New Developments in Legal Ethics

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THREATENING CRIMINAL PROSECUTION OR DISCIPLINARY ACTION TO OBTAIN A CIVIL ADVANTAGE

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I. THE ABA APPROACH

A lawyer’s conduct of threatening criminal prosecution to obtain a civil advantage provides a fascinating insight into the national and state bars’ approach to ethics -- and provides another excellent example of why lawyers cannot follow their "moral instinct" or "smell test" when making ethics decisions. There is a substantial difference between the approach taken by the American Bar Association, which has eliminated the specific rule from the ABA Model Rules and the approach taken by Virginia and other states which have retained specific rules prohibiting such conduct.

The old ABA Model Code contained a fairly straightforward prohibition.

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Model Code DR 7-105(A).

When the ABA adopted its Model Rules in 1983, it deliberately dropped this provision.

The ABA explained its reasoning in a LEO issued about ten years later.

The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C. W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide
an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

ABA LEO 363 (7/6/92) (footnote omitted).

In defending its decision, the ABA first dealt with the possibility that such threats could amount to extortion. Model Rule 8.4(b) provides that

[i]t is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the “property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.” Model Penal Code, § 223.4 (emphasis added); see also § 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:

A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense. (emphasis supplied)

Id. (emphases added; emphasis in original indicated by underscore). See Model Penal Code § 223.4 ("Theft by Extortion") ("It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful..."
services.”); Model Penal Code § 242.5 (“Compounding”) ("A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.”).

The ABA concluded as follows:

The Committee concludes, for reasons to be explained, that the ABA Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

ABA LEO 363 (7/6/92).

The ABA also explained that wrongful threats of criminal prosecution could amount to violations of other ABA Model Rules, such as:

Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability improperly to influence a government official or agency.

Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no
substantial purpose other than to embarrass, delay, or burden a third person. . ." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. See also Hazard & Hodes, supra, § 4.4:104.

Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.

Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. 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.

ABA LEO 363 (7/6/92).

The Restatement also deliberately excluded this prohibition -- dealing with the issue in an obscure comment to the rule governing statements to a non-client.

Beyond the law of misrepresentation, other civil or criminal law may constrain a lawyer's statements, for example, the criminal law of extortion. In some jurisdictions, lawyer codes prohibit a lawyer negotiating a civil claim from referring to the prospect of filing criminal charges against the opposing party.


The ABA approach is the same with respect to a lawyer’s threat of a bar complaint against his adversary. In ABA Formal Op. 383 (7/5/94), the ABA held that a lawyer's threat to file a disciplinary complaint against his adversary to gain an advantage in a civil case would violate the Model Rules if: the adversary's conduct required reporting; the misconduct was unrelated to the civil matter; the disciplinary charges are not well-founded in fact or law; or the threat is designed solely to harass.

II. APPROACH TAKEN BY OTHER STATES
Even as of 1992, the ABA explained that a number of states had chosen to continue the prohibition on such threats even after they shifted to a Model Rules format. The ABA listed the following states as having made this decision: Illinois; Texas; Connecticut; Maine; D.C.; North Carolina. The ABA also noted that the following states continued to follow the basic rule, but by way of legal ethics opinion rather than black-letter rule or comment: New Jersey; Wisconsin.

The ABA/BNA Lawyers’ Manual on Professional Conduct § 71:601 provides a list (current as of 2003) of those states which have continued the prohibition in their rules, expanded the prohibition to include disciplinary charges, and adopted the prohibition by way of legal ethics opinion rather than by rule.

Because the ABA has dropped the prohibition, states deciding to retain it must determine where in their rules they will insert the prohibition. Of course, states do not have this problem when adopting a variation of an ABA Model Rule -- because they use the same rule number, but include a different substance. With the prohibition on threatening criminal prosecution, there is no ABA Model Rule to use as a guide.

This makes it very difficult for practitioners to determine if a particular state continues to prohibit such conduct.

- At least one state has retained the prohibition in its Rule 1.2 (entitled "Scope of Representation"). Illinois Rule 1.2(e).
- Some states retaining the prohibition include it in Rule 3.4 (whose title is "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Georgia Rule 3.4(h); Florida Rule 4-3.4(g); Virginia Rule 3.4(i).
- Some states include the provision in their Rule 4.4 (entitled "Respect for the Rights of Third Persons"): Tennessee Rule 4.4(b); Texas Rule 4.04(b).
- At least one jurisdiction has included the provision in its Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g).
• Those states having unique rules also must find a place to put a prohibition that they wish to retain: New York DR 7-105(A); California Rule 5-100(A).

As indicated above, some states follow essentially the same approach, but using legal ethics opinions rather than rules. See, e.g., North Carolina LEO 98-19 (4/23/99) ("Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence."); West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

Illinois has chosen to retain the prohibition, and included it in its Rule 1.2 (entitled "Scope of Representation").

A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary actions to obtain an advantage in a civil matter.

Illinois Rule 1.2(c).

III. APPROACH TAKEN BY VIRGINIA
Virginia has chosen to retain the prohibition, and included it in its Rule 3.4 (entitled "Fairness to Opposing Party and Counsel").

A lawyer shall not . . . present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Virginia Rule 3.4(i).


Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.


When Virginia changed its Rules in 2000, it deliberately dropped the prohibition on a lawyer "participat[ing] in presenting" criminal charges. Virginia Rule 3.4, Va. Code Comparison. The Virginia Code Comparison explains that Virginia lawyers "therefore may freely offer advice to the client about the client’s rights under the criminal law.” Id.

Unlike the ABA and some other states, Virginia takes the position that the prohibition against threatening criminal prosecution applies even if the lawyer’s client has a legitimate basis for bringing criminal charges against the threatened party. Thus, while the client could rightfully file criminal charges, the lawyer may not use the client’s threat of going to the police to leverage or extract a settlement of a civil claim from the threatened party. Legal Ethics Opinion 1361 (1990) serves to illustrate this point. The Committee addressed a scenario in which a defense lawyer learned that the plaintiff tried to bribe a witness. The Committee acknowledged that the lawyer must advise the
tribunal of the potential crime [see Rule 3.3(b)] and may also advise the Commonwealth's Attorney (the Committee did not decide if failure to report the crime would amount to misprision of a felony under Va. Code § 18.2-461). The Committee said that the lawyer may continue to represent the defendant in the civil case even though the lawyer might be a witness in the resulting criminal matter. “Reporting the bribery would itself be unethical only if the lawyer was acting "solely for the purpose of obtaining an advantage in a civil matter."” Thus, the fact that the client or lawyer may be justified in reporting the opposing party’s crime to law enforcement authorities is NOT a justification for using the threat of criminal prosecution solely to obtain a civil advantage.

Finally, it is important to emphasize that Virginia’s rule requires that the attorney’s threat of criminal or disciplinary action must be “solely” to obtain an advantage in a civil matter. New York takes the same approach, making clear that the term “solely” narrows substantially the conduct prohibited by the rule.1

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“DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made “solely to obtain an advantage in a civil matter.” For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.” (Emphasis added.) Other New York ethics opinions have similarly concluded that a violation of D.R. 7-105 requires that the attorney must have intended to threaten criminal prosecution “solely” to gain an advantage in the civil litigation. For example, N.Y. State Bar Assoc. Op. 81-100 (1981), succinctly stated that “[i]f the test under this Rule is one of motivation, namely, whether the attorney made the report only to secure a strategic or other edge in a civil litigation.” Similarly, N.Y. City Bar Assoc. Op. 79-64 (1980), concluded that the “principle of DR 7-105” is “[i]f the attorney's motivation ... is solely to gain an advantage in a civil litigation, the action would be improper.” Also consider, for example, the following New York ethics opinions: Bar Assoc. of Nassau Co. Op. 93-13 (1993) (attorney may not send a letter to the former employee demanding reimbursement, or the matter will be referred to the district attorney for criminal prosecution); N.Y. State Bar Assoc. Op. 635 (1992) (noting it would be improper for a lawyer to make a report of misconduct without having a reasonable basis for doing so, solely to gain a tactical advantage);
IV. IS THERE A DUTY TO REPORT TO THE BAR WHEN A LAWYER IMPROPERLY THREATENS CRIMINAL PROSECUTION OR A BAR COMPLAINT SOLELY TO OBTAIN A CIVIL ADVANTAGE?

In Legal Ethics Opinion 1646 (1995) the Committee was faced with the question of whether a lawyer had a duty to report another lawyer’s alleged misconduct to the Virginia State Bar when the latter offered to withdraw his client’s bar complaint in exchange for payment of a settlement of the client’s malpractice claim against the lawyer.

Under the facts, Attorney A and his law firm were defendants in a legal malpractice case.

Bar Assoc. of Nassau Co. Op. 90-9 (1990) (it is improper to use the threat of charges against an adversary solely to bargain for better terms of an agreement); N.Y. City Bar Assoc. Op. 82-21 (1982) (a lawyer is prohibited from presenting or participating in presenting criminal charges solely to obtain an advantage in a civil matter); Bar Assoc. of Nassau Co. Op. 82-3 (1982) (attorney may not send a collection letter threatening to present criminal charges in order to solely induce payment); and Nassau County Opinion No. 82-3 (1982) (attorney may not send a letter stating pay your outstanding bill, or the matter will be referred to the district attorney to be criminally prosecuted for theft of services).

New York disciplinary cases which have sanctioned attorneys for threatening criminal prosecution, only found a violation of the ethical rules where the attorney sought to gain a tactical advantage in the civil litigation, principally by making financial demands. For example, in In Re Gelman, 230 A.D. 524 (1st Dep. 1930), the attorney was censured for sending an adversary an ultimatum-type letter to pay a past owed monetary judgment—stating “If I am put to the trouble of proceeding against you personally on the judgment referred to, I will be compelled to institute criminal proceedings against you for failing to cover your taxicab by proper insurance policy under the law.” In In Re Penn, 196 A.D. 764, 765 (1st Dept. 1921), the attorney was censured for writing a letter to his adversary, demanding the return of, among other things, a diamond engagement ring. The attorney’s letter stated that the recipient was criminally liable, but that no further action would be taken if she returned the property to the attorney or his client. And in In re Hyman, 226 A.D. 468, 469 (1929), the lawyer was censured for writing an ultimatum-type letter to a personal injury defendant, in which the attorney stated: “Unless you show some substantial evidence of your willingness to compensate [my client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client.” (Emphasis added.) Also, in In re Beachboard, __ A.D. __, 263 N.Y.S. 492, 493 (1st Dept. 1933), an attorney was censured for sending a letter to his adversary, which stated that unless money was immediately paid, the attorney “would present the matter to the district attorney upon a charge of larceny and embezzlement.” In In re Glavin, 107 A.D.2d 1006, 1007 (1985), the attorney was censured for sending a letter to an adversary, which stated that unless the money was returned, the lawyer would “have a warrant issued for [his] arrest” – “you will return the money or go to jail.” (Emphasis added.) In Matter of Geoghan, 253 A.D.2d 205, 206-07, 209 (1st Dept. 1999), the attorney violated D.R. 7-105. In the Geoghan case, however, rather than threaten criminal prosecution because criminal assault charges had already been filed against the defendant – the attorney told the defendant that in exchange for $100,000 to settle the civil case resulting from the assault, the attorney (Geoghan) and his client would attempt to have the criminal charges dismissed. Finally, New York’s new Rule 3.4(g) modified the language of New York’s version of D.R. 7-105(A) to state that a lawyer shall not “present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter when doing so is prohibited by law.” The new rule replaces the subjective inquiry into “sole” motives with an objective inquiry into whether the conduct is “prohibited by law.”
The plaintiff had also filed a bar complaint against Attorney A based on the same facts alleged in the legal malpractice suit. The malpractice suit was non-suited but the Plaintiff announced their intent to refile the suit. While the bar complaint was under investigation, Plaintiff’s attorney sought settlement of the malpractice case and offered in return to withdraw Plaintiff’s bar complaint as part of the proposed settlement. Attorney A believed that this was a violation of DR 7-104 [now Rule 3.4(i)] and asked the Committee if Attorney A was obligated to report this misconduct to the bar under DR 1-103 [now Rule 8.3].

