LRB-2941

2003 DRAFTING REQUEST

Bill

Received: **07/02/2003**

Received By: **chanaman**

Wanted: **As time permits**

Identical to LRB:

For: **Judith Robson (608) 266-2253**

By/Representing: **Don Dyke**

This file may be shown to any legislator: **NO**

Drafter: **chanaman**

May Contact:

Addl. Drafters: **mdsida**

Subject: **Criminal Law - miscellaneous**

Extra Copies: **Don Dyke**

Submit via email: **YES**

Requester's email: **Sen.Robson@legis.state.wi.us**

Carbon copy (CC:) to: **don.dyke@legis.state.wi.us**

Pre Topic:

No specific pre topic given

Topic:

Deferred prosecution agreements for worthless check violations; licensing requirement for collection agencies

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?							Local
/1	rryan 07/22/2003	jdyer 08/25/2003 jdyer 08/26/2003	chaskett 08/26/2003		lemery 08/26/2003		Local

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/2	mdsida 11/24/2003	jdyer 11/25/2003 jdyer 11/25/2003	pgreensl 11/25/2003	_____ _____ _____ _____	sbasford 11/25/2003		Local
/3	mdsida 01/23/2004	jdyer 01/23/2004 jdyer 01/23/2004	rschluet 01/23/2004	_____ _____ _____ _____	sbasford 01/23/2004	lnorthro 02/09/2004	

FE Sent For:

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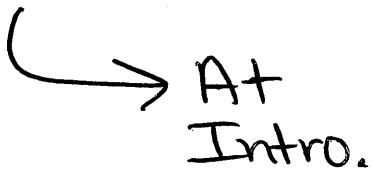

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FE Sent For:

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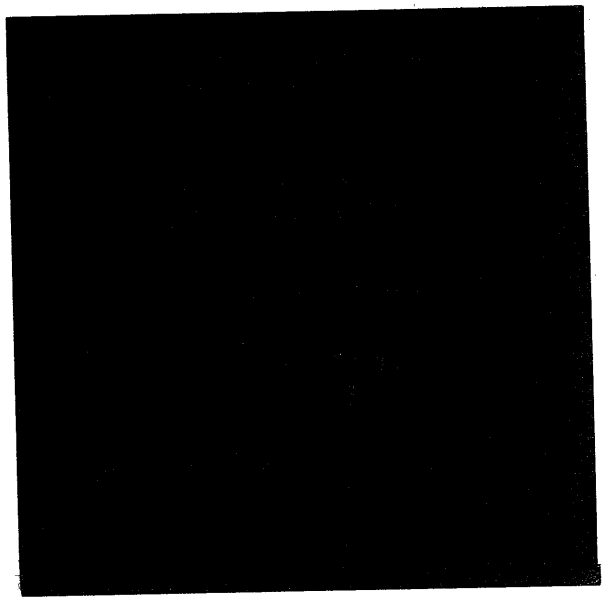
David J. O'Leary
Rock County District Attorney

Perry L. Folts
Deputy District Attorney



May 13, 2003

Mr. W.F. Petzrick
1698 Morse Avenue
Beloit, WI 53511-3528

In re: Worthless Check Offender Program

Dear Mr. Petzrick:

Pursuant to the several meetings we have had on this matter, I am sending you this letter to outline the assistance your association can provide. I have been attempting for some time to create a check offender program in Rock County whereby the Rock County District Attorney can effectively handle the volume of bad checks written to area businesses each year. Winnebago County, Illinois, created such a program over ten years ago, and it has been successful in prosecuting offenders and returning restitution to victims of this type of crime in excess of $1,000,000. Winnebago contracts with a private agency to not only send the necessary notices to the offenders, but also to provide the educational component required of any deferred prosecution program to prevent recidivism. The offender program also works with area businesses to make sure that the necessary information is obtained to make prosecution of worthless check cases possible.

The November 26, 2002, Attorney General's Opinion issued to Rock County sets forth the problem with operating such a program in Wisconsin. Sec. 218.04, Wis. Stats., classifies any private vendor as a "collection agency" if the primary purpose is to receive payment for an unpaid debt. The problem arises that there is not a statutory exemption for district attorneys, whose primary purpose is not to collect a debt, but to enforce the laws regarding issuance of worthless checks and prevent future recidivism. The fact that restitution is sought on behalf of the victims of this crime, as in most types of theft cases, does not change the fact that prosecution of the offense is still the primary goal of the district attorney's office. The Wisconsin State legislature would need to create an exception which would permit the district attorney's office to create a worthless check offender program which would not fall into the definition of a "collection agency" under sec. 218.04, Wis. Stats.

