



The North Carolina State Bar

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January 29, 2013

Professor Jason Huber
Charlotte School of Law
2145 Suttle Ave.
Charlotte, NC 28208
VIA E-MAIL

RE: Proposed 2013 FEO 1-*Release/Dismissal Agreement Offered by Prosecutor to Convict*

Dear Professor Huber:

The Ethics Committee of the North Carolina State Bar met in regular quarterly session on January 24, 2013, and considered your inquiry. In response thereto, the committee has proposed the above referenced formal ethics opinion, a copy of which is attached. The proposed opinion will be published in the next issue of the *State Bar Journal*. Assuming no criticism of the proposed opinion is received following its publication, the committee will recommend its adoption to the Council at the Council's next meeting in April. If objection is received, the Ethics Committee will reconsider the proposed opinion at its April meeting and decide whether to recommend the proposed opinion's adoption to the Council or to revise or withdraw the proposed opinion.

Sincerely yours,

Alice Neece Mine
Assistant Executive Director

anm/lvh

cc: John Bruce Windy (Majer) Ortega
Brad Bannon
Burton Craige
Jeffrey P. Dunlaevy
William Hart Sr.

Proposed 2013 Formal Ethics Opinion 1
Release/Dismissal Agreement Offered by Prosecutor to Convict
January 24, 2013

Proposed opinion rules that a state prosecutor may not condition initiation of or cooperation in a proceeding to dismiss a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities or other public officials or entities.

Inquiry:

Defendant was convicted of rape in a North Carolina state court and sentenced to life in the North Carolina prison system. After Defendant served ten years, the alleged victim recanted. In the absence of the victim's testimony, there was no longer evidence sufficient to support the conviction. Prosecutor presented an agreement to Defendant, while in prison, offering to initiate proceedings to dismiss the conviction (and to recommend Defendant's release from prison) upon condition Defendant execute a release purporting to waive any civil claims for wrongful arrest, prosecution, and imprisonment against the prosecutor, law enforcement authorities, or other public officials or entities. After the agreement was signed, Prosecutor initiated a proceeding to vacate the conviction, the conviction was vacated, and Defendant was released from prison.

When a state prosecutor is made aware of new evidence that justifies the granting a motion for appropriate relief, may the prosecutor prepare, offer, or execute an agreement (a "release/dismissal agreement") that conditions the prosecutor's initiation of a proceeding to dismiss the conviction or the prosecutor's agreement not to object or contest such a proceeding initiated by the convicted person upon the convicted person's agreement to release civil claims against public officials or entities arising from the convicted person's arrest, prosecution, or imprisonment?

Opinion:

No.

This inquiry is limited to state court prosecutions in which the State did not also assert civil claims against the defendant arising from the same alleged criminal conduct.

The special responsibilities of a prosecutor are set for in Rule 3.8. As explained in the comment to the rule, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, cmt. [1]. Rule 3.8(a) specifically prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. When new evidence clearly demonstrates that a convicted person should be released from prison, the duty to "seek justice" requires a state prosecutor to initiate a proceeding to have the conviction vacated if not already initiated by the convicted person. Therefore, conditioning the initiation of that proceeding, or cooperation with a proceeding initiated by the convicted person, upon the convicted person's agreement to release civil claims

against the authorities arising from the convicted person's arrest, prosecution, or imprisonment violates the most basic tenets of a prosecutor's responsibilities as set forth in Rule 3.8. To imply that a prosecutor may withhold or contest the dismissal unless a release is executed by the convicted person also violates Rule 8.4(d) which prohibits conduct that is contrary to the administration of justice.