



Can Defense Counsel Ethically Breach A Plea Agreement?

By: **Stephen P. Hurley*** and **Erik R. Guenther***

After a hard fought series of motions and discovery battles, you and the Assistant District Attorney have reached a settlement in a difficult case. Both sides have recognized evidentiary difficulties which would face them at trial. You have spent significant time explaining and weighing the settlement offer versus the choice to try the case, and the collateral consequences of the conviction with your client. Your client has made an informed choice to agree to the most recently negotiated settlement offer. You both appear in court to present the plea.

Before either you or the prosecutor can present much information about the substance of the plea recommendation, the judge says, "Here's how I'm thinking this case should be resolved..." Remarkably the Court's suggestion is far better for the accused than that which was bargained for. The judge directs the next question to you, "Counselor, what are your thoughts about this proposal?"

As this was unexpected, you have little time to think and attempt to quickly balance your duty to your client and the ethical obligations to the court and to the prosecutor... How do you respond?

Do you agree with the judge's suggestion to the benefit of your client, but in breach of the plea agreement? Do you stand by the plea agreement consistent with your ethical obligations, but perhaps compromising the potential for a better result for your client? Is there a third option?

What can this hypothetical teach us to prepare for such a conundrum?

This scenario is rare, but it has occurred. This article seeks to find the best answer to this difficult question by touching upon the origins of the plea bargaining process, examining the duties of advocacy and the ethical and contractual issues to determine how best to serve your client in this unusual scenario. More importantly, the article provides an additional consideration for defense counsel for all cases resolved by plea.

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History of Plea Agreements in Criminal Cases

Plea bargaining has lengthy roots in the criminal justice system. “Public prosecutors have preferred plea bargains to trials ... [v]irtually from the beginning.”¹ The process of placing cases “on file” was an early form of plea bargaining which has morphed into our current system of probation.² Another early form of bargaining was “charge bargaining” which was rampant in dismissing some counts of a complaint in liquor cases and murder cases.³ The use of “on file” and “charge bargaining” tactics were manners in which prosecutors (and defendants and their counsel) could arrange for relatively predictable results, when judges were still reluctant to allow overt pleas. However, as civil case filings expanded significantly, judges’ reluctance to allow plea bargaining waned.⁴ Now, plea bargaining has simply morphed back to its earlier forms in the federal system, with the ability to manipulate charges through the sentencing guidelines to maintain prosecutors’ ability to bargain in cases.⁵

Plea bargains are founded in contract and have been described by the United States Supreme Court as “mere executory agreement[s]”.⁶ Plea bargains also raise constitutional due process issues for an accused.⁷ The rationale behind entering in such an agreement is that “each side may obtain advantages when a guilty plea is exchanged for sentencing concessions.”⁸ However, case law reflects the fact that agreed plea recommendations have not always been honored. Breaches of plea agreements by prosecutors have been raised several times in Wisconsin and federal case law. As an example, in *Marby v. Johnson*, 467 U.S. 504 (1984), the prosecutor made an offer to have a 21 year sentence run concurrently to other sentences which the defendant was serving. Three days later, defense counsel called the prosecutor to accept the offer and the deputy prosecutor withdrew the offer as a mistake. He instead proposed that the defendant plead to the same sentence running consecutively. Initially, the respondent rejected this new offer. Following a mistrial, the defendant accepted the prosecutor’s second offer, and the trial judge imposed a 21-year sentence to be served consecutively to the previous sentence.

In *State v. Bangert*, 389 N.W.2d 12 (1986), the prosecutor agreed to not “directly or indirectly mention the word maximum in connection with [the] sentence recommendation” and also agreed not to oppose any parole request made by the defendant. *Id.* at 31. At the sentencing hearing, the prosecutor said,

[p]ursuant to plea agreements made with [defense counsel], the State is not going to ask the Court to impose the maximum sentence. That was the agreement... I would point out to the Court again that this community is watching this proceeding. *Id.* at 32.

The circuit court sentenced Mr. Bangert to the maximum term of twenty years in prison. Following sentencing, at the first opportunity in which the defendant was eligible for parole, the prosecutor sent a letter to the parole board which stated: “This prosecutor strongly opposes ever paroling this defendant.” *Id.* at 32.

