Thus, from a practical standpoint, a prosecutor should avoid giving legal advice to a pro se defendant beyond suggesting that the defendant seek counsel.

C. *Bargaining*

1. Representations to the Opposing Party as Part of Negotiations

In addition to prescribing candor toward a tribunal, the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from making false statements to others outside the context of presenting evidence to the tribunal. Rule 4.01 declares that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."[161] As the comment explains, "[a] lawyer violates [the provision] either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another

157. *Id.* 4.03 & cmt.; *see also* People v. Clough, 74 P.3d 552, 560 (Colo. 2003) (addressing an allegation that the defense counsel's encounter with a prosecution witness at the courthouse, during which time he accused her of being drunk and "advised [her] to either take the 'Fifth' or to say that she arrived by bus," violated rules against giving advice to unrepresented persons).

158. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10.

159. *Id.*

160. *See* United States v. Talao, 222 F.3d 1133, 1141 (9th Cir. 2000) (praising a prosecutor for declining to discuss the case with a defendant who wished to fire her attorney, advising her to seek new counsel, and giving her the opportunity to seek a new attorney); *see also* N.C. St. Bar Ethics Op. 189 (Oct. 21, 1994) (stating that prosecutors may advise a pro se defendant to seek counsel).

161. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(a).

person."[162] A prosecutor, for instance, who represents to a defendant that the State will introduce certain evidence based upon a witness's statement that the prosecutor knows is false would run afoul of the rule.[163] Similarly, defense counsel who insists his client is innocent based upon an alibi counsel knows is false would also violate the rule.[164]

Statements will violate the rule, however, "only if the lawyer knows they are false and intends thereby to mislead."[165] Thus, a lawyer who threatens prosecution based upon a witness's statement which he only suspects may be false does not violate Rule 4.01(a). Similarly, a defense attorney's claim of innocence on behalf of his client based upon statements the lawyer believes, but does not know, are false will not violate Rule 4.01(a).[166]

The comment also stresses that the rule is not quite as rigid as it might first appear when applied to settlement negotiations.[167] "[U]nder generally accepted conventions in negotiation," Comment 1 observes, "a party's supposed intentions as to an

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162. *Id.*

163. *See* ABA Comm'n on Ethics & Prof'l Responsibilty, Formal Op. 06-439 (2006) (explaining, as an example of a false statement of material fact, that "neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case"); *cf. In re* McGrath, 468 N.Y.S.2d 349, 350–52 (N.Y. App. Div. 1983) (per curiam) (disciplining an attorney for representing that the client's insurance coverage was for only $200,000, rather than $1,000,000 of the actual policy); Flume v. State Bar of Tex., 974 S.W.2d 55, 60 (Tex. App.—San Antonio 1998, no pet.) (serving a file-marked copy of an unsigned temporary restraining order without explaining that the order was not valid violated Rule 4.01(a)).

164. *Cf.* Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578, 579–80 (Ky. 1997) (disciplining an attorney for violating Rule 4.1 by failing to disclose that her client in a personal injury suit had died during settlement negotiations); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 872–73 (Ohio 1977) (per curiam) (suspending indefinitely an attorney who failed to disclose the client's death in a workmen's compensation case).

165. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01 cmt. 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

166. *Cf. id.* 3.03(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal."); *id.* 3.03(a)(5) ("A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false."); Smith v. Black, 904 F.2d 950, 962 (5th Cir. 1990), *vacated*, 503 U.S. 930 (1992) (asserting that a prosecutor is obligated to reveal the falsity of testimony only when he "knows" the testimony is false); Weisinger v. State, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd) (declaring that counsel's belief alone that testimony is false is insufficient to justify his refusal to introduce that testimony).

167. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01 cmt. 1 (explaining that during settlement negotiations, negotiating positions are not viewed as representations of material fact).

acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact."[168] In the context of plea negotiations, the rule and the comment together suggest that a prosecutor may not misrepresent the underlying facts of a case in plea talks, but he may represent that the State will charge a greater degree of offense or demand a greater punishment than it is actually willing to accept in the case.[169] Similarly, defense counsel may not misrepresent the facts, but she may contend that the defendant will assert various possible defenses that she does not believe she will actually put forward at trial. Defense counsel may also maintain that her client is not willing to plead to a greater charge or accept a higher sentence than the client in actuality may be prepared to accept.

Prosecutors especially should exercise caution during plea negotiations.[170] As one commentator has noted, "[d]isciplinary sanctions are avoided only when *all* parties to the negotiation—not merely the party implicated in the falsehoods—could reasonably believe that any misrepresentations are part of the tactical sparring of preliminary negotiations."[171] A prosecutor who threatens greater charges must also remember the proscription of Rule 3.09(a) that he "refrain from . . . threatening to prosecute a charge that [he] knows is not supported by probable cause."[172]

Rule 4.01(b) also admonishes lawyers not to knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or

168. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

169. ABA Comm'n on Ethics & Prof'l Responsibilty, Formal Op. 06-439 (2006) ("[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's 'bottom line' position, in an effort to reach a more favorable resolution.").

170. *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 7.2–7.5 (1998) (examining conduct that the author maintains constitutes prosecutorial misconduct during plea bargaining).

171. Robert P. Schuwerk & John F. Sutton, Jr., *Commentary on the Texas Disciplinary Rules of Professional Conduct, in* TEXAS LAWYERS' PROFESSIONAL ETHICS 1–92 (3d ed. 1997); *see also* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1026 (1989) (arguing in favor of an increased responsibility of prosecutors for making disclosures during the plea bargain process).

172. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a).

knowingly assisting a fraudulent act perpetrated by a client."[173] Thus, defense counsel may not act as a conduit for his client during negotiations and later claim he was merely passing along information or a message. Literally interpreted, prosecutors are not subject to that provision in Rule 4.01(b), since it applies to disclosures necessary to avoid becoming a party to criminal or fraudulent acts "perpetrated by a client."[174] However, in keeping with the prosecutorial duties of candor and justice, it is also the intention of the rule that a prosecutor would do well to follow its prescription in situations in which it becomes apparent that a prosecution witness may be attempting to commit perjury.

2. Plea Bargaining Criminal and Civil Cases Together

Rule 4.04(b) requires that "[a] lawyer shall not present, participate in presenting, or threaten to present . . . criminal or disciplinary charges solely to gain an advantage in a civil matter."[175] Since the rules governing conflicts of interest

173. *Id.* 4.01(b).

174. *See* Draughon v. State, 831 S.W.2d 331, 336 (Tex. Crim. App. 1992) (stating that prosecutors do not represent victims as "clients").

175. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(b)(1); *see also* People *ex rel.* Gallagher v. Hertz, 608 P.2d 335, 338 (Colo. 1979) (explaining the reasoning behind disciplining a special prosecutor for threatening criminal action in an effort to get a settlement in a civil case); People v. Attorneys Respondent, 427 P.2d 330, 330 (Colo. 1967) (reprimanding a district attorney for filing criminal charges and extraditing a woman in an effort to collect a debt for a client); *In re* LaPinska, 381 N.E.2d 700, 705 (Ill. 1978) (describing the suspension of a city attorney for using the "leverage and power of his position" to gain a favorable settlement for his client); *In re* Lantz, 420 N.E.2d 1236, 1237 (Ind. 1981) (discussing a prosecutor who was reprimanded for filing bad check charges on behalf of a client, giving the appearance that a public office was being used to collect private debts); *In re* Joyce, 234 N.W. 9, 10 (Minn. 1930) (explaining the suspension of a county attorney for filing criminal charges in an effort to enforce a trade agreement for the client); *In re* Bunston, 155 P. 1109, 1111 (Mont. 1916) (detailing the disbarment of a county attorney for sending a settlement claim on county letterhead and refusing to dismiss criminal charges unless the defendants paid debts owed to the attorney's clients); *In re* Waggoner, 206 N.W. 427, 432 (S.D. 1925) (ordering the suspension of a State's attorney for filing criminal charges of adultery against a defendant at the same time he was representing the wife in a divorce action); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 261 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (describing a lawyer's violation of the rule against threatening criminal action to gain advantage in a civil matter when he informed the opposing party that he suspected she had broken into his apartment and assured her that he would not report the break-in if the lawsuit could be settled); *cf.* McDonald v. Musick, 425 F.2d 373, 374–75 (9th Cir. 1970) (asserting that a prosecutor may not attempt to plea bargain away a potential civil suit and then file additional charges if that attempt fails).

generally prohibit district attorneys from representing a victim simultaneously in civil and criminal actions,[176] a State's attorney will rarely be confronted with the danger of directly violating this provision.[177] However, the rule is not limited to lawyers directly connected to the civil suit—under the wording of the rule, an attorney who presents or threatens to present a criminal charge against another on behalf of a third party solely to gain advantage in a civil suit violates the prohibition, regardless of whether he would personally gain anything from the threat.[178]

Subsection (2) of the rule also prohibits a lawyer from threatening "civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation" in the disciplinary action.[179] In addition, section 15.09 of the Texas Rules of Disciplinary Procedure provides the same persons with complete immunity from suit predicated on their communications with a grievance committee or its counsel.[180]

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176. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 810 (1987); Ganger v. Peyton, 379 F.2d 709, 711 (4th Cir. 1967); *In re* Belue, 766 P.2d 206, 210 (Mont. 1988) (holding that a county attorney could not represent both the county and the crime victim); *see also* Adkins v. Commonwealth, 492 S.E.2d 833, 835–36 (Va. Ct. App. 1997) (holding that a special prosecutor's former position as counsel to the victims in a civil suit created a conflict of interest requiring the prosecutor's disqualification); EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE 139–42 (2006 ed.); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 173, 182–92 (2002).

