



Threatening a Disciplinary Complaint

In a previous column, we looked at the ethical rules involved when a lawyer considers threatening the opposing party (with or without counsel) with criminal prosecution while representing a client in civil litigation.¹

How about the situation where a lawyer threatens to report professional misconduct to induce a settlement of his client's claim?

But how about the situation where a lawyer wants to threaten opposing counsel with a disciplinary complaint to gain an advantage in a civil case? This scenario was different enough from the usual one involving an opposing party to warrant a separate formal ethics opinion from the ABA.²


First, let's distinguish the situation covered by ERs 1.8(h)(2) and (3),³ which prohibit a lawyer from making an agreement with her own client or former client that limits the client's right to report that lawyer to disciplinary authorities. What we are talking about here involves opposing counsel and limitations that might be placed on reporting professional misconduct to induce a settlement of that lawyer's client's claim.

Second, we must distinguish those cases where the misconduct the lawyer threatens to report is of such a nature as to raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. ER 8.3(a) requires the lawyer observing such conduct to inform the disciplinary authorities of it at the risk of running afoul of ER 8.4(a), which states that it is professional misconduct for a lawyer to violate the rules of professional conduct or knowingly assist another to do so. So the reporting of these kinds of ethical violations should never be the subject of negotiations: As a lawyer, you must report them, period.

That leaves us with what remains: misconduct about which the lawyer may not have the requisite "actual knowledge" requiring him to report it, or which is protected by ER 1.6,⁴ or which is simply not egregious enough to raise a substantial question as to the other lawyer's honesty, trustworthiness or fitness.

The ABA opinion concludes that in these situations, a threat by counsel to file disciplinary changes to coerce a settlement in a civil case would appear to fall within the definition of "extortion" and, therefore, would be unethical unless it concerns the lawyer's conduct in the very case in

which the threat is made, or conduct that is the subject of the case in which the threat was made, such as a legal malpractice action. Otherwise, threats to file disciplinary charges against opposing counsel may violate ER 8.4(b) (prohibition against a lawyer committing a criminal act—extortion); ER 8.4(c) (prohibition against a lawyer engaging in conduct prejudicial to the administration of justice); ER 3.1 (a lawyer shall not bring a proceeding unless there is a good-faith basis in law and fact); ER 4.4(a) (a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden any other person); and ER 4.1(a) (a lawyer shall not make a false statement of material fact or law to a third person, such as threatening action she has no intention of pursuing).

Lawyers have, in fact, been disciplined for threatening opposing counsel with disciplinary complaints,⁵ so it is wise to stay as close to those situations contemplated by ER 8.3(a) as you can when deciding whether to bring up the matter with the other side's lawyer. 

A new ethics opinion is on page 61. Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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endnotes

1. *Threatening Criminal Prosecution*, ARIZ. ATT'Y, July/August 2009, at 10.
2. ABA Formal Op. 94-383 (July 5, 1994) (Use of Threatened Disciplinary Complaint Against Opposing Counsel).
3. Rule 42, ARIZ.R.S.C.T.
4. Comment [2] to ER 8.3 states that a report about misconduct is not required if it would involve a violation of ER 1.6's duties of confidentiality. The comment states that a lawyer should encourage a client to consent to disclosure as long as it doesn't prejudice the client's interests.
5. See *In re Pyle*, 91 P.3d 1222 (Ky. 2004) (lawyer disciplined for threatening to report other lawyer's misconduct unless case settled promptly), and *In re Discipline of Eicher*, 661 N.W.2d 354 (S.D. 2003) (lawyer repeatedly threatened to report opposing counsel to disciplinary authorities.).