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You Can't Stop A Client From Complaining

BY STEVEN C. KRANE

The representation did not go well. The client was unhappy with your services. Your fee bills remained unpaid for months on end. The client fired you and retained new counsel.(Things did not go much better for the client thereafter, a fact that gave you some warped pleasure.) Still, no payment came. You sued to recover the fees you were owed. The client counterclaimed, alleging that you had committed malpractice and acted unethically during the representation. After a fair amount of skirmishing, you reached a settlement with the client. Under that deal, which the client's new lawyer negotiated, you were to be paid some of the money you were owed and general releases were to be exchanged. But you wanted total peace. You wanted to know that you were rid of this problem once and for all. Consequently, you wanted the client to agree as part of this global settlement that the client would not file a complaint against you with the disciplinary or grievance committee for your jurisdiction.

This is a scenario in which red flags should rapidly unfurl. Is it proper for a lawyer to ask a client to for bear from complaining to the appropriate authorities about the ethics of the lawyer's conduct? I was presented with this question as Ethics Partner in my firm a few months ago, and my initial reaction was to say, "Why not?" I could understand that it would not be proper to ask for such an agreement in advance of the representation, or if the client had some legal obligation to report arguably unethical conduct, something analogous to the lawyer's limited ethical duty under DR 1-103(A) to report certain misconduct by another attorney. But I was not aware of any rule of law that requires a lay person to report knowledge of unethical conduct by lawyers. Because this question arose during the summer, a fact that is significant only because it meant that there was a ready supply of research assistance at my firm in the form of summer law student interns, I asked for an intern to be assigned to investigate this issue.

Public Policy Underlies Rule

What the intern found surprised me. There is a substantial and unanimous body of authority stating that a lawyer may not ask for or obtain the agreement of a current or former client to withdraw or refrain from filing disciplinary charges against the lawyer in the context of a settlement of a lawyer-client dispute or otherwise. The rationale for this rule appears to lie in a public policy that favors effective policing of the legal profession and the unfettered reporting of possible ethical transgressions to attorney regulatory authorities. Allowing lawyers to avoid disciplinary scrutiny by, in effect, buying off the complainant is inconsistent with this policy.

Settlements of disputes between New York lawyers and their clients are governed generally by DR 6-102(A), which states:

> A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent

> representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.

There is nothing in this rule that says anything about complaints filed with attorney disciplinary authorities. The rule speaks to liability for malpractice, strongly suggesting that it is aimed at settlements of civil malpractice claims. Nevertheless, courts and ethics committees around the country have interpreted this rule and its counterpart in the Model Rules as applying to settlements of lawyer-client disputes that involve agreements to forbear from filing grievances, or to withdraw grievances that have already been filed.

In *Matter of Wallace*, 518 A.2d 740 (N.J. 1986), for example, the Supreme Court of New Jersey disciplined a lawyer in part for having settled a dispute with a client through an agreement in which the client agreed to dismiss a pending ethics complaint against the lawyer. The court concluded that this conduct violated DR 6-102(A), *id*. at 740-41, evidencing "extreme indifference to the intent of the Disciplinary Rules." "Public confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants." *Id*. at 743. *See, also, State of Oklahoma ex rel. Oklahoma Bar Association v. Colston, 777* P.2d 920 (Okla. 1989) (lawyer committed a "clear violation" of DR 6-102(A) by offering a client $5,000 in exchange for an agreement not to pursue a grievance).

Ethics Opinions Agree with Decisions

Ethics committee opinions are in accord. While Arizona Opinion No. 91-23 acknowledged that "nothing in the Code specifically prevents an attorney from limiting his exposure to disciplinary proceedings," the Committee opined that an agreement allowing a lawyer to pursue a settled fee claim if the client subsequently filed a bar complaint against him was prohibited under Rule 1.8(h) of the Arizona Ethics Rules. Rule 1.8(h) is the Model Rules counterpart to DR 6-102(A). The Committee observed that the agreement in question involved the "same evils" that rule was designed to prevent, including "the strong potential of coercion and overreaching on the attorney's part, and the potential conflict between the lawyer 's interests and those of his client." The Committee continued:

> Additionally, and more importantly, agreements limiting an attorney's exposure to disciplinary action have the effect of undermining the Bar’s efforts at self-regulation. It is one thing to say that an attorney can conduct an arm's-length transaction with a client (who is represented by independent counsel) which will limit the client's monetary damages in a potential malpractice case, and another to say an attorney can "limit" the integrity of the profession by preventing a complaint from being filed with the State Bar. As a matter of public policy, every attorney must be accountable for his misconduct, and should not be able to contract his way out of it.

