INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 1 OF 1985

Facts

Attorney "A" represents an Amish client who has a religious objection to filing a lawsuit. This client sold forty (40) acres of unimproved real estate on contract to an individual who has filed bankruptcy. The contract buyer has remained in possession of the real estate and has refused to make payments. Attorney "A" has been hired to pursue litigation. Client, as a result of his religious beliefs, would like to deed real estate to Attorney "A" so client would not be the plaintiff in the foreclosure action. Attorney "A" would be paid for his services in handling the foreclosure litigation.

Inquiry

Is it permissible for an attorney to undertake to become a plaintiff in a cause of action for which he is also acting as counsel of record? Alternatively, could attorney solicit a third party on client's behalf to serve as a trustee of a land trust for purpose of bringing the cause of action in client's behalf?

Response

If a deed is given by a client to an attorney to advance prospective litigation, this would suggest on its face that the lawyer has an interest in the outcome of the litigation. Canon 5 prohibits this situation except as an attorney may have a lien for fees. DR 5-103 provides that:

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(See also EC 5-1, EC 5-2 and EC 5-3.)

However, Attorney "A" has also suggested that a land trust be created for the purpose of bringing the foreclosure action. The committee believes that the attorney may serve as trustee of a land trust created for the purpose of maintaining the foreclosure action. Obviously, the attorney is responsible for
disclosing the implications of this arrangement to his client, and must comply with his fiduciary duties as trustee.

The only problem the committee envisions with this arrangement is the possibility that the attorney may become a witness in the litigation. Therefore, the attorney should be guided by the provisions contained in DR 5-101 and DR 5-102. Under the facts recited in this opinion, the committee believes it is not obvious that the attorney would become a witness, but at such time as the attorney knows, or it becomes obvious he may be called as a witness, DR 5-102 should be consulted.

Conclusion

It is this committee's considered opinion that the attorney's conduct, should he acquire an interest in the real estate which is the subject of litigation and file a lawsuit in his own name, would place the attorney squarely within the prohibitions listed in DR 5-101, DR 5-102 and DR 5-103. Furthermore, the attorney may serve as trustee of the land trust with the caveat that he not run afoul of the attorney as witness provisions of DR 5-102.
The Committee has been presented with the question of whether an advertisement from the South Bend telephone directory is ethical.

Assuming the representations are accurate, e.g., that divorces are furnished by the persons listed and that they are all licensed lawyers, the advertisement would appear to fit squarely within DR 2-101 and EC 2-9 and 2-10.

Therefore, the Committee sees no problem with the advertisement.
A non-profit, national association of Christian attorneys (the "Association") proposes to establish a lawyer referral service for the benefit of mission agencies, missionaries, and their dependents throughout the United States. The existence of this lawyer referral service will be publicized throughout the relevant missionary community. Participating attorneys will be drawn from the members of the Association who indicate a willingness to become involved. There is no fee charged by the Association in order to be a participating attorney. Upon being contacted, the Association will provide the inquirer with the names, addresses, and telephone numbers of the participating attorneys in the relevant geographic area. When a potential client contacts a participating attorney, it is expected that any initial consultation by the participating attorney will be undertaken on a non-fee basis. Thereafter, the charges for any legal services provided would be as negotiated between the individual attorney and the client.

The regular membership of the Association is limited to attorneys, judges and law students. There is a special associate membership category for lay persons. Associate membership entitles the associate member to receive Association publications and other information regarding Association activities, but does not entitle the associate member to participate in the governance of the Association.

The question presented here is whether participation by attorneys in the proposed lawyer referral service is proper as coming within the scope of DR 2-103(C). DR 2-103(C) of the Code of Professional Responsibility provides:

A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association or cooperate with any other qualified legal assistance organization.

Clearly, if the lawyer referral service is "operated, sponsored, or approved by a bar association," then participation is proper. This depends upon whether or not the Association qualifies as a bar association. The definition of a bar association found at the end of the Code of Professional Responsibility provides no guidance.