Without such a program, it is impossible to prosecute all the worthless checks issued in Rock County simply because of the volume of work involved. Most local municipalities prosecute a small portion of these offenses, such as the first three to five worthless checks issued by a person. After that, the additional offenses go unprosecuted. A business such as Wal-Mart or Target would have such a high volume of worthless checks to prosecute that is would swamp most offices who attempt to handle them.

If you have any questions concerning this information, please call at your convenience. Otherwise, you may wish to discuss your concerns about these types of cases with your local legislative representatives to see if they would support such a change in the law.

Very truly yours,

David J. O'Leary
Rock County District Attorney

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

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P.O. Box 7857
Madison, WI 53707-7857
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Steven E. Tinker
Assistant Attorney General
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608/266-0764
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November 26, 2002

Mr. Thomas A. Schroeder
Corporation Counsel
51 South Main Street
Janesville, WI 53545

Dear Mr. Schroeder:

Attorney General Doyle has asked that I respond to your opinion request of March 4, 2002, regarding a proposal of a private vendor to the Rock County District Attorney that it be allowed to operate a first offender worthless check program through the district attorney's office. The district attorney would provide the vendor with space located in the district attorney's office. The vendor would assign staff to the district attorney's office and would assume responsibility for bookkeeping related to the program. The vendor would then be responsible for pursuing a participating merchant's worthless checks. The participating merchants would promise not to separately pursue remedies against the issuers without the vendor's consent.

The vendor's employees would attempt to collect payment from the individuals accused of issuing worthless checks and would correspond with those individuals on the district attorney's letterhead. However, the vendor and its employees and agents are deemed independent contractors and are prohibited from holding themselves out as members of the district attorney's office.

As part of the diversionary process, the offender would be required to undergo a class or counseling on basic issues related to financial management and the impact of issuing worthless checks. The offender would pay a fixed fee to participate in the program. The fee revenues would be used to fund the training and pay vendor costs. The fee would cover the costs of running the program.

You have requested an informal opinion on four questions related to this proposed program.

I. First Question: Is the private vendor that would operate the program a collection agency within the meaning of Wis. Stat. § 218.04?

Our opinion is that the private vendor would be a "collection agency." A "collection agency" is defined by the statute as "any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness." Wis. Stat. § 218.04(1)(a). The vendor here would be engaged in the business of collecting payment on checks representing debts owed to creditors other than itself and thus would meet the statutory definition. In addition, this office has previously stated that "any person who holds himself out to debtor and to creditor alike as able to effectuate the payment of accounts, and uses or allows his name to be used to gain the psychological advantage arising from the entry of a third person into the debtor-creditor relationship for the purpose of bringing pressure upon the debtor to pay his account, is engaged in collecting and is subject to the statute." 39 Op. Att'y Gen. at 428. Again, the vendor would be considered a collection agency under that reasoning.

The fact that the vendor would receive its fee from debtors rather than from creditors does not prevent it from being considered a collection agency. One of the purposes of the collection agency law is to ensure that such agencies safely handle funds that belong not to the agency but to the creditors for whom the debts are being collected. *See* 39 Op. Att'y Gen. at 427. By this reasoning the vendor should be subject to regulation under Wis. Stat. § 218.04 because, even though its own costs would be covered by a fee paid by the debtors, it would nonetheless be collecting, receiving and handling funds belonging not to itself, but to the creditors. Any time such activities take place, regulation to protect the public is appropriate. Irresponsible financial practices by any entity engaged in the practice of collecting debts for others could cause financial injury to creditors and debtors alike. The purpose of the collection agency law thus demands that any entity engaged in the practice of pursuing, collecting and handling funds owed to others should be considered a "collection agency," regardless of how that entity obtains its own fee for its services.[1]

The fact that the vendor would be acting in association with the district attorney's office also would not prevent it from being considered a collection agency. The requirements of the collection agency law do not apply to "attorneys at law authorized to practice in this state and resident herein," Wis. Stat. § 218.04(1)(a), but this office has narrowly interpreted that exception

