



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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.

This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 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. 86-9
December 2, 1986**

Topic: 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.

Ref.: Rule 7-105
ISBA Opinion No. 550
In re Lewelling, 296 Or. 702, 678 P.2d 1229 (Or. En Banc. 1984)

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 7-105 of the Illinois Code of Professional Responsibility provides that "A lawyer shall not present, participate in the presenting, or threaten to present criminal charges to obtain an advantage in a civil matter."

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 prosecution, by advising the debtor that the matter will be taken up with the State's Attorney's Office.

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.)

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