Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Cross-Appellant,

v

Thomas H. Oehmke, P-22963,

Respondent/Appellant.

Case No. 91-96-GA

Decided: January 15, 1993

BOARD OPINION

The hearing panel issued an Order of Reprimand based upon its conclusion that the respondent engaged in professional misconduct by sending a threatening letter to opposing counsel in a legal malpractice case. The letter, sent in August 1990, allegedly contained a threat to bring criminal charges against opposing counsel and his client unless the malpractice case was dismissed. The panel found that the respondent's statements were made with the primary intent to gain a pecuniary advantage in the malpractice action and therefore constituted conduct prejudicial to the administration of justice.

The respondent has filed a petition for review seeking dismissal of the complaint on the grounds that the conduct complained of does not constitute a violation of the Michigan Rules of Professional Conduct adopted by the Michigan Supreme Court effective October 1, 1988. A separate petition for review was filed by the Grievance Administrator on the grounds that the respondent's conduct warrants a suspension of 120 days or more. The Attorney Discipline Board concludes that the respondent's conduct was not prohibited by the Michigan Rules of Professional Conduct or MCR 9.104(1-4). The hearing panel Order of Reprimand is vacated and the complaint is dismissed.

The formal complaint filed by the Grievance Administrator charged under Count I that the respondent failed to take appropriate action on his client's behalf in a claim for benefits under a pension and profit sharing plan. The hearing panel ruled that the allegations of misconduct were not established by a preponderance of the evidence. The dismissal of Count I is not challenged by either party.

The second count charged that the client whose claim was the subject of Count I subsequently obtained a judgment against the respondent in a legal malpractice action. On or about August 23, 1990, the respondent sent a letter to his former client's counsel. In that letter, the respondent allegedly threatened to bring criminal charges against the former client for illegally tape recording telephone conversations with the respondent. In addition, the letter allegedly threatened criminal charges against opposing counsel for having submitted the tape-recorded conversations into evidence in the legal malpractice

proceedings. The complaint specifically charged that the respondent's offer to surrender any rights he might have to proceed under the federal wiretapping statutes in exchange for a dismissal of the malpractice action constituted statements made "with the intent to gain a pecuniary advantage in the legal malpractice action" in violation of MCR 9.104(1-4) and the Michigan Rules of Professional Conduct, MRPC 8.4(a,c).

While the parties differ as to whether the respondent's letter of August 23, 1990 contained a "threat" of criminal prosecution or merely a "warning", neither the contents of the letter nor the fact that it was sent to opposing counsel are in dispute. After expressing the respondent's confidence that the malpractice judgment would be set aside on appeal, the letter continued:

> "Then there remains another issue which, also, may be born out of your own legal malpractice: [your client] has testified, under oath, that he tape-recorded interstate telephone calls, to which I was a party and without my knowledge or consent. He used the transcripts of those telephone calls at trial. You are well aware that this violates federal wire-tapping laws, which are both criminal and civil in nature. Among the avenues of recourse open to me are a visit to the FBI, as well as a civil suit against [your client] and yourself for the damages which I suffered from these illegally intercepted wiretapped telephone calls. Indeed, you can be sure that my beginning calculation of damages will start with the $47,572.83 Judgment.
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> * * *
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> Have no doubt that I am fully prepared to exhaust every available option the law has provided to me in this regard--against you, your P.C., and [your client].
>
> As you can see . . . this problem is far from being resolved and is quite likely to become 'messy' as we proceed further. As an offer and compromise, I am willing to enter into the following settlement agreement: . . . [your client] would agree to a dismissal, with prejudice, of this litigation and, in turn, I would agree to surrender any rights I might have to proceed under the federal wiretapping statute against [your client], yourself, and your P.C.
>
> If this offer of settlement is not agreeable, then, of course, we will all proceed to exhaust our legal alternatives."

MCR 9.104(4) and MRPC Rule 8.4 are general rules which declare that it is misconduct to violate the standards or rules of professional responsibility adopted by the Supreme Court. No discussion of those rules is required.

The issues before the Board are therefore whether or not the contents of the respondent's letter of August 23, 1990 constituted conduct prejudicial to the proper administration of justice [MCR 9.104(1) and MRPC 8.4(c)]; conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach [MCR 9.104(2)]; or conduct that is contrary to justice, ethics, honesty or good morals [MCR 9.104(3)].