[1]Under the sample agreement submitted by the corporation counsel, the district attorney would be responsible for providing for "the collection, recording and/or daily deposit of program receipts." If this means that all aspects of the collection and handling of funds owed to creditors would be under the control of government officials, then it is possible that at least part of the rationale for regulating the vendor as a "collection agency" would not apply. The sample agreement also says, however, that the vendor is responsible for issuing checks to merchants for funds recovered in the program.

and has said that persons operating "what is essentially a collection agency business" cannot escape regulation under the collection agency licensing law simply by becoming associated with a law office. 31 Op. Att'y Gen. at 378. It follows that the private vendor operating the proposed check collection program could be considered a collection agency within the meaning of Wis. Stat. § 218.04, in spite of its connection with the district attorney's office.

If this proposal is going to go forward, it would be appropriate to also obtain an opinion from the Department of Financial Institutions (DFI). If the vendor is a collection agency under the statute, then the proposed program could not legally go into effect unless the vendor first obtains a license from the division of banking in DFI. *See* Wis. Stat. § 218.04(2)(a). Because DFI is charged with administering and enforcing Wis. Stat. § 218.04, it is the appropriate agency to make an initial determination as to whether that statute applies to the proposed program.

II. Second Question: Would the private vendor be a debt collector within the meaning of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692a?

As we noted in earlier correspondence, this question asks about the applicability of a federal statute to the private vendor in question. Except in extraordinary circumstances, this office does not issue opinions on the applicability of federal statutes and therefore will not express an opinion on this question. It is notable, however, that federal courts have held that attempts to collect payment on bad checks do constitute debt collection practices subject to the FDCPA. *See Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997); *Duffy v. Landberg*, 133 F.3d 1120, 1124 (8th Cir. 1998). Accordingly, two federal district courts have held that it could not be said, as a matter of law, that vendors operating check collection programs similar to the program at issue here were not "debt collectors" within the meaning of the FDCPA. *See Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp.2d 988 (W.D. Mich. 2001); *Liles v. American Corrective Counseling Services*, 131 F. Supp.2d 1114 (S.D. Iowa 2001). In particular, those courts found that the connection of the vendors in those cases with local government officials did not transform the vendors into government officers or employees who would be exempt from the FDCPA under 15 U.S.C. § 1692a(6)(C). It thus appears likely that the vendor operating the proposed program at issue here would be considered a debt collector within the meaning of the FDCPA.

III. Third Question: Would the vendor, when acting pursuant to its contract with the district attorney's office, be acting "under color of state law" for purposes of determining liability under 42 U.S.C. § 1983?

For the reasons set forth in the response to the prior question, our office will discuss this question, but not express an opinion. In addition, where private conduct is involved, as it is here, the U.S. Supreme Court has emphasized that the state action inquiry requires "sifting facts and weighing circumstances" on a case-by-case basis. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). This office cannot resolve such fact-specific questions. *See* 77 Op. Att'y Gen. Preface, 3.C. (1988).

Based on the sample agreement submitted, however, it appears possible that the vendor could, under some circumstances, be found to be acting under color of state law within the meaning of 42 U.S.C. § 1983. State action by a private actor may be found: (1) where the state and the private entity maintain a sufficiently interdependent or symbiotic relationship, *see Burton*, 365 U.S. at 722; (2) where the state requires, encourages or is otherwise significantly involved in nominally private conduct, *see Lombard v. State of Louisiana*, 373 U.S. 267 (1963); or (3) where the private entity exercises a traditional state function, *see Marsh v. State of Alabama*, 326 U.S. 501 (1946). Under the sample agreement, the responsibilities of county officials include: "[o]verall administration of the program . . ."; development of letters to be sent to offenders on county letterhead; supervision of the issuance of such letters; provision of legal advice and services, including the prosecution of uncooperative offenders; collection, recording and daily deposit of program receipts; provision of audit services; and provision of office space. These activities arguably could suffice to establish an interdependent or symbiotic relationship between the county and the vendor and could significantly involve county officials in the vendor's conduct. In addition, the vendor's activities would include threatening debtors with criminal prosecution – an activity traditionally reserved to the state. It is thus possible that the vendor could be held liable under 42 U.S.C. § 1983 if it violated a debtor's constitutional rights.

