

Threatening to File a Grievance Against Opposing Counsel

BY ROY SIMON

May you ever ethically threaten to file a grievance against opposing counsel? This column explores that multi-faceted question.

Some Scenarios

To help us think about the question in more concrete terms, let's set forth some scenarios.

Scenario # 1: After months of negotiations over a proposed \$27 million acquisition, the lawyers on both sides meet to close the deal. As usual, a few key issues remain to be negotiated at the closing. After hours of hard bargaining, the lawyers finally reach agreement on the exact language of some crucial terms, and the buyer's lawyer leaves the room to have the handwritten language typed up and incorporated into the final documents. He returns ten minutes later with the revised documents, complete with colorful "sign here" tabs on the signature pages. He hands the revised documents and a pen to the seller's lawyer, who quickly reads through the papers. Suddenly the seller's lawyer slams his fist on the table and says, "You've altered the language we negotiated, without even telling us! If you don't change it immediately back to the language we agreed upon and increase the purchase price by \$1 million, we're going to file a grievance against you and make sure you never practice again!" Ethical?

Scenario # 2: In a multi-million dollar commercial contract dispute, the plaintiff's lawyer accuses the defendant's lawyer of using forged receipts and other forged documents to cover up the breach. During settlement negotiations, the plaintiff's lawyer shows the original documents to the defense lawyer to demonstrate the forgery, but the defense lawyer persists in denying the breach and using the allegedly forged documents. Whether the defendant's documents are genuine will be a key issue at trial. The parties continue to negotiate to the brink of trial but cannot agree on a settlement. The plaintiff's lawyer tries to break the impasse by saying, "If you use those forged documents at trial, we are going to file a grievance against you for using fraudulent evidence and seek sanctions for our full attorney fees for going to trial." Ethical?

The Starting Point: DR 1-103

The source of the problem is DR 1-103(A) of the New York Code of Professional Responsibility, which provides as follows:

A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1 102 [1200.3] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Let's take the rule apart. DR 1-103(A) requires a lawyer to report "knowledge" of another lawyer's serious professional misconduct (i.e., a violation of DR 1-102 that raises a "substantial question" as to the other lawyer's "honesty, trustworthiness or fitness as a lawyer") unless one of two exceptions applies: (1) the knowledge is "protected as a confidence or secret," or (2) the knowledge was "gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee."

For purposes of this article, I will assume the "lawyer assistance" exception does not apply to the lawyer's knowledge about opposing counsel's alleged misconduct because the lawyer did not gain the information about the misconduct while serving as a member of a lawyer assistance committee or similar program. I will also assume that the exception for confidences and secrets does not apply to the knowledge because, although the information about the opposing lawyer's misconduct constitutes a "confidence or secret," it is no longer "protected" because (as often happens) the lawyer's client has validly consented to let the lawyer reveal the information for the purpose of filing a grievance. In short, for purposes of this article, I will assume that the lawyer contemplating the grievance possesses information that is not subject to either exception in DR 1-103(A).

Since the information does not fall within either exception in DR 1-103(A), the inquiry boils down to three questions:

The first question is: Does the information in the lawyer's possession rise to the level of "knowledge"? If not, then a report is not mandatory. Rumors, suspicions, hunches, gut instincts, and beliefs do not rise to the level of "knowledge" and therefore need not be reported. As EC 1-4 indicates, reporting is required only when a lawyer "believes clearly" that a serious violation of the Code of Professional Responsibility has occurred.

The second question is whether the information in the lawyer's possession rises to a level that permits filing a grievance. On one hand, a "good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report." N.Y. State 635 (1992). On the other hand, it is "patently improper" to report another lawyer's alleged misconduct "without having a reasonable basis for doing so... or solely to gain a tactical advantage in a matter." *Id.* Thus, if the lawyer lacks a "reasonable basis" for believing or suspecting that opposing counsel has violated the Code of Professional Responsibility, then the lawyer is prohibited from filing a grievance. In other words, when the exceptions to DR 1-103(A) do not apply, a lawyer has discretion whether or not to file a grievance based on information that rises to the level of a good faith belief or suspicion but falls short of knowledge.

The third question is: Does the information raise not just a routine question but a "substantial" question about the other lawyer's "honesty, trustworthiness, or fitness as a lawyer"? If the evidence raises only a minor question, or if it raises a substantial question about something other than the lawyer's honesty, trustworthiness, or fitness as a lawyer (e.g., if it raises a question only about the lawyer's fitness as a spouse or parent), then a report is not mandatory.

