New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 821 – 2/11/08

Topic: Threat by prosecutor of criminal prosecution to aid enforcement of civil claim.

Digest: A prosecutor who suggests a civil resolution in lieu of a criminal prosecution must have probable cause to support the criminal charge.

Code: DR 7-102(A)(1), (2); DR 7-103(A); DR 7-105(A); EC 7-13; EC 7-21.

QUESTION

1. May a prosecutor, in aid of civil efforts to recoup alleged overpayments of welfare benefits, communicate to an alleged recipient of such an overpayment that the prosecutor will defer criminal prosecution to allow time for civil resolution but will be required to consider prosecution further if there is no satisfactory civil resolution?

OPINION

2. An assistant district attorney ("ADA") assigned to the welfare fraud bureau in the district attorney's office in which the ADA serves has been asked by the Department of Social Services ("DSS") in the county to send a letter, drafted by DSS, to persons suspected of having received welfare benefits for which they were not eligible. The letter would state that the District Attorney's office has received a report "prepared by the Investigative/Fraud Unit" that the recipient had received welfare benefits for which the recipient was not eligible. The letter would further state that the District Attorney's office "has accepted this case for proposed review for criminal prosecution," but suggests "as an alternative to prosecution," that the recipient contact a DSS fraud investigator to work out a civil resolution of the claim. The letter invites the recipient to discuss with the DSS investigator any concerns the recipient may have that the complaint is in error or unfounded but goes on to state: "Should this procedure be followed [administrative resolution of the complaint as a civil matter], my office intends to defer any possible prosecution. However, unless the situation, which led to the filing of this complaint, is satisfactorily resolved, I will be required to review this matter again to determine if prosecution is then warranted."

3. The proposed letter, which can be readily characterized as a "we won't prosecute if you pay up" letter, will likely have a coercive effect on its recipient. As such, the letter may be seen to implicate DR 7-105(A), which states, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter," and EC 7-21, which cautions against using "the criminal process to coerce adjustment of private civil claims."[1]

4. In carrying out his or her special responsibilities as a public prosecutor, a prosecutor needs to be quite careful in suggesting civil resolution as a means of avoiding criminal prosecution. In the Committee's view, the letter proposed here does not fulfill those special responsibilities. In coming to that conclusion, however, we need not and do not reach the applicability of EC 7-21 or of DR 7-105(A). Rather, we look to DR 7-102(A)(1) and (2) and DR 7-103(A).

5. DR 7-102(A)(1) and (2) enjoin all lawyers not to assert or "advance," *inter alia*, an unwarranted position or claim. Under DR 7-103(A), public prosecutors, in particular, are barred from instituting criminal charges that are not supported by probable cause. EC 7-13 explains: "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict." If there is no probable cause or a case is unprovable, a prosecutor must refrain from instituting charges or, once having done so, must drop the charges and do so without exacting any price.[2] Thus, before making a charge of unlawful conduct against anyone, and throughout the maintenance of that charge, a public prosecutor has a responsibility to investigate the facts and circumstances and to confirm that there is and continues to be probable cause to believe that the target of that charge is guilty and that the charge is provable.

6. Even though the proposed letter states only that the District Attorney's office may "review" the case for criminal prosecution, and invites the recipient to discuss why the complaint is in error or unfounded, we believe that the clear import of the letter is that the ADA who signs it believes that the recipient has committed a crime ("it appears from the report [of the Investigative/Fraud Unit] that you received benefits . . . you were not eligible to receive") and that the recipient will be prosecuted if he or she doesn't pay.

7. In N.Y. State 770, we opined that it would be "clearly not ethical" for a prosecutor to reach an agreement not to bring charges on condition that the person who would be

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[1] Cf. Cowles v. Brownell, 73 N.Y.2d 382, 388, 389, 538 N.E.2d 325, 328, 329, 540 N.Y.S.2d 973, 976, 977 (1989) (Titone, J., concurring in the result) (agreements in which criminal charges are dismissed in exchange for a release from civil liability "offend public policy" because, among other reasons, they "encourage prosecutors to violate" DR 7-105 and EC 7-21).

[2] N.Y. State 770, at 3 (2003) ("A prosecutor . . . should not seek a plea to reduced charges unless there is probable cause to believe that the defendant has committed an offense."); Cowles, 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975 (if the defendant is innocent or the case is unprovable "the prosecutor [is] under an ethical obligation to drop the charges without exacting any price for doing so").

charged make a donation to a non-profit organization, "unless there is probable cause that the person committed an offense."[3] We conclude that the same is true here, where the proposed letter would seek to extract a settlement of a claimed civil liability to DSS.

8. As the Court of Appeals said in *Cowles v. Brownell*, "The prosecutor's obligation is to represent the people and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution."[4] If the District Attorney or an ADA has investigated a matter sufficiently to have formed an opinion that there is probable cause, he or she would be, as a general matter, ethically free to seek lawful dispositions other than prosecution to judgment. In that event, the ADA could, for example, write a letter such as the one at issue here calling upon the recipient to pay, or to explain why he or she should not be required to pay, to avoid the commencement of a formal prosecution.

9. Needless to say, if upon investigation the prosecutor is not able to form an opinion that there is probable cause, he or she would be ethically bound not to prosecute and not to seek a *quid pro quo* for abstaining from doing so. *A fortiori*, if a prosecutor has not conducted an investigation sufficient to support an opinion one way or the other, that prosecutor would not be ethically free to charge the would-be recipient with any unlawful conduct or to propose a disposition alternative to prosecution as in the proposed letter.

CONCLUSION

10. A prosecutor may propose an alternative civil disposition to a criminal charge, but only if, after due investigation, the prosecutor has formed an opinion that there is probable cause to support the charge and that it is provable.

(27-07)

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[3] N.Y. State 770, at 10.

[4] 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975.