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Cover Page Footnote

J.D. Candidate, 2001, Fordham University School of Law. I would like to thank Professor Bruce A. Green for his guidance and insight, my family for their support, and my wife, Camille, for her love, encouragement, and patience.

NOTES

ABOVE THE LAW: THE PROSECUTOR'S DUTY TO SEEK JUSTICE AND THE PERFORMANCE OF SUBSTANTIAL ASSISTANCE AGREEMENTS

*Ross Galin**

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

*Robert H. Jackson*¹

INTRODUCTION

In 1987 the United States Sentencing Commission fulfilled the purpose for which Congress created it by enacting the Federal Sentencing Guidelines (“guidelines”).² Intended to create uniform sentences, the guidelines established a clear and rigid sentencing structure with narrow ranges within which federal judges must sentence the guilty.³ A judge can grant a federal criminal defendant a sentence below the prescribed range only if the government—ordinarily the prosecutor—makes a formal section 5K1.1 (“5K”) motion to the court requesting a downward departure based on substantial assistance.⁴ 5K motions are an important tool used by prosecutors to induce and reward both guilty pleas and cooperation

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1. Robert H. Jackson, *The Federal Prosecutor* (Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940), *reprinted in* 31 *J. Am. Inst. L. & Criminology* 3, 6 (1940).

2. *See infra* Part I.A.

3. *See infra* Part I.A.

4. *See infra* Part I.B.

by one criminal defendant in the prosecution of another.⁵ Typically, the government will promise to move the court for a lesser sentence if the defendant provides useful assistance, namely candid information and truthful testimony, in the prosecution of another criminal. The ultimate decision whether to move for a downward departure is left solely in the hands of the prosecutor, even where the prosecutor has entered into a formal agreement.⁶ Courts are extremely reluctant to question the decisions of prosecutors in the exercise of this discretion.⁷ Essentially, courts will compel a prosecutor to submit a downward departure motion only if the prosecutor is not acting in good faith when refusing to make the motion.⁸ This good faith legal standard forces prosecutors to abide by basic contract law principles and prevents them from acting in an unconstitutional manner, but still allows them great leeway in choosing whether to honor their agreements. Consider the following three cases.

1. *United States v. Jimenez*⁹

As part of a lengthy investigation of motorcycle gangs in the Denver, Colorado, area,¹⁰ federal prosecutors charged Charles Joseph Jimenez with multiple counts of conspiracy to distribute cocaine, conspiracy to defraud the United States of taxes, and various Interstate Travel Act offenses.¹¹ Jimenez agreed to plead guilty to the cocaine and tax charges; in exchange, the prosecutor promised, among other things, that he would recommend that the defendant be sentenced to no more than seven years and that the sentence be served concurrently with a prior sentence.¹² In accordance with the agreement, Jimenez waived his right to trial and entered a plea of guilty to the cocaine and tax charges.¹³

In the period between the entering of the plea and sentencing, the government came to believe that Jimenez had leaked to gang members grand jury testimony that was provided to him by his lawyer.¹⁴ The prosecutor informed the court of the government's beliefs,¹⁵ and noted at the sentencing hearing that he was recommending a seven-year concurrent sentence only because he had agreed to do so.¹⁶ He went on to explain, however, that although he could not sustain an intimidation charge against the defendant simply on the basis of the leaked testimony, he was upset

5. See U. S. Sentencing Guidelines Manual § 5K1.1 (1998) [hereinafter USSG].

6. See *infra* Part I.B.

7. See *infra* Part I.C.

8. See *infra* Part I.C.

9. 928 F.2d 356 (10th Cir. 1991).

10. See *id.* at 359.

11. See *id.* at 358.

12. See *id.* at 359.

13. See *id.* at 358-59.

14. See *id.* at 359.

15. See *id.* at 360.

16. See *id.*

by the defendant's conduct and hoped the court would consider Jimenez's actions in reaching its decision as to an appropriate sentence.¹⁷ Not surprisingly, the court announced that it would not follow the prosecutor's seven-year recommendation and instead sentenced Jimenez to twenty years in prison on the cocaine charge and five years on the tax charge, to be served concurrently with one another but consecutive to the prior sentence.¹⁸

2. *United States v. Forney*¹⁹

As part of a plea agreement with the United States Attorney's Office for the Middle District of Florida, Mark Forney pleaded guilty to conspiracy with intent to distribute cocaine.²⁰ According to the agreement, Forney was to plead guilty, cooperate fully with the government in its investigation, and provide the government with truthful information and testimony as required in the future.²¹ Forney cooperated based on the understanding that the prosecutor would exercise his power under section 5K1.1²² of the guidelines to submit a letter to the court detailing Forney's assistance and encouraging the court to depart from the guidelines and sentence Forney to a lesser sentence.²³ Forney's understanding with the prosecutor was memorialized in a formal written agreement.²⁴

Forney complied fully with the agreement by providing the government with "a lot of information" and identifying pictures shown to him.²⁵ Despite Forney's cooperation, the government decided not to recommend a downward departure from the guidelines. In fact, the district judge asked the Assistant United States Attorney ("AUSA") twice if the government intended to make a motion for a downward departure. Both times, the AUSA answered negatively.²⁶ The government based its refusal not on a lack of cooperation, but on the notion that the assistance provided by Forney was not "substantial" because it did not lead to any arrests.²⁷ The reason no arrests were made, however, was that the government decided that the crimes were too minor to prosecute.²⁸ At Forney's sentencing, he requested that he be given the benefit of a downward departure on the basis that he had fully satisfied his end of the agreement.²⁹ Forney also insisted that had he known the government would deem the crimes he provided information about

17. *See id.* at 360-61.

18. *See id.* at 361.

19. 9 F.3d 1492 (11th Cir. 1993).

20. *See id.* at 1494-95.

21. *See id.*

22. *See id.* at 1497.

23. *See id.* at 1495.

24. *See id.* at 1494-95.

25. *Id.* at 1497.

26. *See id.* at 1496.

27. *See id.* at 1497.

28. *See id.*

29. *See id.*

to be too small to act upon, he never would have signed the agreement or pled guilty.³⁰

The trial judge refused to grant the downward departure and sentenced Forney to 120 months in prison—the statutory mandatory minimum—and five years of supervised release.³¹ The judge explained that under the law he could not depart from the guidelines unless he received a substantial assistance motion from the government.³² The judge further explained that the guidelines placed the decision to offer a downward departure motion exclusively in the hands of the AUSA, who serves as the government's representative in criminal litigation.³³ The prosecutor had even more leeway here because under the terms of the written agreement, only the prosecutor could “consider whether such cooperation qualifies as ‘substantial assistance.’”³⁴ The judge concluded by stating, “[s]o it seems to me as a matter of law I am completely without discretion to depart or impose any sentence in this case except 120 to 121 months.”³⁵ The district court's decision was subsequently affirmed by the Eleventh Circuit.³⁶

3. *United States v. Brechner*³⁷

Following the filing of tax evasion charges against him, Milton Brechner and the government entered into a written plea agreement.³⁸ The agreement provided that if the United States Attorney's Office determined that Brechner had cooperated fully, provided substantial assistance, and otherwise complied with the terms of the agreement, the government would move for a downward departure on his sentence under section 5K1.1.³⁹ “Brechner went to considerable lengths to help the government obtain incriminating evidence against another person.”⁴⁰

At a debriefing session with the government, the prosecutor asked Brechner if he had ever received any kickbacks from two of his suppliers. Brechner initially responded that he had not.⁴¹ After a brief break in the session, requested by Brechner's attorney immediately following his client's answer, Brechner corrected himself and admitted to having received kickbacks from the suppliers.⁴² After the prosecutor told Brechner that he could have a “fresh start,” he proceeded to give more details about the

30. *See id.*

31. *See id.* at 1498.

32. *See id.* at 1497.

33. *See id.* at 1498.

34. *Id.* at 1495.

35. *Id.* at 1497.

36. *See id.* at 1504.

37. 99 F.3d 96 (2d Cir. 1996).

38. *See id.* at 97.

39. *See id.*

40. *Id.*

41. *See id.* at 98.

42. *See id.*

kickbacks.⁴³

At Brechner's sentencing, however, the government refused to move for a downward departure.⁴⁴ The prosecutor indicated that this refusal stemmed from Brechner's misrepresentations and the fact that it would be difficult to prosecute the other individual with only Brechner as a witness.⁴⁵ Brechner moved to compel the 5K motion, alleging prosecutorial bad faith.⁴⁶ The trial court granted Brechner's motion on the grounds that his cooperation was sufficient to warrant a 5K motion despite his false statements.⁴⁷ The trial court's ruling was subsequently overturned on appeal by the Second Circuit under the theory that Brechner's false statements represented a breach of contract.⁴⁸

In each of these three cases, the prosecutor's actions were found to be legal and the courts refused to force the government to offer a 5K motion. But did these prosecutors act consistently with their ethical duty to seek justice?⁴⁹ In light of the extremely lenient legal standard that allows a prosecutor to rescind almost any substantial assistance agreement entered into, how should a prosecutor who has formed such an agreement behave in order to fulfill the prosecutor's duty to seek justice? This Note considers whether ethical considerations may require a prosecutor to honor a cooperation agreement and thus make a 5K motion even when the law does not so require. Part I of this Note begins with a background discussion of the guidelines' purpose and the manner in which they function. Part I then focuses on section 5K1.1 itself, the courts' treatment of 5K, and the development of the legal standard of review regarding the responsibilities of prosecutors who have entered into these agreements. Part II analyzes the ethical responsibilities of the prosecutor in the criminal justice system and distinguishes it from that of other lawyers, particularly with respect to the negotiation and disposition of contracts. Part II concludes with a discussion of why the prosecutor's duty to seek justice should render a prosecutor's ability to back away from a cooperation agreement more difficult than the law allows.⁵⁰ Part III presents a number of hypothetical scenarios designed to demonstrate how the duty to seek justice should govern prosecutors' behavior in a variety of practical situations involving substantial assistance agreements.

43. *Id.* at 98-99. The clear implication of "fresh start" was that the prosecutor would pretend the false answer had never been given.

44. *See id.* at 99.

45. *See id.*

46. *See id.* For a discussion of the good faith standard of review, see *infra* Part I.C.

47. *See Brechner*, 99 F.3d at 99.

48. *See id.* at 99-100.

49. *See infra* Part II.B.

50. At times this Note uses the terms "substantial assistance agreement" and "cooperation agreement" interchangeably. The two phrases are synonymous in the context of this Note.

I. THE SENTENCING GUIDELINES, SUBSTANTIAL ASSISTANCE AGREEMENTS, AND THE COURTS: A RECIPE FOR PROSECUTORIAL DISCRETION

This part begins by describing the reasons for the sentencing guidelines' enactment, their purpose, and the way judges use them to sentence criminal defendants. It then explores section 5K1.1 of the guidelines and substantial assistance motions. This part concludes with an examination of the standard of review established by courts with respect to defendants' claims that the government breached a duty to submit a downward departure motion.

A. *The United States Sentencing Guidelines*

Congress passed the Sentencing Reform Act of 1984⁵¹ in response to years of public discontent over the wide variance in sentences for similar federal criminal offenses.⁵² The Sentencing Reform Act created the United States Sentencing Commission and empowered the commission to develop a comprehensive set of federal sentencing guidelines designed to eliminate inconsistent sentences.⁵³ On April 13, 1987, the proposed guidelines were submitted to Congress for review, and on November 1, 1987, the first edition of the guidelines went into effect nationally.⁵⁴

The basic approach of the guidelines is to improve the criminal justice system by creating a fair and effective sentencing system.⁵⁵ One commentator notes:

The Guidelines' purpose was threefold: to combat crime through an effective, fair sentencing system; to achieve reasonable uniformity in sentencing by narrowing the range of sentences that could be imposed for similar offenses committed by similar offenders; and to seek proportionality in sentencing by imposing different sentences

51. See Pub. L. No. 98-473, 98 Stat. 1988 (codified at 18 U.S.C. §§ 3141-3150 (1988)).

52. See Melissa M. McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. Ill. U. L.J. 321, 321 (1991); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 Am. Crim. L. Rev. 1267, 1272 (1997).

