

IOWA ETHICS OPINION

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WRONGFULLY ACCUSING A LAWYER OF UNETHICAL CONDUCT, FRAUD, DISHONESTY OR DECEIT TO GAIN A TACTICAL ADVANTAGE VIOLATES IA. R. PROF'L C. 32:8.4(C).



IA ETHICS OP 14-02

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Ethics and Practice Guidelines Committee¹

Is it unethical to call a fellow lawyer unethical? Recently the Committee has received inquiries from all quarters of the bar – criminal prosecution and defense; civil plaintiff and defense – about the propriety of calling opposing counsel’s conduct unethical. Sadly, some have said that the threat of an ethical complaint has been used to coerce action.

The Committee recognizes that emotions sometime get the better of counsel when they are in the heat of battle. But there are limits and experienced counsel know the line. The purpose of this “back to basics” opinion is to give the bar a closer focus on the line and the ability to discern real unethical behavior from that which merely reflects professional differences.

The Accusation of Unethical Conduct

The Iowa legal profession takes great pride in it being self-policing. It is one of the three hallmarks of being a profession. Consequently when one member of the profession accuses another of being unethical the mere fact of the allegation alone is taken seriously. Iowa R. Prof'l Conduct 32:8.3 mandates that:

¹The Iowa State Bar Association Committee on Ethics and Practice Guidelines: Nick Critelli, Chair David Phipps, Maureen Heffernan, J.C. Salvo, Matthew Hartman McKinney, David Beckman, Sam Langholz, Stan Thompson, Andrew Heiting-Doane, Paula L Roby, Andrew C Abbott, Art Cady, Sara Laughlin; ex officio Joe Feller, Pres ISBA, Dwight Dinkla, Ex. Dir ISBA.

(a) A lawyer who knows that another lawyer has committed a violation of the Iowa Rules of Professional Conduct shall inform the appropriate professional authority.

The rule is mandatory, not discretionary. One who makes the allegation must report it to the Iowa Supreme Court Attorney Disciplinary Board. Failure to do so is itself a violation of Rule 32:8.4(a)

The Allegation of Fraud, Dishonesty and Deceit

Like allegations of unethical conduct, assertions of fraud, dishonesty and deceit made by one lawyer against another are serious. Rule 32:8.4(c) provides:

“It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;”

The asserting lawyer has an obligation under Rule 32:8.to report the conduct to the Iowa Attorney Disciplinary Board. Consequently these allegations should never be made to obtain a tactical advantage or to coerce action.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has come to a similar conclusion in ABA Formal Opinion 94-383: “Use of Threatened Disciplinary Complaint Against Opposing Counsel “:

“A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.”

The Warning of a Potential Ethical Violation

To escape the duty to report under Rule 32:8.3 and avoid their Rule 32:8.4 violation for failure to report, sometimes counsel employ a tactic of “warning”

opposing counsel of the “potential” for ethical conduct. When the warning is issued as a threat, or with the ulterior motive to influence or coerce opposing counsel to do or do not do a particular act that the accuser finds unacceptable, it violates Iowa Supreme Court Rule 33: 1(1):

A lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner.

It also violates Iowa Supreme Court Rule 32:1(3):

Conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

In Sec. Nat’l Bank of Sioux City v. Abbott Labs., 2014 U.S. Dist. LEXIS 102228, 2014 WL 3704277 (N.D. Iowa July 28, 2014), Bennett, J. noted, at fn 8:

“Iowa trial lawyers have a long and storied tradition and culture of civility that is first taught at the state's two law schools, the University of Iowa College of Law and the Drake University Law School. I know this because I have taught and lectured at both of these outstanding law schools that produce the bulk of Iowa lawyers. Civility is then taken very seriously, nourished and lead by the Iowa Supreme Court, and continually reinforced by the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, and all of the other legal organizations in the state, as well as senior members of the bar, law firm partners from large to small firms, and solo practitioners across the state. There is great pride in being an Iowa lawyer, and describing someone as an Iowa lawyer almost always connotes that lawyer's high commitment to civility and professionalism. Of course, there are stinkers in the Iowa bar, but they are few and far between.”

Wrongfully accusing a fellow lawyer of unethical conduct, fraud, dishonesty or deceit to gain advantage is the antithesis of professionalism.

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