New York State Bar Association

Committee on Professional Ethics

Opinion 772 – 11/14/03

Topic: Threatening and presenting criminal, administrative and disciplinary charges to obtain an advantage in a civil matter.

Digest: DR 7-105(A) prohibits the presentation and threatened presentation of criminal charges when the purpose is to effect a resolution of a civil dispute; the disciplinary rule does not embrace administrative or disciplinary charges that may be threatened or presented in connection with a civil dispute, regardless of purpose.

Code: DR 1-102(A)(4), 1-102, 1-102(A)(3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21.

QUESTION

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

OPINION

When a client invests funds with a Broker who is an associated member of a self-

regulatory body, such as the NYSE or the National Association of Securities Dealers, and the Broker then wrongfully takes a portion of those funds for his or her own benefit, the Broker's conduct can have a variety of legal consequences. Viewed as a conversion of the client's funds, the taking may become the subject of a civil liability claim asserted by the client, perhaps leading to the filing of a lawsuit or arbitration. Viewed as a theft, the taking may become the subject of a criminal complaint filed by the client with a Prosecutor, perhaps leading to a criminal prosecution. Viewed as a violation of the rules of the NYSE or any other self-regulatory body of which the Broker is associated, the taking may become the subject of a professional disciplinary proceeding to revoke the Broker's license to practice.

Consequently, when a client believes that a Broker has wrongfully taken funds, the lawyer is faced with various choices about how best to represent and promote the client's interests. Of course, it is the client who decides the objectives of the representation. *See* DR 7-101(A)(1); EC 7-7. If the client's primary objective is to obtain the return of such funds, the lawyer is likely to suggest first writing a letter to the Broker demanding the return of the funds. If the Broker does not return the funds within the specified time period, the client often will authorize the filing of a lawsuit or arbitration proceeding against the Broker for conversion. But if the client asks about alternative or additional ways of proceeding, a question of legal ethics is likely to arise: may the lawyer file or threaten to file a complaint or charge regarding the Broker's alleged wrongful conduct with either a Prosecutor or the NYSE?[1]

I. The Filing of a Complaint With a Prosecutor or the NYSE

A. The General Ethical Rules Regarding the Filing of any Complaint

In deciding whether to file any complaint against the Broker -- whether a lawsuit or an arbitration or a letter of complaint with either a Prosecutor or the NYSE -- there are a number of applicable disciplinary rules. DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim . . . that is unwarranted under existing law, except that a lawyer may advance such claim . . . if it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 7-102(A)(l) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position . . . or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Thus, before filing any complaint against the Broker, the lawyer must determine that the client's claim is warranted in law and in fact and that the complaint is not being made merely to harass or injure the Broker.

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[1] In focusing this opinion on questions regarding the lawyer's actual or threatened filing of a complaint on behalf of a client, we choose not to opine on any related questions regarding whether it would be permissible for a non-lawyer client, who is not bound by the constraints of the New York State Lawyer's Code of Professional Responsibility (the "Code"), to file such a complaint on his or her own behalf. In this opinion, we are concerned only with the lawyer's professional responsibilities regarding the lawyer's own conduct.

Two other disciplinary rules are relevant in preparing such a complaint. DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law or fact." Together, these two disciplinary rules impose additional ethical limits on what can be said in any such complaint.

Another disciplinary rule that deals specifically with the interplay of the system of civil liability and the criminal justice system, DR 7-105(A), states "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

EC 7-21 explains the purposes underlying DR 7-105(A):

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine -- that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system -- DR 7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Does DR 7-105(A) apply to the lawyer's filing of a complaint about the Broker's conduct with either a Prosecutor or the NYSE?[2]

B. Filing a Complaint With a Prosecutor

Whether the lawyer's filing of a complaint about the Broker's conduct with a

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[2] We assume throughout this opinion that the lawyer's client has consented to the lawyer filing or threatening to file a complaint about the Broker's conduct. Such consent would be necessary under the Code if the disclosure of the Broker's conduct would be embarrassing or detrimental to the client or the client expressly asked the lawyer not to disclose the Broker's conduct, because the lawyer is prohibited from revealing to third parties the client's "secrets," *see* DR 4-101(B)(1), and, by definition, the Broker's conduct would be a "secret" under DR 4-101(A).

