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## Wisconsin Formal Ethics Opinion E-01-01: Threatening Criminal Prosecution or Professional Discipline

March 5, 2001

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*Professional Ethics Opinion E-01-01 considers whether lawyers may threaten criminal prosecution or disciplinary action in relation to a civil matter.*

### Question

**May a lawyer threaten to initiate a criminal proceeding against a third person or a disciplinary action against an adverse lawyer in relation to a civil matter?**

### Opinion

**Threatening criminal prosecution in relation to a civil action.** Whether a lawyer may threaten a criminal prosecution in a civil matter is addressed by [SCR 20:3.10](#):

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

In Opinion [E-87-5](#), the State Bar Professional Ethics Committee addressed this issue under an identically worded provision of the predecessor code to the Rules of Professional Conduct. *See* SCR 20:39, Code of Professional Responsibility. That opinion concludes that while a lawyer representing a client in a civil matter may assist the client in providing a prosecutor with information relating to an adverse party's probable criminal conduct, threatening to present such information unless some action is taken by the adverse party is prohibited. Therefore, the opinion reasons a lawyer "informing adverse parties of their possible criminal conduct while representing clients in civil matters against them" is prohibited.

The Professional Ethics Committee now withdraws Ethics Opinion [E-87-5](#).

The committee now opines that in a civil matter, a lawyer may *inform* another person that their conduct may violate a criminal provision provided the criminal conduct is related to the civil matter, the lawyer has formed a good faith belief that the conduct complained of constitutes a criminal violation, and the lawyer or the lawyer's client has a duty or right to report the criminal violation. Informing someone under such circumstances may involve informing them that the lawyer or the lawyer's client intends to initiate a criminal action when the lawyer or the lawyer's clients actually have formed the intention to do so either as a matter of legal obligation or right.

The ABA Model Rules do not include a provision similar to [SCR 20:3.10](#). The *Restatement of the Law Governing Lawyers* notes that this exclusion was deliberate and based on the belief that

the provision was vague and overly broad and prohibited what would constitute legitimate negotiating tactics. *See* § 98 Reporter's Note to Comment f. However, the Wisconsin Supreme Court chose to include this provision in its version of the Rules of Professional Conduct. Since the adoption of [SCR 20:3.10](#), there have been no reported instances of a Wisconsin lawyer being disciplined for a violation of this rule.

The few authorities that address similar rules in other states suggest cautious enforcement. Whenever confronted with threats of criminal action by a lawyer against a party adverse to the lawyer's client, courts appear to have strained to find reasons why the mention of criminal charges could be justified. *See ABA/BNA Lawyer's Manual of Professional Conduct* at § 71:602-603. Grounds for nonenforcement of this provision include noting that it was not clear that the lawyer's *sole* purpose was to gain an advantage in the civil action, distinguishing between informing an adverse party about the criminal law as opposed to threatening criminal prosecution and noting statutes in some states require giving notice of possible criminal charges as part of bringing certain civil actions.

ABA Ethics Opinion 92-363 has noted that a lawyer may use the possibility of presenting a criminal charge against an opposing party in a private civil matter to gain relief for his client provided that the criminal charge is related to the civil claim, both the civil claim and the possible criminal charge are warranted by law and the facts of the situation, and the lawyer does not attempt to exert improper influence over the criminal process.

**Threatening a disciplinary proceeding against another lawyer.** The obligation of lawyers to report the misconduct of other lawyers is governed by SCR 20:8.3 (a). Beyond this mandatory obligation to report such misconduct, lawyers must be mindful that theirs is a self-regulating profession and that self government carries with it special responsibilities including not only to observe the Rules of Professional Conduct, but also to aid in securing their observance by other lawyers. *See* Preamble to Rules of Professional Conduct.

In Wisconsin Ethics Opinion [E-89-16](#), this committee opined that while presenting facts to a disciplinary authority regarding another lawyer's misconduct during the course of representation should be permitted, "threatening to present such charges 'unless' would clearly violate SCR 20.39" (the identically worded predecessor to SCR 20:3.10). Neither SCR 20:3.10 or its predecessor, SCR 20.39, make reference to reporting professional misconduct.

The committee now withdraws [E-89-16](#) and opines as follows:

The responsibility of a lawyer to report the misconduct of another lawyer is governed by SCR 20:8.3 and the obligation of all members of a self-regulating profession to assure observance of the Rules by their fellow professionals. Reporting misconduct of other lawyers must be accomplished within the framework for behavior established by the very Rules this obligation is meant to protect. This includes due attention to the lawyer's duty of confidentiality, SCR 20:8.3(c); not advancing claims or factual positions that the lawyer knows are frivolous, SCR 20:3.1; not using means that have no substantial purpose other than to embarrass, delay, or burden a third person, SCR 20: 4.4; or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, SCR 20:8.4(c).

A lawyer who seeks to gain a bargaining advantage by threatening to report another lawyer's misconduct commits misconduct even if that lawyer believes that the other lawyer's conduct raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness. Seeking such a bargaining advantage in such circumstances is inappropriate because reporting such misconduct is an obligation imposed by the Rules. SCR 20:8.3(a). *See* ABA Formal Ethics Opinion 94-383. Likewise, a lawyer commits misconduct by entering into any agreement to not report such misconduct. *See In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill.1988).