THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2015-5: WHETHER AN ATTORNEY MAY THREATEN TO FILE A DISCIPLINARY COMPLAINT AGAINST ANOTHER LAWYER

TOPIC: Threatening to file a disciplinary complaint against another lawyer

DIGEST: An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules of Professional Conduct (the "New York Rules" or "Rules"). Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.

RULES: 1.6, 3.1, 3.4(a)(6), 3.4(e), 4.4(a), 8.3(a), 8.4(a), 8.4(b), 8.4(c), 8.4(d) or 8.4(h)

QUESTION: May an attorney threaten to file a disciplinary complaint against another lawyer?

OPINION:

I. Introduction

According to the Scope of the New York Rules, the purpose of the Rules is "to provide a framework for the ethical practice of law." Scope, at [8]. Compliance with the Rules "depends primarily on understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, where necessary, upon enforcement through disciplinary proceedings." *Id.* One of several tools that the disciplinary system relies on for enforcement of the Rules is the mandatory reporting obligation, which requires lawyers to report certain types of ethical violations. *See* R. 8.3(a) (requiring attorneys to report another lawyer's "violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer"). Short of reporting unethical conduct, however, many attorneys are uncertain of their obligations when they perceive that another lawyer has violated the disciplinary rules. One question that continues to plague many attorneys is whether – and under what circumstances – they are ethically permitted to *threaten* another lawyer with disciplinary charges. Here, we use the term "threat" to mean a "statement saying you will be harmed if you do not do what someone wants you to do." Merriam-Webster Dictionary, at http://www.merriam-webster.com/dictionary/threat. In our view, merely advising

another lawyer that his conduct violates a disciplinary rule or could subject them to disciplinary action does not constitute a "threat" unless it is accompanied by a statement that you intend to file disciplinary charges unless the other lawyer complies with a particular demand.

Rule 3.4(e) arguably comes closest to addressing this issue, as it prohibits lawyers from threatening "to present criminal charges solely to obtain an advantage in a civil matter." It is silent, however, with respect to threatening disciplinary charges. Accordingly, as discussed below, we conclude that Rule 3.4(e) does not expressly prohibit disciplinary threats. Nevertheless, an attorney who contemplates making such a threat should carefully consider whether doing so violates other Rules. In this opinion, we discuss several other Rules that may apply to threats of disciplinary charges, depending on the circumstances. Although we have attempted to address a variety of scenarios in which disciplinary threats arise, there may be situations that implicate other Rules, which are not addressed in this opinion.

II. Rule 3.4(e) Does Not Apply to Threats to File Disciplinary Grievances

Rule 3.4(e) states: "A lawyer shall not . . . present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Comment [5] elucidates the Rule further:

> The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

Several states do have rules that explicitly prohibit threatening to file a disciplinary grievance against an adversary to gain an advantage in a civil matter. In California, for example, a lawyer "shall not threaten to present *criminal, administrative or disciplinary charges* to obtain an advantage in a civil dispute." California Rules of Prof'l Conduct, R. 5-100(A) (emphasis added). District of Columbia also prohibits a lawyer from "seek[ing] or threaten[ing] to seek criminal charges *or disciplinary charges* solely to obtain an advantage in a civil matter." D.C. Rules of Prof'l Conduct, R. 8.4(g) (emphasis added).[1] Unlike these states, New York's corresponding rule prohibits only a

[1] Other states have similar rules. *See, e.g.*, Louisiana Rules of Prof'l Conduct, R. 8.4(g) ("It is professional misconduct for a lawyer to . . . [t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."); Colorado Rules of Prof'l Conduct, R. 4.5 ("A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter."); Ohio Rules of Prof'l Conduct, R. 1.2(e) ("Unless otherwise required by law,

threat to file criminal charges and omits any reference to disciplinary charges. Further, in an opinion analyzing the predecessor of Rule 3.4(e), the Committee on Professional Ethics for the New York State Bar Association ("NYSBA") declined to extend the rule to threats of disciplinary charges. *See* NYSBA Ethics Op. 772 (2003) (discussing former DR 7-105(A) of the New York Code of Professional Responsibility (the "Code")). Opinion 772 examined whether a lawyer could ethically threaten a stockbroker with a disciplinary complaint filed with a self-regulatory body unless he returned funds wrongfully taken from a client. The opinion states:

> In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions . . . .
>
> Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A).

Id. Therefore, according to the opinion, "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*." *Id.* n.4 (emphasis added). We agree that Rule 3.4(e) does not extend to the threat of disciplinary charges.

