

Limits on threats of criminal prosecution

by

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A Minnesota attorney was recently given a private admonition for threatening criminal prosecution of a client who had not paid the lawyer's bill. While many lawyers might believe that failure to pay a legal fee ought to be a crime it is not, in and of itself, a crime. It is, however, a violation of the Minnesota Rules of Professional Conduct (MRPC) to threaten criminal prosecution in connection with a civil case under certain circumstances.

A little bit of history is in order. Before 1985, DR 7-105 of the Minnesota Code of Professional Responsibility 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." When Minnesota adopted its version of the ABA Model Rules of Professional Conduct — our current rules — the explicit prohibition on threatening criminal prosecution did not carry forward. That, however, did not mean that threats of criminal prosecution were or are fair game.

In 1992 the ABA issued Formal Opinion 92-363 addressing the issue. They opined that a threat of criminal prosecution in connection with a civil matter is only appropriate where (1) the criminal matter is related to the client's civil claim; (2) 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 (3) the lawyer does not attempt to exert or suggest improper influence over the criminal process. The ABA concluded that the provisions of a number of the Rules of Professional Conduct may still prohibit the threat of criminal prosecution under certain circumstances. For instance, Rule 4.4(a), MRPC, prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay or burden a third person. Rule 3.1, MRPC, prohibits an advocate from asserting a claim that is not well founded in fact and in law. Rule 8.4(d), MRPC, prohibits conduct prejudicial to the administration of justice. All of these rules could be implicated in the case of a lawyer who threatens criminal prosecution where there is no basis for the prosecution, such as the lawyer who threatened the delinquent client with criminal prosecution for failure to pay his fees.

The ABA has also opined on the related issue of threatening to file a disciplinary complaint against opposing counsel. In Formal Opinion 94-383, they opined that the

use of a threat of filing a disciplinary complaint against opposing counsel to obtain an advantage in a civil case is improper if the professional misconduct is unrelated to the civil claim, the disciplinary charges are not well founded in fact or law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice. While this generally tracks the ABA's opinion on threatening criminal prosecution, there is an additional provision of the Rules of Professional Conduct that comes into play when using the threat of a disciplinary complaint as a bargaining chip. Rule 8.3(a), MRPC, requires lawyers who know that another lawyer has violated the Rules of Professional Conduct in such a manner that raises a substantial question as to that attorney's honesty, trustworthiness or fitness as a lawyer in other respects to inform the appropriate professional authority (typically, the Office of Lawyers Professional Responsibility). Thus when you offer to forgo reporting opposing counsel's violation in exchange for some advantage in the underlying litigation, you are, in essence, offering to violate the Rules of Professional Conduct yourself. You may not do that. If you have actual knowledge of the violation and it meets the substantial question test, you must report.