177. *See* People v. Parmar, 104 Cal. Rptr. 2d 31, 50–51 (Cal. Ct. App. 2001) (concluding that no conflict existed where a prosecutor represented the State in prosecutions of nuisance cases in both criminal and civil courts in an attempt to stop an ongoing nuisance); State v. Moen, 76 P.3d 721, 725 (Wash. 2003) (explaining that it is not a violation of the rule against using criminal prosecution to gain advantage in a civil action where a wholly separate entity, represented by different counsel, brought the forfeiture proceeding).

178. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(b)(1) (prohibiting a lawyer from bringing or threatening "criminal or disciplinary charges solely to gain an advantage in a civil matter"); *see also* State v. Cortner, 893 So. 2d 1264, 1273 (Ala. Crim. App. 2003) (declaring that a plea agreement used to dismiss a criminal charge in exchange for a civil forfeiture was void as against public policy); Weiss v. Comm'n for Lawyer Discipline, 981 S.W.2d 8, 18–19 (Tex. App.—San Antonio 1998, pet. denied) (relating that an attorney violated the rule by threatening prosecution on stalking charges if the client failed to pay a contingent fee).

179. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(b)(2).

180. *See* TEX. R. DISCIPLINARY P. 15.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005) (granting express immunity to complainants and witnesses).

Rule 4.04 does not directly bar defense counsel from threatening civil action to gain advantage in a criminal law matter. However, in light of the prohibition in subsection (a) that a lawyer "shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person," a threat of civil action which has no basis or which defense counsel would bring merely to harass or embarrass a prosecutor would violate the spirit, if not the letter, of the rule.[181] Furthermore, if there were no basis for the civil action, a lawyer's mere threat could violate Rule 3.01—"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous"—and Rule 3.02—"In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[182]

But what of plea bargains which involve a defendant's civil release in exchange for dismissal of the criminal action? The Supreme Court has held that release-dismissal agreements which involve a defendant's waiver of civil causes of action are valid, and thus has implied that the prosecutor's representation of the State in a dual capacity as prosecutor and State's attorney does not create a conflict of interest and does not appear to violate ethical canons.[183]

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181. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(a).

182. *Id.* 3.01–.02.

183. *See* Town of Newton v. Rumery, 480 U.S. 386, 397 (1987) ("Because release-dismissal agreements may further legitimate prosecutorial and public interests, we reject the Court of Appeals' holding that all such agreements are invalid *per se.*"); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-3.9(g), 71–72 (3d ed. 1993) ("The prosecutor should not condition a dismissal of charges . . . on the accused's relinquishment of the right to seek civil redress *unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such a waiver is approved by the court.*" (emphasis added)). *But see* McDonald v. Musick, 425 F.2d 373, 374–75 (9th Cir. 1970) (forbidding the dismissal of criminal charges in exchange for a forestallment of civil litigation); *Cortner*, 893 So. 2d at 1273 (determining that a release-dismissal agreement violates public policy in multiple ways); Cowles v. Brownell, 73 N.Y.2d 382, 387 (1989) (obtaining a release "is not the duty of the prosecutor," and in deciding to obtain one, the prosecutor must ignore his "obligation . . . to exercise independent judgment in deciding to prosecute or refrain from prosecution"); Erin P. Bartholomy, Note, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331, 352–58 (1993) (concluding that release-dismissal agreements constitute prosecutorial misconduct).

3. The Prosecution's Duty to Disclose

Although, as the Supreme Court has observed, "the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision likely will be," a prosecutor is not obligated to provide the defendant with "all useful information" in her possession before entering into plea bargain discussions.[184] A prosecutor is not even constitutionally obligated to disclose impeachment evidence in her possession prior to entering into a plea bargain with a defendant, although the prosecutor would be obligated to turn over such evidence before the case went to trial.[185]

It is unclear whether a prosecutor has a constitutional duty to disclose material exculpatory evidence—as opposed to impeachment evidence—before entering into a plea bargain.[186] At least two Texas cases suggest that prosecutors have a duty to disclose exculpatory evidence before entering a plea bargain, but as both can be distinguished, they do not resolve the issue.[187] A

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184. United States v. Ruiz, 536 U.S. 622, 629 (2002); *see also* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case.").

185. *See Ruiz*, 536 U.S. at 633 ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.").

186. It is clear that a prosecutor does not have a constitutional duty to disclose evidence that is not material and exculpatory before entering into a plea bargain. *See Weatherford*, 429 U.S. at 559 (determining that there is no constitutional right to discovery); Michaelwicz v. State, 186 S.W.3d 601, 613 (Tex. App.—Austin 2006, pet. ref'd) (concluding that discovery is not a constitutionally protected right); *see also* People v. Jones, 375 N.E.2d 41, 44 (N.Y. 1978) (stating that the prosecutor had no duty to inform the defendant that the key witness had died before negotiating a guilty plea).

> Suppressed information that would have changed a defendant's mind about pleading guilty but is not exculpatory of the charge to which he pleaded guilty should not be considered favorable. There is no constitutional violation if the record shows that the defendant's verdict and punishment are accurate in light of all the evidence.

Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1016 (1986).

187. *See Ex parte* Lewis, 587 S.W.2d 697, 703 (Tex. Crim. App. [Panel Op.] 1979) (holding that the prosecutor's failure to reveal a letter from a psychiatrist suggesting the defendant was incompetent to stand trial violated due process). A close reading of *Ex parte Masonheimer*, 220 S.W.3d 494, 494 (Tex. Crim. App. 2007), in which the Court of Criminal Appeals held that double jeopardy bars a third retrial of a defendant following a declaration of mistrial during the first trial and a subsequent mistrial during a proceeding on the defendant's plea of *nolo contendere,* reveals that the court focused on the State's failure to disclose exculpatory evidence before the first trial, rather than on the second

number of pre-*Ruiz*[188] decisions, on the other hand, suggest that there is no duty to disclose before a plea,[189] and the reasoning the Supreme Court applied to its rejection of a duty to disclose impeachment evidence is applicable to exculpatory evidence as well.[190]

The Texas Disciplinary Rules of Professional Conduct offer little guidance. Rule 3.09(d) requires a prosecutor to "make timely disclosure to the defense of all evidence or information

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plea hearing, thus leaving open the question of whether the prosecution has a duty to disclose exculpatory evidence prior to entering into a plea bargain.

188. United States v. Ruiz, 536 U.S. 622 (2002).

189. *See* Orman v. Cain, 228 F.3d 616, 620 (5th Cir. 2000) ("The duty articulated in *Brady* . . . was expressly premised on a defendant's right to a fair trial, a concern that does not animate [a guilty plea]."); Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985) ("[T]here is no authority within our knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process."); *see also* White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (citing cases which have refused to provide impeachment evidence before trial); United States v. Kidding, 560 F.2d 1303, 1313 (7th Cir. 1977) (deciding that a defendant has no constitutional right to be apprised of inculpatory evidence before a plea bargain); United States v. Victor Teicher & Co., 726 F. Supp. 1424, 1442–43 (S.D.N.Y. 1989) (citing cases in which courts have refused to provide impeachment evidence before trial); United States v. Ayala, 690 F. Supp. 1014, 1016 (S.D. Fla. 1988) (holding that the results of a fingerprint analysis implicating only the codefendant, which were not revealed to the defendant prior to entering into a plea bargain, did not affect the "consensual nature of the plea thereby impairing its validity"); United States v. Wolczik, 480 F. Supp. 1205, 1210 (W.D. Pa. 1979) (concluding the defendant has no right to obtain *Brady* material in deciding whether or not to plead guilty prior to trial); People v. Simone, 401 N.Y.S.2d 130, 134 (N.Y. Sup. Ct. 1977) (acknowledging courts that have declined to impose upon prosecutors a duty to disclose exculpatory evidence before trial), *aff'd*, 418 N.Y.S.2d 725 (N.Y. App. Div. 1979). *But see* Tate v. Wood, 963 F.2d 20, 25–26 (2d Cir. 1992) (remanding the case for a *Brady* evidentiary hearing where the prosecutor failed to reveal evidence before making a plea agreement that the victim may have been the first aggressor); Fambo v. Smith, 433 F. Supp. 590, 598–600 (W.D.N.Y. 1977) (holding that the prosecutor should have informed the defendant that the dynamite was actually filled with sawdust before accepting a plea bargain but that the failure is harmless where a defendant would still have pled to a second count), *aff'd*, 565 F.2d 233 (2d Cir. 1977); State v. Gardner, 885 P.2d 1144, 1153 (Idaho Ct. App. 1994) (allowing a defendant to withdraw his guilty plea because the prosecution failed to disclose a material exculpatory witness statement prior to entry of the guilty plea); State v. Johnson, 816 P.2d 364, 368–71, (Idaho Ct. App. 1991) (allowing the defendant to withdraw his guilty plea because the State failed to disclose police reports that were exculpatory and material).

