



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.**

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**This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 3.1, 3.3(a), 4.4, and 8.4(a)(4). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.**

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**Opinion No. 01-06  
March 2002**

**Topic:** Zealous Representation of Client; Truthfulness in Statements to Others; Actions Serving Merely to Harass or Maliciously Injure Another

**Digest:** While a lawyer may zealously represent the interests of a client, a lawyer must be truthful in dealings with adversaries and third parties and cannot take actions designed merely to harass or burden such other parties.

**Ref.:** Rules 1.2(f)(1), 3.3(a), 4.1(a) 4.4 and 8.4(a)(4)  
ISBA Opinion Nos. 96-3 and 95-10.

## **FACTS**

Lawyer represents Financial Corporation. Financial Corporation loaned money to Business and the owner of Business, Husband, personally guaranteed the obligation. Wife does not have any interest in Business and did not guarantee the loan. Business defaults on the loan and Lawyer obtains a judgment against Business and Husband in the amount of \$1,228,000 on behalf of Financial

Corporation. Business is liquidated and the proceeds are used to reduce the debt to \$350,000.

Lawyer serves Citations to Discover Assets on banks who have loaned money to partnerships in which Wife and in some instances the children, but not Husband, have an interest (the "Partnerships"). The Citations list the unsatisfied judgment amount as \$1,228,000.

Husband and Wife's counsel ("Counsel") sends Lawyer a letter reciting that the Citations issued in the higher amount were impeding Husband and Wife's ability to obtain new loans, and demanding that Lawyer issue corrected Citations showing the accurate amount of the unsatisfied judgment. Lawyer fails to correct the Citations, and subsequently sends out another Citation, again reciting the original judgment amount, to a bank holding the mortgage on the family's residence, which is held in Wife's name alone.

Lawyer additionally makes telephone calls to the banks that had loaned funds to the Partnerships, telling the banks they should not renew the loans and that any new funds extended by the banks would go toward the repayment of the debt due to Financial Corporation. Lawyer also suggests that it would be illegal for the banks to renew the Partnership loans.

Several months later, Lawyer deposes Husband, who testified that he did not have any interest in the Partnerships or residence on the date of the judgment against Business and himself. When the deposition ends, Lawyer tells Husband in the presence of Counsel that Lawyer intends to involve Wife, their children, and Wife's business partners in the collection efforts. Lawyer also states that when he gets through with Husband, Husband would never be able to borrow again.

Subsequently, the banks financing the Partnerships refuse to advance additional funds and Partnerships fold. Husband files a Chapter 7 bankruptcy. Lawyer files an adversary proceeding on behalf of Financial Corporation in Husband's bankruptcy alleging that Husband fraudulently conveyed assets to Wife. The court holds in favor of Husband and against Financial Corporation, discharging Husband's debt to Financial Corporation.

## QUESTIONS

1. Did Lawyer violate an ethical duty by issuing the Citations in the original judgment amount rather than the reduced amount then outstanding, and by failing to correct the Citations when called upon to do so?
2. Did Lawyer violate the Rules of Professional Conduct by his conduct regarding Wife and the Partnerships, or by his statements following Husband's deposition?

## OPINION

This inquiry involves the line between zealous representation of a client and the bounds of ethical

conduct. We are of the opinion that such line was clearly crossed with regard to the inaccurate Citations, and likely crossed by some of Lawyer's other conduct.

With respect to the first question, Lawyer had an obligation both to issue the Citations in the correct amount then outstanding, and to correct the Citations when called upon to do so.

To this effect, Rule 4.1(a) states that in the course of representing a client, a lawyer shall not "make a statement of material fact or law to a third person which statement the lawyer knows or reasonably should know is false." Rule 3.3(a) contains almost identical language regarding statements made by a lawyer to a tribunal. Lawyer violated these Rules in having a Citation issued by the Court, and then served on the banks, listing the unsatisfied judgment in an incorrect amount, and by then failing to rectify such inaccuracy when so called upon. Lawyer's conduct would also violate Rule 8.4(a)(4), which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

To a similar effect, Rule 1.2(f) provides that in the representation of a client, a lawyer shall not "file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or reasonably should know that such action would serve to harass or maliciously injure another." Such Rule was violated both by the original issuance of the Citation reflecting the full amount of the judgment as being unsatisfied, and by then failing to correct the amount when requested to do so.