Is the Grievance Mandatory, Discretionary, or Prohibited?

At this point, I am ready to reach two conclusions.

One conclusion is that a lawyer may not ethically threaten to file a *mandatory* grievance. If a lawyer concludes that DR 1-103(A) requires him to file a grievance, then the only remaining questions are when and where to file it. Thus, if a lawyer possesses knowledge of another lawyer's violation of the Code of Professional Responsibility that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer, and if that knowledge does not fall within either of the exceptions to DR 1-103(A), then the lawyer must file a grievance. When those criteria are met, then merely threatening to file a grievance makes no sense because the opposing lawyer and his client cannot do anything to negate the mandate of DR 1-103(A). A lawyer has the right to file a grievance against opposing counsel without notice in these circumstances.

Of course, a lawyer has the right, in my view, to notify opposing counsel, as a courtesy, of the intention to file the grievance. A lawyer also has the right to confront opposing counsel with evidence of misconduct and to ask whether opposing counsel denies the misconduct or can cast doubt on whether it occurred. But if opposing counsel does not shake the reporting lawyer's knowledge of a serious violation, then making a threat – and thereby inviting the opposing lawyer to bargain away the grievance – is improper. When public policy demands that a grievance be filed, private interests cannot negotiate around that public policy.

Another conclusion is that a lawyer may not ethically threaten to file a *prohibited* grievance. If a lawyer lacks even the minimal evidence needed to ground a good faith belief or suspicion that opposing counsel has engaged in professional misconduct that raises a substantial question about the lawyer's honesty, trustworthiness, or fitness as a lawyer, then filing a grievance is prohibited. In my view, it is unethical for a lawyer to threaten to do something that he is in fact prohibited from doing.

That leaves in limbo the vast middle category of discretionary grievances. Thus, we need to address situations in which the lawyer's state of mind is below the level of "knowledge," or the question about the other lawyer's honesty, trustworthiness, or fitness as a lawyer is not "substantial," or both. May a lawyer ethically threaten to file a discretionary grievance against opposing counsel?

Does DR 7-105 Prohibit a Threat to File a Grievance?

Since the grievance is discretionary, the propriety of threatening to file the grievance depends on rules other than DR 1-103. The first rule that comes to mind is DR 7-105, which provides that a lawyer shall not "present, participate in presenting, or *threaten to present* criminal charges solely to gain an advantage in a civil matter." (Emphasis added.) The logic behind DR 7-105 is explained in EC 7-21 as follows:

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting 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 process tends to diminish public confidence in our legal system.

In Illinois State Bar Association Advisory Op. 87-07 (1988), after quoting EC 7-21, the Illinois ethics committee said:

The ... same reasoning should apply to threats of administrative or disciplinary action. The Attorney Registration and Disciplinary Commission were created to license and discipline lawyers. It is not intended to settle disputes between private parties. Threatening to use the lawyer disciplinary process to coerce adjustment of private claims would subvert that process as well as deter the target lawyer from asserting his or her legal rights in the civil action. Thus, the use of threats of disciplinary action to influence civil litigation would compromise both the disciplinary system and the civil adjudicative process.

Nassau County Bar Ethics Op. 98-12 (1998), addressing an inquiry from a divorce attorney who learned that opposing counsel had submitted fraudulent papers to the court about the husband's income, reached the same conclusion. The Committee said: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." Thus, the Committee concluded, a threat to file a grievance if the adversary attorney refused to offer a better settlement would violate DR 7-105.

But in N.Y. State 772 (2003), a well reasoned and well researched opinion, the Committee expressly rejected both Nassau 98-12 and Illinois 87-07. Observing that New York's DR 7-105(A) refers only to "criminal charges" and not to administrative or disciplinary charges, the N.Y. State Bar ethics committee concluded that a threat to file a complaint with disciplinary authorities "lies outside the scope of DR 7-105(A). ... In our view, DR 7-105(A) is limited in scope to actions related to 'criminal charges.'" Footnote 5 reinforced this point, stating that because filing a complaint with a disciplinary authority is not within the scope of DR 7-105(A), "the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds."

Which position is correct? Does DR 7-105 encompass threats to file disciplinary charges, or not?