Prior to the adoption of the Michigan Rules of Professional Conduct, effective October 1, 1988, the conduct of Michigan attorneys was governed by the Code of Professional Responsibility. Canon 7 of the Code, DR 7-105(A), directed that "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." There is no counterpart to DR 7-105(A) in the Michigan Rules of Professional Conduct which were in effect when the letter was sent. Nevertheless, the spirit of the former rule permeated the proceedings below. Indeed, Count II of the complaint contains a paraphrase of DR 7-105 in paragraph II (G) which alleges that "respondent's statements were made with the intent to gain a pecuniary advantage in the legal malpractice action."

The hearing panel below conceded that there is no specific rule in Michigan prohibiting the transmission of letters in which criminal prosecution is threatened unless the other party agrees to a concession in a civil matter. However, the panel's report cited opinions issued by the Supreme Courts of New Jersey and Nebraska in 1955 and 1954, respectively. In the Nebraska case, Nebraska State Bar Association v Dunker, 160 Neb 779; 71 NW2d 502 (1955), that state's Supreme Court found that "[i]t is generally the rule that a lawyer who threatens criminal prosecution to enforce a civil claim for himself or his client thereby breached his obligation and duty as a lawyer and officer of the court, which may justify disciplinary action." Dunker at 71 NW2d 506-507.

A similar result was reached by the Supreme Court of New Jersey in In re Dworkin, 16 NJ 455; 109 A2d 285 (1954). These cases, based on the common law as it existed in those states almost forty years ago, are not dispositive when applied to this case.

The discussion found in Committee on Legal Ethics v Printz, 416 SE2d 720 (1992) is relevant to the issue before the Board. West Virginia, like Michigan, replaced its Code of Professional Responsibility with Rules of Professional Conduct based substantially on the American Bar Association's Model Rules. Printz, on behalf of a company which had discovered a substantial embezzlement, sent a "final demand" letter giving the employee/ embezzler the choice of 1) agreeing to a financial arrangement for repayment of the embezzled funds, or 2) criminal prosecution. The letter in question in that case was sent in August 1987, at a time when West Virginia's version of DR 7-105(A) of the Code of Professional Responsibility was in effect.

The West Virginia Supreme Court of Appeals ordered that the disciplinary charges should be dismissed, reasoning that the Rules of Legal Ethics should not prohibit lawyers from engaging in otherwise legitimate negotiations. On the question of whether Printz's conduct was "otherwise legitimate", the Court employed the doctrine of desuetude--disuse or cessation of use--to void that state's criminal statue prohibiting the making of an offer to forbear from prosecution in exchange for the return of funds. The court noted that the last reported case prosecuted under the criminal statute was in 1938.

In reaching its decision on the inapplicability of DR 7-105 (A), the West Virginia Court took into consideration the reasons for the omission of a counterpart to that rule in the Model Rules. Quoting extensively from Hazard and Hodes, The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct, S4.4:103 (Prentice Hall Law and Business, 1990) the Court noted that the prohibition originally found in DR 7-105(A) does not appear in the Rules of Professional Conduct because it was deliberately omitted as redundant or overbroad or both.

> "The ethical ban on threatening criminal prosecution is redundant because in some jurisdictions it covers much the same ground as the crimes of extortion and compounding a crime, and Rule 8.4 makes it a disciplinary offense for a lawyer to commit such crimes . . .
>
> [As to] Rules like DR 7-105(A): They are overbroad because they prohibit legitimate pressure tactics and negotiation strategies. DR 7-105(A) evidently meant to push beyond extortion and compounding crime, but without any coherent limit.
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> In reality, many situations arise in which a lawyer's communications on behalf of a client cannot avoid addressing conduct by another party that is both criminal and tortious. Inevitably, the question of which remedial routes will be taken must also be addressed." Printz, supra, 416 SE2d 720 at 722, 723.

The question of whether the Michigan Rules of Professional Conduct contain any ethical constraints on the use of warnings of possible criminal prosecution to assist in obtaining legitimate objectives in a civil proceeding was considered by the State Bar Committee on Professional and Judicial Ethics in its informal ethics opinion RI-78 dated March 14, 1991.