Prior to the enactment of the guidelines, criminal sentences were left almost entirely to the discretion of judges. Judges could receive input from prosecutors, probation officers, or others, but there were no formal guidelines that judges were required to follow. Several studies indicated that the lack of formal guidelines led to widely disparate sentences. This disparity was perceived as being unfair and in conflict with the notion that similarly situated defendants should be treated equally, and in turn, led many legal scholars and lawyers to believe that the discretion of judges should be restricted so as to lead to more uniform sentences. See McGrath, *supra*, at 324-25.

53. See Secunda, *supra* note 52, at 1272.

54. See USSG, *supra* note 5, ch. 1, pt. A, introduction.

55. See *id.*

for criminal conduct of differing severity.⁵⁶

To achieve these goals, the guidelines establish a system in which the severity of the crime committed is graphed on one axis, juxtaposed against the criminal history of the offender on another axis.⁵⁷ The axis that determines the magnitude of the offense is comprised of forty-three levels. Movement along the criminal-history axis is determined by prior convictions, while movement on the offense-level axis is determined by the nature of the crime as well as any aggravating or mitigating factors.⁵⁸ Once the intersection of the offense-level and the criminal history is determined, the court is presented with a very narrow range of months to which the defendant can be sentenced.⁵⁹ While there is a debate as to whether the guidelines reduce the variance in sentences,⁶⁰ there is no debate that judges' sentencing discretion has been greatly reduced.⁶¹ Equally clear is that a significant portion of the discretion lost by judges has been transferred to prosecutors.⁶²

B. *Section 5K1.1: Substantial Assistance Motions*

Section 5K1.1 was enacted as part of the original guidelines in 1987,⁶³ and amended to its current form in 1989.⁶⁴ The crucial portion

56. *Secunda, supra* note 52, at 1272; *see also* Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 Minn. L. Rev. 1253, 1256 (1994) (describing the three goals of the guidelines as uniformity, proportionality, and honesty in sentencing).

57. *See* USSG, *supra* note 5, sentencing table; *Secunda, supra* note 52, at 1273; Gyurci, *supra* note 56, at 1256-57.

58. *See* USSG, *supra* note 5, sentencing table; *Secunda, supra* note 52, at 1273; Gyurci, *supra* note 56, at 1257.

59. *See* USSG, *supra* note 5, sentencing table; *Secunda, supra* note 52, at 1273; Gyurci, *supra* note 56, at 1257.

60. *See, e.g.,* McGrath, *supra* note 52, at 351 (claiming that by allowing downward departures to some, but not all, defendants, the purpose of the guidelines is undermined and sentences consequently lack uniformity); *Secunda, supra* note 52, at 1269 (arguing that the tremendous discretion given to prosecutors defeats the guidelines' purpose of fairness and uniformity in sentencing).

61. *See generally* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998) (discussing how the guidelines have changed judging by restricting the discretion afforded judges in sentencing); *see also* *Secunda, supra* note 52, at 1278 (same).

62. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 418-19 (1992) (explaining that the guidelines have restricted the power of judges while producing a corresponding increase in the power of prosecutors); Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 Rutgers L. Rev. 199, 234-35 (1997) (arguing that recent court decisions have made clear that the prosecutor has the ability to determine whether a court will be able to exercise discretion and depart from the prescribed sentencing range); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2141 (1998) (discussing the power of the prosecutor to, in effect, impose sentences under the guidelines).

63. *See* USSG, *supra* note 5, § 5K1.1 cmt. (historical note).

of the section reads, “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”⁶⁵ This section is policy-driven and aimed at recognizing the importance of a defendant’s assistance in the prosecution of criminal cases.⁶⁶ As such, 5K seeks both to induce cooperation and to treat it as a mitigating circumstance in sentencing.⁶⁷ Defendants facing the possibility of a stern sentence under the guidelines will frequently offer prosecutors information about another criminal in exchange for a promise by prosecutors to move the court for a lighter sentence than that prescribed by the guidelines. Such an offer may be made by prosecutors as well as by defendants. Once entered into, the agreement is ordinarily memorialized in a formal writing that serves as a contract between the defendant and the government.⁶⁸ While 5K provides the statutory ability to enter into a cooperation agreement, it is the language of the contract itself that establishes both the general and specific requirements that must be met by each party.

5K’s language has been interpreted by courts as placing the decision to offer a downward departure for substantial assistance in the hands of the prosecutor, the government’s representative in the criminal justice system.⁶⁹ By granting this power exclusively to prosecutors, the guidelines allow prosecutors to provide defendants with the most lenient sentencing alternative.⁷⁰ A defendant knows that the judge must stay within the guidelines unless the prosecutor submits a downward departure motion, and the prosecutor will do so only if the defendant both pleads guilty and provides substantial assistance.⁷¹

It is clear from the wording of section 5K1.1 that the primary

64. *See id.* app. C, amend. 290.

65. *Id.* § 5K1.1. 5K1.1(a) lists five factors that may be used by the court in determining the appropriate reduction in sentence:

1. The court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
2. The truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3. The nature and extent of the defendant’s assistance;
4. Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
5. The timeliness of the defendant’s assistance.

Id. § 5K1.1(a).

66. *See id.* § 5K1.1, cmt.; McGrath, *supra* note 52, at 332.

67. *See* USSG, *supra* note 5, § 5K1.1 cmt.

68. *See infra* note 214 for an example of a typical substantial assistance agreement.

69. *See infra* Part I.C.

70. *See generally* Lynch, *supra* note 62 (arguing that prosecutors actually administer justice based on their power to use the guidelines to extract pleas).

71. *See id.* at 2132.

purpose of the section is to induce cooperation by offering reward. Not to be overlooked, however, is the benefit to the government in obtaining guilty pleas. As the Supreme Court in *Santobello v. New York*⁷² recognized, plea agreements help facilitate the efficiency of the justice system.⁷³ Writing for the majority, Chief Justice Burger explained that “[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged.”⁷⁴ The Chief Justice noted that were every criminal charge to go to trial, the government would need to greatly increase the number of courts and judges.⁷⁵ Further benefits of plea bargains include: protecting society from accused defendants who are prone to commit further crimes while on pre-trial release; shortening the time between the filing of charges and final disposition, which increases chances of rehabilitation; and finality and the efficient conclusion of criminal proceedings.⁷⁶

If a primary purpose of 5K is viewed as encouraging plea bargains and cooperation, the section has enjoyed great success. Since the guidelines were introduced in 1987, nearly ninety percent of defendants in criminal cases have entered guilty pleas.⁷⁷ In 1996 alone, approximately 12,000 defendants not only pled guilty, but received a downward departure for their pleas.⁷⁸ Nearly two-thirds of these downward departures were the result of substantial assistance agreements.⁷⁹

As these numbers indicate, prosecutors have used their discretion to reward thousands of defendants who provided assistance. But prosecutors have also shown a willingness to exercise their discretion not to offer cooperative defendants the opportunity to enter a substantial assistance agreement. In fact, while two-thirds of all defendants in criminal cases provide some assistance to the

72. 404 U.S. 257 (1971).

73. *See id.* at 260-61.

74. *Id.* at 260; *see also* Corbitt v. New Jersey, 439 U.S. 212, 222 (1978) (expressing the view that the government has a legitimate interest in facilitating plea agreements); Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 Fordham L. Rev. 987, 991-92 (1995) (examining the mutual advantages of plea bargaining).

75. *See Santobello*, 404 U.S. at 260.

76. *See id.* at 261.

77. *See* USSG, *supra* note 5, ch. 1, pt. A; Gyurci, *supra* note 56, at 1264.

78. *See* Ian Weinstein, *Substantial Assistance and Sentence Severity: Is There a Correlation?*, 11 Fed. Sent. Rptr. 2 (Sept.-Oct. 1998).

79. *See id.* Although there are other circumstances in which judges can depart from the guidelines, these instances are primarily limited to those occasions where the defendant has no prior criminal history and is willing to accept responsibility for the crime committed or where extenuating family circumstances exist. *See generally* Stith & Cabranes, *supra* note 61.

government, many of these defendants offer their cooperation without having entered into agreements. Only 38.6% of the defendants who cooperate with prosecutors, either through formal agreements or informally, receive the benefit of a substantial assistance departure motion from prosecutors.⁸⁰ For the many defendants who provide assistance but do not receive 5K motions, simply demonstrating that they provided substantial assistance is not enough to force prosecutors to enter and fulfill substantial assistance agreements.⁸¹ While the majority of cooperation agreements are fulfilled, the courts are littered with cases in which prosecutors have refused to honor the agreements they formed with defendants. Just as courts will not compel prosecutors to enter into a substantial assistance agreement, they will typically refuse to force a prosecutor to honor an existing agreement absent a showing of bad faith.

C. *Enforcement of Substantial Assistance Agreements and the Legal Standard of Review*

Substantial assistance agreements are a type of plea agreement because they require a plea of guilty by the cooperating defendant.⁸² Although prosecutors are given tremendous discretion in whether to forge a plea agreement, once one is entered into the prosecutor's discretion becomes more limited.⁸³ In *Santobello v. New York*,⁸⁴ a prosecutor entered into a plea agreement with the defendant under which the defendant agreed to plead guilty in exchange for a promise by the prosecutor that he would not make a sentence recommendation.⁸⁵ At the defendant's sentencing, a new prosecutor who claimed to be unaware of the agreement and not bound by another's promise, refused to honor his predecessor's agreement.⁸⁶ The Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."⁸⁷ In explaining its reasoning, the Court spoke in terms of contract law principles,⁸⁸ finding that the defendant had "bargained" and negotiated for a particular plea," and that the conduct of the prosecution amounted to a breach.⁸⁹

80. See Cynthia Lee & Brian Derdowski, Jr., *The Future of Substantial Assistance: Recommendations for Reform*, 11 Fed. Sent. Rptr. 2 (Sept.-Oct. 1998).

81. See *Wade v. United States*, 504 U.S. 181, 186 (1992).

82. See Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 567 (1999).

83. See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

84. 404 U.S. 257 (1971).

85. See *id.* at 258.

86. See *id.* at 259.

87. *Id.* at 262.

88. See *id.*

89. *Id.*

Consistent with *Santobello*, courts have come to regard plea agreements as contracts and apply contract law principles, such as breach, consideration, and the duties of performance and good-faith in their review of plea agreements.⁹⁰ For example, in *Margalli-Olvera v. INS*,⁹¹ the Eighth Circuit stated that “[p]lea agreements are contractual in nature, and are interpreted according to general contract principles.”⁹² Courts thus apply contract law principles to determine whether the agreement signed by the defendant and the government constitutes a binding agreement,⁹³ and what remedy should apply where the court finds that the agreement has been breached.⁹⁴

Although the substantial assistance agreement is a type of plea bargain, it is unique, and certain enforcement issues arise in relation to substantial assistance agreements that do not arise in general plea agreement cases. Unlike most plea agreements, the government’s duty to perform is tenuously conditioned on the government’s approval of the defendant’s cooperation. Section 5K1.1 states, and most agreements echo,⁹⁵ that the government can submit a downward departure motion if it deems the defendant to have provided “substantial assistance.”⁹⁶ Courts have offered their interpretations as to what “substantial assistance” requires, including actual assistance that yields some sort of result that is useful to the government.⁹⁷ The

90. See, e.g., *Margalli-Olvera v. INS*, 43 F.3d 345, 351 (8th Cir. 1994) (explaining that contract law principles apply to substantial assistance agreements); *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990) (same); *United States v. San Pedro*, 781 F. Supp. 761, 771 (S.D. Fla. 1991) (“A plea agreement is a contract between the defendant and the United States. Therefore, although constrained at times by due process implications, commercial contract principles govern the interpretation and enforcement of plea agreements.”).

