



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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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 1.2(e), 4.2 with its Comment [5], and 8.4(g). 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.

**Opinion No. 95-12
January 1996**

Topic: Threat to file and disclose ARDC complaint in pending litigation; direct communication with city officials concerning pending ordinance violation prosecution and related controversy.

Digest: The prohibition on threatening opposing counsel with disciplinary proceedings extends to ordinance violation as well as purely civil matters; lawyer prohibited from directly communicating with represented city officials concerning pending ordinance violation prosecution against lawyer's client but prohibition does not necessarily extend to communication concerning related controversy.

Ref.: Illinois Rules of Professional Conduct, Rules 1.2(e) and 4.2
ISBA Advisory Opinions on Professional Conduct, Nos. 91-19, 91-29 and 92-3

FACTS

D, a defense lawyer, is defending an ordinance violation prosecuted by P involving the use of property allegedly in violation of zoning laws. While the ordinance prosecution is pending, D filed an application for a zoning review by the municipal zoning department and, in the process thereof, communicates directly with zoning and building code municipal officials concerning the subject property. P threatens to file an ARDC complaint against D for violating Rule 4.2 for directly

communicating with D's client. D disregards the threat and informs P that municipal employees are not P's clients and that D has legal right to communicate with public officials regarding their official duties. P wishes to file an ARDC complaint against D and file a motion in the trial court asking the court to enjoin D from communicating with the municipal officials and attach his ARDC complaint letter as an exhibit to the motion.

QUESTIONS

1. Will attaching an ARDC complaint letter to a motion as a exhibit violate Supreme Court Rule 766 providing that ARDC investigations should be "private and confidential?"
2. May a lawyer communicate with city officials concerning a pending case or a related controversy absent consent of the city attorney on the pending case?

OPINION

The first question posed in the inquiry involves the interpretation of one of the Supreme Court Rules empowering the Attorney Registration and Disciplinary Commission to conduct its affairs. Interpretation of those Rules is not generally within the scope of this Committee's review. Opinion No. 91-19 interpreted Rule 3.6 to opine that it was not improper for a lawyer to disclose to the news media details of his report to the ARDC on another lawyer and also noted that Supreme Court Rule 766 confidentiality is restricted to limited ARDC activities and actions and does not prohibit disclose by the lawyer reporting misconduct.

This inquiry, however, raises issues which are specifically addressed in the Rules of Professional Conduct.

Rule 1.2(e) states:

A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary action to obtain an advantage in a civil matter.

While the facts in this inquiry involve an ordinance violation as opposed to a "civil case," the clear intent of the Rule is to condemn using threats against opposing counsel to gain an unfair advantage. Opinion No. 91-29 condemned a lawyer's conduct in suggesting during settlement negotiations that opposing counsel's client may be prosecuted.

The Preamble to the Illinois Rules of Professional Conduct urges lawyers to look to the values or goals in interpreting the prohibitions in the Rules. One of those values is "defending the integrity of the judicial system against those who would corrupt, abuse, or defraud it." The conduct of P in threatening opposing counsel with filing an ARDC complaint and attaching the complaint to a pleading in a pending ordinance violation case clearly violates the spirit, if not the letter, of Rule 1.2(e) even though this is a quasi-criminal case. While P may file a complaint with ARDC, the facts indicate that the threats to file a complaint and to attach the complaint to a motion are intended to gain an advantage in the pending prosecution rather than initiate an investigation into alleged misconduct. P may advise the municipal officials not to communicate directly with D outside P's presence or without his consent with respect to the ordinance violation.

The second question raised by the inquiry concerns the propriety of contacting city officials about

the ordinance violation case or the related zoning matter.

Rule 4.2 states:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

ISBA Advisory Opinion No. 92-3 involves facts similar to those of this inquiry. There the lawyer defending a client sued by the city proposed sending copies of his correspondence with the city attorney to certain city officials and employees. That Opinion expressed the view that, absent consent of the city attorney, it was improper for opposing counsel to communicate directly with represented employees of the city regarding the litigation. In the facts presented, P has clearly not consented but opposes communication by D with city officials. In these circumstances, direct communication by D with city officials about the ordinance violation is prohibited by Rule 4.2. However, as discussed in Opinion No. 92-3, an exception for communications with a represented party may permit the client to speak about the controversy with government officials as communications "otherwise authorized by law" because they are public servants required to be accessible and accountable to the public. The lawyer should not assist the client in directly communicating with represented government officials who are parties to litigation concerning the litigation. This is separate from the issue of whether a lawyer may assist a client in petitioning public officials for redress of grievance, i.e., the zoning review, while acting as counsel in the same matter. As a general rule, such contact with officials regarding a matter in dispute does not violate the Rules of Professional Conduct.

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