In LEO 1646, the Committee cited to several prior opinions holding that misconduct in violation of DR 7-104 [now Rule 3.4(i)] may give rise to an obligation to report such matters to the bar. LEOs 1528, 1582 and 1635. Assuming that the lawyer is obligated to report the misconduct to the bar, the sole remaining issue is one of timing. The committee stated the duty to report misconduct requires that the report be made “promptly,” however, the Committee acknowledged that the filing of the bar complaint while the malpractice case was pending would render Attorney A’s conduct “suspect as long as there is a possibility that Attorney A would gain an advantage in the in the simultaneously pending malpractice claim.” The Committee concluded that as long as the report of misconduct is being made by Attorney A not for leverage to settle or conclude the malpractice claim, Attorney A is not required to wait until the settlement or conclusion of the malpractice claim before reporting the misconduct to the bar.
THREATS:
HYPOS

For purposes of these hypos, assume that there is a reasonable factual basis for the underlying misconduct that is the subject of the report or threat to report. Also, assume that gaining advantage for the lawyer’s client is a primary motivation for reporting or threatening to report in all of these circumstances.

1. CRIMINAL CONDUCT BY OPPOSING PARTY

   (a) A bank employee has stolen funds from bank trust accounts. The bank wishes to confidentially and expediently recover the stolen trust funds to avoid reputational injury and potential loss of clients. May the lawyer representing the bank in negotiating with the employee’s lawyer over repayment of the funds raise the possibility of foregoing reporting of criminal conduct to authorities as part of a settlement? [See Richmond, Faughnan, & Matula, Professional Responsibility in Litigation 436 (ABA 2011); Committee on Legal Ethics of the W.Va. State Bar v. Printz, 416 S.E.2d 720 (W. Va. 1992)]

   (b) Does the answer change if the factual situation is different and the implicit threat has no relationship to the underlying cause of action? [See ABA Formal Op. 92-363]

   (c) In answering the questions above, does it make any difference whether it is the defendant’s lawyer or the victim’s lawyer who initially raises the possibility of not reporting prosecution of the crime as part of the settlement negotiations? If so, why? [See NYC Bar Ethics Op. 1995-13]

2. IMMIGRATION STATUS OF OPPOSING PARTY

   (a) Lawyer represents Client accused of physical abuse by his spouse in a civil family law matter. Under the ethics rules, may Lawyer threaten to report the opposing party’s undocumented alien status to federal authorities in order to gain an advantage for Client in the civil matter? [See N.C. Formal Ethics Op. 2005-3] Does it matter whether Lawyer actually intends to follow through on the threat?

   (b) Same facts as (a), except Client raises the possibility of making the threat, and asks Lawyer if Client is permitted to make the threat. What are Lawyer’s obligations under the ethics rules? [See ABA Formal Op. 11-461] Does it matter whether Client actually intends to follow through on the threat at the time it is made?

   (c) Same facts as (a). Rather than threatening to report, Lawyer actually reports the opposing party’s undocumented immigration status to federal authorities. Has Lawyer acted unethically? Unprofessionally?

   (d) Same facts as (a). Lawyer makes the threat and the opposing party accepts the proposed settlement on the condition that neither Lawyer nor Client makes a report of the
opposing illegal party’s immigration status. Does a settlement on these terms violate Lawyer’s obligations under the ethics rules?


(f) Change the facts again. Assume Lawyer is representing Client, who is a plaintiff in a retaliatory discharge case against a nonprofit corporation X. Client alleges that while serving as X’s Executive Director, he learned that one of X’s directors is an illegal alien, which he understood would potentially jeopardize funding for the organization. Client alleges that he was fired in violation of public policy after he asked the director to verify her immigration status. Assuming Client has a colorable claim under state law, may Lawyer ethically seek discovery on behalf of Client regarding the director’s immigration status in the lawsuit? [See Diaz v. Washington State Migrant Council, 2011 WL 5842778 (Wash. App. Nov. 22, 2011)] May Lawyer threaten to report plaintiff’s illegal alien status in order to gain an advantage for Client in these circumstances?

3. BREACH OF PROFESSIONAL DUTIES BY OPPosing LAWYER

(a) In the representation of Client in a civil litigation matter, Lawyer concludes that opposing counsel has engaged in unethical discovery conduct during the course of the litigation that Lawyer believes reflects adversely on opposing counsel’s fitness as a lawyer. Lawyer decides his client would be well-served by threatening opposing counsel with a bar complaint. Is making this threat unethical? Unprofessional? [See ABA Formal Op. 94-383; see also In re Pyle, 91 P.3d 1222 (Kan. 2004)]

(b) Same facts as (a). Rather than threatening to file a bar complaint, Lawyer actually files one. Has Lawyer acted unethically? Unprofessionally?

(c) Same facts as (a). Lawyer makes the threat and the opposing party accepts the proposed settlement on the condition that neither Lawyer nor Client files a bar complaint against the opposing lawyer. Does a settlement on these terms violate Lawyer’s obligations under the ethics rules? [See MRPC 8.3(a); Discipline of Eicher, 661 N.W.2d 354 (S.D. 2003); Iowa Supreme Court Board of Professional Ethics and Conduct v. Furlong, 625 N.W.2d 711, 714 n.1 (Iowa 2001), citing Committee on Professional Ethics & Conduct v. McCullough, 468 N.W. 458, 462 (Iowa 1991); see also In re Riehlmann, 891 So.2d 1239 (La. 2005)]
(d) Change the facts. During the course of a representation of Husband in a divorce proceeding, Wife files a bar complaint against Lawyer alleging that Lawyer mishandled escrow funds, a portion of which Wife contends should have been paid to her. The parties thereafter reach a settlement, and in drafting the proposed settlement agreement, Lawyer proposes language resolving the escrow account issue and requiring Wife “to relinquish and forever waive” the bar grievance based on the handling of escrowed funds. In a follow up letter to opposing counsel, Lawyer clarifies that “if I don’t have a release, this matter will not be resolved.” Wife signs the agreement, later asserting that she did so based on her counsel’s advice that such a provision legally unenforceable. Lawyer later asserts that it was Client, not him, who insisted on including the “release,” and that Lawyer knew the provision would not be legally enforceable. Did Lawyer act unethically? Unprofessionally? [See In re Welch, 30 A.3d 315 (N.J. 2011) (adopting decision of the N.J. Disciplinary Review Board, at http://lawlibrary.rutgers.edu/drb/decisions/11-117.pdf)].

(e) Change the facts. Lawyer believes that opposing counsel has violated the ethics rules in the representation of his client by failing to identify and resolve a conflict of interest. Lawyer believes that the mistake was inadvertent, resulting from a failure in the firm’s conflict database, and does not reflect adversely on opposing counsel’s fitness to practice law. Did Lawyer act unethically? Unprofessionally? Is threatening the opposing lawyer to seek disqualification unless the opposing party accepts a settlement on terms favorable to Client unethical? Unprofessional?

4. THREAT TO REPORT IMPROPER THREAT

What are the ethics and professionalism issues associated with the following correspondence?

February 3, 2012

Lionel Hutz, Esq.
123 Main Street
Springfield, TV 00000

Re: Brockman v. Wiggum

Dear Lionel:

I am in receipt of your January 31 letter, and I am at something of a loss. I am writing this letter in hopes that you can assist me in trying to wrestle a very troubling issue to the ground.

In your letter, you communicated your client’s latest settlement demand, which curiously was for even more money than your client’s settlement demand, but the more troubling part of your letter was your statement that if Chief Wiggum did not accept the settlement demand within seven days of the date of your letter that you and your client would be left with no choice but to
schedule a meeting with the District Attorney about, in your words, “Chief Wiggum’s long-time association with ‘Fat Tony’ and his ongoing gambling venture being run out of the ‘Legitimate Businessman’s Social Club.’”

Setting aside the fact that I really have no reason to believe that Chief Wiggum is engaged in any criminal activity of any sort, I am having trouble reading your letter as amounting to anything other than a threat to pursue criminal charges against my client in an effort to obtain an advantage in the above-captioned Section 1983 civil rights suit Mr. Brockman filed late last year over what he alleges was a false arrest.

As you might know, there are abundant authorities out there that have concluded that it is unethical for an attorney to threaten to pursue a criminal charge in an effort to obtain an advantage in civil litigation. As you most certainly know, under our ethics rules, specifically Rule 8.3, a lawyer is ethically obligated to report an ethics violation committed by another lawyer if the violation raises substantial questions about honesty, trustworthiness, or fitness to practice law in other respects.

What I need your help figuring out is this: Why shouldn’t I conclude that your improper threat raises substantial questions about your fitness to practice law and proceed accordingly?

I look forward to hearing from you immediately.

Yours,

The Blue-Haired Lawyer

5. THREATENING CLIENT WITH CRIMINAL PROSECUTION

Client filed disciplinary complaint against Lawyer for failure to act diligently in a probate proceeding. In response, Lawyer threatened Client with criminal prosecution and a civil defamation suit. Does this threat violate the ethics rules? [See In re: Robinson, 46 So.3d 662 (La. 2010); see also La. S.Ct. Rule XIX, section 12 regarding complainant immunity].
THREATS:
RESOURCE LIST

Rules

ABA Model Code of Professional Responsibility:

- DR 7-105: Threatening Criminal Prosecution. (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

- EC 7-21: The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. 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 our legal system.

ABA Model Rules of Professional Conduct:

- Rule 4.4: Respect For Rights Of Third Persons. (a) 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 8.4. Misconduct. It is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . (d) engage in conduct that is prejudicial to the administration of justice . . .

State RPCs

- Alabama

RPC 3.10. Threatening Criminal Prosecution. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENT: The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. 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 or her legal rights and when that happens 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 the criminal process tends to diminish public confidence in our legal system.

