

speaking of ethics

By Hope C. Todd

Threatening to Report a Crime That Has Not Yet Been Committed: An Ethical Violation?



Somewhere in the back of many lawyers' minds may lurk the disquieting notion that suggesting criminal or disciplinary charges to another lawyer or to an opposing party is not entirely consistent with the mandate of the D C Rules of Professional Conduct.

In particular, this notion most often manifests itself when the subject of such a suggestion is the lawyer's client or, perhaps worse, the lawyer specifically. These situations may arise, for example, when the lawyer is told in the midst of heated negotiations that criminal charges will be filed unless his or her client agrees to a settlement offer, or perhaps, when an opponent proposes not to file a complaint with the client's regulatory and licensing board if the client accepts certain terms.

D C Bar Legal Ethics Committee Opinion 339 addresses the issue of a lawyer drafting a civil debt collection letter who seeks to avoid the hassle of receiving bad checks. The lawyer reasoned that the debtor would be far less inclined to pass a bad check were the debtor specifically made aware that (1) writing a bad check is a crime, and (2) if the debtor sends the lawyer a bad check and fails to fund it after notice, the lawyer might refer him for prosecution.

Sounds reasonable—and probably very effective—but the plan begs the question: is it ethical?

Rule 8 4(g) makes it professional misconduct to "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." In examining whether proposed language in a hypothetical debt collection letter violated Rule 8 4(g), the D C Bar Legal Ethics Committee first considered whether the letter's citation to the D C statute making bad check writing a criminal offense constituted a threat. The committee concluded it did not, reasoning that "the mere citation or quotation of a law, without more, is not a *per se* threat." D C Bar Legal Ethics Comm Op 339 (2007).¹

The committee then considered whether an additional statement, that the lawyer might refer a bad check writer to the police, constitutes a threat. It concluded that it did, finding the suggestion that the lawyer may refer a matter to prosecuting authorities moves the statement "beyond the citation of a law, to a threat to take action to see the law implemented." *Id.*

The committee next determined whether the letter's threat of criminal referral was a threat "solely to obtain an advantage in a civil matter" in violation of Rule 8 4(g). In Opinion 220, the committee had previously explained the decisive question in the application of Rule 8 4(g) is whether the threat is made *only* to obtain an advantage in the civil matter or whether an alternative motivation exists. In that case, the committee found if a disciplinary complaint is filed with the Office of Bar Counsel in a good-faith effort to comply with a lawyer's reporting obligations arising under Rule 8 3 (Reporting Professional Misconduct), then it cannot be said to be filed *solely* for the purpose of gaining advantage in a civil matter and, thus, would not violate Rule 8 4(g).²

In Opinion 339, the committee ultimately concluded the letter's reference to the potential for criminal referral for writing a bad check was *not* a threat made solely for advantage in a civil matter. Inter alia, the committee credited the lawyer's experience that many debtors pay with unfunded checks and his desire to avoid this problem. Consistent with Opinion 220, the committee made clear that the question of motive, the determination of the existence of one other *bona fide* purpose for threatening a criminal charge while a civil matter is pending, is necessarily one of fact. The context of the threat, the lawyer's motivations, the likelihood of the threat being misleading and thus misunderstood are all relevant to the conclusion and subject to proper examination in each instance.

As with any advisory opinion, the

conclusions of Opinion 339 are specific to the inquiry presented. However, an analysis of the approach taken and understanding of the general principals espoused by the committee offers some practical guidance on how to avoid violating Rule 8 4(g).

In a civil matter, after concluding that contemplated conduct might constitute a threat of a criminal charge, a practitioner would be wise to

- Articulate at least one "imminently plausible alternative explanation" for threatening prosecution. If coming up with such an alternative explanation proves difficult, then it does not likely constitute an appropriate *bona fide* motivation.
- Consider whether the threat is tied directly to the civil matter.³
- Determine whether the threat is related to past criminal conduct or seeks to prevent future action which is not certain to occur. The latter, given its propensity for inhibiting future crime, may well constitute evidence of an alternative motivation.
- Consider whether the threat may violate other rules or substantive law, such as statutes proscribing blackmail.⁴

In the context of Rule 8 4(g), the last two suggestions are related and particularly important, indeed, thwarting blackmail appears to be the original impetus for the existence of the D C Rule, which has no counterpart or analog in the American Bar Association (ABA) Model Rules of Professional Conduct.⁵

While threats of any sort strike many as improper, the nature of the adversary system, the existence of civil and criminal penalties for similar or related conduct, the duty of zealous representation, and even practical circumstances may result in their proper and ethical utilization. As always, the practitioner is expected to use his or her best professional judgment to make the determination.

