OUTLINE OF ETHICAL PLEA BARGAINING UNDER THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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CHAPTER 3

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NOTE: This outline is based upon a much more detailed analysis soon to be published by the St Mary's Law Journal. For a more thorough discussion, and additional case citations, see Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct, ST. MARY'S L. J.* (2008).

I. CONSTITUTIONALITY OF PLEA BARGAINING

A. The Following Plea Bargain Situations Are Not Unconstitutional:

1. Threatening a defendant with a greater charge in the course of plea bargaining does not violate due process.[1]
2. A plea bargain to avoid a more severe punishment does not violate the Fifth Amendment.[2]
3. A prosecutor does not have an obligation under the Due Process Clause to forego a plea bargain if the defendant pleads guilty but simultaneously attests his innocence.[3]
4. Defense counsel's incorrect assessment of the strength of the case against the defendant will not invalidate an otherwise proper plea.[4]
5. A plea is not constitutionally invalid merely because the defendant may have made a bad bargain.[5]

B. There Are Constitutional Limits to Plea Bargaining

1. A defendant is entitled to the assistance of counsel during plea negotiations.[6]
2. A plea must not be the result of actual or threatened physical harm or mental coercion overbearing the will of the defendant. A plea must represent a voluntary and intelligent choice among alternative courses of action.[7]
3. The record must reflect that the plea was knowingly and voluntarily made.[8]
4. A prosecutor must keep his plea-bargained promise.[9]
5. A defendant enjoys the right to have any plea bargain offer from the State conveyed and explained to him by his attorney.[10]
6. A defendant has the constitutional and statutory right to accept or reject any plea offer made by the State.[11]

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[1] See Bordenkircher v. Hayes, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1977).

[2] See Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970); see also Gaither v. State, 479 S.W.2d 50, 51 (Tex. Crim. App. 1972)("a plea is not rendered involuntary because it was induced as a result of a plea bargain situation").

[3] See North Carolina v. Alford, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167-68, 27 L.Ed.2d 162 (1970); but see Davis v. State, 686 S.W.2d 287, 290 (Tex. App. – Houston [14th Dist.] 1985, no pet.)(plea involuntary where court suggested that it would not order a p.s.i unless defendant pleaded *nolo contendere* and defendant continued to maintain his innocence during punishment phase).

[4] See Parker v. North Carolina, 397 U.S. 790 797-98, 90 S.Ct. 1458, 1462-63, 25 L.Ed.2d 785 (1970)

[5] See Bradshaw v. Stumpf, 545 U.S. 175, ___, 125 S.Ct. 2398, 2407 (2005).

[6] See Brady, 397 U.S. at 758, 90 S.Ct. at 1474.

[7] See id. at 750, 90 S.Ct. at 1470; see also Alford, 400 U.S. at 31, 91 S.Ct. at 164.

[8] See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969).

[9] See Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); see also Gibson v. State, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991).

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

[11] See 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. CODE CRIM. PROC. ANN. art. 1.13(a)(Vernon 2005)(defendant may only waive jury trial "in person by the defendant"); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(Vernon Supp. 2007)(court must admonish defendant personally before accepting plea as part of a plea bargain agreement); see also TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(3)(a lawyer shall abide by a client's decision "in 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").

II. CHARGING AS PART OF THE PLEA BARGAIN PROCESS

A. "Overcharging"

1. Rule 3.09(a) of the Rules of Professional Conduct requires that a prosecutor "refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause," and thus prohibits "overcharging" in its simplest and most direct form.[12]

   (a) The Court of Criminal Appeals has suggested that under the rule "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 has been applied in Texas to prohibit the inclusion of unsupported allegations in an indictment," a practice which might be characterized as "overcharging."[13]

   (b) The thrust of the courts' conclusion is plain: a prosecutor may not add allegations he cannot prove to an otherwise valid indictment or information simply in order to gain an advantage in the resolution of the primary charge.[14]

2. The practice of including unsupported allegations in an otherwise valid indictment or information might also violate Rule 3.03(a)(1).[15]

B. "Undercharging"

1. A prosecutor should not plead a case down to a charge that is not consistent with the known facts, even if the plea benefits the defendant, or she risks violating Rule 3.09(a).[16]
2. A prosecutor and defense counsel who submit a plea to the court that does not conform to the known facts violate Rule 3.03(a)(1).[17]

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[12] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a)

[13] Lehman v. State, 792 S.W.2d 82, 85 n.2 (Tex. Crim. App. 1990); cf. People v. Pelchat, 62 N.Y.2d 97, 106-07 (1984)(prosecution should not have proceeded on, and defendant should not have been permitted to plead guilty to indictment where prosecutor was aware that sole witness before grand jury who had linked the defendant to possession of drugs had explained that he had misunderstood question put to him during grand jury appearance and denied that defendant had possessed the contraband).

[14] See Lehman, 792 S.W.2d at 85 n.2; compare State v. Korum, 141 P.3d 13, 19-20 (Wash. 2006)(overturning lower court's conclusion that prosecutor had "overcharged" defendant and holding that additional charges were based upon the evidence and strengthened the State's primary charge); Roehl v. State, 77 Wis.2d 398, 410-12, 253 N.W.2d 210, 215-16 (1977)(no evidence that prosecutor brought additional charges only for the purpose of obtaining a plea bargain).

[15] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1)("A lawyer shall not knowingly . . . make a false statement to a tribunal"); see also Lawyer Disciplinary Bd v. Turgeon, 210 W.Va. 181, 185, 557 S.E.2d 235, 239 (2000), cert. denied, 534 U.S. 841, 122 L.Ed.2d 99, 151 L.Ed.2d 59 (2001)(lawyer's sidebar reference to witness's purported polygraph examination, where witness had never submitted to polygraph, violated rule against making a false statement of material fact).

[16] See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(a)("A 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"); see also Iowa Supreme Court Attorney Disciplinary Board v. Zenor, 707 N.W.2d 176, 180 (Iowa 2005)(city 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 Board v. Howe, 706 N.W.2d 360, 370-71 (Iowa 2005)(assistant city prosecutor violated rules of ethics in allowing misdemeanor defendants to plea to non-moving traffic violations for which there was no factual basis)

[17] See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1).

III. PROSECUTORIAL DISCRIMINATION AND VINDICTIVENESS IN PLEA BARGAINING

A. Prosecutorial Discrimination in Plea Bargaining

1. The Equal Protection Clause of the Fifth Amendment prohibits 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.[18]

   (a) 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, violates the Equal Protection Clause.[19]

2. A presumption of regularity supports State's counsels' decisions to prosecute cases -- and by extension, plea bargains – and "in the absence of clear evidence to the contrary, the courts presume that they have properly discharged their duties."[20]

   (a) Thus, in order to succeed in a claim of abuse of prosecutorial discretion, a defendant must present "exceptionally clear proof" of "purposeful discrimination" that "had a discriminatory effect" on him.[21]

   (b) The defendant must also establish that the decision makers "in *his* case acted with discriminatory purpose,"[22] unless the selective prosecution allegation "is based on an overtly discriminatory classification."[23]

3. "Discriminatory purpose" implies "more than intent as volition or intent as awareness of consequences. It implies that the decision-maker ... selected or reaffirmed a particular course of action at least 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group" or individual.[24]
4. As well as violating a defendant's equal protection rights, discrimination in plea bargaining based upon an arbitrary or invidious

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[18] Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985)(quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962); County v. State, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989); see also Falls v. Town of Dyer, 875 F.2d 146, 148-49 (7th Cir. 1989) (prosecution selective because statute enforced only against defendant, even though defendant chosen at random, rather than on improper basis such as race, because statutory classification applicable to only a single individual is irrational).

