

Practice Pointer: The Rule Against Threatening Criminal Prosecution to Gain an Advantage in a Civil Matter

by Kate A. Toomey

In law school, many of us learned a professional ethics rule proscribing threatening criminal prosecution to gain an advantage in a civil matter. Shortly after I began working for the Office of Professional Conduct, the office received an informal complaint alleging that an attorney had violated this rule. I read and re-read the Rules of Professional Conduct (RPC) without finding what I was looking for, then confessed to someone with superior knowledge that I couldn't find the rule, although I knew it existed. I was amazed to learn that although Utah at one time had such an explicit rule,¹ it was omitted from the current rules. I'm not the only one to make this mistake: the OPC regularly hears from attorneys on its Ethics Hotline who want to know where to find the rule. This is what I tell them.

Several RPC govern an attorney's permissible conduct in negotiating settlements on a client's behalf. For example, the rules provide that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Rule 4.4, RPC. The rules also provide that "In the course of representing a client a lawyer shall not knowingly: . . . Make a false statement of material fact or law to a third person." Rule 4.1(a), RPC. They also provide that "A lawyer shall not . . . offer an inducement to a witness that is prohibited by law." Rule 3.4(b), RPC. Moreover, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, . . ." Rule 3.1, RPC. Additionally, "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" or to "engage in conduct that is prejudicial to the administration of justice." Rule 8.4(b) & (d), RPC.

Essentially, these rules exhort attorneys to engage in honest, fair play in their dealings with people other than their clients. They obviously apply to all of an attorney's conduct on behalf of a client, not simply the end stages of the representation. But collectively, they also prohibit threatening criminal prosecution solely for the purpose of negotiating a favorable settlement in a civil action – something on the order of theft by extortion within the meaning of the criminal code.² The rules also, obviously, overlap in their application.

Does this mean that the mere mention of the possibility of criminal charges being brought is off-limits? The answer is no. The ABA Ethics Committee has issued an opinion holding that an attorney may use the possibility of bringing criminal charges against an opposing party in a private civil matter as long as the civil matter and the criminal matter are related and warranted by law and fact, provided that the attorney does not try to influence the criminal process. ABA Op. 92-363 (1992). By the same token, unless doing so would violate other legal duties, such as the child abuse reporting statute,³ an attorney may agree to refrain from presenting criminal charges against an opposing party as part of a settlement.

Wrongful conduct, including criminal conduct, dishonesty, and deceit are forbidden. The rules allow lawyers to make truthful observations – it's permissible, for example, to point out that the opposing party's actions could be subject to criminal prosecution – but not to participate in extorting money from the other side. Discipline cases from other jurisdictions illustrate what is not

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permissible.⁴

I urge ethics hotline callers to make certain that their clients understand the limits of what an attorney can do. Tell them you cannot and will not do it. Making idle or dishonest or frivolous threats is inconsistent with every lawyer's obligations under the RPC. Nevertheless, discussing the criminal implications of a party's conduct is not necessarily forbidden. For example, your business client negotiating an appropriate resolution for an instance of theft by an employee who is not in a fiduciary role with the business or its clients, might legitimately explore refraining from reporting the matter for criminal prosecution in exchange for repayment of the money. What is not permissible is demanding huge sums of money in exchange for not reporting the theft. If you know your client would never under any circumstances refer a matter for criminal prosecution, it is wrong to threaten such action.

Returning to the question about the RPC, the answer is that there is no explicit rule, and yet the prohibition implicitly remains in the overlapping application of several of the other rules. If you

are honest in your dealings with others, and mindful of the rule prohibiting attorneys from engaging in criminal behavior, you are unlikely to run afoul of these provisions.

¹ DR7-105(A) of the predecessor Model Code barred lawyers from presenting, participating in presenting, or threatening to present criminal charges "solely to obtain an advantage in a civil matter." The latest version of the Model Rules eliminated this provision because it was viewed as redundant and overbroad. See Annotated Model Rules at 427.

² See Utah Crim. Code § 76-6-406. The statute provides that "A person is guilty of theft if he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof." Utah Code § 76-6-406(a). Extortion includes a person threatening to "[a]ccuse any person of a crime;" causing official action against someone, or doing "any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling career, financial condition, reputation, or person relationships." Id. at (b).

³ See Utah Code § 62A-4a-403.

⁴ See e.g. *Louisiana State Bar Ass'n v. Harrington*, 585 So.2d 514, 520 (La. 1990) (lawyer's letter stating "If we do not receive this information [concerning the identity of an insurer] within ten days of the date of this letter, I will seek to have felony criminal charges pressed against you and seeked [sic] to have you expedited [sic] from the State of Texas to Louisiana, where you will face criminal charges."); *In re Yao*, 661 N.Y.S.2d 199, 201 (N.Y. 1st Div. 1997) (agreement to refrain from public revelation of information concerning person's personal life in exchange for payment of large sums of money).