ISBA Professional Conduct Advisory Opinion

Opinion No. 20-03
May 2020

Subject: Threatening criminal prosecution

Digest: A demand letter written by a lawyer in an attempt to settle a civil claim may accurately set forth the relevant statute including the statute's possibility of both civil and criminal liability. However, a demand letter should not threaten criminal prosecution in order to gain an advantage in a civil matter. Further, a lawyer should not state that criminal prosecution can be avoided by making payment (settling the claim) because such a statement would be an improper threat.

References: 820 ILCS 115/1 (Illinois Wage Payment and Collection Act)

Illinois Rule of Professional Conduct 8.4(g)

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Nieves v. OPA, Inc., 948 F. Supp. 2d 887 (N.D. Ill. 2013)

ABA Formal Ethics Opinion No. 92-363 (July 6, 1992)

Model Rule of Professional Conduct 8.4

In re Schaaf, 99 SH 64, M.R. 17387 (Mar. 23, 2001) (approved and confirmed review board report)

In re Zeas, 2014PR00069 (Jan. 14, 2016) (complaint dismissed by hearing board)

In re Denison, 2013PR00001, M.R. 27522 (Sept. 21, 2015) (approved and confirmed review board report)

ISBA Advisory Opinion No. 12-01

FACTS

A lawyer represents an employee with an alleged Illinois Wage Payment and Collection Act claim. The lawyer wishes to send a demand letter to the client's employer setting forth the law in Illinois. The Illinois Wage Payment and Collection Act has both a civil and a criminal

component. (820 ILCS 115/14.) The lawyer has requested the opinion of the Committee on Professional Conduct of the Illinois State Bar Association (the "Committee") regarding whether she may properly state in her wage payment demand letter to her client's employer that the employer's alleged violation of the Illinois Wage Payment and Collection Act may result in criminal and/or civil liability and that a report to law enforcement will be avoided if the employer pays the demand amount or whether such a statement would be in violation of Rule 8.4(g) of the Illinois Rules of Professional Conduct. The lawyer also raised the significance, if any, of ABA Formal Opinion No. 92-363.

QUESTIONS

(1) Does a lawyer violate Rule 8.4(g) of the Illinois Rules of Professional Conduct if she sends a demand letter to her client's employer which accurately sets forth the law which includes the potential for both civil and criminal liability?
(2) Does a lawyer violate Rule 8.4(g) of the Illinois Rules of Professional Conduct if the lawyer includes a copy of the relevant law with her demand letter?

(3) Can a lawyer state in a demand letter that the alleged offense could result in criminal liability?
(4) Can a lawyer agree to withhold criminal prosecution if a civil demand is met?
(5) Does Rule 8.4(g) of the Illinois Rules of Professional Conduct forbid any reference to criminal liability in a demand letter?

OPINION

Rule 8.4(g) of the Illinois Rules of Professional Conduct states as follows:

> It is professional misconduct for a lawyer to: (g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

Illinois lawyers have been disciplined for threatening criminal charges to gain an advantage in a civil matter. See *In re Ditkowsky*, 2012 PR 00014 (violation found where lawyer sent emails replete with allegations of criminal wrongdoing to lawyers involved in a matter and copied various law enforcement personnel on the emails).

However, not all references to criminal law are a violation of Rule 8.4(g) of the Illinois Rules of Professional Conduct.

For example, the disciplinary complaint against a lawyer was dismissed in *In re Zeas*, 2014PR00069 (January 14, 2016) (Hearing Bd. at page 25). Zeas was charged with threatening to present criminal charges by stating in a cover letter to opposing counsel that unless she agreed to execute and file a joint motion to vacate, he would have "no alternative but to serve and file the above pleadings against your cause seeking lawyer's fees and costs, including, *inter alia*, serious allegations of fraudulent misrepresentation and omission before [the court], as well as selective mail tampering by your client with supporting documentary." *Id*. It was determined by the hearing

board that the statements in Zeas' letter did not constitute a clear threat to pursue criminal charges: "Unlike these cases where the communications specifically reference law enforcement or criminal prosecution, the statement at issue here only expressly mentions the civil case." It was determined to be significant that the letter did not mention contacting any law enforcement agency or other authority and did not specifically threaten any criminal prosecution.

In order to prove a violation of Rule 8.4(g) based upon a threat to present criminal charges, a lawyer must have undertaken clear action threatening to present criminal charges, communicated to the intended target of such a prosecution. *In re Zeas*, 2014PR00069 (January 14, 2016) (Hearing Bd. at page 25) citing *In re Lavelle*, 94 CH 187, M.R. 11951 (Mar. 26, 1996) (Hearing Bd. at page 11). There also must be a clear connection between the presentation or threat of criminal charges and a purpose of gaining an advantage in a civil matter. *Id*. citing *In re Schaaf*, 99 SH 64, M.R. 17387 (Mar. 23, 2001); see also *In re Denison*, 2013PR00001, M.R. 27522 (Sept. 21, 2015) (page 39) (None of the blog posts with which Denison was charged clearly communicated an effort to use or threaten criminal prosecution to try to induce another person to act in a specific way in relation to the case at issue. The link, required by Rule 8.4(g), to any effort to gain an advantage in a civil case was not established.)

