



Threatening Criminal Prosecution

Those of us who have been around the practice for awhile remember the rather clear prohibition against making threats of criminal prosecution against an opposing party in order to gain an advantage in a civil case. This was set forth in old DR 7-105(a) of the Code of Professional Responsibility that existed in Arizona until we adopted the ABA's Model Rules of Professional Conduct in 1983. When that happened, all references to the prohibition were deleted, leading many lawyers to believe that making such threats was now considered acceptable ethical behavior. If you are one of these lawyers, you need to keep reading.

Almost without exception, bar associations, courts and legal commentators who have addressed the issue, as well as the drafters of the Model Rules, have concluded that abusive threats of criminal prosecution were in fact adequately covered by other more general prohibitions in the Model Rules, and there was no need to address such threats specifically.¹ These general provisions are ER 8.4(b)² (prohibition against a lawyer committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); ER 8.4(c) (prohibition against a lawyer engaging in conduct that is prejudicial to the administration of justice); ER 3.1 (a lawyer shall not bring a proceeding unless there is a good-faith basis in law and fact); ER 4.4 (a) (a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden any other person); and ER 4.1(a) (a lawyer shall not make a false statement of material fact or law to a third person). This last rule would apply to those making a threat with no intention of carrying it out.

What has been overlooked is that knowingly obtaining or seeking to obtain "property" by means of threatening to bring criminal charges against anyone is considered to be extortion, a Class 4 felony in Arizona.³ And engaging in extortionate acts by lawyers is generally discouraged here and elsewhere.

Acts that would otherwise be considered extortionate may not be considered to be illegal or unethical generally if (1) the contemplated criminal matter is directly related to the client's civil claim; (2) the lawyer has a well-founded belief that the civil claim and the potential criminal charges are warranted by the law and the facts; and (3) the lawyer does not attempt to exert or suggest improper influence over the criminal process. At least this was the conclusion of the ABA Standing Committee on Ethics and Professional Responsibility.⁴ The folks who write ethics opinions at the State Bar have tried to make it even simpler: Threats of criminal prosecution are not *per se* violations of the Rules of Professional Conduct. Only if such threats run afoul of a specific ethical proscription or violate Arizona's criminal extortion statute would such threats be considered unethical.⁵

Against these general and well-intentioned guideposts, bar associations, courts and legal commentators have not been all that consistent in their applications, indicating that caution and temperance are still required in this area.⁶ Some states, including Arizona, have adopted the Model Rules of Professional Conduct

without reference to the old DR 7-105(a) prohibitions; others have specifically carried those provisions over into their present ethical rules,⁷ and courts are not always in agreement over what circumstances need be present before a statement made about potential criminal action may be unethical.⁸

Lawyers contemplating using the threat of criminal prosecution while representing a client in a civil matter still need to be cautious and heed the most important admonitions set forth in ABA Formal Opinion No. 92-363: Make sure the criminal matter is directly related to the client's civil claim and that the lawyer has a well-founded belief that the civil claim and the potential criminal charges are warranted by the law and the facts.⁹

endnotes

1. 2 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. 1985), at § 40.4.
2. Rule 42, ARIZ.R.S.CT.
3. A.R.S. § 13-1804 A.5 and C.
4. ABA Formal Op. No. 92-363 (July 6, 1992) (Use of Threats of Prosecution in Connection with a Civil Matter).
5. Ariz. Ethics Op. 91-07 (Mar. 7, 1991).
6. An example that has been given is the threat of criminal sanctions imposed for stopping payment on a check. *Cf. Decato's Case*, 379 A.2d 825 (N.H. 1977), Fla. Ethics Op. 85-3, Ga. Ethics Op. 26 (1980) and Utah Ethics Op. 71 (1979) [not ethical] with New Mexico Ethics Opinion 1987-5 [ethical]. There are other cases collected at Annotated Model Rules of Professional Conduct (ABA Center for Professional Responsibility, Sixth Edition), at 417.
7. A description of how other states have specifically incorporated old DR 7-105 into their present ethics rules is found at ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, at ¶ 71:601.
8. *Cf. In Re Vollintine*, 673 P.2d 755 (Alaska 1983) (allusion to a criminal prosecution in a letter constituted a threat) *with In Re McCurdy*, 681 P.2d 131 (Ore. 1984) (mere mention of criminal penalties does not show specific intent to threaten).
9. See Note, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 GEO. J. LEGAL ETHICS 935 (2008).

A new ethics opinion is on page 63. Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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