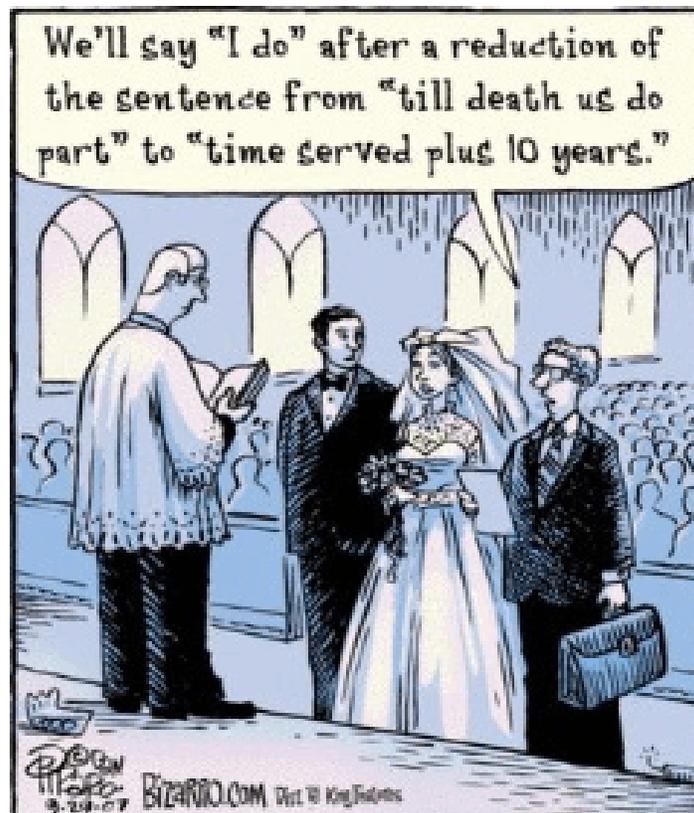


# Ethical Considerations in Plea Bargains

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After graduating from law school, Ms. Cummings worked as a briefing attorney for Judge Larry Fuller and Judge Richard Barajas at the Eighth District Court of Appeals in El Paso, Texas. Later she worked as a prosecutor in the Williamson County Attorney's Office in the juvenile division. In 1993, Ms. Cummings entered into private practice in Williamson County. She has served as president of the Williamson County Bar Association and as a Board Member for the Children's Support Coalition. Ms. Cummings has appeared on Court TV, both as a commentator and a trial participant.

## I. Introduction

Section 51.17(a) of the Texas Family Code states that “Except ... when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title.” In some respects, this provision is misleading because there are many situations that are not expressly governed by the Juvenile Justice Code or the Rules of Civil Procedure. In these situations, the courts routinely borrow from the rules that govern the criminal justice system. Thus, although it is well settled that the Texas Code of Criminal Procedure does not govern juvenile proceedings, there are many instances where either Title 3 borrows language from the Code of Criminal Procedure or where specific sections of the Code of Criminal Procedure actually apply to juvenile proceedings.

In regard to the topic of ethics in plea bargaining, Title 3 addresses some of the issues we face as juvenile practitioners yet many issues are best addressed and understood by looking at plea bargaining in the criminal justice system. Given this fact, a large portion of this paper comes from a paper entitled “Guilty Pleas,” written by John Bradley, the Williamson County District Attorney.

## II. Legal Duties in Plea Bargaining

### A. Prosecutor

1. There is no federal or state constitutional or statutory law that requires a prosecutor to engage in plea bargaining. *Lynch v. Overholser*, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962); *Morano v. State*, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978). Nor can a judge order mediation. See **Tex. Code Crim. Pro. Art. 26.13(h)**.
2. Plea bargaining is done by the state to minimize the risks associated with trial, reduce the cost to the county and achieve a quick, final disposition of the case.
3. The state’s primary duty during plea negotiations is to see that justice is done. **Tex. Code Crim. Pro. Art. 2.01**. This means the prosecutor must evaluate the case on behalf of the entire community—as well as the victim—and recommend a disposition that is just. **Tex. Fam. Code § 57.002 & Tex. Code Crim. Pro. Art. 56.02 (d)**.
4. Although a victim may not prevent a prosecutor from disposing of a juvenile case through a plea agreement, the prosecutor should inform the victim of any plea negotiations, any plea agreement reached, and all substantive court proceedings. **Tex. Fam. Code § 57.002(a)**; see also **Tex. Code Crim. Pro. Art. 42.12 § 5** (in a criminal case a judge is

required to find that deferred adjudication for sex offense is in best interest of victim – does this apply in a juvenile proceeding?).