Prosecutor violates DR 7-105(A) depends, in part, upon the meaning of the phrase "present criminal charges." If that phrase refers only to a Prosecutor's actions, then a lawyer's filing of a complaint would not qualify as either presentation of such charges, or participation in such presentation.

We have been unable to find any ethics opinions or court decisions interpreting DR 7-105(A) that address the definition of "present criminal charges." Perhaps this phrase was intended as a term of art, referring to the Fifth Amendment's requirement of a grand jury presentment or indictment for capital and infamous crimes. *See* 1 Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999) ("The Constitution speaks also of a 'presentment' but this is a term with a distinct historical meaning now not well understood. Historically presentment was the process by which a grand jury initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."). Likewise, some criminal cases from the 1940s and 1950s refer to a prosecutor's presentation of criminal charges to the grand jury. *See, e.g., Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T. Monroe County 1957).

Despite this historical context, the fact remains that numerous ethics opinions and court decisions concerning DR 7-105(A) assume that a lawyer's conduct in reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). *See, e.g.*, *Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3.[3]

Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor.

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. *See* §II (B) below. As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended

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[3] These ethics opinions and court decisions contain no discussion and, therefore, provide no guidance as to whether the filing of such a complaint is construed as the presentation of criminal charges or participation in the presentation of criminal charges.

that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

C. Filing a Complaint With the NYSE

In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that 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").

Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. *See, e.g.*, Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system -- to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges."[4] In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

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[4] We also reject the specific analysis underlying Nassau County 98-12 (1998). In that opinion, the Committee concluded that DR 7-105(A) prohibits an attorney from threatening to file a report with disciplinary authorities against another attorney. Citing *People v. Harper*, 75 N.Y.2d 313 (1990), the Committee stated: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." But *Harper* did not find that DR 7-105(A) covered threats of filing or the actual presentation of disciplinary charges. *Harper* was an appeal from a jury verdict that a witness had received a bribe. The *Harper* Court referred to DR 7-105 solely with reference to the People's argument that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." 75 N.Y.2d at 318. The *Harper* Court rendered no opinion about the actual or threatened reporting of disciplinary violations by lawyers.

II. Sending a Demand Letter

DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges,"[5] and (ii) do so "solely to obtain an advantage in a civil matter."

A. Threats

Some letters contain unambiguous threats to present criminal charges. In *In re Hyman*, 226 App. Div. 468 (1929), the First Department censured a lawyer who wrote a letter to the driver of an automobile that hurt his client, Miss Horn, stating:

> Unless you show some substantial evidence of your willingness to compensate Miss Horn [the attorney's client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered.

226 App. Div. at 469. Four years after *In re Hyman*, the First Department censured another lawyer who sent a letter stating that unless money was paid immediately he "would present the matter to the district attorney upon a charge of larceny and embezzlement." *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933).[6] More recently, the Third Department censured a lawyer for sending a letter to a workman which stated that unless the workman returned a sum of money to his client the lawyer would "have a warrant issued for [the workman's] arrest;" "you will return the money or go to jail." *In re Glavin*, 107 A.D.2d 1006- 1007 (1985).

In each of these cases, the letter refers to future criminal prosecution, but

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[5] Because, for the reasons stated above, the filing of a complaint against the Broker with an administrative or disciplinary authority, such as the NYSE, is not within the scope of DR 7-105(A), the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds.

[6] This short decision does not make it clear whether the respondent lawyer was acting on behalf of a client or for himself in sending the threatening letter. In our view, however, that does not matter. We agree with the numerous decisions in other jurisdictions holding DR 7-105(A) or its counterparts applicable where the respondent lawyer is acting on his or her own behalf. *See, e.g.*, *Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718-19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993).

provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision.[7]

Based on these cases, we conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds. In reaching this conclusion, we consider it immaterial under DR 7-105(A) whether the Broker actually owed the client the requested funds or whether the client had good grounds for believing the funds were owed. As stated below, DR 7-105(A) prohibits a letter that threatens to file a complaint with a Prosecutor solely to obtain a civil advantage, regardless of whether the threat is extortionate or justifiable. *See* § II(C) below.

