

**Threatening Disciplinary Action Against  
Attorneys in New York**

**A Report of the Commercial and Federal  
Litigation Section of the New York State Bar Association<sup>1</sup>**

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<sup>1</sup> This Report was prepared by the Ethics and Professionalism Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. Its principal authors are Brem Moldovsky, Beverly Braun, James Wicks, Anthony Harwood and Anne Sekel. Opinions expressed in this Report are those of the Section and do not represent those of the New York State Bar Association unless and until the Report had been adopted by the Association's House of Delegates or Executive Committee.

## 1. Introduction

This report examines the practice of threatening to report violations of the Rules of Professional Conduct to disciplinary authorities to create leverage in settlement negotiations or to obtain other advantages in a civil suit. This is an issue of importance to commercial litigators, who often are charged with prosecuting and settling actions in which ethical violations may have occurred. This report surveys the authorities on the issue to provide guidance to attorneys who confront violations of the Rules of Professional Conduct by opposing counsel in cases, or who are on the receiving end of threats by opposing counsel.

The ethics opinions and case law addressing the issue in New York are in conflict.<sup>2</sup> Some authorities have held that Rule 3.4 of the Rules of Professional Conduct and its predecessor, DR 7-105, which prohibit lawyers from threatening criminal prosecution solely to obtain an advantage in a civil case, apply to threats to report disciplinary violations as well. Others have held that the rules relating to criminal prosecutions do not apply, but, relying on other rules, hold that in some circumstances threats of discipline may be permissible, while still condemning the practice in other circumstances.

The authorities reviewed below show that there is a great deal of uncertainty about whether it is proper to threaten disciplinary action to obtain an advantage in a civil action, whether for settlement or otherwise. Moreover, while it may be possible to defend the use of such threats in some limited circumstances, it is at best a risky tactic, that may backfire, leaving the attorney who makes the threat exposed to disciplinary charges.

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<sup>2</sup> Although ethics opinions of bar associations are not binding on the courts that decide disciplinary complaints, their analysis is often thoughtful and comprehensive and therefore they are a source of useful guidance to attorneys in interpreting the rules of professional conduct.

**2. New York Authorities Equating Threats to Bring Disciplinary Charges with Threats of Criminal Prosecution Under Rule 3.4.**

The Rules of Professional Conduct in New York and their predecessor, the Disciplinary Code, do not expressly address whether threats to report disciplinary violations are proper. To fill this void, some authorities have looked to Rule 3.4(e), and its predecessor, DR 7-105, which addresses threats to present criminal charges. Rule 3.4(e) provides:

A lawyer shall not:

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(e) present, participate in presenting, or threaten to present, criminal charges solely to obtain an advantage in a civil matter.

DR 7-105, which governed before the adoption of the Rules of Professional Conduct in 2009, contained the identical language. New York case law is replete with examples of courts censuring lawyers for threatening the institution of criminal actions during civil proceedings.<sup>3</sup>

**a. Nassau County Bar Ethics Opinion 98-12.**

In 1998, the Nassau County Bar Ethics Committee opined that threatening to file a disciplinary grievance if an adversary attorney refused to improve a settlement offer would violate DR 7-105, even though the rule says nothing about threats of disciplinary actions. *See*

