LEGAL ETHICS

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“IS THAT A THREAT?”
An Examination of the Ethical Prohibition
Against Presenting or Threatening to
Present Criminal Charges or Professional Disciplinary Actions to Obtain an
Advantage in a Civil Matter

Introduction
Have you ever received a letter that either implicitly or explicitly threatened you with disciplinary action? Have your
adversaries ever warned that they would inform the authorities of alleged “criminal” activity on the part of your client?
Unfortunately these types of threats are not altogether unusual, especially in the inherently contentious world of litigation. Such
threats have the potential to generate bad feelings or even hatred between litigants and their attorneys. What’s more, these
threats, if put forth for the purpose of getting the upper hand in a civil matter, are unethical and may subject the lawyer making
the threat to disciplinary action. This article will examine the ethical prohibition against presenting, participating in presenting,
or threatening to present criminal charges or professional disciplinary action to obtain an advantage in a civil matter. In Illinois,
an analysis of this prohibition must begin with Rule 1.2(e) of the Supreme Court of Illinois Rules of Professional Conduct.

Rule 1.2(e) of the Rules of Professional
Conduct and Related Opinions

Text of the Rule
Rule 1.2(e) reads as follows:

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

Supreme Court Rule of Professional Conduct 1.2(e), Adopted February 8, 1990; effective August 1, 1990.

The text of the rule expressly establishes that it is wrong to use certain actions or threats to obtain an advantage in a civil
matter. We must look to case law and ethics opinions for guidance about the rationale behind the rule as well as the
circumstances under which the rule applies.

Ethics Opinions and Case Law

The reason for rule 1.2(e) was explained by the Illinois State Bar Association Advisory Opinion on Professional Conduct No.
87-07 in January of 1988. Actually, the opinion dealt with a prior incarnation of Rule 1.2(e) under the old Illinois Code of
Professional Responsibility. At that time, Rule 7-105 of the Illinois Code of Professional Responsibility explicitly prohibited
threatening to present criminal charges to obtain an advantage in a civil matter, but did not expressly mention administrative or
disciplinary charges. ISBA Opinion No 87-07 at p. 1. The ISBA ethics Committee was presented with the following facts: “A
lawyer files a civil action for damages against a former client. The former clients’s new lawyer threatens to file a complaint with
respect to the prior representation with the disciplinary commission if the action is not settled favorably to the former client.”

The Committee was asked whether it is ethically proper to coerce a settlement of a civil action by threatening disciplinary
action against a party who is a lawyer? The answer was “no.” In rendering its opinion, the Committee looked to the purpose
behind the rule. To do this, the Committee looked to ISBA Ethical Consideration 7-21, which states:
The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as whole. Threatening to use, or, using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that 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 private disputes is impaired. As in all cases of abuse of the judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

ISBA Opinion No. 87-07 at p.1.

The Committee then found that the same rational that prohibited the threat of criminal actions, should prohibit the threat of disciplinary action to obtain advantage in a civil matter. Id. at p.2. The Committee noted that, “The Attorney Registration and Disciplinary Commission was created to license and discipline lawyers. It is not intended to settle disputes between private parties. Threatening to use the lawyer disciplinary process to coerce adjustment of private claims would subvert that process as well as deter the target lawyer from asserting his or her legal rights in the civil action.” Id. At p.2.

Another classic example of threatening criminal prosecution to gain advantage in a civil action was presented in ISBA Opinion No. 91-29 (May 1992). The facts presented to the Committee in connection with that opinion were as follows:

Attorney A represents husband in an action for dissolution of marriage. In the course of settlement negotiations, attorney B, representing the wife, stated in a letter to A the following: “My client was inclined, and still is inclined, to unveil this sham to the bank and ask that (A’s client) be prosecuted.” (Reference was to an allegation that husband forged wife’s signature to mortgage).

ISBA Opinion No. 91-29 at p.1.

The Committee found that such a threat was clearly an attempt to gain an advantage in a civil matter and was not a statement of objective fact. Therefore, the statement violated Rule 1.2(e). Id. at pp.1-2. Interestingly, the Committee also opined that the threatened attorney did not, however, have an obligation to report such a statement to the ARDC pursuant to In re Himmel, 125 Ill. 2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988). The Committee stated that “the mandatory reporting required (Rule 8.3(a)) is that of acts constituting illegal conduct or conduct involving dishonesty, fraud, or misrepresentation (Rule 8.4 (a)(3) and (4)). The reporting of the attorney’s comment relating to the conduct of the client is not conduct of the attorney which would require reporting. Attorney B’s letter containing the violation of the Rule 1.2(e) is misconduct under Rule 8.4(a)(1) which is not a mandatory report under Rule 8.3(a).” Id. At p.2