5. Discovery in a juvenile case is governed by the Code of Criminal Procedure and by case decisions in criminal cases. **Tex. Fam. Code § 51.17(b)**. The phrase “case decisions in criminal cases” encompasses the various constitutional and common law discovery rights of a defendant in a criminal case, such as the due process right to disclosure from the State of exculpatory and mitigating evidence. Ordinarily, a prosecutor must disclose all exculpatory evidence in connection with a criminal case set for trial. **Tex. Code Crim. Pro. Art. 2.01**; *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). However, a prosecutor may be relieved of that duty, absent an affirmative claim of innocence, if the defendant decides to plead guilty. **Tex. Code Crim. Pro. Art. 1.14(a)**; *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (waiver of right to impeachment information before pleading guilty did not violate right to fair trial); see also *Matthew v. Johnson*, 201 F.3d 353 (5<sup>th</sup> Cir. 2000), cert. denied, 531 U.S. 830, 121 S.Ct. 291, 148 L.Ed.2d 44 (2000). Note that *Ruiz* did not decide whether such a waiver could extend to evidence of actual innocence. Cf. *Orman v. Cain*, 228 F.3d 616 (5<sup>th</sup> Cir. 2000) (claim of amnesia as to offense did not equate to a claim of innocence requiring disclosure of exculpatory evidence before guilty plea).

6. Withdrawal of Offer. The state may interrupt a plea proceeding at any time before a judge approves a plea bargain. Generally, the state interrupts a plea proceeding upon discovering some fact not known at the time a disposition recommendation was offered that causes the state to become dissatisfied with the recommendation. The state also may interrupt a plea proceeding if the Juvenile Respondent fails to perform some act required by the bargain (e.g., to plead true, judicially confess, or waive appeal). Even if the state withdraws an offer, the trial court may nonetheless proceed, as there is no statutory protection for the state to enforce such a withdrawal of an offer. If the state interrupts the plea proceeding after the judge has approved the plea bargain, the judge must nonetheless order specific performance of the plea agreement, if possible. *Castleberry v. State*, 704 S.W.2d 21 (Tex. Crim. App. 1984). Otherwise, the Juvenile Respondent must be permitted to withdraw his plea. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

7. Ethical Dilemma:

a) The difficult victim – Issues with the case dictate that a particular plea offer is the best, most prudent, resolution of the case. The victim is dissatisfied and is very vocal. What do you do?

b) The leverage move – A juvenile is a co-defendant to a serious offense also committed by several adults. The evidence is strong against the juvenile, should you use this as leverage to get the juvenile to cooperate in the adult prosecution?

## **B. Defense Attorney**

1. A Juvenile Respondent is entitled to effective assistance of counsel. The Dallas Court of Appeals recently held that the constitutional right to counsel in juvenile cases includes the right to effectiveness of representation. *In re K.L.O.*, 27 S.W.3d 340 (Tex. App. – Dallas 2000, review denied). The Dallas Court also held that ineffectiveness in juvenile cases is determined by the same standards employed in criminal cases. A criminal defense attorney has a duty to provide effective assistance to the defendant during the plea bargaining process. *Ex parte Battle*, 817 S.W.2d 81 (Tex. Crim. App. 1991). See also *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999) (applying *Strickland* ineffective assistance standard to punishment stage of noncapital trial). In general, what this probably means is that the defense attorney must educate the Juvenile Respondent as to the charge, the disposition options, and the evidence that is available to prove the Juvenile Respondent's guilt. He then must determine whether the Juvenile Respondent wants to consider pleading true and negotiate a fair resolution of the case. For admonition requirements, See **Tex. Fam. Code § 54.03(b) & (j)**.

