

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 92-363

July 6, 1992

USE OF THREATS OF PROSECUTION IN CONNECTION WITH A CIVIL MATTER

*The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.*

*The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law.*

In this opinion the Committee reconsiders the propriety of the use or threat of criminal prosecution to gain an advantage for a client in a private civil matter. [FN1] The Committee has addressed this issue twice before, in Informal Opinions 1427 (1978) and 1484 (1981), both of which analyzed the issue under the Model Code of Professional Responsibility (1969, amended 1980). [FN2] Those opinions turned, however, on the specific prohibition of DR 7- 105(A) against a lawyer using or threatening a prosecution to gain an advantage in a civil matter--a provision that has no counterpart in the Model Rules of Professional Conduct (1983, amended 1991). The Committee therefore believes it advisable to revisit the issue of when and how a lawyer may, on behalf of a client, raise the possibility of criminal charges, and the prospect of forgoing such charges in exchange for satisfaction of the client's civil claims. [FN3]

There has never been any doubt that a lawyer may represent a client in seeking to enforce a civil claim stemming from a matter that may also involve criminal activity by the opposing party. The closer questions, addressed here, are (1) whether it is proper under the Model Rules for a lawyer to inform the opposing party that the criminal activity will be brought to the attention of the prosecuting authorities if her client's civil claim is not satisfied; and (2) since such a contingent threat necessarily implies an offer to refrain from reporting such conduct in return for satisfaction of the civil claim, whether it is proper for the lawyer to agree, or have the client agree, as part of the settlement of a civil claim, to refrain from reporting the potentially criminal conduct.

The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

In addressing these issues, we will first review the predecessor Model Code's prohibition against threats to present criminal charges and the rationale for that prohibition; then examine the new Model Rules of Professional Conduct, with particular attention to the intention of the drafters in omitting the language of DR 7-105(A) or any counterpart from the Rules; then focus on the limits imposed by the Model Rules on threats to bring criminal charges.

## **The Express Prohibition of DR 7-105(A)**

Disciplinary Rule 7-105(A) of the Model Code expressly prohibited a lawyer from threatening to use, or using, the criminal process solely to enforce a private civil claim: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The Code's rationale for prohibiting such threats or use of prosecution was to prevent the oppressive use, and thereby the subversion, of the criminal justice system. This policy was expressed in Ethical Consideration 7-21, which states that:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

## **The Prohibition Was Deliberately Omitted by the Drafters of the Model Rules**

The Model Rules, as submitted by the Commission on Evaluation of Professional Standards ("Kutak Commission") and subsequently adopted by the ABA House of Delegates (August 2, 1983), omitted both the specific language of DR 7-105(A) and any express counterpart to its prohibition. That omission was deliberate, as clearly stated by the drafters in their *Proposed Final Draft of the Model Rules* (May 30, 1981): "The Code of Professional Responsibility, in DR 7-105, prohibits threats of criminal prosecution 'solely to gain advantage in a civil matter.' That provision is not continued in the Model Rules." *See also* 2 G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* (2nd ed. 1990) § 4.4:103:

Rule 4.4 does not incorporate the prohibition originally found in DR 7- 105(A) of the Code of Professional Responsibility, which provided that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Nor does this prohibition appear elsewhere in the Rules of Professional Conduct; it was deliberately omitted as redundant or overbroad or both.

The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C.W. Wolfram, *Modern Legal Ethics* (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). [FN4] Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

## **The Limitations Imposed by the Model Rules on the Use of Threats of Criminal Prosecution**

Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b). It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.*" Model Penal Code, § 223.4 (emphasis added); see also § 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well

founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:

A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for *harm caused by the offense*. (emphasis supplied)

Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability improperly to influence a government official or agency.

Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person...." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. *See also* Hazard & Hodes, *supra*, § 4.4:104.

Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.

Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

While the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime (or similar crimes). A relatedness requirement avoids exposure to the charge of compounding, which would violate Rule 8.4(b)'s prohibition against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." It also tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration. *See* Rule 8.4(c).

Accordingly, it is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules.

Implicit in the view of the drafters of the Model Rules that no general prohibition on threats of prosecution is justified is the proposition that such a prohibition would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to "zealously" assert the client's position under the adversary system. *See* Model Rules Preamble: A Lawyer's Responsibilities. Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent. [FN5]

#### **Agreeing to Refrain from Pressing Criminal Charges as Part of the Settlement of a Client's Civil Claim**

A threat of criminal prosecution is likely to be of use in advancing a civil claim only if it is accompanied by an offer, explicit or implied, to refrain from instigating the prosecution. Thus it is necessary to address the ethical propriety of a lawyer's offering to refrain from pressing criminal charges in return for favors in a civil matter.

Neither the Model Rules nor the predecessor Code expressly prohibits a lawyer from agreeing to refrain from reporting an opposing party's criminal violations as a part of the settlement of a client's civil claim. Although there is no express prohibition against such an agreement, a lawyer must be careful to avoid the criminal offense of compounding a crime, which in turn would violate Rule 8.4(b)'s prohibition against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." As noted above, however, it is an affirmative defense to the crime of compounding that "the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense."