91. 43 F.3d 345 (8th Cir. 1994).

92. *Id.* at 351.

93. See *San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996) (“[T]o enforce a promise made during plea negotiations, there must have been a valid, binding agreement in the first instance upon which the defendant relied in deciding to forego his constitutional rights and plead guilty.”).

94. See *United States v. Nelson*, 717 F. Supp. 682, 685 (D. Minn. 1989) (explaining that if the court finds that the government breached the contract, it can order specific performance).

95. See, e.g., *United States v. Knights*, 968 F.2d 1483, 1485 (2d Cir. 1992) (citing a plea agreement requiring substantial assistance prior to the submission of a downward departure motion); *San Pedro*, 781 F. Supp. at 763 (referring to a plea agreement where the prosecution may recommend a more lenient sentence in exchange for defendant’s cooperation).

96. USSG, *supra* note 5, § 5K1.1.

97. See, e.g., *United States v. Gonsalves*, 121 F.3d 1416, 1419 (11th Cir. 1997), *cert. denied*, 522 U.S. 1067 (1998) (“‘Substantial assistance’ generally requires that the defendant’s assistance has yielded results that are useful to the government, not merely that the defendant expended substantial effort or good faith in attempting to assist.” (emphasis omitted)); *United States v. Torres*, 33 F.3d 130, 133 (1st Cir. 1994) (explaining that 5K was amended in 1989 to make clear that the assistance had to actually be provided and not simply attempted).

definition that is most important, however, is the one applied by each prosecutor to the specific case at issue.⁹⁸ In *United States v. Torres*,⁹⁹ for example, the court reasoned that what constitutes "substantial assistance" is a matter left to the discretion of the prosecutor.¹⁰⁰ In addition, the court did not object to the fact that the government took a "hard line" approach to the "broad scope of its authority to discern 'substantial assistance.'"¹⁰¹ The prosecutor had defined "substantial assistance" as requiring an actual arrest and conviction,¹⁰² a definition that is common among prosecutors.¹⁰³ This ability to define "substantial assistance" places a great deal of discretion in the hands of prosecutors and makes it exceedingly difficult for a defendant to challenge the refusal of a prosecutor to submit a downward departure motion.¹⁰⁴

Aside from placing a great deal of power and discretion in the hands of prosecutors, the ability to define "substantial assistance" makes these agreements what contract scholars refer to as satisfaction contracts.¹⁰⁵ A satisfaction contract allows one of the parties to be excused from its duty to perform if that party is not satisfied with the performance of the other party.¹⁰⁶ In the case of substantial assistance agreements, the contracts are usually worded in such a manner as to at least imply that the prosecutor does not have a duty to perform if he or she is not satisfied by the level of assistance provided by the cooperating defendant.¹⁰⁷ Although courts will distinguish between "implied" and "actual" satisfaction conditions contained in commercial contracts,¹⁰⁸ this does not seem to be a frequent

98. See *Torres*, 33 F.3d at 133.

99. 33 F.3d 130 (1st Cir. 1994).

100. See *id.* at 133.

101. *Id.*

102. See *id.* at 131-32.

103. See *United States v. Forney*, 9 F.3d 1492, 1497 (11th Cir. 1993) (demonstrating a prosecutor's insistence on actual arrests derived from defendant's cooperation).

104. See Gyurci, *supra* note 56, at 1272-73.

105. See John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.37 (4th ed. 1998) (describing a type of contract in which the lack of personal satisfaction by one of the parties to the contract may serve as an excuse of condition).

106. See *id.*

107. See, e.g., *United States v. Knights*, 968 F.2d 1483, 1485 (2d Cir. 1992) (providing an example of a cooperation agreement worded to give the government an implied excuse of condition if it is not satisfied by the level of cooperation: "The United States reserves the right to evaluate the nature and extent of defendant's cooperation" (emphasis omitted)); see also *United States v. San Pedro*, 781 F. Supp. 761, 763-64 (S.D. Fla. 1991) (providing an example of an implied condition of satisfaction).

108. See Calamari & Perillo, *supra* note 105, § 11.37 (explaining that implied satisfaction requires only reasonable performance, while actual satisfaction often requires nothing less than performance to subjective satisfaction). It is worth noting, however, that there are some courts that will hold the government to its duty to perform on the basis of substantial performance by the cooperating defendant. See, e.g., *Ramallo v. Reno*, 931 F. Supp. 884, 894-95 (D.D.C. 1996) (holding that the

distinction made by courts in reviewing cooperation agreements. More often than not, courts require that the defendant's level of cooperation must meet the arbitrary satisfaction of the prosecutor. Courts thus require only that the government base its decision on a good faith analysis of the assistance offered by the defendant.¹⁰⁹ For example, in *United States v. Nelson*,¹¹⁰ the court refused to force the prosecution to offer a downward departure motion when the prosecution was honestly dissatisfied with the level of assistance provided by the defendant.¹¹¹ Although the defendant in *Nelson* eventually provided detailed information about drug activities, the prosecutors considered his initial answers to their questions to be evasive.¹¹² The defendant was also reluctant to play a pro-active role in the government's investigation, and the information he provided did not lead to any arrests.¹¹³

The fact that substantial assistance agreements are satisfaction contracts differentiates them from ordinary plea agreements and has forced courts to consider what the standard of review should be when a prosecutor refuses to make a 5K motion and fulfill his or her duty of performance. The most definitive standard was set forth by the Supreme Court in 1992 in *Wade v. United States*.¹¹⁴ The Court began by clarifying that the inclusion of the phrase "[u]pon motion of the government"¹¹⁵ in section 5K specifically restricts courts from departing from the prescribed guideline range for cooperation unless the government—ordinarily through the prosecutor—formally makes a motion to the court indicating that departure is appropriate.¹¹⁶ The

government cannot avoid its contractual obligation if the cooperator substantially complied with the cooperation agreement and any deviation is minor and of no significant legal effect).

109. See *United States v. Nelson*, 717 F. Supp. 682, 685 (D. Minn. 1989) ("Although the government clearly reserved the right to determine whether to recommend a downward departure, it has an obligation to make that determination in good faith."); see also *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990) ("There is . . . an implied obligation of good faith and fair dealing in every contract. A prosecutor's determination of dissatisfaction . . . cannot be made invidiously or in bad faith." (citation omitted)); *San Pedro*, 781 F. Supp. at 773 ("Notwithstanding the plea agreement's silence on the issue, courts regularly supply a term imposing on both parties to a contract a duty of good faith and fair dealing.").

110. 717 F. Supp. 682 (D. Minn. 1989).

111. See *id.* at 686.

112. See *id.* at 684.

113. See *id.*

114. 504 U.S. 181 (1992).

115. USSG, *supra* note 5, § 5K1.1.

116. See *Wade*, 504 U.S. at 185 (recognizing that a government motion is required for a downward departure under 5K); see also *United States v. Forney*, 9 F.3d 1492, 1498 (11th Cir. 1993) ("A district court's ability to impose a sentence below a statutory minimum is restricted by [5K] to instances when the government moves for such a departure based upon a defendant's substantial assistance."); *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990) ("The decision to make the motion is thus expressly lodged in the prosecutor's discretion.").

Court's requirement of a government motion places a tremendous amount of power in the hands of the prosecutor and necessarily restrains the courts' ability to review prosecutors' decisions not to offer 5K motions.¹¹⁷ In *Wade*, the Court explained that judges have the authority to review prosecutors' 5K decisions only for narrow abuses: "[F]ederal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive."¹¹⁸ In determining whether the motive is unconstitutional, courts may review the decision to ensure that it is rationally related to some legitimate government end.¹¹⁹ As an example of an unconstitutional motive that bears no relationship to a legitimate government end, the Court reasoned that a court could act if it found that a prosecutor had refused a departure motion on the basis of the defendant's race or religion.¹²⁰

The *Wade* holding has been interpreted by courts to mean that prosecutors cannot be compelled to offer a downward departure if they can demonstrate that their actions were made in good faith and are consistent with the principles of contract law.¹²¹ This standard is obviously very generous to prosecutors. Although courts will not allow prosecutors to unilaterally rescind a plea agreement for no valid reason,¹²² courts have shown a willingness to accept nearly any contractual argument as a good faith reason for rescinding the agreement. For example, courts have refused to enforce agreements when the prosecutor can make a good faith argument that the defendant should not be granted a 5K letter because, in the prosecutor's mind, the defendant breached his contractual obligation to provide substantial assistance by lying,¹²³ by not being thoroughly candid,¹²⁴ or because the information did not result in any arrests or convictions.¹²⁵ When courts do enforce substantial assistance agreements, they often give prosecutors great latitude in fulfilling their duty to offer a downward departure motion. In several cases,

117. See Gershman, *supra* note 62, at 419-20; Stith & Cabranes, *supra* note 61, at 130.

118. *Wade*, 504 U.S. at 185-86.

119. See *id.* at 186.

120. See *id.*

121. See, e.g., *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996) (explaining that prosecutors have great discretion whether to offer a 5K motion, and that courts can review their decisions only for bad-faith); *United States v. Torres*, 33 F.3d 130, 133 (1st Cir. 1994) (same); *United States v. Forney*, 9 F.3d 1492, 1500-01 (11th Cir. 1993) (same).

122. See *United States v. Reardon*, 787 F.2d 512, 516 (10th Cir. 1986) ("Plea bargains, like contracts, cannot normally be unilaterally broken with impunity or without consequence.").

123. See *Brechner*, 99 F.3d at 100; *United States v. Pollack*, 91 F.3d 331, 336 (2d Cir. 1996).

124. See *United States v. Nelson*, 717 F. Supp. 682, 684 (D. Minn. 1989).

125. See *Torres*, 33 F.3d at 133.

courts have enforced the letter of the agreement, but allowed the prosecutor to violate the spirit of the agreement.¹²⁶ In these cases, prosecutors were able to undermine the effectiveness of their downward departure motions by making speeches at the defendant's sentencing that implied that the court should ignore the 5K motion.

By taking such a liberal view of what constitutes performance and good faith, courts have effectively weakened the *Santobello* principle that promises that induce pleas must be fulfilled.¹²⁷ Moreover, this liberal approach has created a legal standard that allows prosecutors to easily escape their duty to perform. The next part will discuss whether this weakened legal standard is superseded by a heightened ethical duty of prosecutors to honor contractual agreements entered into with criminal defendants.

II. THE ETHICAL RESPONSIBILITIES OF PROSECUTORS AS DISTINGUISHED FROM THOSE OF THE PRIVATE LAWYER

The extremely lenient legal standard of good faith makes it very easy for prosecutors to meet their legal obligation in the context of fulfilling their 5K agreements. The law, however, does not provide the only set of obligations that lawyers must satisfy. Beyond their legal duties, lawyers are subject to ethical duties that must be fulfilled. In many circumstances, ethical responsibilities require more of lawyers than does the law.¹²⁸ Specific ethical responsibilities, however, differ depending on the role of the individual lawyer within the legal system. In order to determine whether ethical norms require more of prosecutors than does contract law, this part first examines how the role of the private lawyer shapes his or her ethical responsibilities in negotiating commercial contracts. It then focuses on prosecutors and explores whether their unique role engenders different ethical responsibilities than those faced by private lawyers, and if so, how this role affects their conduct with respect to cooperation agreements.

A. *The Private Lawyer*

The ethical responsibilities of lawyers are shaped by the role they play in the legal system. It is therefore critical to understand the role

126. See, e.g., *United States v. Jimenez*, 928 F.2d 356, 364 (10th Cir. 1991) (finding that the defendant was not entitled to an enthusiastic recommendation, and that an unenthusiastic recommendation is still a recommendation); *United States v. Hand*, 913 F.2d 854, 857 (10th Cir. 1990) (stating that simply because the prosecutor recommended a reduction, the prosecutor need not stand mute if the prosecutor believes there is additional information of which the court should be aware); *United States v. Benson*, 836 F.2d 1133, 1136 (8th Cir. 1988) (holding that there was no breach by the government where the prosecutor satisfied the letter of the agreement even if he had deviated from its spirit).

