

LEGAL ETHICS OPINION 1582

THREATENING CRIMINAL CHARGES:
PART-TIME COMMONWEALTH'S
ATTORNEY WRITING THREATENING
LETTER ON BEHALF OF CIVIL,
PRIVATE CLIENT WHERE POSSIBLE
ACTIVITY OCCURRED IN ADJOINING
COUNTY.

You have presented a hypothetical situation in which Attorney A serves as a part-time Commonwealth's Attorney for County X and maintains a separate civil practice. On behalf of a client, Attorney A wrote a letter to the client's sister regarding concerns over the handling of the financial affairs of the client's mother. You state that the sister and her daughter were taking care of the mother, including [managing] her finances. You also state the the mother is elderly, with short-term memory deficits.

You state that the letter, which was sent on the letterhead of the firm with which Attorney A practices, suggests certain steps to allay the concerns of the client and concludes with the following statement: "If you do not feel you can honor these requests, he will have no choice but to seek assistance through law enforcement and legal avenues." You indicate that any mishandling of funds would have occurred in County Y, which adjoins County X. Furthermore, neither the mother, sister, nor niece of the client is aware that A is the Commonwealth's Attorney for County X. You further indicate that, in the course of representing the mother in a guardianship proceeding brought by Attorney A on behalf of the son, Attorney B becomes aware of this letter.

Finally, Attorney A, without being aware that B knows of this letter, represents to the Circuit Court of County Y that he has no interest in seeing the sister or niece of his client prosecuted.

You have asked the committee to opine, under the facts of the inquiry, whether the letter from Attorney A constitutes misconduct raising a substantial question regarding his fitness to practice law.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:7-104(A) which provides 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; and DR:1-103(A) which states that a lawyer having information that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or ability to practice law in other respects, shall report such information to the appropriate professional authority.

The committee believes that the inquiry's response requires a two-step analysis, i.e., (1) is the letter a threat; and (2) if so, is the threat solely to obtain an advantage in a civil matter.

¹The Disciplinary Rule was amended, effective October 1, 1993, to include the "honesty, trustworthiness" language.

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The committee interprets the letter, referring to seeking assistance through "law enforcement and legal avenues" as threatening. The committee has previously opined that it is improper for a lawyer to allude to possible criminal prosecution, when corresponding with a debtor, for the sole purpose of advancing a client/creditor's civil claim. See LE Op. 715 and LE Op. 716. The committee has also previously opined that it is unethical for an attorney to assist his client in alluding to criminal prosecution if such notice is for the sole purpose of obtaining an advantage for the client in a civil suit. See LE Op. 1388, LE Op. 1569.

The facts you provide indicate that Attorney A has represented to the Circuit Court of County Y that he has no interest in seeing the sister or niece of his client prosecuted. The committee feels it reasonable to conclude, therefore, that Attorney A sent such a threatening letter to intimidate the sister into taking the actions requested by Attorney A and his client. Thus, the committee opines that it is improper, under DR:7-104(A), for Attorney A to send such a letter to his client's sister.

Having so opined that the letter sent by Attorney A was improper, the committee again refers you to DR:1-103(A) which describes the lawyer's obligation to report misconduct of another lawyer. In interpreting that Rule, the committee has also consistently adopted a two-prong test to be satisfied before the obligation to report misconduct arises: (1) the lawyer must have information to a substantial degree of certainty indicating that another lawyer's conduct has violated one of the Disciplinary Rules; and (2) that violation must raise a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects. /1 See LE Op. 1004. Whether an attorney's conduct is such that it raises a "substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects" requires a case-by-case determination which should be made after consideration of the facts and analysis of the impact on the offending lawyer's characteristics. See LE Op. 1308 and *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988).

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Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.

¹The Disciplinary Rule was amended, effective October 1, 1993, to include the "honesty, trustworthiness" language.