[19] See Gray v. State, 650 P.2d 880, 882-84 (Okla. Crim. App. 1982)(applying equal protection analysis to prosecutor's refusal to negotiate plea); 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 government's plea bargain offer); Moody v. State, 716 S.W.2d 562, 565 (Miss. 1998)(holding that prosecutor's practice of requiring defendants to agree to fine as condition of dismissal of bad check charge violated equal protection rights of indigent defendants); see also Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978)("the 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 unjustificable standard such as race, religion, or other arbitrary classification")(quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962)).

[20] United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926); Garcia v. State, 172 S.W.3d 270, 271 (Tex. App. – El Paso 2005, no pet. h.); Hall v. State, 137 S.W.3d 847, 855 (Tex. App. – Houston [1st Dist.] 2004, pet. ref'd).

[21] See McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987) (quoting Wayte, 470 U.S. at 608, 105 S.Ct. at 1531); Green v. State, 934 S.W.2d 92, 103 (Tex. Crim. App. 1996), cert. denied, 520 U.S. 1200, 117 S.Ct. 1561, 137 L.Ed.2d 707 (1997); County, 812 S.W.2d at 308; Nelloms v. State, 63 S.W.3d 887, 893 (Tex. App. – Fort Worth 2001, pet. ref'd).

[22] McCleskey, 481 U.S. at 292, 107 S.Ct. at 1767 (emphasis in original); see also United States v. Lawrence, 179 F.3d 343, 350 (5th Cir. 1999), cert. denied, 528 U.S. 1093, 120 S.Ct. 836, 145 L.Ed.2d 703 (2000)(disparate treatment of co-defendants not selective prosecution where defendant failed to allege or prove any particular animus by prosecutor).

[23] Wayte, 470 U.S. at 608 n.10, 105 S.Ct. at n.10; Garcia v. State, 172 S.W.3d 270, 271 (Tex. App. – El Paso 2005, no pet. h.); Hall v. State, 137 S.W.3d 847, 855 (Tex. App. – Houston [1st Dist.] 2004, pet. ref'd).

[24] McClesky, 481 U.S. at 298, 107 S.Ct. at 1770 (quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)).

classification would subject counsel to discipline under Rule 5.08(a) of the Rules of Professional Conduct.[25]

B. Prosecutorial Vindictiveness in Plea Bargaining

1. Generally, due process prohibits the State from increasing the severity of the charges against a defendant who has exercised a procedural right.[26]
2. A presumption of vindictiveness will arise if circumstances create a "realistic likelihood" of vindictiveness.[27]

   (a) 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.[28]

3. 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:

   (a) There is no prosecutorial vindictiveness when additional charges are filed after a mistrial or an acquittal, and a plea bargain offer thus increased.[29]

   (b) Prosecution for the same offense by two separate entities does not raise the presumption of prosecutorial vindictiveness. Thus, prosecution by a second entity after the defendant has refused a plea offer from the first entity is not unconstitutional.[30]

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[25] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.08(a)("A lawyer shall not willfully, in connection with an adjudicatory proceeding . . . manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity").

[26] See Blackledge, 417 U.S. at 28-29, 94 S.Ct. at 2103.

[27] See United States v. Goodwin, 457 U.S. 368, 381-82, 102 S.Ct. 2485, 2493, 73 L.Ed.2d 74 (1982); Blackledge, 417 U.S. at 27, 94 S.Ct. at 2102; Neal v. State, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004); Watson v. State, 760 S.W.2d 756, 759 (Tex. App. — Amarillo 1988, pet. ref'd); cf. Chaffin v. Stynchcombe, 412 U.S. 17, 26-27, 93 S.Ct. 1977, 1983-84, 36 L.Ed.2d 714 (1973) (likelihood of vindictiveness de minimis where defendant re-sentenced by a second jury after successful appeal of the first jury verdict).

[28] Compare Thigpen v. Roberts, 468 U.S. 27, 31-32, 194 S.Ct. 2919-20, 82 L.Ed.2d 23 (1984) (vindictiveness presumed where defendant charged with felony manslaughter after appealing misdemeanor DWI conviction, despite involvement with two separate prosecutorial agencies); Blackledge, 417 U.S. at 27-28, 94 S.Ct. at 2102-03 (vindictive prosecution presumed where prosecutor increased charge after defendant appealed misdemeanor conviction to a trial de novo); Bouie v. State, 565 S.W.2d 543, 546-47 (Tex. Crim. App. 1978) (presumption of prosecutorial vindictiveness where prosecutor added habitual enhancement to indictment after defendant successfully appealed first conviction); Doherty v. State, 892 S.W.2d 13, 15-16 (Tex. App. — Houston [14th Dist.] 1994, pet. ref'd) (prosecutor charged defendant with capital murder after he successfully appealed his conviction for murder); with Borenkircher v. Hayes, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978)(no presumption of vindictive prosecution where prosecutor re-indicted case after defendant refused a plea bargain offer for lower charge); Lopez v. State, 928 S.W.2d 528, 533 (Tex. Crim. App. 1996) (no presumption of vindictiveness where prosecutor sought deadly weapon finding after defendant successfully appealed his conviction for murder); Godsey v. State, 989 S.W.2d 482, 494-95 (Tex. App. — Waco 1999, pet. ref'd) (no presumption of vindictiveness where prosecutor re-files after the defendant successfully appeals negotiated plea to lesser charge); Cover v. State, 913 S.W.2d 611, 614 (Tex. App. — Tyler 1995, pet. ref'd) (no presumption of vindictiveness where prosecutor pursues charge of retaliation against defendant after the defendant filed post-trial writs of habeas corpus accusing the prosecutor of suborning perjury where victim and sheriff's office were responsible for the charge); Watson v. State, 760 S.W.2d 756, 758-59 (Tex. App. — Amarillo 1988, pet. ref'd) (no presumption of vindictiveness where prosecutor increases charge after the defendant successfully withdraws from a plea agreement on a motion for new trial).

[29] See United States v. King, 126 F.3d 394, 400 (2d Cir. 1997), cert. denied, 523 U.S. 1024, 118 S.Ct. 1308, 140 L.Ed.2d 472 (1998)(no presumption of vindictiveness after mistrial); United States v. Contreras, 108 F.3d 1255, 1263-64 (10th Cir. 1997), cert. denied, 522 U.S. 839, 118 S.Ct. 116, 139 L.Ed.2d 68 (1997)(no presumption after mistrial); United States v. McAllister, 29 F.3d 1180, 1185-86 (7th Cir. 1994)(no presumption after mistrial); but see United States v. Motley, 655 F.2d 186, 187-89 (9th Cir. 1981) (presumption of vindictiveness when enhanced charges added after mistrial declared over government's objection); United States v. Sattar, 314 F.Supp.2d 279, 311-12 (S.D.N.Y. 2004)(no presumption of vindictiveness nor evidence of actual vindictiveness where defendant successfully moved to quash charges and prosecution re-filed, adding additional counts).

[30] See United States v. Raymer, 941 F.2d 1031, 1042 (10th Cir. 1991)(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, 1195-96 (D. Kan. 2003)(no presumption of vindictiveness where defendant rejected plea offer from state prosecutor and was later prosecuted by federal authorities).

