

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 1995-2

December 22, 1995

This Opinion is merely advisory and is not binding on the inquiring attorney, the courts, or any other tribunal.

A member of the Delaware Bar has requested an opinion on (1) whether he may use the threat of presenting criminal charges against an opposing party in a civil matter in order to obtain an advantage for his client; and (2) whether he or his client may agree, as part of a civil settlement, to refrain from reporting the opposing party's potentially criminal conduct to the prosecuting authorities.

FACTS

Attorney represents Client in a civil matter involving the administration of Client's deceased husband's ("Decedent") estate. Opposing Party was appointed the sole Executor of Decedent's estate under the terms of Decedent's Last Will and Testament. Pursuant to the terms of Decedent's Will, 10% of Decedent's estate was bequeathed to Opposing Party and would have passed to opposing Party if Decedent had not married Client following the making of the Will.

Opposing Party was the informant of Decedent's death on the death certificate issued for Decedent. The death certificate lists Decedent's marital status as "never married" even though Opposing Party had knowledge of Decedent's marriage to Client. Additionally, Opposing Party filed, under oath, a Petition for Authority to Act as Personal Representative with the New Castle County Register of Wills office. In Section 3 of the Petition, providing for the listing of the surviving spouse, Opposing Party wrote "N/A" (not applicable).

Following Decedent's death, Client informed Opposing Party that she needed a car and requested money from Decedent's estate for that purpose. Opposing Party provided Client with approximately \$7,000.00 in estate money for the purchase. Unknown to Client, however, Opposing Party caused the title of the vehicle which Client purchased with estate funds to be placed in his own name rather than in the name of Client. Opposing Party still maintains exclusive possession of the automobile.

Following Attorney's initial meeting with Client, Attorney prepared and filed a Petition for Removal of Personal Representative and a Petition to Require Executor to Give Bond with the New Castle County Register of Wills office. Subsequently, Opposing Party voluntarily resigned as Executor and thereafter, Client was appointed Successor Administratrix with the Will Annexed of Decedent's estate.

According to Attorney, based upon a review of the financial records for Opposing Party's administration of Decedent's estate, Opposing Party failed to account for approximately \$22,400.00. Opposing Party has neither complied with Attorney's demand for the return of the amount of estate funds nor properly accounted for or responded to this demand. No civil suit has yet been filed and Client has requested that Attorney threaten Opposing Party with criminal prosecution in order to induce Opposing Party to satisfy Client's civil claims.¹ Client is willing

¹ Attorney intends to report the following facts to the prosecuting authorities as a basis for presenting criminal charges against Opposing Party:

- (1) Opposing Party, as informant of Decedent's death, knowingly and intentionally caused Decedent's death certificate to be issued with false information regarding Decedent's marital status in an effort wrongfully to obtain a portion of Decedent's estate;

(Continued ...)

to agree to refrain from reporting Opposing Party's potentially criminal conduct to the prosecuting authorities if Opposing Party agrees to satisfy Client's civil claims. If, however, Opposing Party refuses to settle Client's civil claim, Client has requested that Attorney turn the case over to the Delaware Attorney General's office.

CONCLUSION

Attorney may use the threat of presenting criminal charges against Opposing Party in order to gain relief for Client in her civil claim without violating the applicable ethical standards if the criminal matter is related to Client's civil claim; Attorney has a well founded belief that both the civil claim and the criminal charges are warranted by Delaware law and the facts; Attorney is not attempting to exert or suggest improper influence over the criminal process; and Attorney and/or Client actually intend to proceed with presenting the charges if the civil claim is not satisfied. In addition, Attorney may agree to, or have Client agree to, refrain from reporting criminal charges in return for satisfaction of Client's civil claim.²

(2) Opposing Party filed a petition under oath with the New Castle County Register of Wills in which he falsely represented Decedent's marital status in an effort wrongfully to obtain a portion of Decedent's estate;

(3) Opposing Party knowingly and intentionally caused the automobile purchased by Client with estate funds to be titled in his sole name, thereby misappropriating estate assets; and

(4) Opposing Party failed properly to account for approximately \$22,400.00 of estate funds which came into his hands while acting as Executor of Decedent's estate.

² 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. Further, we interpret "refrain from reporting" to refer to reporting as an initial matter, and not to include failure to respond to lawful process in connection with a criminal investigation or prosecution.

