

The Plea Agreement as a Contract

by Nana Knight

Over 90 percent of cases in the criminal justice system are resolved through plea agreements.¹ The courts have endorsed plea bargains as an essential and desirable part of the criminal process.² Parties plea bargain because of the benefits bargains provide. For prosecutors, negotiated pleas net a greater return on convictions while conserving resources. For defendants, pleas secure a more favorable outcome by either avoiding the maximum penalty or by getting charges or cases dismissed. In many cases, plea negotiations are informal, often through a quick conversation between the parties or a casual email. Once ratified by the court, however, plea bargains bind prosecutors to enforceable contracts and breaching an agreement often triggers a judicial remedy.³

Understanding the basic rules behind contract formation is useful during negotiations and especially in situations where the prosecutor wishes to withdraw from the plea. This article discusses the mechanics of contract formation, withdrawals from contracts, remedies for breach, and practice tips for prosecutors to consider during plea bargaining.

Plea Bargaining: Definition and Limitations

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Penal Code section 1192.7(b) defines plea bargaining as an arrangement where

the defendant agrees to plead guilty or *nolo contendere*, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

On its face, the statute prescribes a bargained-for-exchange, which resembles a “contract” between the defense and prosecution.⁴ The contracts can take on numerous forms; for example, the prosecutor may:

- agree to reduce or dismiss the number of charges;
- agree to a “stipulated” sentence or a “lid” on custody time;
- dismiss other pending cases;
- agree not to file a case against the defendant; or
- agree to refrain from making any sentencing recommendation at all.⁵

In felony cases, the prosecutor must explain on the record the reasons for any agreement involving an amendment, dismissal of charges, or sentence recommendation to the court.⁶ This disclosure is designed to prevent prosecutorial abuse of the plea bargaining procedure.⁷

The parties have wide latitude in negotiating and contracting, but there are certain limitations that apply. For example, the parties may not enter into an agreement that requires the court to impose an illegal sentence.⁸ Similarly, the prosecution is prohibited from plea bargaining in any case in which the information charges a serious felony, felonies with personal firearm use allegation, driving under the influence offenses, or violent sex offenses.⁹ This prohibition remains subject to the following exceptions: situations where the testimony of a material witness is unavailable, when the evidence is insufficient to prove the prosecution’s case, or when a reduction or dismissal would not substantially change the sentence.¹⁰ During negotiations, the parties are required to conduct themselves “openly and with the utmost fairness.”¹¹ Intentionally deceiving opposing counsel has been found to constitute misconduct.¹²

Court Approval Required

A typical pre-plea negotiation involves an offer by the prosecutor, and following consultation with the defendant,

acceptance by defense. Under general contract law principles, this transaction creates an enforceable contract between the parties, and the defendant would be entitled to enforce the unexecuted plea bargain.¹³ However, California courts have declined to enforce such unexecuted plea bargains and require court approval for the plea deal to go into effect.¹⁴ During plea negotiations, the court has a limited role and may not directly engage on behalf of the prosecution or the defense.¹⁵ However, once an agreement has been reached, the court is charged with “spread[ing] the entire bargain on the table and mak[ing] it part of the record.”¹⁶ When parties negotiate a deal, the court may not arbitrarily refuse to consider a plea agreement.¹⁷

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The courts have wide latitude in rejecting plea agreements. However, the court cannot impose a plea bargain that involves dismissal of some charges or a plea to a lesser charge if the prosecution objects.¹⁸ In reviewing the proposed bargain, the courts are guided with the principles of protecting and promoting the public’s interest in the “vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crime.”¹⁹ Therefore, the court can reject a deal that runs counter to these principles. The court considers the prosecutor’s statement of reasons under Penal Code section 1192.6(c) to determine the propriety of the plea bargain. Since public interest is paramount in executing plea bargains, the court has discretion to reject a plea agreement even after the defendant has pled.²⁰

A Contract Is Formed

Following court approval, the plea bargain becomes a tripartite agreement between the defense, the prosecution, and the court.²¹ Both the prosecution and the defendant are entitled to the benefit of the bargain they have agreed to.²² The defendant is entitled to due process when accepting a plea.²³

When the prosecutor fails to abide by the terms of the plea agreement, the defendant's due process rights are implicated.²⁴ Thus, absent the defendant's deception, fraud, or other valid reason, the prosecutor will not be allowed to repudiate a plea bargain he or she previously accepted.²⁵ The fact that the prosecutor's violation of the plea agreement was inadvertent does not lessen the impact of the violation.²⁶

