



Professional Ethics Committee

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INFORMAL OPINION 15-01

(Revising Informal Opinion 93-23)

Lawyer May Not Properly Condition Settlement of a Civil Matter on Agreement
Not to Report Professional Misconduct

You have presented the following facts concerning your representation of a client in a civil matter: You instituted a civil action in superior court against an attorney and his professional corporation on behalf of a former client of the attorney. The civil action sought money damages because of an alleged improper fee splitting arrangement in personal injury cases that the attorney referred to other counsel for disposition. You alleged in the civil complaint that the acts or omissions of the defendant attorney constituted not only civil wrongs but, arguably, breaches of professional responsibility. In a similar case you had brought against the same defendant attorney, on behalf of another former client of that attorney, the lawyer's defense counsel required a confidentiality agreement and an agreement not to bring a grievance proceeding as part of the settlement terms of the earlier action. In the current case, as part of an overall settlement proposal you initiated, you offered "not to bring professional discipline" against the attorney and to keep the terms of the settlement confidential. You have asked for an opinion on the applicability of Rule 3.4(7) of the Rules of Professional Conduct, but Rule 8.3 addresses the situation more precisely.

Rule 8.3(a) provides, in pertinent part, that a "lawyer may not condition settlement of a

civil dispute involving allegations of impropriety on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.” In Informal Opinion 97-13, the Committee responded to a similar inquiry concerning the propriety of an agreement not to file a grievance. There, Attorney B drafted a settlement agreement that included a provision that Attorney B’s client would not grieve Attorney A (Attorney B’s client was a former client of Attorney A and had threatened to grieve Attorney A). The Committee concluded as follows:

The rules and the cases and opinions indicate that the result does not depend on whether the agreement to forego an ethics complaint was required by Lawyer A or was proffered by Lawyer B. Such a distinction does not appear to be warranted, especially in view of the second sentence in Rule 8.3(a), which provides "a lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority." Nor is there any indication that there would be a different result if Lawyer A is convinced that the threatened grievance is invalid, frivolous, harassing or otherwise unjustified. An exception to the general rule based upon the respondent attorney's opinion of the validity of a threatened grievance would eviscerate the therapeutic goal of the grievance procedure.

The prohibition on non-reporting provisions in settlement agreements is consistent with another directive of Rule 8.3(a):

A lawyer having knowledge 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 in other respects, shall inform the appropriate disciplinary authority.

A lawyer with a sufficient knowledge of professional misconduct to initiate a civil action implicating another lawyer’s honesty, fitness or trustworthiness may well have sufficient knowledge to trigger his or her obligation under Rule 8.3(a) to inform the appropriate professional authority of that misconduct. If the reporting obligation under Rule 8.3(a) is triggered, the attorney cannot ethically propose that as part of the settlement he or she will agree not to report the misconduct.

The Comment to Rule 8.3 provides that "[a] measure of judgment is . . . required in complying with the provisions of this Rule." For instance, a lawyer may properly elect not to report misconduct if doing so would require unauthorized disclosure of information protected by Rule 1.6, or if the lawyer learns of the misconduct only through hearsay and without direct evidence. Similarly, not every violation of the Rules of Professional Conduct is subject to the reporting obligation of Rule 8.3(a), only those violations raising "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

While the non-reporting settlement term you propose violates Rule 8.3(a), it is not a violation of Rule 3.4(7). That Rule provides that "A lawyer shall not: . . . (7) Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

We understand that an offer not to file a grievance complaint if a civil case is settled could be viewed as an implied threat to do so if the case is not settled. But Rule 3.4(7) is not applicable because the prohibition of that Rule is limited to a prohibition on threatening criminal charges. If the Judges of the Superior Court had intended the prohibition to reach threats of disciplinary action, they could easily have included such language.

While nothing in Rule 3.4(7) suggests that it may be read more broadly than its express terms provide, a threat to initiate a grievance may implicate other Rules. As the American Bar Association's Standing Committee on Ethics and Professional Conduct concluded, "[t]he Model Rules have not expressly prohibited the use of a threat of disciplinary charges to obtain an advantage in a civil case, but a lawyer considering such a threat must comply with the Model Rules intended to protect the integrity of the judicial process and the disciplinary process, and with the criminal law." ABA Standing Committee on Ethics and Professional Conduct, Formal

Opinion 94-383 (referencing Rules 3.1, 4.1, 4.4 and law of criminal extortion).

THE COMMITTEE ON PROFESSIONAL ETHICS

BY 

Marcy Tench Stovall, Chair