190. *Compare Ruiz*, 536 U.S. at 628–34 (reasoning that disclosure of impeachment evidence to the defendant before a plea bargain is not necessary because impeachment evidence is useful only at trial), *with* Matthew v. Johnson, 201 F.3d 353, 360–362 (5th Cir. 2000) (suggesting that the focus of *Brady* is to protect the integrity of trials, so a defendant waiving his right to a trial has no constitutional right to receive exculpatory evidence from the prosecution).

known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[191] Neither the rule nor the comments cast light on what constitutes timely disclosure. A number of courts have suggested that the problem of the states withholding exculpatory evidence before a plea is not one of due process, but pertains to whether the plea itself was voluntary and intelligently made.[192] Other courts have concluded that "[u]nder limited circumstances ... the prosecution's failure to disclose evidence may be sufficiently outrageous to constitute the sort of impermissible conduct that is needed to ground a challenge to the validity of a guilty plea."[193] Texas has not adopted either standard.[194]

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191. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

192. *See* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargain Context*, 80 WASH. U. L.Q. 1, 7–21 (2002) (discussing the various approaches courts have taken in recognizing *Brady* claims after a plea bargain); *see also* John G. Douglas, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 463–69, 474–77 (2001) (evaluating the finality and validity of guilty pleas).

193. *See* Ferrara v. United States, 456 F.3d 278, 291 (1st Cir. 2006) (holding that the government's failure to reveal that it had manipulated its chief witness into repudiating his most recent confession and adopting his initial version of the crime constituted an "egregious circumstance[]" that was "one of those rare instances in which the government's failure to turn over evidence constitutes sufficiently parlous behavior to satisfy the misconduct prong of the involuntariness test"); United States v. Campusano, 947 F.2d 1, 5 (1st Cir. 1991) (concluding that there was no evidence in the record that the prosecutors made misrepresentations to such a degree as to invalidate the plea); United States v. Bouthot, 878 F.2d 1506, 1511 (1st Cir. 1989) (refusing to hold that the prosecutor's failure to reveal that federal charges were pending for the very same crime amounted to a misrepresentation).

194. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1), (5) (prohibiting a lawyer from knowingly using or offering false evidence and from making false statements to the tribunal); *id.* 3.04(b), (c)(5) (forbidding a lawyer from falsifying evidence and testimony, and from disrupting the proceedings); *id.* 4.01 (stating the lawyer must not knowingly fail to reveal a material fact when necessary to avoid a criminal or fraudulent act and must not misrepresent a material fact to a third party); *id.* 4.04(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."); *id.* 8.04(a)(1), (3), (4) (prohibiting a lawyer from violating these rules, engaging in dishonest behavior, and engaging in obstruction of justice); *see also* John G. Douglas, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 466–69, 472–77 (2001) (rejecting the argument that "an 'uninformed' plea is not an 'intelligent'" plea).

4. Plea Bargaining and Conflicts of Interest

a. Constitutional Conflicts of Interest

1. The Defense

Multiple representation of codefendants—either the serial[195] or simultaneous representation of codefendants[196]—does not per se violate either the Sixth Amendment[197] or the Texas Disciplinary Rules of Professional Conduct.[198] Indeed, as the Supreme Court has observed, in many cases "[a] common defense ... gives strength against a common attack."[199] Thus, although a possible conflict of interest "inheres in almost every instance of multiple representation,"[200] the courts have rejected "an inflexible rule that would presume prejudice in all ... cases."[201] A plea bargain offer to one client at the expense of another, however, could create a conflict which violates counsel's duty to both clients.

As the Fifth Circuit has observed, "[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest"[202] because, as the Supreme Court has noted, multiple representation may prevent an attorney "from exploring possible

195. *See* Cuyler v. Sullivan, 446 U.S. 335, 337–38 (1980) (describing a serial representation case where the first defendant was convicted but the codefendants were later acquitted at separate trials).

196. *See* Holloway v. Arkansas, 435 U.S. 475, 477–78 (1978) (recognizing the conflict of interest in the simultaneous representation of the defendant, the public defender moved for separate counsel, but the court denied the motion).

197. *See Cuyler*, 446 U.S. at 348 (observing that the Sixth Amendment does not impose a duty upon the trial court to investigate the propriety of multiple representation); James v. State, 763 S.W.2d 776, 778 (Tex. Crim. App. 1989) (citing *Holloway,* 435 U.S. at 475) (noting that multiple representation does not always equal ineffective assistance of counsel).

198. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)–(c) (limiting representation of multiple clients to circumstances where each client consents to representation after full disclosure and "the lawyer reasonably believes the representation of each client will not be materially affected").

199. Glasser v. United States, 315 U.S. 60, 92 (1942); *see also* Kegler v. State, 16 S.W.3d 908, 913 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (holding no actual conflict in an attorney representing codefendants where both claimed a third party committed the offense). *See generally* Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 574–82 (1997) (comparing advantages and disadvantages of joint representation).

200. *Cuyler*, 446 U.S. at 348.

201. Baty v. Balkcom, 661 F.2d 391, 397 n.12 (5th Cir. 1981).

202. *Id.*

plea negotiations and the possibility of an agreement to testify for the prosecution" for at least one of the defendants.[203] Though they have been quick to acknowledge that the mere failure to obtain a plea bargain is not *ipso facto* evidence of a Sixth Amendment violation,[204] courts have concluded that counsel's failure to seek a plea bargain offer, or his recommendation to refuse one, when representing multiple defendants will violate the Sixth Amendment when done under circumstances in which the pursuit of a plea bargain would have constituted sound pre-trial strategy.[205]

Even if the defendant can establish that his lawyer labored

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203. *Holloway*, 435 U.S. at 490.

204. *See Burger*, 483 U.S. at 785–86 (concluding that even if there had been a conflict of interest, the conflict did not harm counsel's advocacy where the record showed the prosecution refused to plea bargain); Eisemann v. Herbert, 401 F.3d 102, 109–10 (2d Cir. 2005) (concluding that even if counsel had a conflict, the record indicates that the defendant had nothing to bargain with, so plea bargaining "was not remotely a plausible defense strategy").

205. *See* Hammon v. Ward, 466 F.3d 919, 930–31 (10th Cir. 2006) (declaring an actual conflict of interest where counsel represented two brothers who had agreed on a joint defense, then negotiated a plea bargain for one brother that prevented him from testifying as part of the defense and failed to tell the other brother until after trial had started, thus keeping the second brother from accepting a pretrial plea offer); United States v. Salado, 339 F.3d 285, 291–92 (5th Cir. 2003) (remanding for a determination of whether there was an actual conflict of interest where counsel failed to negotiate a plea agreement for the defendant but negotiated one for a codefendant, whom counsel also represented); Edens v. Hannigan, 87 F.3d 1109, 1117 (10th Cir. 1996) (indicating that counsel labored under an actual conflict of interest that adversely affected his representation where counsel insisted on discussing only a joint plea deal for codefendants and refused to negotiate a separate plea offer for the individual defendant); Thomas v. Foltz, 818 F.2d 476, 481–82 (6th Cir. 1987) (stating that there was an actual conflict of interest that violated the defendant's Sixth Amendment rights where the prosecution offered an "all or nothing" plea agreement to three codefendants, and the third defendant refused to plead until after pressured by counsel); Ford v. Ford, 749 F.2d 681, 682–83 (11th Cir. 1985) (concluding that there was "an actual conflict of interest" where an attorney who represented two brothers offered a "both or nothing" plea bargain offer where one brother wished to plead and the other refused); *Baty*, 661 F.2d at 397 (asserting that an attorney labored under a conflict of interest when he represented codefendants and refused to negotiate a plea bargain for the first defendant in exchange for testimony against the second defendant); Sheridan v. State, 959 S.W.2d 29, 31–32 (Ark. 1998) (declaring that dual representation of a codefendant when the other defendant entered into a plea bargain in exchange for testimony against the second defendant created an actual conflict of interest that adversely affected representation because counsel was precluded from effectively cross-examining the first defendant); Thomas v. State, 551 S.E.2d 254, 256 (S.C. 2001) (recounting that counsel faced an actual conflict of interest that adversely affected his performance when a prosecutor made a plea bargain offer to a husband and wife to dismiss charges against one spouse if the other would plead guilty to the drug possession charge).

under a conflict of interest between multiple defendants, he still must show that the conflict adversely affected counsel's ability to secure a plea bargain.[206] Situations in which a conflict may not adversely affect the plea bargaining process include cases where the State refuses to plea bargain,[207] the defendant has nothing to offer as part of a bargain or refuses to testify for the prosecution,[208] or the State has no need of the defendant's testimony.[209]

Joint representation of codefendants is not the only conflict of interest that may so affect plea bargaining as to violate the Sixth Amendment.

> Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing [him] from offering testimony against [the leader] or from taking other actions contrary to the [leader's] interest.[210]

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206. *See* Burger v. Kemp, 483 U.S. 776, 785–86 (1987) (concluding that an asserted conflict of interest does not establish a valid claim for ineffective assistance of counsel where the conflict fails to harm the attorney's advocacy of the case).

207. *See id.* (stating that no conflict arose when there was no offer to negotiate a plea bargain in the record and all attempts by defense counsel to negotiate such a plea were rejected).

208. *See* Stewart v. Wolfenbarger, 468 F.3d 338, 350–53 (6th Cir. 2006) (highlighting a fact pattern where the defendant only possessed hypothetical testimony from a witness that would implicate the witness himself, despite the fact that the witness maintained Fifth Amendment privileges against self-incrimination); Eisemann v. Herbert, 401 F.3d 102, 109–10 (2d Cir. 2005) (stating that upon review of the record, there was no evidence within the defendant's possession that could be used to negotiate a plea bargain with the prosecution); Smith v. Newsome, 876 F.2d 1461, 1463–64 (11th Cir. 1989) (indicating that joint representation of criminal defendants where only one party is offered a plea bargain will not give rise to a claim of ineffective assistance of counsel for the other defendant when the record shows that the prosecution was only willing to negotiate a plea with the first defendant); Guaraldi v. Cunningham, 819 F.2d 15, 17 (1st Cir. 1987) (rejecting the defendant's argument that he could have testified against another party in return for leniency by the State when the record showed that the defendant unequivocally rejected such an offer earlier in the proceedings); Abernathy v. State, 630 S.E.2d 421, 433–34 (Ga. Ct. App. 2006) (concluding that no actual conflict of interest existed where a husband and wife pursued a joint defense strategy and agreed not to pursue plea bargains despite cautions by counsel and the trial court).