IV. Fourth Question: Would the proposed program create potential liability problems for the county either under 42 U.S.C. § 1983 or under general tort theories of liability?

The question of potential county liability under 42 U.S.C. § 1983 cannot be conclusively answered without specific facts for the reasons already given. Under most foreseeable circumstances, however, county liability would appear to be unlikely because local governments cannot be held liable under 42 U.S.C. § 1983 on the basis of *respondeat superior*. *See Monell v. Dept. of Soc. Serv. of City of N. Y.*, 436 U.S. 658, 690-91 (1978). Only if an official policy or custom of the county were found to be responsible for a constitutional violation would the

county be potentially liable. *See id.* at 694-95. The sample agreement, on its face, does not appear to countenance any unconstitutional practices. Therefore, even if the vendor, while acting under that agreement, were to violate an individual's constitutional rights, the county would not be liable unless a policymaking official of the county either directed the vendor's unconstitutional actions, *see Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), or was aware of those actions and acquiesced in them with deliberate indifference to the individual's constitutional rights, *see Bd. of County Com'rs of Bryan County v. Brown*, 520 U.S. 397 (1997).

As for general tort liability, the answer depends on whether the vendor would be considered an independent contractor or an agent of the county. *See* 69 Op. Att'y Gen. 197, 198-200 (1980). Municipalities may be held liable, under the doctrine of *respondeat superior*, for the torts of their agents, but they are not liable for the torts of independent contractors. *See id.* The primary factor distinguishing an independent contractor from an agent is the degree of control exercised by the municipality over the details, means or mode of accomplishment of the work performed by the private actor. *See id.* (citing cases).

The sample agreement submitted by the corporation counsel expressly provides that the vendor shall be considered an independent contractor. While such a provision is not determinative of the issue, it does indicate the intent of the parties. Nevertheless, in considering potential liability, a court would consider whether, as a factual matter, the county exercised sufficient control over the work performed by the vendor for the latter to be considered an agent of the county. Based on the sample agreement and the proposed relationship between the vender and the district attorney's office, it cannot be said with certainty whether the county would have enough control over the vendor's work for the latter to be considered an agent of the former.

In addition to the questions you have posed, this proposal gives rise to a number of concerns about the authority of the district attorney to enter into this agreement. As a precondition to diversion, the offender must agree to pay a fee. This fee covers the vendor's administrative costs of running the program and providing classes for worthless check writers. A question arises whether the district attorney may assess a fee as a precondition to participating in this program. As a general rule, the state constitution or statute prescribes the district attorney's official authority and duties. *See* 27 C.J.S. *District and Prosecuting Attorneys* § 20 (1999). The Wisconsin Constitution does not define the power and duties of the district attorney. *See* Wis. Const. art. VI, § 4. Absent a constitutional grant of authority, the district attorney must rely upon a legislatively conferred grant of authority to exercise the power and duties of the office. We have found no provision within Wis. Stat. ch. 978 or the worthless check statutes, Wis. Stat. §§ 943.24 and 943.245 which expressly authorize the district attorney to assess fees for a worthless check diversion program.

An additional issue raised by this proposal is whether the district attorney may enter into contractual language agreeing to indemnify the private vendor it utilizes to collect worthless

checks. For example, in Winnebago County, Illinois, the prosecutor and the private entity agreed that the County would indemnify the firm "against any and all claims . . . made by offenders which arise out of a claim under the Fair Debt Collection Practices Act, the Illinois Collections Practices Act, or other state and federal regulations related to debt collection, including, but not limited to, attorneys' fees and costs." Wisconsin Stat. ch. 978 does not provide the district attorney with authority to enter into agreements to indemnify a private vendor working under its direction to pursue worthless check claims. The district attorney's agreement to indemnify a private entity may be construed as waiver of the governmental immunity defense in actions brought under the Fair Debt Collection Practices Act. Furthermore, the indemnification agreement may also undermine the state's authority to assert absolute or qualified immunity as a defense to an action.

Is indemnification necessary to a Wis. program?

Lastly, any agreement entered into must be carefully drawn so as not to violate the provisions of SCR 20:3.10 which prohibits a lawyer from threatening criminal prosecution solely to obtain an advantage in a civil matter.