(c) There is no presumption of vindictiveness where a prosecutor increased the charges against a defendant after he refused a plea bargain offer.[31]

(1) 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.[32]

4. The presumption of vindictiveness is not absolute, and may be overcome by objective evidence justifying the prosecutor's action.[33]

(a) 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 charge or enhancement had been omitted through mistake or oversight.[34]

(b) A prosecutor may also establish that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion.[35]

5. In the absence of a presumption of vindictiveness, a defendant must prove actual vindictiveness in order to prevail on a claim of vindictive prosecution.[36]

(a) In proving actual vindictiveness, a defendant need not establish that the prosecutor acted in bad faith or maliciously.[37]

(b) In order to establish actual vindictiveness, however, a defendant must show that the prosecutor's charging decision "was a 'direct and unjustifiable penalty' that resulted

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[31] United States v. Goodwin, 457 U.S. 368, 378-79, 102 S.Ct. 2485, 2492, 73 L.Ed.2d 74 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978); Christensen v. State, 575 S.W.2d 42, 45-46 (Tex. Crim. App. [Panel Op.] 1979)(rejecting presumption of vindictiveness where prosecutor re-indicted case after defendant refused plea bargain offer); Cowan v. State, 562 S.W.2d 236, 238-39 (Tex. Crim. App. 1978)(rejecting presumption of vindictiveness where following defendant's rejection of plea prosecutor added enhancements to indictment); Bouie v. State, 565 S.W.2d 543, 546-47 (Tex. Crim. App. 1978); Sterling v. State, 791 S.W.2d 274, 278 (Tex. App. – Corpus Christi 1990, pet. ref'd)(rejecting presumption of vindictiveness based upon prosecutor's motion to stack sentences after defendant successfully withdrew from an agreed plea bargain).

[32] See Palm v. State, 656 S.W.2d 429, 436 (Tex. Crim. App. [Panel Op.] 1981); Bouie v. State, 565 S.W.2d 543, 547 (Tex. Crim. App. 1978).

[33] See United States v. Goodwin, 457 U.S. 368, 376 n.8, 102 S.Ct. 2485, 2490 n.8, 73 L.Ed.2d 74 (1982)(observing that presumption of vindictiveness may be overcome "by objective evidence justifying the prosecutor's action"); Hood v. State, 185 S.W.3d 445, 449-50 (Tex. Crim. App. 2006)(examining difference between objective and subjective explanations to presumed vindictiveness); Neal v. State, 150 S.W.3d 169, 173-74 (Tex. Crim. App. 2004)(requiring objective evidence to rebut presumption of vindictiveness); cf. Texas v. McCullough, 475 U.S. 134, 141, 106 S.Ct. 976, 980, 89 L.Ed.2d 104 (1986) (presumption of judicial vindictiveness may be rebutted).

[34] See Blackledge, 417 U.S. 21, 29 n.7, 94 S.Ct. 2098, 2103 n.7, 40 L.Ed.2d 628 (1974) (discussing Diaz v. United States, 223 U.S. 442, 448-49, 32 S.Ct. 250, 251, 56 L.Ed. 500 (1912), where defendant initially pled guilty to misdemeanor assault, and later was found guilty of murder after the victim died); Hood, 185 S.W.3d at 450 ("mistake or oversight" sufficient objective explanation for adding enhancements after initial conviction was reversed); Byrd v. McKaskle, 733 F.2d 1133, 1138 (5th Cir. 1984) (intervening change in Texas Penal Code that equalize penalties under original and subsequent charge sufficiently objective reason for change as to overcome presumption of vindictiveness); see also Hardwicke v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978)(.

[35] See United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983) (en banc); Raetzch v. State, 709 S.W.2d 39, 41 (Tex. App. – Corpus Christi 1986, pet. ref'd)(prosecutor rebutted presumption of vindictiveness by explaining that new enhancement was based upon State's receipt of defendant's pen-packet, which it had not had in its possession at the time of the first trial); cf. McCullough, 475 U.S. at 143-44, 106 S.Ct. at (no judicial vindictiveness where additional evidence discovered after first trial); but see United States v. King, 126 F.3d 394, 399 (2d Cir. 1997), cert. denied, 523 U.S. 1024, 118 S.Ct. 1308, 140 L.Ed.2d 472 (1998)(presumption of vindictiveness may be rebutted "with a showing of legitimate, articulable, objective reasons for [the] superseding indictment," and not just upon showing of subsequent intervening events).

[36] See Goodwin, 457 U.S. at 384; Neal v. State, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004).

[37] See Blackledge, 417 U.S. at 28, 94 S.Ct. at 2102; Doherty v. State, 892 S.W.2d 13, 15-16 (Tex. App. — Houston [14th Dist.] 1994, pet. ref'd).

'solely from the defendant's exercise of a protected legal right.'"[38]

(1) The defendant "shoulders the burden of production and persuasion" when raising a claim of actual vindictiveness, and is not afforded the aid of any legal presumption.[39]

6. Once a defendant carries his burden of proof, the prosecution may respond with evidence of a lack of animus.[40]

(a) 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.[41]

(b) If a defendant is unable to carry his burden of proof of actual vindictiveness or a realistic likelihood of vindictiveness, the trial court need not reach the issue of the prosecution's justification.[42]

III. COMMUNICATION

A. Communication between prosecution and defendant – the no-contact rule

1. The basic rule governing communication with a person represented by counsel, Rule 4.02, 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."[43]

(a) A defendant may not waive an attorney's obligation to notify opposing counsel under Rule 4.02(a).[44]

(b) If a defendant discharges her attorney and represents herself *pro se*, a lawyer is not 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."[45]

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[38] See Neal, 150 S.W.3d at 174 (quoting Goodwin, 457 U.S. at 384 n.19, 102 S.Ct. at 2494 n.19).

[39] See Neal, 150 S.W.3d at 174; United States v. Sarracino, 340 F.3d 1148, 1177-78 (10th Cir. 2003), cert. denied, 540 U.S. 1131, 124 S.Ct. 1105, 157 L.Ed.2d 935 (2004); United States v. Moulder, 141 F.3d 568, 572 (5th Cir. 1998).

[40] See id.; see also United States v. Johnson, 171 F.3d 139, 140-41 (2d Cir. 1999); United States v. Amberslie, 312 F.Supp.2d 570, 572 (S.D.N.Y. 2004).

[41] See Hood v. State, 185 S.W.3d 445, 450 (Tex. Crim. App. 2006)("mistake or oversight" sufficient objective explanation to rebut claim of vindictiveness); Castleberry v. State, 704 S.W.2d 21, 29 (Tex. Crim. App. 1986)(defendant's withdrawal from plea sufficient explanation for increased punishment); Sterling v. State, 791 S.W.2d 274, 278 (Tex. App. – Corpus Christi 1990, pet. ref'd)(discovery of additional evidence, particularly additional offenses defendant had committed, sufficient to rebut vindictiveness allegation); see also United States v. Schenk, 299 F.Supp.2d 1192, 1195-96 (D. Kan. 2003)(transfer of case to federal court after defendant rejected plea bargain offer in state court could have been prompted by lack of resources to pursue case in state court, thus defendant had failed to prove actual vindictiveness); United States v. Raymer, 941 F.2d 1031, 142 (10th Cir. 1991)(same).

[42] Neal, 150 S.W.3d at 175.