In discussing an inquiry precisely like the instant one, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association has concluded, without discussion, that a referral service like that described here is not "operated, sponsored, or approved by a bar association."
Informal Opinion 85-1512. With recent concerns related to the antitrust implications of professional association activities, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); Wilk v. American Medical Association, 719 F.2d 207 (7th Cir. 1983), it is questionable whether the term "bar association" can be restricted to long-established, majority bar associations like the American Bar Association and the Indiana State Bar Association. Inasmuch as this inquiry can be resolved on other grounds, the definitional parameters of a "bar association" need not detain us.

The next question is whether participation in the referral service meets the criteria for cooperating with "any other qualified legal assistance organization" under DR 2-103(C). The existing Code of Professional Responsibility is silent regarding what constitutes a "qualified legal assistance organization." Prior to the January 14, 1985 revisions, the Code provided much more detail in identifying those organizations coming within the scope of a "qualified legal assistance organization," with whose legal activities a lawyer could ethically cooperate. DR 2-103(D)(1) through (4), in effect between January 1, 1978 and January 13, 1984, described the organization's constituting "qualified legal assistance organizations."

It is our opinion that the brief reference in the current DR 2-103(C) to "qualified legal assistance organizations" was not intended to disapprove of the listing of organizations in the old DR 2-103(D) as being, at least, exemplary of "qualified legal assistance organizations." Rather, old DR 2-103(D) may be examined to provide some guidance as to the types of organizations falling within the category of "qualified legal assistance organizations."

The instant Association is not within the scope of old DR 2-103(D)(1) through (3). However, it appears that the Association comes within the scope of organizations described in old DR 2-103(D)(4):

Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

DR 2-103(D)(4)(a) (as in effect between January 1, 1978 and January 13, 1984)

In its recent Informal Opinion 85-1512, the Standing Committee on Ethics and Professional Responsibility of the ABA has concluded that a lawyer referral
service operated by a similarly described organization would not violate DR 2-103(D)(4)(a) of the Model Code of Professional Responsibility, provided the other requirements of DR 2-103(D)(4) are met. We concur. Old DR 2-103(D)(4) of the Indiana Code of Professional Responsibility is similar to DR 2-103(D)(4) of the Model Code. We, too, find that the instant Association meets the description of old DR 2-103(D)(4)(a), as long as it also satisfies the other requirements of old DR 2-103(D)(4) (b) through (g):

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Disciplinary Commission of the Supreme Court of Indiana at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service
activities, or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

It is further our opinion that, in this instance, meeting the requirements of old DR 2-103(D)(4) establishes the organization as a "qualified legal assistance organization" under new DR 2-103(C). Thus, cooperation with the organization's activities, including its lawyer referral service, would not constitute a violation of the Code of Professional Responsibility.

We note in passing that under old DR 2-103(D)(4)(g), an organization described in DR 2-103(D)(4) must have filed periodic reports of appropriate information with the Disciplinary Commission of the Supreme Court of Indiana. No such filing provision appears in the present version of the Code of Professional Responsibility. However, Admission and Discipline Rule 26 requires any group legal services plan to develop a written plan and file the plan and periodic written reports with the Clerk of the Supreme Court and Court of Appeals. It appears to this committee that the instant Association's lawyer referral service meets the definition of a "group legal services plan" as set out in Admission and Discipline Rule 26, and that therefore compliance with the reporting requirements of that rule should be met.
The Committee has been presented with a question involving the following fact situation:

A law firm represented a woman who was principal stockholder, director, and an officer in a newspaper contesting certain management decisions then made by the chief executive officer of the company. As a result of that action, she became more involved in the management and received certain bonuses.

Subsequently, her children, who were minority stockholders, requested that the same firm represent them in a derivative action against the chief executive officer concerning the bonuses. If the litigation is successful, it will reduce the bonus of the chief executive officer and the woman who originally contacted the firm.

The woman, whose children now attempt to employ the firm, has been notified by the firm that if successful, amounts paid to her as a shareholder would be reduced. She has fully consented to the representation of her children and expressed an opinion that, in fact, she is in support of their position.

The firm has no pending matter in behalf of the woman, the previous representation being complete.

