**Editor's Note:**

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

# FORMAL OPINION NO. 1989-106

**ISSUE:**

May a prosecutor's agreement to dismiss a criminal action be conditioned on the defendant's stipulation that there was probable cause for his arrest, relieving the police of potential civil liability?

**DIGEST:**

An offer to dismiss a criminal prosecution may not be conditioned on a release from civil liability because that practice constitutes a threat to obtain an advantage in a civil dispute in violation of the Rules of Professional Conduct.

**AUTHORITIES**

**INTERPRETED:**

Rules 5-100 and 5-110 of the Rules of Professional Conduct of the State Bar of California

**DISCUSSION**

The Committee has been asked to render an opinion on the subject of the ethical propriety of release-dismissal agreements in criminal cases. These are agreements between a prosecutor and a criminal defendant whereby the prosecutor agrees to seek a dismissal of a criminal prosecution against the defendant, provided that the latter agrees to stipulate that there was probable cause for his or her arrest, thereby releasing the police agency from potential civil liability.

For purpose of this analysis it is assumed that a criminal charge is not merely contemplated but has already been filed. It is also assumed that the charge has some basis in fact. The responsibility of a prosecutor in a case where the charges are manifestly not supported by probable cause is set forth in rule 5-110, which provides as follows:

> A member of the State Bar in government service shall not institute criminal charges when he knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, a member of the State Bar in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, he shall promptly so advise the court in which the criminal matter is pending.

(See also Standard 3-3.9, American Bar Association Standards Relating to the Administration of Criminal Justice.)

Rule 5-100, paragraph (A) of the Rules of Professional Conduct, provides as follows:

> A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

The California rule is similar to American Bar Association Code of Professional Responsibility, Disciplinary Rule 7-105 (A), and relates to the same subject matter addressed in a series of California cases disciplining attorneys for conduct equivalent to the

crime of extortion. (See *Arden v. State Bar* (1959) 52 Cal.2d 310 [341 P.2d 6]; *Libarian v. State Bar* (1952) 38 Cal.2d 328 [239 P.2d 865]; *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565 [160 P.2d 9].) Rule 5-100 seeks to discourage the threat of use of criminal, administrative or disciplinary proceedings to exert leverage in the settlement of civil disputes. The rules promote the public policy of allowing free and open access to civil courts without fear that the criminal, administrative or disciplinary process will be used to coerce the resolution of private civil controversies.

It is important to be mindful of the distinct functions of the civil and criminal processes, and to recognize the need to keep them on parallel and independent courses. As stated in American Bar Association Ethical Consideration 7-21:

> 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 civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so 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.

The term "present" as used in rule 5-100 is not defined in the rules. In a narrow sense, once a complaint, information, or indictment is filed, the presentation of the charges alleged by the prosecution has been completed. According to this interpretation, it would not be possible to threaten to present charges after the proceedings have been instituted.

A broader definition would view the presentation of charges as an ongoing course of conduct beginning with the filing of the first formal document and continuing through trial and judgment. If this view is accepted, the prosecutor's acts and intentions throughout the pendency of the case can be scrutinized under rule 5-100.

To give effect to the strong policy behind the rule, the Committee adopts that broader definition of the term "present." The rules support a distinction between "institution" of charges, as an isolated act by which a criminal action is begun, and "presentation" of charges, as an ongoing process. (See rule 5-110, *supra.*)

Indeed, the mere filing of bare allegations with a clerk only starts a process in motion. The introduction of evidence is as much a part of the presentation of the case as is the initial filing.

A prosecutor's offer to dismiss a colorable criminal action in exchange for a release from civil liability is tantamount to a threat to continue the action if the defendant will not give such a release. There is often an imbalance of power between the prosecution and the individual defendant. The nature of this relationship makes it difficult to consider a release-dismissal agreement by the same standards as other settlement agreements.

It is clear from prior decisions interpreting former rule 7-104 (predecessor to current rule 5-100), that an explicit threat is not required for a violation of the first clause of rule 7-104. In State Bar Formal Opinion No. 1983-73, we opined that a threat need not be expressly stated but may be inferred from the circumstances. This result is consistent with cases under the extortion statute which hold that:

> . . . [A] threat may in some cases be implied. (See, e.g., *People v. Choynski* (1892) 95 Cal. 640, 641-42) [30 P. 791] ['Parties guilty of [extortion] . . . seldom . . . speak out boldly and plainly, but deal in mysterious and ambiguous phrases . . . [which] in light of surrounding circumstances . . . have no uncertain meaning.']; See also *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670].)

