

## Utah Ethics Opinions

2003.

03-04. USB EAOC Opinion No. 03-04

UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 03-04

Issued October 14, 2003

¶1 **Issue:** May a lawyer threaten to present criminal charges against an opposing party or witness during negotiations in a private civil matter?

¶2 **Opinion:** In the course of representing a client in a civil matter, it is not per se unethical for a lawyer to threaten that the client may pursue criminal charges against an adverse party where the civil and criminal matters are related. However, such a threat will be a violation of the Utah Rules of Professional Conduct if it constitutes "extortion," if the lawyer does not have a reasonable belief that such charges are warranted by the law and the facts, or if it involves "abusive treatment" of a witness.

¶3 **Background:** This query arose when counsel, during a mediation, stated that the opposing party's witness was in violation of Utah law and that the County Attorney's office "would be interested" to learn of the alleged violation.

¶4 *The Former Rule.* Prior Disciplinary Rule 7-105 of the Model Code of Professional Responsibility barred a lawyer from using criminal charges to gain leverage in a civil action: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." (fn1) The stated intent of DR 7-105 was to prevent lawyers from using the criminal justice system for oppressive purposes, and the rule set the boundaries of acceptable lawyer conduct clearly.

¶5 The drafters of the American Bar Association Model Rules of Professional Conduct ("Model Rules"), however, deliberately left out the provisions of DR 7-105. The rationale behind this omission was the drafters' belief 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." (fn2) The prior rule was thought to be overbroad because it prohibited legitimate pressure tactics and negotiation strategies. (fn3) The current Utah Rules of Professional Conduct also include no analog to DR 7-105,

but instead prohibit a lawyer from using "means that have no substantial purpose other than to embarrass, delay or burden a third person" (fn4) and from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation [or] . . . in conduct that is prejudicial to the administration of justice." (fn5)

¶6 *ABA Opinion 92-363:* The American Bar Association addressed the permissibility of threats in 1992 in Formal Opinion 92-363 ("Opinion 363"). Opinion 363 concluded that a lawyer may use the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for the client, as long as the criminal and civil matters are related, the lawyer has a reasonable belief that threat is warranted by the law and the facts, and the lawyer does not suggest she possesses improper influence over the criminal process or try to exert such influence. (fn6) Correspondingly, a lawyer may agree to refrain from presenting criminal charges as part of a settlement so long as the agreement does not violate applicable law. (fn7)

¶7 The same factors apply to threats against an opposing party's witness. Opinion 363 notes that "abusive treatment" of witnesses may implicate Model Rule 4.4. Abusive treatment exists if the lawyer's purpose in suggesting charges may be brought is merely to embarrass, delay or burden a third person. If, however, the lawyer has a well-founded belief that criminal charges related to the civil action may be justified, and the lawyer does not suggest the presence of improper influence over the criminal process, the conduct is not abusive.

¶8 **Analysis:** Given the deliberate omission of DR 7-105 from the current Model Rules and the reasoning of Opinion 363, we conclude that threats of possible criminal charges are sometimes permissible under the Utah Rules of Professional Conduct. As Hazard & Hodes explain:

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. . . . An example is where a lawyer for a financial corporation must deal with an employee who has been discovered in embezzlement. . . . In these circumstances it is counterproductive to prohibit the lawyer from discussing with the employee, or the employee's counsel, the possibilities [of having the employee pay back the money without the adverse publicity that a criminal trial would bring]. (fn8)

Such threats, however, are subject to limitations on the manner with which an advocate may proceed.

¶9 Under the current rules, as with the old, behavior that is

"extortionate" is impermissible, (fn9) because extortion is a "crime that reflects adversely on a lawyer's honesty." (fn10) Whether lawyer conduct is extortionate and qualifies as an ethical violation is to be determined by the facts on a case-by-case basis. (fn11)

¶10 For example, a 1993 New Hampshire case involved a lawyer being disciplined for such improper behavior. In that case, when a plaintiff's civil rights lawyer publicly maligned city officials and threatened them with serious criminal charges, his behavior was found to be "decidedly intimidating" and "beyond the parameters of zealous advocacy." (fn12) An ethical violation also occurred when a plaintiff's lawyer, on the eve of trial, sent a letter to defendant's lawyer threatening to send the prosecutor's office certain documents that could incriminate the defendant, her sister and other members of her family, unless the plaintiff was immediately paid for rent due. (fn13)

¶11 The possible criminal action must, moreover, be related to the current civil matter. (fn14) This helps insure that a lawyer's conduct does not compound another crime. The relatedness requirement also ensures that permissible negotiation will be focused on the merits of the civil litigation and that parties will not become distracted by unconnected matters.

¶12 The use of threats also implicates Utah Rules of Professional Conduct 3.1, 4.1, 4.4 and 8.4. A lawyer must conform to these rules when using the possibility of criminal prosecution as leverage. Rule 3.1, for example, prohibits a lawyer from asserting claims in court that are not meritorious. Rule 4.1 requires lawyers to be truthful in dealing with others on a client's behalf, forbidding a lawyer from "knowingly" making a "false statement of material fact or law to a third person." Accordingly, a lawyer violates Rule 4.1 if he threatens criminal prosecution where he knows the facts do not support such charges. Further, Rule 4.4 says, "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." Thus, an off-hand threat without any informed opinion that criminal charges are well-founded may violate Rule 4.4.

