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See You in Court: Threatening Others

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For lawyers, threatening others is often a routine part of a day's work. A letter to opposing counsel raising the prospect of litigation over a contract dispute is a ready example. Even though threatening others is a common component of many lawyers' work, there are some distinct constraints on how far we can go. In this column, we'll look at three: (1) threatening criminal charges to gain advantage in a civil matter; (2) the boundary between good faith positions advanced for a client and threats that are not supported by the facts or the law involved; and (3) "no contact" issues that surface when sending demand letters and similar threats.

Threatening Criminal Charges

RPC 3.4(g) allows lawyers to threaten criminal charges related to a civil case—but the permissible window is very narrow:

> "A lawyer shall not:
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> . . .
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> "(g) 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."

Under this standard, a lawyer representing a company seeking the return of funds from an embezzling former bookkeeper could permissibly threaten to report the embezzler to the police if the former bookkeeper did not return the money involved. This threat would be permitted because it is intended, in the words of the rule, "to make good the wrong which is the subject of the charge." By contrast, a lawyer representing a company in a contract dispute could not permissibly threaten to report the opponent for violating an unrelated criminal environmental statute. This second threat is prohibited under RPC 3.4(g) because it is unrelated to the matter involved.

Under the Oregon rule, the fact that no settlement was completed is not a defense (*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 under the exception is not present (*see In re Huffman*, 328 Or 567, 570-71, 983 P2d 534 (1999)). In short, the Oregon rule includes both a very broad prohibition and a very narrow exception.

The Role of Good Faith

RPC 3.1 prohibits a lawyer from "assert[ing] a position . . . unless there is a basis in law and fact for doing so that is not frivolous[.]" Similarly, RPC 4.4(a) prohibits a lawyer from "us[ing] means that have no substantial purpose other than to embarrass, delay, harass or burden a third person[.]" The Supreme Court in *In re Marandas*, 351 Or 521, 539, 270 P3d 231 (2012), equated a lawyer's good faith in this context to advancing a position that is "plausible" under the particular facts and law involved. Similarly, OSB Formal Opinion 2005-59 cast the term "frivolous" as not being "reasonable" under the circumstances. Although *Marandas* and the Opinion 2005-59 set a relatively low bar, lawyers need to be careful in how far they "push the envelope" in representing the facts or the law in demand letters and equivalent communications with third parties.

RPC 4.1(a), in turn, prohibits a lawyer from "mak[ing] a false statement of material fact or law to a third person[.]" Similarly, RPC 8.4(a)(3) prohibits lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.]" If, for example, a lawyer intentionally misrepresents the availability of an attorney fee remedy in a demand letter, the disciplinary risk shifts to the more dangerous territory of whether the lawyer lied.

The "No Contact" Rule

RPC 4.2 generally prohibits a lawyer from contacting a represented person "on the subject of the representation[.]" Although the contacting lawyer must know that the person contacted is represented, RPC 1.0(h) notes that actual knowledge can be inferred from the circumstances. In *In re Schwabe*, 242 Or 169, 408 P2d 922 (1965), a lawyer was disciplined under RPC 4.2's predecessor. In doing so, the Supreme Court found that the fact that the lawyer subjectively believed the contacted person was not represented was irrelevant when the lawyer had received objective evidence to the contrary. Copying the represented person's lawyer does not protect the sender. In *In re Hedrick*, 312 Or 442, 822 P2d 1187 (1991), a lawyer was disciplined under RPC 4.2's predecessor for sending a letter simultaneously to a represented person and her lawyer. In sanctioning the lawyer, the Supreme Court in *Hedrick* noted (at 312 Or at 448) "the categorical nature of the rule[.]" Although the "no contact" rule contains an exception when the lawyer for the represented person has given express permission for direct contact, the lawyer in *Hedrick* had not obtained permission either. In sending a demand letter, therefore, lawyers need to carefully assess whether the recipient is represented and, if so, direct the letter

solely to the recipient's lawyer unless the sender has specific permission from the recipient's lawyer to communicate directly with the recipient.

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