209. *See Eiseman*, 401 F.3d at 110 (noting that a defense strategy of pursuing a plea bargain does not plausibly exist if the prosecution is not interested in such negotiations).

210. Wood v. Georgia, 450 U.S. 261, 268–69 (1981) (footnote omitted).

Though the mere fact that a third party pays counsel's fees is not enough to support the conclusion that an actual conflict of interest exists,[211] where there is evidence that the third party instructed counsel not to pursue a plea bargain or where counsel has manipulated negotiations to the third party's advantage at the expense of his client, the conflict violates the Sixth Amendment.[212]

Given the courts are split as to the appropriate test to employ in assessing the constitutionality of the conflict,[213] counsel also may be compromised by conflicts which might cause him to urge a client to accept or reject a plea bargain for personal reasons rather

211. *See* Cabello v. United States, 188 F.3d 871, 876 (7th Cir. 1999) (stating that the mere fact that legal fees are paid by a third party is not sufficient to establish an actual conflict of interest); United States v. Corona, 108 F.3d 565, 575 (5th Cir. 1997) (concluding that payment of attorney's fees by an independent third party is not indicative of a conflict of interest, especially when the defendant had ample opportunity to decline the assistance for fear of disloyalty); United States v. Allen, 831 F.2d 1487, 1493–97, 1500, 1503 (9th Cir. 1987) (highlighting that although an actual conflict of interest arose when the third party paying the legal fees was also the operator of the alleged criminal enterprise, the defendant had been given adequate independent representation and therefore did not suffer from ineffective assistance of counsel).

212. *See Wood*, 450 U.S. at 269 (suggesting that counsel had arranged a fine as part of the defendant's plea bargain knowing that defendant could not pay and that a third party would not pay); Lipson v. United States, 233 F.3d 942, 947–48 (7th Cir. 2000) (remanding for an evidentiary hearing on the grounds that counsel, whose fees were paid by a codefendant, did not seek a plea bargain when the other codefendants had successfully obtained a plea in exchange for testimony against the codefendant); Quintero v. United States, 33 F.3d 1133, 1136–37 (9th Cir. 1994) (remanding for an evidentiary hearing on the basis that counsel, who was being paid by the defendant's drug supplier, recommended that the defendant reject a favorable plea bargain offer that required him to cooperate in prosecution of the drug supplier).

213. *See* Mickens v. Taylor, 535 U.S. 162, 173–75 (2002) (suggesting, but not deciding, that the test in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), was not appropriate to conflicts of interest other than simultaneous multiple representation); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY KING, CRIMINAL PROCEDURE § 11.9(d) (4th ed. 2004) (observing that the decision in *Mickens* "left open the possibility of adopting the *Beets* position"); EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE at 161–65 (2006 ed.) (examining the differences between the *Strickland* and *Winkler* tests); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 208–13 (2002) (explaining further the differences between the tests illustrated in *Strickland* and *Winkler*). *Compare* Beets v. Scott, 65 F.3d 1258, 1265–66 (5th Cir. 1995) (en banc) (expressing that the two-pronged *Strickland* test should be used in evaluating whether a conflict violated a defendant's constitutional right to counsel), *with* Winkler v. Keane, 7 F.3d 304, 307, 309 (2d Cir. 1993) (determining that a defendant must establish that the "attorney's and defendant's interests diverge[d] with respect to a material factual or legal issue or to a course of action" and that the defendant suffered an "actual lapse in representation").

than the client's best interest. Representing a defendant on a contingent fee basis—a practice which violates the Texas Disciplinary Rules of Professional Conduct[214]—creates a conflict of interest because it might prompt counsel to recommend or discourage a plea bargain in order to increase his fee.[215] An attorney's simultaneous representation of the defendant and the county entity or the attorney prosecuting him has also been held to constitute a conflict of interest that adversely affects counsel's ability to negotiate a plea bargain.[216] Similarly, counsel who is being investigated by the government may labor under an impermissible conflict of interest if he believes that his manipulation of plea negotiations could benefit him personally at the expense of his client.[217] Other types of conflicts might tempt

214. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(e), *reprinted in*, TEX. GOV'T CODE ANN., tit 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.").

215. *See Winkler*, 7 F.3d at 309 ("Without [a] doubt, trial counsel's acceptance of the contingency fee arrangement for representing a criminal defendant is highly unethical and deserves the strongest condemnation."). However, this does not invoke a Sixth Amendment violation where a defendant refused to permit counsel to enter into plea negotiations. *Id.*; *see also Ex parte* Morrow, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) (showing no actual conflict of interest where the defendant failed to prove that his attorney had agreed to a contingency fee of 40% of the seized cash returned as a result of a plea bargain agreement).

216. *See* Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983) (noting an actual conflict of interest that violated the Sixth Amendment right to counsel where counsel represented the county in a lawsuit challenging the composition of the county jury lists while simultaneously representing the defendant in a capital murder case), *overruled by* Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986); Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir. 1979) (concluding that the actual conflict of interest rendered the trial "fundamentally unfair" where the same law firm represented both the defendant in a criminal case and the prosecutor in an unrelated civil action); People v. Castro, 657 P.2d 932, 944–45 (Colo. 1983) (stating that the representation of the district attorney on criminal charges of overspending the office budget while at the same time representing the defendant on a charge of murder created a conflict of interest that violated the Sixth Amendment); State v. Gregory, 612 S.E.2d 449, 450–51 (S.C. 2005) (explaining that there was an actual conflict of interest that violated the Sixth Amendment where counsel simultaneously represented a defendant against criminal charges and the assistant solicitor assigned to prosecute the defendant in her divorce action).

217. *See* United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir. 1987) (indicating a Sixth Amendment violation where a lawyer half-heartedly plea bargained on behalf of his client, thereby delaying the attorney's indictment on an unrelated matter until the conclusion of the client's case). *But see* United States v. Montana, 199 F.3d 947, 949 (7th Cir. 1999) (explaining that no actual conflict of interest existed where the lawyer did not read a note from one codefendant to another demanding payment in exchange for favorable testimony and where there was no evidence that the representation was

counsel into refusing to explore the possibility of a plea negotiation, or into recommending the acceptance or rejection of a plea bargain for personal gain instead of the client's welfare, and thus could violate the Sixth Amendment.[218]

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adversely affected); Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (establishing no impermissible conflict of interest where there was no evidence that an indictment and subsequent guilty plea by counsel on unrelated charges had an adverse effect on representation); Roach v. Martin, 757 F.2d 1463, 1479–80 (4th Cir. 1985), (identifying no actual conflict of interest when an attorney was being investigated by the state bar while representing a defendant); Commonwealth v. McCloy, 574 A.2d 86, 91 (Pa. Super. Ct. 1990) (holding that no constitutional violation existed where there was no evidence that counsel's investigation by and cooperation with federal investigators in a bribery investigation had an adverse affect on his representation of the defendant on state criminal drug charges).

218. *See* United States v. Hanoum, 33 F.3d 1128, 1130–32 (9th Cir. 1994) (dismissing an appeal without prejudice for further fact-finding on the issue of whether the attorney was having sex with the defendant's wife and therefore had an incentive to ensure the defendant was found guilty and sentenced to prison); Moore v. United States, 950 F.2d 656, 660–61 (10th Cir. 1991) (remanding for an evidentiary hearing on whether the lawyer, due to a personal conflict of interest, had advised the defendant to plead guilty to a perjury charge in order to protect himself from being implicated for perjury); United States v. Cancilla, 725 F.2d 867, 870–71 (2d Cir. 1984) (recognizing that counsel had an actual conflict of interest that adversely affected his advice regarding whether to engage in plea negotiations where, unbeknownst to the defendant, counsel had engaged in the same insurance fraud scheme and may have feared a plea bargain, and defendant's subsequent cooperation would have revealed the lawyer's involvement); States v. Cain, 57 M.J. 733, 737–39 (A. Ct. Crim. App. 2002) (declining to create a per se rule of conflict where counsel and client had sexual relations, even where counsel's sexual conduct could have subjected him to court-martial, and finding no actual conflict where the defendant failed to show lapses in representation); United States v. Babbitt, 26 M.J. 157, 159 (C.M.A. 1988) (declining to create a per se rule of conflict and determining that counsel's sexual affair with his client did not create a conflict of interest where counsel actively defended his client); Howard v. State, 783 S.W.2d 61, 62 (Ark. 1990) (determining that there is an unconstitutional conflict of interest where counsel had a sexual relationship with the defendant and advised her to enter an open plea in an effort to obtain a suspended sentence, though such a punishment was not available); People v. Singer, 275 Cal. Rptr. 911, 917, 920–21 (Cal. Ct. App. 1990) (asserting that a lawyer's affair with the defendant's spouse constituted an unconstitutional conflict of interest where the attorney and wife agreed that the affair would end after the trial was over); People v. Jackson, 213 Cal. Rptr. 521, 523 (Cal. Dist. Ct. App. 1985) (concluding that a defense attorney who dated the trial prosecutor during the pendency of the case labored under an actual conflict that violated the defendant's right to counsel because "[n]o matter how well intentioned defense counsel is in carrying out his responsibilities to the accused, he may be subject to subtle influences manifested, for example, in a reluctance to engage in abrasive confrontation with opposing counsel during settlement negotiations and trial advocacy"); Hernandez v. State, 750 So. 2d 50, 55 (Fla. 1999) (rejecting a claim of ineffective assistance where the defendant failed to show a "lapse in the conduct of the defense" due to counsel's sexual relationship with the defendant's wife); Commonwealth v. Croken, 733 N.E.2d 1005, 1012–14 (Mass. 2000) (remanding for further fact-finding on the issue of whether the defense

