

Prosecutorial Ethics & Pleas in Criminal Cases
Fall Public Defender Seminar – November 2008
S. Mark Rabil, Assistant Capital Defender
Forsyth Regional Office, Winston-Salem, N.C.

I. Selections From The North Carolina Revised Rules for Professional Conduct, with Selected Comments & Bar Opinions:

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening

public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. *See, e.g.*, N.C. Gen. Stat. Â§15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

Amended November 16, 2006.

ETHICS OPINION NOTES

[RPC 129](#). Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

[RPC 152](#). Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

[RPC 197](#). A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

[RPC 204](#). It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

[RPC 243](#). It is prejudicial to the administration of justice for a prosecutor to threaten to

use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment (Selected)

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for

example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. *See* Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. *See also* Comment [7].

[98 Formal Ethics Opinion 5](#). Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

Rule 3.4 Fairness to Opposing Party and Counsel

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, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request,

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(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, ask an irrelevant question that is intended to degrade 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 a managerial 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.

Comment (*Selected*)

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.



Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

[RPC 152](#). The prosecutor and the defense attorney must see that all material terms of a

negotiated plea are disclosed in response to direct questions when the plea is entered in open court. [See below]

[RPC 152

January 15, 1993

Disclosure of Material Terms of Plea Agreements

Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

Inquiry #1:

A prosecutor and defense attorney discuss the circumstances under which a defendant in a pending criminal case will plead guilty. It is tentatively agreed that the defendant will plead guilty to a lesser included offense as to one charge and that another unrelated charge will be dismissed. After discussion with counsel, defendant accepts the plea arrangement.

A transcript of plea is prepared which does not refer to the charge that is to be dismissed. Further, the transcript, as prepared, does not state that the defendant has agreed to plead as part of a plea arrangement.

When the plea is actually entered and accepted by the presiding judge, the defendant, under oath, states that there is no plea agreement. Neither the prosecutor nor defense counsel inform the judge about the earlier plea discussion or that in return for the plea of guilty, the defendant is being allowed to plead guilty to a lesser included offense and that another unrelated charge is to be dismissed as a result of the plea.

Under the above recited factual situation, would the conduct of all counsel be consistent with the Rules of Professional Conduct?

Opinion #1:

No. Rule 1.2(c) of the Rules of Professional Conduct prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. From the facts presented, it is clear that the client's guilty plea was the product of a negotiated plea arrangement. The client's untruthful answers to questions relating to the subject plea agreement and the lawyer's signature on the transcript, misrepresent the plea arrangement and thus are in violation of Rule 1.2(c). Additionally, Rules 7.2(a)(5) and (8) prohibit an attorney from knowingly using perjured testimony or false evidence and from counseling or assisting his client in conduct that the lawyer knows to be fraudulent.

Inquiry #2:

Assume a similar factual situation where the prosecutor agrees to tell the judge in open court before sentencing that the state is not opposed to a probationary sentence in return for the defendant's guilty plea, the transcript of plea states that the defendant has not agreed to plead as part of a plea agreement, when the plea is accepted by the trial court, the defendant, under oath, states there is no plea agreement and the judge

is again unaware of the plea negotiations.

Opinion #2:

No. See opinion #1.

Inquiry #3:

Assume a similar factual situation where the plea negotiation takes place between a lay administrative assistant of the district attorney and defense counsel. Assume further that the administrative assistant has not discussed the case beforehand with the district attorney or the assistant district attorney assigned to the case, but that the district attorney and his assistants are aware that the lay administrative assistant engages in such practice as a routine matter and that the district attorney has not disapproved of such practice.

Opinion #3:

Even though the district attorney may not directly participate in or become familiar with particular cases in which plea negotiations have been undertaken on his behalf by the administrative assistant, he or she is professionally responsible for the conduct described in the preceding inquiry to the extent that he or she has knowingly ratified the practice by acquiescence. Rule 3.3(c)(1) makes a lawyer professionally responsible for any conduct of a nonlawyer under his or her supervision which would violate the Rules of Professional Conduct if engaged in by a lawyer if the supervising lawyer "orders or, with the knowledge of specific conduct, ratifies the conduct involved..." Since the above described practice is described as being "routine" and the district attorney is aware of the conduct, such conduct would be inconsistent with the requirements of Rule 3.3(c)(1).]