DISCUSSION

A. Using or Threatening to Use Criminal Charges to Advantage Civil Client

1. Former D.R. 7-105(A)

Before 1985, the answers to Attorney's questions were straightforward.

Disciplinary Rule 7-105(A) of the Delaware Code of Professional Responsibility (the "Code") expressly stated:

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 was to prevent misuse of the criminal justice system. This policy was expressed in the companion Ethical Consideration 7-21, which provided:

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 Delaware Supreme Court censured and fined an attorney for violating DR 7-105 in In re Arlen Meckler, Del.Supr., 406 A.2d 20 (1979).

2. The Delaware Rules of Professional Conduct

In 1985, the Code was replaced with the Delaware Lawyers Rules of Professional Conduct (the "Delaware Rules"). The Delaware Rules are based on the ABA's Model Rules of Professional Conduct. Neither the Delaware Rules nor the Model Rules contain the blanket prohibition set forth in former DR 7-105(A) or EC 7-12. Thus, there is no longer any express general prohibition against an attorney presenting or threatening to present criminal charges to gain advantage for a client in a civil matter.

3. ABA Formal opinion 92-363

In light of the omission of DR 7-105(A) from the Model Rules and the confusion caused by such omission, in 1992, the American Bar Association Committee on Ethics and Professional Responsibility ("ABA Committee") revisited the issue of when and how a lawyer could raise the threat of criminal charges and the prospect of forgoing such charges in exchange for satisfaction of a client's civil claims.³ In Formal Opinion 92-363 (1992) ("ABA Formal Op.92-363"), the ABA Committee concluded that the Model Rules do not prohibit presenting or threatening to present criminal charges where 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 specific facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. Id. at 2. In reaching this conclusion, the ABA Committee relied on the deliberate omission in the Model Rules of both the specific language of DR 7-105(A) and any express counterpart to its prohibition. Id. at 3-4. The intentional nature

of the omission of DR 7-105(A) in the Model Rule is evidenced by the drafters' statement 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.

The drafters of the Model Rules did not incorporate DR 7-105(A) because they viewed the per se prohibition on threats of criminal prosecution as redundant or overbroad or both. ABA Formal Op. 92-363 at 4; see also Comm. on Legal Ethics of the West Virginia State Bar v. Printz, 416 S.E.2d 720, 722 (W.Va. 1992) (both quoting 2 G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* (2nd ed. 1990)§4.4:103).⁴

DR 7-105(A)'s ban on threatening criminal prosecution was considered redundant because "extortionate, fraudulent, or otherwise abusive threats [are] covered by other more general prohibitions in the Model Rules and thus there [is] no need to outlaw such threats specifically." ABA Formal Op. 92-363 at 4 (quoting C.W. Wolfram, Modern Legal Ethics (1986) §13.5.5, at 718). Such conduct implicates Model Rule 8.4 (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness),⁵ Rule 4.4 (use of means that have no substantial purpose other than to embarrass, delay or burden), Rule 4.1 (duty to be

³ The ABA Committee had addressed similar issues twice before, in Informal Opinions 1427 (1978) and 1484 (1981), both of which analyzed the issue under former DR 7-105(A).

⁴ In Printz, the Supreme Court of Appeals of West Virginia held that an attorney did not violate the West Virginia Rules of Professional Conduct by informing his client's employee that unless the employee made restitution of amounts embezzled from the client, the attorney would press criminal charges.

⁵ In some jurisdictions, such conduct covers the same ground as the crimes of extortion and compounding a crime and Rule 8.4 makes it a disciplinary offense for a lawyer to commit such crimes. Printz, 416 A.2d at 722.

truthful in statements to others) and Rule 3.1 (prohibiting assertion of frivolous claims). ABA Formal Op. at 4-5.

DR 7-105(A) was also omitted from the Model Rules because it was considered overbroad. It inhibited attorneys from zealously representing their clients (ABA Formal Op. 92-363 at 6) while also prohibiting legitimate pressure tactics and negotiation strategies. Printz, 416 S.E.2d at 723 (quoting 2 G.C. Hazard & W.W. Hodes, at §4.4:103).