- **California**

**RPC 5-100: Threatening Criminal, Administrative, or Disciplinary Charges.**

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

- **Colorado**

**RPC 4.5: Threatening Prosecution**

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other’s conduct may violate criminal, administrative or disciplinary rules or statutes.

**COMMENT**

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For purposes of this Rule, a civil matter is a controversy or potential controversy over rights and duties of two or more persons under the law whether or not an action has been commenced.

[2] Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid 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, administrative or disciplinary process tends to diminish public confidence in our legal system.

[3] The Rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this Rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

[4] This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil proceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

[5] Moreover, this Rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person’s conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

[6] While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

[7] Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer’s clients. Where no such reasonable relation exists, the communication likely constitutes a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person’s writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

- **Connecticut**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(7) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.
• **D.C.**

RPC 8.4. Misconduct. It is professional misconduct for a lawyer to (g) seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

• **Florida**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(h) present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

• **Georgia**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(g) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter; or

(h) present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter.

• **Hawaii**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(i) present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

• **Idaho**

RPC 4.4. Respect for the Rights of Third Persons.

(a) In representing a client, a lawyer shall not

(3) present or participate in presenting criminal charges solely to obtain advantage in a civil matter; or

(4) threaten to present criminal charges in order to obtain advantage in a civil matter.
Comment [3]: Paragraph (a) also maintains Idaho’s more traditional view, abandoned in most jurisdictions, prohibiting the threat of or presentation of criminal charges solely to gain advantage in a civil matter.

- **Illinois**

  RPC 8.4. Misconduct. It is professional misconduct for a lawyer to

  (g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

- **Kentucky**

  SCR 3.130(3.4): Fairness to Opposing Party and Counsel. A lawyer shall not

  (f) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter.

- **Louisiana**

  RPC 8.4. Misconduct. It is professional misconduct for a lawyer to

  (g) threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

- **Massachusetts**

  RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

  (h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter.

Comment [6]: Paragraph (h) is taken from former DR 7-105(A), but it prohibits filing or threatening to file disciplinary charges as well as criminal charges solely to obtain an advantage in a private civil matter. The word “private” has been added to make clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government. This rule is never violated by a report under Rule 8.3 made in good faith because the report would not be made "solely" to gain an advantage in a civil matter.

- **New Jersey**

  RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not
(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

- **New York**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(e) present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter.

Comment [5]: The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer’s threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

- **Ohio**

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

- **Oregon**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

- **South Carolina**

RPC 4.5: Threatening Criminal Prosecution. A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.
Comment: This Rule is not included in the Model Rules of Professional Conduct. The language of this Rule is based upon DR 7-105 of the Code of Professional Responsibility.

- **Tennessee**

  RPC 4.4. Respect for the Rights of Third Persons.

  (a) In representing a client, a lawyer shall not

  (2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

- **Texas**


  (b) A lawyer shall not present, participate in presenting, or threaten to present:

  (1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

  (2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

- **Vermont**

  RPC 4.5: Threatening Criminal Prosecution. A lawyer shall not present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter.

  Comment [1]: The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. 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 the person’s 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 our legal system.

  Reporter’s Notes—2009 Amendments: There is no equivalent in the Model Rules to V.R.P.C. 4.5, which was based on the former Vermont Code if Professional Responsibility, DR 7-105 and EC 7-21. See Reporter’s Notes to V.R.P.C. 4.5 (1999). The only change is the insertion of the bracketed number to designate the Comment.
Note that the conduct proscribed is also an offense under 13 V.S.A. § 1701, which provides criminal penalties for maliciously threatening “to accuse another of a crime or offense,…with intent to extort money or other pecuniary advantage, or with intent to compel the person so threatened to do an act against his will” and thus might also be a violation of Rule 8.4.

Reporter’s Notes: This rule is not based upon an ABA Model Rule. The rule is identical to former Vermont DR 7-105, except that “solely” has been deleted after “charges.” The comment is a reiteration of former EC 7-21.

**Virginia**

RPC 3.4: Fairness to Opposing Party and Counsel. A lawyer shall not

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Comments:

[5] Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client’s rights and responsibilities in connection with such prosecution.

[6] Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

**Wyoming**

RPC 4.4. Respect for Rights of Third Persons.

(c) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.
Comments:

[4] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. 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 our legal system.

[5] A federal law may require lawyers to give notice of potential criminal prosecution as part of their bringing a civil action. If an attorney is required to give such notice and the attorney knows that the individual is represented by counsel, the attorney should send the notice to both the individual and his or her counsel contemporaneously.

Ethics Opinions/Guidelines

ABA Formal Op. 92-363 (Use of Threats of Prosecution in Connection with a Civil Matter) (http://www.americanbar.org/content/dam/aba/publications/YourABA/11_92_363.authcheckdam.pdf)

ABA Formal Op. 94-383 (Use of Threatened Disciplinary Complaint Against Opposing Counsel)

Ethical Guidelines for Settlement Negotiations, at §§4.2.3, 4.3.2 (ABA Section of Litigation, Aug. 2002) (http://www.aspenlawschool.com/books/folberg_resolvingdisputes/egsn.pdf)

Alaska Ethics Op. 97-2 (https://www.alaskabar.org/servlet/content/indexes_aeot__97_2.html)


Illinois Ethics Op. 87-7

(http://www.lacba.org/Files/Main%20Folder/Organization/files/OP_469.pdf)


Maryland Ethics Op. 93-15

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North Carolina Ethics Op. 09-5  
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North Carolina Ethics Op. 05-3  
(http://www.ncbar.gov/ethics/printopinion.asp?id=726)

North Carolina Ethics Op. 98-19  
(http://www.ncbar.gov/ethics/printopinion.asp?id=281)

South Dakota Ethics Op. 94-3  
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Utah Ethics Op. 03-04  
(http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_03_04.html)

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2 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, LAW OF LAWYERING §40.4 (3d ed. 2008 Supp.)


Michael G. Daigneault & Jack Marshall, Games Legal Negotiators Play: The Use of Threats, 44 FED. LAW. 46 (September 1997)


Nicola M. McMillan, Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters, 21 GEO. J. LEGAL ETHICS 935 (2008)


2005 Formal Ethics Opinion 3

July 14, 2005

Immigration Prosecution to Gain An Advantage in a Civil Matter

Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

Inquiry:

During the discovery phase of a civil lawsuit, the defense lawyer learns that the plaintiff may be in the country illegally. Some of the plaintiff's witnesses may also be in the country illegally. The plaintiff's immigration status is entirely unrelated to the civil suit.

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

Opinion:

This is a matter of first impression. The Rules of Professional Conduct and the ethics opinions have previously addressed only the issue of threatening criminal prosecution to gain an advantage in a civil matter.

Before 1997, Rule 7.5 of the Rules of Professional Conduct made it unethical for a lawyer "to present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter." The rule was not included in the Rules of Professional Conduct when they were comprehensively revised in 1997. Nevertheless, a lawyer may not use a threat of criminal prosecution with impunity. Threats that constitute extortion, compounding a crime, or abuse of process are already prohibited by other rules. See Rule 3.1 (meritorious claims); Rule 4.1 (truthfulness in statements to others); Rule 4.4 (respect for rights of third persons); Rule 8.4(b) and (c) (prohibiting criminal or fraudulent conduct). Moreover, 98 FEO 19 provides that a lawyer may present or threaten to present criminal charges in association with the prosecution of a civil matter but only if the criminal charges are related to the civil matter, the lawyer believes the charges to be well grounded in fact and warranted by law, and the lawyer does not imply an ability to improperly influence the district attorney, the judge or the criminal justice system.

The present inquiry involves the threat, not of criminal prosecution, but of disclosure to immigration authorities. Whether making such a threat is criminal extortion is a legal determination outside the purview of the Ethics Committee. If it is, the conduct is prohibited under Rule 8.4(b). Even where a lawyer may lawfully threaten to report a party or a witness to immigration authorities to gain leverage in a civil matter, the exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime.

In ABA Formal Opinion No. 92-363, threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges. As explained in the opinion, requiring a relationship between the civil and criminal matters

- tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Formal Op. No. 92-363; see also Rule 8.4(d) (prohibiting conduct that is prejudicial to the administration of justice).

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. In addition, the prohibition on conduct that is prejudicial to the administration of justice "should be read broadly to proscribe a wide variety of conduct including conduct that occurs
outside the scope of judicial proceedings." Rule 8.4, cmt. [4]. The threat to expose a party’s undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

THE NORTH CAROLINA STATE BAR
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Reporting Opposing Party’s Citizenship Status to ICE

Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over $30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. See Rule 3.1, Rule 4.4, 2005 FEO 3.

Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status?

Opinion #2:

No, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides 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." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation?

Opinion #3:

No. See Rule 4.4(a).
State Bar Committee on Legal Ethics recommended public reprimand of attorney. The Supreme Court of Appeals, Neely, J., held that: (1) attorney who tells client’s employee that unless he makes restitution of amounts embezzled from client, attorney will press criminal charges, does not violate Disciplinary Rules, and (2) attorney could not be prosecuted under statute which prohibits offer not to prosecute crime in exchange for return of funds lost due to crime.

Charges dismissed.

West Codenotes

Limited on Constitutional Grounds

In 1986, Charles F. Printz, Sr., owner of Kable Oil Company, audited company financial records and discovered that $200,000 was missing. Larry Kesecker, the manager of Kable Oil, admitted that he embezzled the money. Neither Mr. Printz nor Mr. Kesecker wanted this case to be prosecuted criminally because Mr. Printz and Mr. Kesecker had developed a close personal relationship and because a criminal prosecution would embarrass Kable Oil. Therefore, Mr. Kesecker, Mr. Printz and Charles F. Printz, Jr., the respondent (and son of Charles F. Printz, Sr.), entered negotiations for repayment of the embezzled money. As a result of these negotiations, the respondent prepared a written confession for Mr. Kesecker to sign, as well as an agreement by Mr. Kesecker to sell his house, motorcycle and other personal property, and to turn over the proceeds to Kable Oil.

After an in-depth audit of Kable Oil showed that the missing funds actually totalled $395,515, Mr. Kesecker agreed to continue working at Kable Oil until it was sold in December, 1986. Mr. Kesecker also agreed to allow his therapist to turn over to the respondent notes from counseling sessions in order to help the respondent find the missing funds. On 15 July 1987, the respondent held a meeting at which Mr. Printz, Sr., Mr. Kesecker and Mr. Kesecker’s father, Donald, were present. Although the parties dispute who called the meeting, the purpose of the meeting unquestionably was to determine if Donald Kesecker would cover the losses caused by his son. Donald Kesecker was unwilling to do so.

