
**E-87-5 Threatening criminal action related to a
civil claim**

Question

How, if at all, may an attorney ethically inform adverse parties that they may have engaged in possible criminal conduct, while the attorney represents a client with a civil claim against them?

Opinion

SCR 20.39, a Disciplinary Rule, states: “A lawyer may not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.” The rationale for this Rule is set forth in SCR 20.34(3)(c), an Ethical Consideration:

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 legal rights and thus the usefulness of the civil process in settling private disputes is impaired.

See also ABA Committee on Ethics and Professional Responsibility Informal Opinion 1427 (8/15/78).

However, a lawyer may ethically represent a client in a civil dispute while simultaneously assisting the client in providing a prosecutor with information relating to an adverse party’s probable criminal conduct. *See* ABA Committee on Ethics and Professional Responsibility Informal Opinion 1484 (12/1/81). The critical question in these circumstances is whether the lawyer is involved in the presentation of criminal charges solely or primarily as leverage in the civil matter or not. Simply “presenting the facts to the prosecutors for such action as [they] may deem appropriate” should be permitted during the course of representation. We concur with the ABA ethics committee that it is. *See* ABA Informal Opinion 1484, *supra*. However, “Threatening” to present such charges “unless . . .” would clearly be violative of SCR 20.39. Therefore, except as discussed above, SCR 20.39 prohibits informing adverse parties of their possible criminal conduct while representing clients in civil matters against them. *See also* Wis. Stats.

section 427.104(1)(b) providing a statutory prohibition in certain consumer transactions.

In response to a subsidiary question posed by this inquiry, we would confirm that prosecutors' duties are not generally restricted by SCR 20.39. *See* Wisconsin Attorney General's Opinion, 63 OAG, 741, holding a prosecutor's threatening criminal prosecution in worthless check cases proper. *But see e.g., MacDonald v. Musick*, 425 F.2d 373, 376 (9th Cir), *cert. denied*, 400 U.S. 852 (1970).

Finally, the committee observes that the Wisconsin Rules of Professional conduct, effective Jan.1, 1988, will not contain a provision equivalent to SCR 2039. Nevertheless, authoritative commentators have found SCR 20.39's general prohibitions contained in more specific prohibitions of the Rules of Conduct (*e.g.*, Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b) and 8.4 (e)). *See, e.g.*, Annotated Model Rules of Professional Conduct (ABA 1984).