

Colo. R. Prof'l. Cond. 4.5

Rule 4.5 - Threatening Prosecution

- (a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.
- (b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

RPC 4.5

Entire rule and comment amended and adopted June 19, 1997, effective 7/1/1997; entire Appendix repealed and readopted April 12, 2007, effective 1/1/2008; amended and adopted by the Court, En Banc, February 8, 2024, effective 2/8/2024.

COMMENT

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For purposes of this Rule, a civil matter is a controversy or potential controversy over rights and duties of two or more persons under the law whether or not an action has been commenced.

[2] Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid 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, administrative or disciplinary process tends to diminish public confidence in our legal system.

[3] The Rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this Rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

[4] This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil proceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

[5] Moreover, this Rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person's conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

[6] While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

[7] Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that the lawyer could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relation exists, the communication likely constitutes a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

*ANNOTATION Law reviews. For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Colo. RPC 4.5: The Ethical Prohibition Against Threatening Prosecution", see 35 Colo. Law. 99 (May 2006). For article, "Litigating Disputes Involving the Medical Marijuana Industry", see 41 Colo. Law. 103 (August 2012). Annotator's note. Rule 4.5 is similar to Rule 4.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. Threatening client with criminal prosecution to obtain attorney fees violates this rule. *People v. Farrant*, 852 P.2d 452 (Colo. 1993). Attorney threatened to present disciplinary charges to obtain an advantage in a civil action where the attorney, in response to a legal malpractice action, threatened to file a grievance against the attorney filing the action unless the action was dismissed. *People v. Gonzales*, 922 P.2d 933 (Colo. 1996). Applied in *People v. Sigley*, 951 P.2d 481 (Colo. 1998). Cases Decided Under Former DR 7-105. Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. *People v. Bannister*, 814 P.2d 801 (Colo. 1991). Applied in *People ex rel. Gallagher v. Hertz*, 198 Colo. 522, 608 P.2d 335 (1979).*
