

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 97-2**

**Use Of Threats Of Criminal Prosecution
In Connection With A Civil Matter**

The Ethics Committee has been asked to review Ethics Opinion No. 77-3 in light of changes to Alaska Rules of Professional Conduct (“Ethical Rules”) adopted in 1993 and American Bar Association Formal Opinion 92-363 relating to the Use of Threats of Prosecution in Connection with a Civil Matter. The Ethics Committee has determined that in light of the present ethical rules, Ethics Opinion No. 77-3 should be withdrawn. Under Alaska’s Ethical Rules, it is ethical for a lawyer to use the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client’s civil claim, the lawyer has well-founded belief that both the civil claim and the 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.

Ethics Opinion No. 77-3 addressed the issue of whether an attorney or firm which represents a client in a civil case to collect a debt may also initiate a criminal prosecution for violation of a statute which makes failure to pay a crime. The opinion holds that an abuse of the ethical rules occurs only where the motive for the prosecution is solely to obtain an advantage in the civil case. The opinion goes on to state that communications from the lawyer to the offender that the offender may avoid prosecution by paying are clearly prohibited by prior Disciplinary Rule 7-105 which stated “[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

In reviewing Ethical Opinion 77-3, it is important to first consider the purpose of prior DR 7-105 and the presence or absence of similar prohibitions in Alaska’s Ethical Rules. The stated purpose for DR 7-105 was to prevent the oppressive use, and thereby the subversion, of the criminal justice system. This provision, however, was deliberately omitted in the Model Rules of Professional Conduct. The reasoning behind this omission 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)*. Similar to the Model Rules, there is no counterpart to DR 7-105 in Alaska’s Ethical Rules.

The American Bar Association addressed a similar issue in Formal Opinion (“ABA Opinion”) 92-363. This opinion holds that the 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.

In reaching this decision, the ABA Opinion cites the fact that the counterpart to DR 7-105 was deliberately not contained in the Model Rules. This fact, along with the reasoning noted above, supports the conclusion that the drafters of the model rule intended to eliminate the previous prohibitions contained in DR 7-105. The ABA Opinion also cites other Model Rules which could govern an attorney’s conduct similar to those in question. These rules include Model Rule 8.4(b) which provides that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Model Rule 4.4 prohibits a lawyer from using means that “have no substantial purpose other than to embarrass, delay, or burden a third person...” Threatening criminal charges to merely harass a third person would violate this rule. Additionally, Model Rule 4.1 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 would violate this rule. Finally, Model Rule 3.1 prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact or law, or threatens such prosecutions in furtherance of a civil claim that is not well founded violates this rule.

While the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime (or similar crimes).¹ A relatedness requirement avoids exposure to the charge of compounding, which would violate Rule 8.4(b)’s prohibition against “criminal act[s] that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” It also tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes criminal liability arising from the same facts or transaction, and discourages

¹ See AS 11.56.790 (*Alaska Compounding Statute*) and AS 11.41.520 (*Alaska’s Extortion Statute*).

exploitation of extraneous matters that have nothing to do with evaluating that claim.

Alaska's Ethical Rules contain similar or identical language to the Model Rules noted above. Under these circumstances, this committee agrees with the logic of the ABA Formal Opinion No. 92-363. The holding in Ethics Opinion 77-3 is based upon the language of past DR 7-105, which is not contained in the present Ethical Rules. Additionally, other provisions within the Ethical Rules adequately address potential unethical conduct. Finally, the rule adopted under ABA Formal Opinion No. 92-363 provides clearer guidelines for practitioners and is more consistent with an attorney's obligations to zealously assert a client's position in our adversary system.

Therefore, under Alaska Ethical Rules, it is not unethical for a lawyer to use the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. Therefore, Ethics Opinion 77-3 is withdrawn.

Approved by the Alaska Bar Association Ethics Committee on March 6, 1997.

Adopted by the Board of Governors on March 21, 1997.