

When may a lawyer ethically threaten criminal prosecution?

Many lawyers and members of the public look askance at lawyers who threaten criminal prosecution as part of negotiations in civil litigation. Every year we receive several complaints against lawyers who have done this, based on the complainant's belief that to do so is always unethical. Is this correct? You may be surprised to learn that, although such conduct implicates several ethics rules, it is not ethically prohibited and may be ethically permissible under certain circumstances. Let's review.

Background

Prior to 1983, most ethics rules expressly prohibited using or threatening criminal prosecution solely to gain an advantage in a civil matter. This began to change in the mid-1980s when the ABA changed its model rules to remove this express prohibition. In 1992, the ABA issued a formal opinion, based upon the revised model rules, on the circumstances under which it was ethically permissible to threaten (and

relatedly refrain from pursuing) criminal prosecution to leverage a client's position in a civil matter.¹ According to that opinion, threats of criminal prosecution against an opposing party may be made in order to obtain relief in a civil matter so long as (1) the criminal matter is related to the client's underlying civil claim, (2) the lawyer has a well-founded belief that both

the civil claim and criminal charges are warranted under the law and facts, and (3) the lawyer does not try to exercise or suggest improper influence over the criminal process.

The Director has long relied on the ABA position regarding the permissibility of threats of prosecution in related civil litigation and has published articles advising the bar to this effect. See Patrick R. Burns, *Limits on Threats of Criminal Prosecution*, Minnesota Lawyer, October 10, 2011; Kenneth L. Jorgensen, *When Lawyers Threaten Criminal Prosecution in a Civil Case*, Minnesota Lawyer, April 24, 1998. There is more to the story, however, that is worth discussion.

Other jurisdictions

Some states carried forward the original express prohibition. For example, Rule 8.4(g) of the Illinois Rules of Professional Conduct provides that "It is professional misconduct for a lawyer to present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter." Texas Rule of Professional Conduct 4.04(b)(1) also prohibits a lawyer from presenting, participating in presenting, or threatening to present "criminal or disciplinary charges solely to gain an advantage in a civil matter." This may matter to you because, under the ethics rules choice of law provisions, the ethics rules to be applied to a matter will be the rules of the jurisdiction where a tribunal sits, if the conduct relates to a matter pending before a tribunal; where the conduct occurred; or where the predominant effects of the conduct occurred.² Due to the multi-jurisdictional nature of many practices, you should know the ethics rules to the extent your conduct has significant contact with other jurisdictions. And if you are considering a threat regarding criminal prosecution, you should be reviewing the applicable ethics guidance from that jurisdiction.

Criminal law

The primary rationale behind omitting the pre-1983 prohibition language was that other rules covered this conduct. For example, as noted in the ABA Opinion, "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)."³ Minnesota does not have an extortion statute, but does have a very broad coercion statute.⁴ Criminal coercion occurs when "whoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act," including "a threat to make or cause to be made a criminal charge, whether true or false."⁵ Criminal law is well beyond the purview of the Director's Office. However, provided a lawyer follows the guidance in the 1992 ABA opinion, the Director has not imposed discipline. Nor am I aware of an occasion where a lawyer was charged under the coercion statute after following the ABA guidance. But the criminal law on its face is very broad.

Recently, the Minnesota Court of Appeals struck down as unconstitutional a subdivision of the criminal coercion statute, specifically Minn. Stat. §604.27, subd. 1(4), in *State v. Jorgenson*, 934 N.W.2d 362 (Minn. Ct. App. 2019), review granted December 17, 2019. That subdivision criminalized "a threat to expose a secret or deformity... or otherwise to expose any person to disgrace or ridicule." The court of appeals determined the statute was overbroad as it proscribes and criminalized a substantial amount of protected speech. Subdivision 1(5) of Minn. Stat. §609.27 may suffer from the same constitutional problems, as it similarly proscribes a substantial amount of protected speech, including claims of right and, in some instances, other statutorily mandated speech. For example, someone collecting on a worthless check must provide a notice of dishonor that includes notification



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

✉ SUSAN.HUMISTON@COURTS.STATE.MN.US

of criminal penalties under Minn. Stat. §604.113, subdiv. 3. However, the criminal statute as presently written makes it unlawful to “threaten to make or cause to make a criminal charge, whether true or false,” and you should take that into consideration when making decisions regarding your own conduct.

The ethics rules

ABA Opinion 92-363 addresses additional rules practitioners should keep in mind to guide their conduct. Rule 4.4(a), MRPC, prohibits a lawyer from using means that have “no substantial purpose other than to embarrass, delay, or burden” an opposing party. Accordingly, “A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4.” Rule 4.1, MRPC, imposes a duty of truthfulness in statements to others. So, “A lawyer who threatens criminal prosecution, without an actual intent to so proceed, violates Rule 4.1.” Rule 3.1, MRPC, prohibits the assertion of non-meritorious claims or contentions. Thus, “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.”

Conclusion

Tread carefully when making any threat to an opposing party, particularly relating to criminal prosecution. Lawyers frequently represent clients in matters where there are both civil and criminal remedies available, and to perform your job competently, those overlapping remedies often need to be addressed. If you choose to use potential criminal prosecution as a negotiating tactic, make sure you are operating in a jurisdiction where this is permitted, and that (1) the civil and criminal claims are related, (2) you have a well-founded belief that both the civil claim and the criminal charges are warranted by the law and facts, and (3) you do not attempt to exert or suggest improper influence over the criminal process. Otherwise you almost certainly are running afoul of the ethics rules. Also, make sure your negotiation demands are reasonable. If you are demanding more than your claim is worth to forgo criminal prosecution, chances increase that you may violate a coercion or extortion statute.

We often field requests from lawyers on our ethics hotline on the topic of ethically threatening criminal prosecution in a client’s civil matter. We also see several complaints on this topic annually. Most lawyers err on the side of caution when approaching this topic, but many lawyers do not. Zealous representation does not mean you can use as leverage every bad (or criminal) thing you know about the opposing party, even though your client may want you to. As always, if you have questions regarding your ethical obligations, please call us at 651-296-3952, or visit our website at lprb.mncourts.gov to submit an online request. ▲

Notes

¹ ABA Formal Opinion 92-363 (July 6, 1992).

² Rule 8.5(b), Minnesota Rules of Professional Conduct (MRPC).

³ Rule 8.4(b), MRPC, “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.”

⁴ Minn. Stat. §609.27.

⁵ Minn. Stat. §609.27, subd. 1(5).