127. See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

128. See *infra* note 206 and accompanying text.

of the private lawyer in order to understand why the norms of ethics have developed as they have. The American Bar Association's Model Rules of Professional Conduct defines the lawyer's role as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."¹²⁹ In practical terms, the lawyer's primary role is as the representative of those lacking the skill or knowledge to represent themselves in the legal system.¹³⁰ As representatives, lawyers enter a fiduciary relationship with their clients, in which the lawyer serves as the agent and the client as the principal.¹³¹ This relationship requires the lawyer's near total loyalty to the client and the client's interests.¹³² Such a high premium is placed on loyalty due to the adversarial nature of the American legal system.¹³³ As a fiduciary representative, the lawyer's responsibility is to serve as a zealous advocate of the interests of his or her client.¹³⁴

The belief that lawyers must act as zealous advocates is so powerful that it is the foundation upon which the ethical rules for lawyers are constructed.¹³⁵ Because ethical norms view the lawyer's responsibility as a zealous advocate, those norms not only allow, but encourage, aggressive advocacy. As advocates, lawyers are thus ethically allowed to urge any permissible construction of the law that is beneficial to their clients, whether or not they believe the interpretation will be accepted by the court.¹³⁶ In addition, lawyers are expected to attempt to resolve any legal issues that may be in doubt in favor of their

129. Model Rules of Professional Conduct Preamble (1998) (discussing the lawyer's responsibilities).

130. See Charles W. Wolfram, *Modern Legal Ethics* 145-46 (1986) (explaining that people hire lawyers because lawyers have special skills and knowledge not shared by members of the public, which would be uneconomical for most people to attempt to acquire).

131. See *id.* at 146 (discussing the idea that the attorney-client relationship is based on fiduciary principles).

132. See *id.* (discussing the client's expectation of complete loyalty from the lawyer).

133. See generally Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 2 (1975) [hereinafter Freedman, *Adversary System*] (discussing the manner in which our adversary system of law places the interests of the individual in due process and trial by jury above the interests of the state).

134. See The American Lawyer's Code of Conduct Preamble (1982) ("In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it . . .").

135. See Model Code of Professional Responsibility Canon 7 (1980) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."); Model Rules of Professional Conduct Rule 1.3 cmt. (1983) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

136. See Model Code of Professional Responsibility EC 7-4 (cautioning that a legal theory presented to a court must not be frivolous and must be asserted in good faith).

clients.¹³⁷ An extreme view of this advocacy role states that a lawyer should not be concerned with anyone but the client and should be willing to do anything in order to advance the interests of the client.¹³⁸

The duty to act as a zealous advocate is not confined to the courtroom. Even in the negotiation and performance of contracts, lawyers are instructed to act as advocates and to seek the result most advantageous to their clients.¹³⁹ Ethics standards reason that lawyers must always be conscious of the reality that they function in an adversary system and that today's negotiation may be the subject of tomorrow's litigation.¹⁴⁰ The acceptance of the belief that the lawyer must act as a zealous advocate even in negotiations has resulted in a system in which misleading the opposition is a shrewd tactic employed even by those lawyers considered to be among the most forthright, honest, and trustworthy, and which is tacitly approved of by the legal community.¹⁴¹ Although ethical principles do not explicitly condone this view, their emphasis on zealous advocacy does little to discourage this behavior and actually encourages it to the extent that it is not explicitly prohibited. In fact, when the Model Rules were drafted,

137. See *id.* EC 7-3 ("Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." (citation omitted)).

138. See Monroe H. Freedman, *Understanding Lawyers' Ethics* 65-66 (1990) [hereinafter Freedman, *Understanding Ethics*].

"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."

Id. (quoting Trial of Queen Caroline 8 (1821)).

139. See generally Model Rules of Professional Conduct Preamble (1998) (discussing the lawyer's responsibilities as a negotiator).

140. See The American Lawyer' Code of Conduct Preamble (1982) ("Lawyers function in an adversary system even when their clients are not actually involved in litigation. . . . The lawyer drafting a contract or a will must anticipate and guard against interests adverse to the client's that may exist or that may develop in the course of time."); Freedman, *Understanding Ethics*, *supra* note 137, at 66. Professor Freedman cautions:

It is important to remember, however, that any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind. . . . The advice given to a client and acted upon today may strengthen or weaken the client's position in litigation next year. In short, it is not just the advocate in the courtroom who functions in an adversary system, and it is not just the client currently in litigation who may require and be entitled to "warm zeal in the maintenance and defense of his rights."

Id.

141. See generally Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219, 1220-21 (1990). Professor Wetlaufer argues that lying in negotiations is accepted practice and is even considered a virtue. *Id.*

language specifically requiring truth in negotiations was rejected.¹⁴²

Thus, ethical canons do not require the lawyer representing the private client in contract negotiations or disputes to do anything more than the law requires. Those who feel they have been taken advantage of by an immoral lawyer receive no more protection from the rules of ethics than they do from the common law, which simply postulates *caveat emptor*.¹⁴³ If the rules of ethics have any true impact on the way lawyers think about contracts, it is to encourage them to interpret the terms of the contract and the law in the manner most advantageous to their clients,¹⁴⁴ or to encourage lawyers to use the law as a tool to advance clients' interests, even if that means creating or exploiting a loophole to avoid the duty to perform.¹⁴⁵

The majority of lawyers handling negotiations and contractual disputes are able to accomplish the goals of their clients while acting in an evenhanded manner. In some circumstances, however, other ethical norms are subjugated to the duty of zealous advocacy.¹⁴⁶ A private lawyer thus need not consider principles of community morality or the integrity of the legal profession in negotiating contracts, but must only abide by legal requirements and the ethical duty of zealous advocacy. Does this mean that a cooperating defendant entering into an agreement with a prosecutor can expect no protection from legal ethics in enforcing the agreement, and can rely only on the protection of the law? Or are prosecutors' ethical responsibilities such that they are treated differently from ordinary lawyers and subjected to additional ethical responsibilities? The next sections explore these questions.

B. *The Prosecutor*

As with all lawyers, the ethical responsibilities of prosecutors begin with an understanding of the role they play in the legal system. The role of the prosecutor is as the government's lawyer in the criminal justice system. With respect to 5K agreements, although the prosecutor signs the agreement, she does so on behalf of the entire government.¹⁴⁷ In essence, a prosecutor who enters into a substantial

142. See Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 La. L. Rev. 447, 452 (1995) (citing the Center for Professional Responsibility, American Bar Association, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* (1987)).

143. See *id.* at 462.

144. See *supra* notes 136-37 and accompanying text.

145. See *supra* notes 136-37 and accompanying text; cf. Rubin, *supra* note 142, at 451 (explaining that achieving the best result for the client is paramount). See generally Wetlaufer, *supra* note 141 (discussing the use of lies in negotiation to gain advantages for the client).

146. See Rubin, *supra* note 142, at 451 (claiming that acting as a zealous advocate for the client can overwhelm an even-handed approach to negotiations).

147. See *United States v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) ("Though the

assistance agreement negotiates and executes a contract on behalf of the government. Thus, the prosecutor fulfills very much the same role in a 5K negotiation or dispute as does a lawyer for a private client in a contract negotiation or dispute. But is the role of the prosecutor truly the same? Or is the role different, and thus are the prosecutor's ethical responsibilities different from those of other lawyers?¹⁴⁸ The generally recognized answer is that prosecutors have a substantially distinct role and "professional ethos" from that of private lawyers.¹⁴⁹ The fact that the Model Rules contain a rule that is special to, and specifically written for, prosecutors seems to provide clear evidence that prosecutors serve a unique role in the criminal justice system.¹⁵⁰

Government negotiates its plea agreements through the agency of specific United States Attorneys—as necessarily it must—the agreements reached are those of the Government.”).

148. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *Fordham Urb. L.J.* 607, 610 (1999) (discussing how the professional ethos of prosecutors is different from that of other lawyers).

149. See Freedman, *Adversary System*, *supra* note 133, at 79 (discussing the understanding that prosecutors and defense lawyers have different roles and functions that lead to different ethical difficulties and solutions); see also Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 *Sw. U. L. Rev.* 98, 98 (1975) (discussing the role and responsibilities of prosecutors); Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 *Mo. L. Rev.* 699, 728-32 (1998) (discussing how the role of the prosecutor is unique).

150. See Model Rules of Professional Conduct Rule 3.8 (1998). The special responsibilities of the prosecutor are to:

- (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) make timely disclosure to the defense of 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 the 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) 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;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (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.
- (g) 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

The distinction stems from the recognition that, unlike the private lawyer, the prosecutor does not have a single client.¹⁵¹ The prosecutor represents the interests of the government, which translates into representing the interests of society in general.¹⁵² This unique role as the representative of society not only inheres prosecutors with additional powers,¹⁵³ but also with additional ethical responsibilities. Thus, conduct that would be tolerable on the part of a private attorney is not necessarily tolerable on the part of a prosecutor.¹⁵⁴

The most common description of the role of the prosecutor is as a "minister of justice."¹⁵⁵ One formulation of this role of a "minister of justice" describes it as balancing legislative pronouncements with the individual circumstances of each case while always considering the public interest.¹⁵⁶ Justice Douglas asserts that the role of the prosecutor is to "vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial."¹⁵⁷ The most famous, and arguably most important, attempt at defining the role of the prosecutor, however, was expressed in *Berger v. United States*.¹⁵⁸ In *Berger*, the Court stated:

The United States Attorney is the representative not of an ordinary

enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Id., accord Standards Relating to the Administration of Criminal Justice, The Prosecution Function (1992).

151. See Wolfram, *supra* note 130, at 759 ("The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies." (citation omitted)).

152. See Carol A. Corrigan, Commentary, *On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537, 537 (1987) ("The prosecutor occupies a unique role in a legal system predicated generally on individual representation. The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole." (citation omitted)); Secunda, *supra* note 52, at 1280-81 (discussing the unique role of the federal prosecutor).

153. See generally Freedman, Adversary System, *supra* note 133 (providing examples of the difference between the government and individual citizen); Gershman, *supra* note 62 (describing how the balance of the criminal justice system is skewed to the advantage of the prosecutor).

154. See Freedman, Understanding Ethics, *supra* note 138, at 214 (recognizing the distinct role of the prosecutor).

155. Model Rules of Professional Conduct Rule 3.8 cmt. (1998) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Standards Relating to the Administration of Criminal Justice Standard 3-1.2 ("The prosecutor is an administrator of justice."); Model Code of Professional Responsibility EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." (citation omitted)).

156. See Daniel C. Richman, *Foreword to The Changing Role of the Federal Prosecutor*, 26 Fordham Urb. L.J. at vii. (1999) ("At its core, the prosecutor's job always has been to mediate between spectacularly broad legislative pronouncements and the equities of individual cases, giving due attention to the public interest and such technical matters as evidentiary sufficiency." (citation omitted)).

157. *Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting).

158. 295 U.S. 78 (1935).

party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁵⁹

These views share an implicit understanding that not only is the role of the prosecutor different from that of the ordinary lawyer, but that as a “minister of justice,” the prosecutor is beholden to a different ethical standard.¹⁶⁰ This notion is supported by the realization that behavior that would be tolerated from a lawyer representing a private client is not always tolerated from a prosecutor.¹⁶¹ In the words of the ABA and the Association of American Law Schools, “[t]he public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor’s duties are to be properly discharged.”¹⁶² In support of this position, the Model Rules place special restrictions on prosecutors that exceed those applied to other lawyers.¹⁶³

The unmistakable message contained in these norms is that prosecutors are held to a different, and arguably higher, ethical standard than are private lawyers.¹⁶⁴ What then is the ethical obligation faced by prosecutors as ministers of justice? The manner in which the obligation is ordinarily phrased is as a “duty to seek

159. *Id.* at 88 (criticizing an overzealous prosecutor for misstating facts and other indiscretions in an attempt to gain a conviction in a counterfeiting case).