2. For a Juvenile Respondent who has decided to plead true, the defense attorney's primary duty is to determine whether the Juvenile Respondent is voluntarily entering the plea of true. *Butler v. State*, 499 S.W.2d 136, 139 (Tex. Crim. App. 1973); *Fontnette v. State*, 24 S.W.3d 647 (Tex. App. — Beaumont 2000, pet. ref'd).

3. Rather than relying solely on the facts as represented by the prosecutor, a defense attorney has a duty to make an independent investigation of the facts of the case. *Charles v. State*, unpublished, No. 14-01-01248 – CR, 2003 WL 21 511268 (Tex. App. – Houston [14<sup>th</sup> Dist] 2003). *Melton v. State*, 987 S.W.2d 72 (Tex. App. — Dallas 1998, no pet.). Although the defense attorney must become familiar with the facts surrounding the offense charged, the defense attorney does not have an obligation to conduct as extensive an investigation of the facts as is required before proceeding to trial. *Toupal v. State*, 926 S.W.2d 606 (Tex. App. — Texarkana 1996, no pet.); see also *Eddie v. State*, 100 S.W.3d 437 (Tex. App. — Texarkana 2003, pet. ref'd) (applying same lessened duty to investigate to plea of true to motion to adjudicate or revoke).

#### 4. Offers and Replies:

a) A defense attorney must convey any offer made by the prosecutor to the client. *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000); *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987); *Atkins v. State*, 26 S.W.3d 580 (Tex. App. — Beaumont 2000, pet. ref'd). But see *Harvey v. State*, 97 S.W.3d 162 (Tex. App. — Houston [14<sup>th</sup> Dist.] 2002, pet. ref'd) (no tentative agreement reached); *Hernandez v. State*, 28 S.W.3d 660 (Tex. App. — Corpus Christi 2000, pet. ref'd) (no duty to convey passing offer by prosecutor that was not firm).

b) And convey the client's subsequent acceptance or rejection of that offer back to the prosecutor. *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993); *Guidry v. State*, 177 S.W.3d 90 (Tex. App. — Houston [1<sup>st</sup> Dist.] 2004) (requiring hearing on motion for new trial as to whether defense attorney communicated acceptance of offer to prosecutor).

c) The defense attorney also must explain the offer to the client. *State v. Williams*, 83 S.W.3d 371 (Tex. App. — Corpus Christi 2002, no pet.).

d) And inform the client of any deadline the prosecutor imposed for accepting the offer. *Turner v. State*, 49 S.W.3d 461 (Tex. App. — Fort Worth 2001), pet. dismissed, improvidently granted, 118 S.W.3d 772 (Tex. Crim. App. 2003).

e) However, a defense attorney does not have a duty to advise the client to accept or reject a plea offer. *Jordan v. State*, 852 S.W.2d 689 (Tex. App. — Houston [14<sup>th</sup> Dist.] 1993), aff'd, 883 S.W.2d 664 (Tex. Crim. App. 1994). The client ultimately must make any decision for himself. See *United States v. Cothran*, 302 F.3d 279 (5<sup>th</sup> Cir. 2002) (stern warning from defense counsel about likely consequences of trial does not render plea involuntary).

5. In negotiating a plea agreement, a defense attorney should be cautious about revealing privileged information to the prosecutor. **Tex. R. Evid. 503** (establishing lawyer-client privilege). A defense attorney should obtain the defendant's waiver of the lawyer-client privilege before discussing the Juvenile Respondent's version of the offense with the prosecutor. **Tex. R. Evid. 511** (waiver of privilege); *Carmona v. State*, 941 S.W.2d 949 (Tex. Crim. App. 1997) (defense attorney disclosed polygraph results to prosecutor to avoid indictment).

6. The most common allegation made against a defense attorney who participates in a plea of true is that the attorney did something to force or trick the Juvenile Respondent into pleading true. To prove ineffective assistance following a plea of true, a Juvenile Respondent must show that: (1) the attorney's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the attorney's errors, the Juvenile Respondent would not have pled true and would have insisted on going to trial. See *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (guilty plea in criminal case).

