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Lewis and Clark County

OFFICE OF THE COUNTY ATTORNEY

TO: The Merchants of Lewis and Clark County and Other Interested Parties

FROM: LEO J. GALLAGHER, County Attorney

RE: Bad Check Prosecutions

Every year this office is asked to prosecute thousands of bad checks. To prosecute these cases successfully my staff needs your help. Before filing a bad check case my office must review the facts of the case to determine if there is enough evidence to convince a jury that there is proof beyond a reasonable doubt that the person who issued the check knew **AT THE TIME THE CHECK WAS WRITTEN** that there wasn't enough money in the account to pay the check.

To streamline the process, I have established policies and procedures that every bad check victim should follow before asking for prosecution. These policies and procedures are set forth in the material that accompanies this memorandum.

The most important aspect of a successful prosecution is proof establishing the identity of the person who wrote the check. Before beginning a prosecution of a Nonsufficient Fund ["NSF"] or "CLOSED ACCOUNT" check case, therefore, my staff will review the check to make sure that a witness can tell a jury that he or she accepted the check after verifying the identity of its maker through the witness's contemporaneous examination of identification bearing the maker's photograph and some other identifier, such as the maker's date of birth, social security number or driver's license number. My office will not prosecute bad checks if the person who took the check did not take this simple precaution.

Secondly, my office requires evidence that after the check was dishonored as a "CLOSED ACCOUNT" or "NSF" or check, its recipient notified the maker of the

check's dishonor so that a jury will believe beyond a reasonable doubt that the bad check maker did not act innocently or accidentally.

Thirdly, if you wish this office to prosecute a criminal case, **DO NOT**, enter into a payment agreement with the maker either before or after submitting the check for prosecution. This office asks the court to order restitution as part of a criminal sentence, but it is not a collection agency. If a merchant or a collection agency on the merchant's behalf accepts partial payment for a dishonored check, then the prosecution for the check becomes difficult, if not impossible. If the prosecution is successful, the merchant may pursue all civil remedies provided by the law **AFTER** the prosecution ends.

I request that you follow the steps outlined in the "**PROCEDURE FOR PROSECUTION OF BAD CHECKS**" that accompanies this memorandum to expedite our prosecution efforts. You should review and follow these procedures before submitting a check to my office for prosecution.

Thank you in advance for your help in taking the time necessary to further the successful prosecution of those who injure us all when issuing bad checks.

PROCEDURE FOR PROSECUTION OF BAD CHECKS

I. INITIATING PROSECUTION: Upon receipt of a bad check and prior to requesting prosecution, each merchant should:

A. When accepting a check, have the clerk who receives it initial it. The clerk should witness the signing of the check and should require, and examine, a photographic I.D. The check should show the name and current street address of the maker. You should be aware that the clerk accepting the check may be called to testify as a witness, should the prosecution result in a trial.

B. Make every effort to contact the maker of the check to collect. Keep track of your collection efforts so you can testify about them. You may wish to run the check through the maker's bank more than once. If you encounter a check that is an apparent forgery, report the forgery to your bank, ask to submit an "Affidavit of Forgery" and report the forgery directly to the Helena Police Department or to the Lewis and Clark County Sheriff's Department for investigation.

C. Complete a bad check prosecution request form (see form below) and notify the maker of the bad check at his/her last known address by certified, return-receipt mail. It is a good idea to send the letter by first class mail as well. You may wish to use the notice form provided by this office (see form below).

II. PROSECUTION:

A. If the five-day notice set forth in your letter passes without payment, submit the following documents to the Lewis and Clark County Attorney's Office:

1. Bad check prosecution form;
2. A copy of the notice form;
3. Post office receipt and the green signature card, or, if the letter is unclaimed, the envelope returned to you by the post office.

4. The original check stamped by the bank with the reason for nonpayment or the substitute check copy supplied to you by the bank when it dishonored the check.

B. Criminal prosecution will not be authorized for the following types of bad checks:

1. Checks in an amount of less than \$25.00;
2. Postdated checks;
3. Two-party checks;
4. Checks that the maker requested that the payee hold for any period of time prior to cashing or depositing;
5. Checks which are held for more than one year before seeking prosecution;
6. Counter checks;
7. Checks upon which partial payment has been accepted;
8. Checks accepted to provide a customer with cash for the purpose of gambling, or checks taken for the payment of gambling indebtedness;
9. A check that wasn't paid because the bank received a "Stop Payment" order. If you believe the maker's "stop payment" order was part of a criminal scheme rather than a civil dispute, please report your suspicions to the Helena Police Department or to the Lewis and Clark County Sheriff's office so that an investigation can begin.
10. Checks that are the subject of a repayment agreement.

C. Please document any contacts you have with the maker of a bad check. In particular, please make a written record of any statements made by the maker regarding the bad check because these statements can be important evidence in a bad check prosecution.

Thank you for your cooperation in following the requirements. Should you have any questions or concerns, please feel free to contact the Lewis and Clark County Attorney's Office at 406-447-8221 for assistance.