

FORMAL OPINION NO 2005-113

District Attorneys: Plea Bargains Including Waiver of Civil Remedies

Facts:

District Attorney plans to offer a plea bargain to Defendant in a pending criminal prosecution, conditioned on one or both of the following: (1) Defendant's waiver of civil remedies against arresting officers and the governmental entity that employs them, or (2) the simultaneous resolution of a civil forfeiture proceeding that District Attorney is bringing against Defendant.

Question:

May District Attorney make such an offer?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 3.4(g) provides that a lawyer shall not

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Oregon RPC 8.4(a) provides, in pertinent part:

(a) It is professional misconduct for a lawyer to:

....

(4) engage in conduct that is prejudicial to the administration of justice

District Attorney's offer does not involve a threat to present criminal charges because the charges are already pending. Oregon RPC 3.4 therefore does not apply.

Although situations could theoretically arise in which an offer of simultaneous settlement could constitute “conduct that is prejudicial to the administration of justice,” no such conduct is disclosed by these facts.¹ The offer is not *per se* prejudicial to the administration of justice. In fact, the offer could result in the most “just” result possible, by resolving all connected matters concurrently.

Approved by Board of Governors, August 2005.

¹ *Cf. In re Haws*, 310 Or 741, 801 P2d 818 (1990). If, for example, District Attorney was 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, District Attorney’s conduct would violate both Oregon RPC 8.4(a)(4) and Oregon RPC 3.8. Oregon RPC 3.8 provides that the prosecutor in a criminal case shall

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Cf. In re Leonhardt, 324 Or 498, 930 P2d 844 (1997); *In re Gustafson*, 327 Or 636, 968 P2d 367 (1998).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.6-8 (threatening criminal prosecution), § 8.11 (conduct prejudicial to the administration of justice), § 11.1 (ethics rules applicable to government lawyers), § 11.4-2 (executive branch lawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 57, 97 (2000) (supplemented periodically); ABA Model RPC 3.8; and ABA Model RPC 8.4(d). See also Washington Advisory Op No 1135 (1987) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).