2. The Prosecution

Prosecutors enjoy wide discretion in handling a case,[219] including, as the Supreme Court has acknowledged, "whether to enter into plea bargains and the terms on which they will be established."[220] Even in the light of such broad discretion, prosecutors, too, must avoid conflicts of interest which would so

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attorney had a conflict of interest between the defendant and his live-in girlfriend, whom he later married and who was an attorney for the district attorney's office); United States v. Lasane, 852 A.2d 246, 257 (N.J. Super. Ct. App. Div. 2004) (declaring that counsel's sexual relationship with a seventeen-year-old's mother constituted an unconstitutional conflict of interest that affected counsel's advice regarding the defendant's open plea of guilty); State v. Stough, 980 P.2d 298, 301–02 (Wash. Ct. App. 1999) (concluding that the defendant's sexual relationship with her attorney affected her ability to make her decision free and independent of her lawyer's influence). Though no court has yet addressed the issue, a fee arrangement involving a contract for media rights could pose a conflict of interest over a possible plea bargain, since the resolution of a case through a plea could reduce the value of any subsequent media rights. *See* Buenoano v. Singletary, 963 F.2d 1433, 1438–40 (11th Cir. 1992) (remanding for a hearing on whether a fee arrangement that gave a portion of a book and movie contract to an attorney created an impermissible conflict of interest); United States v. Hearst, 638 F.2d 1190, 1193–94 (9th Cir. 1980) (remanding for a hearing on whether the attorney's book contract created an actual conflict of interest).

> Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client . . . giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(c), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G. App. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

219. However, prosecutors are barred from prosecuting cases in which they formerly represented the defendant in the cause. *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon Supp. 1999) ("Each district attorney shall represent the State in all criminal cases . . . except in cases where he has been, before his election, employed adversely."); *Ex parte* Morgan, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981) (disqualifying a district attorney who had represented the defendant on the original conviction from representing the State in the defendant's probation revocation); *Ex parte* Spain, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) (granting the defendant's writ because the district attorney who originally represented the defendant on a guilty plea was disqualified from representing the State upon probation revocation); Garrett v. State, 94 Tex. Crim. 556, 252 S.W. 527, 528–29 (1923) (proclaiming that a district attorney who represented the defendant before the indictment was handed down, but who had nevertheless discussed the case with the defendant, was disqualified); *In re* Reed, 137 S.W.3d 676, 679–80 (Tex. App.—San Antonio 2004, orig. proceeding) (deciding that a district attorney's representation of a former justice of the peace on civil matters and her office's advice on appealing a suspension order did not create a conflict of interest); Canady v. State, 100 S.W.3d 28, 32 (Tex. App.—Waco 2002, no pet.) (ruling that a defendant failed to prove a conflict of interest where he did not establish that the district attorney gained any knowledge about the case from his prior representation of a defendant on a separate criminal law matter).

220. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 (1987).

impair their ability to fairly plea bargain as to constitute a violation of due process. Such a conflict might be comprised of a financial interest in a related civil action,[221] an overwhelming personal animus toward the defendant,[222] or some other factor that might

221. *See* Ganger v. Peyton, 379 F.2d 709, 713–14 (4th Cir. 1967) (noting the existence of a conflict of interest in violation of due process because the prosecutor in a criminal suit also represented the victim in an ancillary civil suit, and this financial interest influenced the plea bargain offer); People v. Vasquez, 137 P.3d 199, 201, 214 (Cal. 2006) (deciding that, although not established in the record of the case, a prosecutor's refusal to plea bargain based on her fear that the office might appear to be favoring the defendant, the child of a former employee, could constitute such prejudice as to violate due process); *see also* Polo Fashions, Inc. v. Stock Buyers Int'l, Inc., 760 F.2d 698, 704 (6th Cir. 1985) ("[A] privately employed attorney has the single permissible objective of forwarding his client's interests. A public prosecutor, on the other hand, must consider the public interest which lies as much in seeing justice done in every case as in the successful prosecution of any particular case."); Bd. of Locomotive Firemen & Enginemen v. United States, 411 F.2d 312, 319 (5th Cir. 1969) (opining that the prosecutors in the criminal contempt action, who were also counsel for private parties in the civil case, faced a conflict in generating pressure on the opposing party to come to book as soon as possible, thus placing them "in an awkward or disadvantageous position," as well as a conflict in the "obligation to make sure that the [contemnor's] rights were scrupulously preserved"); Ky. Bar Ass'n v. Lovelace, 778 S.W.2d 651, 653–54 (Ky. 1989) (suspending the prosecutor for participating in civil and criminal actions arising from the same facts); *In re* Truder, 17 P.2d 951, 951–52 (N.M. 1932) (per curiam) (disciplining a district attorney for participating in related civil and criminal cases); *In re* Williams, 50 P.2d 729, 732 (Okla. 1935) (disciplining a county attorney for participating in related civil and criminal actions); *In re* Jolly, 239 S.E.2d 490, 491 (S.C. 1977) (per curiam) (reprimanding a circuit solicitor for having an improper fee interest in the related civil action); *In re* Wilmarth, 172 N.W. 921, 921, 926 (S.D. 1919) (censuring the State's attorney for representing a party in a civil action while prosecuting the same party in a criminal action based on the same facts); *In re* Schull, 127 N.W. 541, 542–43 (S.D. 1910) (suspending a district attorney for prosecuting a party in a criminal action and for representing the same party in a civil action based on the same set of facts), *modified on reh'g*, 128 N.W. 321 (S.D. 1910); *cf. In re* Snyder, 559 P.2d 1273, 1274–75 (Or. 1976) (disciplining a district attorney for violating statutes that prohibited the concurrent practice of civil law). *But see* People *ex rel.* Hutchison v. Hickman, 128 N.E. 484, 487–88 (Ill. 1920) (holding that a district attorney's representation of the victim in a criminal action after the criminal proceeding was completed violated a statute but did not necessitate disbarment); *In re* Koch, 276 A.D. 36, 36 (N.Y. App. Div. 1949) (per curiam) (withholding the censure of a prosecutor who brought a criminal charge against the stepdaughter of his client where the prosecutor disclosed the dual representation to a grand jury). For an extended examination of the constitutional scope of the "disinterested prosecutor," see EDWARD L. WILKINSON, LEGAL ETHICS & TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE at 127–35 (2006 ed.).

222. *Compare* Clearwater-Thompson v. Michael A. Grassmueck, Inc., 160 F.3d 1236, 1237 (9th Cir. 1998) (declaring that where a prosecutor is not disinterested in the prosecution, the "judgment of conviction is to be reversed without the need of showing prejudice"), *and* Wright v. United States, 732 F.2d 1048, 1055–56 (2d Cir. 1984) (declaring bias where the prosecutor's wife had had numerous political and legal confrontations with the defendant because a prosecutor is not disinterested "if he has, or is under the influence

prompt a prosecutor to fail to consider a plea bargain for reasons other than the merits of the case itself.[223] Mere personal animus,[224] however, or the political concerns or aspirations of a

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of others who have . . . an axe to grind against the defendant"), *with* Gallego v. McDaniel, 124 F.3d 1065, 1079 (9th Cir. 1997) (stating that the defendant failed to establish prejudice where the prosecutor entered into a book deal after the case was tried), United States v. Lilly, 983 F.2d 300, 309–10 (1st Cir. 1992) (reasoning that although the assisting prosecutor had an "ax to grind" against the defendant because of previous personal litigation between the two, her conduct in supplying the prosecutor conducting the case with public information did not rise to the level of a due process violation), United States v. Wallach, 935 F.2d 445, 460 (2d Cir. 1991) (determining that prosecutorial bias did not exist because the individual prosecutors did not "have . . . an actual interest in the outcome of [the] case"), Dick v. Scroggy, 882 F.2d 192, 199 (6th Cir. 1989) (Celebrezze, J., concurring) (agreeing that without a showing of "some specific instance of misbehavior," mere representation of the victim of an auto accident while prosecuting the driver of the vehicle that caused the accident for assault rather than a DWI, was insufficient to establish a due process violation), *and* United States v. Terry, 806 F. Supp. 490, 497 (S.D.N.Y. 1992) (declaring that neither the prosecutor's personal comment to the defendant nor his later use of the defendant in political ads established that the prosecutor had "a personal 'axe to grind'"), *aff'd*, 17 F.3d 575 (2d Cir. 1994).

