Opinion No. 2 of 2005

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

The Committee would like to acknowledge the valuable assistance provided on this issue by the Indiana Prosecuting Attorneys Council and the Indiana Public Defender Council.

Issue presented

s it ethically permissible for prosecutors, criminal defense counsel or civil counsel to enter into a release-dismissal agreement?

Facts

A release-dismissal agreement is an agreement between a prosecutor and criminal defense and/or civil counsel to dismiss criminal charges in return for a release of some entity from civil liability. These agreements might arise when a criminal defendant suffered personal injuries by officers allegedly involved in police brutality. In that instance, the defense attorney may approach the prosecutor, or vice versa, and propose not to sue the city or county for the actions of the police officers if, in return, the prosecutor dismisses the criminal charges pending against the defendant. This is just one example of a variety of situations where these agreements may come into play.

Discussion

This is not a new ethical question across the country, but it does appear to be an issue never specifically addressed in Indiana. Courts and state bar ethics committees across the nation have come to differing opinions on this issue. Two

state bar ethics opinions are cited as representing well the opposing sides of this issue. See, State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1989-106 (1989) (opining that such agreements are unethical) www.calbar.ca.gov/calbar/html unclassified/ca89-106.html and Ethics Committee of the Colorado Bar Assoc., Formal Opinion No. 62 (1982), revised (1988), addendum (1995) (opining that such agreements are appropriate under strict guidelines including court review and approval) www.cobar.org/ static/comms/ethics/fo/fo 62.htm. (For further detailed analysis, read "An Ethical Analysis of the Release-Dismissal Agreement," 7 Notre Dame J.L. Ethics & Publ.Pol'y 331 (1993).)

The state bar ethics committees that have found release-dismissal agreements ethically permissible rely on the U.S. Supreme Court case *Town of Newton v. Rumery*, 480 U.S. 386 (1987). In this case the prosecutor entered into an agreement with the defendant to dismiss criminal charges if the defendant would sign a release for any claim he might have for false arrest.

In a 5-4 plurality opinion, the Supreme Court found the agreement in Town of Newton valid. The majority cautiously approved the agreement, though citing concerns that such agreements can lead to vindictive prosecutions and involuntary waiver of section 1983 rights by defendants. Because of these concerns, the majority found that release-dismissal agreements should come under very close review. The majority held that these agreements must affirmatively establish that there was not an abuse of process by the prosecutor, that the defendant knowingly and voluntarily entered into the agreement, and that the court reviewed

and approved the agreement. *Id.* at 399 (O'Connor, J., concurring in part and judgment).

The dissenting opinion in *Town of Newton*, however, found release-dismissal agreements to be "inherently coercive" and to create a "conflict of interest for the prosecutor" who is now looking out for the interests of the present client, "the sovereign State," and the interests of the potential civil defendant, the Town of Newton. *Id.* at 411-412 (Stevens, J., dissenting).

An earlier 9th Circuit case, *Macdonald v. Musick*, 425 F.2d 272 (9th Cir. 1970), held the agreement invalid, finding an abuse of prosecutorial power and an abuse of the criminal justice system. In that case, the prosecutor had entered into a release-dismissal agreement wherein criminal charges were dropped in return for the release of any police brutality action.

The closest Indiana case for consideration is In the Matter of Robert T. Miller, 677 N.E.2d 505 (Ind. 1997). In Miller, there was a civil action filed by a plaintiff against the director of a planned community (among others) for essentially misappropriating funds. After much discussion with the elected prosecutor, plaintiff's counsel convinced the prosecutor to bring criminal charges against the director of the planned community. After filing the criminal charges, the prosecutor informed the defendant's counsel that, if he attempted to fairly settle the civil suit, the prosecutor would proceed with dismissing the charges. The defendant proceeded to settle the civil case in excess of \$100,000, and the prosecutor dismissed the criminal case as promised. The Indiana Supreme Court found that the prosecutor's use of formal prosecution of the director as a bargaining tool on behalf of the civil plaintiff violated Indiana Professional Rule of

Conduct 8.4(d), stating specifically that the actions of the prosecutor were "conduct prejudicial to the administration of justice." *Id.* at 508-509.

Opinion

It is the opinion of the Indiana State Bar Association Legal Ethics Committee that release-dismissal agreements are unethical pursuant to Ind. Rules of Prof. Conduct (RPC) 1.7(a), 3.8(a) and 8.4(d).

The committee is of the opinion that release-dismissal agreements violate RPC 1.7(a), which states in pertinent part, "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client." In the case of release-dismissal agreements, the prosecutor has the competing interests of the state of Indiana, whom he/she represents, and the interests of the law enforcement agency or municipality who is the subject of a potential civil suit.

The prosecutor's primary client is the state of Indiana, and the citizens of Indiana are entitled to prosecution of criminal matters without any consideration of the civil liability of others. The inherent difficulties for a prosecuting attorney in trying to fashion releasedismissal agreements were noted in the dissenting opinion in *Town of Newton*:

There is, however, an obvious potential conflict between the prosecutor's duty to enforce the law and his objective of protecting members of the Police Department who are accused of unlawful conduct. The public is entitled to have the prosecutor's decision to go forward with a criminal case, or to dismiss it, made independently of his concerns about the potential damages liability of the Police Department. It is equally clear that this separation of functions cannot be achieved if the prosecutor may use the threat of criminal prosecution as a weapon to obtain a favorable termination of a civil claim

against the police. In negotiating a release-dismissal agreement, the prosecutor inevitably represents both the public and the police. When release agreements are enforceable, consideration of the police interest in avoiding damages liability severely hampers the prosecutor's ability to conform to the strictures of professional responsibility in deciding whether to prosecute. The ethical obligation of every prosecutor is consistent with the general and fundamental rule that "a lawyer should exercise independent professional judgment on behalf of a client. (emphasis added)

Town of Newton, at 412-413 (Stevens, J., dissenting), citing in part ABA Model Rules of Prof. Conduct, Rule 3.8(a)(1984).

The committee agrees with the dissent in *Town of Newton* that considerations involved in release-dismissal agreements can lead to a violation of Rule 3.8(a). RPC 3.8 states that "[t]he prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

The committee is also of the opinion that release-dismissal agreements violate RPC 8.4(d),

which provides that, "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice." Although the facts in Miller are different, the committee nevertheless believes that the same RPC 8.4(d) concerns expressed by the Court in *Miller* also would apply so as to bar the use of release-dismissal agreements by prosecutors. The committee's opinion is further supported by the holding in Macdonald and the dissent in Town of Newton that release-dismissal agreements are prejudicial to the administration of justice because the prosecutor is using the power of a criminal charge to coerce a defendant to release a civil right.

Finally, it should be noted that Rule 8.4(d) also applies to a defense or civil attorney to prohibit him or her from the violation of any rules or from engaging in any conduct that is prejudicial to the administration of justice. Therefore, a criminal defense attorney or civil attorney who proposes a release-dismissal agreement would be in violation of RPC 8.4(d) as well.