LEGAL ETHICS OPINION 1755 THREATENING CRIMINAL ACTION IN A CIVIL MATTER; CONTACT BETWEEN OPPOSING PARTIES.

You have presented a hypothetical situation in which Owner entered into a contract with Contractor, who employed Subcontractor F. Litigation ensued between Owner, Contractor and subcontractors on issues of breach of contract, fraud claims at law and mechanic's liens actions in equity. In one lawsuit, a mechanic's lien was filed in the name of Subcontractor F against Owner, who settled the mechanic's lien suit and was subrogated in whole or part to Subcontractor F's claim for the payment against Contractor. Subsequently, a suit was filed in Subcontractor F's name against Contractor ("the suit"). Owner's lawyer is counsel of record for Subcontractor F. After becoming aware of the suit, but prior to service of process, Contractor contacted Subcontractor F to discuss a possible monetary settlement of the suit. Thereafter, counsel of record for Subcontractor F wrote a letter to Contractor's lawyer, stating: "I just learned that after Monday's hearing [in another case not related to the suit] Contractor contacted F and requested that F or F's counsel in the mechanic's lien action call Contractor's lawyer 'to work something out.' If these ex parte communications continue and if Contractor/Contractor's lawyer are attempting to bribe F or influence his action against Contractor or his testimony in any way, we will take the matter up with Judge and the Commonwealth's Attorney. Contractor/Contractor's lawyer are to have no further communications with F. Any and all communications regarding the F action should be directed to me."

Under the facts you have presented, you have asked the committee to opine as to whether the portion of the attorney's letter highlighted herein constitutes a threat of criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 3.4(h), which states that a lawyer "shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter," and Rule 4.2, which directs a lawyer not to "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The Committee has previously opined that, under Rule 3.4(h), a lawyer should not allude to criminal prosecution in correspondence to an opposing party or their attorney if the allusion is made solely to obtain an advantage in a civil matter. See, LEOs 715, 716, 1388, 1569, 1582, and 1753. The Committee has developed a two-part test for analyzing communications regarding Rule 3.4(h)'s prohibition: is the communication a threat and, if so, was the threat made solely to obtain an advantage in a civil matter.

In applying this two-part test to the letter sent in the present hypothetical, the first prong of the test is clearly established. The provision in the subcontractor's letter presents a definite threat of criminal prosecution. The thornier question in this instance is whether that threat was made solely to obtain an advantage in a civil matter. The letter does not make the usual demand for

payment/settlement by threatening prosecution; rather, the letter seeks to stop the opposing party and/or his attorney from contacting the subcontractor directly. The letter demands that all contact be made with the attorney himself. Instructive in the present instance is LEO 1063, in which an attorney sends a letter to a "stalker" of his client demanding that the "stalking" cease or else criminal and civil actions would be pursued. The Committee in LEO 1063 opined that while a threat had been made, that threat was not solely made to obtain an advantage in a civil matter but in whole, or at least in part, to stop the harassing actions of the stalker. Accordingly, the Committee opined that the attorney's letter was proper, stating that "when it appears that a letter was sent to stop a certain action rather than to gain an advantage in a civil matter, there is no violation." The attorney in the present hypothetical would seem, from the face of this letter, at least in part, to be trying to stop the opposing party from contacting his own client directly. Thus, under the reasoning of LEO 1063, as this letter is meant to stop a certain action (i.e., contact), then there would seem to be no violation of Rule 3.4(h).

The Committee does note that in LEO 1063, the conduct that the lawyer sought to extinguish was clearly prohibited by law. In the present hypothetical, the conduct is contact by one party with the opposing party. Rule 4.2 does prohibit a party's lawyer from contacting the opposing party if represented by counsel (absent that counsel's consent); nonetheless, Comment One to that rule expressly provides that "parties to a matter may communicate directly with each other." The Committee notes that Comment One should be reviewed in tandem with the prohibition in Rule 8.4(a) against violating a rule through the acts of others. Thus, while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party. In the present hypothetical, the content of the contact by the contractor was that the subcontractor or its counsel should contact the contractor's lawyer to reach a settlement. Further information is not available as to whether the contractor's lawyer was behind this conversation. The subcontractor's lawyer, from the face of his letter, appears concerned that the contractor's lawyer did direct this contact. It is further contact of this sort that the letter seeks to prevent. Applying the analysis from LEO 1063 to this hypothetical, the Committee opines that on its face, the letter seeks to prevent further contact with his client and is therefore not solely for the purpose of obtaining an advantage in the civil matter. Thus, under the two-prong test, this letter does not by itself violate Rule 3.4(h). The Committee's opinion on this point rests on an absence of any further information regarding the motive of the subcontractor's attorney.