Sincerely,

Steven E. Tinker
Director, Criminal Litigation
Antitrust and Consumer Protection Unit

SET:jjn

c: David O'Leary
District Attorney

tinkerse\cor\rock county memo.doc

P/C to Don Dyke

Address issues raised in AG letter

P/C to Kelley in Robson's office

- Don't exempt private agency under contract w/ DA from caller agency licensure requirement – just the DA
- Do authorize DA to charge fee
- Don't authorize DA to indemnify private vendor

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–2941/P1
RLR:....

In 7/22/03

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

D-Note

AN ACT ...; **relating to:** deferred prosecution agreements for persons charged with issuing a worthless check or other order for payment and allowing a district attorney to collect money owed to others.

Analysis by the Legislative Reference Bureau

Under current law, a person who intentionally issues a worthless check for $2,500 or less is guilty of a Class A misdemeanor. A person who intentionally issues a worthless check for more than $2,500 or intentionally issues several worthless checks over a 15–day period that total more than $2,500 is guilty of a Class I felony. If the state prosecutes a worthless check violation and the defendant is found guilty, the court may order the defendant to pay restitution to the person to whom the check is issued. A payee of a worthless check may also file a civil suit to recover the value of the check, any other actual damages resulting from the issuance of the worthless check, punitive damages of up to $500, and the costs incurred in pursuing the civil action. Also under current law, except for certain violations, a district attorney may enter into a deferred prosecution agreement with a criminal defendant to dismiss criminal charges against the defendant if the defendant complies with specified conditions.

This bill makes several changes related to deferred prosecution agreements under which a district attorney agrees to dismiss charges against a defendant for issuing a worthless check if the defendant pays money owed for the worthless check to the district attorney for remittance to the payee. Current law generally requires that a person who collects debts on the behalf of another be licensed by the Department of Financial Institutions as a collection agency. The bill provides that

a district attorney is not required to be licensed as a collection agency for purposes of collecting money under deferred prosecution agreements for worthless check violations. The bill allows a district attorney to charge defendants a fee for entering into a deferred prosecution agreement to resolve a charge of issuing a worthless check. Finally, the bill provides that a district attorney may contract with a collection agency to collect money under worthless check deferred prosecution agreements and to administer such agreements.

For further information see the ***local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 943.245 (3m) of the statutes is amended to read:

943.245 **(3m)** Any recovery under this section shall be reduced by the amount recovered as restitution for the same act under ss. 800.093 and 973.20 and by any amount that a district attorney collects in connection with the act under a deferred prosecution agreement and pays to the plaintiff.

History: 1985 a. 179; 1987 a. 398; 1989 a. 31; 1993 a. 16.

SECTION 2. 971.41 of the statutes is created to read:

971.41 Deferred prosecution program; worthless checks. (1) In this section:

(a) "Collection agency" has the meaning given in s. 218.04 (1) (a).

(b) "Collector" has the meaning given in s. 218.04 (1) (b).

(c) "Solicitor" has the meaning given in s. 218.04 (1) (b).

(2) A district attorney may enter into a deferred prosecution agreement with a defendant charged with violating s. 943.24 to dismiss the charge if the defendant pays money owed for the worthless check or other order issued in violation of s. 943.24 to the district attorney for remittance to the payee of the worthless check or order. Notwithstanding s. 978.06 (1), a district attorney may charge a defendant who is a party to a deferred prosecution agreement under this section a fee to cover the

district attorney's cost of performing the terms of the agreement. A district attorney may contract with a collection agency to collect money from defendants under deferred prosecution agreements under this section and to administer such agreements. Notwithstanding s. 218.04, a district attorney is not required to be licensed as a collection agency, a collector, or a solicitor under s. 218.04 for purposes of collecting money from defendants under this section.

(END)

d-note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2941/1dn
RLR:....

Kelley Flury:

This bill exempts district attorneys from the collection agency licensing requirement for the purpose of collecting money from criminal defendants under deferred prosecution agreements related to worthless checks violations. The bill also addresses one of the issues raised by Steven Tinker in his letter of November 26, 2002, by authorizing district attorneys to charge defendants a fee for participating in a deferred prosecution program for worthless check violations. The bill does not address other issues in the November 26, 2002 letter such as compliance with the federal Fair Debt Collection Practices Act, 15 USC 1692a to1692o, tort liability, liability under 42 USC 1983, or indemnification of a private vendor. Also, as we discussed, the bill does not exempt a private vendor who collects money from criminal defendants pursuant to a contract with a district attorney from the collection agency licensing requirement.