Mr. Bangert sought to withdraw his plea following sentencing. The Court determined that he must show “both the breach, and that the breach is sufficiently material to warrant releasing the party from its promises (prosecution or defense) before the same judge who accepted the plea, whenever possible.” *Id.* (internal citations omitted.) The Wisconsin Supreme Court found that the breach was “merely technical” and did not allow Mr. Bangert to withdraw his plea.

The judicial system provided no remedy for the prosecutors’ breaches of the plea agreements in *Marby* or *Bangert*, as neither was allowed to withdraw their plea following the breach by the government. These cases illustrate the difficult hurdles that a defendant must overcome when a prosecutor chooses to not abide by a proposed plea agreement.⁹

Ethical Implications of Breaching a Plea Agreement

The Wisconsin Supreme Court has noted that prosecutors must balance their duty to convey relevant information to the court with their contractual duty to honor the plea agreement, and has acknowledged that these conflicting obligations force the State to “walk ‘a fine line’”.¹⁰ There are several cases which provide guidance to prosecutors to strike that balance, but none which assist defense counsel. Although, a breach by defense counsel does not raise any constitutional issues as a breach by a prosecutor may, it does raise contractual issues and, of course, ethical ones.

The Constitutional interests in a plea agreement apply only to the accused and only arise once a guilty plea is entered upon a false premise.¹¹ As stated by the Wisconsin Supreme Court:

The principal rule of law applicable to the present case is that an accused has a constitutional right to the enforcement of a negotiated plea agreement. An agreement by the State to recommend a particular sentence may induce an accused to give up the constitutional right to a jury trial. Consequently, once an accused agrees to plead guilty in reliance upon a prosecutor’s promise to perform a future act, the accused’s due process rights demand fulfillment of the bargain.

State v. Williams, 637 N.W.2d 733, 744 (2002) (internal citations omitted).

However, such a breach by a prosecutor only raises constitutional issues (and contractual issues), if it is a “real and substantial breach.” *Id.* Therefore, since such a circumstance can only apply to the accused, a breach of a plea agreement by defense counsel can never raise a constitutional issue. However, contractual and ethical concerns are squarely implicated. The preamble to SCR 20 states that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”¹² It also states that “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.” The question of whether to “breach” a plea agreement when the judge suggests a more favorable result for your client falls squarely within the Preamble’s suggestion that “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living.”

A breach of a plea agreement can, thus, raise ethical issues.¹³ Caselaw suggests that a breach that is not “sufficiently material” may be permissible (at least to not allow vacating a plea agreement), but permissible is not necessarily consistent with a choice being ethical.¹⁴ The Supreme Court Rules (SCR) suggest strongly that a breach of a plea agreement by defense counsel (or prosecutor) would breach the ethical obligations of counsel.

SCR 20:1.2(a) states that

A lawyer shall inform a client of all offers of settlement and abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The decision to enter into a plea is that of the client. Further, SCR 20:1.2(a) uses the mandatory “shall” to describe a lawyer’s duty to abide by a client’s decision to accept a settlement offer. This duty is combined with the attorney’s duties under SCR 20:1.4 to “keep a client reasonably informed” and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the

representation.” Such discussion ought include the remote possibility that the judge could suggest a more favorable disposition or a less favorable disposition of the accused’s case than that proposed by the parties. This information should be part of the full discussion with the client that includes the likelihood of success at trial, possible sentences and the possibility of success of any motions (filed or discussed).

A Breach of a Plea Agreement Raises Contractual Issues

The ethical rule relating to “fairness to opposing party and counsel” discusses access to evidence, the need to not falsify evidence, and obeying the obligations to a tribunal among other matters.¹⁵ It does not appear to expressly or implicitly deal with a breach of a plea or settlement agreement.

Therefore, it is worthwhile to briefly consider the contract principles as applied to a plea agreement. In a plea agreement the contract elements are typically: (1) a prosecutor or defense attorney conveys the final offer, (2) which is accepted by the other party, and (3) this offer results in a negative result for the accused (deprivation of liberty, monetary loss through fines or restitution, community service obligations, etc.) and for the State (the loss of the ability to obtain a more severe penalty “for the benefit of society.”)¹⁶

The next contractual question is whether defense counsel’s statement to the court would constitute a substantial (or material) breach rather than a technical (or nonmaterial) breach.¹⁷ A material breach is considered a substantial breach of a material covenant.¹⁸ In contrast, a technical breach exists where there is not absolute compliance with the contract but the breach is harmless.¹⁹ This is an important distinction because a substantial breach would allow the prosecutor to not be bound by his/her end of the agreement and to feel free to argue for any sentence while a prosecutor would still be bound to the agreement were the breach merely technical.²⁰

