

# Opinion No. 1 of 2008

## Committee approval

This formal opinion is disseminated in accordance with the charge of the Indiana State Bar Association Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Association and does not carry the weight of law.

## Issue

Can a lawyer threaten to report a party opponent to an Indiana professional licensing agency, if the adversary fails to pay \$5,000 in settlement of a civil claim?<sup>1</sup>

## Conclusion

Maybe. A lawyer may be able to threaten to report a party opponent to the administrative agency if the conduct at issue relates to the subject matter of the underlying conflict and the \$5,000 is no more than a reasonable approximation of the actual losses suffered by the attorney's client.

## Hypothetical facts

Client and party opponent ("adversary") were participants in a real estate deal. The parties purchased a foreclosure residence to "flip" it for a profit. The adversary used his broker's license to help purchase the property. A title defect was not discovered at the time of purchase. Although the property was later refurbished and sold, the client hired Attorney to obtain a \$5,000 recovery from the broker-adversary.

## Analysis

The question here is whether it is a violation of Indiana's Rules of Professional Conduct for an attorney to threaten to report an adversary to a professional licensing agency<sup>2</sup> in the course of negotiating a \$5,000 settlement. For the reasons below, the committee believes this may be permissible under the Rules

## Attorney's threat to report adverse party to professional licensing commission

depending on the facts of the particular case.

Disciplinary Rule 7-105(A) of Indiana's previous Code of Professional Conduct<sup>3</sup> prohibited a lawyer from bringing or threatening criminal charges if the sole purpose was to gain an advantage in a civil matter. *See, Matter of Strutz*, 652 N.E.2d 41, 48 (Ind. 1995) (finding that attorney violated D.R. 7-105(A) because, "by accusing his client of criminal blackmail," the attorney "implicitly threatened to present criminal charges against his client solely to obtain advantage in negotiating settlement of the \$2,000,000 civil action, which [the attorney] caused to be filed.") As the Indiana Supreme Court explained, "[s]uch threats of prosecution serve to subvert the judicial process and to diminish public confidence in our legal system." *Id.* at 48. Generally speaking, the rationale is that the criminal process exists for the protection of society as a whole, not as a tool to force settlement of private controversies. By the same token, the civil process is designed to achieve the settlement of disputes, and its functioning is similarly impaired if a person is wrongly dissuaded from pursuing a remedy.

The Rules of Professional Conduct, which became effective Jan. 1, 1987, do not contain a corresponding prohibition against threatening to file a criminal action. However, threatening an administrative complaint to gain an advantage in a civil matter could subject the lawyer to discipline under the following Rules of Professional Conduct: Rule 3.1 (Meritorious Claims and Contentions), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.1 (Truthfulness

in Statements to Others), Rule 4.4 (Respect for Rights of Third Persons), and Rules 8.4(b), (d) and (e) (Misconduct). Nevertheless, Indiana has not addressed the issue of threatening to report a non-attorney party opponent to a licensing authority or administrative agency.

The issue presented has been considered by applicable bodies in other states with most jurisdictions prohibiting such threats. Some states have adopted rules of professional conduct that explicitly prohibit lawyers from making threats of administrative charges. *See, e.g.*, California Rule of Prof. Conduct 5-100 ("A member shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute."); Maine Rule 3.6(c) of the Code of Prof. Resp. (same); and Colorado Rule of Prof. Conduct 4.5 (same). As the Colorado Bar explained,

Threatening to use, or using, the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal, administrative or disciplinary process tends to diminish public confidence in our legal system.

Colo. R. of Prof. Conduct 4.5, comment 2. *Accord* 2005 N.C. Eth. Op. 3, 2005 WL 3964317 (July 14, 2005) (lawyer may not threaten to report an opposing party or witness to immigration officials to gain an advantage in civil settlement negotiations); S.C. Adv. Op. 89-18, 1989

WL 608456 (S.C. Bar. Eth. Adv. Comm. 1989) (an attorney violates the disciplinary rules when he threatens to report to the IRS a suspected failure to report income by an adverse party to force settlement of ongoing litigation). In addition, the District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Texas and Virginia also prohibit threatening disciplinary charges.