**Issue**

The issue has been raised whether the representation is contrary to DR 5-105, and/or whether it is contrary to DR 4-101(C).

**Response**

It is clear that the representation would violate both DR 4-101(C) and DR 5-105 if there is not sufficient disclosure and waiver.

In this situation there is a conflict, although the first client, the mother, is asserting her belief that in the long run she will gain more financially if the litigation contemplated by her children is successful. Obviously this is an opinion which to some degree is affected by advice from the attorneys.

Nevertheless, if the disclosure has fully and completely been made to both the first client and to her children, and if they both consent to the representation, then the firm could proceed. This is a very close issue since the informed consent itself is somewhat dependent upon the firm with the apparent conflict. However, assuming that the disclosure has been comprehensive and the consent obtained is meaningful, then the firm could represent the children.
The Legal Ethics Committee has been asked to render an opinion whether or not there exists a conflict of interest or an appearance of impropriety when a law firm, which has among its members, a deputy prosecuting attorney, accepts representation of a juvenile and his parents against a corporate defendant and one of its employees in a civil cause of action arising out of a set of circumstances which conceivably could result in criminal charges being brought against the corporate defendant by the office of the prosecuting attorney of which the member is a deputy.

It is the opinion of the Legal Ethics Committee that there does exist a conflict of interest and an appearance of impropriety.

In reviewing the past opinions of the Legal Ethics Committee, it appears that if the law firm represents the juvenile and his parents in a civil action against the corporate employer and the employee, it is in a conflict of interest because one of its members is a deputy prosecuting attorney. The basis for this conclusion is that the corporate employer is potentially subject to criminal prosecution pursuant to IND. CODE 35-41-2-3. The fact that criminal prosecution is possible has been a significant factor in past Legal Ethics Committee opinions when deciding whether there is a conflict of interest. (See DR 7-105.) For example, in Opinion No. 7 of 1981, the Committee found that there would be a violation of DR 9-101(B) where a part-time prosecuting attorney or his part-time deputy, in his capacity as a private attorney, handled cases involving the collection of child support. DR 9-101(B) prohibits a lawyer from accepting private employment in a matter in which he has substantial responsibility while serving as a public employee.

The committee has concluded that DR 9-101(B) is violated because the support actions could potentially have collateral criminal proceedings. The committee has further indicated that if the action involved merely the modification of a support order, there would be no conflict of interest as the modification was exclusively a civil proceeding without potential criminal action.

In the committee's most recent opinion on conflict of interest relating to a deputy prosecuting attorney, Unpublished Opinion No. U3 of 1984, the committee again found a conflict of interest when a deputy prosecutor in his private capacity gets involved in a child support action. Such conflict of interest arises regardless of whether the deputy prosecutor represents the plaintiff or defendant in the civil action.

Consistent with the committee's opinions are the recent Indiana Supreme Court decisions addressing the duties and responsibilities of a prosecuting attorney as a public employee. The Court in In the Matter of Lantz, 420 N.E. 2d 1236 (1981), publicly reprimanded a part-time prosecutor for filing civil actions involving bad checks because of his responsibility for enforcing the criminal
laws regarding bad checks. Likewise, the Court in In the Matter of George Fisher, 400 N.E. 2d 1127 (1980), also reprimanded Mr. Fisher as he represented an individual in a civil action where there was a collateral criminal action.

Because the set of facts leading to the civil action filed by the deputy prosecutor's law firm potentially could also result in a collateral criminal action which in turn could result in the deputy prosecutor being involved, there is a conflict of interest and an appearance of impropriety. Accordingly, it would appear the law firm must resign from the employment.
This committee has been asked whether A & B can practice law as a partnership in County S and retain part-time public legal appointments. A proposes to continue employment as a part-time prosecuting attorney handling support and misdemeanor cases in County S and B proposes to continue employment as a part-time public defender in County T. Their respective public files could be kept in their respective public office space at all times and would never be housed on their partnership office. They recognize that a special prosecutor and special public defender would have to replace them if by chance, they opposed each other as a direct conflict would disqualify both of them in such case.