[43] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a).

[44] See In re News America Pub., Inc., 974 S.W.2d 97, 103 (Tex. App. – San Antonio 1998)(orig. proceeding); see also United States v. Lopez, 4 F.3d 1455, 1462 (9th Cir. 1993); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.), cert. denied, 412 U.S. 932 (1973); United States v. Batchelor, 484 U.S. 812, 813); Suarez v. State, 481 So.2d 1201, 1206 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986); *In re* Conduct of Burrows, 291 Or. 135, 144, 629 P.2d 820, 825 (1981); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

[45] *In re* Users System Services, Inc, 22 S.W.3d 331, 334-36 (Tex. 1999); see also In *re* Capper, 757 N.Ed.2d 138, 139-40 (Ind. 2001)(attorney reprimanded for relying upon client's representation that opposing party (client's ex-wife) was not represented by counsel and contacting the opposing party without notifying opposing counsel); but see Gentry v. State, 770 S.W.2d 780, 790 (Tex. Crim. App. 1988), cert. denied, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1013 (1989)(even though defendant "without a doubt" terminated defense counsel, prosecutor violated Rule 4.02 by not contacting defense attorney when 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 America Pub., Inc., 974 S.W.2d 97, 103 (Tex. App. – San Antonio 1998)(orig. proceeding)(attorney violated Rule 4.02(a) when he failed to contact plaintiff's lawyer after plaintiff informed him that he had discharged his attorney and then negotiated a settlement and counsel had not filed a notice of withdrawal in the case); ABA Comm. on Ethics and Professional

(c) By its wording, Rule 4.02 does not prohibit communications with a represented person concerning subjects other than "the subject of representation."[46]

(1) 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.[47]

2. Communications with an accused after indictment regarding the charged offense also implicates the Sixth Amendment.[48]

(a) Under the Court of Criminal Appeals interpretation of the Sixth Amendment, 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.[49]

(b) A defendant may waive his Sixth Amendment right.[50]

(c) A defendant whose Sixth Amendment right has attached and who is represented by an attorney cannot, as a matter of constitutional law, unilaterally waive his Sixth Amendment right to counsel if the State has initiated the interrogation, however.[51]

B. Communicating with a Pro-Se Defendant

1. The Code of Criminal Procedure explicitly prohibits state's counsel "in any adversary judicial proceeding that may result in punishment by confinement" from "communicating" 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 he has waived the opportunity.[52]

(a) Counsel is also prohibited from "initiating or encouraging" any attempts "to obtain from a defendant who is not represented by counsel a waiver of the right to counsel."[53]

Responsibility, Formal Op. 95-396 (1995)(counsel should not communicate with a person represented by counsel until the person's lawyer has withdrawn her appearance in the case); State v. Yatman, 320 So.2d 355, 403 (Fla. App. 1975)(while prosecutor may not have known defendant was represented by counsel, it would "behoove one in his position to make some reasonable inquiry to find out").

[46] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a)("In representing a client, a lawyer shall not 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 the subject, unless the lawyer has the consent of the other lawyer to do so").

[47] See In the Matter of Dumke, 171 Wis.2d 47, 53-54, 489 N.W.2d 919, 922 (1992); *In re* Conduct of Burrows, 291 Or. 135, 144, 629 P.3d 820, 825 (1981)

[48] See Maine v. Moulton, 474 U.S.159, 180 (1985); United States v. Morrison, 449 U.S. 364, 364 (1981); United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993); United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981); see also Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 260 (Tex. App. – Houston [14th Dist.] 1999, no pet.)(communications with plaintiff without her attorney's knowledge or permission violated Rule 4.02). Law enforcement can constitutionally communicate with defendant regarding unrelated offenses, however, as the Sixth Amendment right to counsel is "offense specific." See Texas v. Cobb, 532 U.S. 162, 168-69, 121 S.Ct. 1335, 1341-42, 149 L.Ed.2d 131 (2001).

[49] See Upton v. State, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993).

[50] See Gentry v. State, 770 S.W.2d 780, 790 (Tex. Crim. App. 1988), cert. denied, 490 U.S. 1102, 109 S.Ct. 2459, 104 L.Ed.2d 1013 (1989) see also Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 239-40, 523 S.E.2d 552, 555-56 (1999)(prosecutor violated prohibition against communicating with defendant, who was represented by counsel, when prosecutor discussed possibly of plea bargain with defendant after defendant's counsel failed to appear for a hearing); In the Matter of Howes, 123 N.M. 311, 319, 940 P.2d 159, 167 (1997)(AUSA disciplined for "communicating" with defendant who was represented by counsel after prosecutor, who was contacted by defendant, accepted defendant's phone calls and listened to defendant's statements, though he refrained from asking defendant questions).

[51] See Michigan v. Jackson, 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631 (1986); Upton, 853 S.W.2d at 553.

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

[53] TEX. CODE CRIM. PROC. ANN. art. 1.051(f-1)(1)(Vernon Supp. 2007). Section (f-2) of the statue further provides that a court may not "direct or encourage a defendant to communicate with the attorney representing the state" until after the court has advised the defendant of his right to counsel and the procedure for the appointment of counsel and the court has denied the appointment of counsel and provided the defendant the opportunity to secure counsel or the defendant has waived his right to counsel. TEX. CODE CRIM. PROC. ANN. art. 1.051(f-2)(Vernon Supp. 2007).

2. 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."[54]

   (a) 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."[55]
   (b) The comment adds that the rule does not apply "to any person appearing *pro se* with the approval of the tribunal."[56]

      (1) Thus, a prosecutor may, within the bounds of ethics, discuss waiving certain rights during plea negotiations with a *pro se* defendant.[57]

3. A prosecutor should ensure during negotiations that the *pro se* defendant understands the prosecutor's role in the proceedings.[58]

IV. BARGAINING

A. Representations to the opposing party as part of negotiations

1. Rule 4.01 declares that "in the course of representing a client" a lawyer shall not "knowingly . . . make a false statement of material fact or law to a third person."[59]

   (a) 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 person."[60]
   (b) Rule 4.01 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 knowingly assisting a fraudulent act perpetrated by a client."[61]

B. Plea bargaining criminal and civil cases together

1. Rule 4.04(b) requires that a lawyer not "present, participate in presenting, or threaten to present" a criminal or disciplinary charge "solely to gain an advantage in a civil suit."[62]

   (a) 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 hearing solely to prevent" the person's participation in the disciplinary action.[63]

2. The rule does not directly bar defense counsel from threatening civil action to gain advantage in a criminal law matter.

   (a) In light of the prohibition in Subsection (a) of the rule, however, 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 would have no basis or that would be brought merely to harass or embarrass a prosecutor would violate the spirit, if not the letter, of the rule.[64]

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[54] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c).

[55] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c) cmt. 4.

[56] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c) cmt. 4.

[57] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c).

[58] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.03 ("in dealing . . . with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested").

[59] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(a).

[60] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(a).

[61] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(b).