This view is not without contrary authority. The Nassau County Bar Association Committee on Professional Ethics ("Nassau") concluded that DR 7-105 applied to threats to file disciplinary charges. *See* Nassau Ethics Op. 98-12 (1998) ("An actual threat to file a grievance if the adversary attorney would not offer a better settlement would . . . violate DR 7-105."). While we agree that this conduct may violate other New York Rules, as discussed below, we do not believe it violates Rule 3.4(e), the successor to DR 7-105. Likewise, in *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290, 293 (S.D.N.Y. 2003), Judge Scheindlin extended the application of DR 7-105(A) by analogy to "threats of regulatory enforcement," noting that the analogy was "especially apt" where "regulatory enforcement can result in industry wide 'censure' and fines upward of one million dollars." In our view, however, the plain language of Rule 3.4(e) should govern and we decline to extend the rule by analogy to threats of disciplinary action against attorneys. Our conclusion does not mean, however, that lawyers are free to threaten disciplinary charges with impunity. As discussed below, other ethical rules impose limits on making such threats.

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a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.").

III. An Attorney May Not Threaten to File a Disciplinary Complaint Where There is a Mandatory Duty to Report the Other Lawyer's Misconduct

Under Rule 8.3(a), New York attorneys are required to report certain misconduct by other lawyers. Specifically, "[a] lawyer who *knows* 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* shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." R. 8.3(a) (emphasis added).[2] The policy behind this mandatory reporting requirement is to foster an effective system of self-regulation by lawyers. As explained in the Comments, "[s]elf-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." R. 8.3, Cmt [1]. Even an "apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." *Id.* Further, "[r]eporting a violation is especially important where the victim is unlikely to discover the offense." *Id.*

Before concluding that there is a mandatory duty to report, an attorney must "know" that another lawyer has violated the Rules. R. 8.3(a). The term "knows" means to have "actual knowledge of the fact in question." R. 1.0(k). The attorney need not be an eyewitness to the conduct, however, because "knowledge can be inferred from the circumstances." *Id.* In addition, not every violation triggers a duty to report – only those violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a); *see also* ABA Ethics Op. 94-383 (1994) (noting that the "Rules do not require the reporting of every violation of the Rules"). Subjecting every rule violation to a mandatory report would be unworkable. Not only would every insignificant or inadvertent violation be a reportable offense, but the very failure to report such violations would itself be a reportable offense, potentially creating an endless loop of reportable violations. Consequently, Rule 8.3(a) "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." R. 8.3, Cmt [3]. For example, a lawyer who believes an attorney on the opposite side of a real estate transaction is charging an unreasonable fee is not necessarily required to report the violation. *See* NYSBA Ethics Op. 1004 (2014). Reporting is required only if the lawyer concludes "under all circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty." *Id.*

Once an attorney concludes that she has a mandatory duty under Rule 8.3(a) to report another lawyer's conduct, failing to report the misconduct would itself violate Rule 8.4(a), which prohibits a lawyer from "violat[ing] or attempt[ing] to violate the Rules of Professional Conduct." ABA Ethics Op. 93-383. By extension, *threatening* to file a

[2] There are several exceptions and exclusions to this reporting requirement. Reporting is not required if the information is protected by Rule 1.6 (confidentiality) or was gained during participation in a "bona fide lawyer assistance program." R. 8.3(c). In addition, the "duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question." R. 8.3, Cmt. [4]. Rule 8.3(a), which refers only to the misconduct of "another lawyer," does not require a lawyer to report his or her own misconduct or the improper conduct of a nonlawyer.

disciplinary complaint unless the other lawyer accedes to some demand would, likewise, violate Rule 8.4(a). Even if the attorney who made the threat ultimately reports the other lawyer's conduct (perhaps because the lawyer does not succumb to the threat) she would still be in violation of Rule 8.4(a), which prohibits a lawyer from attempting to violate the New York Rules. That said, before making a report, an attorney is permitted to confront her adversary with evidence of misconduct to confirm that an ethical violation has occurred. *See* Roy D. Simon, "Threatening to File Grievance Against Opposing Counsel," New York Legal Ethics Reporter (Originally published in NYPRR, Nov. 2005), available at http://www.newyorklegalethics.com/threatening-to-file-grievance-against-opposing-counsel/ [hereinafter, Simon, "Threatening to File Grievance"]. As Professor Simon explains, "a lawyer has the right . . . to notify opposing counsel, as a courtesy, of the intention to file the grievance." *Id.* Further, the attorney may "confront opposing counsel with evidence of misconduct" and may "ask whether opposing counsel denies the misconduct or can cast doubt on whether it occurred." *Id.* What the attorney may not do is condition the handling of a mandatory grievance on compliance with a particular demand. So, if after confronting the opposing lawyer with evidence of the misconduct, the attorney is convinced that the other lawyer in fact committed the misconduct, it would be improper, in the words of Professor Simon, to "invit[e] the opposing lawyer to bargain away the grievance." *Id.*