It is important to note that a mere threat of criminal or disciplinary action is insufficient to constitute a violation of Rule 1.2(e). The threat must be made in order to gain advantage in a civil matter. This point was brought out in ISBA Opinion No. 93-5 (September 1993) in which the Committee was asked whether an attorney would violate the rule by presenting a returned check of an adversary to the state’s attorney for criminal action? Under the facts presented in connection with this opinion, the Committee concluded that because judgment had already been obtained in the underlying civil action which gave rise to the dishonored check, the reporting of the returned check to the state’s attorney was not being undertaken to attempt to obtain an advantage in a civil matter, and was therefore, permissible. Id. At pp.1-2.

The Supreme Court of Illinois addressed the predecessor to Rule 1.2(e) (Disciplinary Rule 7-105(A)) in the case of In re Madsen, 68 Ill. 2d 472, 12 Ill.Dec. 576, 370 N.E.2d 199 (1977). In that case, the ARDC charged in a complaint that Madsen, an attorney, and his two associates had mailed to approximately 2,090 of their clients a two-page communication entitled “Tips from your Lawyer for 1973.” Also included were certain other materials that, it was charged, contained, “professionally self-laudatory statements calculated to attract lay clients.” The complaint further charged that the document gave “unsolicited advice to laymen,” “suggested the need of the respondents’ legal services,” and constituted “the solicitation of professional employment by advertising.” Madsen, 68 Ill. 2d at 474. During a pre-hearing conference held at the offices of the ARDC, Madsen made certain statements to his former associates. Essentially, it threatened the associates that, if they testified in the proceeding against him, he would submit evidence that their conduct had been unethical, that they were guilty, “on a civil basis,” of contractual violations and violations of the Criminal Code. Madsen, 68 Ill. 2d at 475. The complaint against Madsen was then amended to add an allegation that this conduct violated Disciplinary Rule 7-105(A), which provides: “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.” Madsen, 68 Ill. 2d at 478.
The hearing panel pointed out that Madsen’s violation of this rule “arose in an atmosphere of bitterness that was existing between the respondent and his two former employees” and that all of the acts of misconduct were done “openly in the presence of the assistant administrator of the Disciplinary Commission and of the chief counsel of the Disciplinary Commission.” *Madsen*, 68 Ill.2d at 478. The panel then concluded that no sanctions should be imposed by reason of the mailing charged in the complaint but that Madsen should be censured for his threats to the former associates. *Madsen*, 68 Ill. 2d at 478.

The Review Board later modified the recommendation of the hearing panel and unanimously recommended that Madsen be suspended from the practice of law for two years and until further order of the court. In making this recommendation, the Review Board concluded that Madsen’s conduct was “inimicable to the integrity of the legal profession and adversely reflected on his fitness to practice law.” *Madsen*, 68 Ill. 2d at 478.

Subsequently, the supreme court, found that, although Madsen’s violation was proved by clear and convincing evidence, the fact that the statements were made in the presence of the assistant administrator of the disciplinary system and its general counsel and that there was no surreptitious effort to influence or intimidate the witnesses, justified a lesser sanction than that proposed by the Review Board. *Madsen*, 68 Ill. 2d at 478. The Court then examined certain other conduct engaged in by Madsen during the time the disciplinary proceedings against him were unfolding and found that he failed to comprehend the impropriety of the conduct charged and that his misconduct and certain other behavior on his part during the disciplinary process, “demonstrated an attitude of self-righteousness and rationalization of the actions taken.” *Madsen*, 68 Ill. 2d at 481-82. The Court suspended Madsen for a period of 30 days. *Madsen*, 68 Ill. 2d at 482.

**Conclusion**

As can be seen from an examination of the text of Rule of Professional Conduct 1.2(e), the supporting ethics opinions and case law, it is absolutely improper for an Illinois attorney to threaten or present criminal or disciplinary action for the purpose of attempting to obtain an advantage in a civil matter. Although examples of attorneys who have been disciplined for making such threats or actually pressing such charges, may be sparse, the conduct is nonetheless clearly prohibited. Further, threats made solely for the purpose of obtaining an advantage in a civil matter are the kind of unseemly actions that can further erode the public’s perception of the legal profession. The ISBA Ethics Committee in Opinion 87-07 stated, “As in all cases of abuse of the judicial process, the improper use of the criminal process tends to diminish public confidence in our legal system.” Rule 1.2(c) is a recognition of this reality. An increased awareness of this rule, along with a much needed return to civility among lawyers, should help curtail instances of these threats as the practice of law forges ahead into the 21st Century.

**ABOUT THE AUTHOR:**

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