# THREATENING TO PRESENT CRIMINAL CHARGES

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May an attorney present or threaten criminal charges to gain advantage in a civil matter? The clear and specific prohibition found in the old Code of Professional Responsibility does not have a single counterpart in the Rules of Professional Conduct. DR 7-105(A) 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 rationale for this prohibition was set forth in Ethical Consideration 7-21 which stated in part,

> 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 the legal system.

The Model Rules of Professional Responsibility adopted by the American Bar Association did not contain a specific counterpart to DR 7-105(A). The drafters of the Model Rules determined that extortionate, fraudulent, or abusive threats were covered by more general prohibitions in the Model Rules and thus the express prohibition of former DR 7-105(A) was no longer necessary.[Ftn1] Additionally, DR 7-105(A) was potentially in conflict with state statutes such as Minn. Stat. §332.50 which requires notice of a criminal liability be given in order for the party to be eligible to pursue civil remedies.

The Model Rules have, in effect, turned the clock back to the period before 1969, when the ABA Model Code and DR 7-105(A) were promulgated. The old ABA Canons had no specific counterpart to DR 7-105(A), but authorities generally agreed with Drinker, *Legal Ethics* (1953), 153, that an attorney "may not threaten a criminal action or disciplinary proceedings in order to effect a civil settlement . . ."

Of the states that adopted versions of the Model Rules, only two, Connecticut and North Carolina, specifically carried the substance of DR 7-105(A) forward into their version of the Model Rules.[Ftn2] At least three other states have interpreted their rules as continuing to include the prohibition notwithstanding the omission of specific language.

The New Jersey Ethics Committee in addressing the issue of the absence of DR 7-105(A) in the new rules held the conduct was still prohibited. After inquiry of the drafters, the committee found no discussions concerning intentionally omitting the rule. The committee determined that such an important ethical principle would not have been abandoned without discussion. From the record's silence, the committee inferred that DR 7-105(A) lived on.[Ftn3]

A Wisconsin ethics opinion indicated that while the new rules did not contain an equivalent

provision, the general prohibition could be found in other more specific prohibitions of the new rules including: Rules 3.1; 3.3; 3.4; 3.5; 3.8; 4.4; 8.4(b); and 8.4(e).[Ftn4] The Wisconsin opinion indicated that the crucial question would be whether the criminal charges were brought or threatened primarily as leverage in the civil matter.

New Mexico's Bar Advisory Committee, in confronting the issue of attorneys threatening criminal prosecution, focused on the reasons for the earlier disciplinary rule.

> Because the rationale behind former Rule 7-105(A) was that threats of criminal prosecution for civil ends constituted a subversion of the criminal process and might deter the recipient of a letter from asserting his legal rights, thereby impairing the usefulness of the civil process, and that such threats tended to diminish public confidence in the legal system, it would appear that such conduct would be a violation of new Rule 16-804(D).[Ftn5]

New Mexico Rule 16-804(D) prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice.

Minnesota adopted its version of the ABA Model Rules effective September 1, 1985, without a specific counterpart to DR 7-105(A). The elimination of the express prohibition resulted in a number of inquiries as to whether such conduct was no longer prohibited.

The Director's Office continues to view the threat of criminal prosecution as unprofessional conduct in certain circumstances. For example, if the civil and threatened criminal matters are not related, the threat to seek prosecution would generally not be permissible. Such conduct may constitute a violation of Minn. Stat. §609.27 (1986) (coercion), and thereby violate Rule 8.4(b) and/or (d).[Ftn6] On the other hand, statutorily required notice of criminal liability in connection with civil remedies would be permissible.[Ftn7] Generally, a crucial question will be whether the threatened criminal charges were clearly unfounded, unrelated, or otherwise abusive.

In determining whether threatening or presenting criminal charges in connection with a civil matter could be considered unethical, attorneys should particularly consider Rule 3.1, meritorious claims and contentions; Rule 4.4, respect for rights of third persons; and Rule 8.4(d) forbidding conduct prejudicial to the administration of justice. If, after consulting these authorities, questions to proposed conduct remain, attorneys may contact the Director's Office for an advisory opinion.

A somewhat related issue is that of threatening to file an ethics complaint. This issue was discussed in a (March [sic]) December 1983 *Bench & Bar* article, which indicated such conduct could subject an attorney to discipline.

An attorney's obligation under Rule 8.3(a) is to report conduct known to the attorney which raises a *substantial question* as to the other attorney's honesty, trustworthiness, or fitness. If an attorney believes a substantial question exists concerning an opposing party's conduct, the attorney is obligated to report the matter to the Director's Office. Questions over ethical conduct are not to be raised as part of a strategy in representing clients. Threatening to file an ethics complaint may constitute conduct which is prejudicial to the administration of justice and subject the attorney to discipline.

## NOTES

[1] *Model Rule 8.4 Legal Background Note (Proposed final draft, May 30, 1981).*

[2] *ABA/BNA Lawyers Manual on Professional Conduct, 71:601 (1987).*

[3] *New Jersey Advisory Committee on Professional Ethics. Opinion 595 (December 18, 1986).*

[4] *Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-87-5 (July 17, 1987).*

[5] *New Mexico State Bar Advisory Opinions Committee, Opinion 1987-5.*

[6] *Wolfram,* Modern Legal Ethics *(1986) at 718, takes this view. However, he also believes that DR 7-105(A) should have been carried forward more specifically, and that "abusively harassing another with threats of well-founded criminal complaint may be permissible under the Model Rules. . . ."* See also *Minn. Stat. §609.505, "Falsely Reporting Crime."*

[7] See, e.g., *Minn. Stat. §332.50 subd, (3) (1986).*