160. See Freedman, *Understanding Ethics*, *supra* note 138, at 215 (“[The prosecutor’s ethical standards] are different as a result of the prosecutor’s distinctive role in the administration of justice.”).

161. See *supra* note 149. An example of this difference is the treatment of evidence. While it is clear that a defense lawyer does not have a responsibility to disclose evidence to the prosecution that it knows may inculcate his or her client, a prosecutor must turn over evidence that may exculpate the defendant. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); Model Rules of Professional Conduct Rule 3.8(d) (1998).

162. ABA & Ass’n of American Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

163. See *supra* note 150, providing text of Model Rule 3.8.

164. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 699 (1992) (explaining that Rule 3.8 is “meaninglessly redundant if it means only that the prosecutor is prohibited from violating other, specific ethical rules”).

justice.”¹⁶⁵ Clearly, the prosecutor’s ethical duty to seek justice is far more stringent than the ethical responsibility of the private lawyer to serve as a zealous advocate. Yet the duty to “seek justice” is, at least at first blush, rather amorphous and difficult to grasp. In order to understand the exact nature of the prosecutor’s ethical duty, particularly with respect to the performance of substantial assistance agreements, the phrase “seek justice” must be given more precise meaning. An understanding of what “seeking justice” entails makes it possible to understand how prosecutors should behave with respect to the 5K contracts that they have negotiated on behalf of the government.

C. *The Meaning of “Seek Justice”*

The primary goal of any lawyer, including and especially a prosecutor, should be to fulfill her ethical responsibilities. A prosecutor’s ethical integrity is vitally important because prosecutors hold virtually unilateral discretion over whom to investigate, whom to charge, who should receive plea agreements, who should be compelled to testify, and other key decisions in the administration of criminal justice.¹⁶⁶ The prosecutor thus has a greater impact on the course of the criminal justice system than does any other party.¹⁶⁷ A prosecutor who fulfills her ethical duties will also fulfill her legal duties because the ethics norms encompass the legal responsibilities of lawyers. Thus, a prosecutor’s primary goal should be to fulfill her ethical duty, which is to “seek justice.” The phrase “seek justice,” however, is vague and leaves a great deal of latitude for individual interpretation.¹⁶⁸ Understanding what is meant by “seek justice” is crucial because the ethical responsibility of the prosecutor hinges

165. See Standards Relating to the Administration of Criminal Justice Standard 3-1.2(c) (1992) (“The duty of the prosecutor is to seek justice, not merely to convict.”); accord *United States v. Bartelmo*, 129 F.3d 663, 670 (1st Cir. 1997) (describing the prosecutor’s duty as seeking truth and ensuring that justice is done); Model Code of Professional Responsibility EC 7-13 (1981).

166. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1524-37 (1981) (describing the vast discretion that prosecutors enjoy in a number of important areas, such as in charging decisions and plea bargaining); *supra* note 165.

167. See Freedman, *Understanding Ethics*, *supra* note 138, at 213; Stith & Cabranes, *supra* note 61, at 130-36; Vorenberg, *supra* note 166, at 1524-37.

168. See Michael Q. English, Note, *A Prosecutor’s Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 Fordham L. Rev. 525, 555 (1999); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 48 (1991) (“The ‘do justice’ standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct.”); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose Nonevidentiary Information*, 67 Fordham L. Rev. 3005, 3026 (1999) (noting that the ethical standards provide very few specific duties of the prosecutor).

upon this interpretation. In turn, in light of the low good-faith legal standard, the degree to which a prosecutor should feel compelled to fulfill his or her promise to issue a 5K motion is largely determined by the responsibility to “seek justice.”

Interpretations of “seek justice” vary among scholars and prosecutors from definitions that are narrow in scope to those that are rather broad. Among those who take a narrow view of “seek justice” are prosecutors who view themselves as zealous advocates and measure their success only in terms of convictions.¹⁶⁹ In a study of prosecutors, Dr. Felkenes found that nearly one-third of those prosecutors surveyed viewed their primary function as securing convictions.¹⁷⁰ One such respondent indicated that justice meant “the guilty person must be found guilty.”¹⁷¹ Professor Zacharias subscribes to only a moderately more liberal view of “seek justice.” He concludes that “seek justice” has “two fairly limited prongs: (1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial.”¹⁷² Among those subscribing to a more liberal definition of “seek justice,” Professor Green reasons that “[d]oing justice comprises various objectives [primarily fairness and due process] which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of what it means for the sovereign to govern fairly.”¹⁷³ This Note argues that a liberal definition that considers the many disparate aspects of the prosecutor’s role is the more appropriate definition.

It is clear from the language of the Model Code of Professional Conduct¹⁷⁴ that the duty of the prosecutor goes beyond simply gaining convictions, and that “seeking justice” is about more than simply convicting the guilty.¹⁷⁵ Many courts and legal scholars view the role

169. See Felkenes, *supra* note 149, at 109 (offering an empirical study showing the tendency among prosecutors to view their role as to gain convictions); Melilli, *supra* note 164, at 685-86.

170. See Felkenes, *supra* note 149, at 109.

171. See *id.* at 111.

172. Zacharias, *supra* note 168, at 49.

173. Green, *supra* note 148, at 634. Professor Green provides examples of the objectives of “seek justice” that include: “enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing . . . and affording the accused, and others, a lawful, fair process.” *Id.*

174. See Model Code of Professional Responsibility EC 7-13 (1981) (“The responsibility of a public prosecutor differs from that of the usual advocate: his duty is to seek justice, not merely to convict.”).

175. See Zacharias, *supra* note 168, at 53 (explaining that when read as a whole, the ethics codes suggest a view of justice that is based on the adversary system and is not “outcome-oriented”); see also *United States v. Vaccaro*, 115 F.3d 1211, 1216 (5th Cir. 1997) (arguing that prosecutors should be zealous but not to the point that ambition for a conviction jeopardizes integrity); Felkenes, *supra* note 149, at 109 (“It is the

of the prosecutor as having two separate, yet equal parts: a duty to convict the guilty and a duty to seek justice.¹⁷⁶ A better view that more accurately describes both the role and duty of the prosecutor is that the responsibility to obtain convictions is subsumed within the larger duty to seek justice.¹⁷⁷ This view recognizes that the prosecutor is not simply the advocate for the victim, but acts as the legal representative of society as a whole.¹⁷⁸ As such, the prosecutor owes a duty not only to the victim, but to all of the many constituencies she represents.¹⁷⁹

Chief among these constituencies is the law-abiding public. As their representative in the criminal justice system, the prosecutor bears the burden of upholding public faith in the system.¹⁸⁰ The importance of this responsibility is expressed by Professor Corrigan: “[i]f our nation of laws is to remain both strong and free, we must have a system of criminal justice in which every citizen can have confidence.”¹⁸¹ In order to maintain confidence in the system, it is incumbent upon prosecutors that they not punish the innocent,¹⁸² abuse the power or

primary responsibility of the prosecutor to see that justice is achieved rather than to assure conviction.”).

176. See, e.g., John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 543 (1994) (explaining that prosecutors have a dual role in the criminal justice system, one aspect of which is to obtain convictions and the other of which includes preventing the conviction and punishment of innocent people); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 Colum. L. Rev. 1298, 1303 (1988) (describing prosecutors as having a dual role as both advocates seeking convictions and as public servants); Note, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. Rev. 749, 762 (1987) [hereinafter *Let's Make a Deal*] (“The prosecutor, on the other hand, is not concerned solely with winning the case, but with seeing that ‘justice shall be done.’”); see also *United States v. Francis*, 170 F.3d 546, 553 (6th Cir. 1999) (explaining that prosecutors must be both zealous advocates and protectors of fairness); *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998) (same).

177. See Melilli, *supra* note 164, at 698 (“If prosecutors truly accept their obligation to define the public interest they represent, the apparent conflict between zealous advocacy on behalf of the state and ‘seeking justice’ disappears.”); Zacharias, *supra* note 168, at 56-60 (arguing that the prosecutor’s duty is to help achieve “adversarial justice”).

178. See *supra* notes 151-52 and accompanying text.

179. See Corrigan, *supra* note 152, at 538 (describing the prosecutor as the spokesperson for the “People”); see also Wolfram, *supra* note 130, at 759-60 (discussing the role of the prosecutor as the representative of the public in the criminal justice system).

180. See Corrigan, *supra* note 152, at 540 (discussing the need for the prosecutor to act fairly so as to uphold the public’s faith in the criminal justice system); see also *In re Petition for Review of Opinion 569 of the Advisory Comm. on Prof’l Ethics*, 511 A.2d 119, 122 (N.J. 1986) (explaining how the public’s trust in government is dependent upon its employees); Flowers, *supra* note 149, at 703 (discussing how the public’s perception of the prosecutor affects its perception of the criminal justice system as a whole, and the prosecutor’s responsibility to foster confidence in the system).

181. Corrigan, *supra* note 152, at 543.

182. See *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., concurring) (“Law enforcement officers have the obligation to convict the guilty and to make sure

discretion afforded by their office,¹⁸³ or treat witnesses unfairly or dishonestly.¹⁸⁴ The concept of “seeking justice,” therefore, must include protecting public confidence in the criminal justice system by refraining from behavior that impugns the integrity of the justice system.¹⁸⁵

Also included among the constituencies to whom the prosecutor owes a duty to “seek justice” is the defendant himself.¹⁸⁶ One of the most basic tenets of the criminal justice system is that it is better that a guilty defendant escape conviction than that an innocent one be punished.¹⁸⁷ The duty to see that an innocent person is not sent to prison lies primarily with the prosecutor.¹⁸⁸ As the Supreme Court stated in *Brady v. Maryland*,¹⁸⁹ “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”¹⁹⁰

Because a prosecutor with great integrity is the best protection a defendant has,¹⁹¹ federal prosecutors have a special responsibility to use their powers in accordance with the principles of the Due Process Clause of the Fifth Amendment.¹⁹² The meaning of due process, however, is nearly as vague as that of “seeking justice,” and courts have struggled at times to determine exactly how far due process

that they do not convict the innocent.”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (same); *Green*, *supra* note 148, at 640 (same); *Melilli*, *supra* note 164, at 699 (same).

183. *See supra* note 180 and accompanying text.

184. *See generally Berger*, 295 U.S. 78 (providing an example of overzealous treatment of a witness by a prosecutor having an adverse effect on the criminal justice system); *see also Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (explaining that it is not only important for a prosecutor to gain a conviction but to obtain it fairly).

185. *See Zacharias*, *supra* note 168, at 59-60.

186. *See Model Rules of Professional Conduct Rule 3.8 cmt.* (1983) (explaining that “seek justice” carries with it specific obligations that the defendant be accorded procedural fairness and that guilt be based on evaluation of the evidence); *Melilli*, *supra* note 164, at 697-98 (explaining that the prosecutor’s ethical duty extends to the defendant even after he has been charged).

187. *See, e.g., In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (arguing that the social cost of convicting an innocent man is greater than that of acquitting someone who is guilty); *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (expressing belief that it is better that a criminal go free than that the government play an ignoble part in putting an innocent person in prison); *see also English*, *supra* note 168 *passim*.

188. *See Bessler*, *supra* note 176, at 543; *see also Wolfram*, *supra* note 130, at 759 (“[Prosecutors] bear alone the state’s considerable responsibility to see that no innocent person is prosecuted, convicted, or punished.”).

189. 373 U.S. 83 (1963).

190. *Id.* at 87.

191. *See Jackson*, *supra* note 1, at 6.

