

FORMAL OPINION NO 2005-139

Prejudice to Administration of Justice:

Prosecutor's Threat to Charge More Serious Offense

Facts:

Prosecutor charges Defendant with multiple misdemeanors, although there is probable cause to file felony charges. Prosecutor makes a plea offer. Defendant, through defense counsel, rejects the plea offer and files a motion to suppress. Prosecutor tells defense counsel that if Defendant does not accept the plea offer before the suppression hearing, Prosecutor will file felony charges. Making the original plea offer, filing the suppression motion, and raising the issue of filing felony charges all occur within a short time after the original charges are filed.

Question:

May Prosecutor threaten to bring more serious charges supported by probable cause in response to Defendant's refusal to plead guilty?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 8.4(a)(4) provides that a lawyer must not "engage in conduct that is prejudicial to the administration of justice."

The Oregon Supreme Court has established a three-part test for determining whether there has been a violation of *former DR 1-102(A)(4)*, which is identical to Oregon RPC 8.4(a)(4). *In re Haws*, 310 Or 741, 746–47, 801 P2d 818 (1990); *In re Smith*, 316 Or 55, 58–59, 848 P2d 612 (1993). First, the accused must have engaged in "conduct." That is, the accused must have performed or failed to perform some act. *In re Haws*, 310 Or at 746. Second, the conduct must have occurred in the context of the "administration of justice." *In re Haws*, 310 Or at 746. Third, the conduct must have been "prejudicial" in nature; it must have caused or had the potential to cause harm or injury. *In re Haws*, 310 Or at

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747. The amount of harm so caused must be more than minimal. The harm may result either from repeated conduct causing some harm to the administration of justice or from a single act causing substantial harm to the administration of justice. *In re Haws*, 310 Or at 748.

The first two parts of the test are easily met by the above facts. It is the third part that warrants attention. Prosecutor's threat of bringing more serious charges if Defendant refuses to negotiate the case or files pretrial motions has the potential to cause harm or injury to Defendant. Prosecutor's threat may make Defendant reluctant to exercise the right to go to trial or to challenge a warrantless search for fear that if unsuccessful, Defendant will be in a worse position than if Defendant had not challenged the government and merely negotiated disposition of the case. Such a dilemma, however, is contemplated by ORS 135.405¹ and 135.415,² which authorize Prosecutor to refrain from bringing potential additional charges if Defendant pleads to an offense charged, and to

¹ ORS 135.405(3) provides, in pertinent part:

(3) The district attorney in reaching a plea agreement may agree to . . . the following, as required by the circumstances of the individual case:

. . .

(c) To . . . refrain from bringing potential charges if the defendant enters a plea of guilty or no contest to the offense charged.

² ORS 135.415 provides, in pertinent part:

In determining whether to engage in plea discussions for the purpose of reaching a plea agreement, the district attorney may take into account, but is not limited to, any of the following considerations:

(1) The defendant by the plea of the defendant has aided in insuring the prompt and certain applications of correctional measures to the defendant.

. . .

(6) The defendant by the plea of the defendant has aided in avoiding delay in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

make plea negotiation decisions on resource-allocation grounds. Because, under ORS 135.405, Prosecutor can *refrain* from enhancing charges if Defendant pleads to lesser charges, it follows that Prosecutor may threaten that if Defendant does *not* plead to the offense charged, enhanced charges for which probable cause has always existed will be brought. Such resource-allocation decisions in the context of plea negotiations do not frustrate, but rather facilitate, the administration of justice.

Courts have found due-process violations when enhancement of charges in this context has been based on inappropriate factors or motivated by vindictiveness or the desire to engage in retaliation. Vindictiveness or retaliation may be overt or may, under some circumstances, be inferred from the timing of the decision. *See, e.g., Blackledge v. Perry*, 417 US 21, 27–28, 94 S Ct 2098, 40 L Ed 2d 628 (1974) (convicted person is entitled, as matter of due process, to pursue right to *de novo* trial without fear that state will “up the ante” by substituting more serious charge for original one); *State v. Halling*, 66 Or App 180, 184–85, 672 P2d 1386 (1983) (vindictive prosecution found when prosecutor waited two years before filing additional charges, without new evidence, and expressly admitted wanting to cause “further evil” to defendant); *State v. Farkes*, 71 Or App 155, 163, 691 P2d 489 (1984), *rev den*, 298 Or 704 (1985) (prosecutor’s threat to recommend jail sentence if defendant exercised right to jury trial and to file suppression motion did not constitute “objective proof of actual vindictiveness”); *State v. Folsom*, 125 Or App 29, 32, 865 P2d 372 (1993), *rev den*, 319 Or 625 (1994) (new information supported filing of more serious charges after nine months).

It is not altogether clear from the cases under what circumstances prosecutorial vindictiveness violating due process would be deemed to constitute prejudice to the administration of justice.³ When there is no

³ Such conduct might also violate Oregon RPC 3.1 (prohibits a lawyer from taking action on behalf of client unless there is nonfrivolous basis in law or fact) and Oregon RPC 4.4(a) (prohibits lawyer from using means that have no purpose other than to “embarrass, delay, harass or burden a third person”).

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indication of actual vindictiveness, however, and the timing does not give rise to a presumption of vindictiveness, the threat to file more serious charges supported by probable cause in the context of plea negotiations does not, in and of itself, prejudice the administration of justice.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.6-8 (threatening criminal prosecution), § 8.10 (special responsibilities of a prosecutor), § 8.11 (conduct prejudicial to the administration of justice) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 94, 97 (2000) (supplemented periodically); and ABA Model RPC 8.4.