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<sup>3</sup> *See, e.g., Bianchi v. Leon*, 138 A.D. 215, 122 N.Y.S. 1004 (1st Dep't 1910) (holding that obtaining a settlement under a threat of criminal prosecution is blackmail and that it is of no significance that a criminal threat was made to report a legitimate criminal matter); *In re Hyman*, 226 A.D. 468 (1st Dep't 1929) (censuring lawyer for threatening defendant with criminal and civil actions unless defendant "show[ed] some substantial evidence of [his] willingness to compensate plaintiff for her injuries"); *In re Gelman*, 230 A.D. 524 (1st Dep't 1930) (censuring attorney for threatening adversary with criminal action if monetary judgment was not paid); *In re Beachboard*, 263 N.Y.S. 492 (1st Dep't 1933) (censuring lawyer who threatened to file charges of larceny and embezzlement unless money was paid to plaintiff immediately); *In re Glavin*, 107 A.D.2d 1006 (3rd Dep't 1985) (censuring lawyer for threatening criminal penalties to induce the return of money to lawyer's client and claiming that he would "tell the City not to punish" the client's adversary if he complied with the lawyer's demand); *Jalor Color Graphics, Inc. v. Univ. Advertising Systems, Inc.*, 749 N.Y.S.2d 816 (App. Term 2002) (sanctioning attorney who threatened plaintiff repeatedly with criminal prosecution as "part of a calculated, deliberate strategy designed to harass plaintiff into folding its litigation hand").

Op. 98-12 (1998). The matter arose out of a child support proceeding. There, counsel for the respondent submitted papers stating that his client could not pay child support because he was injured and could not work. Counsel for the petitioner seeking child support learned from an investigator who independently communicated with the respondent, without the advance knowledge of the petitioner's attorney, that the respondent was working "off the books" refinishing floors.<sup>4</sup> Respondent also told the investigator that he had used his attorney in the child support proceeding as a work reference. The petitioner's attorney, being unsure of how to proceed, posed the dilemma to the Ethics Committee.

The Committee stated that the petitioner's lawyer should first attempt to verify or disprove the apparent improper conduct by confronting the respondent's attorney, explaining that:

While the information as presented appear to reasonably point in the direction of a possible fraud, the Inquiring Attorney still does not know whether the adversary attorney (1) employed the client in the recent past, (2) is aware of an ongoing use of the attorney's name by the client as a work reference; and (3) knows that this employment was "off-the-books," which may have implications for violations of child support obligations.

The Committee found authority for this recommendation in EC 1-5 of the old Disciplinary Code, which was then in effect. It states, "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise."

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<sup>4</sup> The committee stated that if the petitioner's attorney had assigned the investigator to communicate with the represented respondent, that would have violated DR 7-104, which states: "During the course of the representation of a client a lawyer shall not . . . communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." The Rules of Professional Conduct that went into effect in 2009 contain essentially the same provision at Rule 4.2.

The Committee stated that if the respondent's attorney takes the "necessary corrective measures," the petitioner's attorney need not take any further action, but that if respondent's attorney did not take the necessary corrective action, the petitioner's attorney would have to inform the court or a disciplinary board. It based this conclusion on DR 1-103(A), which is essentially the same as Rule 8.3(a) in the Rules of Professional Conduct currently in effect. Rule 8.3(a) states:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

The Committee stated that attorneys have some discretion in determining whether there is sufficient knowledge to make it compulsory for the attorney to report to a tribunal or disciplinary authority, or whether there is merely a suspicion, in which case reporting is optional (citing its prior opinions 93-41 and 93-34).

The Ethics Committee considered whether the petitioner's attorney could use the threat of a disciplinary action to obtain a better settlement offer for petitioner. The Committee advised that while the information acquired through investigation may be used for the benefit of his or her client, the attorney should be mindful of DR 7-105 (current Rule 3.4), stating that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," (citing *People v. Harper*, 75 N.Y.2d 313 (1990))<sup>5</sup>. The

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<sup>5</sup> The citation to *People v. Harper* in the Nassau County opinions seems erroneous. The *Harper* case does not state that threatening a grievance is the same as threatening to file criminal charges.

Committee concluded that, “An actual threat to file a grievance if the adversary attorney would not offer a better settlement would, however, violate DR 7-105.”

**b. Zubulake v. UBS Warburg LLC**

In *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003), Judge Scheindlin extended DR 7-105 beyond the purely criminal context holding that it was impermissible to report a regulatory violation to securities regulators to gain an advantage in a civil suit. Although that case did not involve a threatened disciplinary charge, a disciplinary proceeding might be viewed as a type of regulatory proceeding. Therefore, the court’s conclusion that the rule applies to regulatory proceedings could have implications for attorneys threatening disciplinary proceedings.

