



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, 1.16, 3.1, 3.4, 3.6(b), 8.3(a), and 8.4(b) and (c). 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. 93-19
May, 1994

Topic: Negotiations; Fairness to opposing party and counsel; Extrajudicial statements and media publicity; Mandatory reporting of attorney misconduct.

Digest: A settlement proposal to sign a release and confidentiality agreement as an alternative to projected media publicity if a judgment is obtained against the defendant is not *per se* professionally improper.

Ref.: Illinois Rules of Professional Conduct, Rules 1.16, 1.2, 3.1, 3.4, 3.6, 4.1, 8.3 and 8.4
In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790, 127 Ill.Dec. 708 (1988)
Sheppard v. Maxwell, 384 U.S. 333 (1966)
Cox v. Louisiana, 379 U.S. 536 (1965)
ISBA Opinions on Professional Conduct, Nos. 218 and 90-36.
ABA Informal Opinion No. 83-1502
Rotunda, The New Illinois Rules of Professional Conduct, 78 Ill.Bar. 386 (Aug. 1990)

FACTS

A medical malpractice case approaches trial. The defendant doctor is convinced that he did not commit malpractice and is prepared to go to trial. His attorney receives from plaintiff's counsel a letter containing a settlement demand. In the letter, plaintiff's attorney states that, if his client

receives a judgment, he can "foresee that it will be highly publicized." He points out that a local television station had done a series earlier "about negligent doctors" and that the station had contacted him about a follow-up series. He closes by stating that, if the case is settled and a confidentiality agreement is reached, he will not include the case in the series. As a result of the letter, the doctor becomes upset and is reconsidering his decision to go to trial.

QUESTION

The inquirer asks whether, under these facts, plaintiff's counsel has committed the crime of intimidation; and whether defense counsel is required under *In re Himmel*, 125 Ill.2d 539, to report plaintiff's counsel to the Attorney Registration and Disciplinary Commission.

OPINION

In rendering advisory opinions, the Committee does not determine whether certain hypothetical facts constitute the commission of a crime. That determination must be made by others. It is the Committee's function, rather, to interpret the facts presented in relationship to the Rules of Professional Conduct (Rules), and to offer guidance with respect to the applicable principles. Consequently for the purposes of this opinion, we presume that the conduct described is NOT a violation of the Illinois Criminal Code and intimidation; no authority has been presented to the Committee that would contradict this presumption. However, if this conduct constitutes a crime of intimidation, our opinion would not apply.

The Rules impose on all attorneys admitted to practice in Illinois certain duties with respect to the courts and other tribunals, other attorneys and their clients, and third persons generally. An attorney may not, for example, participate in a proceeding "merely for the purpose of harassing or maliciously injuring any person" (Rule 1.16); nor engage in frivolous litigation (Rule 3.1); nor make a false statement of material fact to a third person (Rule 4.1).

As to negotiating a settlement on behalf of a client, the Rules contain scant guidance, no doubt owing to the wide variety of methods that may be used by counsel in attempting to settle a case in the best interests of their clients. An attorney may not, of course, threaten to bring criminal charges or professional disciplinary proceedings to gain an advantage in a civil action (Rule 1.2(e)), nor may the attorney take any action on behalf of a client when the attorney knows or should know that such action would serve merely to harass or maliciously injure another (Rule 1.2(f)(1)).

Here, the facts portray an aggressive approach to settlement of an apparently high-profile case. The prospect of adverse media publicity, whether in the form of a news article or a television series, can be a legitimate concern in a defendant's decision to settle or to take his chances a trial. Where the prospect of unfavorable publicity is brought to the attention of the defendant and his counsel in the manner described, the propriety of such conduct is not answered by whether it is effective, but by an analysis of the pertinent Rules.

In making this analysis, we must assume that the statements in the letter from plaintiff's attorney are not contrived; that, in addition, any statements that might later be made to the media regarding the forthcoming trial would be based on matters of record; and, finally, that the trial will have concluded before the television series is aired.

Under Rule 3.6, an attorney may not make an extrajudicial statement expected to be disseminated by the media which will "pose a serious threat to the fairness of an adjudicative proceeding." Statements referring to civil jury trials are included within the Rule (Rule 3.6(b)). Certain statements, however, may be made "without elaboration," including statements relating to the general nature of the claim or defense, information contained in the public record, and the result of any step in the litigation (Rule 3.6(c)). The basis for the limitation on such statements is the perception of prejudice that may result to a litigant.

