Missouri Supreme Court Advisory Committee

Formal Opinion 122

SETTLEMENT TERM PROHIBITED THAT REQUIRES
WITHDRAWING, REFRAINING FROM FILING,
OR DECLINING TO COOPERATE REGARDING A COMPLAINT.

The question to be addressed is whether it is a violation of Supreme Court Rule 4, the Rules of Professional Conduct for an attorney to participate in a settlement in which a term of the settlement is that a party will withdraw, refrain from filing, or decline to cooperate regarding, a complaint under Supreme Court Rule 5.

"The fundamental purpose of an attorney disciplinary proceeding is to 'protect the public and maintain the integrity of the legal profession.'" *In re Snyder,* 35 S.W.3d 380, 384 (Mo. banc 2001). A settlement between individuals that effectively eliminates the potential for a disciplinary proceeding related to allegations of an attorney's misconduct is contrary to the public policy reasons for establishing a system for attorney discipline. The Advisory Committee agrees with the statement of the New Jersey Supreme Court in *Matter of Wallace*, 104 N.J. 589, 594, 518 A.2d 740, 743 (NJ 1986):

> 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.

Other states have addressed this issue. Several states have adopted specific rules prohibiting this conduct.[1] States that have decided the issue by case law have found this conduct to violate the disciplinary rules.[2]

It is the opinion of the Advisory Committee that an attorney who enters into, or attempts to enter into, a settlement that includes a term that a party to the agreement will withdraw, refrain from filing, or decline to cooperate regarding, a complaint under Supreme Court Rule 5 violates Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice.

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[1] For example, Illinois Rule of Professional Conduct 1.8(h); Massachusetts Supreme Judicial Court Rule 4:01, Section 10; Oregon RPC 1.8(h).

[2] Most states that have addressed the issue have found that this conduct is conduct prejudicial to the administration of justice in violation of rules similar to Missouri's rule 4-8.4(d). *Matter of Tartaglia*, 20 A.D.3d 81, 798 N.Y.S.2d 458 (NY 2005); *The Florida Bar v. Frederick*, 756 So.2d 79 (FL 2000) *Matter of Wilson*, 715 N.E.2d 838 (IN 1999); People v. Vsetecka, 893 P.2d 1309 (CO banc 1995); *Conduct of Boothe*, 303 Or. 643, 740 P.2d 78 (OR 1987). Iowa found that it is misconduct because it frustrates the intent of the rule imposing a duty to report misconduct by other attorneys. *Iowa Supreme Court Board Of Professional Ethics And Conduct v. Miller*, 568 N.W.2d 665 (IA 1997). Oklahoma found it was improperly limiting liability to a client. *Oklahoma Bar Association v. Colston*, 777 P.2d 920 (OK 1989). *See also* ABA/BNA Lawyers Manual on Professional Conduct 51:1101

The complainant and respondent attorney involved in a complaint under Rule 5 may communicate with each other and attempt to resolve any problems between them. If they are able to resolve the problems that led to the complaint, they may enter into an agreement indicating that their problems have been resolved and that they will inform the Office of Chief Disciplinary Counsel or the Regional Disciplinary Committee of the resolution. This agreement may be reached as a part of the Complaint Resolution Program established by Rule 5.10 or independent of that program. Regardless, the agreement cannot provide that the complainant will withdraw a complaint, refrain from filing a complaint, or decline to cooperate with attorney discipline authorities. Under Rule 5.17[3], a complainant does not have the ability to withdraw a complaint, even if it were appropriate to request that a complainant do so.

March 8, 2006

[3] The unwillingness or neglect of the complainant to prosecute the charges or the settlement, compromise or restitution of the claim by the complainant shall not justify the failure to undertake or complete proceedings commenced pursuant to this Rule 5.