Defendants are bound by the same contractual obligations. The courts have held that "[f]ailure to hold a defendant to the terms of his bargain would undermine the integrity of the judicial process."²⁷ Therefore, when the defendant violates the agreement, the prosecutor is entitled to enforcement. This may come up in a context where the defendant has received leniency in exchange for testifying for the prosecution. Additionally, once the plea is made and accepted by the defense, defense counsel has a duty to follow through with it.²⁸ If defense counsel fails to adequately pursue the agreement, the court is deprived of the opportunity to exercise its discretion in approving or rejecting a potentially beneficial disposition by plea.²⁹ Finally, if there are any ambiguities in the plea agreement, they are usually resolved in the defendant's favor.³⁰

Withdrawing from the Plea Agreement

There are two situations when the prosecution may withdraw from a plea agreement. First, withdrawal is allowed before the court accepts the plea. Second, the prosecution may withdraw before the defendant detrimentally relies on the agreement. In the first scenario, when the prosecutor withdraws before the court has a chance to approve, the agreement is not effective. If this happens, the court has no authority to impose an earlier bargain on the prosecution.³¹

To illustrate, here is an example of a scenario in a domestic violence case: The prosecutor extends an offer to defense before the preliminary hearing. Defense counsel accepts the offer and executes a change of plea form signed by the defendant. The form is handed to the judge, but before the court has a chance to approve, the prosecutor learns that the victim sustained far more serious injuries than what was initially reflected in the police report. At this point, since the court has not yet approved the bargain, the prosecutor is free to withdraw from the agreement.

As for detrimental reliance, the defendant must demonstrate that he or she relied upon a prosecutor's plea offer "by taking some substantial step or accepting a serious risk of an adverse result following acceptance."³² For example, the defendant may show detrimental reliance if he or she performed some part of the bargain, such as if the defendant provided beneficial information to prosecution.³³ Mere passage of time does not amount to detrimental reliance.³⁴ Further, absent a showing of specific prejudice, the defendant may not rely on detrimental reliance by showing that he or she stopped preparing his or her defense.³⁵ Finally, detrimental reliance may not be shown by the possibility of a longer sentence.³⁶

Remedies for Breach

As in general contract law, the nature of the breach determines the judicial remedy. When the plea agreement is violated, the objective is to redress the harm caused by the breach without prejudicing either party or limiting the court's sentencing discretion.³⁷ Typically, in case of a breach, the court will allow the defendant to withdraw the plea and to proceed to trial on the original charges. Other times, the court may specifically enforce the plea bargain. Specific enforcement is especially common in situations where the prosecutor refuses to comply with the agreement.³⁸

The following three examples demonstrate the remedies that are available when a plea agreement is violated:

- *People v. Mancheno* (1982) 32 Cal.3d 855: The prosecutor and the defendant agreed to a diagnostic study before a sentence was imposed. At the sentencing hearing, there was no mention of the study, and the defense did not address this term of the agreement. The court sentenced the defendant to several years in prison. Because the defendant was entitled to a specific performance of a diagnostic study, the sentence was vacated and remanded.
- *People v. Kaanehe* (1977) 19 Cal.3d 1: The prosecution agreed to refrain from recommending or arguing the disposition at sentencing. The prosecutor later breached this agreement by submitting a letter and arguing in chambers to the judge to impose a specific prison term. The prosecutor's actions were found to be a violation of the plea agreement. As such, the defendant was given an opportunity to withdraw his plea and proceed to trial or continue with a new sentencing

hearing with the condition that the prosecutor's letter be stricken from the record.

- *People v. Daugherty* (1981) 123 Cal.App.3d 314: One prosecutor agreed to dismiss the pending charges in exchange for a plea. The court approved this agreement. Another prosecutor, who substituted in for the original prosecutor, disagreed with the plea bargain, calling it "unwise." In this scenario, the defendant was entitled to specific enforcement of the bargain, i.e., dismissal of the charges, since the entire prosecution office was bound by the plea agreement that the original prosecutor had entered.

Practice Tips

District attorney's offices across the state have specific policies that guide plea negotiations and plea bargains; it is important to adhere to those established policies. In making an offer to settle a case, prosecutors normally consider a host of factors, including the defendant's criminal history and personal circumstances, public safety, the evidentiary strength of the case, and the victim's input.

To ensure that the offer properly reflects the "value" of the case, it is important to review and obtain all relevant evidence prior to extending an offer. Frequently, this means conducting supplemental investigation early in the proceedings to gather all the facts and assess the type of offer and likelihood of winning at trial.

For example, in domestic violence cases, the alleged injuries may appear less serious than they really are and medical records may be necessary to ascertain the true nature of the injuries to serve as a basis for potential enhancements. Conducting early investigation may also avoid situations on the eve of trial where the prosecutor is forced to extend an offer to settle a case with evidentiary issues—problems that the prosecutor could have discovered upon conducting a proactive pre-trial investigation.

