ADVISORY ETHICS OPINION 87-16

SYNOPSIS:

A state's attorney may not insist as part of a plea agreement that a defendant enter a plea of guilty rather than *nolo contendere* when the sole motive of the prosecutor is to attain an advantage for the victim in subsequent civil litigation.

QUESTION PRESENTED:

When a criminal prosecution is filed in which there are potential civil ramifications (e.g., DWI with resulting fatality), is it ethical for the state's attorney to insist as part of the plea agreement that the defendant enter a plea of guilty rather than *nolo contendere* when the sole motive is to attain an advantage for the victim in subsequent civil litigation?

OPINION:

We have been asked our opinion as to whether a state's attorney may insist as part of a plea agreement that a defendant plead guilty rather than *nolo contendere* when the *sole* motive of the prosecutor is to attain an advantage for the victim in subsequent civil litigation. (The emphasis on the word "sole" was supplied by the inquiring attorney.) The request poses a hypothetical which in actual practice will not often occur. A prosecutor will usually have a variety of concerns about disposition of a matter which the prosecutor may properly consider when deciding whether or not to insist that a defendant be compelled to enter a plea of guilty. But if a single motive can be isolated and that sole motive is to assist a victim in civil litigation, the prosecutor may not insist on a plea of guilty. The answer to the question is, therefore, no.

DR 7-105(A) states as follows:

> A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

This role prohibits a lawyer from utilizing the criminal process *solely* for the purpose of obtaining an advantage in a civil matter. The role applies both to attorneys in civil proceedings and to attorneys fulfilling the function of prosecutor because "A prosecutor is also bound by the rules governing lawyers generally." *Annotated Model Rules of Professional Conduct,* Rule 3.9 (discussing the proposed Model Rule, not adopted in Vermont, and the former Rule DR 7-103(A), which still governs). We have found no cases or opinions addressing the point, but the language of the rule implies that a prosecutor should not be permitted to use any aspect of the criminal process *solely* to influence civil litigation. For example, the role provides that a lawyer shall not "participate in presenting" criminal charges when his/her sole motivation is to obtain an advantage in a civil action.

DR 7-105(A) attempts to clarify the separation between the criminal justice system and the civil law system. The obligation of a state's attorney is to serve the general public, that is, the client of the prosecutor is "the people" as a corporate body. A prosecutor's role is therefore limited to the criminal system. In *State v. Britton,* the court described a prosecutor's duty to further the state's interests as follows:

> A prosecutor's duty as a public officer is to serve the interest of the state in securing convictions of those who violate laws of this organized society. On a concomitant parity with the former duty is the duty that a prosecutor must conduct his office always to insure justice for those subjected to prosecution. Consequently, a prosecutor's duty to the accused is fairness. Though the public interest demands that a prosecution be conducted with energy, skill and zealousness, the State's Attorney should see that no unfair advantage is taken of the accused. "It is as much the prosecutor's duty to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime of which he maybe charged".[1] (citations omitted).

The *Britton* court went on to state that a prosecuting attorney should not represent conflicting interests.[2] Although the facts of *Britton* are distinguishable from the facts presented in this opinion (e.g., in *Britton* the prosecuting attorney was not permitted to offer legal advice to the defendant being prosecuted), the conflict of interest rationale applies to the present question. When a prosecutor steps out of his/her role in the criminal justice system to advance the cause of a civil litigant, a conflict of interest emerges. Since a prosecutor's client is the public, this obligation is fulfilled only when the prosecutor's actions are dictated by the needs of the public as opposed to private interests.

[1] 203 S.E.2d 462, 466 (W.Va. 1974).
[2] *Id.*

This analysis was applied by the court in *MacDonald v. Musick*[3] in facts converse to those presented here. In *MacDonald,* the prosecutor attempted to use the criminal process to protect a policeman in a civil proceeding. In its decision, the Court stated:

> It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case.[4]

Furthermore. a plea of *nolo* recognizes that a criminal defendant should not be compelled to build a civil suit against him or herself. It is important to recall that various motivations, other than guilt, all too often counsel such a plea.

It is also instructive to recall the admonition of E.C. 7-21:

> . . . using the criminal process to coerce adjustment of private civil claims on controversies is a subversion of the process . . . [and may imperil] the usefulness of the civil process in settling private disputes. . . .

[3] *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1980).
[4] *Id.* at 375.