

Advisory Opinion 1987-5

An attorney has requested advisory opinions on the following questions:

1. it is unethical for an attorney to advise an adverse party of the specific criminal sanctions of N.M. Stat. Ann. § 48-2-10.1 (1978) or N.M. Stat. Ann. § 30-36-5 (1978) in demand letters for payment of supplies or recovery on worthless checks, respectively?
2. if it is unethical for an attorney to make such references, may he advise his client to do so in a letter directly from the client to the adverse party?

Former Rule 7-105(A) of the New Mexico Code of Professional Responsibility, which was patterned after the A.B.A. Model Code of Professional Responsibility, directly addressed this question in the following terms:

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

Effective January 1, 1987, New Mexico has adopted new Rules of Professional Conduct, patterned after the A.B.A. Model Rules of Professional Conduct. The new rules do not contain a specific counterpart to former Rule 7-105(A). The A.B.A. says that the reason this provision was not carried forward into the new Model Rules is that the misconduct to which former Rule 7-105(A) is directed is proscribed more narrowly by specific new rules. *ABA/ BNA Lawyers' Manual on Professional Conduct*, ¶ 101:1001 (1986).

There are a number of opinions from other jurisdictions interpreting other states' versions of former Rule 7-105(A). Ethical Consideration EC-7-21 of the A.B.A.'s Model Code of Professional Responsibility explains the rationale behind Rule 7-105(A) as follows:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. 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 legal rights and thus the usefulness of civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

A number of ethics opinions from other jurisdictions have concluded that it is improper to threaten or even allude to criminal sanctions or possible prosecution in demand letters. See, e.g., Virginia State Bar Opinion No. 715 (August 30, 1985); Vermont Bar Association Opinion No. 82-10 (undated). The Vermont opinion states that even a reference in a demand letter that it is illegal to write a bad check is improper, pointing out that although simply stating that a particular action is illegal does not involve a direct threat of prosecution, the effect of such indirect language is the same, and is equally violative of the Code.

Some jurisdictions have issued opinions that it is permissible to refer to criminal sanctions in letters written demanding honoring of worthless checks, where a statute requires notice to be given in a statutorily prescribed form includes such a reference. See, e.g., Utah State Bar Opinion No. 71 (November 16, 1979); Florida Bar opinion No. 85-3 (August 1, 1985). New Mexico's Worthless Check Act, however, does not prescribe a particular form of notice. N.M. Stat. Ann. §30-36-1 et seq. (1978, as amended).

It is our opinion, therefore, that threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105(A).

Although the new Rules of Professional Conduct do not carry forward a specific counterpart to former Rule 7-105(A), new Rule 16-804 states:

It is professional misconduct for a lawyer to:

(D) engage in conduct that is prejudicial to the administration of justice;

(F) state or imply an ability to influence improperly a government agency or official

Because the rationale behind former Rule 7-105(A) was that threats of criminal prosecution for civil ends constituted a sub-version of the criminal process and might deter the recipient of the letter from asserting his legal rights, thereby impairing the usefulness of the civil process, and that such threats tended to diminish public confidence in the legal system, it would appear that such conduct would be violative of new Rule 16-804(D) To the extent that such threats imply an ability to influence a prosecutor improperly to bring criminal charges, the action might also violate new Rule 16-804(F).

It is our opinion, therefore, that threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks are improper under the new Rules of Professional Conduct.

Because the lawyer himself is prohibited from threatening or referring to criminal sanctions, it would also be improper for him to advise his client to do so in a letter directly from the client to the adverse party. Oregon State Bar opinion No. 450 (July, 1980); State Bar of Michigan opinion No. CI-776 (May 22, 1983).