

62

DUTIES OF PUBLIC PROSECUTOR, RELEASE OF DEFENDANT'S CIVIL CLAIMS

Adopted November 20, 1982.

Revised November 19, 1988.

Addendum issued 1995.

Syllabus

Under DR 7-105(A), EC 7-21, and DR 1-102(A)(5), it is always unethical to coerce the release of a civil claim in exchange for dismissal of a criminal accusation. Release-dismissal agreements are fraught with possibilities for coercion. But release-dismissal agreements may be proper as an exception to this general rule if the charges arise from the same transaction as the criminal episode and are well founded, no serious civil rights violation has occurred of which the prosecutor is aware, the agreement is informed, voluntary and judicially approved and the agreement is in the public interest. Thus it is necessary to determine on a case-by-case basis whether it is improper for a public prosecutor to bargain for releases of governmental agencies or their agents from actual or potential civil claims. Depending on the facts, it may likewise be improper for a city attorney to make such request of a public prosecutor. This opinion is limited to release-dismissal agreements, which is the context in which this question usually arises.

Facts

An individual arrested by municipal police officers was charged criminally. The defendant gave statutory notice of his intent to sue the municipality, and the officers involved, for actual and punitive damages arising from the same incident. The city attorney requested that the district attorney not enter into any plea disposition, or sentencing concession, without first obtaining a release from the defendant absolving the municipality and its police officers of civil liability arising from the incident.

Opinion

The duty of a public prosecutor is to “seek justice.” American Bar Association Standards for Criminal Justice, 2d Ed. Vol. I, 3-1.1(c). Ethical Consideration 7-13 likewise provides that:

The responsibility of a public prosecutor differs from that of the usual advocate; his 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 the governmental powers. . . .

Ethical Consideration 7-21 states:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private claims or controversies is a subversion of the process; further, a person against whom criminal process is misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

A prosecutor has broad discretion in the charging decision. Illustrative factors which he or she may properly consider are found in Part IV, Sec. 4.1 Standards for Criminal Justice, American Bar Association, 2d Ed. Vol. I:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense of the offender;

- (iv) possible improper motives of a complainant;
- (v) prolonged non-enforcement of a statute, with community acquiescence;
- (vi) reluctance of the victim to testify;
- (vii) cooperation of the accused in the apprehension or conviction of others;
- (viii) availability and likelihood of prosecution by another jurisdiction.

These criteria are in keeping with a duty of a public prosecutor as set forth in Disciplinary Rule 7-103(A): “A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”

In fulfilling his duty to “seek justice,” a public prosecutor must use his best professional judgment, disregarding the desires of others which might impair his free judgment. EC 5-21. Similarly, DR 7-105(A) precludes a lawyer from presenting, participating in presenting, or threatening to present criminal charges “solely” to obtain an advantage in a civil matter. EC 7-21 makes it clear that “coercion” of settlement of a civil claim is what is unacceptable. This would cover claims of the government or any other party, such as a forfeiture or restitution plea bargain. Further, a lawyer has a duty under DR 1-102(A)(5) to avoid all conduct, “prejudicial to the administration of justice.”

A prosecutor may be justified in reducing criminal charges, or making sentencing concessions, even where a defendant’s guilt on all charges can be proven. Standards for Criminal Justice, American Bar Association, 2d Ed. Vol. 1. The prosecutor’s criteria for reduction of charges or sentencing concessions do not include “coercing” a defendant to abandon what may be a meritorious civil claim against a municipality or its police officers. Even assuming that a defendant is guilty of criminal charges, he or she may still possess meritorious civil claims against governmental agents. EC 7-21, quoted *supra*, underscores the impropriety of coercing release of civil claims, as does Formal Opinion No. 56 of the Colorado Bar Association Ethics Committee.

In light of the ethical considerations and prosecutorial standards which apply, a public prosecutor should refrain from adopting a blanket policy of refusing to dismiss criminal charges unless civil releases are granted. Bargaining for release of civil claims not arising from the same transaction would be likewise unethical. It is improper for a city attorney to attempt to influence a public prosecutor in this manner. As stated by EC 7-21, using the criminal process to coerce adjustment of private claims or controversies is a subversion of that process.

A recent decision of the U.S. Supreme Court indicates that release-dismissal agreements are enforceable if they are entered into under circumstances which are not coercive. *Town of Newton v. Rumery*, 480 U.S. 94 (1987). However, *Town of Newton* makes it clear that such agreements must be scrutinized on a case-by-case basis to determine whether the agreement is enforceable.

From the point of view of the public prosecutor, the scrutiny required of such an agreement is substantial. *Newton* brings up a need for guidance in an area which the Ethics Committee had previously considered out-of-bounds because of the difficulty of the ethical questions posed. In order to justify an exception to the ethical prohibition of blanket or coerced release-dismissal agreements, a public prosecutor must be satisfied that all of the following factors are present:

- (1) That the charges are well-founded and that no serious civil rights violation has occurred. This factor does not impose a burden of investigation on the prosecutor but does require that the prosecutor consider all facts known at the time of the plea.
- (2) That the defendant’s decision is informed. The factors which should be considered include the opportunity to consult with counsel and to participate meaningfully in the negotiation of the terms of the plea bargain, the defendant’s age, mental status, education and the like.
- (3) That the defendant’s decision is voluntary. The factors which should be considered include the defendant’s mental state, whether the defendant was in custody at the time, whether the defendant was under the influence of any drug at the time and the like. In appropriate cases, as in *Newton*, a cooling off period to allow for an evaluation of the plea bargain may be appropriate.

- (4) That the reciprocal promises of the plea agreement deal with a single transaction as opposed to disparate claims.
- (5) That the agreement is judicially approved.
- (6) That the agreement is in the public interest.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 4.5 (prohibiting threatening prosecution) and Rule 8.4(g) (defining misconduct as violating of accepted standards of legal ethics).