223. *See, e.g.*, People v. Vasquez, 137 P.3d 199, 214 (Cal. 2006) (stating that although not established in the record of the case, a prosecutor's refusal to plea bargain based on her fear that the office might appear to be favoring the defendant, the child of a former employee, could constitute such prejudice as to violate due process); People v. Connor, 666 P.2d 5, 6, 9 (Cal. 1983) (disqualifying the entire district attorney's office because the defendant had fired his gun in the direction of one of the attorneys and the attorney had spoken to his colleagues about his "harrowing experience"); People v. Superior Court of Contra Costa County, 561 P.2d 1164, 1174 (Cal. 1977) (concluding that the prosecutor was properly disqualified where the mother of the homicide victim was employed in the district attorney's office and was involved in a custody dispute with the defendant, the victim's ex-wife, over the victim's child), *superseded by statute*, CAL. PENAL CODE § 1424 (1992); People v. Cline, 6 N.W. 671, 672–73 (Mich. 1880) (disqualifying the prosecuting attorney because the victim was his brother); State v. Jones, 268 S.W. 83, 85 (Mo. 1924) (noting that the prosecutor was disqualified where he was the victim of the defendant's alleged DWI); People v. Gentile, 511 N.Y.S.2d 901, 904 (N.Y. App. Div. 1987) (deciding that the prosecutor's "admittedly close personal relationship" to the victim and "deep emotional involvement in the case" deprived the defendant of a fair trial). *But cf.* Kubsch v. State, 866 N.E.2d 726, 732–34 (Ind. 2007) (recognizing that the prosecutor had a potential conflict of interest in plea negotiations between the defendant and a former client, but rejecting an actual conflict because the defendant stated he would not accept a plea offer); State v. Condon, 152 Ohio App. 3d 629, 2003-Ohio-2335, 789 N.E.2d 696, at ¶ 46–48 (concluding that the defendant failed to produce evidence showing a conflict of interest where the prosecutor was both prosecuting the defendant in a criminal suit and representing the defendant in a civil action).

224. *See, e.g.*, *Gallego*, 124 F.3d at 1079 (failing to find prejudice where the prosecutor entered into a book deal after the case was tried); United States v. Terry, 17 F.3d 575, 579 (2d Cir. 1994) (determining that the prosecutor's personal animus toward an anti-abortion group to which the defendant belonged was insufficient to support an inference that the prosecution was politically motivated); *Wallach*, 935 F.2d at 460 (noting that a prosecutor must have an actual interest in the outcome of the case for a defendant's

prosecutor[225] alone are not enough to warrant disqualification.

b. Conflicts of Interest Under the State Bar Rules

The Texas Disciplinary Rules of Professional Conduct unequivocally prohibit representing a client after a conflict of interest develops.[226] The comment to Rule 1.06 of the rules states that "[l]oyalty is an essential element in the lawyer's relationship to the client."[227] Rule 1.06(b) therefore mandates that:

> [A] lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; *or* [if the representation of that person] reasonably appears to be or become[s] adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.[228]

Rule 1.06(b)(1) addresses the simultaneous representation of

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rights to be violated); *Wright*, 732 F.2d at 1056 n.8 (noting that the degree of personal animus of the prosecutor toward the defendant necessary to require disqualification rises as the case goes forward); *see also Lilly*, 983 F.2d at 309–10 (determining that even though the assisting prosecutor had an "ax to grind" against the defendant, supplying the prosecutor with public information was not a due process violation); *Scroggy*, 882 F.2d at 199 (Celebrezze, J., concurring) (declaring that mere representation of an automobile accident victim while prosecuting driver at fault in the accident for assault rather than a DWI, without a showing of "some specific instance of misbehavior," was insufficient to establish a due process violation). *But see Clearwater-Thompson*, 160 F.3d at 1237 (concluding that where a prosecutor was not disinterested in the prosecution, the "judgment of conviction is to be reversed without the need of showing prejudice").

225. *See, e.g.*, *Wallach*, 935 F.2d at 459–60 (asserting that prosecutorial bias did not exist simply because of the Attorney General's alleged involvement); *Scroggy*, 882 F.2d at 196 (stating that political ambition among prosecutors is not uncommon, and "[a]bsent a demonstration of selective prosecution," a conviction should not be set aside simply due to an appearance of impropriety); *Wright*, 732 F.2d at 1055 (refusing to reverse a defendant's conviction simply because the prosecutor's wife was a political opponent of the defendant); Azzone v. United States, 341 F.2d 417, 419 (8th Cir. 1965) (explaining that "the motivation for a criminal charge is not of primary importance," and thus, a politically motivated prosecutor does not per se require the setting aside of a conviction); United States v. Terry, 806 F. Supp. 490, 497 (S.D.N.Y. 1992) (deciding that the prosecution's aim for political gain by prosecuting the defendant was not enough to warrant a disqualification), *aff'd*, 17 F.3d 575 (2d Cir. 1994).

226. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

227. *Id.* 1.06 cmt. 1.

228. *Id.* 1.06(b)(1), (2) (emphasis added).

parties whose interests are not directly adverse, but where the potential for conflict exists, such as the representation of codefendants in a criminal case.[229] Directly addressing the type of conflict that may develop when counsel is faced with the possibility that one client might achieve an outcome by turning on his codefendant as part of a plea bargain, the comment clarifies that an impermissible conflict may exist or develop by reason of an "incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."[230] The comment expresses "grave" concern over the conflict of interest involved in representing codefendants in a case and advises that "ordinarily a lawyer should decline to represent more than one codefendant."[231]

Rule 1.06(b)(2) is as broad as Rule 1.06(b)(1), its counterpart. It prohibits a lawyer from representing a person if the representation "reasonably appears to be or become[s] adversely limited by the lawyer's ... responsibilities to another client or to a third person."[232] The rule does not define "adversely limited." Comment 4 to Rule 1.06 indirectly recognizes how a personal conflict or duty to a former client might affect plea bargaining by paraphrasing the rule: "[L]oyalty to a client is impaired ... in any situation when lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's ... responsibilities to others."[233]

The thrust of the rule is easily grasped although its scope is, perhaps necessarily, not well-defined—a lawyer must decline or withdraw from representation if his own or another client's interests might impede either the lawyer's judgment or his ability or willingness to "consider, recommend, or carry out an

229. *Id.* 1.06(b)(1) & cmt. 3.
230. *Id.* 1.06 cmt. 3.
231. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b) cmt. 3.
232. *Id.* 1.06(b)(2).
233. *Id.* 1.06 cmt. 4. Additionally:

> [A lawyer's] representation of one client is 'directly adverse' to [his] representation of another client if the lawyer's independent judgment on behalf of [the] client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.

Id. 1.06 cmt. 6.

appropriate course of action."[234] In *United States v. Phillips*,[235] for example, a partner in the firm of Foreman, DeGeurin, and Nugent represented a defendant in a six-month-long drug conspiracy case.[236] After her conviction, the client agreed to testify at the government's request and to respond to all government questions truthfully.[237] In exchange for her cooperation, the government agreed to seek a reduction in her sentence.[238]

Another partner in the firm simultaneously represented a second client on drug conspiracy charges which were to be tried after the first client's trial.[239] The allegations only tangentially involved the first client, so that any testimony by the first client would have been "narrow and well-defined."[240] There was also a conflict in testimony as to whether the second partner had ever participated in the preparation of the first client's defense.[241] Nevertheless, the court granted the government's motion to disqualify counsel for the second client.[242] Observing that the first client's interests were potentially adverse to those of the second client due to the second client's potential need to cross-examine the first *and* to argue that she lacked credibility, thus undercutting her bid for a reduced sentence, the court concluded that the conflict violated Rule 1.06(b)(2).[243]

234. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9); *see also id.* preamble ¶ 3 ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law.").

235. United States v. Phillips, 952 F. Supp. 480 (S.D. Tex. 1996).

236. *Id.* at 484 n.11.

237. *Id.* at 481.

238. *Id.*

239. *See id.* (discussing the first client's concerns regarding the representation by her attorney's firm of the second client in a related drug case, in which trial the first client expected to be called as a witness).

240. *Phillips*, 952 F. Supp. at 481.

241. *See id.* (noting that the first client had never discussed the second client with her attorney; however, it was her perception that the second client's attorney assisted in the preparation of her case, which directly contradicted the testimony of the second client's attorney).

242. *Id.* at 486.

243. *Id.* at 484.

V. ACCEPTANCE OF A PLEA BARGAIN OFFER

A. *Defense Counsel's Constitutional Duty to Convey a Plea Offer to the Defendant*

The Supreme Court has observed that "[f]rom counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[244] Nowhere, perhaps, are the duties to consult with the accused and to keep him informed of important developments more apparent than in plea bargain negotiations. "Failure of defense counsel to inform a criminal defendant of plea offers made by the State is an omission that falls below an objective standard of professional reasonableness."[245] Furthermore, the failure to sufficiently or fully explain the terms of plea offers may also fall below the standard of reasonableness.[246] Counsel's failure to convey a deadline attached to a plea offer likewise falls below the objective standard of reasonableness even when he has informed his client of all other aspects of the proposed agreement.[247]

The two-pronged test for constitutional ineffective assistance of counsel may be applied to an attorney's failure to convey a plea bargain offer.[248] A defendant must prove that her counsel failed to convey a plea bargain offer and that she would have accepted the offer had it been relayed to her.[249]

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244. Strickland v. Washington, 466 U.S. 668, 688 (1984).

245. *Ex parte* Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000); *see also Ex parte* Wilson, 724 S.W.2d 72, 73–74 (Tex. Crim. App. 1987) (stating that counsel has a Sixth Amendment duty to convey plea bargain offers from the State); State v. Williams, 83 S.W.3d 371, 374 (Tex. App.—Corpus Christi 2002, no pet.) (agreeing that failure to fully explain an offer of deferred adjudication "fell below [the] objective standard of reasonableness").

246. *See Williams*, 83 S.W.3d at 374 (reasoning that counsel's conduct "fell below an objective standard of reasonableness" by failing to fully explain the State's plea bargain offer of deferred adjudication).