¶13 A lawyer who threatens criminal proceedings must be sure that both the present civil suit and the threat of criminal action are well-founded. The lawyer, therefore, can only threaten criminal prosecution in the good-faith belief that such prosecution may be warranted by the law and facts. While a lawyer in a civil action may not use the criminal justice system to make frivolous, patently untruthful or otherwise unjustified threats against an opposing witness, the threat of criminal charges that are warranted would not violate these rules.

¶14 Various provisions of Rule 8.4 also affect the permissibility of threats of criminal prosecution. A lawyer's failure to report criminal wrongdoing may be unethical under Rule 8.4(b) if it facilitates another crime. More generally, under section (c) of Rule 8.4, it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Additionally, section (d) of the rule prohibits a lawyer from behaving in a manner that is "prejudicial to the administration of justice," and section (e) says that a lawyer may not "state or imply an ability to influence improperly a government . . . official." These provisions, also, prohibit the lawyer from dishonestly stating that another has committed a crime. Similarly, a lawyer is prohibited from suggesting that he can ensure that the prosecution or the court will act in a particular way if criminal charges are in fact considered.

¶15 Finally, although in certain circumstances it is ethically permissible for a lawyer to discuss both the civil and criminal implications of certain matters (e.g., embezzlement), this does not give a lawyer unfettered license to threaten parties or witnesses with criminal prosecution. In suggesting the possibility of criminal prosecution, a lawyer needs to be very careful not to violate ethical standards set forth in Rules 3.1, 4.1, 4.4 and 8.4, that the comments are not subject to being misinterpreted as attempted extortion, and that whatever is said about the possibility of criminal prosecution is directly related to the pending civil matter.

¶16 **Conclusion.** We adopt the position of a number of other states' ethics committees (fn15) and conclude that, in the course of representing a client in a civil matter, it is not *per se* unethical for a lawyer to threaten that the client may pursue criminal charges against an adverse party where the civil and criminal matters are related. However, a lawyer should use these tactics with a watchful eye on whether their use constitutes "extortion" under Utah Law, whether the lawyer reasonably believes that such charges are warranted by the law and the facts, and whether they involve "abusive treatment" of a witness.

#### Footnotes

1. The Model Code of Professional Responsibility governed Utah attorneys' professional behavior until January 1988, when the Utah Supreme Court adopted a version of the ABA's Model Rules of Professional Conduct.

2. C.W. WOLFRAM, MODERN LEGAL ETHICS § 13.5.5, at 718, citing ABA Model Rule 8.4, legal background note (Proposed Final Draft, May 30, 1981) (1986) (hereinafter "Wolfram").

3. G.C. HAZARD & W.W. HODES, THE LAW OF

LAWYERING § 40.4, at 40-7 (2003) (hereinafter, "Hazard & Hodes").

720 (W. Va. 1992).

**Rules Cited:**

4. Utah Rules of Professional Conduct 4.4 (2003).

**3.14.14.48.4**

5. *Id.* Rules 8.4(c) and (d).

6. *See also* ABA/BNA, Lawyers' Manual on Professional Conduct § 1001:117 (1984).

7. The situation is somewhat different, however, when it involves threats against a party's lawyer. Rule 8.3 imposes an affirmative duty of reporting when a lawyer has knowledge of another lawyer's violation of the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness."

8. Hazard & Hodes § 40.4, at 40-7 to 40-8 (2003). *See Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992), permitting negotiations regarding embezzlement as described above.

9. *See id.* and Wolfram, *supra* note 1.

10. Utah Rules of Professional Conduct 8.4(b).

11. Utah Code Ann. § 76-6-406(2) defines "theft by extortion." Our opinion here is limited to the ethical implications of a lawyer's conduct. It is not our purview to render legal opinions about whether specific conduct may or may not cause a prosecutor to conclude that the conduct constitutes the crime of extortion under Utah law.

12. *In re Robertson's Case*, 626 A.2d 397, 400 (N.H. 1993).

13. *In re Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993).

14. *See* Kate A. Toomey, *Practice Pointer: The Rule Against Threatening Criminal Prosecution to Gain an Advantage in a Civil Matter*. UTAH BAR J., Dec. 2002, at 12.

15. For example, in Opinion No. 1995-2, [www.dsba.org/ethics95-2.pdf](http://www.dsba.org/ethics95-2.pdf), the Delaware State Bar Commission on Professional Ethics held that a lawyer may threaten criminal charges to gain relief for a client in the administration of an estate matter. The charges must be related and be warranted by law and facts. Opinion 97-2 (1997) of the Ethics Commission of Alaska Bar Association, [www.alaskabar.org/index.cfm?ID=4870](http://www.alaskabar.org/index.cfm?ID=4870), holds similarly. The West Virginia Committee on Legal Ethics found that a lawyer's threat to press criminal charges against his client's former employee unless he made restitution of embezzled funds was a legitimate negotiating technique. *Committee on Legal Ethics v. Printz*, 416 S.E.2d