Robin Ryan
Legislative Attorney
Phone: (608) 261–6927
E–mail: robin.ryan@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2941/1dn
RLR:jld:cph

August 26, 2003

Kelley Flury:

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Robin Ryan
Legislative Attorney
Phone: (608) 261–6927
E–mail: robin.ryan@legis.state.wi.us

David J. O'Leary
Rock County District Attorney

Perry L. Folts
Deputy District Attorney

Office of District Attorney
Rock County Courthouse
51 South Main Street
Janesville, Wisconsin 53545
Phone 608-757-5615
FAX 608-757-5725

September 8, 2003

Senator Judith Robson
State Capital
P.O. Box 7882
Madison, WI 53707-7882

In re: Worthless Check Program

Dear Judy:

I have reviewed your proposed bill to amend 943.245(3m) and to create 971.41 of the statutes. I would request that you clarify in 971.41(2) by stating:

> A district attorney may enter into a deferred prosecution agreement with a defendant charged with violating s. 943.24 to amend or dismiss the charge if the defendant completes a deferred prosecution program and pays money owed for the worthless check or other order issued in violation of s. 943.24 to the district attorney for remittance to the payee of the worthless check or order....

The underlined portion indicates the proposed changes. It is important to give district attorneys options other than total dismissal of the charges as some defendants complete some of the deferred prosecution program's requirements but not all. In those cases, it may be justified to amend the State criminal charges to a non-criminal county ordinance. In addition, individuals may go through the program, but because they may have a prior unrelated recorded offense, the charges may be amended rather than dismissed.

The second change is vital to emphasize that the fundamental requirement for any reduction or dismissal of the charges is for the defendant to go through a deferred prosecution program to avoid future criminal conduct. I believe that is the intent of your legislation, but the proposed language is silent on that point. Collection of restitution is important, but district attorneys are primarily responsible for prosecuting and deterring criminal conduct rather than merely acting as a collection agency.

Thank you for considering these amendments. If you have any questions, please feel free to contact me at your convenience.

Very truly yours,

David J. O'Leary

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–2941/1 or (2)
RLR:jld:cph

D Note

2

mgd

2003 BILL

AN ACT ***to amend*** 943.245 (3m); and ***to create*** 971.41 of the statutes; **relating to:** deferred prosecution agreements for persons charged with issuing a worthless check or other order for payment and allowing a district attorney to collect money owed to others.

Analysis by the Legislative Reference Bureau

Under current law, a person who intentionally issues a worthless check for $2,500 or less is guilty of a Class A misdemeanor. A person who intentionally issues a worthless check for more than $2,500 or intentionally issues several worthless checks over a 15–day period that total more than $2,500 is guilty of a Class I felony. If the state prosecutes a worthless check violation and the defendant is found guilty, the court may order the defendant to pay restitution to the person to whom the check is issued. A payee of a worthless check may also file a civil suit to recover the value of the check, any other actual damages resulting from the issuance of the worthless check, punitive damages of up to $500, and the costs incurred in pursuing the civil action. Also under current law, except for certain violations, a district attorney may enter into a deferred prosecution agreement with a criminal defendant to dismiss criminal charges against the defendant if the defendant complies with specified conditions.

This bill makes several changes related to deferred prosecution agreements under which a district attorney agrees to dismiss charges against a defendant for issuing a worthless check if the defendant pays money owed for the worthless check to the district attorney for remittance to the payee. Current law generally requires

that a person who collects debts on the behalf of another be licensed by the Department of Financial Institutions as a collection agency. The bill provides that a district attorney is not required to be licensed as a collection agency for purposes of collecting money under deferred prosecution agreements for worthless check violations. The bill allows a district attorney to charge defendants a fee for entering into a deferred prosecution agreement to resolve a charge of issuing a worthless check. Finally, the bill provides that a district attorney may contract with a collection agency to collect money under worthless check deferred prosecution agreements and to administer such agreements.

