

16-02

Opinion No. 16-02

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

March 23, 2016

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Issues

1. What are the ethical constraints on lawyers settling potential legal malpractice claims or bar complaints with clients?

Opinion

2. A lawyer may neither request nor agree to limit his or her duties to the administration of justice regarding filing or participating in a bar complaint.

3. A lawyer may not request that a present or former client refrain from filing or participating in a bar complaint as a condition to settling disputes between the client and the lawyer.

4. A lawyer may not participate in an agreement that limits the lawyer's liability for malpractice or prohibits the lawyer from accepting future clients except as permitted by rule or law.[1]

Background

5. There are three factual situation to consider:

1. In the context of settling civil litigation a lawyer for one party demands as a condition of settlement that the lawyer for the opposing party agree to forgo filing or participating in a bar complaint.

2. A lawyer is settling a dispute with a former client. That client has threatened to file a bar complaint which the lawyer believes frivolous. As a condition of settling the dispute the lawyer wishes to include a provision precluding the former client from filing or participating in a bar complaint.

3. Finally, in consideration of settlement, a party demands conditions that would limit the lawyer's ability to take further cases against the settling party or waives a former

client's malpractice claim.

Discussion

6. Requesting an opposing attorney, an opposing party, or a client or former client to refrain from filing or participating in a bar complaint as a condition of settlement of outstanding disputes violates several of the Rules of Professional Conduct including Rules 8.3 and 8.4.[2] Agreeing to refrain from filing or participating in such a complaint also violates these same rules.

7. Rule 8.3 of the Rules of Professional Conduct requires that a lawyer who has knowledge[3] "that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial[4] question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall[5] inform the appropriate professional authority" (emphasis added). Accordingly, Rule 8.3(a) would preclude a lawyer from agreeing to refrain from filing or participating in a meritorious bar complaint.

8. Rule 8.4 (a) provides that "it is professional misconduct" for a lawyer to "knowingly assist or induce another" to "violate . . . the Rules of Professional Conduct." Because it is unethical for an attorney to agree not to report a serious breach of the Rules of Professional conduct, Rule 8.4 (a) would preclude a lawyer from making such a request as his conduct would knowingly "assist or induce" a violation of the other lawyer's obligation to report under Rule 8.3.

9. Demands to forego reporting as a condition of settlement would hinder bar authorities from meeting their responsibilities of deterrence of serious matters and the protection of the public. As the Comment to Rule 8.3 notes, "An apparently isolated incident may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

10. Simply because the opposing party or client is a lay person without duties to the public and the bar does not lessen the misconduct in attempting to obtain an agreement not to file a complaint. It is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d). Seeking to prevent a client or opposing party from filing or participating in a bar complaint is "prejudicial to the administration of justice."

11. Similarly, it is "professional misconduct" to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4 (c). Requesting a client or former client to not file a bar complaint could possibly involve "dishonesty, fraud, deceit or misrepresentation." Where an attorney has made mistakes in handling the

client's case, the attorney must nevertheless "keep the client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Rule 1.4. Where the attorney is attempting to resolve a possible malpractice case with a client or former client, the lawyer may be tempted to provide less than thorough or candid information, which could constitute "conduct involving dishonest, fraud, deceit or misrepresentation."

12. Rule 1.8(h) deals with an attorney settling a claim or prospective claim for "malpractice" with a client or former client. It requires that the client be "independently represented" in an agreement "prospectively limiting" malpractice liability and that the client or former client be "advised in writing" of the desirability of having "independent counsel" to settle a "claim or potential claim" for malpractice. Tellingly, this rule addresses only settlement for "malpractice" and does not address the protocol for settling claims for violations of the Rules of Professional Conduct or complaints to the Bar. This suggests that including agreements that a client or former client will decline to report an attorney to the bar is not permitted under the Rules of Professional Conduct.

13. The purpose of attorney discipline is "to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Supreme Court Rules 14-501 (a). Requesting an agreement not to report misconduct might fall within this provision. Violation of Rule 8.4(d) of the Utah Rules of Professional Conduct is grounds for disbarment under Supreme Court Rule 14-605(a).

14. Even if the threatened bar complaint is believed to be frivolous, or not substantial, a request to forego a bar complaint still violates the Rules of Professional Conduct. Paragraph 10 of the Preamble to the Rules of Professional Conduct provides, "Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement." Responding to frivolous, or not substantial, complaints is simply a price lawyers pay for the extensive societal power granted members of the profession.

15. In settling cases, placing other conditions may also violate the Utah Rules of Professional Conduct. The Committee warned against analogous requests requiring a settling lawyer to indemnify the defendant against unknown medical claims in Ethics Advisory Opinion No. 11-01. The Committee found that requesting or agreeing to indemnify against unknown medical claims created a conflict of interest between the lawyer and the client. Further, Rule

5.6(b) specifically precludes the inclusion of restrictions on the lawyer's right to practice as a portion of a settlement agreement. Simply put, a lawyer may not include conditions in a settlement agreement that would raise impermissible conflicts of interests for either settling lawyer.

16. A request to a lawyer as a condition of settlement of a civil lawsuit to waive reporting an incident of serious professional misconduct places the lawyer in conflict with her duties to the client to settle the matter and her duties to the court and to the public.[6] This is because in litigation, a lawyer owes duties to the public and the court. "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, [and] to the legal system...."[7]

17. If the request was not related to a violation of the rules, it would violate Rule 4.4's prohibition on a lawyer using means that have no substantial purpose other than embarrass, delay or burden a third person.[8] This is mere harassment, analogous to using frivolous threats of criminal prosecution to obtain civil settlements.

Notes:

[1] Rule 1.8(h) of the Utah Rules of Professional Conduct provides:

A lawyer shall not:

1(h)(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

1(h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person 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.

[2] We note that the lawyer is dealing with an unrepresented party. "In dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." RPC 4.3(a).

[3] "Knowledge" denotes actual knowledge of the fact in question. Utah Rules of Prof I Conduct R. 1.0(g).

[4] "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance." Utah Rules of Prof I Conduct R. 1.0(m).

[5] "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for

purposes of professional discipline." Utah Rules of Prof I Conduct, Preamble, ¶ 14.

[6] Rule 1.7(a)(2) prohibits representation if there is a significant risk that the representation would be materially limited by the lawyer's responsibilities to third persons which would include responsibilities to the Court as well as to the general public. Utah Rules of Prof I Conduct R. 1.7 1(a)(2).

[7] Utah Rules of Prof I Conduct, Preamble, ¶¶ 8-9.

[8] While Rule 4.4 does not prohibit such threats, "[a] *baseless* threat to inform a prosecutorial or regulatory authority would constitute 'means that have no substantial purpose other than to embarrass.'" Hazard, Hodes, & Jarvis, *The Law of Lawyering* 40.4 n. 6 (2008) (citing ABA Comm. on Ethics & Prof I Responsibility, Formal Op. 92-363 (1992)).
