Illinois Attorneys Cannot Threaten To Report Opposing Counsel, But Researching The Issue Teaches Important Lessons

POSTED ON JUNE 26, 2015 UPDATED ON NOVEMBER 3, 2015

By Tim Miller, General Counsel, Novack and Macey LLP

Timothy J. Miller

Recently, a client asked, "can I tell opposing counsel that I will report counsel's misdeeds to the ARDC if the case does not settle on favorable terms?" I responded, "probably not, but let me do some quick research to make sure." The subsequent research confirmed that, in Illinois, it is unethical to threaten to report counsel to the ARDC to gain an advantage in a civil matter, but I (re)learned valuable lessons along the way.

My initial answer to the client was based on my recollection of an explicit ethical rule that forbids threatening criminal prosecution in order to gain advantage, but I could not recall which rule I was thinking of. So, as I frequently do, I started my research by going to my copy of the ABA's Annotated Model Rules of Professional Conduct. The index to the Model Rules contains an entry for "threat of disciplinary action." The reference in the index is to an annotation to ABA ModelRule 4.4, "Threatening to Prosecute or Report." The annotation reports that the old Model Codeexpressly barred a lawyer from threatening to present criminal charges, but that this requirement was removed from the Model Rules. As a result, ABA Formal Ethics opinion 94-363 (1994) concludes that, under current Rule 4.4, while many threats may violate one or more other provisions of the Rules, some threats of criminal prosecution may be proper. The Model Rule annotation also references a 1988 Illinois State Bar Association Ethics Opinion (87-7). According to the annotation, the ISBA Opinion concludes that threatening to report somebody to the ARDC violates the Model Code.

I then looked at Illinois Rule 4.4 and noted that it has no prohibition against threats. Nor did the index to the Rules have a relevant entry.

In light of the age of the ISBA Opinion referenced in the ABA annotation, I decided that I would see if it had been cited in any Illinois cases. I did a Westlaw search for "Illinois State Bar Association Opinion 87-7." While I did not see any cases citing the ISBA Opinion, that search told me that there was another more recent ISBA Opinion whose topic is "Participation in Presentment of Criminal Charges to Obtain Advantage in Civil Matter." (No. 93-05.) In turn, that opinion notes that Illinois Rule 1.2 (e) provides that "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." In short, I learned that Illinois carried the old Model Code prohibition against threats into the Model Rules and made it expressly applicable to ARDC complaints.

I next reviewed Illinois Rule 1.2 and saw that, as of January 1, 2010, there is no section (e) in the Rule. Further, on Westlaw, the notes of decisions for Illinois Rule 1.2 have an entry for "threatening act." That entry refers to one case, *Skolnick v Altheimer & Gray*, 191 Ill. 2d 214, 234, 730 N.E.2d 4, 17 (2000). When I reviewed *Skolnick*, I saw that it contains the following statement: "The Skolnicks correctly observe that an attempt by a lawyer to blackmail an opponent through the threatened use of ARDC proceedings violates the Rules of Professional Conduct. 134 Ill.2d R. 1.2(e)." *Id.* According to Westlaw, however, there are no later cases that cite *Skolnick* for this proposition.

I had not reviewed the older ISBA Opinion referenced in the ABA Annotation because it was issued when Illinois followed its version of the Model Code. Nonetheless, at this point, I decided to review the ISBA Opinion itself. Significantly, the second paragraph of the Opinion contains the statement that "This opinion was AFFIRMED by the Board of Governors in July 2010." The next sentence of the ISBA Opinion states "Please see the 2010 Illinois Rule of Professional Conduct 8.4(g).

So, I went to Illinois Rule 8.4(g). Sure enough, Illinois Rule 8.4(g) states that it is professional misconduct to "present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter." In other words, the prohibition at issue had moved from the Model Code to Illinois Rule 1.2(e) and from Rule 1.2(e) to Illinois Rule 8.4(g) in 2010.

After all of this, it was clear that my initial advice to my client was correct and that threats to report counsel to the ARDC are improper. I called my client and told him so.

So, what lessons did I (re)learn? *First*, I was reminded that legal ethics research is not always straightforward in Illinois, and that it is especially prudent to pay particular attention to the differences between Illinois' Rules of Professional Conduct and the ABA's Model Rules. Illinois has adopted almost all, but not the entirety, of the Model Rules and it also has adopted provisions that vary from the Model Rules. Moreover, neither Illinois Rule 1.2 — where the prohibition at issue used to reside — nor Illinois Rule 4.4 — where the ABA discussed the prohibition — reference Rule 8.4(g). Thus, it required careful research to locate Illinois Rule 8.4. *Second*, I was reminded that it is dangerous to promise "quick" research or assume that a research question is easy.

(This is for informational purposes and is not legal advice.)