



Office of the
Criminal District Attorney
Bastrop County, Texas

CHARLES D. PENICK
CRIMINAL DISTRICT ATTORNEY
PHONE (512) 321-2244

804 PECAN STREET
BASTROP, TEXAS 78602
FAX (512) 321-4519

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Honorable John Cornyn
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee

RQ-0088-JC

To the Honorable John Cornyn:

This is a request for an Attorney General's opinion concerning whether or not the District Attorney's Office is legally liable to a merchant for its failure (because of a mistake) to collect restitution for a merchant who accepted a bad check and brought it to the District Attorney's office for collection.

And whether or not the District Attorney is liable can he use the funds in his hot check fee account to pay the merchant his restitution.

The following are the facts surrounding this matter. A merchant brought a hot check in for an attempted collection. The check is in the amount of \$500.+.

The person who wrote the hot check was summoned to court and an offer was made of deferred prosecution if he would pay for the check, take a hot check seminar and pay \$50.00 supervision fee to the probation department. When this was done, the amount of restitution owed to the merchant was removed from our computer and our balance showed \$0 being owed, because the probation department was to collect the money owed.

The defendant failed to perform according to the agreement and was brought back into court and was placed on probation with an order to pay restitution on other outstanding checks but not on the merchant's check that he was filed on for because the amount owed showed a \$0 balance. The amount owed had not been placed back in our computer due to clerical error. The defendant was subsequently released from probation and after he was released the merchant called regarding restitution not received and only then did we realize the mistake that had been made.

Applicable Law

Article 102.007 (F) Texas Code of Criminal Procedure states in part that "Expenditures from this fund shall be at the sole discretion of the attorney and may be used only to defray the salaries and expenses of the prosecutor's office, but in no event may the County, District or Criminal District Attorney supplement his or her own salary from this fund.

A governmental official may not do any act, which is not expressly authorized by statute passed by the legislature.

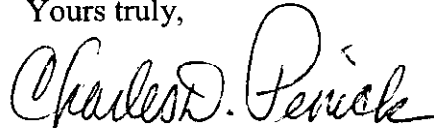
“A prosecutor is fully protected by absolute immunity from any actions when performing the traditional functions of an advocate”. *Imbler vs. Pachtman* 96 S. Ct. 984-996 – See also *Kalina v. Fletcher* 118 S. Ct. 502

Conclusion

The District Attorney and his staff are fully protected by absolute immunity from any negligent acts of omitting to collect restitution when entering into a plea bargain that placed defendant on probation.

There is no authority under the state to allow the District Attorney to make restitution to a merchant out of his hot check fee account for any negligence in not collecting restitution for the merchant.

Yours truly,



Charles D. Penick
Criminal District Attorney

CDP:ec

*Your help in answering this will
be greatly appreciated.*