[RPC 197](#). A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

[RPC 204](#). It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

[RPC 243](#). It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant. [*See below*]

[RPC 243

January 24, 1997

Restraint in Exercising Prosecutor's Discretion to Calendar Cases

Opinion rules that it is prejudicial to the administration of justice for a prosecutor to

threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

Inquiry #1:

Defense Attorney represents Client on a pending criminal charge. Prosecutor offered Client a plea bargain. Defense Attorney informs Prosecutor that Client will not accept the offered plea bargain. Prosecutor tells Defense Attorney that if Client does not accept the offered plea bargain, "Client's going to be sitting in the courtroom all week and he's going to be on the calendar every Monday morning for weeks to come." Is it unethical for Prosecutor to imply that he will use the statutory calendaring power of the district attorney's office to delay Client's trial if Client will not accept the plea bargain?

Opinion #1:

Yes, threatening to use the discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant is prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. A prosecutor should use restraint in the discretionary exercise of the authority to calendar criminal cases. See comment [1] to Rule 7.3, "Special Responsibilities of a Prosecutor," ("... the prosecutor represents the sovereign and therefore should use restraint in the discretionary use of government's powers....").

Inquiry #2:

If a lawyer overhears the conversation between Prosecutor and Defense Attorney, does the lawyer have a duty to report Prosecutor's conduct to the State Bar or other appropriate authority?

Opinion #2:

Rule 1.3(a) requires a lawyer who has knowledge that another lawyer has committed a violation of the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to report the conduct to the North Carolina State Bar or other appropriate authority. Comment [3] to Rule 1.3 states that

[t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware.

Prosecutor's conduct may be an isolated incident resulting from a momentary lapse in judgment. If so, such conduct does not raise a "substantial" question as to Prosecutor's fitness as a lawyer. The lawyer who overhears the conversation may want to counsel Prosecutor with regard to his conduct, but the lawyer is not required to report the conduct to the State Bar. However, if the lawyer knows that Prosecutor routinely abuses the discretionary power to schedule criminal cases or, after being advised that this conduct is a violation of the Rules, Prosecutor continues the conduct, the lawyer should report the matter to the State Bar or other appropriate authority.]

II. N. C. Constitution & Victim Rights.

N.C. Const. art. I, § 37 (2008)

Sec. 37. Rights of victims of crime

(1) *Basic rights.* Victims of crime, as prescribed by law, shall be entitled to the following basic rights:

(a) The right as prescribed by law to be informed of and to be present at court proceedings of the accused.

(b) The right to be heard at sentencing of the accused in a manner prescribed by law, and at other times as prescribed by law or deemed appropriate by the court.

(c) The right as prescribed by law to receive restitution.

(d) The right as prescribed by law to be given information about the crime, how the criminal justice system works, the rights of victims, and the availability of services for victims.

(e) The right as prescribed by law to receive information about the conviction or final disposition and sentence of the accused.

(f) The right as prescribed by law to receive notification of escape, release, proposed parole or pardon of the accused, or notice of a reprieve or commutation of the accused's sentence.

(g) The right as prescribed by law to present their views and concerns to the Governor or agency considering any action that could result in the release of the accused, prior to such action becoming effective.

(h) The right as prescribed by law to confer with the prosecution.

(2) *No money damages; other enforcement.* Nothing in this section shall be construed as creating a claim for money damages against the State, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The General Assembly may provide for other remedies to ensure adequate enforcement of this section.

(3) *No ground for relief in criminal case.* The failure or inability of any person to provide a right or service provided under this section may not be used by a defendant in a criminal case, an inmate, or any other accused as a ground for relief in any trial, appeal, postconviction litigation, habeas corpus, civil action, or any similar criminal or civil proceeding.

HISTORY: 1995, c. 438, s. 1.

III. N. C. Statutes (& case notes):

§ 15A-1025. Plea discussion and arrangement inadmissible. The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

HISTORY: 1973, c. 1286, s. 1; 1975, c. 166, s. 27.