Next, victims have specific rights when it comes to case disposition. Marsy's Law, article I, section 28(b)(6) of the California Constitution, requires that victims, upon request, be notified and informed before any pre-trial disposition of the case. Conferring with victims is especially important in domestic violence cases, particularly where the defendant is about to be released and there is a chance he or she may pose a threat to the victim while out of custody. It is good practice to speak to victims before any disposition and obtain their input or approval.

Criminal convictions often have immigration consequences, and prosecutors should strive to protect pleas from future attacks. Most criminal law practitioners are familiar with *Padilla v. Kentucky*, which requires defense counsel to advise their clients of the risks of deportation when deportation consequences of a plea to a criminal charge are “truly clear.”³⁹ Failure to advise of the consequences may amount to ineffective assistance of counsel, which may lead to a reversal of the plea. Further, prosecutors should be familiar with Penal Code section 1016.3(b), which directs prosecutors to consider avoiding adverse immigration consequences in the plea bargaining process.⁴⁰ To protect the plea agreement from future attacks, the California District Attorneys Association’s *Guilty Plea Handbook* recommends that prosecutors state on the record that the People would not consider a more favorable offer to mitigate or avoid immigration consequences.⁴¹ Protecting the record this way will undercut future defense arguments that the defendant was prejudiced by defense counsel’s defective advisement on immigration consequences.⁴²

Carefully recording all the terms of the plea agreement is imperative during plea negotiations. Detailed notes ensure that there are no ambiguities or misunderstandings between the parties. If there are any ambiguities, Civil Code section 1644 instructs: “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense,”⁴³ In cases involving successive prosecutors, it is especially important to note offers and pre-trial discussions in the file to preserve negotiation history.

Penal Code section 1192.5 requires that the court find a factual basis for negotiated settlements. Some of the reasons the courts require a factual basis for pleas is to provide a more accurate record, to assist correctional facilities in the performance of their duties, and to provide the court with a better assessment of the defendant’s competency and understanding of the charges.⁴⁴ Prosecutors should be familiar with the case of *People v. Palmer*, where the court endorsed a “flat” stipulation to the factual basis by defense and prosecution, without requiring that counsel recite facts or stipulate to a specific document.⁴⁵ Although such stipulations are allowed pursuant to this case, the prosecutor should consider stipulating to a specific document, like a preliminary hearing transcript, a written

plea agreement, or the police report to provide the factual basis for the plea. As the court noted in *Palmer*, reference to a specific document is desirable to eliminate any uncertainty regarding the existence of a factual basis for the plea.⁴⁶ For prosecutors, such references defend against future attacks on the plea.

Occasionally, defendants who plead guilty fail to appear at sentencing hearings. If the defendant fails to appear and subsequently receives a more severe sentence by the court, the defendant can withdraw his or her plea, if the greater sentence was not part of the plea agreement.⁴⁷ To avoid a withdrawal of a plea in this situation, the plea agreement may specify for an increased sentence if the defendant fails to return for the sentencing hearing. As part of the plea agreement, for example, the defendant can expressly waive his or her rights under Penal Code section 1192.5 to withdraw his or her guilty plea, should the court subsequently disapprove the plea bargain in the future by imposing a higher sentence.⁴⁸ Upon receiving such a waiver, the court may sentence the defendant in excess of the bargained-for-term. There is no need for the court to allow the defendant to withdraw his or her plea since the court is still acting within the purview of the plea agreement.⁴⁹

Conclusion

Plea bargaining is a defining feature of the criminal justice system. The bargaining process is guided by general contract law principles, where the bargained-for-exchange between the parties is supported by legal sanctions. The most notable distinction from contract law, however, is that court approval is required for the plea deal to go into effect. When approving a plea deal, the guiding principle for the courts is to promote the public interest in the vigorous prosecution of the accused and to protect victims of crime. As such, the courts have wide discretion in approving and rejecting plea agreements.

Once ratified by the court, the plea bargain becomes an enforceable contract between the parties. Knowing the rules governing plea negotiations and the remedies for breach is therefore, useful during negotiations and may be especially helpful for the prosecutor who wishes to withdraw from the plea bargain. ■

