MAY A LAWYER THREATEN CRIMINAL PROSECUTION IN ORDER TO OBTAIN ADVANTAGE IN A CIVIL MATTER?

I. OFFICE OF DISCIPLINARY COUNSEL v. KING

In *Office of Disciplinary Counsel v. King*, a complaint was filed by the Office of Disciplinary Counsel against King, an attorney, for violating Model Code of Professional Responsibility DR 7-105. That rule bars "threatening criminal prosecution solely to obtain an advantage in a civil matter."  

In the case, King had been retained by his client in a forcible entry and detainer action against the client's mother-in-law. On the day just prior to the trial on the action, King sent a letter to the attorney of his client's mother-in-law which essentially posed the threat of criminal prosecution if the defendant did not accede to demands in the civil matter. The letter demanded monetary reimbursement on the civil complaint and further stated that "unless [my client] is reimbursed for her expenses and the loss of property, she will bring to the attention of the Prosecutor's Office the enclosed documents for the purpose of seeking criminal prosecution." The counsel receiving the letter considered it a threat of criminal prosecution. As such, he spoke with King on the day of the trial. King reiterated that he would contact the Prosecutor's Office unless opposing counsel did what the letter requested.

The court found that this was a violation of DR 7-105. The threat of criminal prosecution was clear and did not have to be inferred. Further, the court determined that this threat was used only as a bargaining tool by King in the civil matter. The Court, following DR 7-105 and the recommendation of the Disciplinary Board, ruled that King be publicly reprimanded and forced to pay the costs of the proceeding. It is interesting to note that nothing more was asked for in the letter than was allegedly due King's client in the civil matter. This will have important rami-

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1. 617 N.E.2d 676 (Ohio 1993).
2. *Id.*
4. *Id.*
5. *King*, 617 N.E.2d at 676.
6. See *id.* at 677.
7. See *id.*
fications in other contexts. As will be seen below, not all courts follow DR 7-105 as provided in the Model Code of Professional Responsibility.

II. PROPER ATTORNEY ROLE AND GENERAL ETHICAL CONSIDERATIONS

Primarily, a lawyer owes a duty to his or her client. This duty is embodied in the obligations of loyalty, confidentiality, and diligence that attorneys owe to their client.8 Beyond the obvious duty owed to clients, an attorney also owes a duty to other outside parties such as the court and third persons. Many of the duties owed to third persons are expressed in Model Rule 4.4, "Respect for Rights of Third Persons."9 The Model Code, in DR 7-102(A)(1) states that an attorney may not pursue "action[s] on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."10 The Model Rules proscribe certain behavior in the course of client representation by providing that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use means of obtaining evidence that violate the legal rights of a third person."11 It can be seen that obligations owing to those other than clients color the responsibility of an attorney. There appears to be a fine line between zealously protecting a client and violating the rights of another.

The Model Rules help to define a boundary, beyond which lawyers should not cross in their zeal to protect the interests of clients. Threatening criminal prosecution in a civil matter clearly can be used as a device of abuse, and fall under the purview of duties owed to third persons. It is not too difficult to imagine a scenario in which an attorney’s threat of criminal prosecution would amount to an action intended to "harass or maliciously injure another."12 While an attorney should exercise his or her professional judgment on a client’s behalf and represent him or her zealously, an attorney cannot ignore the rights of third parties in the quest for victory.13

12. Id.
The policy considerations involved with DR 7-105 illustrate the many hats a lawyer is required to wear and the dilemma he or she often faces. While the attorney is an advocate, he or she is not a bully with free license to trample upon others in an attempt to advance the interests of those fortunate enough to be on the “right team.” Ethics rules serve to maintain the adversarial system while injecting a notion of justice through fairness which, in the end, protects all parties touched by the judicial system.

It does seem as though it is necessary to introduce some sort of bridle into the adversarial system to ensure justice. Without it, the dilemma of justice versus the interests of clients would never be satisfactorily resolved.

III. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105

DR 7-105(A) states that “[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain advantage in a civil matter.”14 Essentially, the rule “prohibits a lawyer from bringing, directly or indirectly, or threatening to bring criminal charges for the sole purpose of gaining an advantage in a civil case.”15

The reasoning provided behind the rule as posed by the drafters of the Code proves persuasive. The drafting committee asserts that the criminal process exists for the protection of society as a whole, and that it is undermined when it is used as a tool to force settlement of private claims or controversies. Further, the committee asserts, the civil process, which is primarily designed for the settlement of disputes, is impaired when the person against whom it is misused is deterred from asserting his or her legal rights.16

“Violations of DR 7-105 most often take place when a lawyer, attempting to collect money owed to his client, mentions or threatens the possibility of bringing applicable criminal charges.”17 Typically, the threat takes the following forms: “you will return the money or you will go to jail” and “if you return the money, I will tell them not to punish

you.”\textsuperscript{18} Clearly, this would appear to be a complete subversion of the judicial process. Some attorneys have gone even further with their threats. They have suggested that they have complete authority and discretion regarding the enforcement of the threatened criminal matter. In \textit{Florida Bar v. Suprina},\textsuperscript{19} the attorney threatened the other party by telling him that he would “have the court give [him] the maximum sentence both in court and in [his] pocketbook.”\textsuperscript{20} This type of conduct appears unethical from a common sense standpoint and has been described as contrary to the idea of fair play.\textsuperscript{21}

Some courts, in interpreting the rule, have focused on the rule’s requirement that the lawyer’s threats must have been made for the \textit{sole purpose} of gaining an advantage in a civil case. In \textit{Decato’s Case},\textsuperscript{22} a lawyer wrote a letter to a party stating that unless he received more information as to why the party had stopped payment on a check, the lawyer would consider filing a criminal complaint for the theft of services.\textsuperscript{23} The court focused its analysis on the word “solely” in DR 7-105 and reasoned that the lawyer did not demand payment, but merely informed the party of the possible criminal charges. Thus, “[t]he opinion suggests that deception or overreaching is the real evil to be avoided by DR 7-105.”\textsuperscript{24} In this case, since there was no demand for payment, the lawyer’s mentioning of criminal charges did not trigger DR 7-105 under the court’s analysis.

