

ADVISORY ETHICS OPINION 79-02

SYNOPSIS:

A state's attorney may not institute criminal proceedings in order to assist a third person in collecting moneys due and owing from the defendant.

QUESTION PRESENTED:

The question has been presented to the Professional Responsibility Committee as to what extent a state's attorney might participate in effectuating collection of a civil debt by use or threat of criminal prosecution.

OPINION:

We have been asked our opinion as to whether or not a state's attorney may institute criminal proceedings in order to assist a third person in collecting moneys due and owing from the defendants. The answer is a categorical "no."

In the case presented, the state's attorney, at the behest of a third person, brought criminal charges against the defendant for transferring personal property against which there was a lien, without notice to the buyer of the lien's existence, in violation of 13 V.S.A., Sections 2014, 2073, and Section 2075. The state's attorney first gave the defendant an opportunity to rectify the situation "by coming to new terms acceptable to" the complainant. The defendant was informed that unless he came to terms satisfactory to the complainant, criminal charges would be filed. When, after two such notices and a conversation, the defendant did not reach such an agreement, criminal charges were filed.

The state's attorney then wrote the complainant that "to resolve the case, we filed charges against" the defendant. Later, upon confirmation from the complainant that a satisfactory agreement on payment had been made with the defendant, the state's attorney dismissed the charges, without prejudice.

The issue arises because the former defendant thereafter failed to keep his agreement. The state's attorney drafted a letter to the former defendant threatening to reinstitute the original charges, if the defendant did not live up to the earlier agreement to repay. The state's attorney had second thoughts about the matter, however, and referred the draft to us for our opinion as to its propriety. The state's attorney states in his letter:

"Much of prosecution does involve State enforcement of private grievances which is entirely consistent with the theory and history of criminal law enforcement and the criminal justice system. It is my view that it is entirely proper for a prosecutor to attempt to reconcile disputes between a victim-complainant and an offender either prior to or after institution of a criminal proceeding based upon a complaint which sets forth a violation of the criminal laws.

To the extent that this adjudication reconciliation process breaks down, it seems to me proper for the prosecution to resort again to the tool which is designed not only to provide a neutral forum for the adjudication of factual controversies, but which also is a prerequisite step leading to the invocation of criminal sanctions. The tool is the bringing of a criminal charge."

We disagree with the quoted language in regard to the theory and history of criminal law enforcement. Our common-law criminal law initially punished offenses against the King's peace and was in no way involved in the collection of private debts. As our society developed and our population became more mobile, myriad new criminal laws have been enacted to punish those who did take advantage of the complexity and mobility to defraud others. This has had the two-fold benefit of removing barriers to commercial transactions on the one hand and reducing the need for an injured person to use "self-help" on the other. It has not, however, changed the role of a prosecutor from one whose job is to protect the King's peace to one whose job includes private collections.

The state's attorney's client is the people of the state collectively; namely, the state itself. The state's attorney's official relationship with persons in their individual capacities is, therefore, a relationship with third persons. Canon 5 regarding conflicts applies in full force in connection with the state's attorney's official relationship with third persons.

The state's attorney's decision whether or not to prosecute must be based upon his individual judgment as to the needs of the state, without regard to the personal benefit of third persons. Once a prosecution is begun on that basis, the fact of an agreement to pay a third party should not affect it in any way. [Nothing herein should be construed to suggest impropriety in a recommendation for restitution as a sanction in connection with sentence, nor as part of pre-trial diversion in the case of a

juvenile or first offender. What we are concerned with here is the use of the criminal law solely and explicitly for the collection of private moneys admittedly owed and not for the punishment of a malefactor for the overall purposes of criminal law enforcement.]

While the foregoing seems clear from the ethical considerations of Canon 5, the disciplinary rules of that canon do not appear to directly cover the situation for a full-time, as opposed to a part-time, state's attorney. The disciplinary rules under other canons also do not appear to directly address the matter. Attention is directed, however, to DR 7-102(A)(1) and DR 7-105(A).

The latter disciplinary rule reads:

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

While the "advantage" referred to in this disciplinary rule is clearly the lawyer's advantage or the advantage of his client, the rule still seems apposite. For, if a state's attorney threatens to bring a criminal action solely to collect a private debt, must he not be proceeding on the basis that he represents every one of his constituents individually. We have indicated our position that such is not the case. If it were, DR 8-101(A)(2) and (3) might also come into play, since a state's attorney could not possibly threaten and/or bring suit in every case in which there is an admitted delinquent private debt, and he would have to choose from among his supporters those that he would assist in this fashion.

A state's attorney should be influenced in starting a prosecution only by matters directly related to the purposes of criminal law enforcement. He should remember at all times that the power of his office to invoke the punishment inherent in a breach of the criminal law should be used for these purposes and for no others. There often will be a reasoned purpose to invoke the criminal law against a civil debtor, but the purpose of collecting a civil debt will never suffice.