The Committee came to a similar conclusion in Opinion No. 96-3. There, a lawyer was involved in negotiations with an insurance company of a personal injury claim when his client died, the effect of which may positively or negatively effect the issue of damages depending on whether the cause of death was related to the injuries suffered. The Committee concluded that the lawyer in those circumstances had an obligation under both Rules 4.1(a) and 8.4(a)(4) to notify the opposing party of the client's death.

Similarly, in Opinion No. 95-10, the Committee concluded that Rules 4.1(a) and 8.4(a)(4) require that a lawyer making a material change in a document submitted by another lawyer for signature must disclose the change when returning the signed document. The Committee reasoned that the lawyer had a duty to notify opposing counsel of the changes made in keeping with the philosophy of the Rules regarding truthfulness in statements to others, and that making the change without notification to the other lawyer may constitute conduct involving deceit or misrepresentation.

The conduct in the present instance is substantially more egregious. To misstate the amount of the unsatisfied judgment in serving the Citations, and in then refusing to correct the misrepresentation, Lawyer has clearly violated the aforementioned Rules.

The inquirer's second question involves whether Lawyer violated any ethical obligations in his other conduct regarding Wife and the Partnerships, or by his statements following Husband's

deposition. While Wife, the Partnerships and Husband were not Lawyer's clients, and he therefore owed them no duty as such, the Rules nonetheless prescribe certain minimum standards on how a lawyer may treat persons other than a client.

As previously stated, Rule 1.2(f)(1) provides that in representing a client, a lawyer shall not:

“file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or reasonably should know that such action would serve merely to harass or maliciously injure another.”

Similarly, Rule 4.4, “Respect for Rights of Third Persons,” states:

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

From the facts presented, we cannot say that Lawyer acted inappropriately in serving Citations on the various banks whose dealings were with Wife and the Partnerships, inasmuch as Lawyer was fairly entitled to make inquiry on the subject of ownership of the assets, and to seek information which could support a claim that the assets were susceptible to being applied in satisfaction of the judgment even if technically owned by someone other than the judgment debtors. Such conclusion is supported by the fact that a claim of fraudulent transfer was subsequently made in Husband's bankruptcy, and that a trial was ultimately held on the issue. It would thus appear that Lawyer's efforts to discover assets from the banks were consistent with his obligation to vigorously pursue a course of action on behalf of his client.

However, other of Lawyer's conduct is more questionable. The Rules do not allow tactics designed merely to injure or harass a third party that have no other legitimate purpose in advancing the position of a lawyer's client. Some of the statements made by Lawyer may have crossed that line.

To this effect, Lawyer's statements after Husband's deposition regarding the involvement of Wife, Husband's children and the Partnerships, while possibly in part appropriate as a statement of Lawyer's legitimate intention to claim that a fraudulent transfer of assets had occurred, may also, depending on the purpose and manner in which expressed, have been for no purpose other than to threaten and harass. This is especially true of the statement that when Lawyer gets through with Husband, Husband would never be able to borrow again.

Similarly, Lawyer is stated to have called the banks and told them not to renew loans to Wife or the Partnerships, that any renewal of the loans would go toward payment of the judgment, and that renewing the loans might be illegal. Again, it is possible to view Lawyer's statement that any funds extended by the banks would go toward payment of the judgment as being informational of the Lawyer's intent to seek application of Wife's Partnership funds to satisfy the outstanding judgment.

However, Lawyer's other statements that the banks should not renew the loans and that to do so would be illegal would appear to be for no purpose other than to harass or burden Husband and Wife in violation of Rules 1.2(f)(1) and 4.4, and may also be untrue in violation of Rule 4.1(a).

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