[62] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(b)(1); see also Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 261 (Tex. App. – San Antonio 1999, no pet.)(lawyer violated rule against threatening criminal action to gain advantage in civil matter when he informed opposing party that he suspected that she had broken into his apartment and assured her that he would not report the break-in if the lawsuit could be settled); see also; In re Lantz, 420 N.E.2d 1236, 1237 (Ind. 1981)(prosecutor reprimanded for filing bad check charges on behalf of a client, giving appearance that public office was being used to collect private debts); People *ex rel* Gallagher v. Hertz, 198 Colo. 522, 525-26, 608 P.2d 335, 339 (1979)(special prosecutor disciplined for threatening criminal action in an effort to gain settlement in civil case); People v. Attorneys Respondent, 162 Colo. 174, 177, 427 P.2d 330, 331 (1967)(district attorney reprimanded for filing criminal charges and extraditing woman in an effort to collect a debt for a client); In re LaPinska, 72 Ill.2d 461, 473, 381 N.E.2d 700, 705 (1978)(city attorney suspended for using "leverage and power of his position" to gain favorable settlement for client).

[63] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(b)(2).

[64] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.04(a).

(b) 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").[65]

V. A PROSECUTOR'S DUTY TO DISCLOSE

A. A Prosecutor Is Not Required to Disclose Impeachment Evidence Before Plea Bargaining

1. A prosecutor is not 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.[66]

B. A Prosecutor May Be Required to Disclose Exculpatory Evidence Before Entering Into a Plea Bargain

1. 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.

   (a) At least two Texas cases suggest that prosecutors have a duty to disclose exculpatory evidence before entering a plea bargain, but as they can be distinguished, they do not resolve the issue.[67]

   (b) Several pre-Ruiz decisions, on the other hand, have suggested that there is no duty to disclose before a plea,[68] and the reasoning the Supreme Court applied to its rejection of a duty to disclose impeachment evidence is applicable to exculpatory evidence as well.[69]

2. Rule 3.09(d) requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[70]

   (a) Neither the rule nor the comments cast light on what constitutes "timely disclosure."

VI. PLEA BARGAINING AND CONFLICTS OF INTEREST

A. Constitutional conflicts of interest

1. Although multiple representation of co-defendants does not *per se* violate either the Sixth Amendment,[71] or the Rules of Professional Conduct,[72] a plea bargain offer to one client at the expense of another could create a conflict which violates counsel's duty to both.[73]

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[65] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01; TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.

[66] See Ruiz, 536 U.S. at 633, 122 S.Ct. at 2457.

[67] See Ex parte Lewis, 587 S.W.2d 697, 703 (Tex. Crim. App. 1979)(prosecutor's failure to reveal letter from psychiatrist suggesting defendant was incompetent to stand trial violated due process). A close reading of Ex parte Masonheimer, 220 S.W.3d 494 (Tex. Crim. App. 2007), in which the Court of Criminal Appeals held that double jeopardy bars a third re-trial 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 plea hearing, thus leaving open the question of whether the prosecution has a duty to disclose prior to entering into a plea bargain.

[68] See Orman v. Cain, 228 F.3d 616, 620 (5th Cir. 2000)("The duty articulated in Brady, however, was expressly premised on the 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)("There is no authority within our knowledge holding that suppression of Brady material *prior to trial* amounts to a deprivation of due process"(emphasis in original)); see also White v. United States, 858 F.2d 416, 422 (8th Cir. 1988)(quoting Campbell).

[69] Compare Ruiz, 536 U.S. at 628-34, 122 S.Ct. at 2454-2456 with Matthew, 201 F.3d at 360-362.

[70] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(d).

[71] See Cuyler, 446 U.S. at 348, 100 S.Ct. at 1718; James v. State, 763 S.W.2d 776, 778 (Tex. Crim. App. 1989).

[72] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b).

[73] Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978)(as the Supreme Court has noted, multiple representation may prevent an attorney "from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution" for at least one of the defendants); Baty v. Balkcom, 661 F.2d 391, 397 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982)("plea bargains are perhaps the most obvious example of the manifest effects of [a] conflict of interest").

(a) 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,[74] the 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.[75]

(b) Even if the defendant can establish that his lawyer labored 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.[76] Situations in which a conflict may not adversely affect the plea bargaining process include cases:

(1) in which the State refuses to plea bargain;[77]
(2) in which the defendant has nothing to offer as part of a bargain or refuses to testify for the prosecution,[78]
(3) in which the State has no need for the defendant's testimony.[79]

2. Representation of one client whose fees are paid by a third party might create an unconstitutional conflict of interest.[80]

(a) Although 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,[81] an unconstitutional conflict will exist where:

(1) there is evidence that the third party instructed counsel not to pursue a plea bargain, or
(2) counsel has manipulated negotiations to the third party's advantage at the expense of his client.[82]

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[74] See Burger v. Kemp, 483 U.S. 776, 785-86, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987)(even if there had been a conflict of interest, conflict did not harm counsel's advocacy where record showed the prosecution refused to plea bargain); Eisemann v. Herbert, 401 F.3d 102, 109 (2d Cir. 2005)(even if counsel had a conflict, the record indicates that the defendant had nothing to bargain with, and hence, plea bargaining "was not remotely a plausible defense strategy").

[75] See Hammon v. Ward, 466 F.3d 919, 930-31(10th Cir. 2006)(finding 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, preventing him from testifying as part of the defense, but never told the other brother until after trial had started, thus keeping the second brother from accepting a pre-trial plea offer); United States v. Salado, 339 F.3d 285, 291-92 (5th Cir. 2003)(remanding for determination of whether there was an actual conflict of interest, where counsel's failure to negotiate a plea agreement for the defendant, while at the same time negotiating one for co-defendant whom counsel also represented); Edens v. Hannigan, 87 F.3d 1109, 1117 (10th Cir. 1996)(counsel labored under actual conflict of interest that adversely affected his representation where counsel insisted on discussing only joint plea deal for co-defendants, and refused to negotiate separate plea offer for defendant); Thomas v. Foltz, 818 F.2d 476, 481-82 (6th Cir. 1987), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987)(attorney suffered actual conflict of interest that violated defendant's Sixth Amendment rights where prosecution offered an "all or nothing" plea agreement to three co-defendants and third defendant refused to plead until after pressured by counsel); Ford v. Ford, 749 F.2d 681, 682 (11th Cir. 1985), cert. denied, 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed.2d (1985)(attorney acted under actual conflict of interest where he represented two brothers offered a "both or nothing" plea bargain offer and one brother wished to plead and the other refused).

[76] See Burger v. Kemp, 483 U.S. 776, 785-86, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

[77] See id., 107 S.Ct. at 3121.

[78] See Stewart v. Wolfenbarger, No. 04-2419, 2006 WL 3230286, at *13 (6th Cir. November 9, 2006); Eiseman v. Herbert, 401 F.3d 102, 109-10 (2d Cir. 2005); Smith v. Newsome, 876 F.2d 1461, 1463 (11th Cir. 1989); Guaraldi v. Cunningham, 819 F.2d 15, 17 (1st Cir. 1987); Abernathy v. State, 278 Ga.App. 574, 585, 630 S.E.2d 421, 433-34 (2006).

[79] See Eiseman, 401 F.3d at 110.

[80] Wood v. Georgia, 450 U.S. 261, 269, 101 S.Ct. 1097, 1102, 67 L.Ed.2d 220 (1981)("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 where the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will keep 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").

[81] See Cabello v. United States, 188 F.3d 871, 878 (7th Cir. 1990); United States v. Corona, 108 F.3d 565, 575 (5th Cir. 1997); United States v. Allen, 831 F.2d 1487, 1497, 1503 (9th Cir. 1987).