The only New York court that has taken a position on this question is *Zubulake v. UBS Warburg LLC*, 2003 WL 21087136 (S.D.N.Y. 2003). There, the plaintiff in an employment discrimination action wanted to send certain deposition transcripts to the SEC. The defendant had designated the transcripts as "confidential," but the plaintiff argued that she was required to send the transcripts to the SEC to discharge her professional duty as a "member" of the NYSE to report securities law violations by another member of the exchange. The court held that the plaintiff was not a "member" of the exchange and therefore had no duty to report the defendant. The court then said:

In the absence of a clear professional duty, the only obvious reason for Zubulake to disclose this material to regulators is to gain leverage against UBS in this action. As a general rule, though, a party to civil litigation cannot threaten to instigate criminal charges solely to gain a strategic advantage. [A footnote dropped a "see" cite to EC 7-21 and DR 7-105.] The logic of this rule applies with equal force to threats of regulatory enforcement. The analogy is especially apt where, as here, regulatory enforcement can result in industry-wide "censure" and fines upward of one million dollars.

In my view, the *Zubulake* court is correct that the “logic” of DR 7-105 applies with equal force to threats of regulatory enforcement (which I take to include threats of disciplinary charges against lawyers) because such threats bear a close “analogy” to threats of criminal charges. But N.Y. State 772 is also correct that DR 7-105 refers only to “criminal” charges, not to administrative or *disciplinary charges*. Some jurisdictions have expressly extended their ethics rules to threatened disciplinary charges. For example, District of Columbia Rule 8.4(g) makes it professional misconduct for a lawyer to “[s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter,” and California Rule 5-100 provides that a lawyer “shall not threaten to present criminal, administrative, or *disciplinary charges* to obtain an advantage in a civil dispute.” (Emphasis added.) Since New York has not added a reference to disciplinary charges, it is correct to limit DR 7-105 to criminal charges.

Nevertheless, threats to file disciplinary charges are troubling. The *Zubulake* court’s analogy to DR 7-105 is apt because disciplinary charges are in many ways like criminal charges. Indeed, in *In re Ruffalo*, 390 U.S. 544, 551 (1968), a case mandating that states adhere to the requirements of due process in lawyer disciplinary proceedings, the United States Supreme Court labeled disciplinary proceedings against lawyers “quasi criminal.” That raises another question: Does threatening to file a discretionary grievance constitute conduct that is “prejudicial to the administration of justice”?

Does Threatening a Grievance Violate DR 1-102(A)(5)?

New York’s DR 1-102(A) (5) provides that it is “misconduct” for a lawyer to engage in “conduct that is prejudicial to the administration of justice.” Does threatening a grievance violate DR 1-102(A) (5)? In my view, there is no cut and dried answer to that question. Rather, the answer depends on all of the facts and circumstances.

ABA Formal Ethics Op. 92-363 (1992) sheds some light on the facts and circumstances that would render a threatened grievance prejudicial to the administration of justice. In 1983, when the ABA replaced the old ABA Model Rules of Professional Conduct (on which the New York Code of Professional Responsibility is based) with the ABA Model Rules of Professional Conduct, the ABA deliberately omitted the language of DR 7-105. Thereafter, in ABA 92-363, the ABA ethics committee addressed whether threatening to file criminal charges remained unethical in the absence of DR 7-105. The committee addressed “whether it is proper under the Model Rules for a lawyer to inform the opposing party that the criminal activity will be brought to the attention of the prosecuting authorities if her client’s civil claim is not satisfied.”

The Committee began its analysis by noting that the omission of any direct equivalent to DR 7-105 in the Model Rules of Professional Conduct was “deliberate.” The drafters believed that “extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically.” CHARLES WOLFRAM, *MODERN LEGAL ETHICS* (1986) § 13.5.5, at 718. One of the provisions in the ABA Model Rules that is broad enough to cover improper threats is Rule 8.4(d), which –in language identical to New York’s DR 1-102(A)(5) – makes it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Other provisions include Rule 8.4(b), which makes it professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness a lawyer in other respects,” and Rule 8.4(e), which makes it professional misconduct for a lawyer to “state or imply an ability to influence improperly a government agency or official”

After reviewing these provisions and Model Penal Code provisions relating to extortion, the ABA ethics committee concluded:

[A] threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules.

Conversely, restricting a lawyer's zeal on behalf of a client "is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent."

