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J ‘accuse! Threatening Criminal Prosecution

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Scenario 1

You represent Local Company that just discovered that its bookkeeper, Weasel, is an embezzler. Local Company sued Weasel to recover the funds. Can you tell Weasel’s lawyer that you’ll go to the DA if Weasel doesn’t return the money?

Scenario 2

You represent Local Company in a contract dispute against Smoke Stack. When you’re at Smoke Stack to take depositions, you see its employees pouring radioactive waste into the storm drain, which is a crime around here. Can you tell Smoke Stack’s lawyer that you’ll go to the DA if Smoke Stack doesn’t settle the contract case?

These two scenarios illustrate, respectively, threats that lawyers can and cannot make in Oregon matters under RPC 3.4(g), which reads:

“A lawyer shall not . . . threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.”

In Scenario 1, the threat is permissible because it is intended, in the words of the rule, “to make good the wrong which is the subject of the charge.” By contrast, the threat in Scenario 2 is impermissible leverage to settle an unrelated matter.

In this column, we’ll first look at the unusual history of Oregon’s rule and then we’ll briefly survey how other states around the Northwest handle this issue.

Oregon

When Oregon adopted the former Disciplinary Rules in 1970 they were based on the ABA's Model Code of Professional Responsibility. Like the ABA Model Code, the Oregon DRs contained a prohibition on threatening criminal prosecution "solely" to gain an advantage in a civil matter—DR 7-105(A). In 1984, the Bar argued in *In re McCurdy*, 297 Or 217, 220, 681 P2d 131 (1984), that any "mention of criminal penalties in the context of a demand letter implies a threat of criminal prosecution which constitutes a per se violation of DR 7-105(A)." The Supreme Court rejected the Bar's position (and dismissed the case), finding that the Bar had to prove a specific intent to improperly threaten criminal charges. In 1986, DR 7-105(A) was amended to drop the word "solely"—effectively creating the "per se" prohibition the Bar had argued unsuccessfully for in *McCurdy*. In 1991, DR 7-105(A) was amended further to create a narrow exception: "A lawyer may threaten to present such charges if, but only if, the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge."

We moved to professional standards based on the ABA Model Rules of Professional Conduct in 2005. The ABA Model Rules, however, don't have a specific rule on threatening criminal prosecution. ABA Formal Ethics Opinion 92-363 notes (at 2; citation omitted) that when the ABA replaced the Model Code

with the Model Rules in 1983, the drafters felt that more general rules on litigation conduct adequately addressed such threats: “The deliberate omission of DR 7-105(A)’s language or any counterpart . . . 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.’” Oregon, however, retained its version of DR 7-105(A) in the form of RPC 3.4(g).

Under our rule, the fact that no settlement was completed is irrelevant (see *In re Charles*, 290 Or 127, 130, 618 P2d 1281 (1980)). It is also irrelevant that the lawyer who made an improper threat actually went to the authorities (see *In re Lewelling*, 296 Or 702, 704, 678 P2d 1229 (1984)). Similarly, it is irrelevant that the other party’s conduct may, in fact, violate the law if the connection required in the exception isn’t present (see *In re Huffman*, 328 Or 567, 570-71, 983 P2d 534 (1999)). In short, our rule includes both a very broad prohibition and a very narrow exception.

Around the Northwest

Other states around the Northwest have taken equally idiosyncratic positions. Washington has no specific rule but is currently examining a possible ethics opinion. Alaska doesn’t have a rule either, but has an ethics opinion (Alaska Bar Ethics Opinion 97-2) mirroring its ABA counterpart. Idaho, in turn, retained a specific rule (Idaho RPC 4.4(a)(3)) but describes the prohibition in an

accompanying comment using the word “solely”—thereby making its exception broader than in Oregon.

Summing Up

As our dueling scenarios illustrate, Oregon’s approach creates a bright line. Lawyers considering a threat should make sure they’re on the right side.

ABOUT THE AUTHOR

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