
Wisconsin Formal Ethics Opinion EF-21-01: Threatening Criminal Prosecution or Professional Discipline

January 1, 2021

Synopsis: *There is no prohibition in the Rules of Professional Conduct against threatening criminal prosecution to gain an advantage in a civil matter. A lawyer considering doing so, however, must take care to ensure that the criminal matter is related to the client's civil claim, the lawyer has a good faith belief that both the civil claim and the criminal charges are supported by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. There is similarly no prohibition in the Rules of Professional Conduct on the lawyer and the lawyer's client agreeing, as part of a settlement, to refrain from reporting information regarding the purported criminal conduct to the relevant authorities.*

A lawyer may not, however, use the threat of reporting another lawyer's misconduct to the disciplinary authority to gain an advantage in a matter because the Rules of Professional Conduct prohibit a lawyer from limiting a person's right to report misconduct and lawyers themselves, in certain circumstances, have mandatory duty to report the substantial misconduct of other lawyers and judges. Wisconsin Formal Ethics Opinion E-01-01 is withdrawn.

Introduction

In Formal Ethics Opinion E-01-01, the State Bar's Standing Committee on Professional Ethics (the "Committee") considered the same questions addressed in this opinion. When that opinion was issued in 2001, Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") contained Supreme Court Rule ("SCR") 20:3.10, which prohibited lawyers from "presenting or threatening to present criminal charges solely to gain an advantage in a civil matter." SCR 20:3.10, however, was repealed in 2007.¹ Also in 2007, the Wisconsin Supreme Court adopted SCR 20:1.8(h)(3), which prohibits lawyers from making an "agreement limiting a person's right to report the lawyer's conduct to the disciplinary authorities."² Given these changes to the Rules, the Committee now considers the questions addressed in Formal Opinion E-01-01 under the current Rules.

¹ The repeal of the rule was part of the Wisconsin Supreme Court's "Ethics 2000" revision of the rules – see Wis.Sup. Ct. Order No. 04-07, 2007 WI 4.

² SCR 20:1.8(h)(3) was amended effective January 1, 2021. The prior version of this Rule prohibited limiting "the client's" right to report the lawyer's conduct to the disciplinary authorities.

Opinion

Threatening Criminal Prosecution

Wisconsin's Rules no longer contain any express prohibition on threatening "to present criminal charges solely to obtain an advantage in a civil matter." One reason for the removal of the former Rule is that such an explicit prohibition was never part of the ABA Model Rules of Professional Conduct, and while such an express prohibition was contained in DR 7-105(A) of the ABA Model Code of Professional Responsibility, its omission from the Model Rules was deliberate.³ Moreover, Wisconsin's former SCR 20:3.10 also proved difficult to enforce.⁴ The lack of a specific prohibition, however, does not mean that there are not constraints imposed by other Rules on a lawyer's ability to use the threat of criminal prosecution to the advantage of the client in a civil matter. Specifically, lawyers may not advance a claim on behalf of a client without a basis in law and fact (SCR 20:3.1), may not make false statements of law or material fact to third persons [SCR 20:4.1(a)], may not use means in representing a client that have no substantial purpose other than to embarrass, delay or burden a third person [SCR 20:4.4(a)] and may not state or imply an ability to improperly influence a government agency or official by means that violate the rules or other law [SCR 20:8.4(d)].

This opinion considers a situation where a lawyer wishes to use the threat of criminal prosecution to gain an advantage in a civil matter. Before a lawyer may threaten to report an opposing party to the prosecuting authorities if the client's demands are not met in a civil matter, the lawyer must consider the following questions carefully.⁵

³ ABA Formal Opinion 92-363 explains; "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)."

⁴ See e.g. *Disciplinary Proceedings against Coe*, 2003 WI 117, 665 N.W.2d 849 (2003).

⁵ The former SCR 20:3.10 did not prohibit lawyers from simply *informing* someone that the lawyer intended to report their conduct to prosecuting authorities and there is no prohibition in the current Rules. As stated in Wisconsin Formal Opinion E-01-01, which discussed the then current SCR 20:3.10; "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." This analysis continues to be valid.

1) Is the lawyer’s belief that criminal conduct has occurred well founded in fact and law?

SCR 20:3.1(a) states;

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

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(am) A lawyer providing limited scope representation pursuant to SCR 20:1.2(c) may rely on the otherwise self-represented person’s representation of facts, unless the lawyer has reason to believe that such representations are false, or materially insufficient, in which instance the lawyer shall make an independent reasonable inquiry into the facts.

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, 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 an action would serve merely to harass or maliciously injure another.

This Rule requires that the lawyer have a well-founded basis in fact and law for any assertion of criminal conduct of another, and the lawyer must be able to articulate the law the lawyer believes to have been violated and the facts that support such a violation.⁶

2) Are the lawyer’s statements about the criminality of the conduct in question and the intention to report the conduct if concessions are not made in good faith?