[82] See Wood, 450 U.S. at 269, 101 S.Ct. at 1102 (suggesting that counsel had arranged fine as part of defendant's plea

3. Counsel also may be compromised by personal conflicts which might cause him to urge a client to accept or reject a plea bargain for his own personal reasons rather than the client's best interest, though the courts are split as to the appropriate test to employ in assessing the constitutionality of the conflict.[83]
4. Representing a defendant on a contingent fee basis – a practice which violates the Texas Rules of Professional Conduct[84] – creates a conflict of interest because it might prompt counsel to recommend or discourage a plea bargain in order to increase his fee.[85]
5. 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.[86]
6. 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.[87]

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bargain knowing that defendant could not pay and that third party would not pay); Lipson v. United States, 233 F.3d 942, 947-48 (7th Cir. 2000)(remanding for evidentiary hearing on grounds that counsel, whose fees were paid by co-defendant, did not seek plea bargain when other co-defendants had successfully obtained plea in exchange for testimony against co-defendant); Quintero v. United States, 33 F.3d 1133, 1136-37 (9th Cir. 1994)(remanding for evidentiary hearing on basis that counsel, who was being paid by defendant's drug supplier, recommended that defendant reject a favorable plea bargain offer that required defendant to cooperate in prosecution of drug supplier).

[83] Compare Beets v. Scott, 65 F.3d 1258, 1265-66 (5th Cir. 1995)(*en banc*)(two-pronged Strickland test should be used in evaluating whether conflict violated defendant's constitutional right to counsel) with Winkler Keane, 7 F.3d 304, 309 (2d Cir. 1993), cert. denied, 511 U.S. 1022, 114 S.Ct. 1407, 128 L.Ed.2d 79 (1994)(defendant must establish that "attorney's and the defendant's interests diverged with respect to a material factual or legal issue or to a course of action" and that defendant suffered an "actual lapse of representation"); see also Mickens v. Taylor, 535 U.S. 162, 174, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291 (2002)(suggesting, but not deciding, that test in Cyler v. Sullivan not appropriate to conflicts of interest other than simultaneous multiple representation); see also EDWARD L. WILKINSON, LEGAL ETHICS AND TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE, at 161-65 (TDCAA 2006)(examining differences between the Strickland and Winkler tests); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 208-213 (2002)(same).

[84] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(e)("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case").

[85] See Winkler Keane, 7 F.3d 304, 309 (2d Cir. 1993), cert. denied, 511 U.S. 1022, 114 S.Ct. 1407, 128 L.Ed.2d 79 (1994)("Without doubt, trial counsel's acceptance of the contingency fee arrangement for representing a criminal defendant is highly unethical and deserves the strongest condemnation," but no Sixth Amendment violation where defendant refused to permit counsel to enter into plea negotiations); see also Ex parte Morrow, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 810, 119 S.Ct. 40, 142 L.Ed.2d 31 (1998)(no actual conflict of interest where defendant failed to prove that attorney had agreed to contingency fee of 40% of seized cash returned as a result of plea bargain agreement).

[86] State v. Gregory, 364 S.C. 150, 153-54, 612 S.E.2d 449, 450-51 (2005)(actual conflict of interest that violated Sixth Amendment where counsel simultaneously represented defendant against criminal charges and the assistant solicitor assigned to prosecute the defendant in her divorce action); People v. Castro, 657 P.2d 932, 945 (Colo. 1983)(representation of district attorney on criminal charges of overspending office budget while at same time representing defendant on charge of murder created conflict of interest that violated Sixth Amendment); Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir. 1979), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979)(actual conflict of interest rendered trial "fundamentally unfair" where same law firm represented defendant in criminal case and the prosecutor in an unrelated civil action); Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983), overruled on other grounds, Peek v. Kemp, 790 F.2d 1499 (11th Cir. 1986))(actual conflict of interest that violated Sixth Amendment right to counsel where counsel represented county in a lawsuit challenging the composition of the county jury lists while simultaneously representing defendant in capital murder case)

[87] See United States v. McLain, 823 F.2d 1457, 1463-64 (11th Cir. 1987)(Sixth Amendment violation where lawyer was to be indicted on unrelated matter at conclusion of the case because counsel had incentive to delay proceedings, as reflected by his half-hearted plea bargaining); but see United States v. Montana, 199 F.3d 947, 949 (7th Cir. 1999)(no actual conflict of interest where lawyer did not read note from one co-defendant to another demanding payment in exchange for favorable testimony and no evidence that representation was adversely affected); Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992)(no impermissible conflict of interest where there was no evidence that indictment and later guilty plea by counsel on unrelated charges had adverse affect on representation); Roach v. Martin, 757 F.2d 1463, 1479-80 (4th Cir. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985)(no actual conflict of interest when attorney was being investigated by state bar while representing defendant).

7. Any other conflict which might tempt counsel to refuse to explore the possibility of a plea negotiation or to recommend the acceptance or rejection of a plea bargain for personal gain instead of the client's welfare could violate the Sixth Amendment.[88]
8. Prosecutors must avoid conflicts of interest which would so impair their ability to fairly plea bargain as to constitute a violation of due process, such as:

   (a) a financial interest in a related civil action[89]
   (b) an overwhelming personal animus toward the defendant,[90] or
   (c) some other factor that might prompt a prosecutor to fail to consider a plea bargain for reason other than the merits of the case itself.[91]

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[88] See United States v. Hanoum, 33 F.3d 1128, 1130-32 (9th Cir. 1994), cert. denied, 514 U.S. 1068, 115 S.Ct. 1702, 131 L.Ed.2d 564 (1995)(appeal dismissed without prejudice for further fact-finding on issue of whether attorney was having sex with defendant's wife and therefore had incentive to make sure defendant was found guilty and sentenced to prison); Hernandez v. State, 750 So.2d 50, 55 (Fla. 1999)(rejecting claim of ineffective assistance where defendant failed to show a "lapse in the conduct of the defense" due to counsel's sexual relationship with defendant's wife); United States v. Babbitt, 26 M.J. 157, 159 (C.M.J. 1988)(rejecting *per se* rule of conflict and holding that counsel's sexual affair with his client did not create conflict of interest where counsel actively defended client); United States v. Cain, 57 M.J. 733, 737-38 (A.r. Ct. Crim. App. 2002)(rejecting *per se* rule of conflict where counsel and client had sexual relations, even where counsel's sexual conduct could have subjected him to court-marshal, and finding no actual conflict where defendant failed to show lapses in representation); Moore v. United States, 950 F.2d 656, 660-61 (10th Cir. 1991)(remanding for evidentiary hearing on whether lawyer, due to personal conflict of interest, had advised defendant to plead guilty to perjury charge in order to protect himself from being implicated in perjury); United States v. Cancilla, 725 F.2d 867, 871 (2d Cir. 1984)(counsel had actual conflict of interest that adversely affected his advice whether to engage in plea negotiations where, unbeknownst to defendant, counsel had engaged in same insurance fraud scheme and may have feared plea bargain and defendant's subsequent cooperation would have revealed lawyer's involvement); Commonwealth v. Croken, 432 Mass. 266, 274-77, 733 N.E.2d 1005, 1012-14 (2000)(remanding for further fact-finding on issue of whether defense attorney had a conflict of interest between defendant and his live-in girlfriend, whom he later married, who was an attorney with the district attorney's office); see also TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(c)(prohibiting counsel from contracting for media rights related to matter of representation).