On 26 August 1987, the respondent sent Larry Kesecker a “final demand” letter. In this letter he gave Mr. Kesecker the choice of agreeing to a strict financial arrangement for repayment of the embezzled money or criminal prosecution. On 2 September 1987, Mr. Kesecker responded with a letter accepting the financial arrangement set out by the respondent. However, after Mr. Kesecker retained a lawyer, negotiations broke down and, then, Mr. Printz, Sr. notified law enforcement authorities of the embezzlement. Mr. Kesecker pleaded guilty to embezzlement, was required to make restitution, and received five years probation.
II.

The Committee contends that the respondent should be reprimanded publicly for violation of Disciplinary Rule 7-105(A) of the Code of Professional Responsibility (1978). Noting that “this is admittedly an unusual case,” the Committee nevertheless finds Mr. Printz’s actions worthy of the minimum sanction, a public reprimand. However, as we stated in Syllabus Point 3 of Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984):

This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.

III.

In 1989, West Virginia replaced the Code of Professional Responsibility with the Rules of Professional Conduct. The Committee is correct that the replacement of the Code by the Rules does not absolve lawyers’ actions in 1987 from the ethical guidelines set forth in the Code. However, we have taken into consideration the reasons for the omission of a counterpart to DR 7-105(A) in the new Rules. As stated by Professors Hazard and Hodes:

Rule 4.4 does not incorporate the prohibition originally found in DR 7-105(A) of the Code of Professional Responsibility, which provided that “a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.” Nor does this prohibition appear elsewhere in the Rules of Professional Conduct; it was deliberately omitted as redundant or overbroad or both.

The ethical ban on threatening criminal prosecution is redundant because in some jurisdictions it covers much the same ground as the crimes of extortion and compounding crime, and Rule 8.4 makes it a disciplinary offense for a lawyer to commit such crimes....

Of course in many jurisdictions (and in the Model Penal Code), even overt threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded. In those jurisdictions, the lawyer’s actions could be a crime only if the lawyer sought more of the other party’s property than he believed his client was entitled to. With respect to compounding crime, many jurisdictions excuse the victims of crime who seek restitution in exchange for an agreement not to report.

But these exceptions only point toward the second defect of rules like DR 7-105(A): they are overbroad because they prohibit legitimate pressure tactics and negotiation strategies. DR 7-105(A) evidently meant to push beyond extortion and compounding crime, but without any coherent limit.

In reality, many situations arise in which a lawyer’s communications on behalf of a client cannot avoid addressing conduct by another party that is both criminal and tortious. Inevitably, the question of which remedial routes will be taken must also be addressed. An example is where a lawyer for a financial corporation must deal with an employee who has been discovered in embezzlement. In general, the client corporation is interested in recovering as much of its money as possible, and there is also a public interest in enforcement of the criminal law. These interests are not always compatible, however, for it may well be in the interest of the company to have the employee pay back the money and quietly resign, without the adverse publicity that a criminal trial would bring to the corporation as well as to the employee. Lurking near the surface is [sic] this calculus can be uncertainty about whether the employee’s crime can be proved beyond a reasonable doubt, and the risk that the employee might sue for wrongful discharge or defamation if the employer does file a criminal accusation.

In these circumstances it is counterproductive to prohibit the lawyer from discussing with the employee, or the employee’s counsel, the possibilities noted above. Indeed, competent representation would seem to require the lawyer to press ahead with such full-ranging negotiations. Yet, so long as DR 7-105(A) was on the books, the lawyer had to worry whether she would commit professional misconduct if she even mentioned these possibilities. Indeed, the situation can degenerate into implicit or even explicit blackmail against the lawyer, to pressure the lawyer into recommending to her client that criminal prosecution not even be considered or discussed. Faced with such restrictions (even without the added factor of blackmail), some lawyers might simply avoid the issue, while others might resort to code words and euphemisms. In either event, the client corporation in the example could be seriously disserved. [Footnotes omitted.] [Emphasis added.]


We find this reasoning persuasive. The rules of legal
ethics should not prohibit lawyers from engaging in otherwise legitimate negotiations. However, there are limits as Rule 4.4 of the West Virginia Rules of Professional Conduct [1989] provides the appropriate standards to guide a lawyer’s conduct in these matters. Rule 4.4 states:

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.

All parties to this case might have been served better if the negotiations had continued and a prosecution had never ensued. However, this finding does not exonerate Mr. Printz completely. It exonerates him only if his actions were otherwise legitimate.

IV.

W.Va.Code, 61-5-19 [1923] provides:

If any person, knowing of the commission of an offense, take any money, or reward, or an engagement therefor, upon an agreement or undertaking, expressed or implied, to compound or conceal such offense, or not to prosecute therefor, or not to give evidence thereof, he shall, if such offense be a felony, be guilty of a misdemeanor, and, upon conviction, be confined in jail not more than one year and fined not exceeding five hundred dollars; and if such offense be not a felony, unless it be punishable merely by a forfeiture to him, he may be confined in jail not more than six months, and shall be fined not exceeding one hundred dollars.

The history of W.Va.Code, 61-5-19 [1923], can be traced at least as far back as the Statute of 18 Elizabeth, Chapter 5, which states, in pertinent part:

And be it further enacted, That no such informer or plaintiff shall or may compound or agree with any person or persons that shall offend, or shall be surmised to offend, against any penal statute, for such offence committed, or pretended to be committed, but after answer made in court into the information or suit in that behalf exhibited or prosecuted....

The purpose of this statute was to discourage “the making of improper exactions, and not to punish persons by whom such awards are paid.” Aikman v. Wheeling, 120 W.Va. 46, 50, 195 S.E. 667, 669 (1938).

W.Va.Code, 61-5-19 [1923], on its face prohibits offering not to prosecute a crime in exchange for the return of funds lost due to a crime. Thus, the respondent’s actions in this case appear to violate W.Va.Code, 61-5-19 [1923].

V.

U.S. Const., Amend. XIV, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Due Process Clause requires that a person not be convicted under “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application...” Cline v. Frink Dairy Company, 274 U.S. 445, 459, 47 S.Ct. 681, 685, 71 L.Ed. 1146 (1926) (citing Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)). The United States Supreme Court has long held that convictions under vague statutes are inconsistent with the notions of fair play and a violation of due process under the Fifth and Fourteenth Amendments. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); Cline v. Frink Dairy Company, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); Connally v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); United States v. Cohen Grocery Company, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921).

Vague statutes violate due process because they do not allow fair warning to those who are prosecuted under them. Courts place limits on prosecutorial discretion for the same reasons. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 29 L.Ed. 1146 (1886), the United States Supreme Court said:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Id. at 369-70, 6 S.Ct. at 1071.

4 Closely akin to the doctrine of “vagueness” stands the
far less easily applied doctrine of “desuetude.” Desuetude, like vagueness, is based on the concept of fairness embodied in the due process and equal protection clauses. Thus, a law prohibiting vagrancy is unfair because it is both broad and vague (see Papachristou, supra); similarly, a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it.

Although seldom used, desuetude is a widely accepted legal concept. As Professor Bork has said:

There is a problem with laws like these. They are kept in the code books as precatory statements, affirmations of moral principle. It is quite arguable that this is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them. It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning.


Desuetude is not, however, a concept nearly as new as Professor Bork’s book. As we said in *Pryor v. Gainer*, 177 W.Va. 218, 225, 351 S.E.2d 404, 411 (1986):

[T]he problem of a statute that produces such absurd results that it has long been ignored is a recurring one. Thus, our problem today can be solved by the ancient authority of the Roman law. For although English common law is a creature of the English genius, English equity is firmly grounded in Roman law. The applicable, well established principle can be found in Book One of *The Digest of Justinian*, “De Legibus Senatusque Consultis Et Longa Constuetudine” 32, where the digest proposes the following:

Inueterata consuetudo pro lege non immerto custoditur, et hoc est ius quod dictur moribus constitutum. nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probabat, tenebunt omnes: nam quid interest sufragio populus voluptatem suam declarat an rebus ipsis et factis? quare rectissime etiam illud receptum est, ut leges non solum sufragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.3

3 This legal proposition translates as follows:

Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.

*See also* W. Shakespeare, *Measure for Measure*, Act II, scene II (1623) (“The law hath not been dead, though it hath slept.”)

The United States Supreme Court has also recognized the concept of desuetude. In *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), the Supreme Court considered the Connecticut statute proscribing the use of contraceptives (later found unconstitutional in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). In *Poe*, the Court did not reach the constitutional question because the statute had not been enforced in years. Writing for the Court, Justice Frankfurter said:

The Connecticut law prohibiting the use of contraceptives has been on the State’s books since 1879. Conn.Acts 1879, c. 78. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 [ (1940) ]. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the Act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Error sustained the legislation on appeal from a demurrer to the information, the State moved to dismiss the information. Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement **726 *188* officials
than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. “Deeply embedded traditional ways of carrying out state policy ...” or not carrying it out “are often tougher and truer law than the dead words of the written text.” *Nashville, C. & St. L.R. Co. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940).

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The final criterion that we may take from modern law is that there must be a conspicuous policy of nonenforcement, or as the U.S. Supreme Court described it in *Poe*, “[an] undeviating policy of nullification ... throughout all the long years that ... bespeaks more than prosecutorial paralysis.” *Poe, supra*, 367 U.S. at 501, 81 S.Ct. at 1754. These criteria allow only those statutes whose enforcement would violate due process to die a desuetudinal death. Furthermore, the Legislature may revitalize any statute simply by repassing it.

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We find little analytical aid in merely applying, or refusing to apply, the rubric of desuetude. The problem must be approached in terms of that fundamental fairness owed to the particular defendant that is the heart of due process.

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In other words, does a defendant have fair notice that he may be prosecuted under a particular statute? To answer this question, we must consider three factors.

We need look only to Professors Hazard and Hodes’s discussion of compounding as an accepted and acceptable legal strategy to find vindication for this proposition as well as the second criterion, namely open, notorious and pervasive violation of the statute. See Hazard and Hodes, supra at § 4.4:103. The last reported case of a prosecution under *W.Va.Code, 61-5-19* [1923], was *Aikman, supra*, in 1938. Finally, we have found no reported case of a successful prosecution for compounding a felony or misprision of felony anywhere in the United States in the past 20 years.

4 This does not mean that all compounding is only *malum prohibitum* or that compounding is no longer a prosecutable offense in West Virginia. Compounding that amounts to extortion is still prohibited by *W.Va.Code, 61-2-13* [1923]. Extortion is clearly *malum in se*. Receiving repayment of money taken from a victim is not extortion; however, asking a higher price (i.e., “Give me my money back and $20,000 or I’ll call the cops!”) in return for the victim’s silence is extortion.
One court did discipline a lawyer and suggested that he might be liable for misprision, but a careful review of the facts shows that he did not arrange for his client to receive a return of his stolen property, but instead arranged for his client to receive a payment in exchange for dropping criminal charges. See In the Matter of Friedland, 59 N.J. 209, 280 A.2d 183 (1971). See also Dunaway v. State, 561 P.2d 103 (Okl.Cr.1977) (stating in dicta that threatening to prosecute under a bad check statute could sometimes be a violation of the Oklahoma compounding statute).

