

When Lawyers Threaten Criminal Prosecution in a Civil Case

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Can lawyers ethically threaten criminal prosecution in the context of a civil case? Consider the following scenarios.

1. Fired Frank sued his former employer for unpaid commissions after his termination. In an attempt to encourage his former employer to settle, Frank's attorney threatens to disclose the employer's criminal violations of pollution laws to the EPA.
2. Meanwhile, after Frank's termination his employer discovered that Frank had forged two company checks totaling \$5,000 and deposited them into his personal account. Employer's in-house counsel has written Frank threatening to report the matter to the County Attorney unless Frank repays the \$5,000 within 10 days.
3. Frank is also in divorce proceedings with his wife, who recently wrecked the family car. The parties' only asset is a \$10,000 insurance check, payable to Frank and his wife, which is currently in the possession of wife's counsel. Wife's counsel threatens to report Frank to the Insurance Company for insurance fraud unless Frank stipulates in the divorce that the entire \$10,000 is to be awarded to wife.

One of the few lessons nearly every lawyer remembers from law school ethics is "thou shall not threaten criminal prosecution in a civil matter." The basis for this lesson was DR 7-105(A) of the former Code of Professional Responsibility, which stated:

"A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Many of these same lawyers are now mystified when they are unsuccessful in their attempts to locate this prohibition in the ethical standards which govern lawyer conduct today (i.e., Rules of Professional Conduct).

According to the ABA, DR 7-105(A) was "deliberately omitted" from the ABA Model Rules of Professional Conduct when they were adopted in 1981. The Minnesota Rules of Professional Conduct (based on the ABA Model Rules) similarly do not contain this long-standing prohibition. The ABA has opined that the rule prohibiting criminal threats in civil matters was not retained because the drafters believed that extortionate, fraudulent or otherwise abusive threats were dealt with by other more general rules (e.g., Rules 4.4 and 8.4). See ABA Formal Ethics Opinion 92-363 (7/6/92). Even more surprising, however, was the ABA pronouncement that under certain circumstances it is ethically appropriate to threaten criminal prosecution

to gain an advantage in a civil matter:

"[The Rules of Professional Conduct] 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."

See ABA Formal Opinion 92-363 at page 1.

The requirement that the criminal offense and the civil claim be related stems in part from the Model Penal Code's prohibition against the crime of compounding. The Penal Code does not criminalize threats of prosecution if "the property obtained by threat . . . was honestly claimed as restitution for the harm done" by the criminal act. In short, if the pecuniary benefit of the threat does not exceed in amount that which the victim of the crime would be due as restitution, then the threat of prosecution may be permissible. The well-founded belief requirement is premised upon Rule 3.1, which prohibits lawyers from asserting claims that are frivolous or in bad faith. Although the Minnesota Lawyers Board has not formally adopted ABA Opinion 92-363, the Director's Office does use the opinion in analyzing complaints alleging threats of criminal prosecution in civil matters.

So what happens when the ABA analysis is applied to the threats made by and against Frank Fired? The threat by Frank's attorney against Frank's employer is not ethically permissible because there is no nexus between Frank's civil claim for unpaid commissions and the employer's criminal violations of pollution laws. Although Frank would be free to report the violations to the EPA, his attorney could not ethically use the threat as leverage in the civil claim for unpaid commissions.

On the other hand, in-house counsel's threat to report the matter to the County Attorney directly relates the civil claim for \$5,000 resulting from Frank's criminal act in forging the company checks. More importantly, the amount sought by the employer does not exceed that which would be due as restitution for Frank's criminal act. The employer's discovery that the checks were deposited into Frank's personal account likely satisfies the "well-founded belief" requirement that criminal charges are warranted. This threat would appear to be permissible.

The threat by wife's counsel is not ethically permissible for several reasons. First, there appears to be no nexus between the civil dispute (dividing the parties assets) and Frank's criminal fraud in collecting twice for the same damage on the vehicle. Second, although Frank may have committed a crime, wife is not the victim of the crime nor has she suffered any personal or economic injury from the crime. Finally, the threat by wife's counsel may even exceed that which wife is entitled to seek in her civil claim, since it is the only remaining asset and presumably Frank would be entitled to at least some of the proceeds.

The profession's standards no longer include a black letter rule prohibiting threats of criminal prosecution in civil matters. Nevertheless, the situations in which a lawyer may ethically threaten criminal prosecution in a civil matter appear to be the exception rather than the rule.