

You have advised that an attorney, in all his pleadings and appellate briefs, regularly, routinely and invariably accuses his opposing counsel of dishonesty, crime and ethical improprieties. You indicate that these charges are always made to the trial and appellate courts in the course of litigation and never to the Virginia State Bar. You further indicate that the attorney does not await the conclusion of the litigation to make any such charges.

You have asked that the Committee opine as to the propriety of opposing counsel to this attorney filing disciplinary complaints against the attorney before the conclusion of the litigation without themselves violating the controlling disciplinary rule. Second, you have asked the Committee to consider whether opposing counsel is obligated to file such complaints. Finally, you have asked if the answer to either question will be affected if the particular underlying litigation is such that there is no prospect of its ending at any foreseeable time because of the ability of the attorney to continue filing frivolous motions and appeals.

The appropriate and controlling rules relevant to the issues you have raised are DR:7-102(A)(1) which mandates, in pertinent part, that, in his representation of a client, a lawyer shall not assert a position, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another; DR:7-102(A)(8) which requires that a lawyer not knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule; DR:7-104(A) which requires that a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter; and DR:1-103(A) which mandates that a lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR:4-101.

Further guidance is available in Ethical Consideration 7-18 [EC:7-18] which indicates that “[t]hreatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process.” By inference based upon the language of DR:7-104(A) such consideration would be equally applicable to a threat of the use of the disciplinary process.

The Committee is of the opinion that, prior to any action being taken by opposing counsel, three factual determinations must be made: (a) whether any basis exists for the allegations of dishonesty, crime and ethical improprieties; (b) if such a basis exists, whether the threat is being made *solely* to obtain an advantage in a civil matter; and (c) if a basis exists and the threat is being made solely for such purpose, whether such a violation of the Disciplinary Rules raises a substantial question as to the lawyer's fitness to practice law in other respects. The committee is of the view that, as used in DR:1-103(A), the word “substantial” refers to the seriousness of the possible offense and not to the quantum of evidence of which the (complaining) lawyer is aware. Furthermore, the Committee believes that the “information” possessed by the lawyer should be based on a substantial degree of certainty and not on rumor or suspicion. (See Maine Legal Ethics Op. 100 (October 4, 1989)) Where the facts as you have presented them are subject to

multiple interpretations, however, such determinations must be made by a finder of fact and as such are beyond the purview of this Committee.

Assuming for purposes of this opinion that no basis exists for the attorney's allegations of dishonesty, crime and ethical improprieties on the part of opposing counsel, the committee is of the opinion that such allegations may be violative of DR:7-104(A) if made solely in an attempt to obtain an advantage in a civil matter. The committee is further of the opinion that an extensive and prolonged pattern of such allegations, as you have described them, would constitute improper conduct under DR:7-102(A)(1) and may also be violative of DR:7-102(A)(8), whether or not such threats were being made solely to obtain an advantage in a civil matter.

The Committee is of the opinion that, under most circumstances, the Code of Professional Responsibility does not mandate awaiting the conclusion of litigation prior to the filing of a disciplinary complaint against opposing counsel. A singular exception, however, would exist if the filing of such a complaint would constitute the attorney's intentionally prejudicing or damaging of his client during the course of the professional relationship. See DR:7-101(A)(3). Rather, the Committee believes that, should the attorney conclude both that opposing counsel's conduct is in fact improper and that the impropriety raises a substantial question as to his fitness to practice law in other respects, the attorney is obligated to report such misconduct without any unnecessary delay. Such timely reporting might be particularly urgent if the attorney's conduct was in fact serving to improperly delay a trial in violation of DR:7-102(A)(1).

While your inquiry deals with the propriety of the actions of counsel who is being accused of dishonesty, crime and ethical improprieties in filing a complaint against opposing counsel who is making such allegations, the committee cautions that it would be equally improper for the accused counsel to convey any inferences threatening any disciplinary action in an effort to gain an advantage. (See Wisconsin Opinion E-89-16 (Sept. 8, 1989)) Finally, the committee directs your attention to the possibility of serious consequences for failing to report lawyer misconduct. (See, *e.g.*, *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988))

Committee Opinion
April 20, 1990