

You have presented a hypothetical situation concerning language in correspondence between attorneys for the parties in a breach of contract action. The plaintiff had paid four thousand dollars to the defendant contractor for commercial refrigerator installation. The defendant's attorney advised the court that there was no viable defense to the breach of contract claim and stated that the account for the four thousand dollars now only contained a few hundred dollars. The plaintiff's attorney subsequently wrote the defendant's attorney regarding that account. In that letter, the plaintiff's attorney noted that as only \$1125 of the four thousand had been spent on equipment, he assumes the defendant illegally diverted the remainder. The letter states that the plaintiff's attorney plans to advise his client to file criminal charges against the defendant for that diversion and that repayment of the diverted funds will not stop that course of action.

Under the facts you have presented, you have asked the committee to opine as to whether the provision in the plaintiff's attorney's letter regarding criminal charges constitutes an improper threat. You also ask whether, if that particular provision is not improper, would it then be proper for you to include in a form letter, to be sent to debtors who write bad checks to your clients, a provision indicating that you would advise your client at some future date that the client should institute criminal proceedings for larceny and that repayment will not cease that pursuit once initiated.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 3.4(h), which states as follows: "A lawyer shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."

The Committee notes that Comment 5 to Rule 3.4(h) expressly allows a lawyer to advise his client of "the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution." Thus, the plaintiff's attorney in this hypothetical may advise his client of his right to pursue criminal charges against the defendant without triggering the prohibition of Rule 3.4(h). However, in the hypothetical, the plaintiff's attorney does not merely advise his client of his rights; he also communicates to the defendant's attorney the intent to provide that advice. That communication warrants close scrutiny regarding whether it constitutes an improper threat as contemplated by Rule 3.4(h).

This Committee has rendered several opinions establishing that it is improper, under 3.4(h)'s similar predecessor DR 7-104, for an attorney to allude to criminal prosecution in a letter to a debtor of the lawyer's client solely to obtain an advantage in the civil suit. *See* LEOs 715, 716, 1388, and 1569. The most recent review of that provision occurred in LEO 1582. In the hypothetical presented in that opinion, a part-time Commonwealth's Attorney wrote a letter to his civil client's sister regarding concerns about the mother's finances. In that letter, the attorney stated that if the sister does not take certain steps, the attorney "will have no choice but to seek assistance through legal enforcement and legal avenues." LEO 1582. In considering whether such a letter in that context violated the improper threat prohibition, the Committee developed a two-part test for that analysis: "(1) is the letter a threat; and (2) if so, is the threat solely to obtain

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an advantage in a civil matter.” *Id.*

While the test presented in LEO 1582 involved an application of DR 7-104, the newer Rule 3.4(h) is substantially similar enough to DR 7-104 that the Committee opines that the test continues to be appropriate. In applying the two-part test to the present hypothetical, the Committee does consider the communication to include a threat. Specifically, the provision informing the defendant’s attorney of the plan to advise the plaintiff to pursue criminal charges does operate as a threat to present criminal charges. The harder part of the test to apply is the second part: was the threat made solely to obtain an advantage in a civil matter. Determination of whether a threat is made “solely” for that reason becomes a matter of determining the subjective motive on a factual case-by-case basis. LEO 1388. In LEO 1582, the hypothetical contained information that despite the letter threatening criminal prosecution, the attorney had in fact stated elsewhere that he had no intention of ever pursuing a criminal complaint. Based on that information, the Committee believed that the purpose of the reference to legal action by the Commonwealth Attorney was to intimidate the sister into taking the actions requested by the attorney. Thus, the Committee opined that the sole purpose of the threat was to obtain an advantage in a civil matter and, therefore, that the letter violated the prohibition. In contrast, in the present hypothetical, the letter states that even if the defendant takes remedial action, the criminal prosecution will not cease. On its face, the language does not seem to be an attempt to affect the conduct of the defendant or to change the outcome of the breach of contract suit. Rather, it seems to be a giving of notice of the criminal prosecution. Unlike in LEO 1582, no other information is provided regarding motive to contradict the plain language of the letter: that regardless of any action taken by the defendant, the plaintiff’s attorney was advising a course of criminal prosecution. As no advantage is sought in the breach of contract claim, the “threat” provision of this letter does not alone seem to constitute a Rule 3.4(h) violation. Absent some other information regarding the plaintiff’s attorney’s motive, the letter is not improper.¹

Your request asks whether, if such language is found to be proper, could you insert similar language in a form letter you use for transmittal to people who write bad checks to your clients. Returning to the two-part test from LEO 1582, the Committee does find that such use of a form letter in that context would constitute a “threat” of criminal prosecution. As for whether that threat would be made solely for the purpose of obtaining an advantage in a civil matter, your request provides no information as to whether you would indeed pursue criminal prosecution in each instance. Accordingly, the Committee cannot make that determination from the information provided. Certainly, if you were to send such a letter with no intention of pursuing criminal charges and with the hope of encouraging payment for the bad check, then the letter would not be permissible.

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¹ The committee also observes that since the defendant’s attorney advised the court that there was no viable defense to the breach of contract claim, the letter was not necessary to obtain an advantage in any event.