SCR 20:4.1(a) states:

(a) In the course of representing a client a lawyer shall not knowingly:

(1) make a false statement of a material fact or law to a 3rd person;

A lawyer who informs a third person that their conduct violates criminal law knowing that the statement is not correct, or who falsely informs a third person that their conduct will be reported to the authorities when there is no intent to do so violates SCR 20:4.1(a).

3) Is the asserted criminal conduct related to the client’s civil claim and is the threat of reporting legitimately related to the client’s lawful objectives in the civil matter?

SCR 20:4.4(a) states:

⁶ Of course, this Rule applies to a lawyer who reports conduct of another on behalf of a client even without attempting to use the threat of reporting to the client’s advantage.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

Accordingly, a lawyer who makes a claim of criminal conduct merely to harass another violates SCR 20:4.4(a).

Related to the requirements of SCR 20:4.4(a) is the necessity that the asserted criminal conduct be related to the civil matter in which the lawyer represents the client. This was discussed in ABA Formal Opinion 92-363:

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). 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 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. See Rule 8.4(c).

The Committee agrees with this analysis. Moreover, the lawyer who threatens to report criminal conduct of an opponent unrelated to the matter may be subject to the claim that the threat has no "substantial purpose other than to embarrass, delay or burden" and therefore violates SCR 20:4.4(a).⁷

4) The lawyer must be careful to avoid stating or implying an ability to improperly influence the criminal process.

SCR 20:8.4(d) states that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." This provision underscores the importance of the lawyer carefully choosing her words, and documenting them, when raising the issue of whether criminal conduct may be involved or reported in connection with a civil matter. The lawyer may, if based on a good faith examination of the facts and law, inform a person that their conduct constitutes a crime, or that the lawyer intends to report the conduct to authorities. However, the lawyer may not inform a person that she will commence a criminal action because

⁷The Attorney's Oath, SCR 40.15, which is enforceable in disciplinary matters pursuant to SCR 20:8.4(g) states, in relevant part: "I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."

that authority exclusively rests with the district attorney.⁸ The lawyer must exercise care to ensure that the lawyer does not, for example, imply that the lawyer's relationship with a prosecutor will ensure criminal charges are brought. This is particularly important with dealing with an unrepresented person.⁹ Finally, as part of negotiations, the lawyer may not promise that her client will not cooperate with a lawful investigation of possible criminal conduct should one occur, although, as noted below, negotiations may include an agreement to not report the conduct.

If these guidelines are followed, lawyers who represent clients who have lawful remedies under both civil and criminal law for the same matter, are free to pursue both on behalf of their clients.¹⁰ To prohibit a lawyer from invoking the possibility that a matter might be referred to prosecuting authorities would in effect deprive clients of an otherwise lawful option simply because they have retained a lawyer.¹¹

Of course, threatening to refer a matter to the prosecuting authorities to gain advantage requires that if the client's demands are satisfied, the matter will *not* be referred to prosecuting authorities. There is no prohibition in the rules on agreeing, as part of the settlement of a client matter, not to report alleged criminal conduct.¹² Concerns may arise that a threat of criminal prosecution in connection with a civil matter may be extortionate and that agreeing not to report may constitute compounding and thus potentially violate SCR 20:8.4(b). These concerns were addressed in ABA Formal Opinion 92-363:

It 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

⁸ See Wis. Stat. §978.05; *Biemel v. State*, 71 Wis. 444, 37 N.W. 244 (1888)(private prosecutions prohibited in Wisconsin).

⁹ See also SCR 20:4.3.

¹⁰ The Committee agrees with ABA Formal Opinion 92-363; "Accordingly, it is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules."

¹¹ See e.g. N.Y. City Bar Formal Op. 1995-13.

¹² A number of other opinions have agreed with the position of ABA Formal Op. 92-363. See e.g. Alaska Ethics Op. 97-2 (1997); Utah Ethics Op. 03-04 (2003); North Carolina Ethics Op. 2008-15 (2009). It has also been held that a lawyer's threat of criminal prosecution if embezzled funds were not repaid was a legitimate negotiating tactic. *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992).