Example: Defendant's lawyer submits a brief in support of his motion to dismiss, which cites several fictitious judicial opinions. Plaintiff's counsel contacts defendant's lawyer and presents him with proof that the citations are fictitious. Defendant's lawyer insists that the false citations are valid and not an inadvertent mistake. Assuming Plaintiff's counsel concludes that such conduct triggers a mandatory duty to report, she may not threaten to report the violation unless the motion is withdrawn.

IV. Threatening to File a Disciplinary Grievance Against Another Lawyer May Violate Other Rules

As discussed above, attorneys are not required to report every ethical violation. For example, an attorney is not required to report conduct that she merely suspects – but does not "know" – has been committed. Nor is she required to report conduct that does not raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a). Even where an attorney is not required to report unethical conduct, however, she is *permitted* to report such conduct, subject to confidentiality restrictions and provided she has a "good faith belief of suspicion that misconduct has been committed." *See* NYSBA Ethics Op. 635 (1992). Professor Simon refers to this type of violation as a "discretionary grievance." Simon, "Threatening to File Grievance," *supra*.

The New York Rules do not expressly prohibit attorneys from threatening to report discretionary grievances. Depending on the circumstances, such threats may be consistent with a disciplinary system that is based, at least in part, on self-regulation. For example, if an attorney suspects another lawyer is unaware that his conduct violates the Rules, it may be appropriate to educate the lawyer about the violation and give him an opportunity to change his conduct, before filing a disciplinary violation. In addition, it

may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court.

Example: A personal injury plaintiff's lawyer receives a settlement payment on behalf of a client. A dispute arises between the plaintiff's lawyer and client concerning the amount of the lawyer's fee. Instead of retaining only the amount of the disputed fee in his trust account, as permitted by Rule 1.15(b)(4), the plaintiff's lawyer withholds the entire settlement payment. The client then hires a second attorney to assist in recouping the client's share of the settlement funds. The new attorney sends a letter to the plaintiff's lawyer demanding return of the undisputed portion of the settlement funds and stating "if you refuse to return the funds, you will be in violation of Rule 1.15 of the New York Rules of Professional Conduct, and we will report you to the appropriate disciplinary authority unless the funds are disbursed." In our view, it is permissible to include this language in the demand letter. At this stage, the attorney does not "know" that the plaintiff's lawyer's retention of the funds "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," as specified in Rule 8.3(a). The plaintiff's lawyer may simply misunderstand his obligations under Rule 1.15 and may genuinely believe he has a right to withhold the funds until the fee dispute is resolved. If the attorney subsequently concludes, however, that the plaintiff's lawyer is intentionally and improperly withholding the client's funds, that would likely trigger a duty to report the violation.

We recognize that not all lawyers who threaten to file disciplinary complaints do so for laudable reasons. Lawyers should not interpret the Committee's opinion as an unfettered license to threaten their adversaries with disciplinary violations. Given the opportunity for abuse, we emphasize that the right to threaten a disciplinary grievance is subject to important limitations, which are discussed below.

A. Before Threatening to File a Disciplinary Complaint, an Attorney Must Have a Good Faith Belief That the Other Lawyer is Engaged in Unethical Conduct

An attorney must not threaten to file disciplinary charges against another lawyer absent a "good faith belief" that the lawyer is engaged in conduct that has violated or will violate a disciplinary rule. NYSBA Ethics Op. 635 (1992) ("[I]t would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation "without having a reasonable basis for doing so . . . ."). Such baseless threats would violate multiple provisions of Rule 8.4. *See, e.g.*, R. 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"); R. 8.4(c) (prohibiting "conduct that is prejudicial to the administration of justice"); R. 8.4(h) (prohibiting "other conduct that adversely reflects on the lawyer's fitness as a lawyer").

Example: Plaintiff's counsel sends a letter to Defendant's counsel stating that she has been gravely injured in a car accident and requesting adjournment of an upcoming hearing date. Without taking steps to verify the accuracy of Plaintiff's statements,

Defendant's counsel accuses Plaintiff's counsel of lying about her injuries and threatens to file a disciplinary complaint against her if she seeks an adjournment from the court. Unless Defendant's counsel has a good faith basis to believe that Plaintiff's counsel has lied about the car accident or misrepresented the extent of her injuries, his threats are improper.

