

- whether the defendant is entering the plea of his or her own free will; and
- whether anyone has promised or threatened the defendant to cause him or her to enter the plea.

G.S. 15A-1022(b); *see also State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000) (above questions meet statutory and constitutional requirements to ensure plea is voluntary).

Requirement that full agreement be disclosed on record. Both parties to a plea agreement have an ethical obligation to disclose all material elements of the plea bargain to the court. N.C. State Bar Ethics Opinion, RPC 152 (1993) (prosecutor may not knowingly conceal fact that he withdrew charge as part of plea agreement).

C. Factual Basis for Plea

Generally. Once the court has determined that a plea is a voluntary and knowing decision by the defendant, the court must find that there is a sufficient factual basis for the plea of guilty. The following information may be relied upon in finding a factual basis:

- statement of the prosecutor;
- written statement of the defendant;
- presentence report;
- sworn testimony, including reliable hearsay;
- statement by defense counsel.

G.S. 15A-1022(c). The court may rely on any of the above sources. *See State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (not all of above sources required in every case).

The standard for finding a factual basis for a guilty plea is fairly lenient. *E.g., State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (factual basis for plea to first-degree murder sufficient where infant victim died of fractured skull, defendant had admitted to hitting victim on head, and witness had seen defendant abusing victim on past occasions). However, the record must positively show the factual basis. *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994) (factual basis for failure to appear charge not present when only witness at plea colloquy testified that defendant was present when case was called). Moreover, the defendant's admission of guilt standing alone is not sufficient. *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980). In preparing to negotiate a plea bargain with the prosecutor, it will be helpful to develop a factual basis for lesser included offenses. In a murder case, for instance, you may have to convince the prosecutor and the court that there is a legitimate factual basis for a manslaughter plea.

CAUTION: Be careful about permitting your clients to plead guilty to multiple counts of the same offense, such as multiple larcenies or multiple conspiracies—the evidence may support only one such offense. *E.g.*, *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995) (larceny or robbery of different objects from same person constitutes one larceny or robbery). In *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), the defendant pled guilty to eight counts of soliciting a murder, but the state's factual showing proved one solicitation only. The appellate court upheld Kimble's convictions because the defense lawyer did not move to withdraw the defendant's plea on the grounds of the inadequacy of the factual basis. *Id.* Note that a defendant usually waives any double jeopardy claim, including an objection to multiple punishment, by pleading guilty. *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999) (defendant who pled guilty to offenses of accessing computers and obtaining property by false pretense waived multiple punishment defense and had no right to arrest of judgment on one offense). *See also* Volume I, § 13.4B (discussing double jeopardy principles).

D. Judge's Sentencing Discretion

Rejection of sentencing recommendation. A plea agreement involving a sentencing recommendation by the state must first have judicial approval before it can become effective. G.S. 15A-1023(b); *State v. Wallace*, 345 N.C. 462, 480 S.E.2d 673 (1997) (trial court permitted to reject plea agreement to second-degree murder that included specific sentencing recommendation); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992). If the judge rejects a plea arrangement, he or she must give the defendant an opportunity to withdraw the plea of guilty. G.S. 15A-1024. If the trial judge rejects the plea offer, the defendant is entitled as a matter of right to a continuance. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981); *see also State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985) (defendant must affirmatively ask for continuance).

Limits on judge's discretion to reject plea. A judge may not reject a plea agreement that does not involve a sentencing recommendation unless there is no factual basis for the plea or the judge believes the plea is not a voluntary and informed decision by the defendant. G.S. 15A-1023(c); *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983) (judge required to accept plea to second-degree murder where there was a factual basis for plea and plea was voluntary—judge retained sentencing discretion); *State v. Lineberger*, 342 N.C. 599, 467 S.E.2d 24 (1996) (trial judge erred in rejecting plea to second-degree murder in potentially capital case because trial judge believed plea rendered death penalty scheme arbitrary—defendant entitled to reinstatement of plea offer). Note that the court still may reject the plea if it determines that the defendant is not entering the plea voluntarily. If the judge seems unhappy with a plea arrangement, advise your client to be careful not to say anything that would give the judge reason to reject the plea as involuntary.