A Prosecuting Attorney may not represent a criminal defendant in any other court, Opinion No. 2 of 1972, Opinion No. 6 of 1978. He represents the People of the State as their appointed public official. The State is entitled to undivided loyalty; Opinion No. 5 of 1979; Matter of Davis, 471 N.E. 2d 280 (Ind. 1984). A Prosecutor serves a public trust to enforce the law, Matter of Moore, 453 N.E. 2d 971, 974 (Ind. 1983).

A Public Defender is employed by the Court to represent a defendant who is entitled to have confidence that he will receive effective, faithful, professional assistance, DR 2-103, EC 2-25, EC 2-29.

A partner may not accept employment where his partner is disqualified from accepting such employment without violating DR 9-101, Opinion No. 3 of 1973. Accordingly, a Prosecutor is disqualified from a civil case where he has represented the State in the same matter, Opinion No. 6 of 1979; Shuttleworth v. State, (Ind. App. 4 Dist. 1984) 469 N.E. 2d 1210, 1217, C.F.; Unpublished Opinion No. U2 of 1981. Our committee has permitted a part-time prosecutor to represent other governmental units if "meaningful consent" pursuant to EC 5-16 and DR 5-105(A) and (C) is first obtained, Opinion No. 6 of 1978. However, in our Unpublished Opinion U1 of 1980, our committee ruled that a deputy city court prosecutor may not act as a salaried legal advisor of another city court judge because said association created the appearance of professional impropriety. It is true that the prosecutor and defense attorney may engage in a non-legal business pursuit, if independent professional judgment is not impaired and appearance of impropriety is avoided, Opinion No. 2 of 1982.

Our committee has ruled that a part-time prosecutor may not privately represent a civil client in a support collection matter, Opinion No. 7 of 1981. In our Unpublished Opinion No. U2 of 1981, a part-time prosecutor was permitted to represent a civil client against another client he represented in his capacity as prosecutor if (1) the two cases involved completely different and unrelated matters and (2) meaningful express consent by both
clients after full disclosure is first obtained. The rule elsewhere appears to be that one member of a law firm may not represent the State to prosecute where another firm member defends persons accused of crime; Maine State Bar Association Opinion No. 39 (6/2/83); State Bar of Wisconsin Opinion No. E-81-5 (6/81) citing ABA Opinion No. 342. The principal of imputed disqualification pursuant to DR 5-105(D) has been held applicable to a similar fact situation in order to prevent the public from assuming that defense counsel has the ability to improperly influence the proceedings; Kentucky Bar Association Opinion No. E-291 (9/84); Kansas Bar Association Opinion No. 81-30 (10/16/81).

Accordingly, it is our opinion that the proposed partnership is not permitted by Canon 5 or Canon 9.
Inquiry

A superior court judge has queried whether any ethical problems arise when an attorney who is also a county council member practices before the courts of that county.

Opinion

In Indiana, county councils control the amount of appropriations available for the operations of the courts and have the discretion to supplement the salary of an individual judge above the amount of monies designated and provided by the state.

The quandary is whether a lawyer's position as a county council member constitutes per se use of a public position to influence a tribunal when the lawyer also practices in private practice before the courts of that county.

Whether a lawyer who holds public office has a conflict of interest is a factual question. Whether a lawyer uses public office to attempt to influence a tribunal is also a question of fact.

The conflict of interest rules of Canon 5, particularly DR 5-105 which provides that a lawyer shall not undertake or continue representation of a client if the interests of another client might impair his independent professional judgment, serve as a basis for analysis.

The inquiry also presents a question under DR 8-101(A)(2) which mandates that a lawyer who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client. There would be a violation only if, first, the public official holds a position which gives him the power to influence the tribunal, and, second, he actually attempts to exert an improper influence. The mere appearance before the tribunal of an official is not itself a violation of the rule. See ABA Informal Opinion 1182 and Illinois Opinion No. 84-11 (1-25-85).

Under Canon 9 a lawyer should avoid even the appearance of professional impropriety. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and legal profession.