Are the ABA's guidelines regarding threatened criminal charges adequate to address the problem of threatened disciplinary charges? I do not think so. We are already assuming, for purposes of this article, that the threatened disciplinary charges are related to the representation at hand (i.e., they arise out of the opposing lawyer's conduct during the representation) and that the charges are well founded (i.e., strong enough not to be frivolous). And since the charges are not frivolous, I will also assume that threatening to file the charges does not constitute "an attempt to exert or suggest improper influence over the criminal process." But I do not think those three factors (related, well founded, and not suggesting improper influence) are enough to decide categorically whether threatening disciplinary charges is or is not prejudicial to the administration of justice. I would examine therefore additional factors that take into account the particular purpose and characteristics of the lawyer discipline system.

Additional Factors

The purpose of the lawyer discipline system is to protect the public against future harm by lawyers who are not ethically suited to practice law, not to benefit private clients. If private clients can obtain benefits by agreeing not to file legitimate grievances, the public loses out.

Yet, by hypothesis, we are dealing with grievances where the evidence is too weak or the misconduct is not serious enough to trigger a mandatory report. The original New York Code of Professional Responsibility, which was in place from 1970 to 1990, calculated the public interest differently, imposing a much broader duty to report. The original version of DR 1-103 provided simply: "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." In other words, lawyers used to be obligated to report every violation of the Code of Professional Responsibility by another lawyer. The current version of DR 1-103 is far narrower. As explained in Comment 3 to ABA Model Rule 8.3 (the ABA equivalent to DR 1-103): "If a lawyer were obligated to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable."

Moreover, an analogy to the criminal law suggests that not all threats are improper. Under N.Y. Penal Law §155.05(2)(e)(iv) threatening to accuse another person of a crime unless the target delivers money or property makes out a prima facie case of “extortion.” However, N.Y. Penal Law § 155.15(2) creates an affirmative defense to extortion if the person making the threat “reasonably believed the threatened charges to be true and that his sole purpose was to compel or induce the [threatened person] to take reasonable action to make good the wrong which was the subject of the threatened charge.”

In light of the limited scope of DR 1-103 and analogies in the criminal law, I would therefore assess the propriety of threatening a discretionary grievance by considering the following additional factors:

- Is the threat intended to redress harm or attempted harm to the client of the lawyer who is threatening to file a grievance? For example, was the opposing lawyer’s apparent misconduct intended to harm the client? If so, then the threat is more justifiable because threatening a grievance in the absence of redress is consistent with a lawyer’s zealous representation of the client. It is also consistent with the affirmative defense to extortion that allows threats whose only purpose is to compel the threatened person to “take reasonable action to make good the wrong.”
- Is the threat intended to put a stop to ongoing unethical conduct, or merely to exact a price for misconduct already completed? A threat that is intended to put a stop to future misconduct is more justifiable because it is more consistent with the purpose of protecting the public against future harm. (In Scenario # 1 at the beginning of this article, demanding a \$1 million increase in the purchase price to avoid a report of past conduct strikes me as patently unethical because it is intended to penalize opposing counsel rather than to redress the wrong. In Scenario # 2, in contrast, threatening a grievance and monetary sanctions unless the defendant desists from any further use of false evidence strikes me as ethical because it is aimed primarily to prevent or remedy future misconduct.)
- If the lawyer making the threat has “knowledge” of opposing counsel’s misconduct, how serious is that misconduct? In particular, does the misconduct raise a substantial question as to the opposing lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects? If so, then the public interest in reporting is relatively greater, and merely threatening to report is harder to justify. In other words, the public has a greater interest in having lawyers report a mere good faith belief about serious misconduct than in having lawyers report knowledge of minor misconduct.
- Is the threat intended to give the opposing lawyer an opportunity to explain why the alleged misconduct is in fact ethical, or did not occur? If so, the threat would nearly always be justifiable because filing a grievance precipitously may waste the limited resources of the discipline system and unfairly damage opposing counsel’s reputation.
- Finally, does the threat constitute “extortion” or a similar crime? If so, then the threat is certainly improper and prejudicial to the administration of justice.

Conclusion

Extremes are relatively easy to address. We can say with confidence that it is improper to threaten to file a grievance without a good faith belief or suspicion that misconduct has occurred, and that it is equally improper to threaten to file a mandatory grievance even if misconduct has occurred, because a mandatory grievance must be filed no matter how opposing counsel responds to the threat. But it is difficult to craft a single, invariable rule to measure threats to file discretionary grievances. The propriety of such a threat depends on all of the facts and circumstances, in light of an understanding of the limited reach of DR 1-103, the purposes of the lawyer discipline system, and a lawyer's obligation to represent a client zealously within the bounds of the law.

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