Rule 3.6, however, is concerned almost entirely with pre-trial statements; here the facts indicate the possibility of post-trial publicity. It has long been recognized that First Amendment considerations protect the press in truthfully reporting facts from the public record (*Sheppard v. Maxwell*, 384 U.S. 33 (1966); *Cox v. Louisiana*, 329 U.S. 536 (1965)). Presumably, a civil judgment against the defendant doctor (as well as the report of proceedings) would be a matter of record. Furthermore, as we have seen, Rule 3.6 allows statements by an attorney describing "any step in the litigation."

It must be recognized that negotiation, whether in or outside of litigation, is an art and not a science. There are a variety of procedural tools which, in the litigation arena, may be employed to "pressure" a defendant to settle, and which may or may not be relevant to the strictly legal issues involved. We held long ago, for example, that an attorney's threatened use of a second cause of action against the same defendant to induce the defendant to settle a pending claim was permissible where the proposed claim was of fairly debatable merit. (ISBA Opinion No. 218, November, 1962.) A similar result was reached more recently by the American Bar Association (*see*, ABA Informal Opinion 83-1502, October 30, 1983, holding that a threat of civil prosecution is permissible as long as the attorney makes no false statements of fact or law.)

Other strategic ploys are readily familiar to the trial bar. A plaintiff's attorney may threaten to pursue defendant's own assets unless the case is settled within his policy limits; the same defendant's personal attorney (or his excess insurer) may demand that the primary insurer settle or face the prospect of a "bad faith" claim. Again, one of two defendants may settle with the plaintiff and agree to provide evidence and witnesses against the remaining defendant.

There is little doubt that each of these negotiating maneuvers may put considerable pressure upon the recalcitrant defendant, and may in many cases cause him to reconsider his decision to go to trial. This is part and parcel of the adversary process and, so long as all counsel are operating in good faith in protecting their clients' interests, there is no basis for an imputation of professional misconduct in the employment of such tactics. The Committee does not interpret the letter of plaintiff's counsel as any different from the techniques described. Certainly no provision in the Rules of Professional Conduct prohibits it.

The inquirer suggests that the conduct of plaintiff's attorney may be "prejudicial to the administration of justice," in violation of Rule 8.3(a)(5), or "tend to defeat the administration of justice," in violation of Supreme Court Rule 711, in that it is intended to dissuade the defendant doctor from "vindicating his rights in a court of law." Under Supreme Court Rule 771, conduct which violates the Rules or "which tends to defeat the administration of justice shall be grounds for discipline." One commentator has criticized the quoted language as "about as vague a standard as one could imagine" and questions its retention as a part of a disciplinary system. (Rotunda, *The*

New Illinois Rules of Professional Conduct: A Brief Introduction and Comment, 78 Ill. Bar J. 386, 387 (Aug. 1990). In any event, the "administration of justice" does not demand that all cases be tried; on the contrary, the policy of the law is to encourage settlements. The Committee does not perceive that the statements in question could impede the administration of justice simply because they may convince the defendant to settle and forego the uncertainty of litigation, with resultant unfavorable publicity.

Although the presumption that this conduct is not a crime renders moot the question of mandatory reporting, we believe it advisable to reiterate that only certain kinds of misconduct are subject to the mandatory reporting requirement of Rule 8.3. These include criminal acts which reflect adversely on the attorney's honesty, trustworthiness, or fitness as an attorney in other respects (Rule 8.4(a)(3)), and conduct involving dishonesty, fraud, deceit or misrepresentation. (Rule 8.4(a)(4)). The attorney's knowledge must be "actual knowledge of the fact in question." (Terminology section, Rules of Professional Conduct.)

Guided by these principles, if the conduct of the plaintiff's attorney constitutes the crime of intimidation, then it would meet the definition of mandatory reportable misconduct as set forth in Rule 8.4(a)(3) and 8.4(a)(4). (See Opinion No. 90-36; violation of Rule 1.2(e) prohibiting threat of criminal prosecution not reportable misconduct.)

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