Other letters are more ambiguous in their intention to present criminal charges. 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). *Cf*. 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).

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

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[7] As stated below, in some circumstances such a threat in itself may violate New York's Penal Law because it constitutes criminal coercion or extortion. *See* § II(C) below. In those circumstances, the threat not only violates DR 7-105(A); it also violates DR 1-102(A)(3)'s prohibition against "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

statement.

B. The "Solely" Requirement

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.

Consider, for example, the letter sent by the lawyer in *Decato's Case*, 379 A.2d 825 (N.H. 1977):

> In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore (sic). Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of services. Unless you communicate directly with me and give me some proof that the damages sustained to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

379 A.2d at 826. The New Hampshire Supreme Court imposed no discipline based on that letter, holding that the purpose of the lawyer's letter was not to gain leverage in a civil action by the threat of filing criminal charges, because Decato made no demand or request for payment from the letter's recipient – he only asked for information about the recipient's legal position.

Similarly, ethics committees in several other jurisdictions have opined that a letter referring to the criminal sanctions imposed for stopping payment on a check was not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g.*, Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979). These opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action. *But see* New Mexico Opinion 1987-5 ("threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105[A]").

Thus, if the lawyer sent a letter to the Broker stating that the Broker's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and requesting an explanation or justification of the Broker's conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the Broker's conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific. However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously. *See* Connecticut Informal Opinion

98-19 ("Such an examination [of a lawyer's motivation] is very fact specific"); Florida Opinion 89-3 ("The motivation and intent of the attorney involved obviously will be a major factor in determining whether his or her actions are ethically improper. The Committee believes that such determinations necessarily must be made on a case-by-case basis").

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose – the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.[8]

C. DR 7-105(A)'s Relation to Illegal Conduct

Under New York law, proof of a threat to present criminal charges unless a certain specified action is performed constitutes a *prima facie* case of criminal coercion in the second degree, *see* N.Y. Penal Law § 135.60(4) (Consol. 2003), and, if property is obtained, makes out a *prima facie* case of extortion, *see* N.Y. Penal Law §155.05(2)(e)(iv) (Consol. 2003). However, New York law provides that such conduct is not unlawful if the person making such a threat "reasonably believed the threatened [criminal] charges to be true and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law § 135.75 (Consol. 2003) (affirmative defense to criminal coercion). *Accord* N.Y. Penal Law § 155.15(2) (Consol. 2003) (affirmative defense to extortion).

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such

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[8] The Model Rules have no analogue to DR 7-105(A). The drafters of the Model Rules apparently believed that to the extent DR 7-105(A) serves legitimate purposes, the conduct it proscribes is prohibited by other ethical rules, such as Model Rule 8.4 (which is analogous to DR 1-102), Model Rule 4.1 (which is analogous to DR 1-102[A][4] and DR 7-102[A][5]), Model Rule 4.4 (which is analogous to DR 7-102(A)(1)), and Model Rule 3.1 (which is analogous to DR 7-102[A][2]). *See* ABA 92-363. To the extent that DR 7-105(A) prohibits conduct other than that prohibited by those Rules -- such as the actual or threatened presentation of criminal charges in a civil matter to gain relief for a client when the criminal charges are related to the civil matter, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the facts and the law, and the lawyer does not attempt to exert or suggest improper influence over the criminal process, *see* ABA 92-363, -- the drafters of the Model Rules appear to have believed that DR 7-105(A) was overbroad because it "excessively restrict[ed] a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system." *Id*. *See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering*, § 40.4, at 40-7 (3d ed. 2000) ("rules like DR 7-105[A] . . . are overbroad because they prohibit *legitimate* pressure tactics and negotiation strategies") (emphasis in original).

a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

CONCLUSION

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

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