



ETHICAL ISSUES FOR CHILD SUPPORT ENFORCEMENT ATTORNEYS

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2016 CHILD SUPPORT CONFERENCE

INDIANA PROSECUTING ATTORNEYS COUNCIL

BRINGING A CLAIM BARRED BY THE STATUTE OF LIMITATIONS

- Applicable statutes of limitations:
 - IC 34-11-2-10 Child Support Enforcement Actions
 - Must be commenced not later than 10 years after child's 18th birthday
 - Or child's emancipation.
 - IC 34-11-2-12 Satisfaction of Judgment
 - Judgments “shall be considered satisfied after the expiration of 20 years.”
 - But see, *Estate of Wilson*, 937 N.e.2d 826 (Ind. Ct. App. 2010), discussing *Rex Metal Craft*, 831 N.E.2d 812 (Ind. Ct. App. 2005).

ETHICS QUESTION

- Is it unethical to bring a claim that you know is barred by a statute of limitations?
- The ABA says “Typically not.” ABA Ethics Op. 94-387 (Sept. 26, 1994)
 - No duty to inform opposing party that s/l has run and may negotiate to resolve a time-barred claim. It would violate duties of diligence and confidentiality to do so.
 - Not unethical to file a lawsuit knowing the claim is time-barred.
 - The result is the same even if the lawyer represents the government.

OTHER AUTHORITY

- Less clear in Minnesota. “Can You Ethically Assert a Time-Barred Claim?” Mary L. Galvin, *Minnesota Lawyer* (Nov. 27, 2000).
- Maybe improper in New York. “Lawyer may institute suit on cause against which period of limitations has run only where as a matter of law the limitation attaches to the remedy not the right.” NY State Bar Assn, Opinion #475 (10/14/2077).

STATE LAW SENSITIVE

- What about Indiana?
- Statute of limitations is an affirmative defense that is waived if not pled. Trial Rule 8(C).
- No Indiana authority that it is unethical to knowingly bring a time-barred claim.
- Probably not a violation of the Rules of Professional Conduct to bring such a claim.

OTHER CONSIDERATIONS

- But, other considerations include the prudence of bringing a claim that likely will be successfully defeated by a statute of limitations defense.
- Importance of discussing pros and cons with client. See generally Rule 1.4.
- Do not make misrepresentations of law to opposing party.
- Take special care when dealing with an unrepresented opposing party. Rule 4.3.

BY-PASSING OPPOSING COUNSEL

- Rule 4.2: “In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.”

WHAT RULE 4.2 MEANS

- It applies to lawyers acting in a representative capacity. But, lawyers can and often do act through agents. The acts of an agent are the acts of the lawyer. See Rule 8.4(a): “It is professional misconduct for lawyer to ... violate or attempt to violate the Rules of Professional Conduct through the acts of another.”

Rule 4.2 (cont.)

- See also, Rules 5.1(c): A lawyer shall be responsible for another lawyer's violations of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- Rule 5.3(c) is similar for non-lawyers subordinates

Rule 4.2 (cont.)

- Communication must be about the subject of the representation of the client.
- Does not apply when clients “lawyer shop.”
- The lawyer must “know” the other person is unrepresented. This means actual knowledge as inferred from circumstances. Rule 1.0(f).
- The other lawyer must be known to represent the person “in the matter.”

Rule 4.2 (cont.)

- Exceptions:
 - The communication is allowed by the other lawyer. The other represented person cannot consent. This is unusual where it is the lawyer, not the client, who must consent.
 - Authorization by law or court order. E.g., services of summons, notices to appear, etc.
 - But see: *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999).

APPLICATION TO CHILD SUPPORT

- If there is statutory authorization for direct contact, it does not violate Rule 4.2. Consider courtesy copies to other counsel or counsel's waiver of courtesy copies.
- Are non-lawyer actors in the child support enforcement system lawyer agents for 4.2 purposes?
- If they have an independent, statutory or rule-based role, probably not.

Civil-Criminal Interaction

- The interaction between criminal and civil law is very close in child support context.
- Is it unethical for a child support enforcement lawyer to threaten a criminal referral if a support obligor does not pay?
- “Old” Code of Professional Responsibility: “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.” DR 7-105

Civil-Criminal Interaction

- But the Code has been displaced by the Rules of Professional Conduct.
- What do the Rules say on the subject?  ←Cricket
- See ABA Formal Op. 92-363 (July 6, 1992)
- “The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.”

Op. 92-363 (cont.)

- “The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law.”
- Must consider external law.

UNAUTHORIZED PRACTICE

- Is filing a proof of claim in a bankruptcy court where the attorney is not licensed to practice UPL?
- State UPL considerations should be irrelevant because federal bankruptcy is pre-empted by federal law.
- Actions in other state courts where the lawyer is not admitted to practice (including pro hac vice), could be UPL.

UNAUTHORIZED PRACTICE (cont.)

- But see Rule 5.5 on unauthorized practice of law and multijurisdictional practice.
- Caution: Rule 5.5 varies from state to state and the version in the forum state will control.
- Even if conduct were permissible in Indiana, if it is UPL in another state, it violates our own Rule 5.5(a).

UNAUTHORIZED PRACTICE (cont.)

- Filing a claim as a creditor in a bankruptcy proceeding is something a creditor can do without the assistance of counsel. Even a corporation can file a proof of claim in a bankruptcy through an authorized non-attorney agent.
- If a non-attorney can do it, it is not UPL for a lawyer to do it.



QUESTIONS?

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