The Court of Appeals of Maryland considered the history of misprision as well as the decisions of other states in Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979). The Maryland court noted that although misprision was an ancient common law offense in England, it fell into disuse for a period of over 400 years until it was resurrected in H.L. Sykes v. Director of Public Prosecution, [1961] 3 All.E.R. 33. Shortly after Sykes, however, misprision was replaced by a new crime of “withholding information” which did not punish an agreement not to prosecute in exchange for restitution. Id., 396 A.2d at 1070. The Court of Appeals of Maryland, after exhaustive research, came to the conclusion that no one has been punished under a misprision or compounding statute for agreeing not to prosecute in exchange for restitution in modern times. As the court noted:

‘[I]n the modern acceptance of the term, misprision of felony is almost if not exactly the same as that of an accessory after the fact’ (p. 680). The utility of such an offence has not, however, been demonstrated: ‘... perhaps not a single case can be cited in which punishment for such connection with a felony has been inflicted in the U.S.’

Accordingly, we find W.Va.Code, 61-5-19 [1923], to the extent that it prohibits a victim or his agent from seeking restitution in lieu of a criminal prosecution, void under the doctrine of desuetude. Seeking payment beyond restitution in exchange for foregoing a criminal prosecution or seeking any payments in exchange for not testifying at a criminal trial, however, are still clearly prohibited.

VIII.

Because DR 7-105(A) has proven to be unworkable and because Mr. Printz did not have fair notice that he might be subject to prosecution under W.Va.Code, 61-5-19 (1923), we find that he did not act inappropriately. Accordingly, we dismiss the charges against Mr. Printz.

Mr. Printz is a lawyer who surely would not have left so blatant a paper trail if he believed he was doing anything wrong. More importantly, a reasonable person in Mr. Printz’s shoes, would not have believed that he was opening himself up to prosecution.

Charges Dismissed.

Parallel Citations
416 S.E.2d 720

278 Kan. 230
Supreme Court of Kansas.

In the Matter of E. Thomas PYLE, III, Respondent.

Synopsis

Background: Disciplinary proceedings were brought against attorney.

Holding: The Supreme Court held that public censure of attorney, in addition to the requirement that attorney attend and complete four additional hours of professional responsibility continuing legal education each year for the next three years, was warranted.

Public censure ordered.

Attorneys and Law Firms

Alexander M. Walczak, deputy disciplinary administrator, argued the cause and was on the formal complaint for petitioner.

E. Thomas Pyle, III, respondent, argued the cause pro se.

Opinion

*230 ORIGINAL PROCEEDING IN DISCIPLINE

PER CURIAM:

This is a contested proceeding in discipline filed by the Disciplinary Administrator against E. Thomas Pyle, III, an attorney licensed to the practice of law in Kansas. A hearing panel of the Kansas Board for the Discipline of Attorneys determined that respondent E. Thomas Pyle, III, violated Kansas Rule of Professional Conduct (KRPC) 4.2 (2003 Kan. Ct. R. Annot. 442) (communication with person represented by counsel); KRPC 4.4 (2003 Kan. Ct. R. Annot. 444) (respect for rights of third parties); KRPC 8.3(a) (2003 Kan. Ct. R. Annot. 463) (reporting professional misconduct); and KRPC 8.4(d) and (g) (2003 Kan. Ct. R. Annot. 464) (misconduct). Pyle argues that the panel’s findings were not supported by the evidence and that the proposed discipline of public censure is inappropriate.

We adopt and affirm the hearing panel’s findings and hereby order public censure of respondent.

The hearing panel’s findings of fact are summarized as follows:

Pyle practices law in McPherson, Kansas. Sallie Moline was Pyle’s client in a personal injury case against Ricci Gutzman. Moline was romantically involved with Gutzman.

On August 2, 1999, Moline tripped over a dog cable in Gutzman’s driveway, injuring her knee. Moline contacted Pyle regarding her injury, and Pyle agreed to represent her in an action against Gutzman. Before filing a lawsuit, Pyle helped to prepare an affidavit for Gutzman to sign. The affidavit stated:

“1. I am Ricci Gutzman....

“2. “I am the defendant in a lawsuit filed by Sallie L. Moline....

**231 “3. “On August 2, 1999, Sallie injured her left leg and knee at my residence....

“4. Sallie injured her left leg and knee after tripped [sic] over a dog cable that was wrapped around a basketball goal and stretched out over the driveway. Sallie was walking to my car early in the morning and during the rain when she tripped over the dog cable and injured her left leg and knee.

“5. I normally and routinely removed the dog cable from the driveway every evening. However, the night before the accident, I neglected and failed to remove the dog cable from the driveway and Sallie was unaware of this failure.

“6. It is my understanding that Sallie has sustained permanent injuries to her left leg and knee, has incurred medical expenses, and has lost wages as a result of this accident.

**1225 “7. I take full responsibility for the accident and admit that I am responsible for Sallie’s injuries.

“8. I have homeowner’s insurance with American Family, which includes personal liability coverage. I direct my insurance company to admit liability in this claim and to make every possible effort to settle the claim for a reasonable and fair amount.”

After Gutzman signed the affidavit, Pyle filed Moline’s lawsuit against Gutzman.

American Family Insurance, Gutzman’s homeowner’s insurer, hired John D. Conderman to represent Gutzman in the lawsuit. Conderman filed an answer to Moline’s
petition, denying liability. After receiving the answer, Pyle wrote a letter to Conderman, which contained the following language:

“I have received your answer, request for Rule 118 statement, and defendant’s interrogatories to plaintiff. I will forward the same to my client.

“However, please be advised that we have two options at this point. One, we can settle the case. Two, I can file a motion for sanctions pursuant to K.S.A. 60–211, a motion for partial summary judgment, and other legal and administrative pleadings.

“In regard to option one, the defendant (i.e. your client, not the insurance company) has admitted all liability in the claim and has taken full responsibility for the accident and injuries. Enclosed for your review is a copy of an affidavit from the defendant.

“It is my understanding that you were aware of this affidavit prior to filing the frivolous answer and interrogatories. In light of the defendant’s admission and your awareness of the admission, your answer and interrogatories are frivolous and subject to immediate sanctions pursuant to K.S.A. 60–211.

*232* “You represent the defendant, not the insurance company. The defendant has admitted liability and taken full responsibility for his actions and omissions. You are his advocate and when you filed the answer, you were not advocating his position, but instead were advocating the insurance company’s position and interests. Not only do I find this behavior frivolous, but I also find it unethical.

“The defendant is insured by American Family. The defendant and American Family entered in a contract. Each party to that contract made certain promises.

“Among the promises, the defendant promised to pay his premiums and cooperate with the insurance company in the event that a claim was filed. Just because a defendant admits responsibility and liability does not mean that he is not cooperating with his insurance company. Cooperating does not mean that the defendant has to ignore the truth. The defendant has kept his promises, however, the insurance company has not.

“Among the promises, the insurance company agreed to provide insurance coverage to the defendant and to provide the defendant with a defense in the event that a lawsuit was filed against [sic]. A defense includes an attorney who represents the defendant, insured, and not the insurance company. If the defendant’s and insurance company’s interests are in conflict, then the insurance company needs to hire an independent lawyer to represent the defendant and then their own lawyer to represent their interests. A truly independent lawyer listens to his or her client and advocates their positions [sic]—not the insurance company’s position.

“It is completely unacceptable and unethical for an attorney to represent an individual, ignore that individual’s admissions, and then advocate the insurance company’s position. John, you know better than that. (I note in your advertisement in the Kansas Legal Directory that you are on the Kansas Board for Discipline of Attorneys from 1996 to present. You really should know better!) There is no excuse for your behavior. Just because the insurance company is paying your attorney fees does not give you the right to deny liability and contest an admitted case. Just because you file a denial of liability in 100% of the cases you defend also does not give you that right. In fact, an attorney **1226* who states that he files a denial of liability in 100% of the cases he defends, has made an outright admission that he has filed frivolous pleadings.

“John, as an advocate for my client, I have a duty to represent my client zealously and maximize her recovery. I also have a duty to the Kansas courts, Kansas Supreme Court, Kansas attorneys, and the Kansas Rules of Professional Conduct. Your behavior (i.e. ignoring the defendant’s admissions, advocating the insurance company’s positions, and filing frivolous pleadings) has violated Rules 3.1, Meritorious Claims and Contentions, 3.2, Expediting Litigation, 3.3, Candor Toward the Tribunal, and 3.4, Fairness to Opposing Party and Counsel.

“In light of your behavior and the insurance company’s position, I have been given the authority to accept a settlement offer for the policy limits of $300,000.00. Please forward this offer to both the defendant and the insurance company and then let me know if it is acceptable. However, please be advised that if we do not *233* settle this matter and reach a negotiated resolution of this case within the next twenty (20) days, then I will take the following action:

1. File a motion for sanctions, including but not limited to attorney fees, interest, and penalties for the filing of the frivolous answer and interrogatories.

2. File a motion for partial summary judgment on the issue of liability;

3. Turn the facts of the case over to the Disciplinary Administrator;

4. Recommend to the defendant, through a letter to you, that he find another attorney that will represent his interests and not the insurance company’s interests, recommend that he sue his current attorney and his insurance company, recommend that he file an ethics

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*232* Kansas Supreme Court, Kansas attorneys, and the Kansas Rules of Professional Conduct. Your behavior (i.e. ignoring the defendant’s admissions, advocating the insurance company’s positions, and filing frivolous pleadings) has violated Rules 3.1, Meritorious Claims and Contentions, 3.2, Expediting Litigation, 3.3, Candor Toward the Tribunal, and 3.4, Fairness to Opposing Party and Counsel.

**1226** An attorney who states that he files a denial of liability in 100% of the cases he defends, has made an outright admission that he has filed frivolous pleadings.

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*233* Settle this matter and reach a negotiated resolution of this case within the next twenty (20) days; then take the following action:

1. File a motion for sanctions, including but not limited to attorney fees, interest, and penalties for the filing of the frivolous answer and interrogatories.

2. File a motion for partial summary judgment on the issue of liability;

3. Turn the facts of the case over to the Disciplinary Administrator;

4. Recommend to the defendant, through a letter to you, that he find another attorney that will represent his interests and not the insurance company’s interests, recommend that he sue his current attorney and his insurance company, recommend that he file an ethics

complaint against you with the Disciplinary Administrator, and recommend that he file a complaint against his insurance company with the Kansas Insurance Commissioner;

5. Consider filing a motion to disqualify you from representing the defendant because of your frivolous pleadings and desires to protect the insurance company instead of the defendant; and

6. File Requests for Admission regarding the issue of liability, the petition, and the defendant’s affidavit.

“I take no pleasure in writing this letter or making the statements that I am making. However, because you have ignored your client’s affidavit and admissions, I have no other alternative than to put you on notice of my intentions. You can remedy the wrong by either settling the case or more importantly, by filing an amended petition admitting liability and then restricting the scope of your discovery to the issue of damages. If you would do at least the latter of the two, I would be willing to waive any attorney fees and costs incurred in responding to the frivolous pleadings and discovery.

