

THREATENING CRIMINAL PROSECUTION IN CIVIL CASE

by

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In the last few months, we have received advisory opinion inquiries about whether a lawyer can threaten criminal prosecution in a civil matter. The answer is — it depends. The answer may come as a shock to lawyers who have been around for a while, as well as to those lawyers they mentored. Around 1981, the absolute prohibition on threatening to seek or pursue criminal prosecution in a civil matter was removed from the ABA Model Rules of Professional Conduct and Minnesota followed suit thereafter.

This change, however, did not give lawyers free reign to threaten criminal prosecution in civil cases. The American Bar Association issued Formal Opinion 92-363 to provide guidance to lawyers in civil matters. While the Minnesota Lawyers Professional Responsibility Board has not adopted a formal opinion on this matter, the Director's Office utilizes the ABA's Formal Opinion 92-363 in analyzing the question. ABA Formal Opinion 92-363 outlines the limited times a lawyer may use the threat of seeking criminal prosecution in a civil case.

In analyzing whether criminal prosecution may be threatened, there must be a connection between the civil matter and the potential criminal matter. The lawyer must have a well-founded belief that the facts and the law must support civil claims as well as the criminal claims. Finally, a lawyer threatening criminal action must not attempt to or exert improper influence in the criminal matter, nor overstate his or her ability to ensure that prosecution will occur.

Therefore, Sue, who is representing her client, Brandon, with the recovery of a painting Carol has taken without Brandon's authorization may be able to use the threat of criminal prosecution to assist Brandon with the recovery of the painting. The property at issue in both the civil matter and the potential criminal matter is the same, and there is a well-founded belief the facts and laws support both the civil and criminal claims. As long as the attorney does not attempt to or exert improper influence in the criminal matter, it may be permissible for the attorney to ask for settlement in the civil matter in exchange for the client not seeking criminal prosecution.

However, John, who is representing his client, Jane, in a marital dissolution proceeding and has learned the Jane's soon to be ex-husband, Joe, has taken property from a third

party may not use the threat of criminal prosecution. In this case, there is no connection between the stolen property and the dissolution proceeding. The lawyer's threat of criminal charges is, therefore, not proper.

Lawyers who use the threat of criminal prosecution improperly open themselves up for possible violations of the Minnesota Rules of Professional Conduct. Depending on the circumstances, the following rules may be implicated: Rule 3.1, MRPC, which prohibits the bringing of frivolous claims; Rule 4.4, MRPC, which prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person"; Rule 4.1, MRPC, which provides, "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law"; and Rule 8.4(d), MRPC, which prohibits a lawyer from engaging in acts that are "prejudicial to the administration of justice."

Lawyers must think very carefully about whether they want to threaten criminal sanctions in a civil matter. Failure to do so may lead an attorney to run afoul of the rules.