247. Turner v. State, 49 S.W.3d 461, 464–65 (Tex. App.—Fort Worth 2001), *pet. dism'd, improvidently granted*, 118 S.W.3d 772 (Tex. Crim. App. 2003) (per curiam).

248. *See Lemke*, 13 S.W.3d at 795 (describing the two elements that must be proven to establish ineffective assistance of counsel).

249. *See id.* at 796 (noting that the trial court found that the defendant would have accepted the plea offer if his attorney had notified him of it and that this failure fell below

1. The First Prong of the Test for a Violation of the Duty to Convey an Offer

The failure of defense counsel to inform a defendant of plea offers made by the State has generally been held to be an omission that falls below an objective standard of professional reasonableness.[250] However, there are a number of exceptions to this general rule. For example, Texas courts have held that failure to inform a client of negotiations that do not rise to the level of a genuine offer does not constitute deficient conduct.[251] Similarly, counsel's decision to end negotiations over issues that the accused has declared non-negotiable represents reasonable strategy and will not be found to be deficient.[252]

A third exception to the general rule exists under Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct. The rule requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."[253] Comment 1 of the rule explains both the prescription and its limitation: "A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable."[254]

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the objective standard of reasonableness); Dickerson v. State, 87 S.W.3d 632, 638 (Tex. App.—San Antonio 2002, no pet.) (stating that when an attorney fails to relay a plea bargain, to prove ineffective assistance of counsel, a defendant must show that he would have accepted the plea bargain if it had been presented to him).

250. *Lemke*, 13 S.W.3d at 795; *accord* Harvey v. State, 97 S.W.3d 162, 167 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (determining that defense counsel's failure to inform a defendant of a plea offer fails to meet the objective standard of professional conduct).

251. *Harvey*, 97 S.W.3d at 167; *see also* Hernandez v. State, 28 S.W.3d 660, 665 (Tex. App.—Corpus Christi 2000, pet. ref'd) (concluding that counsel's failure to convey what amounted only to an offer "in passing" met the objective standard of reasonableness).

252. *Harvey*, 97 S.W.3d at 167–68.

253. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

254. *Id.* 1.03 cmt. 1. The comment echoes comment 2 to Rule 1.4 of the ABA Model Rules of Professional Conduct:

> If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action *unless prior discussions with the client have resolved what action the client wants the lawyer to take.* For example, a lawyer

In addition, Rule 1.02 requires that "a lawyer . . . abide by a client's decisions . . . whether to accept an offer of settlement of a matter, except as otherwise authorized by law."[255] Implicit in this requirement, of course, is the duty to convey such an offer of settlement. Comment 2 of the rule articulates this implicit duty and defines its limits:

> *Except where prior communications have made it clear that a particular proposal would be unacceptable to the client*, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.[256]

The comments to Rules 1.02 and 1.03 reflect a practical approach to lawyer-client communication—in order to reduce needless and time-consuming communication, counsel is not obligated to relay settlement or plea bargain offers that the client has already made clear she will not accept.[257] Under this common sense rule, at least one court has rejected a capital murder defendant's complaint that his counsel failed to pursue an offer by the State for a sentence less than death because the defendant "had instructed them that he was not interested in pleading guilty to avoid a death sentence."[258] Similarly, the Fourteenth Court of Appeals has concluded that counsel did not render ineffective assistance in failing to relay a plea bargain offer that involved "jail time as a condition of probation" where the defendant's "instructions to him made jail non-negotiable."[259]

2. The Second Prong of the Test for a Violation of the Duty to Convey an Offer

Simply proving that counsel failed to convey an offer does not

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who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance *unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.*

MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (emphasis added).

255. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a), (a)(2).

256. *Id.* 1.02 cmt. 2 (emphasis added).

257. *Id.* 1.02 cmt. 2, 1.03 cmt. 1.

258. Franks v. State, 599 S.E.2d 134, 145 (Ga. 2004).

259. Harvey v. State, 97 S.W.3d 162, 167–68 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

establish ineffective assistance of counsel.[260] In addition to establishing that counsel failed to apprise him of a plea bargain offer from the prosecution, a defendant must also prove that but for counsel's unprofessional error, the result of the proceeding would have been different.[261] "In the case of a plea bargain that was not relayed, this means proof that the offer would have been accepted."[262] At least one Texas court has rejected a defendant's claim of ineffective assistance of counsel for his counsel's alleged failure to convey a ten-year plea bargain offer where the record reflected that the defendant, though not specifically apprised of the ten-year offer, had indicated that he would not accept any negotiated plea that required penitentiary time.[263]

B. *Defense Counsel's Constitutional Duty to Advise the Defendant About a Plea Offer*

Just as counsel must fully inform and explain any plea bargain offer made by the State, in order to render effective assistance of counsel, a defense attorney must also sufficiently advise his client regarding the ramifications of a plea of guilty or *nolo contendere*.[264] Counsel is not obligated to inform a defendant of the collateral consequences of a plea,[265] however, and a failure to advise the client of such collateral consequences does not constitute ineffective assistance of counsel.[266]

"A consequence is 'collateral' if it is not a definite, practical

260. *See Ex parte* Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000) (setting forth the two elements that must be established to prove ineffective assistance of counsel).

261. *Id.* at 796.

262. Dickerson v. State, 87 S.W.3d 632, 638 (Tex. App.—San Antonio 2002, no pet.).

263. Moore v. State, No. 08-02-00394-CR, 2004 WL 2480517, at *3 (Tex. App.—El Paso Nov. 4, 2004, pet. ref'd); *see also Dickerson*, 87 S.W.3d at 638 (declaring that the defendant "did not state unconditionally that he would have accepted an offer of ten years or more" and therefore did not prove the second prong of the test for ineffective assistance).

264. *Compare Ex parte* Battle, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991) (stating that counsel's conduct was below the reasonable standard where he advised the defendant that he would receive probation after a *nolo contendere* plea when the defendant was actually ineligible for probation), *with* Champion v. State, 126 S.W.3d 686, 696–98 (Tex. App.—Amarillo 2004, no pet.) (holding that the defendant failed to establish that counsel had assured him of probation where the evidence was conflicting).

265. *Ex parte* Morrow, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997).

266. *Id.* at 536–37.

consequence of a defendant's guilty plea."[267] To put it another way, defense counsel is obligated to advise an accused of any plea consequence that is "definite and largely or completely automatic."[268] A consequence is "definite" if it "flow[s] from the plea."[269] It is "automatic" if "there are no exceptions, no wiggle room, no conditions which relieve [the defendant] of that obligation," such as judicial discretion.[270] The consequence is "practical" if "it is logically connected to the plea."[271]

Moreover, even if a consequence is direct, a lawyer will not be determined to have rendered ineffective assistance in failing to advise his client of the consequence if it is "remedial and civil rather than punitive."[272] A number of direct consequences from a guilty plea such as the loss of the right to vote, the loss of the right to possess a firearm, and the ineligibility for certain professional licenses do not involve the nature of the sentence that could be imposed, and are not direct punitive consequences but merely measures for the protection of the public good.[273]

Thus, a lawyer does not render ineffective assistance of counsel if, before his client accepts a plea, he fails to advise him of any applicable sex registration requirement,[274] fails to explain to him at the time of the plea that the defendant's conviction may be used in any subsequent retrial of a conviction on appeal,[275] fails to warn him of possible deportation,[276] fails to advise him of possible enhancement of punishment,[277] fails to explain the possibility of consecutive sentences,[278] fails to warn him of the deprivation of

267. *Id.* at 536.

268. Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Mitschke*, 129 S.W.3d at 135.

274. *Id.* at 136.

275. *See Ex parte* Morrow, 952 S.W.2d 530, 536–37 (Tex. Crim. App. 1997) (concluding that counsel's failure to advise appellant of the effect his plea would have at a hypothetical retrial was not ineffective assistance).

276. Perez v. State, 31 S.W.3d 365, 368 (Tex. App.—San Antonio 2000, no pet.).

277. *See* United States v. Lambros, 544 F.2d 962, 965–67 (8th Cir. 1976) (deciding that the trial court did not commit an abuse of discretion in denying the defendant's motion to withdraw his guilty plea despite the fact that his counsel failed to inform him of a possible enhancement of punishment).

278. *See* United States v. Vermeulen, 436 F.2d 72, 75 (2d Cir. 1970) (stating that appellant should have reasonably concluded that he would have received more than one

the right to vote or to travel abroad,[279] fails to apprise him of the possibility of a dishonorable discharge from the armed forces,[280] or tenders erroneous advice regarding parole.[281] On the other hand, a lawyer who fails to advise his client about the consequences of her guilty plea on her pending capital case[282] or who has improperly advised his client that his sentence will be served concurrently with a federal offense renders assistance outside the range of competent assistance for a criminal attorney.[283]

However, merely proving that counsel provided poor advice on a direct consequence is not enough to prove that counsel's representation was constitutionally deficient.[284] When a defendant challenges the voluntariness of a plea based upon his counsel's advice and claims that his counsel's assistance was ineffective, whether the plea was entered voluntarily "depends on: (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[285]

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punishment arising from two different crimes; therefore, his claim of ineffective assistance of counsel was without merit).

279. Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964); *see also* United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (explaining that although a defendant must understand the consequences of a guilty plea, "the finality of a conviction [does not] depend[] upon a contemporaneous realization by the defendant of the collateral consequences of his plea").

280. *See* Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963) (stating that the court is unaware of any holding wherein a guilty plea is only fully understood by the defendant if he is informed of every possible non-criminal consequence).