Given that any disciplinary threat must be based on a good faith belief, it necessarily follows that a lawyer may not make a threat she *knows* to be false. Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." This prohibition includes threatening to file a disciplinary grievance that is based on a false statement of fact or law. Such a threat would also violate Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

Example (false statement of fact): After a long, acrimonious negotiation over a multi-million dollar corporate acquisition, the parties finally come to terms. When the buyer's lawyer delivers the execution copy of the purchase agreement, however, the seller's attorney falsely accuses the buyer's lawyer of altering some of the negotiated language. In reality, the seller has simply had a change of heart and wants more money. The seller's attorney threatens to file a disciplinary complaint against the buyer's lawyer unless the purchase price is increased by $1 million. This threat violates Rule 4.1 because it is based on a false statement of fact: that the buyer's lawyer altered the negotiated terms.

Example (false statement of law): A class action lawyer creates a website aimed at attracting clients for a lawsuit against a large pharmaceutical company. The company's in-house lawyer, under pressure from the CEO to "do something about that lawyer," sends a letter threatening to report the class action lawyer for "multiple egregious violations of the advertising and solicitation rules" if he does not take down his website. In fact, the website complies with the advertising rules. In our view, this threat violates Rule 4.1 because it is based on a false statement of the law regulating lawyer advertising.

In addition, making such a threat in a civil or criminal proceeding may also violate Rule 3.1(a), which states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." According to the Rule, "[a] lawyer's conduct is 'frivolous' if," *inter alia*, "the lawyer knowingly asserts material factual statements that are false" or "the conduct . . . serves merely to harass or maliciously injure another." R. 3.1(b).

B. An Attorney Must Not Make a Threat That Has No Substantial Purpose Other Than to Embarrass or Harm Another Person

Like Rule 3.1(b), Rule 4.4(a) serves to curb misconduct that is aimed at harming third parties. Unlike Rule 3.1(b), which applies only in the litigation context, Rule 4.4(a) applies to all types of representations. Rule 4.4(a) states, *inter alia*, "[i]n representing a

client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Threatening to file a disciplinary complaint against an adversary in order to gain a strategic advantage violates this rule, if the threat serves no substantial purpose other than to embarrass or harm the other lawyer or his client.

Example: An attorney who represents several plaintiffs in a personal injury lawsuit discovers that a private investigator hired by defense counsel has friended the plaintiffs on social media in order to obtain evidence that their injuries are not as serious as claimed. Although this conduct violates Rule 4.2 ("Communication with Person Represented by Counsel") and Rule 8.4(a) (violating the rules "through the acts of another"), it is not necessarily a mandatory reporting violation. Plaintiffs' attorney threatens to report defense counsel's conduct to the court unless the defendant settles the case on terms the defendant is otherwise unwilling to accept. This threat may harm both the defense lawyer and his client because it could create a conflict of interest between them and interfere with the sanctity of their attorney-client relationship. The defense lawyer may face pressure to recommend a settlement that he believes is against the client's interests in order to protect the lawyer's personal and professional interests. We do not believe that the goals of the disciplinary rules are served when an attorney uses a disciplinary threat improperly to create a conflict of interest between another lawyer and his client. There are legitimate options available to the plaintiffs' attorney to address the misconduct, including seeking sanctions or disqualification.

C. An Attorney May Not Make a Threat in Violation of Substantive Law

Certain types of threats may violate the law. For example, New York Penal Law prohibits the taking of another person's property by "extortion." The statute provides, *inter alia*:

> A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or . . . Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

N.Y. PEN. LAW § 155.05(1)(e)(v), (ix).

Under certain circumstances, threatening to file a disciplinary complaint may violate New York's law against extortion or other criminal statutes.[3] In such cases, the

[3] We reference New York's extortion statute merely as an example of the type of law that might be violated by threats of disciplinary action. Because the Committee has no jurisdiction to interpret substantive law, we offer no opinion on whether a particular threat would violate Section 155.05 or any substantive law.

lawyer's conduct would also violate Rule 3.4(a)(6) ("A lawyer shall not . . . knowingly engage in other illegal conduct") and multiple subsections of Rule 8.4, including Rule 8.4(b) (prohibiting "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"), Rule 8.4(d) (prohibiting "conduct that is prejudicial to the administration of justice"), and Rule 8.4(h) (prohibiting "conduct that adversely reflects on the lawyer's fitness as a lawyer").

V. Conclusion

An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules. Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.