The ABA Committee devised a three part standard for when an attorney may ethically threaten use of criminal charges. The ABA standard derives from Model Rules 8.4, 4.4, 4.1 and 3.1. The ABA standard requires that (1) the criminal matter be related to the client's civil claim, (2) that the attorney have a well founded belief that both the civil claims and criminal charges are legally and factually warranted, and (3) that there not be any improper attempt to exert or suggest improper influence the criminal process.

The ABA's relatedness requirement is intended to avoid exposing the attorney to a charge 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." ABA Formal Op. 92-363 at 5. In addition, it is designed 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." Id.

The requirement that the charges be well founded in fact and law is consistent with Rule 3.1's prohibition on the assertion of frivolous claims. Id. Moreover, it avoids the subversion of the criminal justice system that DR 7-105(A) sought to prevent. Id. at 6.

The requirement that the attorney not improperly attempt to exert or suggest improper influence of criminal process avoids potential Rule 8.4(d) and (e) violations. Rule 8.4(d) and (e) provide that it is professional misconduct for lawyers 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. Id. at 5.

While the ABA Committee standard does not expressly require that the attorney actually intend to present the charges in the event the civil dispute is not resolved, the Committee believes that such a requirement is implicit in Formal Op. 92-363 and explicit in Rule 4.1. Rule 4.1 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 intent to proceed, violates Rule 4.1. Id.

Finally, the Committee notes that Formal Op. 92-363 and this Opinion deal with threatening criminal charges for the purpose of gaining relief for a client in a civil matter. That context is significant in light of Rule 4.4's prohibition on 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. Id. at 5.

4. Application of the Above Principles to Attorney's Inquiry

The DSBA Committee accepts the three part standard set forth in ABA Formal Op. 92-363. The Committee agrees that DR 7-105(A) was omitted from the Model Rules and hence the Delaware Rules because it was redundant and overbroad. In addition, the Committee believes that there should be a further express requirement that the attorney or client actually intends to proceed with the criminal charges.

Based upon the facts and representations provided to the Committee, Attorney's use of threats of criminal prosecution will be ethically permissible under the standard set forth in Formal Op. 92-363 as amplified herein. First, the charges which Attorney intends to present against Opposing Party relate to Client's civil claim for misadministration of the Decedent's estate and failure to make an accounting. Attorney intends to present criminal charges against Opposing Party based on: Opposing Party's intentional and knowing falsification of information on Decedent's death certificate and filing, under oath, a petition containing false information with the New Castle County Register of Wills office; Opposing Party's misappropriation of estate assets by causing the automobile purchased by Client with estate funds to be titled in Opposing Party's name; and Opposing Party's failure to return or to account for approximately \$22,400.00 of estate funds to which he had access solely as a result of his appointment as Executor of Decedent's estate. Thus, the Committee believes that the criminal charges are sufficiently related to Client's civil claim.

Second, based on the facts and representations presented to the Committee, Attorney appears to have a well founded belief that both the civil claim and the criminal charges are warranted by Delaware law and the underlying facts.⁶ Third, on the facts presented, the Attorney does not appear to be attempting to exert or suggest any improper influence over the criminal process by threatening to present criminal charges against Opposing Party. Finally, Attorney and/or the Client intends to proceed with criminal prosecution against Opposing Party if Client's civil claim is not resolved.

In satisfying the above standard, the Attorney will not violate the underlying ethical rules from which the standard derives, i.e., Delaware Rules 8.4, 4.4, 4.1, and 3.1. Delaware 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." Therefore, if a lawyer's conduct is extortionate or compounds a crime under the Delaware Crimes and Criminal Procedure Code, that conduct also violates Rule 8.4(b).

We note that extortion is defined as compelling or inducing another person to deliver property by means of instilling in him a fear that the threatener will "accuse anyone of a crime or cause criminal charges to be instituted against him." 11 Del.C. §846(4). It is an affirmative defense to this crime, however, if the attorney believes the threatened criminal charge is true and his or her only purpose is to induce the opposing party to make good the wrong. 11 Del. C. §847 (b). Accordingly, where threatened criminal charges relate to a client's civil matter and an attorney seeks to recover from the opposing party no more than the amount the attorney believes the client is entitled to, an attorney will likely not violate 11 Del.C. §846 by threatening criminal prosecution.