In *Nieves v. OPA, Inc.*, plaintiffs (employees) sued defendant employer under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 *et seq.* and the Illinois Minimum Wage Law, 820 ILCS 105/1 *et seq*. 948 F. Supp. 2d 887 (N.D. Ill. 2013). One of the issues before the court in *Nieves v. OPA, Inc.* was whether counsel for the defendants (employers) violated Rule 8.4(g) by stating to the court during the initial discovery status hearing that he intended to schedule the deposition of one of the plaintiffs so that the Vernon Hills Police Department could execute an outstanding warrant to arrest the plaintiff. *Id*. at 896. At the initial discovery conference, the lawyer told the court that the police department asked him to schedule the deposition at a certain location so that they could arrest the plaintiff. *Id*. The lawyer also indicated that he intended to comply with the police department's request. *Id*.

In finding no violation of Rule 8.4(g)[1], the Northern District court stated: "While [lawyer] certainly threatened to use [plaintiff's] legal situation to the advantage of the Defendants, he did not present, participate in presenting, or threaten to present criminal charges in this case. Independent, pending charges already existed against [plaintiff] at the time [lawyer] made this statement to [the court]. There is no allegation or evidence that [lawyer] was involved in filing the charges against [plaintiff]. There is no allegation that [lawyer] threatened to file additional charges against [plaintiff]. While [lawyer] stated that he intended to assist the police department in facilitating [plaintiff's] arrest and intended to use the threat of the pending arrest to his advantage by moving to dismiss [plaintiff] if [plaintiff] did not show for his deposition, these actions do not implicate the Rule because [plaintiff] had already been charged by the Vernon Hills Police

[1] The Illinois Supreme Court has exclusive and plenary jurisdiction over lawyer disciplinary matters. Lawyer disciplinary proceedings are conducted by the Lawyer Registration and Disciplinary Commission completely separate and apart from the judicial proceedings in which the alleged lawyer's misconduct occurred. *In re Marriage of Dall*, 212 Ill. App. 3d 85, 92 (5th Dist. 1991).

Department. Therefore, since [lawyer] did not present, participate in presenting, or threaten to present criminal charges, he did not violate the Rule." *Id*. at 897.

In ISBA Opinion No. 12-01, the Committee was presented with the issue of a lawyer who represented a client who wanted to collect on an NSF check. The lawyer filed suit, but the sheriff could not get service on the defendant. The two issues presented were: (1) Could the lawyer send the check back to the client and advise the client of his/her right to file a criminal complaint? (2) Could the lawyer send the check to the State's Lawyer and ask, on behalf of the client, that a criminal complaint be issued. It was the opinion of the Committee that the lawyer could not present or participate in presenting criminal charges to obtain an advantage in the civil aspects of the NSF check matter, but that the lawyer could advise his or her client that he/she may press criminal charges on his/her own if he/she chooses. Opinion No. 12-01 stated: "The lawyer, however, cannot properly 'participate in presenting' such charges to obtain any advantage in the civil aspects of the NSF check matter."

It is the opinion of this Committee that a lawyer does not violate Rule 8.4(g) by sending a demand letter to her client's employer which accurately sets forth the law which includes the potential for both civil and criminal liability. The demand letter should only state that civil remedies will be pursued by the lawyer if the demand is not met. The demand letter should not state that the lawyer will pursue criminal prosecution. Further, it is not a violation of Rule 8.4(g) for a lawyer to state that an alleged act or omission may be criminal so long as the lawyer does not state that she will present, participate in presenting, or threaten to present criminal charges. A demand letter should be limited to the civil matter.

The lawyer has also asked the Committee whether she may agree to withhold criminal prosecution if her client's civil demand is met. A lawyer should not agree to withhold criminal prosecution in exchange for the payment of the client's demand because there is a clear connection between the presentation or threat of criminal liability and gaining an advantage in a civil matter. See *In re Zeas*, 2014PR00069 (January 14, 2016) (Hearing Bd. at page 25).

The lawyer has also raised the significance, if any, of ABA Formal Ethics Opinion No. 92-363. As discussed by ABA Formal Ethics Opinion No. 92-363, the prohibition against threatening criminal prosecution was deliberately omitted by the drafters of the Model Rules. However, Illinois deviates from Rule 8.4 of the Model Rules of Professional Conduct and contains the prohibition which was excluded by the Model Rules. Therefore, ABA Formal Ethics Opinion No. 92-363 does not influence this Opinion.

CONCLUSION

(1) It is not a violation of Rule 8.4(g) of the Illinois Rules of Professional Conduct for a lawyer to accurately recite a relevant statute or enclose a copy of the relevant statute with a demand letter. Such conduct, without more, is not evidence that a lawyer presented, participated in presenting, or threatened to present criminal charges to obtain an advantage in a civil matter.
(2) It is not a violation of Rule 8.4(g) of the Illinois Rules of Professional Conduct for a lawyer to state in a demand letter that the alleged act or omission could result in criminal liability.

However, a lawyer should not threaten criminal prosecution to obtain an advantage in a civil matter.

(3) A lawyer should not state that criminal prosecution could be avoided to gain an advantage in a civil matter because such a statement would be an improper threat. A lawyer should not agree to forgo criminal prosecution in exchange for gaining an advantage in a civil matter.

(4) Rule 8.4(g) of the Illinois Rules of Professional Conduct does not forbid a reference to criminal liability in a demand letter so long as the lawyer does not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter.
