

# Threatening Criminal Charges To Obtain Civil Advantage

BY LAZAR EMANUEL

In an important and far-ranging Opinion (Opinion 772, 11/14/03), the New York State Bar has explored the question: to what extent and under what circumstances may a lawyer threaten a third party with administrative penalties or criminal prosecution in order to recover a civil claim?

The NYSBA Opinion concerned a claim against a stock broker who had converted the funds of a client. The Opinion stated the Question to be decided as follows:

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ...: (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority...or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker 's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker 's actions?

When a stock broker "takes" a client's funds, the client may construe the taking as a civil conversion or as a theft. As a civil conversion, it may be remedied in a civil action to recover the funds. As a theft, it can become the subject of a criminal complaint initiated by the client or his lawyer, or by a prosecutor. The client may also pursue the taking as a violation of the rules of the New York Stock Exchange resulting in disciplinary proceedings and the revocation of the broker's license.

The lawyer representing the client may suggest that the best road to recovery of the funds is a letter demanding their return. But the client may ask whether the letter would be more effective if it suggested or threatened criminal prosecution or an administrative complaint. Or the client may suggest that the lawyer proceed immediately with a criminal or administrative complaint.

## When A Complaint Is Permitted

What disciplinary rules govern whether a lawyer may file a civil, administrative, or criminal complaint against the Broker? A number of Disciplinary Rules come into play:

- DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim...that is unwarranted under existing law, except that a lawyer may advance such claim ...if it can be supported by good faith argument for the extension, modification or reversal of existing law.
- DR 7-102(A)(1) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position... or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would

serve merely to harass or maliciously injure another."

- DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."
- DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law or fact."

Construed together, these rules require: 1) that the lawyer determine that the complaint is justified in law and fact and is not made to harass or intimidate; and 2) that the complaint fairly and ethically states the basis for the claim.

DR 7-105(A), the Rule which deals specifically with the interplay between claims for civil liability and complaints for criminal responsibility, states: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

DR 7-105(A) "...is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine - that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system - DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter." [quoting the Opinion.]

Whether a lawyer comes under DR 7-105(A) by initiating a criminal complaint depends in part on the interpretation of the terms "present" and "participate in presenting." It is possible to interpret the word "present" as a term of art limited to the actions of the prosecutor or the grand jury in a criminal proceeding, but most ethics opinions agree that a lawyer comes within the scope of DR 7-105(A) when he reports a crime to the prosecutor. The State Bar agreed with this interpretation: "Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor."

### **The Lawyer's Intent Controls**

The Opinion goes on to discuss the issue of the lawyer's intent in bringing the complaint:

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent...As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result,

because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

The Opinion went on to consider the meaning of the word "solely" in DR7-105(A)'s phrase "solely to obtain an advantage in a civil matter." It found that most decisions and ethics opinions in other states agree that the rule is not violated "when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter."

After citing one New Hampshire decision and the ethics opinions of several states, the Opinion adopted a fact-specific case-by-case measure for determining whether the lawyer's intent in bringing a criminal complaint violates DR 7-105(A).

We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific.

However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously.

The opinion warned that conditioning a criminal complaint on the return of a client's funds or on the third party's agreement to another civil remedy is likely to violate DR 7-105(A).

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose -the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.

In the case of a stock broker, it is also necessary to consider whether a lawyer's complaint to the NYSE violates DR 7-105(A). The Opinion concluded that it does not violate the Rule because it speaks only of "criminal charges," which are not the same as allegations regarding a violation of administrative or disciplinary rules, regulations, policies or practices. The Opinion recognized that other jurisdictions have come to a different conclusion under rules which, unlike DR 7-105(A) specifically include "administrative or disciplinary charges" within the scope of their prohibitions. Some have come to a different conclusion under rules similar to DR 7-105(A).

However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges." In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law.

[Editor's Note: In a footnote, the NYSBA rejected the analysis in Nassau County Opinion 98-12 (1998), which concluded that DR 7-105(A) prohibits a lawyer from threatening another lawyer with filing a report with the disciplinary authorities. Presumably, such a report would not constitute "criminal charges."]

## Prohibited Threats Under DR 7-105(A)

DR 7-105(A) includes within its prohibitions a lawyer's threats "to present criminal charges solely to obtain an advantage in a civil matter." When does a lawyer's demand letter constitute a prohibited threat?

...even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker 's conduct violates the criminal law and asks for an explanation or justification of the Broker 's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges," and (ii) do so "solely to obtain an advantage in a civil matter."

When a threat of criminal action is unambiguous, the violation of DR 7-105(A) is clear. The Courts have found a violation in the following letters:

Unless you show some substantial evidence of your willingness to compensate Miss Horn for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered. *In re Hyman*, 226 App. Div. 468 (1st Dept. 1929).

[I will] present the matter to the district attorney on a charge of larceny and embezzlement. *In re Beachboard*, 263 N.Y.S. 492 (App. Div. 1st Dept. 1933).

[Unless you pay a sum of money to my client, I will] have a warrant issued for [your] arrest; ...you will return the money or go to jail. *In re Glavin*, 107 App. Div 2d 1006-07 (3rd Dept. 1985).

Each of these letters gave the third party an inescapable choice: act to remedy the civil wrong or face criminal prosecution. "The fear of prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decisions."

Of course, other letters will be more ambiguous. The courts and ethics opinions are split on what constitutes a written "threat" to present criminal charges. Some ethics opinions treat a mere "allusion" to criminal proceedings as a threat. Some consider the use of criminal law terminology as a threat. Some hold that the mere mention of criminal penalties or to possible violations of criminal law does not in itself constitute a threat.

The NYSBA Opinion adopted the following view:

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter....a letter containing an accusation of criminal wrong doing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is

exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

The Opinion continued by commenting on the relationship between the New York Penal Law and DR 7-105(A). Under the Penal Law, a threat to present criminal charges unless some action is taken by the person threatened constitutes a prima facie case of criminal coercion in the second degree (NY Penal Law § 135.60(4)), unless the person making the threat "reasonably believes the threatened charges to be true" and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law §135.75.

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

The Opinion concluded:

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

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