See, also, Michigan Informal Opinion RI-257 (1996) (violation of Model Rule 1.8(h) to arbitrate disputes arising out of the representation that relate to the lawyer 's ethical conduct); *also*, Ohio Supreme Court Op. 96-9 (same).

As noted above, no authorities purport to permit lawyers to enter into agreements with clients to forego or withdraw disciplinary complaints as part of a settlement or otherwise. However, there are some cases and ethics opinions that do not base their prohibition on DR 6-102(A) or Model Rule 1.8(h), but rather

perhaps in recognition of the fact that those rules relate specifically to exculpation for malpractice, or state the proposition more broadly than in the settlement context - predicate their views on the provisions such as DR 1-102(A)(5) or the corresponding Model Rule 8.4(d), which generally bar conduct prejudicial to the administration of justice.

See, People v. Moffitt, 801 P.2d 1197, 1198-99 (Colo. 1990) (lawyer violated DR 1-102(A)(5) by attempting to condition settlement of a malpractice claim upon the client's agreement not to file a grievance against him; deemed a subversion of the grievance process); Attorney Grievance Commission of *Maryland v. Stancil,* 463 A.2d 789, 791 (Md. 1983) (lawyer violated DR 1-102(A)(5) by paying a client $1,400 "at least in part to discourage [the client] from filing a complaint with The Commission concerning the respondent's conduct").

District of Columbia Ethics Op. 260 (1995) is particularly eloquent in its admonition to lawyers against such arrangements: "Allowing a lawyer to bargain with a client to avoid [disciplinary] procedures would significantly impair the Bar's ability to regulate its members as well as protect the courts, the legal profession, and the public's confidence in the integrity and competence of the judicial system, thereby 'seriously interfer[ing] with the administration of justice.'" *See, also* Maine Ethics Op. 68 (1986); North Carolina Ethics Op. 83 (1989).

Connecticut Adopts Rule

Connecticut has apparently viewed this issue as being of such significance that specific language has been added to its rules of professional conduct to deal with it. Connecticut Rule 8.3(a) states, in pertinent part, that "[a] lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct will not be reported to the appropriate disciplinary authority." *See,* also, Connecticut Informal Ethics Op. 97-13; Connecticut Informal Ethics Op. 95-29.

The lone authority from New York State is Matter of Goldberg, 82 A.D.2d 572 (2d Dep't 1981), in which an attorney was censured for having paid a complainant $3,500 for a general release and the withdrawal of all grievances the complainant had filed against the attorney. The Appellate Division's brief opinion does not contain any discussion of the reasoning underlying its conclusion that this conduct was worthy of professional discipline or even cite to a provision of the Code. Still, like all of the other authorities our research uncovered, it answered the question in the negative.

After reviewing all the research, I thought about these authorities and, while I appreciated the underlying policy arguments, I questioned whether it really makes sense to have a blanket prohibition against agreements that implicate the attorney disciplinary process. Suppose a lawyer performs services for a client and sends a bill for $10,000. The client believes this charge to be outrageously high, and refuses to pay it. The client writes the lawyer a nasty letter and threatens all sorts of repercussions if the matter is not resolved satisfactorily, including referral of the matter to "the bar association." After some discussion, the lawyer reduces the bill to $3,000, the client is happy, and money changes hands. The lawyer does not want to live under the threat, however slight, that the matter may still be reported to the authorities, especially after giving up $7,000 in fees. I asked myself, what public policy would be served by leaving open the possibility that the client, who has achieved a very favorable result through the negotiations, might still report the lawyer to a grievance committee? I answered my own question - first noting that

the mere charging of an excessive fee is itself a violation of DR 2-106(A) - by agreeing with the authorities that stress the importance of policing the profession. What if the lawyer routinely sends inflated bills to clients, and nine out of ten pay them without objection? Should the lawyer be able to evade discipline for this pattern of misconduct by buying off the occasional client who complains? Shouldn't we just let the disciplinary system sort it all out?

The legal profession has the privilege of policing itself through the attorney disciplinary process. We have not yet had a lay bureaucracy foisted upon us for regulatory purposes, like other professions. We will continue to have this privilege only if we exercise it responsibly. Thus, I have come to the end of my personal journey through this issue, and have accepted as a precept that prohibiting lawyers from resolving disciplinary complaints through the expedient of civil settlement is a small price to pay for maintaining control over the regulation of our profession.

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