



ISBA Advisory Opinion on Professional Conduct

Opinion No. 12-01
January 2012

Subject: Threatening Criminal Prosecution

Digest: Where a lawyer has filed suit to recover on an NSF check for a client, the lawyer cannot present or participate in presenting criminal charges to obtain an advantage in the civil aspects of the NSF check matter.

References: Illinois Rule of Professional Conduct 8.4(g)

ISBA Professional Conduct Advisory Opinion Nos. 550, 142

In re Lewelling; 296 Or. 702, 678 P.2d 1229 (Or. En Banc. 1984)

720 ILCS 5/32-1

FACTS

A lawyer represents a client who wants to collect on an NSF check. The lawyer files suit, but finds that the sheriff cannot get service on the defendant.

QUESTIONS

1. Can the lawyer send the check back to the client and advise the client of his/her right to file a criminal complaint?
2. Can the lawyer send the check to the State's Attorney and ask, on behalf of the client, that a criminal complaint be issued?

OPINION

Rule 8.4 (g) of the Illinois Rules of Professional Conduct provides that "It is professional misconduct for a lawyer to present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter."

A similar prohibition was contained in the predecessor Rules of Professional Conduct.

ISBA Opinion No. 550 (1976) states that “it is professionally improper for a lawyer to threaten the possible presentment of criminal charges to collect ‘insufficient funds’ checks for a client.” ISBA Opinion No. 142 (1956) provides that advising a debtor that the indebtedness will be taken up with the State’s Attorney’s Office is unethical and unprofessional.

Under the facts as indicated, where the lawyer has filed suit and service has not been obtained, the lawyer can send the check back to the client and advise the client that he/she may press criminal charges on his/her own if he/she chooses. The lawyer, however, cannot properly “participate in presenting” such charges to obtain any advantage in the civil aspects of the NSF check matter.

The harm here is not the filing of a criminal complaint by the client, but the lawyer’s participation in that act to gain advantage in the civil matter.

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of a society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of the process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

In re Lewelling, 296 Or. 702, 678, P.2d 1229, at 1231 (Or. En Banc. 1984) quoting EC 7-21 (Attorney suspended for 60 days for presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter.)

The lawyer should also advise his or her client not to threaten criminal charges in order to obtain payment of the NSF check because the Illinois Criminal Code makes it an offense to receive consideration in return for a promise not to prosecute or aid in the prosecution of an offender. This is known as “compounding a crime.” See 720 ICS 5/32-1

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