

LEGAL ETHICS OPINION 1867 USE OF RELEASE-DISMISSAL AGREEMENTS BY
PROSECUTORS

QUESTION PRESENTED

Is it ethical for a prosecutor to enter into an agreement with a criminal defendant to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the defendant's arrest, prosecution, and/or conviction?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 3.4(i)¹ and 3.8(a)².

ANALYSIS

A release-dismissal agreement is an agreement between a prosecutor and a criminal defendant to dismiss criminal charges in return for a release of some entity from civil liability. The United States Supreme Court considered the permissibility of such agreements in *Town of Newton v. Rumery*, 480 U.S. 286 (1987). The case involved a prosecutor entering into an agreement with a criminal defendant to dismiss criminal charges if the defendant signed 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 without directly addressing the application of the Rules of Professional Conduct to the prosecutor's actions in offering or entering into such an agreement.

Rumery involved a defendant (Rumery) who was charged with tampering with a witness based on a phone call that he made to a sexual assault victim whose assailant was a friend of Rumery's. Rumery's defense lawyer threatened to sue the town and its officials, so the prosecutor entered into a release-dismissal agreement with Rumery whereby the criminal charge would be dismissed in exchange for his release of any civil claims against the town. Several months later, Rumery sued the town, and the town asserted the release-dismissal agreement as an affirmative defense. The United States Supreme Court upheld the dismissal of the civil suit, holding that a per se ban on release-dismissal agreements is not necessary, although such agreements may be abused in particular cases.

First, the Court rejected Rumery's argument that release-dismissal agreements are inherently coercive because the choice between facing criminal charges and waiving civil claims is an unfair choice. The Court held that this scenario is not more coercive than many other choices that are routinely presented to criminal defendants, including the choice to waive a number of constitutional rights in exchange for a guilty plea.

The Court also rejected Rumery's arguments that release-dismissal agreements violate public policy by encouraging prosecutors to trump up charges in response to a civil rights claim and by creating incentives for individuals injured by police misconduct not to pursue claims for that misconduct. The Court dismissed the latter argument on the basis that no individual ever has

¹ Rule 3.4 Fairness to Opposing Party And Counsel
A lawyer shall not:

(i) present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

² Rule 3.8 Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:

(a) not file or maintain a charge that the prosecutor knows is not supported by probable cause.

a duty to pursue a claim for police misconduct, so the diffuse public interest in having police misconduct investigated and remedied should not be elevated above an individual's choice not to pursue a civil remedy. The Court also held that to invalidate all release-dismissal agreements based on the possible behavior of prosecutors neglects other public interests that may justify such an agreement and improperly assumes prosecutorial misconduct. Prosecutors have enormous discretion in charging decisions and courts are not competent to analyze the exercise of that discretion in the absence of other evidence of misconduct. The release-dismissal agreement in this case was particularly justified by the fact that the prosecution of Rumery would have required a traumatized sexual assault victim, who was already reluctant to testify in the sexual assault prosecution, to testify in a second, derivative prosecution.

Likewise, the potential for ethical misconduct by a prosecutor does not require a per se ban on any behavior that might lead to that misconduct. Any time a lawyer is engaged in a prosecutorial function, she may not file or maintain a charge that she knows is not supported by probable cause. Accordingly, if a prosecutor knows that a charge is not (or is no longer) supported by probable cause, she is obligated to dismiss the charge and may not condition that dismissal on a release of civil liability. To maintain the charge pending agreement to or negotiation of a release-dismissal agreement would itself violate Rule 3.8(a). Within the parameters of Rule 3.8(a), however, a prosecutor has enormous discretion to make charging decisions, including the type and timing of charges, as well as the discretion to make plea bargains or to dismiss pending charges. In the absence of other factors indicating misconduct, the prosecutor's exercise of discretion to dismiss pending charges pursuant to a release-dismissal agreement does not indicate that Rule 3.8(a) was violated.

A prosecutor, like any other lawyer, is subject to Rule 3.4(i), which forbids presenting criminal charges *solely* to obtain an advantage in a civil matter. If charges were initiated or trumped up in order to coerce a defendant into accepting a release-dismissal agreement, then the prosecutor's conduct would violate this Rule. However, as in the case of accord and satisfaction agreements or agreements to pay restitution, if there is probable cause to maintain the charges and there is no other evidence that the charges were brought/maintained solely to coerce settlement of the civil matter, this Rule would not be violated by the negotiation of a release-dismissal agreement.

Although the Committee concludes that there is no need for a per se ban on release-dismissal agreements, any such agreement will be subject to intense legal and ethical scrutiny, as the *Rumery* court made clear. Thus, a prosecutor should not require release-dismissal agreements as a matter of course in dismissing criminal charges. To comply with Rule 3.4(i), a prosecutor should not seek a release of civil claims that are unrelated to the criminal charges at issue.

This opinion is advisory only and is not binding on any court or tribunal.