The plaintiff in *Zubulake*, a securities broker, believed that information she obtained in a deposition revealed that her former employer destroyed backup tapes in violation of record keeping rules governing broker dealers. She wanted to give the deposition transcript to securities regulators, but the information was protected by a confidentiality order, so she asked the court to modify the confidentiality order to allow her to give the deposition to the New York Stock Exchange (“NYSE”) and the National Association of Securities Dealers (“NASD”). *Zubulake* claimed that she had an obligation to report the violations under rules of the NYSE and NASD.

Judge Scheindlin concluded that *Zubulake* did not have a duty to report the violations because she was not a member of the NYSE or NASD. Because a clear professional duty to report the alleged violation was absent, she held:

The only obvious reason for *Zubulake* to disclose this material to regulators is to gain leverage against UBS in this action. As a general rule, though, a party to civil litigation cannot threaten to instigate criminal charges solely to gain a strategic advantage. [Citing DR 7-105 and Ethical Consideration 7-21.] The logic of this rule applies with equal force to threats of regulatory

enforcement. The analogy is especially apt where, as here, regulatory enforcement can result in industry-wide “censure” and fines upward of one million dollars. In the absence of a clear duty to disclose, therefore, there is no basis for lifting the confidential designation of the Behny deposition.

If the logic of this ruling were extended to disciplinary proceedings against attorneys, an attorney who brings a disciplinary proceeding, or threatens to bring a disciplinary proceeding, solely to gain an advantage in a civil matter, could be violating Rule 3.4 of the Rules of Professional Conduct. Moreover, in *Zubulake*, Judge Scheindlin concluded that sole motivation for reporting the violations was to gain an advantage in a civil suit without discussing other possible motivations. This shows how risky it is even to report a violation, much less threaten to report a violation. A court or regulatory authority could misconstrue an attorney’s motives in reporting or threatening to report a violation that relates to a civil matter.

**3. New York Authorities Restricting Threats of Discipline on Grounds Other Than Rule 3.4.**

Not all authorities agree that Rule 3.4 and its predecessor, DR 7-105, restrict threats to commence disciplinary proceedings. However, even those authorities that hold Rule 3.4 inapplicable on the ground that it only applies to criminal proceedings, still find the practice improper in many circumstances applying other provisions of the Rules of Professional Conduct.

**a. NYSBA Opinion 772**

In 2003, the New York State Bar Association’s Committee on Professional Ethics, in its Opinion 772, construed DR 7-105 as it applied to both threats to prosecute criminal actions and administrative or disciplinary charges. The Committee interpreted the rule literally, opining that an attorney did not violate DR 7-105 (now Rule 3.4) by filing or threatening to file a complaint with administrative agencies or disciplinary authorities.

The Committee relied on the plain language of the rule, stating:

The language of DR 7-105(A) refers only to “criminal charges” as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to “administrative or disciplinary charges: in addition to criminal charges, *see* Maine Bar Rule 3.6(c), or just “disciplinary charges,” *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning § 7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney “from present[ing] criminal, administrative or disciplinary charges to obtain an advantage in a civil action”).

(Footnotes omitted.)

The Committee acknowledged that its interpretation is contrary to ethics opinions from Nassau County (98-12), Illinois (87-7) and Maryland (96-14), which held that DR 7-105(A) (now Rule 3.4) or its analogue bar threats to file complaints with disciplinary or administrative authorities. It described those opinions as being based at least in part on the idea that the criminal and disciplinary systems have the same goal of protecting society as a whole from wrongdoing. The Committee, however, rejected that analogy “in light of the specific language of DR 7-105(A), which concerns only ‘criminal charges.’”