The D.C. Bar has ruled that threats to file disciplinary charges against a non-attorney with a relevant professional board, for the sole purpose of gaining advantage in a civil matter, is a violation of Rule of Professional Conduct 8.4(g).<sup>4</sup> D.C. Eth. Op. 220 (Sept. 17, 1991) ([http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion220.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion220.cfm)). One of the inquirers was an attorney defending a real estate professional in a malpractice action. In the course of settlement negotiations, opposing counsel advised that his client asked him to consider the filing of a complaint with the relevant associations of realtors and appraisers to seek the suspension or revocation of the inquiring attorney's client's license. The D.C. Bar found this violated Rule 8.4(g):

Rule 8.4(g), by its plain language, renders unethical any threat to file disciplinary charges solely in order to gain advantage in a civil matter. The type of disciplinary charge is not limited either in the rule or in any published explanatory material. Indeed, interpreting the rule's prohibition to extend to filing charges against attorneys but not against non-attorneys would produce the anomalous result of permitting an attorney to file or threaten to file a disciplinary charge against an opposing party for the sole purpose of obtaining advantage in a civil matter but not against his or her attorney for the same reason. This Committee declines to endorse such a result. The rule applies equally to complaints threatened or filed against attorneys and non-attorneys.

Since the complaint referenced in the inquiry regarding the real estate professional could result in the suspension or revocation of a license, it is a disciplinary charge within the meaning of the rule. Again, the matter of whether the complaint is filed solely to gain advantage in a civil matter is a factual question which this Committee is not equipped to decide.

D.C. Bar Opinion 220 (Sept. 17, 1991). The D.C. Bar further refused to differentiate between threats and "hints" of threats of discipline, finding no relevant distinction. *Id.* at n. 3.

As the *ABA/BNA Lawyers' Manual on Professional Conduct* explains,

A lawyer may not threaten to bring administrative charges to obtain an advantage in a civil matter, nor may he present or participate in presenting administrative charges solely to gain an advantage in a civil matter. A lawyer may advise opposing coun-

sel of his client's intent to bring administrative charges against the opposing counsel's client. A lawyer, however, must exercise great care in order to ensure that such communication may not be interpreted as a veiled threat.

801 *Law. Man. Prof. Conduct* 1605.

The Indiana Supreme Court has found that threats can amount to violation of Professional Conduct Rule 8.4(d) because they might hinder the administration of justice. *See, e.g., In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005) (when attorney received letter from client requesting his file and refund of fees, attorney drafted letter to client providing "Please do NOT EVER in your life send me another letter. If you do I will have to make trouble for you while you are locked up!"); *Matter of Whitney*, 820 N.E.2d 143 (Ind. 2005) (lawyer threatened to

(continued on page 36) →

file defamation suit against his client if she pursued disciplinary action against him).<sup>5</sup>

Nevertheless, it is our opinion that a threat to report an adversary to an administrative agency can be employed within the bounds of Indiana's Rules of Professional Conduct. Indiana's rules are based on the Model Rules of Professional Conduct. Indiana's rules, unlike other states such as Colorado and the District of Columbia, do not contain an express prohibition against the threat of administrative charges.

ABA Formal Opinion 92-363 (Use of Threats of Prosecution in Connection with a Civil Matter) (1992) states that a lawyer can threaten the opposing side with criminal prosecution if 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 subject matter of the criminal conduct is related to the underlying civil suit. The requirement that the criminal charge be related to the civil case was in part based on the belief that:

"Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system and tends to prejudice its administration." ABA Formal Op. 92-363 at 5-6.

As the ABA Formal Opinion explained, a lawyer can threaten to use the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that 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. The ABA Formal Opinion also found that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not

itself in violation of law. ABA Formal Op. 92-363 at 1.

Nevertheless, the ABA warned the bar that such threats could be considered "extortionate" or "compound a crime" in some circumstances. The ABA refused to define extortionate conduct and instead referred the reader to the Model Penal Code. According to the Model Penal Code, it is an affirmative defense to the prosecution of the crime of compounding that the pecuniary benefit sought did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense. ABA Formal Opinion 92-363 at 3 (citing Model Penal Code §242.5).

