

You have presented a hypothetical situation in which an attorney represents a former employee. The employee alleges that she was discharged from her job when she demanded that her employer stop continuously sexually harassing her, although the employer claims that the employee quit her job. The matter is heard by the Virginia Employment Commission (VEC). The employee also has filed civil claims with other agencies for damages for sexual harassment.

You indicate that the employee prevails before the VEC, both at the initial hearing and at the appeal. The employer then appeals the decision to the next highest level. Prior to the appeal being set for hearing, and approximately one week before the date set for fact-finding by the Commission, the attorney for the employee receives a letter from the employer's attorney threatening to charge the employee with perjury. You indicate that the letter reads as follows:

As you know, we have appealed the above-referenced matter to the Virginia Employment Commission. I want to put you on notice that we believe your client testified untruthfully on several occasions at the prior hearing. We also believe that the decision that was rendered was based on her untruthful testimony. We believe this gives you certain obligations under the Virginia Code of Professional Responsibility, if you in fact know that (name of client) has testified untruthfully. Please be advised that (employer) intends to fully pursue this matter, and seek full prosecution for all instances of perjury which occurred in this case.

You have asked the committee to opine whether, under the facts of the inquiry, the sending of the letter, without particulars, and the subsequent failure to provide particulars when asked, constitutes a violation of DR:7-104.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:7-104(A) which states that a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The committee has consistently and repeatedly opined that it is improper for an attorney to write to counsel for an opposing party indicating either that a particular action warrants criminal prosecution or that the attorney will seek criminal prosecution if the opposing party does not meet the attorney's demands made on behalf of his client. See LE Op. 715, LE Op. 716, LE Op. 776, LE Op. 1233.

The committee is of the opinion that the sending of the letter you describe is improper since its reference to "full prosecution of all perjury claims" constitutes a threat of criminal prosecution and thus is violative of DR:7-104(A). See LE Op. 1434. The committee is of the further opinion, however, that failure to provide particulars as to the alleged perjury is immaterial to the question you raise.

In analyzing the facts you provide, the committee believes that one must examine the question of whether or not the threat of criminal prosecution was made solely to gain an advantage in the civil matter. Although the answer to this query requires a factual case-by-case determination, which may be premature during the pendency of the civil action,

the committee is of the view that, in the facts you present, the employer's attorney's assistance in threatening presenting, or prosecuting criminal charges against the employee is rendered suspect as long as there is a possibility that an advantage to the employer would result in the simultaneously pending civil suit. See LE Op. 1388.

Committee Opinion

October 20, 1993