7. A Juvenile Respondent who pleads true to a crime may not later sue the defense attorney for malpractice unless the Juvenile Respondent is subsequently exonerated for the crime. *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). As a matter of public policy, the plea of true serves as the sole legal cause for disposition of the Juvenile Respondent's case, regardless of the quality of the attorney's representation. A more likely consequence than reversal is that the defense attorney's negligence would result in a grievance filed with the State Bar.

8. Backing out. For a plea of true before a judge, the Juvenile Respondent's ability to withdraw a plea depends on the timing of the request. Before the judge has adjudicated the child as delinquent or taken the case under advisement, a Juvenile Respondent has an unqualified right to withdraw his plea without assigning any reason to the request. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979). After a judge has pronounced judgment or taken a case under advisement (which includes resetting for a social history report), the withdrawal of a plea of true is within the trial court's discretion. The Juvenile Respondent should pursue the request to withdraw a plea of true by filing a motion and requesting a hearing. *Donovan v. State*, 17 S.W.3d 407 (Tex. App. — Houston [1st Dist.] 2000), aff'd, 68 S.W.3d 633 (Tex. Crim. App. 2002).

9. Ethical Dilemma:

- a) The difficult parent – A parent wants “help” for their juvenile child and desires a disposition that you know will set the juvenile up for failure. What is your duty?
- b) The juvenile in need of supervision – Evidence against your juvenile client is weak, but the child is in need of help and has very uninvolved parents. Do you accept a deal with placement if you believe it's in your client's best interest?

## C. Judges

1. Throughout the plea negotiation process, a judge's primary obligation is to remain impartial. **Tex. Gov. Code T.2, Subt.G, App.B, Canon 3** (Code of Judicial Conduct).
2. For that reason, a judge should not engage in actual plea negotiations. *Ex parte Shufflin*, 528 S.W.2d 610 (Tex. Crim. App. 1975). Relying on ABA Standards and the Code of Judicial Conduct, the Court of Criminal Appeals has repeatedly warned judges to avoid participating in a guilty plea *before* an agreement is reached between the prosecutor and defendant. *Perkins v. Third Court of Appeals*, 738 S.W.2d 276 (Tex. Crim. App. 1987); *Ex parte Williams*, 704 S.W.2d 773 (Tex. Crim. App. 1986); *Ex parte Shufflin*, 528 S.W.2d 610 (Tex. Crim. App. 1975); see also *Holland v. State*, 112 S.W.3d 251, 256 n. 3 (Tex. App. — Austin 2003, no pet. h.) (declining to sanction plea bargaining between defendant and trial court).
3. All plea discussions should take place between the state and the defense attorney. This means a judge should not plea bargain directly with a Juvenile Respondent or even participate in discussions between the Juvenile Respondent and the state regarding the disposition of the case. *Ex parte Spicuzza*, 903 S.W.2d 381 (Tex. App. — Houston [1st Dist.] 1995, pet. ref'd). Federal law expressly prohibits a federal judge from participating in plea bargaining. **Fed. R. Crim. Pro. 11(e)**. For a discussion of the difference between judicial bargaining and mere rejection of a recommendation, see *United States v. Jeter*, 315 F.3d 445 (5<sup>th</sup> Cir. 2002). *Cf. State v. Bowie*, No. 137 S.W.3d 95 (Tex. App. — Tyler 2003) (noting questionable procedure in which judge prohibits plea bargaining by prosecutor but permits defendant to withdraw guilty plea if not satisfied with sentence), rev'd, Nos. 135 S.W.3d 55 (Tex. Crim. App. 2004). If a Juvenile Respondent should plead true pursuant to an agreement with a judge that later proves to be unenforceable, the plea may be challenged as involuntary. *Ex parte Spicuzza*, 903 S.W.2d 381 (Tex. App. — Houston [1st Dist.] 1995, pet. ref'd). Or, if a judge takes a firm position on disposition before hearing the evidence, he may be subject to recusal. See *Teixeira v. State*, 89 S.W.3d 190 (Tex. App. — Texarkana 2002, pet. ref'd).
4. Before accepting or rejecting a plea bargain, a judge must admonish the Juvenile Respondent of the various consequences of a plea of true. See **Tex. Fam. Code § 54.03 (b) & (j)**. (setting out duties of judge in admonishing Juvenile Respondent of consequences of plea of true).