It bears noting in this connection that the American Bar Association Ethical Considerations place a heavier ethical duty, not a lesser one, upon government counsel. American Bar Association Ethical Consideration 7-11 provides in pertinent part that:

> A lawyer's responsibility varies with the condition of the client, with the nature of a proceeding or because he is a government attorney. For instance, duties vary with representing an incompetent or illiterate or before administrative or legislative bodies or *being a public prosecutor*. (Emphasis added.)

(See also American Bar Association Ethical Consideration 7-14, Wise, *Legal Ethics* (2nd ed. 1970) pp. 105-106, Bar Association of San Francisco Ethics Opinion No. 1975-6, and cases of other jurisdictions cited therein.) Further, as stated in

Standard 3-1.1, American Bar Association Standards Relating to the Administration of Justice, ". . . [t]he prosecutor is both an administrator of justice and an advocate; the prosecutor must exercise sound discretion in the exercise of his or her functions. . . . The duty of the prosecutor is to seek justice, not merely to convict."

This opinion does not rely on or create a presumption that a prosecutor who propounds a release-dismissal offer is acting out of an improper motive. We believe, however, that *any* threat to use the criminal justice system to gain leverage in a civil dispute subverts the integrity of the judicial process and should be prohibited. Since a release-dismissal offer constitutes a veiled threat to continue the prosecution if the defendant rejects it (that is, if he or she refuses to waive the right to have a potential civil claim determined by due process), the practice cannot be countenanced under rule 5-100.

We are aware that the release-dismissal procedure has been considered both by the U.S. Supreme Court in *Newton v. Rummery* (1987) 480 U.S. 386 [94 L.Ed.2d 405, 107 S.Ct. 1187] and by the California Supreme Court in *Hoines v. Barney's Club* (1980) 28 Cal.3d 603 [170 Cal.Rptr. 42]. It is also the subject of a recent decision of the U. S. Court of Appeals in *Lynch v. City of Alhambra* (9th Cir., 1989) 880 Fed.2d 1122.[1] Although both courts found as a matter of law that such agreements can in some cases be enforceable, none has dealt squarely with the ethical issues addressed here.

Both *Rummery* and *Hoines* were opinions of sharply divided courts, and in *Rummery* it was a bare plurality which declined to ban enforcement of release-dismissal agreements altogether. Neither case involved the actions of California prosecutors who would be subject to our Rules of Professional Conduct. Accordingly, the agreements in those cases were not analyzed in light of rule 5-100. (*Lynch* simply defers to the reasoning of the *Rummery* court, without considering the application of rule 5-100 or other ethical strictures.)

It is not unusual for conduct to be otherwise legally permissible but proscribed by rules of professional conduct. No principles of law restrict an attorney's ability to communicate with adverse represented parties, for example, or to share legal fees, or to limit his or her liability to the client. But these and a myriad of other aspects of California legal practice are undisputedly regulated by the ethical standards embodied in the Rules of Professional Conduct.

It is also worth noting in *Newton* the release-dismissal agreement was not only drafted by the defendant's own attorney (as it was in *Lynch* too), it appears that the very idea for the agreement was instigated by the defense rather than the prosecution. An uninvited offer by a defendant to stipulate that there was probable cause for his or her arrest cannot be construed as a threat, and we do not mean to imply by this opinion that a prosecutor may not ethically accept such an offer.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, The State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

---

[1] We are also aware that in considering this issue, other state bar association ethics panels have reached results different from ours. In Oregon, for example, an opinion which was in full accord with ours was rescinded after, and solely because of, the holding in *Newton*. (*Newton v. Rummery*, *supra* 480 U.S. at p. 386.) Oregon State Bar Ethics Opinion No. 516 (1988), affecting prior Opinion No. 483 (1983). Similarly, the Colorado Bar Association cited *Newton* in its opinion which stopped short of imposing a *per se* ban on release-dismissal agreements, although it did urge substantial ethical scrutiny of any such agreement on a case-by-case basis. Colorado Bar Association Ethics Opinion No. 62 (revised 1988).

The Colorado opinion states that "*Newton* [brought] up a need for guidance in an area which [that state's] Ethics Committee had previously considered out-of-bounds because of the difficulty of ethical questions posed." We do not agree that the ethical issues were too thorny for discussion before *Newton*, or that *Newton* addressed, much less resolved, those issues.

In any event, we are not constrained to follow the opinions of other bar associations, and in construing our Rules of Professional Conduct we do not hesitate, when appropriate, to impose a higher ethical standard on California attorneys, whether prosecutors or otherwise, than other jurisdictions might.

ETHICS OPINIONS