

# ETHICS OPINION

011115

**FACTS:** Attorney represents owners of a business that failed. Many of the business's customers have been left with unsatisfied obligations; however, Attorney accomplished a civil settlement on behalf of the business owners with their bank. Prosecutors are contemplating filing charges against the business owners for fraud, but have filed no action to date. The business owners have obtained some financing, desire to make good with the customers and propose to pay most, if not all, of the customers some money in exchange for a release of liability, including potential criminal liability. Attorney suggests that the alternative is to file bankruptcy, discharging the debts, ostensibly causing the customers to get nothing if the bankruptcy is successful. The attorney is proposing the following release language to the customers in his efforts to resolve all civil and criminal matters:

*In making this release, the Releasors expressly and unconditionally admit that the Releasees did not make any false statements, promises, or reports to the Releasors for the purpose of influencing in any way any action of the Releasors, including the parting of money or property. The Releasors expressly and unconditionally admit that the Releasees did not have an intent to defraud, deceive, or cheat the Releasors, and that the Releasees had an honest and good faith belief in the truth of their representations. The Releasors further expressly and unconditionally admit that the above-entitled matter is a civil dispute and no more, which has been fully and finally settled to the satisfaction of the Releasors.*

\*\*\*\*

*The Releasors represent that they have reviewed and understand this agreement, have obtained the advice of independent counsel, and that they enter into the terms and conditions of this agreement on the advice of counsel and that they agree to be bound thereby.*

The prosecutors are objecting to the language in the release, contending that the customers were defrauded and that they had said as much in witness interviews. The prosecutors also contend that an attempt to negotiate settlement of the civil cases unlawfully violates 18 U.S.C. section 1512 (the federal statute on witness tampering), and that the settlement language influences testimony by purchasing it. Finally, the prosecutors contend that the proposed settlement is unethical.

Attorney for the business argues that there was no intent to defraud; rather, the failure was the result of inexperience and mistake. Attorney offers that he knows some customers are willing to sign the release and that he is requiring the advice of independent counsel before they do.

**QUESTIONS PRESENTED:**

1. May an attorney representing a potential defendant in a criminal case contact the complaining witnesses to suggest a civil compromise?
2. Is the proposed settlement language unethical or illegal?

### **SHORT ANSWERS:**

1. Yes.
2. The proposed settlement language is not unethical, if modified as suggested in the discussion below. The legality of the language is beyond the purview of this Committee and we decline to proffer an opinioii on that issue.

### **DISCUSSION:**

Rules 3.4 and 4.3 of Montana's Rules of Professional Conduct apply to this situation. These provide, in pertinent part:

#### ***Rule 3.4 Fairness to Opposing Party and Counsel.***

*A lawyer shall not:*

*(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.*

\*\*\*

#### ***Rule 4.3 Dealing with Unrepresented Person.***

*In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.*

Rule 4.2 addressing communications with people represented by counsel does not apply to this inquiry because it is well settled that a complaining witness is not "represented" by the prosecutor. See Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* § 38.10 (3d ed. 2001).

Rule 4.3 does not preclude a lawyer from communicating with an unrepresented "victim" of an incident that may give rise to criminal charges against the lawyer's client. Nor does Rule 4.3 forbid negotiations with an unrepresented person. The *Restatement of the Law Governing Lawyers* says that "[a]ctive negotiation by a lawyer with unrepresented non-clients is appropriate in the course of representing a client" *Restatement (Third) of the Law Governing Lawyers* § 103, Comment b (2000). However, in any communication with the unrepresented person, the lawyer must not misrepresent his role and must correct any misunderstandings about the nature of his or her interest. The *Restatement* cautions that "[i]n dealing with an unrepresented nonclient, a

lawyer's words and actions can result in a duty of care to that person, for example, if the lawyer provides advice."

Misrepresentation and overreaching of an unrepresented person may make rescission of a contract appropriate. *Restatement*, Comments a, b.

The Oregon Bar Ethics Committee wrote about the issue: "An attorney suggesting a civil compromise, however, must be sensitive to the distinction between making the suggestion and advising the complaining witness about whether to accept the compromise. In this regard, it would be appropriate for an attorney to explain the meaning of a compromise and the effect it would have. Such information must be offered, however, in factual terms rather than as advice." Oregon Ethics Committee Formal Opinion No. 2000-163.

The Oregon Opinion further explains: "The suggestion of civil compromise does not constitute the type of conduct prohibited by [Oregon's equivalent to Rule 3.4].... Because the Oregon Legislature has created the mechanism of civil compromise, the suggestion by an attorney representing a defendant in a criminal case to a complaining witness for civil compromise does not constitute conduct that is prejudicial to the administration of justice....; to the contrary, it is conduct that is beneficial to the administration of justice."

In a similar fact pattern, the South Carolina Bar's ethics panel was asked for guidance about dealing with the victim of a traffic accident in which the inquiring lawyer's client was believed to be at fault. The lawyer wanted to meet with the injured victim with the goal of settling the case and forestalling possible criminal charges against the client. The client's insurer had already paid a claim and received a release from the victim under the terms of the client's automobile policy. The victim had not hired a lawyer.

The South Carolina Bar Ethics Advisory Committee concluded that the lawyer's contact with the victim would be permissible so long as it was limited in scope and form. The lawyer would be required to affirmatively advise the unrepresented party of the nature of his interest, and he could not give advice to her. Further, the Committee advised that the lawyer would be precluded from preparing a release for the unrepresented party unless the lawyer clearly advised the party to obtain independent legal advice in reviewing the documents. "{A} lawyer in such a situation is in a precarious position and might find it advisable to provide written notice clarif~'ing the lawyer's role and interest in the transaction." The Committee warned that if the lawyer's offer of settlement on behalf of his client could be construed as an attempt to silence the victim or to procure an agreement not to prosecute, the lawyer could face criminal liability for obstruction of justice. South Carolina Ethics Op. 94-07.

## **OPINION:**

Whether the lawyer's offer of settlement on behalf of his client is or could be construed as an attempt to "silence the victim," or otherwise affecting the "victim's" knowledge or testimony in the criminal proceeding, it is outside the role of this Committee to opine as to the legality of the action or the possibility of potential criminal liability for obstruction of justice.

Resolution of the civil responsibilities may have an impact on the potential criminal charges. The implications of this effect must be left to the prosecutors to consider and act upon according to their ethical standard (*see* Rule 3.8, Special Responsibilities of a Prosecutor). However, the prosecutors will have far less likelihood for objection if the settlement language proposed is modified to avoid language describing the ostensible "victim's" beliefs, mental states, or knowledge of facts, or express any legal opinion or conclusion related to the potential criminal prosecution. As currently proposed, the release language overreaches when it states the customers' understanding of the business owners' intent. This Committee agrees with the cautions contained in the South Carolina Committee's Opinion: that the Attorney for the business clearly advise, in writing, the unrepresented customers of the Attorney's role and interest in the transaction. This Committee views favorably the Attorney's requirement that the customers seek the advice of independent counsel before signing the release.

**CONCLUSION:**

A lawyer may communicate and negotiate a civil compromise with the "victim" of his client's possibly criminal behavior, subject to limitations on the scope of the communication. It is wise to keep the communications within the civil litigation realm and to avoid language affecting potential criminal charges, describing the "victims" beliefs, mental states or knowledge of facts. It is also required that a lawyer clarify his role and interest in the transaction. To the extent that a lawyer proffers advice, it is that the unrepresented party secures the advice of independent counsel before signing a release prepared by the lawyer.

**THIS OPINION IS ADVISORY ONLY**