ENDNOTES

1. Lindsey Devers, Ph.D., *Plea and Charge Bargaining: Research Summary* (2011) U.S. Department of Justice: Bureau of Justice Assistance <<http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>> (accessed Sep. 8, 2017).
2. *Brady v. United States* (1970) 397 U.S. 742, 753; see also *Santobello v. New York* (1971) 404 U.S. 257, 261-262.
3. *People v. Kaanehe* (1977) 19 Cal.3d 1, 13-14.
4. *Puckett v. United States* (2009) 556 U.S. 129, 137 [plea bargains are essentially contracts].
5. *California Criminal Law: Procedure and Practice* (2013) Continuing Education of the Bar of California (CEB), p. 758 ["Negotiations concerning the charges are sometimes referred to as charge bargaining, and negotiations concerning the sentence are sometimes referred to as sentence bargaining."].
6. Pen. Code § 1192.6(a)-(c); see also *People v. Cardoza* (1984) 161 Cal.App.3d 40, 44 [The imposition of a sentence recommended by the prosecution pursuant to a plea bargain without a statement of the prosecutor's reasons was error requiring a remand for resentencing of the defendant.].
7. *Cardoza, supra*, at 40, fn. 4.
8. *In re Daniel M. Williams* (2000) 83 Cal.App.4th 936, 944.
9. Pen. Code § 1192.7(a)(2)-(3); (c).
10. Pen. Code § 1192.7(a)(2)-(3).
11. *People v. Caron* (1981) 115 Cal.App.3d 236, 24, quoting *People v. Ramos* (1972) 26 Cal.App.3d 108, 111 and *People v. Pinon* (1973) 35 Cal.App.3d 120, 125; see also *In re Troglin* (1975) 51 Cal.3d 434, 438 ["Well established is the rule that the People will be held strictly to the terms of a plea bargain made with a criminally accused."].
12. *Monroe v. State Bar of California* (1961) 55 Cal.2d 145, 152; see also *Coviello v. State Bar* (1955) 45 Cal.2d 57, 65-66.
13. See, e.g., *Cooper v. United States* (4th Cir. 1979) 594 F.2d 12, 17-18.
14. *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1354; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 941; *People v. Orin* (1975) 13 Cal.3d 937, 942-943.
15. See, e.g., *People v. Weaver* (2004) 118 Cal.App.4th 131, 148 [The judge abused discretion in refusing to allow the defendant to withdraw guilty plea and encouraged the defendant to accept plea agreement.].
16. *Ramos, supra*, at 111, citing *People v. West* (1970) 3 Cal.3d 595, 610.
17. *People v. Smith* (1971) 22 Cal.App.3d 25, 30-31.
18. *People v. Anderson* (1982) 129 Cal.App.3d 491, 494.
19. *Alvernaz, supra*, at 941, citing *Cardoza, supra*, at 43.
20. *People v. Stringham* (1988) 206 Cal.App.3d 184, 194 [cert. for part. pub.], quoting *People v. Johnson* (1974) 10 Cal.3d 868, 373 ["Implicit in the language of Penal Code section 1192.5 is the premise that the court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea."].
21. *People v. Armendariz* (1993) 16 Cal.App.4th 906, 911 [cert. for part. pub.].
22. *People v. Daugherty* (1981) 123 Cal.App.3d 314, 321, citing *People v. Collins* (1978) 21 Cal.3d 208, 214.
23. *Boykin v. Alabama* (1969) 395 U.S. 238.
24. See, e.g., *Mabry v. Johnson* (1984) 467 U.S. 504, 509 ["It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand."].

25. *Daugherty, supra*, at 321.
26. *Santobello, supra*, at 262.
27. *People v. Vargas* (2001) 91 Cal.App.4th 506, 534 ["In this case, defendant's breach of his bargain included testifying falsely, conduct which is manifestly corrosive of our system of justice."]. See also *Daugherty, supra*, at 322 [The power of the court to set aside a plea bargain on the ground of breach by a defendant of its terms is beyond question.].
28. *People v. Brown* (1986) 177 Cal.App.3d 537 [Defense failed to diligently pursue a plea bargain and correct the pre-plea report.].
29. *Id.* at 554.
30. *Daugherty, supra*, at 319, quoting *In re Tartar* (1959) 52 Cal.2d 250, 257 ["The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute."]. [Emphasis in original.]
31. See, e.g., *Anderson, supra*, at 495 [At the time for entry of the plea in open court, a clear record existed that the People had withdrawn consent to any such bargain.].
32. *Rhoden, supra*, at 1355, quoting *Reed v. Becka* (1999) 511 S.E.2d 396, 403.
33. *Id.* ["Detrimental reliance may be demonstrated where the defendant performed some part of the bargain."].
34. *Id.*
35. *Id.*
36. *Id.*
37. *People v. Mancheno* (1982) 32 Cal.3d 855, 860.
38. *Id.* at 860–861.
39. *Padilla v. Kentucky* (2010) 559 U.S. 356.
40. Penal Code section 1016.3(b) states: "The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."
41. Grover D. Merritt, *Guilty Plea Handbook* (2011) California District Attorneys Association, p. 24.
42. *Id.*
43. *People v. Alvarez* (1982) 127 Cal.App.3d 629, 633.
44. *People v. Watts* (1977) 67 Cal.App.3d 173, 178.
45. *People v. Palmer* (2013) 58 Cal.4th 110.
46. *Id.* at 118.
47. *People v. Cruz* (1988) 44 Cal.3d 1247.
48. *People v. Masloski* (2001) 25 Cal.4th 1212, 1223.
49. *Id.* at 1223–1224.