

Opinion #132

The Committee has been asked by a county prosecutor to address the following question:

My predecessor and numerous other area prosecutors have utilized a procedure whereby NSF cases are referred to their offices and a initial letter is sent to the maker indicating the receipt of a complaint and the possibility of criminal prosecution by collection of the check by prosecutor's office.

It appears that the use by prosecutors of a "reminder" letter in NSF cases is widespread and has historically been used as a method to resolve cases. I have enclosed examples of the type of letters used in the Central Idaho area in this regard.

I would request an opinion from you and the "Standing Committee on Ethics and Professional Responsibility" as to whether the use of such a technique is violative of the Code of Professional Responsibility or any ethical constraints. The primary focus of my inquiry is whether a prosecutor violated ethical standards by use of demand letter letters to obtain funds for victims of NSF check when there is an implicit or explicit threat of criminal prosecution if restitution is not made.

The questioner has also included a number of sample letters from various prosecutor's offices.

The applicable rules are IRPC 4.4(c) and (d) which state:

Rule 4.4            Respect for Rights of Third Persons

In representing a client, a lawyer shall not:

\* \* \* \* \*

- (c) present or participate in presenting criminal charges solely to obtain advantage in a civil matter; or
- (d) threaten to present criminal charges in order to obtain advantage in a civil matter.

Notification to a potential defendant that criminal charges may be filed unless a satisfactory explanation can be provided would seem to be a prudent course for a prosecutor in many types of cases. That aspect of the practice would seem clearly to be permissible. The troubling aspect is whether the prosecutor's letters and efforts may also be extended to collection on the bad check.

No specific cases or ethics opinions that can be found rule specifically on the question presented above.

Clearly, a prosecutor may not threaten criminal prosecution on behalf of a private client. Such conduct has been the basis of discipline in other states. See, e.g.: Nebraska State Bar Ass'n. v. Gobel, 271 N.W.2d 41 (1978). Similarly, veiled threats by lawyers on behalf of clients have also been held to be improper. In Re Barrett, 443 A.2d 678 (N.J.1982) [Discipline for stating ". . . we are also pursuing the possibility of criminal action . . ."]; and In Re Vollintine, 673 P.2d 755 (Ak.1983) [Discipline for "you may find yourself criminally liable . . ."].

Several states have taken the position that making reference to criminal prosecution is permissible so long as no demand is made. Decato's Case, 379 A.2d 825 (N.H.1977); Maryland State Bar Ethics Opinion 86-42.

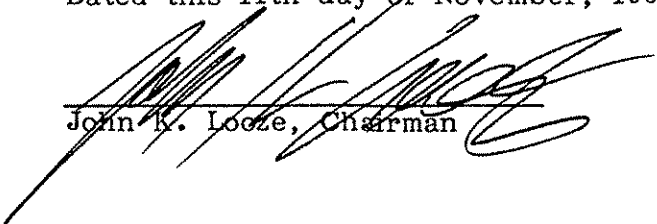
A number of states permit reference to criminal prosecution in a demand letter, so long as that reference is made in "statutory form." Utah State Bar Opinion 71; Florida Bar Opinion 85-3; Georgia Bar Opinion 26.

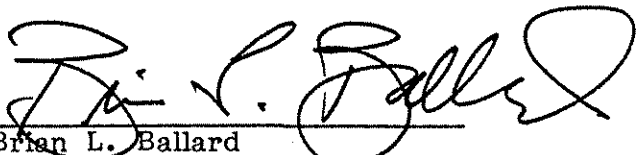
IRPC 4.4 reads: "In representing a client . . .", and we believe that this language is the starting point for answering the question. So long as an aggrieved person is communicating with the prosecutor strictly about pursuit of a criminal case, that person is not "a client." The prosecutor should be free to communicate the dissatisfaction of the complaining party, to share his/her understanding of the criminal statutes, and to advise that unless the parties resolve their differences that a criminal investigation could be imminent. In making those statements the prosecutor is representing the citizens of the jurisdiction and not the check-holder.

Once the prosecutor begins to make demand for payment of the check, however, she/he begins to assume the role of lawyer for the check-holder. Even if this relationship is not formalized by a contract of employment, the prosecutor has actually begun to "represent a client" in the sense that he/she is working to further the interests of that party. Once that relationship is created, further reference to criminal charges or prosecution would be construed as a "threat to present criminal charges in order to gain advantage in a civil matter."

Therefore, it is our opinion that a prosecutor may permissibly write to an alleged bad-check writer to inform them of the complaint of a citizen, and may go into some detail about the possible consequences of violations of the bad check statute. A prosecutor may not make demand or seek collection of the check, which would be a violation of IRPC 4.4(d).

Dated this 11th day of November, 1989.

  
John K. Looze, Chairman

  
Brian L. Ballard

Robert A. Anderson