281. *See Ex parte* Evans, 690 S.W.2d 274, 279 (Tex. Crim. App. 1985) (stating that erroneous advice of counsel regarding parole eligibility does not render a plea per se involuntary).

282. Jackson v. State, 139 S.W.3d 7, 19 (Tex. App.—Fort Worth 2004, pet. ref'd).

283. *See Ex parte* Moody, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999) (noting that the defendant met his burden of proof by demonstrating that but for his counsel's erroneous advice regarding the requirement that one must serve sentences concurrently, the defendant would have refused to plead guilty).

284. *See id.* (stating that an applicant bears the burden of proving that his counsel's performance "fell below a reasonable standard of competence" and that without such poor advice the applicant would have refused to plead guilty).

285. *Ex parte* Morrow, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997); *accord* Hill v. Lockhart, 474 U.S. 52, 52 (1985) (discussing the two-part test for reviewing an ineffective assistance of counsel claim).

Judicial or prosecutorial participation is not determinative of whether the defendant would have pleaded guilty but may be considered in ascertaining whether the accused relied on his attorney's advice in submitting his plea.[286] Similarly, although not required, courts have viewed with skepticism bare claims that the accused would not have pleaded guilty, unaccompanied by "special circumstances that might support the conclusion that he placed particular emphasis on" the advice of which he later complains.[287]

C. *Defense Counsel's Duty to Inform and Advise Under the Texas Disciplinary Rules of Professional Conduct*

Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct also addresses the duty to keep a client informed.[288] The rule is divided into two sub-parts but actually prescribes three separate responsibilities.[289]

1. The Duty to Convey Information

First, under Rule 1.03 a lawyer has the duty to "keep a client reasonably informed about the status of a matter."[290] This responsibility includes informing the client of communications from another party and taking "other reasonable steps to permit the client to make a decision regarding a serious offer from another party."[291] Thus, depending upon the circumstances,

286. *Ex parte* Moody, 991 S.W.2d at 859.

287. *Hill*, 474 U.S. at 60; *Jackson*, 139 S.W.3d at 21 n.10; *cf.* Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1988) (rejecting defendant's "subjective, self-serving, and ... insufficient" testimony that he would have accepted a plea bargain, relying instead on "objective" evidence that "provid[ed] independent reason to believe that there [wa]s a significant probability that, had [counsel]'s advice been reasonable, [the defendant] would have accepted the offer").

288. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

289. *See id.* (mandating three responsibilities: "keep a client reasonably informed about the status of a matter[,] ... promptly comply with reasonable requests for information, ... [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

290. *Id.* 1.03(a).

291. *Id.* 1.03 cmt. 1; *see also* Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 241, 244 (W. Va. 2000) (discussing the Lawyer Disciplinary Board's citation of Rule 1.4 of the West Virginia Rules of Professional Conduct, which states that a lawyer must keep his client informed as to the status of the case and explain any matter such that the client can make informed decisions, and declaring that the Board correctly held that the attorney in question did not disclose the prosecutor's plea offers).

merely passing along a plea bargain offer may not be sufficient to comply with the rule.[292] As already noted, defense counsel need not pass along a plea bargain offer where "prior discussions with the client have left it clear that the proposal will be unacceptable."[293] Under the rule, in extreme circumstances, a lawyer may be required to act for a client without prior consultation.[294]

2. The Duty to Promptly Comply with Requests for Information

The second responsibility of communicating with the client is to "promptly comply with reasonable requests for information" from the client.[295] Circumstances will obviously dictate what may constitute a prompt response to a reasonable request.[296] A request for information during the heat of trial will require a quicker but less detailed reply—or perhaps no immediate reply at all—than a request for an update during the early stages of litigation.[297] "The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[298]

3. The Duty to Inform

While the first two responsibilities focus more upon when there is a duty to communicate, the third responsibility outlines what

292. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a) & cmt. 1 (mandating that the circumstances dictate the reasonableness of the attorney's actions in properly informing his client); *see also* State v. Williams, 83 S.W.3d 371, 374 (Tex. App.—Corpus Christi 2002, no pet.) (failing to fully explain an offer of deferred adjudication fell below the constitutional minimum standard of conduct).

293. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 1; *see also* Harvey v. State, 97 S.W.3d 162, 168 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) ("Obviously, counsel acted reasonably in breaking off negotiations if appellant's instructions to him made jail nonnegotiable.").

294. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 2.

295. *Id.* 1.03(a).

296. *See id.* 1.03 cmt. 2 (stating that circumstances dictate the reasonableness of an attorney's representation).

297. *Id.*

298. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

there is a duty to communicate.[299] Under Rule 1.03(b), a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[300] A client "should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[301] Counsel therefore has the responsibility to explain a matter sufficiently for the client to make informed decisions on his own behalf.[302]

"Adequacy of communication depends in part on the kind of advice or assistance involved."[303] During plea bargain negotiations, for example, there will be time to explain a proposal and review all important provisions with the client before proceeding to an agreement.[304] In contrast, during trial "a lawyer should explain the general [trial] strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others," but counsel cannot be expected to describe trial strategy in detail.[305]

Ordinarily, the information to be provided to the client is that "appropriate for a client who is a comprehending and responsible adult."[306] However, "where the client is a child or suffers a mental disability," this standard may be impractical.[307] "The fact that a client suffers a disability does not diminish the desirability of

299. *See id.* 1.03(a)–(b) (discussing the "when"—keeping the client informed of the status of the case and complying promptly to requests for information, and the "what"—explaining the matter sufficiently to allow the client to make informed decisions).

300. *Id.* 1.03(b); *see also id.* terminology ("'Consult' or 'Consultation' denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.").

301. *Id.* 1.03 cmt. 1; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1) ("[A] lawyer shall [generally] abide by a client's decisions . . . concerning the objectives and general methods of representation.").

302. *Id.* 1.03(b).

303. *Id.* at 1.03 cmt. 2.

304. *Id.*

305. *Id.*

306. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

307. *Id.*; *see also id.* 1.02(g) (stating that a lawyer should seek "appointment of a guardian or other legal representative . . . whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client").

treating the client with attention and respect."[308] Thus, "[i]n addition to communicating with any legal representative [of a disabled client], a lawyer should seek to maintain reasonable communication with [the disabled] client" to whatever degree possible.[309]

Under certain circumstances, "a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication."[310] Similarly, counsel is not required to convey information to the client which he is prohibited by law or a court ruling from disclosing.[311]

As the existence of the duty to communicate suggests, and the comments to Rule 1.03 explicitly set out, a client must be kept informed of the progress of a case because counsel has the duty to abide by the client's decisions.[312] Subject to a number of specific exceptions, under Rule 1.02(a):

> [A] lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation; (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; [and] (3) [i]n a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.[313]

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308. *Id.* at 1.03 cmt. 5.

309. *Id.*

310. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 4.

311. *Id.*; *see also id.* 3.04(d) (prohibiting a lawyer from "knowingly disobey[ing], or advis[ing] the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience"); TEX. CODE CRIM. PROC. ANN. art. 35.29 (Vernon 2006) (mandating that counsel not disclose juror information except upon showing of good cause to the court); Saur v. State, 918 S.W.2d 64, 67 (Tex. App.—San Antonio 1996, no writ) ("In cases where the protection of jurors is an issue, it may be appropriate to take up the [juror] information sheets at the conclusion of trial, with appropriate instruction to counsel about non-disclosure."); Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 778 (2003) ("The disclosure obligations of attorneys to clients are limited by a variety of considerations, including scope of representation, materiality, client knowledge, competing obligations to others, client agreement, and threatened harm to the client or others.").

312. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a), 1.03(a), (b) & cmt. 1 (explaining that "a lawyer shall abide by a client's decisions" and that the client must be able to participate in decisions concerning the objectives of the representation).

313. *Id.* 1.02(a)(1)–(3).

The latter two decisions—whether to waive a jury and whether to testify—are also provided for under the Constitution.[314]

Under Rule 1.02, "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation."[315] "The client [bears the] ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of the representation."[316] Within these broad limits, the lawyer bears the responsibility of determining the means by which the client's objectives may be furthered while consulting with the client about the general methods to be used in pursuing those objectives.[317] In essence, the lawyer has the discretion to determine technical and legal tactics, but only within the framework of the strategic goals determined by the client, including concerns such as the expense to be incurred and the concern for third parties who might be adversely affected by the lawyer's pursuit of certain tactics.[318]

VI. CONCLUSION

Although the Texas Disciplinary Rules of Professional Conduct do not directly address many of the ethical issues that arise in criminal plea bargaining, lawyers who follow the specific constitutional duties governing plea bargains and the general rules of conduct for lawyers can avoid most ethical dilemmas that will confront prosecutors and defense attorneys in the course of plea bargaining.

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314. *See* TEX. CODE CRIM. PROC. art. 1.13(a) (Vernon 2005) (stating that the right to a jury trial may be waived, but only "in person by the defendant in writing"); Rock v. Arkansas, 483 U.S. 44, 44 (1987) (explaining that a defendant's right to testify is found under the Fifth, Sixth, and Fourteenth Amendments); Nix v. Whiteside, 475 U.S. 157, 173 (1986) (declaring that while a defendant has a constitutional right to decide to testify, this "right does not extend to testifying falsely").

315. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2 subtit. G. app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

316. *Id.*

317. *Id.*

318. *Id.*; *cf.* McFarland v. State, 845 S.W.2d 824, 847–48 (Tex. Crim App. 1992) (trial counsel did not render ineffective assistance in failing to introduce mitigating evidence where defendant explicitly instructed counsel not to because he did not wish to embarrass his family).