“So that you can evaluate our settlement offer, enclosed for your review are copies for the following records:

1. List of Medical Expenses;
2. Statement from Ricci L. Gutzman;
3. August 8, 2001, report from Dr. Harbin; and
4. Medical records from Memorial Hospital of Abilene, Salina Physical Therapy, Salina Regional Health Center, Salina Sports Medicine & Orthopedic Clinic, Salina Surgical Hospital, and Anesthesia Associates of Central, Kansas.

“As I indicated, our offer of settlement is open for twenty (20) days. If we do not resolve this matter or if I do not hear back from you, I will proceed as outlined above. Please forward my letter to both the defendant and the insurance company. Thank you for your immediate attention to this most serious matter.”

After Conderman received this letter, Moline called Pyle and relayed statements made by Gutzman. In response, Pyle prepared a second affidavit, which he had Moline deliver to Gutzman without *234 Conderman’s permission. Gutzman signed the affidavit and Moline returned it to Pyle. This second affidavit stated:

“1. I am Ricci Gutzman....

**1227 "2. I am the defendant in a lawsuit filed by Sallie L. Moline....

“3. On the 12th day of September, 2001, I had a conference with my attorney, John D. Conderman.

“4. Mr Conderman explained to me that had two choices. One, I could cooperate with the insurance company. Two, the insurance company could file a lawsuit against me and drop all of my insurance coverage.

“5. I am cooperating with the insurance company. I have given them copies of all of the legal papers filed against me, I have given them a factual history of the accident, and I have made myself available for conference. Just because I have admitted liability and responsibility for the accident, does not mean that I am not cooperating with the insurance company. The insurance company should not be able to hold me hostage to the truth just so that they do not have to pay a legitimate claim.

“6. I do not believe that Mr. Conderman is representing my interests. I do believe that Mr. Conderman is looking out for the insurance company’s interests instead of my own interests. I am disgusted by Mr. Conderman’s behavior and I do not want him to represent me.”

It was delivered to Moline by Pyle with a cover letter stating the following:

“This letter follows your telephone call last night and my telephone call to you this morning. Enclosed please find a proposed affidavit to be signed by Mr. Gutzman. As a party to the case, you have the right to communicate with Mr. Gutzman. Therefore, please talk with him and see if he will sign the enclosed affidavit. The affidavit will help us with your claim and will help him tremendously to defeat any claim by the insurance company and to document his potential claim against his attorney and his insurance company.” (Emphasis added.)

Pyle then wrote a second letter to Conderman. A portion of that letter stated:

 “[P]lease be advised that any reporting to the Disciplinary Administrator is not connected to any settlement offer or negotiation in this case. Instead of proceeding with an ethics complaint and a motion for sanctions pursuant to K.S.A. 60–211, I would have preferred that you would [sic ] amend your petition and discovery requests so that we could litigate the issue of damages.”

Conderman sent a copy of Pyle’s first letter and copies of the petition and answer to the Disciplinary Administrator’s office and withdrew as Gutzman’s counsel, claiming Pyle’s behavior had undermined *235 his relationship with his client. Pyle has argued in this proceeding that the
relationship between Gutzman and Conderman was undermined by Conderman’s words to Gutzman, not by Pyle’s behavior.

The disciplinary panel in this matter discerned no violation of the Kansas Rules of Professional Conduct by Conderman.

Pyle has contended that his first letter to Conderman was not intended as a threat. He also says in his exceptions to the panel’s final hearing report that he wrote this letter in response to information relayed to him by Moline. Gutzman allegedly told Moline that Conderman had said he represented Gutzman’s insurer rather than Gutzman and that Conderman denied liability in 100 percent of his cases regardless of the facts.

Pyle admits the letter was unprofessional but minimizes his conduct by saying that he sent the letter to Conderman in the “heat of battle.” Pyle’s exceptions attach a draft of a letter he claims was preferable. At his hearing, Pyle agreed that he should not have sent the first letter to Conderman and testified that it “adversely reflect[ed] on his fitness to practice law.” He stated that he would not send similar letters in the future and that he would not “use his client to obtain an affidavit from an opposing party represented by counsel.”

Pyle argues that he did not communicate with Gutzman when he prepared the second affidavit. He maintains he told Moline that he could not communicate with Gutzman but **1228 that she could, and he asserts he prepared the second affidavit at her direction.

In addition to finding that Pyle violated KRPC 4.2, 8.3(a), and 8.4(g), as alleged in the formal complaint, the panel considered whether Pyle violated KRPC 4.3 (2003 Kan. Ct. R. Annot. 443), dealing with an unrepresented person, and 8.4(a), violating the rules through the acts of another. The panel found neither violation. The panel also considered whether Pyle violated KRPC 4.4 regarding respect for the rights of third persons and KRPC 8.4(d) regarding misconduct, by threatening to report Conderman to the Disciplinary Administrator’s office to gain an advantage in the lawsuit. The panel found violations of these rules.

*236 The panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (1991) and unanimously recommended that Pyle be publicly censured by this court. The panel also recommended that Pyle attend and successfully complete 4 additional hours of professional responsibility continuing legal education each year for the next 3 years, in addition to the 12 hours required by the rules.

**1228


In disciplinary proceedings, “this court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. [Citation omitted.] Any attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence.” In re Lober, 276 Kan. 633, 636, 78 P.3d 442 (2003).

“This court views the findings of fact, conclusions of law, and recommendations made by the disciplinary panel as advisory, but gives the final hearing report the same dignity as a special verdict by a jury or the findings of a trial court. Thus, the disciplinary panel’s report will be adopted where amply sustained by the evidence, but not where it is against the clear weight of the evidence. [Citations omitted.] When the panel’s findings relate to matters about which there was conflicting testimony, this court recognizes that the panel, as the trier of fact, had the opportunity to observe the witnesses and evaluate their demeanor. Therefore, we do not reweigh the evidence or pass on credibility of witnesses.” Lober, 276 Kan. at 636–37, 78 P.3d 442.

KRPC 4.2

The hearing panel found that Pyle violated KRPC 4.2 by preparing the second affidavit and having Moline deliver it to Gutzman for his signature.

KRPC 4.2 states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

The panel considered whether Gutzman also violated KRPC 8.4(a) but concluded that 8.4(a) was incorporated in 4.2. Because of this, the panel reasoned that finding Pyle also in violation of *237 8.4(a) would not serve any useful purpose. KRPC 8.4(a) states: “It is professional misconduct ... to: [v]iolate ... the rules of professional conduct ... through the acts of another.” The panel relied on American Bar Association Formal Opinion 95–396 and this court’s decision in In re Marietta, 223 Kan. 11, 569 P.2d 921 (1977).

American Bar Association Formal Opinion 95–396 states:

“A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so. Whether in a civil or criminal matter, if the investigator acts as the lawyer’s ‘alter ego,’ the lawyer is ethically responsible for the investigator’s...
In **Marietta**, an attorney prepared a release of liability for back child support for his client to have the client’s ex-wife sign; she had representation. The rule in effect at that time, DR 7–104A(1) of the Code of Professional Responsibility, 214 Kan. lxxxviii, stated: “During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate **1229** on the subject of the representation with a party he knows to be represented by a lawyer in that matter....” (Emphasis added.) Marietta argued that he was not the cause of the communication; instead, he was merely a scrivener following his client’s orders. This court held that Marietta violated DR 7–104A(1) by “preparing said release, ... knowing its significance and its intended use, [and] caus[ing] his client to communicate with his ex-wife without the consent of his ex-wife’s attorney.” **Marietta**, 223 Kan. 11, 569 P.2d 921.

In the present case, the hearing panel found “that even though KRPC 4.2 does not contain the language ‘or cause another to communicate,’ ... attorneys are prohibited from using another, including a client, to do that which the attorney could not do himself.”

The United States District Court for the District of Kansas has interpreted KRPC 4.2 similarly. In **Holdren v. General Motors Corp.**, 13 F.Supp.2d 1192 (D.Kan.1998), Holdren, an employee of General Motors (GM), spoke with his attorney about getting statements from GM employees, including management. Holdren’s attorney advised him on obtaining affidavits from the other **238** employees, informing Holdren of the admissibility of out-of-court statements versus “signed sworn statements.” The attorney then showed Holdren how to draft an affidavit. GM requested a protective order against Holdren’s attempts to get affidavits from employees. GM “concede[d] that the parties ... are not prohibited from communicating directly with each other” but argued that Holdren’s counsel violated KRPC 4.2. 13 F.Supp.2d at 1193. The court noted that the facts “present[ed] a close case” but granted GM’s protective order because Holdren’s counsel “circumvented KRPC 4.2 through the actions of his client.” 13 F.Supp.2d at 1193.

The **Holdren** court reviewed decisions addressing whether attorneys violated KRPC 4.2 by “causing” their clients to act. **Holdren**, 13 F.Supp.2d at 1194–95 (citing **Marietta**, 223 Kan. 11, 569 P.2d 921; ABA Formal Opinion 95–396). The court found that Holdren’s counsel, “while attempting to walk the appropriate line ever so delicately, [had] simply stepped over that line” by encouraging Holdren to obtain affidavits from GM employees, and “facilitat[ing Holdren’s] actions by advising him how to draft an affidavit,” albeit at Holdren’s request. **Holdren**, 13 F.Supp.2d at 1195–96. Holdren held that because KRPC 8.4(a) prohibits violations of the professional code “through the acts of another,” plaintiff’s counsel was in violation of KRPC 4.2 when he encouraged his client to contact certain GM employees. An attorney “may not circumvent KRPC 4.2 by directing his client to contact [those] employees.” **Holdren**, 13 F.Supp.2d at 1194.

Pyle relies on the Comment to KRPC 4.2, which states “parties to a matter may communicate directly with each other.” He claims that an attorney’s client is not an “agent of a lawyer—instead an agent of a lawyer would be an employee [or an] independent contractor.... A client is not the alter ego of the lawyer.” Pyle is correct in stating that KRPC 4.2 does not restrict communication between the parties; and, in certain cases, communication between the parties should be encouraged.

Under the facts of this case, however, the hearing panel’s conclusion that Pyle violated KRPC 4.2 was supported by clear and convincing evidence. Pyle’s claim that he did not cause the affidavit to be delivered to Gutzman is very similar to Marietta’s argument. **239** Even though DR 7–104A(1), the rule relied on by this court in **Marietta**, has changed, the analysis of its restrictions on lawyers’ behavior still has vitality. See **Holdren**, 13 F.Supp.2d 1192. Pyle prepared an affidavit for Gutzman concerning the very nature of the case, albeit at his client’s request, and encouraged Moline to deliver it to Gutzman, who was represented by counsel. Pyle knew Moline would obtain Gutzman’s signature on the affidavit without opposing counsel’s consent. Pyle, through his client, communicated with Gutzman about the subject of the case without Conderman’s approval. Pyle circumvented the constraints of KRPC 4.2 by encouraging his client to do that which he could not.