Additionally, courts have dealt with the issue of what actually constitutes a threat. \textit{In re McCurdy}\textsuperscript{25} concerned an attorney who represented a client whose car had been damaged in a hit-and-run accident.\textsuperscript{26} After the driver of the car that left the accident scene refused to pay for repairs to the client’s car, the attorney wrote a letter to the other driver intimating that he could possibly face criminal charges for his actions. The letter basically informed the other driver that he was guilty of a criminal offense carrying penalties of a fine and possible imprisonment. The lawyer,
in the letter, stated "I am not telling you this to threaten you."27 The court found that the disclaimer was genuine and was understood by the recipient and that the letter was not intended as a threat. Thus, it appears that courts are willing to give at least some latitude in determining when a threat has been made.

It should be noted that there are situations in which it is recognized that the ability to bring criminal charges in relation to civil proceedings is in the public interest. When criminal charges are initiated, but not threatened, there is less possibility that they are being used to gain a civil advantage.28 The ethics opinions that allow a lawyer to file a separate criminal charge in connection with a civil proceeding look to an absence of coercion and the need to protect the public interest.29 Thus, a lawyer may present a matter to a prosecutor if separate grounds exist for the charge and dismissal of charges is not contingent on the settlement of a civil case.30

Further, it is important to be aware that threats made to gain an advantage in a civil case need not necessarily be made to the opposing party. DR 7-105 has been found to have been violated by threats of retaliatory charges made to witnesses.31

Public officials are not shielded from the ambit of DR 7-105. A prosecutor or other government lawyer may not threaten or file criminal charges in connection with a civil case that he or she is also handling.32 Denoting the seriousness with which abuse of the rule in an official capacity is viewed, violations of the rule by prosecutors or public officials are punished more severely than those by other lawyers.33 Similarly, when prosecutors use their ability to bring and dismiss charges as an unfair bargaining tool, they may be violating DR 7-105.34

Application of the rule to public officials seems wholly appropriate, since it would seem that, often, these are just the individuals with the greatest opportunity to abuse the rules of ethics in a way that DR 7-105 seeks to prevent. If public officials were allowed free license to lord the

27. Id.
33. See id.
34. See MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970).
threat of criminal prosecution over civil litigants, our system of justice would be subverted into a dictatorial forum of sorts in which individuals could be coerced to forego their Constitutional rights in order to protect their short-term interests in a civil matter.

IV. MODEL RULES OF PROFESSIONAL CONDUCT

Unlike the Model Code of Professional Responsibility, the Model 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 (1) the criminal matter is related to the client’s civil claim, (2) 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 (3) the lawyer does not attempt to exert or suggest improper influence over the criminal process.\(^{35}\) It is to be noted that it is an affirmative defense under the Model Rules that any pecuniary benefit sought does not exceed an amount which the attorney believes to be due as restitution or indemnification for harm caused by the offense.\(^{36}\)

It is also important to be aware that the Model Rules require that in the context of threatening criminal prosecution, a lawyer is not allowed to attempt to exert improper influence over the criminal process. While the Model Rules do not prohibit this device, they do ensure that a lawyer is not able to become a sort of dictator in the courtroom, trampling on the free volition of parties to suits. A key principle appears to be that an attorney should never be able to represent justice in the eyes of an opposing party. An attorney should not be able to become a “judge,” with opposing parties’ fates in his or her hands. It would seem that the rules of ethics attempt to ensure that attorneys are facilitators of justice rather than coercers of desired results, and rightly so.

V. POLICY IMPLICATIONS AND IMPACT ON LEGAL PROFESSION

The use of threats of criminal prosecution in a civil matter subverts


\(^{36}\) See id.
the judicial process. Civil courts and criminal courts serve two different functions and if they are allowed to overlap to any significant degree, neither can function effectively.

On the other hand, lawyers should, arguably, be free to bargain in civil matters and society has some interest in individuals being accountable for their criminal acts. In the interests of justice, liability for wrongdoing should be brought to bear fully on those who break the law.

However, it would seem that when an attempt at bringing justice to bear in the context cited herein is promulgated, justice can never truly result. It is the very nature of our judicial system that individuals be given the opportunity to defend themselves in the proper forum. If faced with a coercive threat of criminal prosecution in a civil proceeding, an individual is, in a sense, forced into the position of defending that Criminal “charge.” Surely, such cannot be the desired result of the justice system. The ethics rules appear to echo the position that individuals be allowed to defend themselves freely in civil matters, without the baggage of coercive threats better left to other, more appropriate forums.

As the cases and commentaries show, the Rules strike a proper balance between the protection of societal interests in the administration of justice and the right of individuals to avail themselves fully of the civil justice system in a meaningful way. True justice can not, and will not, allow an advantage in one forum at the expense of the subversion of justice in another. Both forums of justice, both civil and criminal, must be weighed one against the other to ensure that justice does, in fact, prevail.

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