The Committee notes that some jurisdictions adopting the Model Rules have chosen to include language almost identical to that of DR 7-105(A). See Rule 1.2(e) Illinois Rules of Professional Conduct (1990); Rule 4.04 Texas Disciplinary Rules of Professional Conduct (1989); Rule 3.4, Connecticut Rules of Professional Conduct (1986); Rule 3.6, Maine Bar Rules (1986); Rule 8.4(g), District of Columbia Rules of Professional Conduct (1990). At least one state that has adopted a version of the Model Rules, North Carolina, has used a formulation of DR 7-105(A) that accords with this Opinion. See Rule 7.5 of the North Carolina Rules of Professional Conduct (1988), retaining the language of DR 7-105(A) while narrowing the scope of the prohibition:

A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter unless the criminal charges are related to the civil matter and the lawyer reasonably believes the charges to be well grounded in fact and warranted by law.

In addition, ethics committees in some states have interpreted the Model Rules as continuing DR 7-105(A)'s explicit prohibition, despite the omission of DR 7-105(A)'s language, or any counterpart, from the Rules. See, e.g., N.J.Comm. on Professional Ethics, Op. 595 (1986) (ABA/BNA Law Manual on Prof. Conduct 901:5804) (concluding that the omission of a counterpart to DR 7-105 from the Model Rules was not the intent of the drafting committee). See also State Bar of Wis., Comm. on Professional Ethics, Formal Op. E-87-5 (1987) (ABA/BNA Law Manual on Prof. Conduct 901:9105). To the extent that these opinions purport to interpret the Model Rules, in this Committee's view they are incorrect.

On the other hand, a recent decision by the highest court of West Virginia, *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 416 S.E.2d 720 (1992), strongly supports the position of this Committee. The Supreme Court of Appeals of West Virginia observed that "Rule 4-4 does not incorporate the prohibition originally found in DR7-105(A)... Nor does this prohibition appear elsewhere in the Rules of Professional Conduct; *it was deliberately omitted as redundant or overboard or both...*" Id. at 722 (quoting G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* (2d ed. 1990) § 4.4:103) (emphases as added by the Court).

In opining as it has, the Committee is aware of issues that may be implicated in the conduct under discussion. Model Rule 8.3(a), for instance, provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." This opinion should not be construed as in any way affecting whatever duty a lawyer may have under that Rule to report misconduct of another lawyer. Likewise, threatening to bring criminal charges, or agreeing to forbear doing so in return for settlement of a civil action, may well have civil or criminal law consequences for the forbearing lawyer or client in the relevant jurisdiction; indeed, such an agreement to forbear reporting criminal conduct may well be unenforceable where, for instance, prosecutorial authorities subpoena the forbearing party to appear and to testify before a grand jury. These are issues which the lawyer should take into consideration in determining whether to threaten to report or to agree to forbear from reporting.

FN1. This opinion addresses only situations involving negotiations between nongovernmental parties, and does not purport to deal with issues that may be presented where one of the parties is in an official position to act or refrain from acting in connection with bringing criminal charges. See *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

FN2. In Informal Opinion 1427 (1978) we concluded that a threat to present criminal charges made solely to collect a civil debt violated DR 7-105(A) even if the lawyer was correct in stating that the debtor violated

an applicable criminal law. In Informal Opinion 1484 (1981) we concluded that a law firm, while pursuing civil remedies on behalf of clients against persons who were also violating a criminal statute, was not prohibited under the Model Code from reporting the violations to prosecutors, because the conduct did not involve the use of a threat against the opposing party.

FN3. Although the *use* of criminal process and the *threat* of such use are analytically distinct, and were both explicitly covered by the provision of DR 7-105(A) that has no counterpart in the Model Rules, as a practical matter it is the *threat* of prosecution, together with an accompanying offer to forbear, that is most likely to be employed as leverage in a civil matter. Accordingly, this Opinion focuses on threats, and accompanying offers to forbear. Insofar as there may be a distinct phenomenon of actual pursuit of criminal prosecution, without any accompanying offer to forbear, we believe it also is governed by the analysis herein.

FN4. Professor Wolfram also points out the overbroad judicial application of DR 7-105(A):

Courts applying the rule make no distinction between well-founded or ill-founded charges or serious crimes and minor infractions. The decisions have also not accepted lawyer arguments that a veiled allusion to the criminal nature of a person's conduct or the like does not constitute a "threat" or that the lawyer was motivated by concerns in addition to "solely" obtaining an advantage in civil litigation. The courts apply the Code rule as a pure attempt at prohibition; a violation is made out by proof of a threat, regardless of the fact that no criminal charges are in fact brought or any settlement achieved. Modern Legal Ethics, *supra*, § 13.5.5 at 717.

FN5. The Model Rules already impose a type of "well-founded in fact and law" requirement on prosecutors in Rule 3.8(a). "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

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