NOTES:

OFFICIAL COMMENTARY

The parallel provision in A.L.I. Code § 350.7 has an initial qualifying clause: "Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn. . . ." The Commission thought this clause unnecessary as *G.S. 15A-1022(b)* requires the judge to examine the defendant as to plea arrangements, and *G.S. 15A-1026* requires that a verbatim record be kept.

The Commission rejected a proposal to add a proviso to this section allowing evidence of plea discussions and arrangements to come in when essential to perjury prosecutions or contempt proceedings. It is not clear whether this was a deliberate policy decision or was based upon the assumption that the courts of necessity would engraft those exceptions upon the literal words of the section.

LEGAL PERIODICALS. --For survey of 1976 case law on criminal procedure, see 55 *N.C.L. Rev.* 989 (1977).

For survey of 1977 case law on evidence, see 56 *N.C.L. Rev.* 1069 (1978).

CASE NOTES

PURPOSE OF SECTION. --This section was designed to facilitate plea discussions and agreements by protecting both defendants and prosecuting officials from being penalized for engaging in practices which are consistent with the objectives of the criminal justice system. *State v. Wooten*, 86 *N.C. App.* 481, 358 *S.E.2d* 78 (1987).

DISCUSSION BETWEEN DEFENDANT AND ARRESTING OFFICER. --This section is not applicable where the only evidence of plea negotiation concerns a discussion between defendant and an arresting officer. *State v. Lewis*, 32 *N.C. App.* 298, 231 *S.E.2d* 693 (1977).

NEW TRIAL REQUIRED. --Admission of investigating police officer's testimony that defendant said that "his lawyer wanted to plead him to six years to the offense and he wanted to know what he should do" was highly prejudicial to defendant's case and potentially influenced the jury verdict, warranting a new trial. *State v. Wooten*, 86 *N.C. App.* 481, 358 *S.E.2d* 78 (1987).

Defendant's letters to the district attorney constituted a "plea discussion" within the intent and meaning of *G.S. 15A-1025* and *G.S. 8C-1*, *N.C. R. Evid.* 410, so the State could not cross-examine defendant concerning those plea negotiations; the trial court committed reversible error and a new trial was ordered because the State's questioning repeatedly placed before the jury defendant's statements that he made a big mistake and

was willing to confess to what he had done and to reveal who planned the robbery, which information was highly prejudicial and potentially influenced the jury's decision. *State v. Walker*, 167 N.C. App. 110, 605 S.E.2d 647 (2004).

STATEMENT NOT MADE DURING ACTUAL NEGOTIATIONS. --Trial court erred by not allowing witness to testify regarding statement allegedly made by defendant: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk," as this section did not cover this statement because it was not made during actual plea bargain negotiations. *State v. Bostic*, 121 N.C. App. 90, 465 S.E.2d 20 (1995), cert. dismissed, 599 S.E.2d 560 (2004).

THE DEFENDANT WAIVED HIS RIGHT TO APPELLATE REVIEW of a possible violation of this section by introducing evidence during his own direct examination of plea discussions and subsequently failing to object to the State's eliciting of further evidence during cross-examination. *State v. Thompson*, 141 N.C. App. 698, 543 S.E.2d 160 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001).

APPLIED in *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976); *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997).

CITED in *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977); *State v. Melvin*, 57 N.C. App. 503, 291 S.E.2d 885 (1982); *State v. Nevills*, 158 N.C. App. 733, 582 S.E.2d 625 (2003), cert. denied, appeal dismissed, 357 N.C. 581, 589 S.E.2d 361 (2003).



Rule 410. Inadmissibility of pleas, plea discussions, and related statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of no contest;
- (3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

HISTORY: 1983, c. 701, s. 1.

NOTES:

COMMENTARY

This rule is identical to *Fed. R. Evid. 410*, except as noted below.

The Advisory Committee's Note states:

"Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326."

Subsection (2), regarding pleas of no contest is the same as the federal rule and is consistent with North Carolina law. *Brandis on North Carolina Evidence* § 177, at 41, 42 (1982).

The third paragraph differs from *Fed. R. Evid. 410* by making a reference to Article 58 of General Statutes Chapter 15A, which specifies the procedure relating to guilty pleas in superior court. The third paragraph also refers to comparable procedures in district court, although no statutory scheme regulates plea negotiations in district court. See Official Commentary to Ch. 15A, Art. 58.