Although the Committee concluded that DR 7-105 did not apply, it discussed other rules that could prohibit a lawyer from threatening to make a disciplinary complaint to advance a civil claim. It referenced DR 7-102(A)(1) & (2), now codified at Rule 3.1(a) and (b), which prohibit a lawyer from bringing a frivolous proceeding. Rule 3.1(b) defines a frivolous proceeding as one that the lawyer knows is unwarranted in law or fact, brought merely to injure or harass another, or to delay or prolong litigation. The Committee also discussed DR 7-102(A)(4) & (5) (now largely codified in Rules 3.3 and 3.4), which prohibit dishonesty, fraud, deceit or misrepresentation. A lawyer who threatens or prosecutes a frivolous disciplinary action or who



knowingly makes false statements of law or fact in connection with a threat to bring a disciplinary action could be in violation of these rules.

The opinion also contains an instructive discussion of what constitutes a threat. Relying on cases interpreting DR 7-105, it reasoned that a demand letter that references future criminal prosecution, but provides the opportunity to avoid prosecution by taking remedial action, is a threat. The opinion also considered whether more ambiguous communications constitute a threat. Reviewing court rulings and other ethics opinions, the opinion stated:

Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See, e.g., In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cr. District of Columbia Opinion 220* (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g., In re McCurdy*, 681 P.2d 131, 132 (Or. 1984)

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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. In our view, a letter containing an accusation of criminal wrongdoing 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.

Although this analysis of threats was in the context of threats of criminal prosecution, the same analysis could apply to threats of disciplinary charges – even a reference to violations of the disciplinary code, without an express threat to file charges, could be interpreted as a threat to file disciplinary charges.

The opinion also discussed the language in 7-105 prohibiting only threats made “solely to obtain an advantage in a civil matter.” The Committee viewed this as a fact intensive question turning on the lawyer's intent. The Committee opined that if the lawyer was merely seeking information to determine whether there was a basis for a civil or criminal claim, then the lawyer was not seeking “solely to obtain an advantage in a civil matter.”

**b. New York City Bar Association Committee on Professional Ethics**

In June 2015, The New York City Bar Association Committee on Professional Ethics issued a formal opinion regarding the issue of disciplinary threats (Formal Opinion 2015-5: Whether an Attorney May Threaten to File a Disciplinary Complaint Against Another Lawyer). As an initial matter, the NYCBA opined that Rule 3.4 does not apply to threats to file disciplinary grievances. This is consistent with the NYSBA Opinion 772 but conflicts with Opinion 98-12 of the Nassau County Bar. The City Bar then examined other applicable rules to determine whether threatening to report disciplinary violation is permissible. It identified four situations in which a threat to report a disciplinary charge is improper.

**i. It is improper to threaten to report a violation that a lawyer has a duty to report**

The City Bar first analyzed Rule 8.3(a), which provides:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a

substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Under this provision, reporting a disciplinary grievance is mandatory when two criteria exist: (1) a lawyer *knows* that another lawyer has violated the Rules of Professional Conduct; and (2) the violation raises a *substantial question* as to the other lawyer's honesty, trustworthiness or fitness as a lawyer.

The definition of "knows" in Rule 1.0(k) bears on this determination. Rule 1.0(k) provides:

"Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

The City Bar concluded that it is improper to threaten to report a violation when reporting the violation is mandatory, because the failure to report misconduct that a lawyer must report is a violation of Rule 8.3(a), and is misconduct under 8.4(a) which prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct. The rationale underlying this analysis seems to be that by threatening to report a disciplinary violation, a lawyer implicitly promises not to report if the threatening lawyer's demands are met. In the circumstance where the lawyer must report the violation, the implicit promise to refrain from reporting is a violation of Rules 8.3(a) and 8.4(a). The City Bar also concluded that if the lawyer threatens to report a grievance that the lawyer has a duty to report, and then ultimately reports the grievance, the reporting lawyer still has attempted to violate the mandatory reporting provisions of Rule 8.3(a). That attempt to violate Rule 8.3(a) constitutes a violation of Rule 8.4(a), which prohibits attempts to violate the Rules.