An attorney who threatens criminal prosecution, however, risks being charged with Compounding a Crime under 11 Del.C. §1246. Section 1246(l) provides that a person is guilty of compounding a crime when:

He solicits, accepts or agrees to accept any benefit from a person upon any representation or pretense that criminal prosecution of such person shall be dropped, withheld or abandoned, or the

⁶ On the facts presented, potential criminal charges against Opposing Party include theft, perjury and offering a false instrument for filing.

sentence thereon reduced, or upon any promise to assert pretended influence to cause such criminal prosecution to be dropped, withheld or abandoned or the sentence thereon reduced.

11 Del.C. §1246(l). It is an affirmative defense to this crime, however, if the benefit obtained by the attorney does not exceed the amount which he or she believes to be due as restitution or indemnification for the harm caused by the underlying crime. 11 Del.C. §1247. Accordingly, an attorney will likely not violate 11 Del.C. §1246(l) by threatening criminal prosecution against an opposing party where the attorney seeks to recover only the amount which the attorney believes the client is due as a result of the harm caused by the underlying crime.

Similarly, the Attorney's conduct is consistent with Rule 4.4 in that he does not appear to be using means that "have no substantial purpose other than to embarrass, delay or burden a third person"; his conduct is consistent with Rule 4.1(a) because Attorney has stated that he intends to proceed with the charges if the civil matter is not resolved; his conduct is consistent with Rule 3.1 in that Attorney does not appear to be asserting a frivolous claim; and his conduct is consistent with Rule 8.4(d) and (e) in that Attorney is not prejudicing the administration of justice or suggesting an ability to improperly influence the criminal process.

The Committee does not believe that its conclusion herein is inconsistent with the result in In re Arlen Meckler, 406 A.2d at 20. Meckler was decided under former DR 7-105(A) which prohibited all threats of presenting charges to obtain an advantage in a civil proceeding. As noted above, that per se prohibition does not exist under the newer Delaware Rules.

Finally, in reaching its conclusion, the Committee notes that the New Jersey Committee on Professional Ethics has reached a contrary conclusion. N.J. Comm. on Prof. Ethics, Op. 595 (1986) (ABA/BNA Law. Manual on Prof. Conduct 901:5804). The New Jersey

Committee concluded that the omission of DR 7-105(A) from the New Jersey Rules on Professional Conduct was not deliberate because there is no record that its omission was affirmatively intended by the committee that recommended the New Jersey Model Rules and the New Jersey Supreme Court's explanatory comments do not refer to DR 7-105(A)'s non-adoption or explain the reasons therefore. Moreover, the New Jersey Committee concluded that the rule set forth in former DR 7-105(A) derives not from any formal canon or code of ethics, but from generally accepted standards of professional conduct long enforced by the New Jersey Supreme Court. ABA Formal Op. 92-363 expressly rejects the New Jersey Committee's opinion as an "incorrect" interpretation of the Model Rules. Id. at 7.

B. Agreeing to Refrain from Reporting Criminal Charges as Part of the Settlement of a Client's Civil Claim

Neither the Delaware Rules (nor the predecessor Code) expressly prohibit an attorney from agreeing to refrain from reporting an opposing party's criminal violations as a part of the settlement of a client's civil claim. Accordingly, the Delaware Rules do not impose upon Delaware lawyers any duty to disclose evidence of past criminal conduct independent of that imposed by the substantive law. See Delaware State Bar Ass'n Comm. of Professional Ethics, Op. 1980-2 (construing the Code).

Although there is no express prohibition against agreeing to refrain from reporting criminal violations as part of a civil settlement, an attorney must be careful not to violate the Delaware Crimes and Criminal Procedure Code. An attorney who consents to such an agreement, or has his client consent to such an agreement, risks being charged with Compounding a Crime under 11 Del.C. §1246. As previously mentioned, however, it is an affirmative defense to this

crime if the benefit obtained by the attorney, or the client, does not exceed the amount which they believe to be due as restitution or indemnification for the harm caused by the crime. 11 Del.C. §1247. Therefore, provided Attorney does not violate the substantive law in Delaware, the Committee concludes that it is not a violation of the Delaware Rules for Attorney to agree, or to have Client agree, as part of the settlement of Client's civil claim, to refrain from reporting Opposing Party's potentially criminal conduct to the prosecuting authorities. See ABA Formal Op. 92-363 at 6-8.

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