192. The Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. Const. amend. V.

protections extend.¹⁹³ What is clear is that “fundamental fairness has become the touchstone of due process.”¹⁹⁴ Thus, a basic premise of due process, and the criminal justice system as a whole, is that not only should the correct outcome be reached, but that the correct outcome be reached through a system that is fundamentally fair to the defendant.¹⁹⁵

In order to ensure that the system is fair to criminal defendants, courts have imposed several restrictions on prosecutors in the name of due process. These protections include not withholding exculpatory evidence,¹⁹⁶ not allowing the use of perjured testimony,¹⁹⁷ and forbidding prosecutors from intentionally delaying indictments to prejudice a defendant.¹⁹⁸ While due process restrictions provide the legal guarantee of fairness to defendants, the prosecutor’s duty to seek justice is intended to provide an even greater ethical guarantee of fairness.¹⁹⁹ The rules, canons, and codes of ethics are meant to serve as a supplement to the law and act to hold lawyers to a higher standard than does the law itself.²⁰⁰ This point is made clear by the number of cases in which the court found ethical violations that demanded the sanctioning of the prosecutor, but did not require that a guilty verdict be overturned.²⁰¹ In *People v. Rice*,²⁰² for example, the

193. See Fisher, *supra* note 176, at 1300; see also Dowling v. United States, 493 U.S. 342, 352-53 (1990) (discussing the meaning of due process); Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 803 (1987) (describing the standards of due process).

194. Fisher, *supra* note 176, at 1300.

195. See *id.*; see also Bessler, *supra* note 176, at 552 (“A fair trial in a fair tribunal is a basic requirement of due process.” (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

196. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding that a prosecutor’s withholding of evidence that is favorable to a defendant violates due process).

197. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (using perjured testimony to obtain a conviction violates due process).

198. See *United States v. Marion*, 404 U.S. 307, 324 (1971) (holding intentional pre-indictment delay by prosecutor, that causes prejudice, to be a violation of due process).

199. See *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (explaining that the limits of prosecutorial conduct were developed to protect the right of defendants to a fair trial).

200. See Bessler, *supra* note 176, at 547 (explaining that ethical duties are different from regulatory constraints); Aaron, *supra* note 168, at 3026 (“Ethics therefore extend professional obligations beyond the limits imposed by law.”).

201. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1463-64 (9th Cir. 1993) (holding that although the prosecutors’ misconduct rose to an intolerable level, it did not constitute prejudice and require dismissal of the indictment); *United States v. Lopez*, 989 F.2d 1032, 1041-42 (9th Cir. 1993) (refusing to dismiss the defendant’s indictment as a remedy for the prosecutor’s violation of ethics rules regarding communications with individuals represented by another lawyer); *United States v. Manko*, 979 F.2d 900, 909-10 (2d Cir. 1992) (ruling that an *ex parte* communication between the prosecutor and the judge was improper, but did not constitute reversible error); *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (explaining that the social cost of reversing convictions for prosecutorial misconduct that did not prejudice the defendant is too high, and that a better method is to allow the conviction to stand and

New York Court of Appeals sternly condemned the actions of the prosecutor as “reprehensible” and unethical, but because the actions did not rise to the legal standard of reversible error the court allowed the defendant’s conviction to stand.²⁰³ In addition, although the law does not prevent a prosecutor from subpoenaing a lawyer before a grand jury to present evidence about a former client, the Model Rules generally prevent a prosecutor from engaging in this type of conduct.²⁰⁴ The law thus focuses on verdicts and whether prosecutorial misconduct may have affected them, while the ethics provisions are concerned not only with verdicts but with procedure.²⁰⁵ In fact, ethical obligations often require more of lawyers than do their constitutional obligations,²⁰⁶ and require not only that the prosecutor provide a fair tribunal, but also that the prosecutor treat the defendant fairly.

Just as with the private lawyer, the ethics of the prosecutor are not confined by the walls of the courtroom; the obligation to seek justice governs the actions of prosecutors in the discharge of all of their duties.²⁰⁷ These duties include the negotiation and performance of plea agreements. Unlike a private lawyer, however, the ethical responsibility of a prosecutor is not to obtain the best result for her client, in this case the government.²⁰⁸ Rather, a prosecutor who has entered into a substantial assistance agreement with a cooperating defendant and is now faced with a decision as to whether to offer a 5K letter must act in a manner that is consistent with the duty to “seek justice.” Therefore, where private lawyers are concerned only with the interests of their clients, a prosecutor must see not only that the defendant pays for the crime committed, but that the defendant is treated consistently with the concepts of due process and fairness, and that public confidence in the system is preserved. The need to balance all of these factors requires much more of the prosecutor in terms of satisfying his or her ethical responsibilities than is required of a private lawyer. Where private lawyers are expected to resolve any

to punish the prosecutor in an alternative manner); *People v. Rice*, 505 N.E.2d 618, 618 (N.Y. 1987) (finding the prosecutor’s use of half-truths reprehensible and not to be condoned, but not severe enough to warrant a reversal of the defendant’s conviction); *see also* *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993) (explaining that in order for an indictment to be dismissed on due process grounds, the conduct must be grossly shocking and outrageous); Acevedo, *supra* note 74, at 1004 (“Behavior that is legal can nonetheless be unethical.”).

202. 505 N.E.2d 618 (N.Y. 1987).

203. *Id.* at 618.

204. *See* Model Rules of Professional Conduct Rule 3.8(f) (1983); *see also* Zacharias, *supra* note 168, at 83 (explaining that sometimes the ethical duty of a prosecutor requires the prosecutor to turn over information that discovery rules do not require).

205. *See* Zacharias, *supra* note 168, at 88.

206. *See id.* at 113-14.

207. *See* Model Rules of Professional Conduct Preamble (1998).

208. *See supra* Part II.B.

possible legal issues in favor of their clients,²⁰⁹ and can urge any permissible construction of the law that is beneficial to those clients,²¹⁰ the prosecutor must consider not only what is legally possible but what is most consistent with the duty to seek justice. Thus, whereas ethical norms do not require more of the private lawyer than does the law with respect to contracts, they do require more of prosecutors than does the law in both negotiating and honoring cooperation agreements. There are, therefore, instances where a prosecutor, unlike a private lawyer, is bound by ethical norms not to exploit a loophole provided by the law. The next part presents a hypothetical fact pattern in which a prosecutor has entered into a cooperation agreement with a defendant, and describes several possible scenarios that illustrate how a prosecutor should behave in order to fulfill the ethical responsibility to seek justice.

III. THE DUTY TO SEEK JUSTICE AS APPLIED TO THE FULFILLMENT OF SUBSTANTIAL ASSISTANCE AGREEMENTS

Unlike the private lawyer, prosecutors have an ethical responsibility with respect to the negotiation and performance of contracts that exceeds their legal responsibilities.²¹¹ This duty requires prosecutors to consider issues of fairness, due process, and public confidence in the criminal justice system when they act.²¹² In order to better examine and define how this duty to seek justice affects prosecutors' responsibilities with respect to substantial assistance agreements, this part sets forth five hypothetical situations and analyzes the prosecutor's legal and ethical duties in honoring their promises to recommend downward departures. Each hypothetical is modeled on a realistic scenario and is designed to explore the differences between the legal and ethical duties of prosecutors.

Consider the following set of hypothetical facts. An Assistant United States Attorney enters into a substantial assistance agreement with a defendant who is charged with possession with intent to distribute cocaine. Under the guidelines, if found guilty, the defendant will receive a sentence of between forty-six and fifty-seven months.²¹³ The defendant, however, has entered into a plea agreement with the government. The defendant agreed to plead

209. *See supra* note 137.

210. *See supra* note 136.

211. *See supra* Part II.

212. *See supra* Part II.C.

213. In order to understand the potential sentence, assume the defendant was caught with 350 grams of cocaine. Under the guidelines, the defendant has been charged with an offense carrying a base level of 22. *See* USSG, *supra* note 5, § 2D1.1. Further, assume that the defendant is not a first-time offender, but rather has two criminal history points, thus placing him in criminal history category II. *See id.* § 4A1.1. The intersection of the offense level and the criminal history result in a possible sentence of 46-57 months. *See id.* ch.5, pt. A.

guilty to the charges he faces, to provide information to the government about his dealer, and to testify as a prosecution witness at the dealer's trial. In exchange for this cooperation, the prosecutor agreed to submit to the court a 5K letter detailing the defendant's assistance and recommending that the judge depart from the guidelines and give the defendant a lesser sentence than that prescribed by the guidelines. The agreement is memorialized in a standard written form that requires the defendant to "provid[e] complete, candid and truthful"²¹⁴ information and testimony before the grand jury and at trial. The agreement also states that the determination as to whether to submit a 5K motion is left to the "sole and unfettered discretion of the United States."²¹⁵

Scenario 1: Induced Breach

The defendant has fully performed his end of the agreement, having provided key information and compelling testimony that led to the conviction of a prominent drug dealer. In the time since she made the agreement, however, the prosecutor has regretted her decision to enter into the agreement. Concerned that a 5K letter would allow the defendant to serve only a short prison term, the prosecutor is considering not sending a 5K letter to the court. The prosecutor's basis for not wanting to move for a downward departure has nothing to do with the cooperation of the defendant. Rather, the prosecutor simply believes that the defendant's crimes were serious enough that

214. For the purpose of the hypothetical, assume in pertinent part that the agreement reads:

Defendant agrees to cooperate fully with the United States Attorney's Office, the Drug Enforcement Administration, and such other law enforcement agencies as either of the foregoing may require by: (a) providing complete, candid and truthful information and testimony concerning trafficking and attempts to traffic in controlled substances by defendant and others; and (b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings as may be required by the Office of the United States Attorney.

The United States reserves the right to evaluate the nature and extent of defendant's cooperation and to advise the Court of the nature and extent of any such cooperation at the time of sentencing. The United States agrees that if, in the sole and unfettered discretion of the United States, the circumstances of defendant's cooperation warrant a departure by the Court from the Sentencing Guidelines range determined by the Court to be applicable, the United States will make a motion pursuant to section 5K1.1 of the Sentencing Guidelines stating that defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. If it is determined by the United States to make such a motion, the amount of the departure requested in such motion will lie in the complete and sole discretion of the United States Attorney.

This language is modeled on agreements at issue in *United States v. Knights*, 968 F.2d 1483, 1485 (2d Cir. 1992), and *United States v. San Pedro*, 781 F. Supp. 761, 763-64 (S.D. Fla. 1991).

215. See *supra* note 214.

he should be forced to serve the maximum sentence. The prosecutor's decision not to make the 5K motion is thus a unilateral, subjective decision to refuse to honor the agreement based solely on the prosecutor's desire that the defendant serve as much time as possible.

In this situation, the law effectively compels the prosecutor to offer the downward departure motion. Under principles of contract law,²¹⁶ the agreement represents a valid and enforceable contract.²¹⁷ The requirements that each party must meet are established by the written agreement and governed by the duty of good faith.²¹⁸ By providing the cooperation requested, the defendant fully performed and fulfilled the condition precedent to the prosecutor's duty to perform. If the prosecutor refused to offer the 5K motion, she would effectively be rescinding the contract unilaterally—an action forbidden by contract law.²¹⁹ Refusing to offer the downward departure motion would also be inconsistent with the principles of *Santobello* that require fulfillment of the promise if it served in any way to induce the defendant's guilty plea.²²⁰ Thus, performance is required by the law, and an analysis of the ethical duty to perform is unnecessary in this instance because the prosecutor is legally obligated to honor the agreement.

Suppose the prosecutor attempts to avoid her duty to perform by baiting the cooperator into perjuring himself before the grand jury. The prosecutor then attempts to use this perjury as evidence that the defendant did not meet the terms of the agreement because he failed to give complete and honest testimony. Both the law and the prosecutor's duty to seek justice are in accord with respect to this type of conduct. The legal duty of good faith and fair dealing that is implicit in all contracts and plea agreements does not allow a prosecutor to attempt to prevent the defendant from performing.²²¹ Similarly, the duty to seek justice would view such an action as a violation of the basic norms of fairness.²²²

Scenario 2: Indirect v. Direct Means

Imagine instead that the prosecutor still wishes to avoid the agreement, but recognizes that her hands are tied and that she must

216. See *supra* notes 83-94 and accompanying text (explaining that courts apply contract law principles when determining the enforceability of a substantial assistance agreement).

