



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1228 (08/30/2021)

Topic: Submitting draft complaint with demand letter

Digest: A lawyer who sends a demand letter to a potential civil defendant may include a draft complaint and a statement that the draft complaint will be filed if the matter is not settled by a certain date, except in unusual circumstances where the threat would violate the prohibition against false statements of fact or law, the prohibition against conduct involving deceit or misrepresentation, the prohibition against threatening frivolous litigation, or a specific prohibition in substantive law.

Rules: 3.1(a) & (b), 3.4(e), 4.1, 8.4(a), 8.4(c)

FACTS:

1. The inquirer represents a party who has a potential civil claim against a business. A previous lawyer for the client sent a demand letter to the principal of the business but received no response. The inquirer has called the principal and left voicemails, but no one has answered the calls or responded to the inquirer's voicemails.
2. The inquirer proposes to "draft a complaint and send it to the company named as the defendant without commencing a lawsuit against the defendant." The inquirer "would provide a deadline by which they must settle or the lawsuit will be filed against them," but would "prefer to file the complaint only as a last resort ... because the complaint becomes public record."

QUESTION:

3. May the attorney for a potential civil plaintiff enclose a draft complaint in a demand letter to the potential defendant and state that the complaint will be filed if the matter is not settled by a certain date?

OPINION:

4. It is a common practice for attorneys to send demand letters asking for redress of their clients' grievances on a voluntary basis, prior to filing a civil claim in court. Such demand letters can serve useful purposes of informing potential defendants of allegations against them, framing the issues of a dispute, and starting a process of resolving the dispute, possibly without needing to resort to litigation.
5. Rule 3.4(e) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer shall not "threaten to present criminal charges solely to obtain an advantage in a civil matter," but that rule applies only to threats of criminal charges. See N.Y. State 772 (2003); N.Y. City 2017-3 (2017); ABA 94-383 (1994). Nothing in the Rules would specifically prohibit the

proposed conduct here, which is to threaten a civil suit.

6. Nevertheless, the Rules do impose some restrictions on a threat to file a civil suit. Thus, the Rules generally prohibit falsehood and deception. See Rule 4.1 (in course of representing a client, lawyer “shall not knowingly make a false statement of fact or law to a third person”); Rule 8.4(c) (lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”); ABA 06-439 (2006) (it may be “knowingly false or misleading to seek an advantage” by making “a threat that is baseless ... because the lawyer has unequivocally stated an intention that does not exist,” especially if the threat is made to a non-lawyer).

7. Whether a particular statement should be regarded as one of fact can depend on the circumstances.” Rule 4.1, Cmt. [2]. For example, “a party’s intentions as to an acceptable settlement of a claim” will ordinarily not be taken as a statement of fact subject to the rule against false statements, Rule 4.1, Cmt. [2]. Nor will “statements regarding ... willingness to compromise.” ABA 06-439. Similarly, threatening a legal proceeding “may not rise to the level of an express or implied assertion of fact or law or of the lawyer’s intended future conduct.” ABA 06-439.

8. The Committee recognizes that the line between a threat and a statement of fact can sometimes be difficult to discern and that negotiators typically use hyperbole, cajolery, exaggeration, and even strategic deception to achieve their objectives. The Committee also recognizes that experienced negotiators are typically not surprised when such tactics are employed against them. But we also agree with N.Y. City 2017-3 (2017) that “care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements ‘of fact,’ are not conveyed in language that converts them, even inadvertently, into false factual representations.”

9. With these principles in mind, we will focus on one particular statement that the inquirer proposes to include in his letter – namely, that if the matter is not resolved by a certain date, the inquirer “will” file the draft complaint in court. On the one hand, if the inquirer’s client has authorized the inquirer to file suit unless the adversary gives an acceptable response to the demand letter, then the threat to file suit presents no issue of falsehood or deception. On the other hand, if the inquirer knows that the client will never authorize such threatened litigation under any circumstances, then the threat that the inquirer “will” file suit may be false or deceptive.

10. There are also many gradients in between these extremes. For example, some clients who are contemplating filing suit might be awaiting fee estimates, further legal research, or additional factual investigation. Other clients will file suit only if an adversary fails to respond or denies any responsibility. Still others may be willing to authorize a suit as a last resort, but want to take every possible step to avoid litigation. Even among clients in these categories, client objectives may be shifting, ambiguous or tentative, and are rarely fixed in stone.

11. For all these reasons, we believe that an attorney’s threat to file suit if a dispute is not resolved by a certain date will in most cases not rise to the level of a false statement of fact. Yet we can certainly conceive of circumstances where a lawyer’s specific threat to sue, despite the client’s unequivocal and irrevocable determination not to sue under any circumstances, could rise to the level of factual misrepresentation – and presenting a draft complaint that the client has no intention of ever filing would compound that misrepresentation. Such circumstances, however are in our view infrequent, and we think it would be an unusual situation in which a lawyer’s threat to file suit would constitute a “false statement” in violation of Rule 4.1 or a “deceit” or “misrepresentation” in violation of Rule 8.4(c).

12. A separate ethical guardrail is that a lawyer may not threaten to file a lawsuit where such a threat would constitute “frivolous conduct” within the meaning of Rule 3.1(b). That would be an “attempt to violate” Rule 3.1(a), and an attempt to violate a rule is prohibited by Rule 8.4(a). See Rule 3.1(a) & (b)(3) (prohibiting assertion in proceedings of frivolous issues and material factual statements known to be false); Rule 3.1 Cmt. [2] (noting that filing a claim “or similar action taken for a client” is not frivolous “merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery,” but also noting that lawyers are required to “determine that they can make good-faith arguments in support of their clients’ positions”). These standards would apply to statements in the draft complaint that the inquirer proposes to send, as well as to statements in the demand letter itself.

13. In particular contexts, substantive law may also place additional constraints on threatening legal action. See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. §1692(e)(5) (providing that for a debt collector to threaten to take an action that is not intended to be taken is a prohibited false, deceptive or misleading representation or means in connection with debt collection). Such legal constraints, however, are beyond our purview, which is limited to interpreting the Rules of Professional Conduct.

CONCLUSION:

14. A lawyer who sends a demand letter to a potential civil defendant may include a draft complaint and a statement that the draft complaint will be filed if the matter is not settled by a certain date, except in unusual circumstances where the threat would violate the prohibition against false statements of fact or law, the prohibition against conduct involving deceit or misrepresentation, the prohibition against threatening frivolous litigation, or a specific prohibition in substantive law.

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