**KRPC 8.3(a)**

The hearing panel found that Pyle violated KRPC 8.3(a) by not reporting what **1230** Pyle believed to be attorney misconduct on Conderman’s part.

KRPC 8.3(a) states: “A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.” (Emphasis added.)

Pyle argues that the word “substantial” found in the comments to the rule should be read into KRPC 8.3(a), requiring there to be knowledge of “substantial misconduct” before a duty to report arises. He also claims that reporting Conderman’s alleged misconduct would have required publicizing confidential information, protected by KRPC 1.6 (2003 Kan. Ct. R. Annot. 368), and that he did eventually report the matter in a timely fashion.
Pyle’s argument that the word “substantial” should be read into the rule is without merit. The language of the rule requires a lawyer to report “any ... conduct” which the lawyer thinks is misconduct. The language of the rule is clear. Further, in Pyle’s brief he stated that at the time he wrote the first letter to Conderman, he believed Conderman’s conduct to be substantial misconduct.

Moreover, Pyle believed Conderman committed misconduct by filing an answer and interrogatories frivolously. The evidence to support that belief was contained in the filings, not in the confidential communications between Pyle and Moline. The filings included Gutzman’s first affidavit admitting liability and Conderman’s answer and interrogatories. Pyle would not have violated KRCP 1.6 by reporting Conderman’s supposed frivolous filings.

Pyle simply states that he reported Conderman’s misconduct in a timely fashion without pointing out his report in the record. Further, at his hearing, Pyle testified that he never filed a KRCP 8.3 complaint against Conderman. Pyle argues that the requirements of KRCP 8.3 were met when he responded to Disciplinary Administrator Stan Hazlett’s letter regarding his own conduct, which referred to Conderman’s behavior. Pyle’s response to a letter questioning his own misconduct is not an independent report of another attorney’s misconduct. He never met the requirements of KRCP 8.3 after forming an opinion that Conderman had committed an ethical violation. It is apparent from the clear and convincing evidence before the panel that Pyle believed that Conderman had committed misconduct but did not report it, choosing instead to write a letter threatening Conderman to gain settlement advantage. KRCP 8.3(a) was violated.

**KRCP 8.4(g)**

Pyle admits to violating KRCP 8.4(g).

**KRCP 4.4 AND KRCP 8.4(d)**

The Formal Complaint did not contain allegations that Pyle violated KRCP 4.4 (2003 Kan. Ct. R. Annot. 444) or 8.4(d). Nevertheless, the hearing panel found that Pyle violated these rules by writing the first letter to Conderman and by threatening to file a complaint with the Disciplinary Administrator’s office.

**KRCP 4.4** states: “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 right of such a person.”

**KRCP 8.4(d)** states: “It is professional misconduct for a lawyer to: ... engage in conduct that is prejudicial to the administration of justice.”

At the formal hearing, a member of the panel questioned Pyle regarding his intent in sending the letter: “Right, it was [the] threat that you would file a complaint unless he admitted liability, correct?” Pyle answered: “That’s the way it reads.” The member further questioned Pyle: “[L]ook at your language... ‘If we do not settle this ... within the next 20 days, I will take the following action: ... turn the facts of the case over to the Disciplinary Administrator.’ That’s a threat that if it’s not settled you’re going to turn it in, right?” Pyle answered: “That’s what the letter says.”

The panel described Pyle’s demeanor as “Clinton-esque” in answering this line of questioning; Pyle’s answers “did not meet straight on the substance of the questions.” The panel concluded that Pyle wrote the letter merely to threaten Conderman with the sole purpose “of attempting to frighten or to put pressure on opposing counsel to settle the lawsuit upon the terms dictated and desired by [Pyle].” In a footnote to the final hearing report, the panel opined that Pyle also may have committed blackmail, pursuant to K.S.A. 21–3428. The panel’s conclusion on Pyle’s motives is adequately supported by the evidence and the panel’s judgment on his credibility. See In re Lober, 276 Kan. at 637, 78 P.3d 442.

The first letter written to Conderman indicated that Conderman had two choices: He could either settle the lawsuit or have a motion for sanctions and a disciplinary action filed against him. Pyle asserted that by filing an answer to the lawsuit, Conderman was in violation of KRCP 3.1 (2003 Kan. Ct. R. Annot. 418), 3.2 (2003 Kan. Ct. R. Annot. 420), 3.3 (2003 Kan. Ct. R. Annot. 424), and 3.4 (2003 Kan. Ct. R. Annot. 429). Pyle later admitted that this letter was unprofessional and should never have been sent. This admission is tantamount to acknowledging that the letter was used as a tool to gain a better bargaining position in the lawsuit. In our view, there was clear and convincing evidence that Pyle sent a letter that had “no substantial purpose other than to embarrass, delay, or burden” Conderman. KRCP 4.4. His conduct was obviously prejudicial to the administration of justice.

Pyle also challenges the procedure followed by the panel regarding these two violations. Under certain circumstances, rules not cited in the formal complaint may be considered by the hearing panel. In re Swisher, 273 Kan. 143, 148, 41 P.3d 847 (2002); State v. Caenen, 235 Kan. 451, 681 P.2d 639 (1984). “Due process requires only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged, but the State is not required to plead specific rules, since it is the factual allegations against which the attorney must defend.” Caenen, 235 Kan. at 458, 681 P.2d 639. Caenen held: “Where the facts in connection with the charge are
clearly set out in the complaint a respondent is put on notice as to what ethical violations may arise therefrom.”


Pyle contends that he was not given adequate notice that he would be accused of violating KRPC 4.4 and 8.4(d). We disagree.

The facts set out in the formal complaint included excerpts from Pyle’s first letter to Conderman and stated that Pyle used the threat of reporting Conderman’s alleged misconduct to the Disciplinary Attorney’s office “as leverage to force Mr. Conderman to settle the lawsuit. The said conduct of the Respondent is prejudicial to administration of justice and adversely reflects on the Respondent’s fitness to practice law.” Pyle received adequate notice that KRPC 4.4 and KRPC 8.4(a) were implicated by his actions.

Discipline

“To determine the appropriate discipline we must evaluate the nature of the duty violated, the attorney’s mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors.... The discipline must be based on the specific facts and circumstances of each case, so other disciplinary actions provide little guidance. [Citation omitted.] Historically, we have applied the ABA Standards for Imposing Lawyers Sanctions as a guide for determining the appropriate discipline.’ ” In re Lober, 276 Kan. at 640, 78 P.3d 442 (citing In re Rumsey, 276 Kan. 65, 78, 71 P.3d 1150 [2003] ).

The hearing panel unanimously recommended that Pyle be publicly censured by this court and that he attend and successfully complete 4 hours of professional responsibility continuing legal education, in addition to the 12 hours required by the rules, each year for the next 3 years.

We are not bound by the panel’s proposed discipline. Rule 212(f) (2003 Ct. R. Annot. 270); In re Bailey, 268 Kan. 63, 64, 986 P.2d 1077 (1999).

Pursuant to ABA Standard 3, the panel considered the following factors:

*243 “Duty Violated. The Respondent violated his duty to the profession to maintain personal integrity.

**1232 “Mental State. The Respondent negligently violated his duty.

“Injury. As a result of the Respondent’s misconduct, the Respondent caused actual injury to the attorney/client relationship between Mr. Conderman and Mr. Gutzman.

“Aggravating or Mitigating Factors. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found no aggravating or mitigating factors present.”

The panel also considered the following ABA Standards:

Standard 6.33: “Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.”

Standard 7.3: “Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.”

Pyle requests that this court consider informal admonition or private censure because he “engaged in an isolated instance of negligence and caused little or no actual or potential interference with the outcome of a legal proceeding.”

After consideration of the facts in this case and the appropriate ABA Standards, we accept the panel’s recommendation of published censure.

IT IS THEREFORE ORDERED that the respondent, E. Thomas Pyle, III, be censured in accordance with Supreme Court Rule 203(a)(3) (2003 Kan. Ct. R. Annot. 226) for the violations found herein.

IT IS FURTHER ORDERED that this order be published in the official Kansas Reports and that the costs of this action be assessed to respondent.

Parallel Citations

91 P.3d 1222
To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a recommendation for an admonition filed by the District XIII Ethics Committee (DEC), which we determined to treat as a recommendation for discipline greater than an admonition. R. 1:20-15(f)(4). The complaint charged respondent with violating RPC 1.15(a) (failure to safeguard property belonging
to a client or a third party) and RPC 8.4(d) (conduct prejudicial to the administration of justice). This matter arose from respondent's release of proceeds from a check to one of two payees, without the endorsement or permission of the other payee, and his attempt to shield himself from an ethics grievance. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1973. He has no history of discipline.

Respondent represented James Parascandola (Parascandola) in a contentious divorce proceeding against Catherine Parascandola, a/k/a Catherine Sutton (Sutton), who was represented by Janna M. Chernetz.

On September 24, 2008, Parascandola delivered to respondent a homestead rebate check in the amount of $1,257.89, payable to both Parascandola and Sutton. Only Parascandola endorsed the check, which respondent deposited in his attorney trust account.¹

On October 9, 2008, respondent disbursed the proceeds of the check to Parascandola, without authorization from either Sutton or Chernetz. The record contains a letter, dated November 3, 2008, from respondent to Chernetz, enumerating several expenses that Sutton was

¹ There are no allegations that either respondent or Parascandola forged Sutton's signature.
delinquent in paying and stating that he had turned over the $1,257.89 to Parascandola. Respondent testified that he had conversations with Chernetz and that she had objected to his paying Parascandola the entire proceeds of the homestead rebate check.

The record does not clearly and convincingly establish that such discussions occurred before the disbursement on October 9, 2009. In fact, the presenter "testified"\(^2\) that Chernetz denied having ever discussed the disbursement with respondent prior to October 9, 2009 and that, according to Chernetz, she found out about it only upon receiving the November 3, 2009 letter from respondent.

In a December 2009 letter to the presenter, respondent stated that he had not reached out to Chernetz to have Sutton endorse the check because he knew that Sutton would refuse to do so, unless she received the funds. Respondent conceded that he could have filed a motion for an order allowing the disbursement of the funds, but stated that the process was too expensive for his client.

