



# Staff Memorandum

HOUSE OF DELEGATES  
Agenda Item #5

To supplement the other materials submitted with respect to the Committee on Standards of Attorney Conduct, attached are comments submitted by the Criminal Justice Section.



March 22, 2019

## Recommendations of the Criminal Justice Section

The Criminal Justice Section has been requested by other sections to review and comment on certain proposed revisions to the Rules of Professional Responsibility. Following are our recommendations and comments:

1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.
2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable

facilitating quick compensation for deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman  
Chair

Criminal Justice Section Ethics and Professional Responsibility Committee