

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 94-10

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When a prosecutor becomes aware that a criminal action lacks merit, it is improper under DR 1-102(A) (5) and DR 7-105(A) of the Ohio Code of Professional Responsibility for the prosecutor to offer to dismiss the criminal charge in exchange for the defendant's promise to sign a release of all civil claims against an arresting police officer, other officers at the scene, and the city.

OPINION: This opinion addressing whether it is proper under the Ohio Code of Professional Responsibility for a prosecutor to offer to dismiss a criminal charge in exchange for a defendant's promise to sign a release of all civil claims against an arresting police officer, other officers at the scene, and the city, once the prosecutor becomes aware that the criminal charge lacks merit.

This opinion proceeds on the assumption that criminal charges are properly initiated by police officers, but later are found by the prosecutor to lack merit. This opinion is not addressing a situation wherein a prosecutor institutes or causes to be instituted criminal charges not supported by probable cause. That conduct is prohibited by DR 7-103(A) -- "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he [she] knows or it is obvious that the charges are not supported by probable cause."

A prosecutor's duty is to see that justice is done. A prosecutor "may prosecute with earnestness and vigor--indeed he [she] should do so. But, while he [she] may strike hard blows, he [she] is not at liberty to strike foul ones." Berger v. U.S., 295 U.S. 78, 88 (1935).

In this Board's view, a prosecutor's offer to dismiss a criminal charge that the prosecutor considers to lack merit in exchange for a civil release from a defendant is a foul strike. Such conduct offends several rules within the Ohio Code of Professional Responsibility, in particular, DR 1-102(A) (5) and DR 7-105(A).

DR 1-102(A) (5) A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice.

DR 7-105(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

The United States Supreme Court has held that as a matter of law release-dismissal agreements are not per se invalid. See e.g., Newton v. Rumery, 480 U.S. 386, 392 (1987) (addressing the enforceability of a prosecutor and defendant's agreement to waive a right to sue as a question of law decided by reference to common law principles). The Supreme Court of Ohio has held that a release executed between private parties, the consideration of which, in whole or in part is the suppression of a criminal prosecution, is against public policy and also is void for lack of consideration. Brown v. Best Products Co., 18 Ohio St. 3d 32, 34-35 (1985). In contrast to these cases, this opinion addresses ethical behavior under the Ohio Code of Professional Responsibility and deals with criminal charges that a prosecutor finds to lack merit.

Several states have considered whether civil release-criminal dismissal agreements are ethical. In California, a prosecutor may not condition an offer to dismiss a criminal action upon a defendant's stipulation that there was probable cause for the arrest, because the practice constitutes a threat to obtain an advantage in a civil dispute. State Bar of California, Op.1989-106 (undated). According to the California committee, the imbalance of power between the prosecutor and the defendant makes it difficult to consider a release-dismissal by the same standards as other settlement agreements. Id. In New Jersey, when probable cause does not exist, a prosecutor may not require, as a condition to a plea bargain, that the defendant sign an agreement that probable cause existed for the arrest, that no excessive force was used, and that the right to sue the arresting officer is waived. Such conduct violates the rules prohibiting prosecution of a charge not supported by probable cause and presenting criminal charges to gain advantage in a civil matter. New Jersey SupCt, Advisory Comm. on Professional Ethics, Op. 661 (1992).

Also, as example, in Oregon, it is permissible for a district attorney to offer a plea bargain in a pending criminal prosecution upon condition of a defendant's waiver of civil remedies, however, this advice is qualified. The Oregon committee stated in a footnote that if the district attorney were proceeding with the prosecution solely for the purpose of seeking a civil release of the arresting officers or if there were no probable cause to support the charge, it would be improper under their rules of conduct. Oregon State Bar, Op. 1991-113 (1991). In Colorado, it is unethical to coerce the release of a civil claim in exchange for dismissal of a criminal accusation, but release-dismissal agreements may be proper as an exception to the general rule when the charges

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arise from the same episode; the prosecutor is aware of no serious civil rights violation; the agreement is informed, voluntary, judicially approved, and is in the public interest. Colorado Bar Ass'n, Op. 62-Rev. (1988).

It is this Board's view that justice is not served when a criminal defendant is asked to relinquish civil and constitutional rights in exchange for a prosecutor's agreement to dismiss criminal charges that the prosecutor has concluded lack merit. Clearly, a prosecutor must seek justice. We are reminded of this through EC 7-13.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.

In seeking justice, it is a prosecutor's duty to dismiss charges that lack merit. The Code of Professional Responsibility acknowledges this duty in EC 7-14.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his [her] superiors and recommend the avoidance of unfair litigation.

A prosecutor's duty to dismiss charges lacking merit should not be conditioned upon a defendant's agreement to release the right to pursue civil remedies to which he or she may be entitled. Such conduct by a prosecutor does not seek or serve justice and in this Board's view it thwarts justice in violation of DR 1-102(A) (5). Such conduct also does not further the aspirations of EC 7-14.

Further, when a prosecutor has concluded that a criminal charge lacks merit, the imbalance of power between a prosecutor and a criminal defendant should not be used as leverage to coerce a defendant into releasing civil rights. When a prosecutor offers to dismiss a criminal charge that lacks merit in exchange for a defendant's waiver of the right to pursue a civil remedy, the quid pro quo is illusory. The defendant relinquishes civil rights in exchange for the prosecutor's agreement to fulfill an ethical duty, the ethical duty to not prosecute criminal charges that lack merit. Such conduct is a

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misuse of the criminal process and in this Board's view constitutes a threat to continue a criminal charge to gain advantage as to a civil matter in violation of DR 7-105(A).

In conclusion, this Board advises that when a prosecutor becomes aware that a criminal charge lacks merit, it is improper under DR 1-102(A) (5) and DR 7-105(A) of the Ohio Code of Professional Responsibility for a prosecutor to offer to dismiss the criminal charge in exchange for a defendant's promise to sign a release of all civil claims against an arresting police officer, other officers at the scene, and the city.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.