

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2010-3

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SYLLABUS: As part of the settlement of a legal malpractice claim, it is improper for a lawyer to require a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance. Such conduct constitutes conduct prejudicial to the administration of justice under Prof. Cond. Rule 8.4(d) and conduct adversely reflecting on fitness to practice law under Prof. Cond. Rule 8.4(h). Further, in response to a demand for information by a disciplinary authority a lawyer is required by Prof. Cond. Rules 8.1(a) and 8.1(b) to respond truthfully and fully in the disciplinary matter including inquiry, investigation, and subsequent disciplinary proceeding. A lawyer's attempts to avoid discipline hinder the disciplinary process.

OPINION: This opinion addresses a question regarding whether a lawyer may ethically require a client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance.

As part of the settlement of a legal malpractice claim, is it proper for a lawyer to require a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance?

Attempts by a lawyer to avoid a disciplinary grievance and attempts by a lawyer to limit liability for legal malpractice are governed by the Ohio Rules of Professional Conduct, but under different rules. Although a disciplinary grievance and a malpractice claim might coexist when a lawyer and client are in dispute, the issues are distinct and are treated as separate issues under the Ohio Rules of Professional Conduct.

A lawyer's attempt to limit liability for professional malpractice is a conflict of interest governed by Prof. Cond. Rule 1.8(h). If a lawyer wants to prospectively limit liability for professional malpractice, or require arbitration of a malpractice claim, or settle a potential or actual malpractice claim, the lawyer must meet the conditions within Prof. Cond. Rule 1.8(h).

Prof. Cond. Rule 1.8(h)

A lawyer shall not do any of the following:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement.
- (2) settle a claim or potential claim for such liability unless all of the following apply:
 - (i) the settlement is not unconscionable, inequitable, or unfair;
 - (ii) the client or former client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel in connection therewith;
 - (iii) the client or former client gives *informed consent*.

A lawyer's attempt to avoid a disciplinary grievance is considered professional misconduct under Prof. Cond. Rules 8.4(d) and 8.4(h).

Prof. Cond. Rule 8.4

It is professional misconduct for a lawyer to do any of the following:

- (d) engage in conduct that is prejudicial to the administration of justice;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Though neither Prof. Cond. Rule 8.4(d) nor 8.4(h) specifically mentions a lawyer's attempts to avoid a disciplinary grievance, disciplinary case law instructs lawyers that such conduct falls under these rules.

Disciplinary Counsel v. Chambers, Slip Opinion No. 2010-Ohio-1809, is the first disciplinary case to consider the conduct of avoiding discipline, since the adoption of the Ohio Rules of Professional Conduct, effective February 1, 2007. In *Chambers*, the Supreme Court of Ohio found violations of Prof. Cond. Rules 8.4(d) and 8.4(h) for a lawyer's conduct in requiring an individual to withdraw a disciplinary grievance as part of the settlement of a civil action. *Id.* at ¶14. The lawyer had an altercation with his

neighbor. He pleaded no contest to a misdemeanor charge of attempted aggravated disorderly conduct and was sentenced to one year of probation. The neighbor filed a civil action and a grievance. *Id.* at ¶10. The lawyer drafted a settlement and mutual release of claims which the parties submitted for the trial court's approval in the civil action. The trial court crossed out most of the provisions of the agreement, leaving the provision requiring the plaintiff to withdraw the disciplinary grievance. In accordance with the revised settlement agreement, the neighbor sent a letter to the Office of Disciplinary Counsel [ODC] seeking withdrawal of the grievance. *Id.* at ¶12. ODC sent a letter informing the lawyer that ODC had authority to investigate matters that came to its attention regardless of a desire by a grievant to withdraw a grievance. ODC advised the lawyer that a client should not be required to forgo filing, dismiss, or resolve a grievance outside of Gov. Bar Rule V. *Id.* at ¶13. The Supreme Court of Ohio found that the lawyer's attempt to have the neighbor dismiss the grievance violated Prof. Cond. Rules 8.4(d) and 8.4(h), even though the lawyer never had an attorney-client relationship with the neighbor. *Id.* at ¶14.

Prior to the adoption of the Ohio Rules of Professional Conduct, a lawyer's attempts to require a grievant to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance were viewed as improper under the Ohio Code of Professional Responsibility. Attempts to avoid discipline were found to violate various rules: DR 1-102(A)(5) (conduct prejudicial to the administration of justice); 1-102(A)(6) (conduct adversely reflecting on fitness to practice law); 6-102 (attempts to limit liability for malpractice); and were suggested to violate 1-102(A)(2) (circumventing a Disciplinary Rule through actions of another).