**ii. Threats to report disciplinary violations are improper when the lawyer lacks a good faith basis to report a violation.**

The City Bar opined that even with respect to disciplinary grievances which are not mandatory to report, there are still circumstances where threatening to report such grievances will run afoul of the New York Rules of Professional Conduct. In order for a grievance to be reportable at all, the reporting attorney must have a good faith belief that the complained-of conduct is, in fact, properly reportable under the NY Rules of Professional Conduct, because Rule 3.1(a) prohibits lawyers from bringing frivolous claims. Thus, if an attorney threatens to report conduct for which he or she does not hold a good faith basis to report, the threat of reporting would violate the Rules of Professional Conduct.

**iii. Threats to report disciplinary violations are improper when the only substantial purpose is to embarrass or harm another.**

The City Bar concluded that Rule 4.4(a) also prohibits threats to report disciplinary violations when the threat serves no substantial purpose other than to embarrass or harm the other lawyer or the lawyer's client.<sup>6</sup>

**iv. Threats to report disciplinary violations are improper if the threat would violate state or federal laws.**

Finally, the City Bar opined that a threat of disciplinary action is impermissible if it violates substantive state or federal law. Threatening to report criminal behavior in order to obtain a benefit in a civil matter may constitute, among other crimes, the crime of larceny by extortion. *See* New York Penal Law § 155.05(2) (e)<sup>7</sup> Similarly, a threat of disciplinary action

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<sup>6</sup> Rule 4.4.(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

<sup>7</sup> That statute provides:

may constitute coercion under NY Penal Law 135.60, or violate the Hobbs Act, 18 U.S.C. 1951. Coercion includes, among other things, using the threat of exposing facts which would harm another person's business. The Hobbs Act prohibits extortion affecting interstate commerce. Where a lawyer's threats of disciplinary action violate a substantive law, they also would violate Rules of Professional Conduct 3.4(a)(6) (prohibiting a lawyer from engaging in illegal conduct), 8.4(b) (prohibiting illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer) and (d) (prohibiting conduct that is "prejudicial to the administration of justice").

**c. In re Dimick**

In the case of *In re Dimick*, 105 A.D.3d 30 (1<sup>st</sup> Dep't 2013), The Appellate Division, First Department, had a case of reciprocal discipline in which an attorney had been found to have violated the Indiana Rules of Professional Conduct by making an implied threat to file a grievance against an attorney if the other attorney did not engage in settlement negotiations. The

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A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . (iv) Accuse some person of a crime or cause criminal charges to be instated . . . or (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or . . . (xi) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Note, however, that there is an affirmative defense to larceny by extortion when the extortion consists of instilling in the victim a fear that the victim or another person will be charged with a crime. In that situation, New York Penal Law § 155.15 (2) provides: "it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge." The language of the statute seems to limit this defense to extortion resulting from the threat of criminal prosecution. The statute says nothing about there being a defense when the extortion results from other types of threats not involving criminal prosecution. Thus, the defense may not apply to threats to report a disciplinary violation.

Indiana Court held that the conduct violated Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. The Respondent did not challenge the imposition of reciprocal discipline. In a brief opinion, the Court imposed a public censure, holding,

Respondent's misconduct in Indiana would also constitute misconduct in New York insofar as engaging in conduct that is prejudicial to the administration of justice also constitutes professional misconduct in New York, pursuant to rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0).

#### **4. Authorities outside New York**

The landscape of this issue nationally is as varied as it is in New York. While the former ABA Model Code had an analog to DR 7-105, the current ABA Model Rules no longer contain such an express prohibition against threatening criminal action. Nor do the Model Rules explicitly address the propriety of threatening disciplinary action. That said, the ABA has made it clear that threats of criminal charges made in a civil action are still prohibited unless (i) the criminal matter is related to the civil claim, (ii) the attorney has a *bona fide* belief that both the civil claim and possible criminal charges are warranted both by the law and the facts, and (iii) the attorney does not try to exert improper influence over the criminal process. Formal Opinion 92-363 (1992). Further, threats of both criminal and disciplinary action can run afoul of other ABA Model Rules – specifically, Rule 8.4 (Misconduct) which provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice or to state or imply an ability improperly to influence a government official or agency; Rule 4.1 (Truthfulness in Statements to Others), which imposes a duty on lawyers to be truthful when dealing with others on a client's behalf; Rule 4.4 (Respect for Rights of Third Persons), which prohibits a lawyer from using means that "have no substantial purpose other than to embarrass,

