

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

Formal Opinion No. 469
June 15, 1992

ADVOCACY AND REPRESENTATION - THREATENING CRIMINAL, ADMINISTRATIVE OR DISCIPLINARY CHARGES. An attorney involved in a fee dispute on behalf of a client against a former counsel is subject to disciplinary action if the attorney threatens to have the client present criminal, administrative or disciplinary charges to obtain an advantage in the dispute.

AUTHORITIES CITED

Crane v. State Bar, 30 Cal.3d 117; 635 P.2d 163 (1981);
California Rule of Professional Conduct 5-100 (formerly
7-104);
State Bar of California Formal Opinion 1983-73;
Los Angeles County Bar Association Formal Opinion
Nos. 355 and 440.

FACTS AND ISSUES

The Los Angeles County Bar Association Ethics Committee's Opinion has been requested in connection with the following:

Attorney A, while representing the former clients of Attorney B, becomes involved in the fee dispute between the clients and Attorney B. During a telephone conversation between A and B, Attorney A states that he will "have (the clients) report (Attorney B) to the State Bar." In a subsequent letter to Attorney B, Attorney A writes: "I have suggested to (the clients) that they report your conduct to the State Bar . . ."

The issue presented is whether it is unethical for an attorney to mention or threaten State Bar discipline proceedings during the course of discussions surrounding a fee dispute.^{1/}

^{1/} The inquirer has raised a number of other issues which will not be addressed in this opinion. The Committee believes that the other issues relate to legal, not ethical, matters which are outside the Committee's purview.

DISCUSSION

California Rule of Professional Conduct 5-100, which replaced former Rule 7-104², states:

"(A) A member shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute.

. . .

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state or local governmental entity."

The purpose of Rule 5-100 is to prohibit an attorney from using the threat of ancillary proceedings to gain an advantage in a civil dispute; it is not intended to deter the filing of a good faith charge of professional misconduct.

The leading case applying this section of the Rules of Professional Conduct is Crane v. State Bar, 30 Cal.3d 117; 635 P.2d 163 (1981). In Crane, an attorney representing a client in a real property matter wrote a letter to the opposing parties requesting a beneficiary statement and offering to waive the statutory penalty if it was promptly received. The letter stated that if the statement was not received within five days, an action would be commenced for damages and forfeiture, and that "the Department of Savings and Loan and the Attorney General's office will be requested to assist us in solution (sic)." A notation at the bottom of the letter indicated that copies of the letter were being sent to a named commissioner of the Department of Savings and Loan and to a named deputy Attorney General.

The State Bar suspended the attorney and found that the letter constituted a prohibited threat within the language in former Rule 7-104, now found in Rule 5-100(A). The Supreme Court affirmed the suspension concluding that the letter, when viewed from the perspective of the recipients and "considered in

2/ Prior Rule 7-104 stated: "A member of the State Bar shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil action nor shall be present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter."

context, . . . could quite reasonably be construed as violative of Rule 7-104."

The import of Crane is that a threat to present charges need not be expressly stated in words of a threatening nature, but may be inferred from the circumstances; and, that the innocent subjective intent of the maker of the statement is not a relevant factor. If the statement can be reasonably interpreted as a threat to present criminal, administrative or disciplinary charges, in the context of a civil dispute, that is sufficient to constitute a violation of Rule 5-100(A). (Also see State Bar of California Formal Opinion 1983-73.)

Under the inquiry presented, the statements of Attorney A that he will have his clients report Attorney B to the State Bar and that he has suggested to the clients that they report Attorney B to the State Bar, can be reasonably taken as an impermissible threat under Rule 5-100.

Rule 5-100 does not prohibit an attorney from presenting disciplinary charges against an adversary based upon conduct arising in a civil dispute without saying anything to the opponent.^{3/} Such action may be appropriate where the attorney has a good faith basis for presenting charges based upon conduct occurring during the dispute. An attorney may reveal to the proper disciplinary authority all unprivileged knowledge of the misconduct of a lawyer which the attorney in good faith believes to be in violation of the California Rules of Professional Conduct. (See Los Angeles County Bar Association Formal Opinion Nos. 355 and 440.)

An attorney deciding to present charges against an adversary in a civil dispute should be aware of Business and Professional Code section 6043.5. This section states: "Every person who reports to the State Bar or causes a complaint to be filed with the State Bar that an attorney has engaged in professional misconduct, knowing the report of complaint to be false and malicious, is guilty of a misdemeanor."

This opinion is advisory only. The Committee acts on specific questions submitted ex-parte and its opinion is based on such facts as are set forth in the questions submitted.

^{3/} The 1987 revision of the California Rules of Professional Conduct deleted the second portion of prior Rule 7-104. In commenting on the deletion the State Bar Office of Professional Standards stated: "The proposed deletion of the prohibition on filing charges would permit an attorney to assist a client in presenting criminal, administrative or disciplinary charges with respect to matters arising out of the same transaction as a civil dispute."