



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in March 2011. Please see the 2010 Illinois Rules of Professional Conduct 1.2 (d), 3.3 (a), including Comment [3], and 8.4 (b), (c), (d), and (g), including Comment [2]. See also 625 ILCS 5/11 – 501 and 625 ILCS 5/2 - 118.1. 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. 89-16
April 9, 1990**

Topic: Plea agreement conditional on defendant's dismissal of civil action.

Digest: Due to the unique interrelationships between the criminal and civil matters, it is not professionally improper for State's Attorney to condition a DUI plea agreement upon defendant's dismissal of related civil proceeding to rescind the statutory summary suspension.

Ref.: Rules 7-101, 7-102(a)(8), 7-105

EC 21

ISBA Opinion Nos. 539 & 87-7

Ill Rev Stat, Ch. 95 1/2, § 11-501 and Ch. 95 1/2, § 2-118.1

MacDonald v. Musick, 425 F.2d 373 (CA9-1970)

FACTS

As part of plea agreement negotiations on a first time DUI defendant's case, the State's Attorney offers court supervision to the DUI charge (Ill.Rev.Stat., Ch. 95 1/2, §11-501) only if the defendant agrees to dismiss the civil proceeding to rescind the statutory summary suspension civil proceeding (Ill.Rev.Stat., Ch. 95 1/2, §2-118.1).

QUESTION

Is the conduct of the State's Attorney professionally improper by attempting to gain an unfair advantage in the civil summary suspension proceeding as a part of the negotiated plea to the DUI charge?

OPINION

Rule 7-101(a)(1) provides that a lawyer shall not intentionally:

fail to seek the lawful objections of his client through reasonably available means permitted by law and the disciplinary rules....

Rule 7-102(a)(8) provides that a lawyer shall not:

knowingly engage in...conduct contrary to a disciplinary rule....

Rule 7-105 provides that:

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

EC-21 provides:

The civil adjudicatory process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of 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 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 judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Applying the foregoing principle and Rules, ISBA Advisory Opinion No. 539 condemned the use of threats of arrest or prosecution or promises not to prosecute by a public prosecutor to effect the settlement of civil matter with criminal consequences between private parties. In ISBA Advisory Opinion 87-7, the Committee applied the same reasoning in concluding that it was improper to threaten the initiation of disciplinary proceedings to influence a civil action.

Some courts have also placed limits upon prosecutorial discretion. For example, see MacDonald v. Musick, 425 F2d 373 (CA9-1970) where the court held it was improper for a prosecutor to condition dismissal of charges on defendant's admission of probable cause to preclude any civil claim against the arresting officers.

The facts presented with this inquiry do not involve threatened criminal action. A pending criminal charge and a pending related civil proceeding does not involve private claims but concerns the public interest in safe public streets and highways. In the Committee's opinion, it is not an improper exercise of prosecutorial discretion for the State's Attorney to condition the plea agreement upon dismissal of the summary suspension proceedings and, alternatively, in appropriate circumstances, to consent to a rescission of the summary suspension as part of the plea negotiations.

The conditional plea agreement does not prejudice the administration of justice but promotes the public interest sought to be served by the legislation. There is no private civil claim involved nor does the prosecutor gain any unfair advantage in a civil claim between private parties. Under the factual circumstances presented, it is not professionally improper for the State's Attorney to propose the conditional plea agreement provided the defendant is adequately informed of the consequences of the plea agreement.