Committee Opinion
January 14, 1991

LEGAL ETHICS OPINION 1388

THREATENING DISCIPLINARY/ CRIMINAL CHARGES: ATTORNEY ADVISING OPPOSING COUNSEL THAT CRIMINAL CONDUCT MAY HAVE OCCURRED AND ASSISTING CLIENT TO PRESENT EVIDENCE TO COMMONWEALTH'S ATTORNEY.

You have indicated that an attorney's client operates a business in the District of Columbia, which business includes a check-cashing service operated on a commission basis. A Virginia corporation drew checks on a Virginia bank, made payable to a Maryland corporation and signed by an agent of the Virginia corporation. After an agent of the Maryland corporation presented the checks for payment through the client's service and received cash proceeds, all the checks were dishonored. The Virginia corporation subsequently executed a confess judgment promissory note for the full amount of the bad checks, personally guaranteed by the agent who had presented the checks, in favor of the client. Civil actions have been filed against the Virginia corporation and the agent, who are represented by counsel. You indicate the attorney's belief that the actions of the corporation and its agent may violate Virginia Code § 18.2-181, the “Bad Check Law.” Furthermore, you advise that the client wishes to refer these matters to the appropriate criminal authorities for investigation. You indicate that it will then be necessary for the attorney to assist the client in presenting evidence to the Commonwealth's attorney, in discussing applicable law, and in encouraging the Commonwealth or the District of Columbia authorities to investigate the case. Finally, you indicate that the attorney has discussed the civil aspects of this matter with opposing counsel, but has never alluded in any way to the existence of criminal conduct or the potential for criminal prosecution. You do advise, however, that there is a dispute as to whether the client's prior attorney earlier had alluded indirectly to the potential criminal nature of opposing parties' conduct.

You have requested that the Committee opine as to the propriety of the attorney's actions in pursuing criminal action against the corporation and its agent and in attempting to resolve the criminal and civil matters through settlement. Specifically, you have requested that the Committee consider the attorney's conduct, prior to his making any criminal complaint: (1) in advising opposing counsel that criminal conduct may have occurred, that the client wants to refer the matter for criminal investigation, and that the client would refrain from such referral if the bad checks were made good; and (2) in assisting the client to present evidence to the Commonwealth's attorney and encouraging investigation without providing any advance notice to opposing counsel. Furthermore, you ask the Committee to consider the attorney conduct, following the filing of criminal charges against the corporation and agent: (1) in contacting opposing counsel and stating that the client will attempt to have the charges dismissed upon payment of the bad checks; and (2) in negotiating a settlement, initiated by opposing counsel, whereby the corporation and agent offer payment in exchange for the client's attempt to dismiss the criminal charges. Finally, you ask that the Committee opine generally as to the meaning of the term “solely” when used in the context of DR:7-104 and, based upon that

definition, when it may be permissible for an attorney representing a client in a civil matter to threaten to present criminal charges.

The appropriate and controlling disciplinary rule to the issue you raise is DR:7-104(A), which prohibits a lawyer from presenting, participating in presenting, or threatening to present criminal [or disciplinary] charges solely to obtain an advantage in a civil matter. Further guidance is found in Ethical Consideration 7-18 [EC:7-18] which advises that threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of the criminal process, designed for the protection of society as a whole, and an impairment of the usefulness of the civil process, designed for the settlement of disputes between parties. Additionally, the Ethical Consideration exhorts that "the improper use of criminal process tends to diminish public confidence in our legal system."

The Committee has earlier opined that it is improper for an attorney to write to an opposing party indicating either that a particular action warrants criminal prosecution or that if the party does not meet the attorney's demands made on behalf of his client, the attorney will seek criminal prosecution. (See LE Op. 715 (demanding sum for forged check); LE Op. 716 (demanding that party reclaim fraudulent check); LE Op. 776 (demanding payment on a bad check); and LE Op. 1233 (attorney representing condominium unit owners "discussing" with developer the criminal aspects of developer's actions in improperly retaining condominium dues)). Conversely, the committee has opined that it is not improper for counsel for a criminal victim to seek accord and satisfaction in exchange for the dismissal of the criminal charge by the Commonwealth, *when the criminal charge is already pending, independent of any action by the victim's counsel*. LE Op. 547 (emphasis added). Finally, LE Op. 1063 indicates that a threat of criminal prosecution is not improper when it is made in an effort to stop harassing actions rather than to gain an advantage in a concomitant civil matter.

The Committee is of the opinion that, irrespective of the client's wishes to refer the matter for criminal investigation and to forgo such referral if the bad checks were made good, it would be improper for the attorney to advise opposing counsel that criminal conduct may have occurred. The Committee views such an allusion to "advising" as tantamount to the threat proscribed by DR:7-104. (See *Crane v. State Bar*, 635 P.2d 163, 165 (Cal. 1981); *In re Barrett*, 443 A.2d 678, 680 (N.J. 1982).) In light of that determination, the client's desires would not override the attorney's responsibility under DR:7-102(A)(8) to refrain from "knowingly engag[ing] in . . . conduct contrary to a Disciplinary Rule." (See also *In re Charles*, 618 P.2d 1281 (Or. 1980).) In addition, the committee opines that it would be similarly improper for the attorney to encourage a criminal investigation regardless of whether advance notice had been provided to opposing counsel, since the plain language of DR:7-104 similarly prohibits the attorney from presenting or participating in the presentation of criminal charges when the intent is to gain an advantage in a concomitant civil matter. The Committee is of the opinion, however, that it is not improper for the attorney to merely report facts of a possible law violation to the appropriate authorities if the report (1) is discrete; (2) does not put pressure on the prosecutor to take action; (3) is not conveyed to the person charged; and

(4) does not, by its timing, suggest a punitive or extortionate intent. Wolfram, *Modern Legal Ethics* at 717; see also *People ex rel. Gallagher v. Hertz*, 608 P.2d 335, 338 (Colo. 1979).

In the event that criminal charges have been filed independent of any action or encouragement by the attorney involved in the civil matter, the Committee believes that the conclusions reached in LE Op. 547 would permit the attorney to seek accord and satisfaction or negotiate a settlement in exchange for the dismissal of the pending criminal charge.

Although the Committee believes that the determination of when criminal charges are presented or threatened *solely* to obtain an advantage in a civil matter requires a factual case-by-case determination, the Committee is of the view that the true subjective motive may be very difficult to ascertain during the simultaneous pendency of the civil case. Therefore, the lawyer's assistance in threatening, presenting or prosecuting the criminal charges against the opposing party would be rendered suspect as long as there is a possibility that an advantage could result in the pending civil suit. Texas Ethics Op. 453 (11/13/87). See also ABA Informal Op. 1427 (August 15, 1978). Furthermore, the Committee recognizes that when criminal charges are brought and dropped upon settlement of a civil case, it may be fair to assume that they were brought to gain a civil advantage.

In response to your final inquiry, the Committee believes that the intent and the plain language of DR:7-104 would preclude an attorney from ever threatening to present criminal charges when the attorney is representing a client in a civil matter related to the criminal charges against the potential criminal defendant.

While not considering the legal ramifications of an attorney threatening to file suit to gain a monetary advantage in a civil matter, the Committee directs your attention to the potential for such a demand being viewed as malicious prosecution or an extortion attempt. *Robinson v. Fimbel Door Co*., 306 A.2d 768 (N.H. 1973); *Libarian v. State Bar*, 239 P.2d 865, 866 (Cal. 1952).