For example, in *Cuyahoga Cty. Bar Assn. v. Berger* (1992), 64 Ohio St.3d 454, 456, two lawyers violated DR 1-102(A)(2), 1-102(A)(5), 1-102(A)(6), and Gov. Bar R. V(5)(a) (neglecting or refusing to assist the grievance committee's investigation) by a settlement agreement with their client that required strict confidentiality as to the settlement terms and that limited responses to inquiries by any bar association to "the matters have been resolved." The hearing panel of the Board of Commissioners on Grievances and Discipline asserted that "respondents' conduct struck at the heart of the disciplinary system and ethical rules established by the Ohio Supreme Court" and concluded that the respondents "attempted to suppress the bar association's investigation." *Id.* at 456. The Supreme Court of Ohio concurred in the Board's findings and recommendations. *Id.* at 456-57.

Over the years, the court's view as to whether a lawyer's attempt to avoid discipline constitutes a violation of DR 6-102 has evolved. In *Cleveland Bar Assn. v. Kates*, 78 Ohio St.3d 69, 70, 1997-Ohio-236, the Supreme Court of Ohio did not find clear and convincing evidence of a violation of DR 6-102 when a lawyer, who had been sued for malpractice by a client, attempted to insulate himself from disciplinary action by inserting into a proposed settlement agreement a clause that the clients would "dismiss and not further prosecute any complaints made to the Cleveland Bar Association or any other such body." "Disciplinary proceedings are not actions for malpractice. Respondent's actions may have violated DR 1-102(A)(2) (circumventing a Disciplinary

Rule through actions of another), but respondent [lawyer] was not charged with such a violation.” Id. at 70-71.

In *Cleveland Bar Assn. v. Kodish*, 110 Ohio St.3d 162, 165, 173, 2006-Ohio-4090, a lawyer violated DR 1-102(A)(5), 1-102(A)(6) and 6-102 by sending a letter to a client proposing a financial settlement to resolve undisclosed disputes that arose from the representation if the client promised not file a grievance claiming professional misconduct or to initiate any criminal prosecution. In *Columbus Bar Assn. v. Smith*, 108 Ohio St.3d 146, 149, 153, 2006-Ohio-413, a lawyer violated DR 6-102 by telling a client, who had asked for a refund after the lawyer missed a statute of limitations, that he would represent her at no charge if she would withdraw the grievance. In *Akron Bar Assn. v. Markovich*, 117 Ohio St.3d 313, 314, 2008-Ohio-862, a lawyer, who was discharged by a client for conduct in an estate matter, stipulated to and was found to have violated DR 6-102 by offering to refund a filing fee if the client dropped the grievance.

Later, in *Akron Bar Assn. v. Wittbrod*, 122 Ohio St.3d 394, 396, 2009-Ohio-3549, the Supreme Court of Ohio accepted a finding of a violation of DR 6-102 or Prof. Cond. R. 1.8(h)(2) based upon the lawyer conceding that at some point during malpractice settlement negotiations, either before or after February 1, 2007, the lawyer proposed a dismissal of a grievance as a term of settlement of a malpractice action. Id. But, the court noted that in *Kates* it “suggested that a lawyer’s attempt to derail a disciplinary investigation through negotiations to dismiss a grievance was more aptly charged as a violation of DR 1-102(A)(2)(prohibiting a lawyer from circumventing a Disciplinary Rule through the actions of another). *Wittbrod*, 122 Ohio St.3d at 396 n.2. Further, the court noted that in *Markovich* it recently accepted a stipulation to a violation of DR 6-102, the former counterpart of Prof. Cond. R. 1.8(h)(2) for a lawyer’s attempt to obtain dismissal of a grievance through negotiations with an unrepresented client, but that “[a]pparently the stipulation resulted not only because the client was unrepresented but because the disciplinary investigation in progress might have led to a malpractice claim.” *Wittbrod*, 122 Ohio St.3d at 396.

In view of these disciplinary cases, there is no debate that attempts by a lawyer to avoid discipline by asking a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance is improper. And following *Chambers*, such conduct constitutes a violation of Prof. Cond. Rules 8.4(d) and 8.4(h).

Further, a lawyer’s attempts to avoid discipline hinder the disciplinary process. A lawyer has a duty under Prof. Cond. Rule 8.1 to cooperate in disciplinary matters.

Prof.Cond. Rule 8.1

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

- (a) knowingly make a false statement of material fact;

- (b) in response to a demand for information from an admissions or disciplinary authority fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

When called upon by a disciplinary authority to provide information, truthful and full responses are required throughout a disciplinary inquiry, investigation, and subsequent disciplinary proceeding.

In conclusion, the Board's advice is as follows. As part of the settlement of a legal malpractice claim, it is improper for a lawyer to require a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance. Such conduct constitutes conduct prejudicial to the administration of justice under Prof. Cond. Rule 8.4(d) and conduct adversely reflecting on fitness to practice law under Prof. Cond. Rule 8.4(h). Further, in response to a demand for information by a disciplinary authority a lawyer is required by Prof. Cond. Rules 8.1(a) and 8.1(b) to respond truthfully and fully in the disciplinary matter including inquiry, investigation, and subsequent disciplinary proceeding. A lawyer's attempts to avoid discipline hinder the disciplinary process.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.