

Turning state's evidence:

Deceit, lies and contractual illegality

It's common for those charged with crimes to cooperate with the police. Most criminal lawyers espouse cooperation as one of the most effective tools for securing a favorable plea agreement. Cooperation can take many forms, including confessing, implicating another party, revealing the location of contraband or assisting the state on an unrelated matter.

While cooperation is encouraged, it is essential to understand the legal ramifications and obligations of the parties.



THE LAW & MORE

Jeffrey S. Mandel

After informing a client to discuss the case only with you, it also should be explained that law enforcement officers (police officers, detectives and prosecutors) may employ “trickery” during interrogation or when discussing a pre-plea bargain “deal.” Law enforcement shouldn't be faulted for this. After all, officers pursue and investigate crimes, offenses and motor vehicle violations, and their duty is to gather evidence by any lawful means. The model jury instruction on entrapment is instructive in this regard. It reads, “The law authorizes law enforcement officers to use stealth and strategy, decoys, traps and deception as a tactic to outwit and catch those engaged in criminal enterprise.”

The preferred and least troublesome technique used by law enforcement is the practice of informing a suspect that disclosure of information will benefit the suspect and that the officer will do whatever possible to secure leniency for the suspect. This is only a partial — but alluring — falsehood and is more analogous to puffery. It isn't necessarily a lie because cooperating will likely benefit a defendant seeking a favorable plea bargain. Prosecutors often ask an arresting officer whether the suspect cooperated with the investigation, resisted and/or hampered arrest or calmly invoked the constitutional right to remain silent.

The more bothersome practice for securing a confession occurs during interrogation. Verbal lies, which courts eloquently label “trickery” in court opinions, can include advising a suspect that a witness has come forward with a positive identification, that an accuser passed a polygraph exam or investigators located the suspect's DNA at the crime scene. Courts even permit officers to lie to suspects about the sentence they may face. Thus, those who confess to murder after being told they faced only imprisonment may still receive the death penalty. See *State v. Cooper*, 151 N.J. 326.

Eliciting confessions and other information through lying and deceit is taught to investigators in their interrogation manuals. They learn that one of the most effective ways of securing a con-

fession is to immediately confront a potential suspect with conjured-up stories of possessing evidence that doesn't exist. These manuals instruct investigators to enter an interrogation room with a file full of “evidence.” This makes suspects believe police already have proof of their involvement in the crime, which reduces the suspect's inhibition against confessing.

Drawing distinctions

Courts now draw distinctions between: (1) permitted trickery in the form of non-verbal cues, i.e., an investigation file filled with unidentified documents; (2) disallowed physical creation of fabricated evidence, i.e., showing the suspect a fake piece of “evidence” from the file; and (3) permitted verbal lies of possessing incriminating evidence, i.e., telling a suspect certain materials are in the investigation file without displaying any fabricated documents.

Courts generally suppress confessions when obtained from lies that produce a false confession or that violate due process. Suppression of evidence and rejection of pleas are rare because courts often employ circular reasoning and conclude a confession coupled with circumstantial evidence means the confessor committed the crime and, therefore, it isn't likely to be a false confession.

In *State v. Patton*, 362 N.J. Super. 16, the Appellate Division drew the proverbial line in the sand as to what is a permissible lie and what isn't. Nineteen hours after being arrested for suspected murder, officers began their interrogation of Ronald Patton. He initially offered an alibi: He stayed at his girlfriend's house the evening of the murder. He maintained that alibi even after being informed an eyewitness to the killing came forward. Police officers then produced for Patton an audiotape on which the eyewitness identified Patton as the murderer. Patton thereafter confessed, only to learn later the witness was actually a law enforcement officer posing as an eyewitness and the audiotape was a complete fabrication. The Appellate Division held that fabricating physical evidence to elicit a confession breached due process and rendered the confession involuntary.

Patton makes clear that in New Jersey, police have boundaries for deceit and lies. Fabricated tangible evidence cannot be used by to elicit a confession. Almost all other lies, trickery and deceit remain fair game.

Contractual illegality

Courts readily enforce contracts between two competent consenting parties. The term “contract” here implies a “meeting of the minds” with an offer, acceptance and consideration accompanied by unambiguous language identifying the material terms of the parties' agreement, whether written or oral, and without either party mistaking or misunderstanding its material terms. Contracts may be enforced whether written by lawyers in mind-numbing legalese, written by illiterates on a napkin who use one-syllable words or an oral agreement never reduced to writing. The difference in court lies in one's ability to prove the existence of the contract and its material terms. Accordingly, a suspect's oral contract with an arresting officer to turn state's evidence in return for favorable treatment is enforceable under contract law — or is it? Would the answer be different if the contract were in writing and signed by the officer?

Jeffrey S. Mandel is an associate at Pitney Hardin in Morristown who appears regularly on Court TV as a guest legal commentator. He also appears on CNN and FOX News Channel.

A plea bargain occurs when the defendant agrees to plead guilty to either lesser offenses or a recommendation for a reduced or modified sentence, including probation or pre-trial intervention. This is a formal proceeding where the prosecutor makes the initial offer in writing. However, it is not uncommon for the entire exchange to be verbally set forth on the record prior to the written agreement. Indictable crimes require completion of a formal plea form, as prescribed by the administrative director of the courts. Consistent with contract law, a defendant's counteroffer is a rejection of the state's offer and may result in the state trying the matter without offering the defendant any additional pleas. In such case, the defendant faces conviction on the original charges, and statements made in the course of plea negotiations are ordinarily inadmissible.

Once a plea is accepted, it is reviewed by the court. The required contractual consideration is acknowledged by the defendant facing a reduced sentence and/or charges and the state not having to expend resources trying to prove every element of the crime or offense. Consideration also may take the form of the defendant cooperating in other investigations. A plea agreement therefore has the most rudimentary elements of a contract: offer, acceptance and consideration.

Extra safeguard

Due to the legal ramifications of a guilty plea, an extra safeguard is employed prior to the contract being judicially recognized and approved. The court elicits a factual basis on the record for the guilty plea and satisfies itself the plea was entered knowingly, voluntarily and intelligently. Unlike ordinary contracts, either the court can reject the plea or the defendant can seek to withdraw it after initial acceptance.

A caveat to the normal procedure is the contract principle of contractual illegality, addressed in *State v. Marsh*, 290 N.J. Super. 663. In that case, a detective entered into a contract with the defendant in which the defendant agreed to cooperate in an unrelated drug investigation in return for having his drunken driving charges dismissed. This is a classic contract that includes an offer, acceptance and consideration. However, the municipal court (and later the Law Division) refused to enforce it on grounds of contractual illegality. The Appellate Division upheld those decisions because the contract violated a Supreme Court guideline prohibiting plea bargains for drunken driving offenses.

The *Marsh* court warns: "[T]here is no room to allow a municipal police officer to make deals with offenders against the laws. Since the officer has no authority to bargain, it follows that he or she has no power to promise dismissal of a pending charge. A police officer is not vested with discretion to decide whether the law should be enforced."

Although *Marsh* applied to an agreement with a police officer, plea agreements with prosecutors also may be deemed unenforceable. See *I/M/O P.C.*, 349 N.J. Super. 569 (agreement between a county prosecutor and a defendant to waive the attorney general's right to seek civil commitment under the Sexually Violent Predator's Act is unenforceable).

Lawyers should continue to negotiate deals on behalf of their clients. It should be done, however, with some caution and with a full understanding of the enforceability of any negotiated deals with law enforcement and with the understanding that the investigation file across the table may contain nothing more than a paper trail leading nowhere.