ABA Formal Op. 94-383
ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-383

American Bar Association

USE OF THREATENED DISCIPLINARY COMPLAINT AGAINST OPPOSING COUNSEL

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A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

The Committee has been asked whether a lawyer may threaten to file a disciplinary complaint against opposing counsel in order to induce agreement to a settlement in a civil case.

The Committee concludes that although a threat to file a complaint against opposing counsel in order to obtain an advantage in a civil matter is not expressly prohibited by the Model Rules of Professional Conduct (1983, as amended), there will frequently be circumstances in which such a threat will violate Model Rule 8.3 or one of the more general restraints on advocacy imposed by the Model Rules.

The issue presented here was expressly reserved by this Committee in Formal Opinion 92-363 when we considered the related question of whether a lawyer could use or threaten criminal prosecution to gain an advantage for a client in a private civil matter. The latter issue arose because the Model Rules contain no analogue to DR 7-105(a) of the predecessor Model Code of Professional Responsibility (1969, amended 1980), which had specifically prohibited a lawyer from using or threatening to use a prosecution to gain an advantage in a civil matter. In Formal Opinion 92-363, this Committee concluded that the 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 a client, where the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the 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. We further concluded that in such circumstances, the client's agreement to refrain from presenting criminal charges against the opposing party could be part of a settlement agreement, provided that such agreement did not violate applicable law. Conversely, the Committee found that using or threatening criminal prosecution to gain an advantage in a civil matter would be inappropriate where such conduct constituted a criminal offense or was inconsistent with one of the ethical constraints on advocacy imposed by the Model Rules.

Although this Committee has not previously examined the issue presented here, several opinions of local and state bar association committees have done so. All of them have concluded that a threat to file disciplinary charges solely to gain advantage in a civil matter was unethical conduct. However, none of these opinions construed the Model Rules. Rather, several of these opinions construed state counterparts of the Model Code of Professional Responsibility and depended upon an analogy between threatening to file a complaint and threatening to file criminal charges, which, as noted above, the Model Code (and the Code in effect in these jurisdictions) expressly prohibited. Illinois State Bar Ass'n, Opinion No. 87-7 (1988); Indiana State Bar

Ass'n Legal Ethics Committee Opinion 10 (1985); Massachusetts Bar Ass'n Committee on Professional Ethics, Opinion 83-2 (1983). The remaining opinions came from jurisdictions whose governing rules of ethics expressly prohibit seeking disciplinary charges to obtain an advantage in a civil matter. Professional Ethics Commission of the Board of Overseers of the Bar of Maine, Opinion 100 (1989) (construing Maine Rule 3.6(d)); Ethics Committee of the District of Columbia Bar, Opinion 220 (1991) (construing D.C.Rule 8.4(g)).

Unlike the standards of professional conduct examined by the foregoing opinions, the Model Rules contain no analogue to Rule 7-105 and do not expressly prohibit making or threatening disciplinary charges to gain an advantage in a civil case. Nor do the Model Rules expressly prohibit reporting or threatening to report the conduct of opposing counsel to a disciplinary body to gain such an advantage. [FN1] However, such conduct is constrained by the lawyer's obligation to report certain professional misconduct under Rule 8.3, the general limits on advocacy invoked in our prior Formal Opinion 92-363, the prohibitions of Rule 8.4, and the criminal law.

Rule 8.3(a) provides that:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

The Rules do not require the reporting of every violation of the Rules. As noted in the Comment, Rule 8.3(a) "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." According to the Comment, "the term 'substantial' refers to the seriousness of the possible offense." A lawyer's duty to report is further limited to violations of which he has knowledge, knowledge being defined as "actual knowledge of the fact in question." Model Rules, Preamble: Terminology.

In those instances in which a lawyer is required to report the professional misconduct of another, the lawyer's failure to report would itself violate Rule 8.4(a). [FN2] Similarly, an agreement not to file a complaint would violate Rule 8.4(a) where the filing of a complaint would otherwise be required by Rule 8.3(a). Because an agreement not to file a complaint if a satisfactory settlement is made is the logical corollary of a threat to file a complaint in the absence of such a settlement, we conclude that a threat to file disciplinary charges is unethical in any circumstance where a lawyer would be required to file such charges by Rule 8.3(a).