In Indiana, the relevant crime to consider is that of intimidation. I.C. §35-45-2-1. We similarly decline to define intimidating conduct for the reader. Using ABA Formal Opinion 92-363 as a guide, the Minnesota Office of Lawyers Professional Responsibility has advised that if an employer discovers an employee has forged two company checks totaling \$5,000 and deposited them into his personal bank account, the in-house counsel can threaten to report the matter to the prosecutor unless the employee repays the \$5,000. Minnesota reasoned that the threat to report directly related to the civil claim for \$5,000, and that the amount sought by the employer did not exceed that which would be due as restitution for the employee's criminal act. "When Lawyers Threaten Criminal Prosecution in a Civil Case," *Minnesota Lawyer* (April 24, 1998).

ABA Formal Ethics Op. 94-383 (1994) (Use of Threatened Disciplinary Complaint Against Opposing Counsel) provides that threatening to file a complaint against the opposing lawyer in order to obtain an advantage in a

civil case is “constrained” by the Model Rules – as well as by extortion statutes – even though not expressly addressed. The threat may not be used as a bargaining point if the misconduct raises a substantial question as to opposing counsel’s honesty, trustworthiness or fitness as a lawyer because in such instances the lawyer has an absolute obligation under Model Rule 8.3(a) to report opposing counsel to disciplinary authorities. By contrast, whereas an attorney has an affirmative duty to report misconduct of a fellow attorney, there is no corresponding duty to report the conduct of another Indiana professional to his or her administrative agency. The threat would also be improper if the misconduct is unrelated to the civil claim, if the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay or burden opposing counsel or his client, or to prejudice the administration of justice.

Based on the reasoning of these formal opinions interpreting the Model Rules, it appears that an attorney may ethically threaten to report an adversary to an administrative agency. As explained by Peter H. Geraghty, Director of ETHICSearch, ABA Center for Professional Responsibility,

Under the reasoning of [ABA] Formal Opinion 92-363, assuming that the conduct in question is related to the underlying civil suit and the lawyer has a well-founded belief that the conduct that may be in violation of the administrative agency’s regulations is warranted by the law and the facts, it would appear that it may be permissible to threaten to report such conduct to the administrative agency.

7 No. 4 PROFLAW 18 at \*18 (August 1996).

Based on the reasoning from Geraghty and without any contrary Indiana authority, we conclude that threats to report an adversary to an administrative agency in the course of negotiating a civil claim may be ethically made, provided that certain safeguards are employed.

## Conclusion

It may be ethically permissible to threaten to report a party opponent to an administrative or professional licensing agency in the context of negotiating a civil claim so long as: the conduct to be reported is related to the underlying suit, the attorney has a well-founded belief that the conduct in question would be violative of the administrative agency’s regulations and is warranted by the law and the facts of the case, the attorney must not state or imply an ability to influence improperly the administrative agency or its officials, and the pecuniary benefit sought from the adversary must be a reasonable approximation of the amount which would be due as restitution for the acts of the adversary.

The reader is cautioned that threats to report an adverse party to an administrative or professional licensing agency are fraught with danger. Most jurisdictions that have addressed the issue have prohibited such threats. The Indiana Supreme Court has not yet ruled upon the issue. 🙏

1. An attorney is, of course, permitted to actually file administrative charges against an adversary. The ethical considerations for the filing of such charges are not within the boundaries of this opinion.
2. The inquiry concerned reporting the party opponent to the Indiana Real Estate Commission. For the reasons stated herein, we find the analysis would fit other types of professional licensing agencies as well.
3. Although the Code of Professional Responsibility was never repealed, it was replaced by the Rules of Professional Conduct.
4. Indiana has no corresponding Rule 8.4(g).
5. Besides being a breach of ethical duties, the threats can also violate the law, under some circumstances. See, *In re Diamond*, 346 F.3d 224, 228-29 (1st Cir. 2003) (reversing dismissal of suit, finding that attorney’s threat to report bankruptcy debtor to real estate commission could have violated automatic stay provision of the Bankruptcy Code).