[89] See Granger v. Payton, 379 F.2d 709, 712 (4th Cir. 1967)(prosecutor who also represented victim in ancillary civil suit had conflict of interest that rose to level of due process violation because financial interest in civil suit influenced plea bargain offer); Ky Bar Ass'n v. Lovelace, 778 S.W.2d 651, 654 (Ky. 1989)(prosecutor suspended for participating in civil and criminal actions arising from same facts); *In re* Jolly, 239 S.E.2d 490, 491 (S.C. 1977)(per curiam)(circuit solicitor reprimanded); *In re* Truder, 17 P.2d 951, 952 (N.M 1932)(district attorney disciplined for participating in civil and criminal cases); *In re* Williams, 50 P.2d 729, 732 (Okla. 1935)(county attorney disciplined for participating in civil and criminal actions); *In re* Wilmarth, 172 N.W. 921, 926 (S.D. 1919)(state's attorney censured); *In re* Schull, 127 N.W. 541, 542-53 (S.D. 1910) modified on rehearing on other grounds, 128 N.E. 321 (S.D. 1910)(district attorney suspended); cf. *In re* Snyder, 559 P.2d 1273, 1275 (Or. 1976)(district attorney disciplined for violating statutes prohibiting concurrent practice of civil law). For extended examination of the constitutional scope of the "disinterested prosecutor," see EDWARD L. WILKINSON, LEGAL ETHICS AND TEXAS CRIMINAL LAW: PROSECUTION & DEFENSE , at 127-135 (TDCAA 2006)

[90] See Wright, 732 F.2d at 1056 (finding bias where prosecutor's wife had had numerous political and legal confrontations with defendant, because a prosecutor is not disinterested "if he has, or is under the influence of others who have, an axe to grind against the defendant"); United States v. Terry, 806 F.Supp. 490, 497 (S.D.N.Y. 1992), aff'd, 17 F.3d 575 (2d Cir.), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994)(neither prosecutor's personal comment to the defendant nor his later use of the prosecution in political ads established that the prosecutor had a personal "axe to grind"); see also Gallego v. McDaniel, 124 F.2d 1065, 1079 (9th Cir. 1997), cert. denied, 524 U.S. 917, 118 S.Ct. 2299, 141 L.Ed.2d 159 (1998)(defendant failed to establish prejudice where prosecutor entered into book deal after the case was tried).

[91] See People v. Vasquez, 39 Cal.4th 47, 70, 45 Cal.Rptr.3d 372, 389, 137 P.3d 199, 214 (2006)(though 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 defendant who was the child of a former employee, could constitute such prejudice as to violate due process); People v. Connor, 666 P.2d 5, 9 (Cal. 1983)(disqualifying entire district attorney's office after one of the attorneys had been shot at by the defendant and the victim had spoken to his colleagues about his "harrowing experience"); People v. Gentile, 511 N.Y.S. 901, 904 (1987)(prosecutor's admittedly close personal relationship to victim and "deep emotional involvement in case" deprived defendant of fair trial); People v. Superior Court, 561 P.2d 1164, 1174 (Cal. 1977)(prosecutor properly disqualified where mother of the homicide victim employed in district attorney's office and involved in custody dispute with defendant, the victim's ex-wife, over victim's child); State v. Jones, 268 S.W. 83, 85 (Mo. 1924)(prosecutor disqualified where he was the victim of defendant's alleged DWI); People v. Cline, 44 Mich. 290, 296, 6 N.W. 671, 672-73 (1880)(victim was prosecutor's brother).

9. Mere personal animus,[92] however, or the political concerns or aspirations of a prosecutor,[93] standing alone, are not enough to warrant disqualification.

B. Conflicts of interest under the StateBar Rules

1. Rule 1.06(b)(1) addresses the simultaneous representation of parties whose interests are not directly adverse, but where the potential for conflict exists, such as co-defendants in a criminal case.[94]

   (a) The rule states that a lawyer shall not represent a person if the representation "involves a substantially related matter in which the person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's law firm."[95]

      (1) The comment to the rule expresses "grave" concern over the conflict of interest involved in representing co-defendants in a case, and advises that "ordinarily a lawyer should decline to represent more than one co-defendant."[96]

   (b) Rule 1.06(b)(2) prohibits a lawyer from representing a person if the representation "reasonably appears to be or become[s] adversely limited by the lawyers' . . . responsibilities to another client or to a third person."[97]

      (1) Comment 4 to Rule 1.06 indirectly recognizes how a personal conflict or duty to a former client might affect plea bargaining by paraphrasing it: "loyalty 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."[98]
      (2) The thrust of the rule is easily grasped: 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 appropriate course of action," including plea bargaining.[99]

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[92] Gallego v. McDaniel, 124 F.2d 1065, 1079 (9th Cir. 1997), cert. denied, 524 U.S. 917, 118 S.Ct. 2299, 141 L.Ed.2d 159 (1998)(defendant failed to establish prejudice where prosecutor entered into book deal after the case was tried); see also United States v. Terry, 17 F.3d 575, 579 (2d Cir. 1994), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); United States v. Wallach, 935 F.2d 445, 460 (2d Cir. 1991), cert. denied, 508 U.S. 939, 113 S.Ct. 2414, 124 L.Ed.2d 637 (1993); Wright v. United States, 732 S.W.2d 1048, 1056 n.8 (2d Cir. 1984), cert. denied, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985).

[93] See United States v. Wallach, 935 F.2d 445, 460 (2d Cir. 1991); Wright v. United States, 732 S.W.2d 1048, 1055 (2d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Dick v. Scroggy, 882 F.2d 192, 196 (6th Cir. 1989); Azzone v. United States, 341 F.2d 417, 419 (8th Cir. 1965), cert. denied, 381 U.S. 943 (1965); United States v. Terry, 806 F.Supp. 490, 497 (S.D.N.Y. 1992), aff'd, 17 F.3d 575 (2d Cir. 1994), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994).

[94] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 2.

[95] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(1).

[96] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b) cmt 3.

[97] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2).

[98] Compare TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt 4 ("Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others") with TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt 6 ("representation of one client is 'directly adverse" to the 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, another client").

[99] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4; see TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3 ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law"); see also See United States v. Phillips, 952 F.Supp. 480, 481, 484 n.11 (S.D. Tex. 1996)(lawyer prohibited from representing defendant where representation might require cross-examination and impeachment of another client of firm).

VII. DUTY TO CONVEY AND EXPLAIN A PLEA BARGAIN OFFER

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

1. 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, and thus may constitute ineffective assistance of counsel.[100]

   (a) The failure to sufficiently or fully explain the terms of plea offers may also fall below the standard of reasonableness as well.[101]
   (b) Counsel's failure to convey a deadline attached to a plea offer also falls below the objective standard of reasonableness, even where he has informed his client of all other aspects of the proposed agreement.[102]
   (c) 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.[104]

2. The two-pronged test for constitutional ineffective assistance of counsel may be applied to an attorney's failure to convey a plea bargain offer: 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.[103]

   (a) There are a number of exceptions to this general rule:

      (1) The failure to inform a client of negotiations that do not rise to the level of a genuine "offer" does not constitute deficient conduct.[105]
      (2) Counsel's decision to break off negotiations over issues that the accused has declared non-negotiable represents reasonable strategy.[106]

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

1. In order to render effective assistance of counsel, a defense attorney must sufficiently advise his client regarding the ramifications of a plea of guilty or *nolo contendere*.[107]

   (a) Counsel is not obligated to inform a defendant of the collateral consequences to a plea.[108]
      (1) A consequence is collateral "if it is not a definite, practical consequence of a defendant's plea."[109]
         (A) A consequence is "definite" if it "flows from the plea."[110]

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[100] See Ex parte Lemke, 13 S.W.2d 791, 795 (Tex. Crim. App. 2000); Ex parte Wilson, 724 S.W.2d 72, 73-74 (Tex. Crim. App. 1987)(counsel has duty under the Sixth Amendment to convey plea bargain offer from the State).