5. Acceptance or Rejection. A judge accepts a plea bargain by pronouncing his decision to accept the agreed disposition recommendation. The decision whether to accept a plea bargain may be delayed until after the judge hears and accepts the plea of true, hears evidence supporting the plea, and receives and considers a social history report or any other disposition evidence. *Ortiz v. State*, 933 S.W.2d 102 (Tex. Crim. App. 1996). A judge should avoid formally accepting a plea bargain until hearing all of the evidence and reading a social history report, if any. *Zapata v. State*, 121 S.W.3d 66 (Tex. App. — San Antonio 2003, pet. ref'd). If a judge rejects the plea bargain, the Juvenile Respondent is legally permitted to withdraw the plea of true. **Tex. Fam. Code § 54.03 (j)**.

### III. Minimum Discovery

- A. Juvenile Respondent's statements (written, recorded, oral)
- B. Scientific reports (drugs, DNA, etc.)
- C. Photographs, videotapes
- D. Diagrams
- E. Conversation with prosecutor
- F. Offense Report

### IV. Who Starts?

- G. Prosecutor should make timely offer
- H. Don't wait for prosecutor to make an offer
- I. Defense could start with acceptance of responsibility and a request for an offer
- J. Defense is protected by **Rule of Evidence 401**

### V. What Matters to the Prosecutor

- A. Acceptance of responsibility
- B. Cooperation in investigation (physical evidence or oral statements that lead to physical evidence)
- C. Identification of evidentiary weakness (e.g., credibility)

- D. Identification of legal issues (provide case law)
- E. Assistance in prosecution of others
- F. Restitution
- G. Verifiable mitigation (provide medical, work, psychological, education records)

VI. To Counter-Offer or Not?

- A. Prosecutor should not bargain with self
- B. Have a commitment from Juvenile Respondent before making counter-offer
- C. Don't play games
- D. Take a fair offer
- E. Politely decline an unfair offer
- F. Don't make a habit of changing your mind

VII. What Can You Bargain?

- A. The Plea Itself
- B. Evidence
- C. The Offense(s)
- D. Enhancements
- E. Deadly Weapon
- F. Family Violence
- G. Disposition
- H. Early Release
- I. Community Supervision
- J. Conditions

- K. Collateral Consequences
- L. Sex Offender Registration
- M. Appeal

## VIII. Preserving Appeal

- A. Negotiated plea waives appeal unless pretrial motion ruled upon or permission from trial court – *In the Matter of B.N.C.*, UNPUBLISHED, No. 04-02-00788-CV, 2003 W.L. 1232997 (Tex. App.-San Antonio 2003).
- B. Defendant may waive the right to appeal – **Tex. Fam. Code § 51.09**; *Blanco v. State*, 18 S.W.3d 218.
- C. Unlike in criminal cases, there is no requirement in juvenile cases that a special notice of appeal be filed that sets out the grounds for appeal. A standard written notice of appeal suffices.

## IX. Protect Yourself

- A. Make an offer in writing. Ask for an offer in writing. Reply in writing. Otherwise, you will be doing an affidavit in reply to a claim of prosecutorial misconduct or ineffective assistance of counsel. See, e.g., *Guidry v. State*, 177 S.W.2d 90 (Tex. App. – Houston 1<sup>st</sup> Dist. 2005); *Acosta v. State*, 160 S.W.3d 204 (Tex. App. Ft. Worth 2005) (swearing match between defense attorney and defendant).
- B. Cover all the details of the offer
- C. Include a warning: “That which isn’t covered by the offer is open to the judge.”
- D. Make notes of your conversations
- E. Do the plea before a court reporter

## X. Resources

- A. Texas Juvenile Law, 6<sup>th</sup> Edition, Robert Dawson (2004).
- B. The Perfect Plea (the law of a guilty plea, including forms and a script). Go to <tdcaa.com>. Or call 512-474-2436.