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)

It is likewise beyond the scope of the Committee's authority to interpret criminal laws, but the Committee notes that a threat to accuse someone of a crime does not constitute the crime of extortion pursuant to Wis. Stat. 943.30(1) unless the threat is made "maliciously." Wis JI-Criminal 1473A, note 4, states that a threat is made "maliciously" if it is made willfully and with an illegal intent. In one case, the Wisconsin Supreme Court stated "it is true that a person so injured has the right in demanding payment for the damages caused by the wrongdoer's misconduct to state to him that a criminal prosecution will be instituted against him for the misconduct if the damages are not paid..."¹³ Similarly, Wisconsin law states that the crime of compounding "does not apply if the act upon which the actual or supposed crime is based has caused a loss for which a civil action will lie and the person who has sustained such loss reasonably believes that he or she is legally entitled to the property received."¹⁴ The purpose of this brief discussion of substantive criminal is not to opine on what conduct may or may not violate criminal statutes, but rather to highlight the importance of any assertion of criminal conduct being well-founded, related to the civil case and made in good faith.

Threatening Disciplinary Action

In Ethics Opinion E-01-01, the Committee stated that 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)."

The committee reaffirms that position in consideration of the current Rules. In 2001 when Formal Opinion E-01-01 was drafted, there was no express prohibition in the Rules on using the threat of reporting a lawyer's conduct to disciplinary authorities, but that opinion relied on

¹³ *O'Neil v. State*, 237 Wis. 391, 296 N.W. 96 (1941).

¹⁴ Wis. Stat. 946.67(2).

lawyer's mandatory duty to report serious misconduct under SCR 20:8.3, and lawyer's obligations in "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)."¹⁵ Those obligations continue to exist, but an express prohibition now exists in the rules. SCR 20:1.8(h)(3) prohibits lawyers from making "an agreement that limiting a person's right to report the lawyer's conduct to disciplinary authorities."¹⁶ Moreover, every lawyer has a mandatory duty to "cooperate with the office of lawyer regulation in the investigation, prosecution and disposition of grievances."¹⁷ Thus, offering or making any agreement that purports to limit any person's right to report a lawyer to the disciplinary authorities, such as an agreement to refrain from reporting misconduct if certain demands are met, is itself misconduct.¹⁸

While the Rules do not expressly prohibit a lawyer from simply *informing* another lawyer that their conduct may violate one or more rules, lawyers should still exercise caution. Even when the lawyer is not seeking to use the threat of filing a grievance to the advantage of a client, lawyers should still exercise caution before accusing another lawyer of misconduct and stating or implying that a grievance may be filed. A lawyer who threatens to file a grievance that is not warranted under existing law violates SCR 20:3.1(a). In addition, a lawyer who threatens to file a grievance without any actual intent to do so violates SCR 20:4.1, which prohibits a lawyer from making a false statement of material fact. Such threats also violate SCR 4.4(a), which prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person," because it burdens both the lawyer threatened and his or her client by "introducing extraneous factors into their assessment of whether to settle."¹⁹

Sometimes, such as when the lawyer believes in good faith that opposing counsel has a conflict based upon prior representation of the client in a substantially related matter, it is entirely appropriate to raise the issue of the conflict with opposing counsel. Without a substantial purpose, however, a lawyer who simply accuses opposing counsel of engaging in misconduct runs the risk of committing misconduct themselves. Calling opposing counsel unethical to gain an advantage is "the antithesis of professionalism," Iowa State Bar Ass'n Comm. On Ethics & Practice

¹⁵ In contrast, ABA Formal Opinion 94-383 took the position that a lawyer *could* use the threat of reporting a lawyer's conduct as a bargaining point in the narrow circumstance where the threat would not violate Model Rules 3.1, 4.1, 4.4, 8.3 or 8.4.

¹⁶ A prior version of SCR 20:1.8(h)(3) prohibited making an agreement limiting "a client's" right to report misconduct. The current version of the Rule became effective on January 1, 2021. See Wisconsin Supreme Court Order in connection with Rules Petition 19-12, 2020 WI 62.

¹⁷ See SCR 21.15(3). This duty applies whether the lawyer is the subject of the grievance or is contacted as a witness – see Wisconsin Formal Ethics Op. EF-20-01.

¹⁸ See SCR 20:8.4(a), which states that it is misconduct to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

¹⁹ See ABA Formal Op. 94-383.

Guidelines, Op. 14-02 (Oct. 24, 2014), and may violate the attorney's oath, which requires the lawyer to "abstain from all offensive personality," SCR 40.15. Violating the attorney's oath is misconduct under SCR 20:8.4(g).

Conclusion

Lawyers are not prohibited by the Rules from threatening criminal prosecution to gain an advantage for a client in a civil matter, provided that the lawyer does not advance a claim on behalf of a client without a basis in law and fact, does not make false statements of law or material fact to third persons, does not use means in representing a client that have no substantial purpose other than to embarrass, delay or burden a third person and does not state or imply an ability to improperly influence a government agency or official by means that violate the rules or other law. A lawyer may not, however, use the threat of reporting a lawyer's conduct to the disciplinary authorities to gain an advantage for a client.

Wisconsin Formal Ethics Opinion E-01-01 is withdrawn.