One could consider responding to the Court in the hypothetical above, by advising the Court that the plea agreement stands as the agreed and bargained for recommendation by your office, but that such a recommendation is of course not binding on the Court who is free to render his/her own judgment as to the proper sentence. This would be consistent with the lawyer’s obligation to not make any false statement of material fact to the Court.²¹ It would also be unlikely to be a substantial breach, particularly in light of the conduct allowed in *Bangert*. It does of course walk that “fine line”. However, such conduct is as distasteful as that of the prosecutors in *Marby* and *Bangert*. While such conduct may not be a “substantial breach”, it is no less unethical. Further, it can create substantive problems for your client as the prosecutor would then be free to argue for a more harsh sentence.

In keeping with one’s ethical obligations under SCR 20:1.2(a), defense counsel should argue to uphold the plea agreement in the above hypothetical. As defense counsel, you should be expected to uphold the bargained for agreement, just as you would expect the prosecutor to uphold the agreement. Because of this obligation, it is important that when reviewing the plea form that the client fully understand that the judge is not bound to accept the joint recommendation, and may impose a higher sentence, or a lower sentence. It is this second warning that is often overlooked, and if remembered can avoid the awkward position faced in this scenario. Providing your client with full information of the consequences of entering into the plea agreement, in accord with SCR 20:1:4, allows the client to make a fully informed choice, with complete awareness of the court’s discretion. With such full disclosure, defense counsel and client need not be caught off-guard by a judge’s more favorable recommendation. ■

(Endnotes)

1. George Fisher, *Plea Bargaining's Triumph* (Stanford: Stanford University Press, 2004), page 11.
2. *Id.* at 14, 62 - 90.
3. *Id.* at 22 - 39.
4. *Id.* at 121 - 133.
5. *Id.* at 17. It is too early to tell the extent to which this power has been altered by the U.S. Supreme Court's decision in *United States v. Booker*. 543 U.S. ____ (2005).
6. *Marby v. Johnson*, 467 U.S. 504, 507 (1984).
7. *State v. Williams*, 637 N.W.2d 733, 745 (2002).
8. *Id.* at 508.
9. It should be noted that in *Marby*, the defendant accepted the subsequent plea offer.
10. *State v. Williams*, 637 N.W.2d 733, 745 (2002).
11. *Id.*; *see also Marby v. Johnson*, 467 U.S. 504 (1984). As stated in *Marby*, "only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause." *Id.* at 509.
12. *See* Comments to SCR 20:1.3. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")
13. *Marby v. Johnson*, 467 U.S. 504, 511 (1984) (noting that the withdraw of a plea agreement is "without constitutional significance" because "[t]he Due Process Clause is not a code of ethics for prosecutors.")
14. *State v. Bangert*, 389 N.W.2d 12 (1986).
15. SCR 20:3.4. This section states, in full, that:
A lawyer shall not:
 - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
 - (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
 - (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
 - (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
 - (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except

when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

16. The modern formulation of a contract contains the elements of offer, acceptance and consideration. *Continental Cas. Co. v. Wisconsin Patients Compensation Fund*, 473 N.W.2d 584, 586 (Ct. App. 1991).

17. The Wisconsin Supreme Court has utilized the following factors to determine the materiality of a breach: In determining the materiality of a failure fully to perform a promise the following circumstances are influential: (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance; (c) The extent to which the party failing to perform has already partly performed or made preparations for performance; (d) The greater or less hardship on the party failing to perform in terminating the contract; (e) The wilful, negligent or innocent behavior of the party failing to perform; (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract. *People's Trust & Sav. Bank v. Watterson*, 276 N.W. 330 (1937) (citing Restatement of Contracts § 275 (1932)).

18. *Ranes v. American Family Mut. Ins. Co.*, 580 N.W.2d 197 (1998) (citations omitted).

19. *Kolb v. Chrysler Corp.*, 661 F.2d 1137 (7th Cir. 1981); *see also* WI-JI - CIVIL 3076.

20. *Ranes v. American Family Mut. Ins. Co.*, 580 N.W.2d 197 (1998) (citations omitted); *see also* *People's Trust & Sav. Bank v. Watterson*, 276 N.W. 330 (1937).

21. SCR 20:3.3.