Respondent cited several reasons for disbursing the funds to Parascandola, including: 1) Sutton was not making mortgage payments on the marital home, as required by a court order; 2) Sutton had received an $1,800 stimulus check and had not applied the proceeds

\(^2\) Chernetz did not testify below.
in accordance with a court order; 3) Parascandola was in charge of their children's care, earned less than Sutton, and was in need of funds; and 4) the disbursement to Parascandola was disclosed to Chernetz before and after it took place. Essentially, respondent believed that all matters concerning funds received by the parties and the ultimate division of those funds would be determined at the end of the matrimonial proceeding.3

In early 2009, Sutton filed an ethics grievance against respondent.4 In August 2009, Parascandola and Sutton signed a property settlement agreement, which was incorporated into the final judgment of divorce in September 2009. Paragraph 34 of the agreement stated, in part:

The parties have also received a real estate rebate check jointly for the Tax Year 2008 in the amount of $1,257.89. Each party acknowledges receiving one-half or $628.94 and neither party makes any further application with regard to rebate or tax refund. The Husband shall be solely

3 When the payment to Parascandola was discovered, Sutton had the bank debit $1,257.89 against respondent's attorney trust account. She received that amount. It is unclear how this was accomplished.

4 The DEC declined to proceed at that time because the matrimonial litigation was ongoing.
entitled to any real estate tax refund from the State of New Jersey for the tax year 2009 and thereafter. The Wife waives any right, title and interest she may have in and to the real estate tax refund check. The Wife also waives and forever relinquishes any ethics grievance against Husband's Attorney or his Law Office regarding the previous processing and clearance of the real estate tax refund check payable to the parties.

[Ex.I;Ex.H-4.]

In August 2009, respondent sent a letter to Chernetz that stated, in part:

Paragraph 34 must remain as is. In fact, because your client has filed an Ethics Complaint against me, this Agreement will not be signed until I have a full Release from her. You are not allowed to delete this Paragraph. In fact, please contact me regarding your client's Release of any potential claim against this office. If I do not have a Release, this matter will not be resolved.

[Ex.J.]

Sutton testified that she signed the property settlement agreement, relying on her counsel's advice that paragraph 34 was unenforceable.
Respondent testified that he, too, did not believe that paragraph 34 was enforceable. Rather, he sought to "freeze" Sutton with regard to any potential disciplinary action against him. He explained that Parascandola had instructed him to require paragraph 34, as a condition of any settlement. Parascandola wanted respondent "to be able to continue [the representation] unfettered without compromise because he knew what was in store for him after the final judgment would have been addressed."6

In mitigation, respondent pointed to his previously unblemished career, his admission of wrongdoing and remorse, and his lack of personal gain from his actions. In addition, he noted that this was an isolated incident and that he had taken the Parascandola case more personally than others in his career.

The DEC concluded that respondent violated RPC 1.15(a), when he accepted a check from Parascandola and deposited it in

5 Although respondent testified that he thought that the language in question was unenforceable, in his reply to the grievance he pointed to paragraph 34, noting that Sutton "also waives any grievance against [respondent]."

6 As of the date of the hearing panel report, October 8, 2010, the matrimonial proceeding was ongoing. Respondent was representing Parascandola. Sutton was acting pro se.
his trust account with only his client's signature, even though Sutton was also a payee, and then disbursed the funds to Parascandola. The DEC noted that respondent knew that Chernetz objected to the disbursement of the funds solely to Parascandola and that Sutton would not agree to it. In the DEC's view, respondent had a fiduciary obligation to hold the funds for the owner(s), here, Parascandola and Sutton. The DEC remarked that respondent had other options, including seeking a court order. The DEC found that respondent's reasons for disbursing the funds to Parascandola were insufficient to overcome his obligations to both parties as an escrow agent.

On the other hand, the DEC noted that respondent did not act out of personal gain, that he did not hide the disbursement to Parascandola, and that Sutton was ultimately made whole, albeit through her own efforts, rather than respondent's.

As to the charged violation of RPC 8.4(d), the DEC found that respondent's requirement that Sutton sign a property settlement agreement that included a paragraph exculpating him from any ethics violations was improper. The DEC reasoned that, "[a]s a condition of signing a matrimonial property settlement, a party cannot be forced to give up an ethical claim against an attorney. Such a position and provision would be contrary to public
policy." The DEC expressed concern about the exculpatory claim in the agreement, notwithstanding the testimony of Sutton and respondent that they did not think it was enforceable. The DEC reasoned that, at the very least, respondent attempted to interfere with the administration of justice.

The DEC found not credible a portion of respondent's testimony on this score:

[Respondent] testified that he knew that paragraph 34 was unenforceable, but that he included it in order to "freeze" Ms. Sutton so that the case would not be taken up with collateral matters involving ethics grievances. [Respondent], through his attorney . . . noted that ethical charges are common in matrimonial cases, as such matters are usually quite contentious in general. That testimony is belied by [respondent's] demanding language in his August 10th letter. In essence, there would be no agreement at all unless Ms. Sutton waived her right to file an ethics charge against [respondent].

Though [respondent] also testified at hearing that this paragraph was required at the request of his client, the panel also did not find that testimony credible. The panel believes that the intent of paragraph 34 was to protect [respondent's] interest and not those of his client.

[HPR9.]

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7 HPR refers to the hearing panel report, dated October 8, 2010.
The DEC noted that respondent was moved by self-benefit, when he attempted to avoid ethics charges. The DEC considered, however, that respondent had been trying to represent Parascandola vigorously, "perhaps becoming too personal in doing so."

Finally, the DEC noted that, although respondent was mistaken in his belief that his actions were justified because all financial issues between Parascandola and Sutton would be resolved in the property settlement agreement, such belief militated against a finding of knowing misappropriation.8

Taking into account respondent's prior unblemished record, the DEC determined that an admonition was the appropriate measure of discipline here.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. Respondent violated RPC 1.15(a) and RPC 8.4(d), when he released

8 Respondent was not charged with knowing misappropriation. Pursuant to In re Susser, 152 N.J. 37 (1997), the release of escrow funds to a party, on the reasonable belief that the release is appropriate under the circumstances, does not constitute a knowing misappropriation.
escrow funds to only one of the parties and attempted to shield himself from an ethics grievance by Sutton.

Improper release of escrow funds, without more, has generally resulted in discipline ranging from an admonition to a reprimand. See, e.g., In the Matter of Karl A. Fenske, DRB 98-211 (May 25, 1999) (admonition imposed on attorney who, although obligated to hold a real estate deposit in escrow, released it to his client, the buyer, when a dispute arose between the parties; in mitigation, it was considered that there was some confusion as to the proper escrow holder and contractual dates); In the Matter of Joel Albert, DRB 97-092 (February 23, 1998) (admonition for the release of a portion of escrow funds to pay college tuition costs of a daughter of a party to the escrow agreement, without first obtaining the consent of the other party; the attorney had a reasonable belief that consent had been given); In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory to argue that the former attorney had either waived or forfeited her claim for the fee); In re Holland, 164 N.J. 246 (2000) (reprimand for
attorney who was required to hold in trust a fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order); *In re Milstead*, 162 N.J. 96 (1999) (attorney reprimanded for disbursing escrow funds to his client, in violation of a consent order); *In re Marqolis*, 161 N.J. 139 (1999) (reprimand for attorney who breached an escrow agreement requiring him to hold settlement funds in escrow until the completion of the settlement documents; the attorney used part of the funds for his fees, with his client's consent); and *In re Flayer*, 130 N.J. 21 (1992) (reprimand for attorney who made unauthorized disbursements against escrow funds; the attorney represented himself in the purchase of real estate).

In the cases where an admonition was imposed (*Fenske*, *Albert*, and *Spizz*) there had been either some confusion about entitlement to the funds, or a belief that consent had been given for a release of the funds, or a theory that the other claimant to the funds had waived or forfeited that claim. In other words, the attorney had some belief, albeit mistaken, that there was no impediment to the release of the funds.

Here, respondent knew that neither Sutton, the second payee on the check, nor her lawyer would have agreed to the release of
the funds solely to Parascandola. Respondent's argument that the money should have gone to his client because Sutton was not holding up her financial obligations was without merit. That was an issue for the court to decide, not respondent. Instead, he engaged in "self-help" on his client's behalf, a decision that was not his to make.

There is an additional element of misconduct for our consideration: respondent's attempt to prevent Sutton from pursuing an ethics grievance against him. That respondent knew that the language in paragraph 34, eliminating Sutton's right to file a grievance against him, was unenforceable is without moment. The point was that he wanted Sutton to believe it was enforceable. In respondent's own words, he sought to "freeze" her from filing a grievance against him, so that he could continue to represent Parascandola. Respondent's actions were an attempt to restrict Sutton's rights, a violation of RPC 8.4(d).

In cases where attorneys have taken steps to have ethics grievances dismissed, a private reprimand (now an admonition), admonitions, and a reprimand have been imposed. See, e.g., In the Matter of , DRB 91-254 (January 22, 1992) (private reprimand for attorney who prepared a "Payment Affidavit and
Cash Receipt" intended to force his client to withdraw all ethics grievances against him); In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case on the dismissal of an ethics grievance filed by the client's parents); In the Matter of Harry J. Levin, DRB 07-132 (January 15, 2008) (admonition for attorney who contacted the grievant's son and convinced him to obtain his mother's withdrawal of her grievance; the attorney also wrote a letter to the grievant containing threats of lawsuits and of court-ordered psychiatric examinations, which threats frightened the grievant into withdrawing her allegations); and In re Mella, 153 N.J. 35 (1998) (reprimand imposed for conduct prejudicial to the administration of justice; the attorney communicated with the grievant in an attempt to have the grievance against him dismissed in exchange for a fee refund and some additional remedial conduct; the attorney was also guilty of lack of diligence and failure to communicate with clients).

9 Because private reprimands are confidential, the name of the respondent has been omitted.
Respondent's violation of RPC 8.4(d), standing alone, most closely resembles the misconduct in Tomlinson (admonition), where the attorney conditioned the resolution of a matter on the dismissal of an ethics grievance. But we need to consider respondent's other ethics transgression, namely, his release of escrow funds to his client alone, knowing that another party had an interest in the funds. As seen from the above cited precedent, ordinarily that offense is met with a reprimand.

Generally, for the sum of misconduct like respondent's we would impose a censure. In mitigation, however, we have considered respondent's lengthy unblemished career of thirty-eight years. We have also considered his quick admission of wrongdoing, his expression of remorse, and his statement that he took this matrimonial matter more personally than other cases. We, therefore, determine that a reprimand is sufficient discipline for the aggregate of respondent's violations.
We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Chief Counsel
The Disciplinary Review Board having filed with the Court its decision in DRB 11-117, concluding that ALAN E. WELCH of SOMERVILLE, who was admitted to the bar of this State in 1973, should be reprimanded for violating RPC 1.15(a) (failure to safeguard property belonging to a client or a third party) and RPC 8.4(d) (conduct prejudicial to the administration of justice), and good cause appearing;

It is ORDERED that ALAN E. WELCH is hereby reprimanded; and it is further

ORDERED that the entire record of this matter be made a permanent part of respondent's file as an attorney at law of this State; and it is further

ORDERED that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs and actual expenses incurred in the prosecution of this matter, as provided in Rule 1:20-17.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 16th day of November, 2011.