
E-76-8 Ethical propriety of amending complaint upward in criminal action

The committee has received an inquiry as to whether the amendment of a criminal complaint upward to allege a felony violation raises an ethical problem where previously defendant had been charged with a misdemeanor. The district attorney had hoped to obtain a guilty plea and spare the alleged nine-year-old victim of the trauma of testifying at a trial, but when the defendant chose to plead not guilty to the charge the trial seemed inevitable.

In the opinion of the committee, it would not be ethically improper to amend the charges from a misdemeanor violation to a felony violation under these circumstances.

The committee specifically concurred in the position that there was no violation of DR 7-103(A) regarding the institution of criminal charges which are not supported by probable cause, since that provision is not pertinent under the facts here. Rather, the pertinent provision is Section 3.9(b), ABA Standards for Criminal Justice—Prosecution Function, which holds that a prosecutor need not present all the charges the evidence might support; and in bringing a charge, the prosecutor may properly consider the reluctance of the victim to testify. Also sec. 971.29(1), 4 Wis. Stats., supports the position that the prosecutor need not bring the maximum charge against the defendant at the first instance.

Finally, the committee stated that it obviously is wrong to “overcharge” a crime in order to coerce the defendant to plead guilty to a reduced charge where the greater charge cannot be proved, as was stated in *Thompson v. State*, 61 Wis. 2d 325, 330 (1973), but such was not the case here.

It was stated that the rationale for bringing the lesser charge in the first instance was to attempt to induce a guilty plea to such charge and thus spare the prosecuting witness the trauma of testifying at the trial involving a charge of the defendant having sexual contact with a nine-year-old girl. Since the defendant chose not to plead guilty to the misdemeanor charge, the trial seems the inevitable route. Thus, filing an amended complaint is ethically proper in the committee’s opinion.