217. It is clear from the signed writing that mutual assent exists and that the exchange of cooperation for a 5K motion represents the necessary consideration.

218. See *supra* Part I.C.

219. See *United States v. Reardon*, 787 F.2d 512, 516 (10th Cir. 1986) ("Plea bargains, like contracts, cannot normally be unilaterally broken with impunity or without consequence.").

220. See *Santobello v. New York*, 404 U.S. 257, 262 (1971); *supra* notes 83-89 and accompanying text.

221. See *United States v. San Pedro*, 781 F. Supp. 761, 774 (S.D. Fla. 1991).

222. See *supra* note 207 and accompanying text.

offer the downward departure motion. The prosecutor also recognizes, however, that the agreement only requires her to alert the court to the fact that the defendant has provided substantial assistance.²²³ Based on this interpretation, the prosecutor submits a 5K letter to the court, but at the defendant's sentencing the prosecutor proceeds to explain to the court that it should know that the government considers the defendant to be a very high-ranking drug dealer who poses a serious threat to the community. It is clear from the tone and substance of the prosecutor's statement that she believes that the judge should use his judicial discretion to ignore the 5K letter and not grant the defendant a downward departure.²²⁴ The prosecutor thus employs an indirect means of subverting the agreement while abiding by its technical terms.

Many courts would interpret the law to allow such behavior. In fact, a number of courts have held that prosecutors are bound only to the letter of the agreements they sign and not to their spirit.²²⁵ To their credit, other courts have held that plea agreements are no place for the government to resort to literalism,²²⁶ and that the government cannot be permitted to do indirectly that which it could not do directly.²²⁷

Although the prosecutor, should she find herself in the "right" courtroom, could indirectly undermine the agreement while fulfilling her duty to perform, the duty to seek justice should prevent such conduct. Making a statement to attempt to influence the court to sentence the defendant within the guidelines, when the defendant has complied in good faith with the agreement, is inconsistent with the

223. See *supra* note 214 for the text of the hypothetical agreement.

224. The described conduct by the prosecutor is nearly identical to that of the prosecutor in *United States v. Jimenez*, 928 F.2d 356, 360-61 (10th Cir. 1991), and similar to that of the prosecutor in *United States v. Hand*, 913 F.2d 854, 856-57 (10th Cir. 1990).

225. See, e.g., *Jimenez*, 928 F.2d at 364 (finding that the defendant was not entitled to an enthusiastic recommendation, and that an unenthusiastic recommendation is still a recommendation); *Hand*, 913 F.2d at 856 (stating that simply because the prosecutor recommended a reduction, the prosecutor need not stand mute if the prosecutor believes there is additional information which the court should know); *United States v. Benson*, 836 F.2d 1133, 1136 (8th Cir. 1988) (holding that there was no breach by the government where the prosecutor satisfied the letter of the agreement even if he had deviated from its spirit).

226. See, e.g., *United States v. Cooper*, 70 F.3d 563, 565-66 (10th Cir. 1995) (holding that the government cannot resort to literalism in order to fulfill its duty under a plea agreement); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989) ("We will not allow the government to resort to a rigidly literal construction of the language of the plea agreement . . ."); *United States v. Greenwood*, 812 F.2d 632, 635 (10th Cir. 1987) (refusing to allow the prosecutor to resort to literalism); *accord United States v. Forney*, 9 F.3d 1492, 1507 (11th Cir. 1993) (Clark, J., dissenting) (preventing the prosecution from doing indirectly that which it is prohibited from doing directly).

227. See, e.g., *United States v. Stemm*, 847 F.2d 636, 638 n.1 (10th Cir. 1988) (refusing to "condone the Government accomplishing through indirect means what it promised not to do directly"); *accord Shorteeth*, 887 F.2d at 256 (same).

prosecutor's obligation to act with fairness and honesty—requirements that are implicit in the duty to seek justice.²²⁸ While such actions may not rise to the level of a due process violation,²²⁹ they certainly constitute conduct that deprives the defendant of a fair process by what functionally amounts to deceit. Statements such as the one discussed essentially deprive the defendant of the promised benefit because the actual recommendation of the prosecutor is that the defendant serve the guideline-prescribed sentence. A system in which the defendant can meet every one of his obligations and still be denied his promised benefit is fundamentally unfair.

Additionally, this type of conduct would serve to undermine confidence in the criminal justice system, something that the duty to seek justice requires the prosecutor to act to preserve.²³⁰ Although the number of defendants who enter into cooperation agreements remains high, it is not unreasonable to believe that future defendants would be understandably leery of entering into substantial assistance agreements if they knew a prosecutor could undermine the effect of the benefit promised to them as cooperators. Such behavior may thus serve to undermine the confidence defendants and their attorneys have in the effectiveness of plea agreements, and thus undermine the confidence of at least a portion of the public in the system itself. Future defendants would be justified in refusing to believe that prosecutors will fulfill their promises, and thus make them less apt to cooperate for lack of confidence that they will be treated fairly and honestly. For these reasons, the ethical duties of the prosecutor must be read to prevent indirect means of avoiding a cooperation agreement where the defendant has fully performed.

Scenario 3: Failure of Condition

Imagine instead a scenario in which, despite the good-faith cooperation of the defendant, the assistance did not result in a conviction of the dealer, although the information was used and was to a certain degree helpful in preparing a case against the other defendant. In her honest judgment, the prosecutor believes that because there was no conviction, the assistance provided did not rise to the level of substantial assistance. Can the prosecutor here refuse to offer the downward departure motion?

The legal standard indicates that the prosecutor would be acting properly were she to refuse to submit a downward departure motion.²³¹ The prosecutor can make a very strong argument that the defendant failed to perform his end of the agreement, and therefore the prosecutor need not perform. The prosecutor could claim that the

228. *See supra* notes 180-207 and accompanying text.

229. *See supra* notes 191-204 and accompanying text.

230. *See supra* notes 178-85 and accompanying text.

231. *See infra* note 234 and accompanying text.

contract reserved to the prosecutor the power to “evaluate the nature and extent of the defendant’s cooperation” for the government, and that the determination as to whether the cooperation rises to the level of substantial assistance so as to warrant a departure motion was left to the “sole and unfettered discretion of the United States.”²³²

Applying the legal standard of review, the arguments made by the prosecutor are not only valid based on contract principles, but can also be made in good faith. In *United States v. Forney*,²³³ the court recognized that prosecutors intentionally draft cooperation agreements so as to reserve sole power to determine the usefulness of the cooperation, and approved of such draftsmanship.²³⁴ The court blessed this practice as “the essence of prosecutorial discretion.”²³⁵ Based on this reasoning, the court in *Forney* held that there was no breach by the government in similar circumstances to those described here.²³⁶ The effect of these decisions has been to place the definition of substantial assistance largely in the hands of prosecutors.

There is little doubt that most courts would not overturn a decision not to offer the downward departure on these facts.²³⁷ In light of that conclusion, using the failure of condition to avoid the duty to perform is certainly the type of zealous advocacy that would be expected ethically of the private attorney,²³⁸ but may not be consistent with the prosecutor’s duty to seek justice. Implicit in the prosecutor’s duty to seek justice is the obligation to ensure that through her actions, confidence in the system and its integrity are maintained.²³⁹ Enticing a defendant into cooperating by the allure of a downward departure motion, only to deny such a motion by exploiting a subjective condition in the contract, jeopardizes the integrity of the government in future plea negotiations. It also undermines the confidence of future defendants—or more accurately defense lawyers who will likely find themselves in similar discussions in the future—that they will be treated fairly should they enter into an agreement.²⁴⁰

232. See *supra* note 214 (setting forth the hypothetical cooperation agreement).

233. 9 F.3d 1492 (11th Cir. 1993).

234. See *id.* at 1501 n.4.

235. *Id.* at 1502 n.4.

236. See *id.* at 1504.

237. See *supra* notes 96-113 and accompanying text.

238. See *supra* Part II.A.

239. See *supra* notes 178-85 and accompanying text.

240. Some may argue that the current rate of 90% of cases resolved by pleas is an indication that defendants and their lawyers are as willing as ever to enter into plea bargains. The high percentage of pleas, however, is a testament to the threat of harsh sentences under the guidelines, not of faith in the government’s integrity. See Weinstein, *Regulating the Market for Snitches*, *supra* note 82, at 566 & n.12. The purpose of meeting a higher ethical standard is not only to ensure that plea bargains remain a useful tool for the disposition of cases, but also to preserve the government’s integrity. If the government’s integrity suffers, so does its ability to negotiate pleas in cases where the threat of the guidelines is not enough or where the evidence is too weak to force a plea.

On the other hand, the agreement—and for that matter the guidelines—is conditioned on the defendant providing substantial assistance for good reason. If a prosecutor cannot reserve the right to evaluate the assistance provided and in some cases refuse to offer the downward departure motion, there would be no way of ensuring the usefulness of the cooperation. Defendants could lure prosecutors into substantial assistance agreements by hinting at helpful information only to provide useless gossip. Absent some element of subjective evaluation, prosecutors wary of being duped would be far more reluctant to offer cooperation agreements, and a valuable tool for the disposition and prosecution of crimes would be severely weakened.

There is undoubtedly a measure of validity to this argument. In fact, this argument is supported by the reality that section 5K1.1 was amended in 1989 to clarify that the defendant must actually *provide* substantial assistance, not simply offer it.²⁴¹ There are no doubt circumstances in which the prosecutor may well be acting consistently with the duty to seek justice by refusing to offer the 5K motion. A prosecutor who can defend such action at least in part on the basis that it was necessary to prevent the defendant's actions from damaging the integrity of cooperation agreements, or on the grounds that the action was fair because the cooperator either knew his assistance was not substantial or never intended it to be so, would likely be fulfilling his ethical duties.

If the 5K motion is denied, however, for no reason other than that the prosecutor believes that the lack of a conviction makes the assistance per se insubstantial, then the refusal of the motion is not consistent with the duty to seek justice. Such a refusal would violate basic principles of fairness by holding the cooperator to a standard based on something other than the true usefulness of his testimony. The wording of section 5K does not require a conviction or arrest,²⁴² and a definition of "substantial assistance" that relies on such requirements unfairly forces the defendant to meet a standard beyond his control. It may well be that the acquittal in this hypothetical was based on the ineffectiveness of the government's other witnesses or counsel. To penalize the cooperator for that result would not be consistent with the prosecutor's duty to seek justice toward the cooperator. Instead, the duty to seek justice should require prosecutors to honor substantial assistance agreements if the defendant acts in good faith to provide potentially useful assistance.

Although the prosecutor would legally be permitted to refuse to offer the downward departure motion in this scenario because she could act in good faith under current constructions of "substantial assistance," and is not basing her decision on any unconstitutional

241. See USSG, *supra* note 5, at app. C, amd. 290.

242. See *id.*, *supra* note 5, § 5K1.1.

motive, the prosecutor may still be forced by the duty to seek justice to offer the motion. By doing so she acts fairly toward the defendant, consistent with notions of due process, and preserves the overall integrity of the criminal justice system.²⁴³

Scenario 4: Non-Material Breach

Taking the hypothetical one step further, imagine that the prosecutor learns that the defendant has perjured himself in the course of his grand jury testimony. The perjurious statement is relatively innocuous and is not important to the outcome of either the grand jury proceedings or the dealer's trial. Can the prosecutor refuse to offer a 5K motion? The prosecutor can in good faith argue that she is discharged from her legal duty to perform because the cooperator, by failing to be candid and truthful as required by the agreement,²⁴⁴ is in breach of contract and that there exists no duty to perform on the government's part. In further support of the breach theory, the prosecutor can argue that by committing perjury the defendant jeopardized his credibility and usefulness as a witness, thereby greatly weakening the government's case.²⁴⁵

Again, just as with scenario three,²⁴⁶ the prosecutor has an ethical duty to seek justice that requires more of the prosecutor than that she simply be able to make a good faith argument for breach of contract. Before deciding not to honor the agreement, the prosecutor must determine whether such a refusal is truly fair in light of the level of cooperation offered by the cooperator. If the assistance was offered in good faith and did in fact lead to a conviction, or even just an arrest, is that assistance actually tarnished by the innocuous perjury, or does the perjury simply provide the prosecutor with an excuse to refuse the motion? It is true that offering the motion would allow the defendant to get away with a lie, but the conviction provides clear evidence that the lie did not affect the outcome of the dealer's trial.