[101] See State v. Williams, 83 S.W.3d 371, 374 (Tex. App. – Corpus Christi 2002, no pet.)(failure to fully explain offer of deferred adjudication fell below the objective standard of reasonableness).

[102] See Turner v. State, 49 S.W.3d 461, 464-65 (Tex. App. – Fort Worth 2001), pet. dismiss'd, improvidently granted, 118 S.W.3d 772 (Tex. Crim. App. 2003).

[104] See Ex parte Lemke, 13 S.W.3d at 795; Harvey v. State, 97 S.W.3d 162, 167 (Tex. App. – Houston [14th Dist.] 2002, pet. ref'd).

[103] See Ex parte Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000); Dickerson v. State, 87 S.W.3d 632, 638 (Tex. App. – San Antonio 2002, no pet.).

[105] See Harvey, 97 S.W.3d at 167; Hernandez v. State, 28 S.W.3d 660, 666 (Tex. App. – Corpus Christi 2000, pet. ref'd).

[106] See Harvey, 97 S.W.3d at 167-68.

[107] See Ex parte Battle, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991)(counsel's conduct was below reasonable standard where he advised defendant that he would receive probation after *nolo contendere* plea when the defendant was actually ineligible for probation); see also Ex parte Moody, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999)(attorney who has improperly advised his client that his sentence would be served concurrently with a federal offense, rendered ineffective assistance); Jackson v. State, 139 S.W.3d 7, 19 (Tex. App. – Fort Worth 2004, no pet. h.)(lawyer improperly failed to advise his client about the consequences of her guilty plea on her pending capital case); Champion v. State, 126 S.W.3d 686, 696-97 (Tex. App. – Amarillo 2004, no pet.)(defendant failed to establish that counsel had assured him of probation where evidence was conflicting);

[108] See Ex parte Morrow, 952 S.W.2d at 530, 536.

[109] See Ex parte Morrow, 952 S.W.2d at 536; see also Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004)(defense counsel is obligated to advise an accused of any plea consequence that is "definite and largely or completely automatic").

[110] Id.

(B) A consequence is "automatic" if there are "no exceptions, no wiggle room, no condition which relieve [the defendant] of the obligation," such as judicial discretion.[111]

(C) A consequence is "practical" if it is "logically connected to the plea."[112]

(b) Even if a consequence is direct, a lawyer may not render ineffective assistance in failing to advise his client of the consequence if it is "remedial and civil rather than punitive."[113]

2. A defendant must also show that, but for the erroneous advice, he would not have pleaded guilty and would have insisted on going to trial."[114]

(a) 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.[115]

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

1. The duty to convey

(a) Under Rule 1.03(a) a lawyer must "keep a client reasonably informed about the status of a matter."[116]

(1) 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."[117]

(2) In extreme circumstances a lawyer may be required to act for a client without prior consultation.[118]

(b) Under certain circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would likely react imprudently to an immediate communication.[119]

(c) Counsel is not required by the rule to convey information to the client which he is prohibited by law or a court ruling from disclosing.[120]

2. The duty to promptly comply with requests for information

(a) The second responsibility of communicating with the client is to "promptly comply with reasonable requests for information" from the client.[121]

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[111] Id.; see also Jackson v. State, 139 S.W.3d 7, 19 (Tex. App. – Fort Worth 2007, pet. ref'd).

[112] Mitschke, 129 S.W.3d at 135.

[113] Id.

[114] Ex parte Moody, 991 S.W.2d at 857-58 (quoting Ex parte Morrow, 952 S.W.2d at 536); see also Hill v. Lockhart, 474 U.S. 52, 60,106 S.Ct. 366, 371, 88 L.Ed.2d 203 (1985); Jackson, 139 S.W.3d 7, 20 (Tex. App. – Fort Worth 2004, no pet. h.).

[115] Hill, 474 U.S. at 60, 106 S.Ct. at 371; Jackson, 139 S.W.3d at 12 n.11; cf. Turner v. Tennessee, 858 F.2d 1201, 1206 (6th Cir. 1989)(rejecting defendant's "self-subjective, serving, and . . . insufficient" testimony that he would have accepted a plea bargain and relying instead on "objective" evidence that provided an "independent reason to believe" that there was a significant probability that had counsel's advice been reasonable, the defendant would have accepted plea bargain offer).

[116] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a).

[117] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 1; see also Lawyer Disciplinary Bd v. Turgeon, 210 W.Va. 181, 185, 557 S.E.2d 235, 239 (2000), cert. denied, 534 U.S. 841, 122 L.Ed.2d 99, 151 L.Ed.2d 59 (2001)(counsel's failure to convey plea offer violated disciplinary rules).

[118] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 2.

[119] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 4.

[120] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 4; TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d)("A lawyer shall not . . . knowingly disobey, or advise 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. 35.29 (Vernon Supp. 2004)(counsel shall 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 pet.)(in cases where protection of jurors is an issue, it may be appropriate to take up the juror information sheets at the conclusion of trial and instruct counsel about non-disclosure).

[121] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a).

(1) Circumstances will obviously dictate what may constitute a "prompt" response to a "reasonable" request.[122]

3. The duty to inform

(a) 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."[123]

(1) Since a client "should have the sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued,"[124] counsel has the responsibility to explain a matter sufficiently for the client to make informed decisions on his own behalf.[125]

(b) The adequacy of communication depends in part on the kind of advice or assistance involved.[126]

VIII. CLIENT'S RIGHT TO DECIDE

A. Client Possesses Constitutional and Statutory Right to Decide Whether to Waive a Jury and Whether to Testify

1. The right to waive a jury and the right to decide whether to testify are provided for under the United States Constitution and the Code of Criminal Procedure.[127]

B. Rule 1.02 and Client's Right to Decide

1. 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) in a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.[128]

(a) Under the rule, both the lawyer and the client have authority and responsibility in the objectives and means of representation.[129]

(b) The client bears the ultimate authority to determine the objectives to be served by legal representation, within the limits of the law, the lawyer's ethical responsibilities, and the agreed scope of the representation.[130]

(c) 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.[131]

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[122] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 2.

[123] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b); see also TEX. DISCIPLINARY R. PROF'L CONDUCT 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").

[124] TEX. DISCIPLINARY R. PROF'L CONDUCT 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").

[125] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b).

[126] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt 2.

[127] See Rock v. Arkansas, 483 U.S. 44, 49, 107 S.Ct. 2704, 2707, 97 L.Ed.2d 37 (1987)(right to testify rests on Fifth, Sixth, and Fourteenth Amendments); Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997, 89 L.Ed.2d 123 (1986)(defendant has a right to decide to testify, but not to testify falsely); TEX. CODE CRIM. PROC. ANN. art. 1.13(a)(defendant may waive right to jury trial only "in person by the defendant in writing").

[128] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1)-(3).

[129] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt 1.

[130] See TEX. DISCIPLINARY R. PROF'L CONDUCT cmt 1.

[131] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt 1.

(1) 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.[132]

[132] See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt 1.