For further information see the ***local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 943.245 (3m) of the statutes is amended to read:

943.245 **(3m)** Any recovery under this section shall be reduced by the amount recovered as restitution for the same act under ss. 800.093 and 973.20 and by any amount that a district attorney collects in connection with the act under a deferred prosecution agreement under s. 971.41 and pays to the plaintiff.

SECTION 2. 971.41 of the statutes is created to read:

971.41 Deferred prosecution program; worthless checks. (1) In this section:

(a) "Collection agency" has the meaning given in s. 218.04 (1) (a).

(b) "Collector" has the meaning given in s. 218.04 (1) (b).

(c) "Solicitor" has the meaning given in s. 218.04 (1) (b).

(2) A district attorney may enter into a deferred prosecution agreement with a defendant charged with violating s. 943.24 to dismiss the charge if the defendant pays money owed for the worthless check or other order issued in violation of s. 943.24 to the district attorney for remittance to the payee of the worthless check or order. Notwithstanding s. 978.06 (1), a district attorney may charge a defendant who

INS 2/16

is a party to a deferred prosecution agreement under this section a fee to cover the district attorney's cost ~~of performing the terms of~~ under the agreement. A district attorney may contract with a collection agency to collect money from defendants under deferred prosecution agreements under this section and to administer such agreements. Notwithstanding s. 218.04, a district attorney is not required to be licensed as a collection agency, a collector, or a solicitor under s. 218.04 for purposes of collecting money from defendants under this section.

(END)

d-note

INSERT A

Current law prohibits intentionally issuing a worthless check. As with nearly all other crimes, a case alleging a violation of this prohibition may be resolved through a deferred prosecution agreement between the district attorney and the defendant. Under such an agreement, the district attorney agrees to amend or dismiss a charge if the defendant complies with specified conditions, such as paying restitution to the victim.

This bill makes several changes relating to the use of deferred prosecution agreements in worthless check cases. Under the bill, a deferred prosecution agreement in a worthless check case may require the defendant to pay money owed for the worthless check to the district attorney for remittance to the payee. If it contains such a requirement, the deferred prosecution agreement must also require that the defendant attend a class or counseling regarding financial management and the impact of issuing worthless checks. The bill also allows a district attorney to charge a defendant a fee for entering into such an agreement, which the district attorney may not otherwise do under current law. Finally, the bill permits a district attorney to contract with a collection agency to collect money under deferred prosecution agreements in worthless check cases and to administer such agreements.

INSERT 2/16

If it includes such a requirement, the deferred prosecution agreement shall also require that the defendant attend a class or counseling regarding financial management and the impact of issuing worthless checks.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2941/2dn
MGD:

Kelley:

As I mentioned in our phone conversation, the previous draft could have been read as prohibiting a deferred prosecution agreement in a worthless check case unless the defendant agreed to pay the district attorney the amount of the check. This draft preserves the right of the district attorney to negotiate a deferred prosecution agreement that does not impose such a condition. That also eliminates the need to specify whether the complaint will be amended or dismissed under the agreement. (The parties are free to negotiate any disposition under the agreement.) At the same time, consistent with David O'Leary's letter of September 8, 2003, and the description of the program in the third paragraph of Steven Tinker's letter, the draft requires the defendant to attend a class or counseling if the deferred prosecution agreement provides that the defendant is to make payments to the district attorney.

Thus, this draft differs substantially different from the prior version. Please review it to ensure that it is consistent with your intent.

Michael Dsida
Legislative Attorney
Phone: (608) 266–9867

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2941/2dn
MGD:jld:pg

November 25, 2003

Kelley:

As I mentioned in our phone conversation, the previous draft could have been read as prohibiting a deferred prosecution agreement in a worthless check case unless the defendant agreed to pay the district attorney the amount of the check. This draft preserves the right of the district attorney to negotiate a deferred prosecution agreement that does not impose such a condition. That also eliminates the need to specify whether the complaint will be amended or dismissed under the agreement. (The parties are free to negotiate any disposition under the agreement.) At the same time, consistent with David O'Leary's letter of September 8, 2003, and the description of the program in the third paragraph of Steven Tinker's letter, the draft requires the defendant to attend a class or counseling if the deferred prosecution agreement provides that the defendant is to make payments to the district attorney.