delay, or burden a third person..."; and Rule 3.1 (Meritorious Claims and Contentions), which prohibits an advocate from asserting frivolous claims.

Various states have taken different approaches to the issue. For example, as in New York, Alabama, California, Colorado, Idaho, Tennessee, Texas, Wyoming Connecticut, District of Columbia, Illinois and Louisiana, Florida, Hawaii, Kentucky, Maine, Massachusetts, New Jersey, Oregon, Vermont and Virginia continue to include a specific prohibition against threats of criminal action (whether as part of a standalone rule or in connection with another ethical rule such as "Scope of Representation" or "Reporting Professional Misconduct"). Of the states that have prohibitions against threats of reporting a criminal matter solely to obtain a benefit in a civil matter, many also prohibit making coercive threats regarding administrative proceedings. The District of Columbia and Florida, for example, prohibit threats of disciplinary charges. ABA/BNA Lawyers' Manual on Professional Conduct, §71:607, (2012). Tennessee prohibits threats of lawyer disciplinary charges. *Id.* California, Maine, Texas and Colorado, prohibit threats of disciplinary and administrative misconduct charges. *Id.* Illinois prohibits threats of professional disciplinary charges as well as administrative charges. *See* Illinois State Bar Association Op. 87-7 (1988).

## **5. Guidance for the Practitioner**

When faced with the possibility of employing the threat of disciplinary action in a civil matter in order to obtain a benefit for a client, the New York practitioner is well-advised to proceed with caution and consider the following questions:

- (1) Whether he or she is under an affirmative and mandatory obligation to report the offending conduct. If so, then it is not appropriate to threaten disciplinary action.

- (2) Whether there is a good faith basis for believing there is a violation of the Rules of Professional Conduct. If not, then it would be improper to make the threat.
- (3) Whether the reason for making the threat is to embarrass or harm another lawyer or the other lawyer's client. If so, then the threat is improper.
- (4) Whether the threat would constitute extortion, coercion or violate other state or federal criminal laws, in which case it would be improper.
- (5) Whether the threat serves solely to gain advantage in a civil matter. If yes, then it may be improper under the line of authorities that apply Rule 3.4 to disciplinary and administrative proceedings. This is a fact specific question of intent, making it difficult to predict how a disciplinary authority will interpret when looking at events in hindsight.
- (6) Whether merely raising the possibility of a violation of the Rules of Professional Conduct, without an explicit threat to report the violation or take action on it, might be construed as a threat.

If a New York practitioner is threatened with the possibility of disciplinary action in a civil matter by another attorney who is making the threat in order to secure a benefit for his or her client, the New York practitioner may want to consider the following:

- (1) Whether to report the threat to an attorney disciplinary committee. In some cases, reporting the threat may be mandatory. Even if it is not mandatory, the attorney receiving the threat may believe it is prudent to report it;
- (2) Whether the threat is a claim that the attorney is required to report to the attorney's insurer under the attorney's malpractice coverage;



- (3) Consulting with an attorney, either within or outside the attorney's firm, who is knowledgeable on legal ethics, including how to respond to such threats;
- (4) Providing information to the attorney making the threat demonstrating that there is no basis for the allegation of a violation of the Rules of Professional Conduct;
- (5) Advising the client of the threat and analyzing whether it creates a conflict with the client, and, if so, whether that conflict may be waived through informed, written consent;
- (6) Whether to report the threat to a criminal prosecutor's office.