> "[t]here would appear to be no direct ethical prohibition upon a lawyer's making good-faith representations on behalf of a client designed to obtain a client's legitimate pursuits, even if those representations include calling to the attention of others applicable criminal law, asserting in good faith a reasonable belief of possible criminal culpability, and requesting commencement or discontinuation of criminal proceedings when and where supported and appropriate. Although the MRPC place reasonable limitations upon the lawyer's conduct, no direct or even indirect prohibitions of good-faith assertions of possible criminal prosecution appears."

In reaching that conclusion, the State Bar's Ethics Committee stated its belief that the deliberate omission of a counterpart to DR 7-105(A) in the Michigan Rules of Professional Conduct was predicated upon a determination that conduct constituting an abuse of process or other impermissible act which threatens or coerces others in the exercise of their legal rights is not only regulated by other provisions of the MRPC but is prohibited under the criminal statutes dealing with extortion [MCL 750.213; MSA 28.418] and the taking of money to conceal certain offenses [MCR 750.149; MSA 28.340].

It is asserted by the Grievance Administrator that Michigan's criminal statutes should be considered in determining whether the respondent's letter was improper. Specifically, it has been argued that the respondent's conduct constituted extortion within the meaning of the criminal extortion statute, MCL 750.213. Notwithstanding the references by the Administrator to the respondent's allegedly "extortionate conduct", there is no evidence in the record that the respondent was ever convicted of criminal activity nor was he charged in the formal complaint with engaging in conduct that violates a criminal law [MCR

9.104(5)]. In light of the disclosure in the record that the omission of a charge under MCR 9.104(5) was "a deliberate decision" (Tr. p. 118), the issue of whether or not the respondent's conduct met the statutory elements of extortion set forth in People v Krist, 97 Mich at 669 (1980) is not present in this case.

In RI-78, the State Bar Committee on Professional and Judicial Ethics concluded that:

> "Therefore, in a proper case a Michigan lawyer may, when acting in good faith and under a reasonable belief that a cause of action or remedy exists, call to the attention of an opposing party's counsel a pertinent penal statute related to the transactions, amy make reference to a specific criminal sanction which may be applicable, and may indicate or warn of the possibility of criminal prosecution, if done solely in order to assist in the enforcement of a valid right or legitimate claim of a client, and not done for the purpose of harassment."

A similar result has been reached by the American Bar Association's Standing Committee on Ethics and Professional Responsibility. In Formal Opinion 92-363, issued July 6, 1992, the Committee reconsidered the propriety of the use or threat of criminal prosecution to gain an advantage for a client in a private civil matter in light of the absence of a counterpart to DR 7-105 (A) in the Model Rules of Professional Conduct. The Committee concluded:

> "[t]he Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process." ABA/BNA Lawyer's Manual on Professional Conduct, 1001:118.

The letter sent by the respondent in August 1990 to opposing counsel was not specifically prohibited under the Michigan Rules of Professional Conduct. The respondent was not charged in the complaint with engaging in conduct which was illegal. The record below is without proper evidentiary support for a conclusion that the respondent engaged in conduct prejudicial to the proper administration of justice; that he exposed the legal profession or the courts to obloquy, contempt, censure or reproach; or that his mailing of that letter was contrary to justice, ethics, honesty or good morals. The hearing panel's findings of misconduct are reversed, the order of reprimand is vacated, and the complaint is dismissed.

Board Members DunCombe, Fieldman, Hotchkiss, Hurwitz and Zegouras concur in this Board Opinion.

Board Chairperson Burns recused himself from this matter at the request of the respondent and did not participate.

DISSENTING OPINION

By George E. Bushnell, Jr.

I oppose the Board's decision in this case. The elimination of a precise counterpart to DR 7-105(A) from the current Michigan Rules of Professional Conduct did not confer upon Michigan attorneys a license to engage in the obnoxious, abhorrent and shoddy conduct which was established in this case. There was ample evidentiary support in the record for the hearing panel's conclusion that the respondent's conduct violated the provisions of MCR 9.104(1-4). I would affirm the hearing panel's decision.