Thus, this draft differs substantially different from the prior version. Please review it to ensure that it is consistent with your intent.

Michael Dsida
Legislative Attorney
Phone: (608) 266–9867

Dsida, Michael

From: Flury, Kelley
Sent: Wednesday, January 07, 2004 12:26 PM
To: Dsida, Michael
Subject: Change to worthless-check offender program bill

Hi, Mike

To address a concern of Department of Justice attorneys, we would like to re-draft LRB 2941/2 to specify that district attorneys may contract with non-profit organizations only. I am wondering if we could specify that the organizations must have 501(c)(3) tax status.

We don't want private vendors that provide the education and debt collection services to be able to make money off the service.

Kelley Flury
Office of Sen. Robson
608-266-2253

1/20

P/c to Kelley re licensure –
She will get back to me

P/c from K.
Yes to Licensure

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–2941/2 (3)
MGD:jld:pg

2003 BILL

Regen

AN ACT ***to amend*** 943.245 (3m); and ***to create*** 971.41 of the statutes; **relating to:** deferred prosecution agreements for persons charged with issuing a worthless check or other order for payment and allowing a district attorney to collect money owed to others.

Analysis by the Legislative Reference Bureau

Current law prohibits intentionally issuing a worthless check. As with nearly all other crimes, a case alleging a violation of this prohibition may be resolved through a deferred prosecution agreement between the district attorney and the defendant. Under such an agreement, the district attorney agrees to amend or dismiss a charge if the defendant complies with specified conditions, such as paying restitution to the victim.

This bill makes several changes relating to the use of deferred prosecution agreements in worthless check cases. Under the bill, a deferred prosecution agreement in a worthless check case may require the defendant to pay money owed for the worthless check to the district attorney for remittance to the payee. If it contains such a requirement, the deferred prosecution agreement must also require that the defendant attend a class or counseling regarding financial management and the impact of issuing worthless checks. The bill also allows a district attorney to charge a defendant a fee for entering into such an agreement, which the district attorney may not otherwise do under current law. Finally, the bill permits a district attorney to contract with a collection agency to collect money under deferred

nonprofit organization that is licensed as a ✓

prosecution agreements in worthless check cases and to administer such agreements.

For further information see the ***local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 943.245 (3m) of the statutes is amended to read:

943.245 **(3m)** Any recovery under this section shall be reduced by the amount recovered as restitution for the same act under ss. 800.093 and 973.20 and by any amount that a district attorney collects in connection with the act and pays to the plaintiff under a deferred prosecution agreement under s. 971.41.

SECTION 2. 971.41 of the statutes is created to read:

971.41 Deferred prosecution program; worthless checks. (1) In this section:

(a) "Collection agency" has the meaning given in s. 218.04 (1) (a).

(b) "Collector" has the meaning given in s. 218.04 (1) (b).

(c) "Solicitor" has the meaning given in s. 218.04 (1) (b).

(2) A district attorney may require, as a condition of a deferred prosecution agreement with a defendant charged with violating s. 943.24, that the defendant pay money owed for the worthless check or other order issued in violation of s. 943.24 to the district attorney for remittance to the payee of the worthless check or order. If it includes such a requirement, the deferred prosecution agreement shall also require that the defendant attend a class or counseling regarding financial management and the impact of issuing worthless checks. Notwithstanding s. 978.06 (1), a district attorney may charge a defendant who is a party to a deferred

prosecution agreement under this section a fee to cover the district attorney's costs under the agreement.

(3) A district attorney may contract with a nonprofit organization that is licensed as a collection agency to collect money from defendants under deferred prosecution agreements under this section and to administer such agreements.

(4) Notwithstanding s. 218.04, a district attorney is not required to be licensed as a collection agency, a collector, or a solicitor under s. 218.04 for purposes of collecting money from defendants under this section.

(END)

Northrop, Lori

From: Flury, Kelley
Sent: Monday, February 09, 2004 10:25 AM
To: LRB.Legal
Subject: Draft review: LRB 03-2941/3 Topic: Deferred prosecution agreements for worthless check violations; licensing requirement for collection agencies

It has been requested by <Flury, Kelley> that the following draft be jacketed for the SENATE:

Draft review: LRB 03-2941/3 Topic: Deferred prosecution agreements for worthless check violations; licensing requirement for collection agencies