There may be many instances in which Rule 8.3(a) does not require a lawyer to report professional misconduct, however. The lawyer may not have the requisite "actual knowledge" of the misconduct; the misconduct may not raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer; or, pursuant to Rule 8.3(c), the information may be otherwise protected by Rule 1.6 or "was gained by a lawyer ... while serving as a member on an approved lawyers assistance program." If a lawyer threatens to file disciplinary charges concerning such a matter, however, the lawyer must avoid making an extortionate, fraudulent or otherwise abusive threat which would violate the criminal law of the governing jurisdiction or restrictions contained in the Model Rules.

Threats by counsel to file disciplinary charges against his opponent may violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4 and 8.4(d). Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." We have previously opined that if a lawyer's conduct is extortionate under the criminal law of the respective jurisdiction, that conduct violates Rule 8.4(b). Formal Opinion 92-363. Although it is beyond the scope of the Committee's jurisdiction to define extortionate conduct, the Committee noted in Formal Opinion 92-363 that a threat of prosecution is not extortionate where "property obtained by threat or accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances

to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." Op. 92-363 at 4, quoting the Model Penal Code, Section 223.4.

A threat by counsel to file disciplinary charges against opposing counsel to coerce settlement in a civil case would appear to come under the Model Penal Code's definition of criminal extortion unless it concerns the lawyer's conduct in the very case in which the threat is made, or conduct which is the subject of the case in which the threat is made (i.e., a malpractice action). Otherwie, the settlement would not be "restitution for harm done in the circumstances to which" the complaint relates.

Rule 3.1 prohibits an advocate from asserting frivolous claims. A lawyer who threatens to file a complaint that is not well founded in fact and in law violates Rule 3.1.

Rule 4.1 imposes a duty on a lawyer to be truthful in dealing with others on a client's behalf. A lawyer who threatens to file a complaint without any actual intent to do so violates Rule 4.1.

Rule 4.4 prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay or burden a third person ..," and Rule 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. Threatening to file a complaint against opposing counsel to extract settlement concessions may violate both of these rules. Such a threat burdens both the opposing lawyer and his client by introducing extraneous factors into their assessment of whether to settle or proceed to trial. It also creates a conflict of interest between them. In the worst case, a lawyer may be forced by the threat to choose between recommending settlement and enduring a complaint proceeding in which the lawyer feels that he must reveal client confidences to defend the accusations against him, as permitted by Rule 1.6. Further, such a threat may prejudice the administration of justice. If the subject of the threat is a matter within the jurisdiction of the trial court, it should be raised in that forum; the failure to do so impairs the ability of the trial court to direct the proceedings before it. If the subject of the threat may, but is not required to, be brought to a complaint committee, to do so or threaten to do so during a proceeding may disrupt the progress of the civil case.

There may be circumstances in which a threat to file a disciplinary complaint or report as a means of advancing a client's interests in a civil case would avoid the constraints posed by criminal law and the several referenced Model Rules. The Model Rules have not expressly prohibited the use of a threat to file disciplinary charges to obtain an advantage in a civil case, but a lawyer considering making such a threat must comply with the Model Rules intended to protect the integrity of the judicial process and the disciplinary process, and with the criminal law. A lawyer who becomes aware of professional misconduct that raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects should report that misconduct promptly, to the extent required by Rule 8.3(a) [FN3], and not use it as a bargaining chip in the civil case. On the other hand, a well-founded report of misconduct which is not required by Rule 8.3(a) to be reported, and which is not within the jurisdiction of the trial court where the civil matter is pending, usually can and should be postponed to the conclusion of the civil proceeding.

[FN1]. Some courts have recognized a difference between informing bar counsel of ethical improprieties on the part of lawyers so that bar counsel can investigate further to decide whether to file a complaint and the filing of a complaint itself. This Opinion makes no distinction between a report and a complaint, because the Committee believes that the principles applicable are the same.

[FN2]. Rule 8.4(a) provides:

[FN3]. Rule 8.3(c) creates an exception to the reporting requirement of Rule 8.3(a) for information protected by the confidentiality requirements of Rule 1.6, and for information gained by a lawyer or judge while serving on an approved lawyers

assistance committee, to the extent that such information "would be confidential if it were communicated subject to the attorney-client privilege."
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