

Committee Opinion
May 18, 1989

LEGAL ETHICS OPINION 1230

ACQUIRING AN INTEREST IN THE
LITIGATION – CONFLICT OF
INTEREST – COLLECTION PRACTICE:
ATTORNEY FILING CRIMINAL
WARRANT AGAINST JUDGMENT
DEBTOR AND PURSUING CIVIL
PROCESS AGAINST THE SAME ON
BEHALF OF CLIENT.

You have advised that an attorney represented a client in a collection proceeding in which a payment plan was agreed upon by the judgment debtor who presented a check to the attorney payable to his firm. The check was then deposited in the firm's trust account and, after several weeks, disbursements were made to the client and to the firm. Approximately one month later, the check was returned for insufficient funds; however, the firm has not sought to recover the funds disbursed to the client nor has the debtor made any further payments under the agreement in the civil case.

You wish to know whether it would be proper for the firm to obtain a criminal warrant against the debtor for the worthless check tendered to the firm with the attorney as the complaining witness. If it would be proper to obtain the criminal warrant, may the attorney continue to pursue civil process, such as garnishment or levy, in an effort to collect the balance due on the judgment on behalf of the attorney's client. Finally, if it would not be proper to obtain a criminal warrant, what recourse would the firm have for the loss incurred due to the debtor's worthless check?

The Committee opines that the first and third questions you have presented in your inquiry are legal questions which are beyond the purview of the Committee and do not raise any ethical issues for the Committee's consideration. However, the second question concerning whether the attorney may continue to pursue civil process on behalf of the client, if he has or will obtain a criminal warrant against the judgment debtor, raises a potential ethical dilemma.

Disciplinary Rule 5-101(A) [DR:5-101] provides that a lawyer shall not accept employment if the exercise of his independent professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client. Also, EC:5-2 states that a lawyer should carefully refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client. Ethical Consideration 5-3 [EC:5-3] further provides that the self-interests of a lawyer which may affect property of the client may interfere with the exercise of free judgment on behalf of his client, and if there is a likelihood of interference that can be foreseen by the lawyer, he should explain the situation to his client and should decline employment or withdraw unless his client consents to the continued representation after full disclosure.

The Committee is of the view that if the attorney, as the complaining witness, has or will obtain a criminal warrant against the judgment debtor, the continued representation

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of the client against the judgment debtor is improper absent the informed consent of the client after full and adequate disclosure prior to obtaining the criminal warrant. The committee believes that the instant case is one that tends to place the self-interests of the lawyer in conflict with those of the client since both seek to recover a debt from the same, but limited, source. Hence, the continued representation is permissible only if the client's informed consent has been obtained after full and adequate disclosure under the circumstances.

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