Even had a conviction not been achieved, if the perjury was not the reason for the lack of a conviction it should not affect the defendant's entitlement to the motion. If, on the other hand, the lie had affected

243. It is worth noting that some courts believe that the prosecution is not only ethically, but also legally, forbidden from backing out of an agreement simply because it did not like the testimony provided. *See, e.g., Thomas v. I.N.S.*, 35 F.3d 1332, 1342 (9th Cir. 1994) ("A criminal's testimony often lacks the persuasive force of plain truth, even when it is true, and often it is hard to know whether it is true. The government bargained for a criminal's testimony, and cannot avoid paying the agreed price because of buyer's remorse.").

244. *See supra* note 214.

245. This was the argument advanced by the prosecution and accepted by the court in *United States v. Brechner*, 99 F.3d 96 (2d Cir. 1996), in which the cooperator lied during a debriefing with the prosecutor. The court held that even though the cooperator almost immediately corrected himself, the government was still within its right to deny the cooperator a 5K motion. *See id.* at 99-100.

246. *See supra* Part III, Scenario 3.

the outcome of the trial or even threatened the prosecution's case, the lie would represent a material breach and not a non-material one. In that situation the prosecutor would be justified both legally and ethically in denying the downward departure motion. The ethical justification for the refusal stems from the fact that the denial would be fair, consistent with due process, and actually preserve the integrity of the system by sending a clear message that defendants cannot abuse cooperation agreements.

A more reasonable alternative in the case of a non-material breach would be to make the 5K motion, but to recommend a lesser departure than the prosecutor might otherwise recommend. The risk of this approach is that it can undermine the purpose of the motion, as described in scenario one, if the recommendation lacks sincerity.²⁴⁷ To deny the motion altogether, however, simply on the basis of a non-material breach, would result in a punishment disproportionate to the misconduct, and therefore inconsistent with concepts of fairness and the principle of "seeking justice."²⁴⁸

Scenario 5: Fraud in the Inducement

Finally, suppose the prosecutor learns, subsequent to entering the agreement, that the defendant actually had a significantly larger role in the drug organization than the prosecutor originally perceived. The prosecutor is upset because she never would have entered the agreement had she been aware of the magnitude of the cooperator's involvement in the drug organization. As a result of the cooperator's assistance, the top people in the organization were arrested and convicted. Nonetheless, the prosecutor is considering refusing to send a 5K motion to the court because now that she realizes the full extent of the defendant's involvement she wishes the defendant to receive a longer sentence.

The prosecutor can in good faith argue that the contract she signed with the defendant is unenforceable because it is void on the basis of fraud in the inducement.²⁴⁹ The prosecutor's argument is that the defendant affirmatively misrepresented the level of his involvement in illegal activities in order to induce the prosecutor into signing a plea agreement. Additionally, if the prosecutor learned of the defendant's involvement in a manner other than a proffer by the defendant,²⁵⁰ the

247. See *supra* Part III, Scenario 1.

248. See *supra* notes 192-204 and accompanying text.

249. See Brian A. Blum, *Contracts: Examples & Explanations* § 13.6 (1998) (explaining that if the signer of an agreement was induced to sign by a misrepresentation, the contract is voidable); Calamari & Perillo, *supra* note 105, § 9.22 (same).

250. Substantial assistance agreements routinely include a provision that the cooperator cannot be prosecuted for any crimes that the prosecution learns of as a result of the cooperation; therefore it is likely that the cooperator in this hypothetical would inform the prosecutor of his level of involvement during a proffer session or

prosecutor may claim that she is legally justified in not offering the 5K motion because the defendant lied and therefore violated the explicit condition of truthfulness and candor.

Some of the courts that refused to force prosecutors to honor their agreements have done so in part on the belief that in circumstances similar to the one described here, the prosecutor has a duty to inform the court of the true level of the defendant's involvement in criminal activities.²⁵¹ The decisions provide the important restriction that the government must have learned of the full extent of the cooperator's criminal history *after* signing the plea agreement, and cannot have known of the information at the time of the agreement.²⁵² The courts reason that prosecutors have an ethical duty to inform the court of the defendant's criminal past so that the judge can make a well-informed decision as to the appropriate sentence, even with a departure.²⁵³ Courts of this opinion believe that allowing the prosecutor to act in this manner is consistent with both the ethical and contractual duties of prosecution. Their thinking is based on the belief that the deal requires only a recommendation that the court depart, and that the responsibility is fulfilled even if it is an unenthusiastic and conflicted recommendation.²⁵⁴

The opinion that an unenthusiastic and conflicted recommendation fulfills the prosecutor's duty with respect to the agreement is not consistent with the ethical duty to seek justice. It may be consistent with the narrow theory that "seek justice" means that all criminals should be convicted and sentenced in a manner directly proportional to their crimes, but it is not consistent with the notion of "seek justice" adopted by this Note and the majority of commentators.²⁵⁵ Under the better view of "seek justice,"²⁵⁶ offering an unenthusiastic and conflicted recommendation would violate the duty because a weak recommendation will be interpreted by the court as a recommendation that no departure be granted at all. A weak recommendation that is not accepted by the court would undermine the confidence in the system and the integrity of substantial assistance agreements overall.²⁵⁷

Although one can argue that the defendant undermines the

debriefing. *See, e.g.*, *United States v. San Pedro*, 781 F. Supp. 761, 764 (S.D. Fla. 1991) (providing an example of a standard cooperation agreement that prevents the prosecution from charging the defendant for any crimes based on evidence that the prosecution learns of through the defendant's cooperation).

251. *See United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir. 1991); *accord United States v. Cooper*, 70 F.3d 563, 566-67 (10th Cir. 1995).

252. *See Cooper*, 70 F.3d at 566.

253. *See id.*; *Jimenez*, 928 F.2d at 363.

254. *See Cooper*, 70 F.3d at 566-67; *Jimenez*, 928 F.2d at 364.

255. *See supra* Part II.C.

256. *See supra* Part III.A.

257. *See supra* Part III, Scenario 2.

integrity of the agreement with his misrepresentations, such an argument is blind to the realities of the criminal justice system. To paraphrase the court in *Thomas v. INS*,²⁵⁸ the prosecution knows it is bargaining with a criminal and therefore must enter any agreement with the understanding that the defendant's past is less than reputable.²⁵⁹ That is not to say that the defendant should be allowed to be less than truthful in the information he provides, rather it is to say that the defendant should not be expected to incriminate himself. To expect the defendant to completely disclose his criminal conduct to the prosecutor before receiving immunity for his information is unrealistic and runs contrary to the adversary system of criminal justice. Expecting the defendant to divulge all information and refusing to offer a downward departure bargained for, or offering one calculated to be ineffective, if the defendant has not provided such information violates reasonable definitions of fairness. Such a refusal also violates the duty to seek justice on the grounds that it is simply disingenuous and places the desire for a severe sentence ahead of fairness.²⁶⁰ This is especially true in light of the fact that the withheld information has no bearing on the trial of the defendants for which the assistance is promised. A more appropriate solution is to expect the government to fully investigate the cooperator's past before entering into a substantial assistance agreement. Thus, as with the other scenarios discussed in this Note, a prosecutor who exploits the legal argument may well be acting consistently with the law, but at the same time failing to fulfill his or her ethical duty to seek justice. The denial would be unfair and deny the defendant due process by forcing him to either incriminate himself or lose the benefit of the cooperation agreement. Such a denial would undermine the integrity of the system.

Admittedly, the hypothetical situations discussed in this Note are to some degree designed to lead to the conclusion that the prosecutor typically has an ethical responsibility to submit a downward departure motion where the defendant has acted in good faith to substantially assist the prosecutor. As noted, there are indeed circumstances in which a prosecutor would be both legally and ethically justified in refusing to offer the 5K motion, such as where the defendant materially breaches the agreement by intentionally providing false information, perjurs himself on the stand in such a way that conviction of the other defendant is jeopardized, misrepresents the extent of his knowledge, or refuses to answer questions. The intention of the hypothetical scenarios discussed is not to propose a rule that a prosecutor can never legally or ethically back away from a substantial

258. 35 F.3d 1332 (9th Cir. 1994).

259. See *id.* at 1342.

260. See *United States v. Jones*, 983 F.2d 1425, 1433 (7th Cir. 1993) (explaining that the prosecutor's duty is to seek the fairest sentence, not the most severe sentence).

assistance agreement. Rather, this Note argues that a prosecutor has a responsibility to act not only legally, but also ethically, when determining whether or not to honor a substantial assistance agreement.

Thus, a prosecutor must be truly above the law in all her actions, seeking to preserve the integrity of the criminal justice system by treating the defendant fairly and consistently with due process notions and by upholding public confidence in judicial procedures. The prosecutor must do this even when the law does not require that she do so. Therefore, a prosecutor should honor the agreement when the cooperator fails to meet a condition of a substantial assistance agreement that is not critical to the prosecution of the other defendant, when a defendant's information is offered in good faith but does not lead to a conviction, or when a defendant does not reveal his full criminal history. In addition, a prosecutor should never seek to induce a breach by the cooperator or attempt to achieve indirectly what she could not achieve directly under the terms of the agreement.

CONCLUSION

As the representative of the government and of society as a whole, the prosecutor is entrusted with an enormous amount of responsibility. It is a responsibility that is characterized in ethical terms as a duty to seek justice. Although "seek justice" is a vague and ethereal concept, any definition that considers the power, prestige, and role of the prosecutor in administering criminal justice must conclude that "seek justice" is broad in its mandate. Under this interpretation, "seek justice" must include notions of fairness, due process, honesty and truthfulness, and proportionality. The phrase must also include a responsibility to protect the integrity of the criminal justice system so as to maintain public confidence. This is a far greater, and at times more demanding, ethical burden than the one faced by attorneys representing private clients.

This enormous ethical responsibility to seek justice governs the prosecutor in all that he or she does. At times, like any ethical responsibility, the duty to seek justice requires more of the prosecutor than does the law. This is certainly true with respect to the duty of the prosecutor to honor a substantial assistance agreement. A prosecutor who does not wish to offer a substantial assistance motion can usually find a legally permissible means of avoiding the agreement so long as he or she is acting in good faith under traditional contract principles. Simply because the prosecutor has a legal escape, however, does not mean that avoiding the responsibility to honor agreements is consistent with the ethical responsibility to seek justice.

As important a role as the law should play in guiding the conduct of a prosecutor, the duty to seek justice cannot be ignored. With respect to the prosecutor's performance of a substantial assistance agreement,

a prosecutor must act not only in good faith, but must do so in a manner that protects the defendant's right to a fair process, preserves the public's confidence in the criminal justice system, and ensures that the guilty are punished in accordance with their crimes. Thus, when a cooperating defendant complies in good faith with the terms of a substantial assistance agreement, the prosecutor has an ethical responsibility that goes well beyond her legal responsibility to honor the agreement. Even if the assistance does not lead to a concrete result, such as arrest or conviction, notions of fairness demand that the agreement be honored if the defendant has used his or her best efforts to assist the prosecution. Likewise, failures of a non-material nature, such as a defendant's evasiveness as to the extent of criminal participation or perjury that does not affect the other defendant's trial, should be excused and the prosecutor required to perform. Although this is more than the law demands of prosecutors, it is precisely what their duty to seek justice demands.