It is the opinion of the committee that the council member who is an attorney can practice before the courts of that county provided, however, that the council member refrains from discussion of and abstains from the vote of each and every matter dealing with the courts and the judges of the county.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 8 OF 1985

Issue

Whether attorneys "sharing space" under circumstances set out in the facts may represent opposing litigants in the same case.

Facts

As stated in the inquiry and supplemented by further investigation, the facts are that three attorneys share a building and have common use of the library, lobby and copying machine. Each attorney maintains an individual practice and there is no formal association of any kind among them. There is a single phone system for the three attorneys, but each has a separate telephone number and is billed separately. All phones have access to the phone system. Incoming calls ring in all offices and the common library. A light on the phone indicates which number is being called. The practice is that no one answers calls for another office. The attorney addressing the inquiry maintains a separate office for himself and a secretary with a separate locked filing system. His office may be entered from an outside entrance or the common lobby. Most of his clients enter through the outside entrance. Persons waiting to see any of the lawyers may be in the lobby area. The lobby area is also occupied by the secretary of one of the three attorneys. The library is used as a conference room. Each attorney apparently has an individual sign. The sign in front of the building consists of four separate placards, one under the other. The top placard says, "Attorneys." The placards beneath that each contain the name of one of the lawyers. It has occurred on occasion that one of the attorneys has accepted a case and discovered that one of the other attorneys in the building is on the other side of the case.

Discussion

The inquiry involves the principles involved in prior opinions of the committee regarding space-sharing with prosecutors or deputy prosecutors preventing the attorneys sharing space with them from representing persons charged with crimes. See Formal Opinions No. 2 of 1972, No. 3 of 1973 and Unpublished Opinions U1 and U3 of 1979. As those opinions have indicated, a chief concern is whether or not the appearance of partnership or association is enough to impose the restrictions on representing adverse interests upon the space-sharers.

We identified in Formal Opinion No. 3 of 1973 that the following were the minimum tests that must be met to avoid misleading the public about the professional relationship between space-sharers:
(1) There should be no sharing of liability, profits or responsibility;

(2) Each attorney should use separate letterheads, cards and announcements containing his name only;

(3) Each attorney should be listed separately in law lists and telephone directories;

(4) Each attorney should have a separate office telephone number;

(5) The building or office door should show no closer connection than "Law Offices, Fred Doe, Arthur Smith."

Such cases are particularly fact-sensitive. In this case, it appears that the space-sharers have met the minimum tests of Opinion No. 3 of 1973 (on the assumption they have separate letterheads, etc.) but there remains a concern regarding the matter of confidentiality.

Accepting that there is no association among the attorneys beyond their sharing the same building with certain common areas, concern must be given to the perception of the arrangement that might be held by a client and the concern that a client might understandably have concerning the confidentiality of his relationship with the attorney and the security of activities in the client's behalf. Under the circumstances, the client will be conscious of the fact that his every visit to his attorney's office may be known to the opposing attorney. The arrival of witnesses or potential witnesses at his attorney's office may be known to the opposing attorney. Phone messages and correspondence may be perceived to be accessible to the opponent's attorney or staff. Research projects in the library may be in view of the opponent's attorney or his staff. Material inadvertently left in the copier is accessible. An attorney has an obligation to preserve the confidences of his client under DR 4-101 and to practice in a setting which could well create the appearance that confidentiality is impaired, runs the risk of creating the appearance of failing to preserve confidentiality.

It is recognized that the economics of practice may often require the sharing of space by attorneys not otherwise associated. It is essential, however, that clients have full confidence that their dealings with their attorney are not subject to scrutiny by the attorney for their opponents.

While the committee does not believe that the situation described rises to the level of a violation of DR 5-105, it raises sufficient concern under Canon 9 and EC 9-6 that the committee believes that the phone system should be changed so that there is no access between the phone systems of the separate practices. The committee is also concerned that the presence of a secretary of one attorney in the reception area creates a situation in which clients or other persons waiting to see one of the other attorneys may hear things related to matters as to which there would be a conflict. Care must be taken to avoid material being left in the copier area or
library which should not be seen by the opposition. Finally, clients should be fully informed of the circumstances of the space sharing and measures to avoid any compromise of client confidentiality so that the client may decide, with full information, whether or not to continue the relationship. If these concerns cannot be met, the committee believes it would be in the best interests of the profession that the attorneys in question not represent adverse interests.
The Legal Ethics Committee has been asked to render an opinion whether the name of a paralegal or legal assistant may be listed on the letterhead of a law firm.