Prior to the 1979 amendments to *Fed. R. Evid. 410* and *Fed. R. Crim. P. 11(e)(6)*, it was questionable whether an otherwise voluntary admission to law enforcement officials was rendered inadmissible merely because it was made in hope of obtaining leniency by a plea. The Notes of the Advisory Committee on the amendment to *Fed. R. Crim. P. 11(e)(6)* state that the rule:

"makes inadmissible statements made 'in the course of any proceedings under this rule regarding' either a plea of guilty later withdrawn or a plea of no contest later withdrawn and also statements 'made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.' It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process ... without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions ... This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases ... must be resolved by that body of law dealing with police interrogations."

If there has been a plea of guilty later withdrawn or a plea of no contest, the third paragraph of Rule 410 makes inadmissible statements made in the course of any proceedings relating to guilty pleas in the superior or district courts. This includes, for

example, admissions by the defendant when he makes his plea in court and also admissions made to provide the factual basis for the plea. However, the rule is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, statements made to the probation officer in connection with the preparation of that report would come within the third paragraph. See Notes of Advisory Committee on the Amendment to *Fed. R. Crim. P. 11(e)(6)*.

The last sentence of Rule 410 provides an exception to the general rule of nonadmissibility of the described statements. Such a statement is admissible "in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it."

"... when evidence of statements made in the course of or as consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not 'against' the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language ... follows closely that in *Fed. R. Evid. 106*, as the considerations involved are very similar." *Id.*

Unlike the federal rule, Rule 410 does not contain an exception permitting a statement made by the defendant under oath, on the record, and in the presence of counsel to be introduced in a criminal proceeding for perjury or false statement.

Rule 410 differs from the federal rule by making the described evidence inadmissible in favor of the defendant as well as against him. North Carolina practice in this area is governed in part by *G.S. 15A-1025* which is consistent with this rule. *G.S. 15A-1025* should be amended after Rule 410 is adopted.

CASE NOTES

THE DEFENDANT WAIVED HIS RIGHT TO APPELLATE REVIEW of a possible violation of this section by introducing evidence during his own direct examination of plea discussions and subsequently failing to object to the State's eliciting of further evidence during cross-examination. *State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160 (2001)*, cert. denied, *353 N.C. 396, 548 S.E.2d 157 (2001)*.

INCULPATORY STATEMENTS IMPROPERLY ADMITTED. --Defendant's letters to the district attorney constituted a "plea discussion" within the intent and meaning of *G.S. 15A-1025* and *G.S. 8C-1, N.C. R. Evid. 410*, so the State could not cross-examine defendant concerning those plea negotiations; the trial court committed reversible error and a new trial was ordered because the State's questioning repeatedly placed before the jury defendant's statements that he made a big mistake and was willing to confess to what he had done and to reveal who planned the robbery, which information was highly prejudicial and potentially influenced the jury's decision. *State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647 (2004)*.

INCULPATORY STATEMENTS PROPERLY ADMITTED --Where defendant was told he would have to be completely cooperative with law enforcement for a plea offer to be considered, but was also told that no formal plea offer was being made, his inculpatory statements to law enforcement were admissible against him, because he had no reasonable, subjective belief that he was negotiating a plea, nor did he state an intention to plead guilty to any offense. *State v. Curry*, 153 N.C. App. 260, 569 S.E.2d 691 (2002).

CITED in *State v. Curry*, 153 N.C. App. 260, 569 S.E.2d 691 (2002).

USER NOTE: For more generally applicable notes, see notes under the first section of this subpart, part, article, or chapter.

IV. Enforceability of Plea Agreements:

In North Carolina, plea agreements are governed by contract principles. One governing principle is that is that when the State has made a plea offer, and the defendant relies on the offer to his detriment, the agreement is binding on the State and may not be rescinded. *State v. Collins*, 300 N.C. 142, 148-49, 265 S.E.2d 172, 176 (1980).

V. National Prosecution Standards. *See attached documents re prosecution standards from the ABA and the National Association of District Attorneys.*