Notes

¹ The opinion notes that other rules circumscribe a lawyer's ability to communicate provisions of law to third

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despondent furies Justice O'Connor's solo could have been subtitled "Homage to Powell" Almost obscquiously she embraced everything he had said and expanded upon it She made it clear that any doubts about the precedential value of his opinion in *Bakke* was gone and it was now the law of the land

The choreographers of the law school admission procedures did a better job than those who fashioned the undergraduate guidelines Both, of course, were modeled upon the Harvard plan blessed by Powell The law school added more factors and made it clear that every applicant was accorded individualized consideration There was no hint of a quota Race was almost lost in the welter of other factors That plan did honestly concede that an undefined "critical mass" of minorities had to emerge from the process but that did not prevent them from getting the Court's approval The undergraduate school made the mistake of believing that arithmetic could be helpful in the selection process and gave each applicant a numerical grade from 1 to 100 They also gave each minority applicant a bonus of 20 points That was fatal This resembled the unacceptable evil "quota" If they had established only 18 grades—A+, A, A-, B+, etc—and awarded a bonus of a "soft plus,— they might have carried the day Such is the subtle constitutional analysis resulting from using the wrong standard Had the Court applied the correct standard of review, "constitutionality is presumed in this context," only two pithy, near-unanimous decisions would have been needed

Justice Ginsburg, in an opinion that was joined by Justices Souter and Breyer, asserted that a less strict standard should have been used She spoke of plans of "inclusion" and "exclusion" rather than of benign and invidious But she did not offer a full analysis of why this should be so She did not make even a nod of acknowledgment or a backward glance to the great Chief Justice or his footnote 4 She was tired from watching all the dancing

Our record in bringing this country to a colorblind society can hardly be described as good In 1787 the northern states made a pact with the devil by putting the stamp of approval on slavery in our new Constitution There would have been no country without it But it took a terrible bloody civil war to erase that stain from the Constitution Soon thereafter we established a system of

apartheid and invidious discrimination that lasted until 1954 in plain violation of the Fourteenth Amendment Next, the Court's too long delayed decision in *Brown* was met with vigorous resistance that lasted for decades but did not prevent much progress from being made toward a country with more freedom and opportunity for all It is still a work in progress It is strange the Supreme Court, which we view as the protector of our liberties and even of certain natural rights, should now erect a barrier against more rapid progress toward that end The schools, particularly the elementary schools, are one of the best places that can bring us closer to that goal Until June 28, 2007, that barrier was permeable and not extraordinarily high We could hope, that like other undesirable walls, it would someday be removed Those hopes were reduced by a mean-spirited plurality opinion, rooted in an "I am safe on board, let the suckers drown" mentality that would heighten the wall and make it thicker Fortunately, that opinion does not state the current law of the land Justice Kennedy joined the four dissenters in asserting that, *under certain circumstances*, race may constitutionally be taken into account

Lawrence J Latto is a senior counsel to the Washington office of Goodwin Procter LLP Eric Hager contributed to this article

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parties, such as Rules 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing With Unrepresented Person) A lawyer should be mindful of these limitations in citing or referencing applicable law

2 Importantly, Opinion 220 states that threatening to file a Bar complaint, distinct from actually filing one, is not an obligation of Rule 8.3(a)

3 In Opinion 339, for example, the collateral effect of having a debtor pay the underlying debt was acceptable, if the true purpose was to avoid the expense and inconvenience of dealing with a check drawn on insufficient funds

4 See D.C. Code § 22-3252

5 *But See* ABA Formal Opinion 94-383 (conduct proscribed by prior Model Code also proscribed by Model Rule 8.4(b)) The former Code provision, DR 7-105(A), was limited to the threat or filing of criminal charges The Commentary of the Jordan Committee Report states that the committee felt conduct prohibited by 8.4(g) "which is tantamount to common law blackmail, was serious enough, and it occurred frequent enough, that a rule clearly forbidding that conduct was needed"

Legal ethics counsels Hope C Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext 231 and 232, respectively, or by e-mail at ethics@dcbar.org

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