The recently amended Indiana Code of Professional Responsibility does not preclude the use of a paralegal's name on a letterhead. DR 2-102 requires only that the heading does not "include a statement or claim that is false, fraudulent, misleading, deceptive, self-laudatory, or unfair." DR 2-101(C) provides a standard for judging the clarity of the letterhead. It cannot:

(1) contain a material misrepresentation of fact;
(2) omit to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
(3) * * *
(6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

These rules contemplate that it would be proper to include a paralegal's name on a letterhead, so long as the person's status as a paralegal (and not an attorney) is identified.

Opinion No. 5 of 1982, by the Legal Ethics Committee, addressed this same issue. The one-page opinion relied heavily on ABA Informal Opinion 909, which quoted Drinker's Legal Ethics: "Attorney-at-Law on a letterhead implies the right to practice law at the address given." The opinion went on to hold that it would be improper to include a non-attorney's name on a firm's letterhead.

There can be no denying that the words "Attorney-at-Law" must be reserved for use only by those licensed to practice law. The obvious purpose of such a rule is to protect the public from misleading designations. Given that purpose, and in light of the applicable disciplinary rules as amended, there is no reason that names of paralegals should be disallowed on a letterhead--provided that their status is specifically identified. If the letterhead is designed in such a manner that attorneys and non-attorneys
are clearly distinguished, there is little chance for deception.

We therefore hold: Paralegals and legal assistants, so long as they are clearly identified as such, may be included on an attorney's letterhead.

This opinion supersedes and overrules Opinion No. 5 of 1982.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION NO. 10 OF 1985

Facts

An attorney representing a client in a malpractice claim against another attorney queries the committee whether it would be unethical for him to threaten the attorney that if he does not satisfactorily and speedily settle the malpractice claim, that a disciplinary action would be filed with the Disciplinary Commission.

Analysis

Unfortunately, the attorney's inquiry provides no factual basis for the committee to determine if the alleged improper conduct could constitute a malpractice claim and a disciplinary violation. We note that the preamble and preliminary statement of the Code of Professional Responsibility provides that: "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." (emphasis added) The committee notes that the areas of civil liability and disciplinary violations are governed by differing standards and even if there is liability in the civil area, there may not be a violation of the disciplinary rules.

Assuming for the purpose of addressing the merits of the inquiry that indeed a disciplinary violation may exist, the attorney should be aware of some alternatives. First, EC 1-4 and DR 1-103 of the Code of Professional Responsibility require that the attorney report unprivileged knowledge of violations of DR I-102 involving attorney misconduct to a tribunal or other authority empowered to investigate or act upon such violation. Secondly, the client himself or herself may file a grievance with the Disciplinary Commission if the client believes a violation of the Code of Professional Responsibility has occurred.

The committee sees no difficulty in attorney or client reporting violations of the Code of Professional Responsibility, regardless of whether a malpractice claim is pending. In fact, under DR 1-103, it may be mandatory that the attorney himself do so.

The troublesome part of the inquiry is that the attorney would propose to use the threat of filing a grievance to expedite a civil settlement.

EC 7-21 and DR 7-105 provide that an attorney shall not threaten to present criminal charges solely to obtain an advantage in a civil trial. Although a disciplinary procedure in Indiana is neither civil nor criminal (see Matter of Moore, 453 N.E. 2d 971 (1984), the underlying purpose of the disciplinary
proceeding is "... to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and public from unfit persons." Moore, supra. The underlying purpose of DR 7-105 is basically the same. As stated in EC 7-21, "The civil adjudicative process is primarily designed for settlement of disputes between the 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 adjustment of private claims or controversies is a subversion of that process."

It is a violation of DR 7-105 for the attorney to threaten the filing of disciplinary action to gain an advantage in settling the client's civil litigation.