

## THREATENING TO FILE AN ETHICS COMPLAINT MAY CONSTITUTE UNETHICAL CONDUCT

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This article will address the important and delicate issue of whether an attorney commits unethical conduct in threatening to file an ethics complaint if opposing counsel refuses to withdraw or take other requested action. The Director's office has experienced a surprising increase in such "complaints" recently.

The Kentucky Bar Association Ethics Committee has issued a formal advisory opinion on this subject. The Kentucky Opinion, issued November, 1982, states:

QUESTION: May a lawyer threaten to file a complaint with the Bar Association against a lawyer in a pending court case where the first lawyer believes that the second lawyer has a conflict of interests?

ANSWER: No.

### OPINION

The fact situation presented is applicable in both civil and criminal cases, and is one which has long concerned members of the bar.

First, the Supreme Court, in adopting the American Bar Association's Code of Professional Responsibility, stated in SCR 3.130 that it accepts the principles embodied in the Code.

The Rules are clear that when a lawyer receives information that is "unprivileged" that a fellow member of the bar has committed a violation of the Disciplinary Rules, that the lawyer has an obligation to report such information to the appropriate investigative body for proper action. EC 1-4 provides in part as follows:

"The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules."

Accordingly, DR 1-103(A) provides as follows:

"A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

A lawyer is obligated to report a violation of the Disciplinary Rules, and the failure to do so may itself constitute misconduct. See DR 1-102(A)(1).

Because a lawyer is under an obligation to report a violation of the Disciplinary Rules, the question under examination becomes, "What is the reason for a lawyer to make a threat, and is the making of the threat unethical?" In examining this issue, consideration should be given to the following:

"A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." DR 7-105.

"In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system." EC 7-37.

It appears that the purposes that could be achieved by making the threat are:

- (1) an unfair advantage, and
- (2) intimidation and verbal abuse of opposing counsel.

In the annotation of *Attorney's Verbal Abuse of Other Attorney*, 87 ALR3d 351, this course of conduct was examined, and the following summary comment is provided:

"Among the forms of verbal abuse which have resulted in disciplinary action being taken are (1) *accusing another attorney of the following: being unethical, trying to impeach one's own client, bad faith, trying to impeach honest answers, putting words into the mouths of witnesses, doing what the court had admonished not to do, playing dirty pool, sandbagging witnesses, trying to beat his client about, abusing witnesses, making untrue statements, being in contempt of court, perversion of justice, smear type tactics, highly improper conduct, making a false and fraudulent affidavit, and inducing a witness to leave the jurisdiction of the court*; (2) referring to opposing counsel as a "sneak and a snitch"; (3) impugning the honesty, integrity, and motives of another attorney; (4) charging another attorney with cheating, bribery, fraud, trickery, robbery, subornation of perjury, conspiracy, misconduct in office, collusion with the judge, criminal misconduct, agreeing to run a place for the sale of intoxicating liquors in violation of law, and conniving to have a person judged insane; (5) falsely stating that an attorney had been sued for fraud; (6) accusing another attorney of criminal action; and (7) making false representations as to the impropriety of political contributions made by attorneys, gross neglect of a case, and excessive drinking." (Emphasis added) At Pages 354-355.

The case-by-case discussion analyzes the cases and a clear conclusion is drawn that the making of threats is a form of verbal abuse, and it has been condemned.

Accordingly, the Committee concludes that the making of a threat to report a violation of the Disciplinary Rules is unprofessional and is unethical. See EC 1-5 and EC 9-6.

It should be noted that the lawyer may have legal remedies available; that is, Motion to Disqualify

Counsel, of which this Committee is not authorized to render advice.

The Director's office adopts the Kentucky Bar Association opinion.

Minnesota dictum supports the conclusion reached in the Kentucky Opinion. In *Jones v. Fleischhacker*, 325 N.W.2d 633 (Minn. 1982), the Minnesota Supreme Court chided plaintiff's attorneys for alleging in a negligence suit that the defendant's attorney acted unethically in representing multiple defendants. The court stated:

Finally, charges of unethical conduct of opposing counsel for the purpose of requiring withdrawal should not be a "standard part of counsel's armament" in litigation. *Black v. State of Missouri*, 492 Fed. Supp. 848, 862 (W.D. Mo. 1980). The Minnesota Lawyers Professional Responsibility Board is the forum normally where such charges should be initially aired. [Citations omitted].

*Jones*, at 638.

Another jurisdiction has held that making ethics charges in a civil complaint constitutes unprofessional conduct. In *Cincinnati Bar Association v. Gebhart*, 69 Ohio St. 2d 287, 431 N.E.2d 1031 (1982), the Ohio Supreme Court publicly reprimanded a lawyer for, *inter alia*, making statements in civil litigation that if opposing counsel proceeded to involve the respondent personally in the case, the respondent would see that opposing counsel were disbarred. In *Gebhart*, the respondent was joined as a party in a civil lawsuit alleging personal responsibility of respondent on a corporate debt. Respondent filed a counter-claim seeking the disbarment of opposing counsel and punitive damages in the amount of \$100,000 from each attorney. Respondent also falsely indicated that the Cincinnati Bar Association had informed respondent that he had a good case against opposing counsel. The Ohio Supreme Court, in reprimanding the lawyer stated:

There are appropriate methods and means by which claims of unprofessional conduct may be heard and proper sanctions, including disbarment, may be meted out . . . It is inappropriate to make such allegations within a pleading in pending civil proceedings in the Court of Common Pleas.

*Id.* at 1032. Ohio and Minnesota courts identify the lawyer disciplinary agency as the place to file complaints of unethical conduct.

The above authorities do not hold nor imply that an attorney may not make an appropriate disqualification motion. The Kentucky opinion provides an express exception for such conduct. The line to be drawn is between taking action merely to harass one's opponent and fulfilling one's ethical obligation to report violation of the disciplinary rules to the discipline agency. See DR 7-102(A)(1) and (2).

## CONCLUSION

Threats to file ethics complaints may subject a lawyer to disciplinary action. DR 1-103(A); DR 1-102(A)(5); EC 7-21. Rather than making such threats, an attorney who has unprivileged knowledge of a disciplinary rule violation has an obligation to report it to the Lawyers Professional Responsibility Board. DR 1-103(A). This agency is the proper forum for deciding questions of professional discipline.