

## PRACTICE TIPS FROM BAR COUNSEL

# AMICABLY RESOLVING CLIENT CLAIMS? GOOD IDEA. ASKING THE CLIENT TO WITHDRAW A BAR COMPLAINT? BAD IDEA.

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Amicably resolving a client's potential claims against you is a good idea. Conditioning the settlement upon the client withdrawing or not filing a bar complaint, however, is a bad idea.

Attorneys, when settling matters, typically draft release language as broadly as possible. For example, a release may include any and all claims which have been, or could have been, brought or that may arise in the future. Such language is not necessarily improper in resolving a fee-dispute or malpractice claims if the client is represented by his or her own counsel.

However, the Office of Bar Counsel has noticed a recent increase in settlement agreements where attorneys, in negotiating broad releases that encompass any and all claims against them, require their clients to either:

1. withdraw a pending bar complaint, or
2. agree to not file a bar complaint.

Although these attorneys may simply be seeking finality to their clients' underlying claims, and not possess any improper or malicious motives, the inclusion of such terms is improper.

The problem with requiring a client to withdraw a pending bar complaint, or agree to not file a bar complaint, is two-fold. First, such requirements are unenforceable pursuant to the Supreme Court Rules. Second, such requirements constitute grounds for professional discipline.

The Supreme Court of Nevada grants absolute immunity to all participants in the disciplinary process. Specifically, Supreme Court Rule (SCR) 106 (Privilege and limitation) states that:

All participants in the discipline process, including grievants, bar counsel staff, members of disciplinary panels, diversion and mentoring participants, and witnesses, shall be absolutely immune from civil liability. No action may be predicated upon the filing of a disciplinary complaint or grievance or any action taken in connection with such a filing by any of the participants.

As such, the absolute immunity conveyed by the Supreme Court precludes a civil suit against a client for filing a complaint or participating in the disciplinary process.

The granting of absolute immunity is common in attorney regulation, and covers any statements made by a complainant. For example, a recent Louisiana attorney discipline case, *In re Raspanti*,<sup>1</sup> concerned an attorney who filed a defamation suit against a client who filed a bar complaint against him. However, like Nevada, Louisiana grants a grievant absolute immunity.

As a result, the attorney was found guilty of violating the equivalent of Rule of Professional Conduct (RPC) 3.1 (Meritorious Claims and Contention) and RPC 8.4 (Misconduct: conduct prejudicial to the administration of justice).

In explaining the public policy behind granting all participants in the disciplinary process absolute immunity, the Louisiana Supreme Court stated that:

A policy of conferring absolute immunity ... encourages those who have some doubt about a lawyer's conduct to submit the matter to the proper agency, where it may be examined and determined. Without immunity, some valid complaints will not be filed. The individual lawyer may suffer some hardship as the result of the occasional filing of a malicious complaint, but a profession that wants to retain the power to police its own members must be prepared to make some sacrifice to that cause.<sup>2</sup>

SCR 106 reflects this policy of encouraging the filing of complaints by granting absolute immunity to grievants, as well as all participants in the disciplinary process, and strengthens the ability of our profession to police itself. Accordingly, even if a settlement agreement between a lawyer and a client prohibited the client from filing a bar complaint, the provision would be unenforceable as no action can be taken against a client based upon his or her filing a bar complaint.



Likewise, should a bar complaint be pending against the attorney, a provision requiring the client to withdraw the bar complaint is also unenforceable, as a grievant does not have standing to dismiss a bar complaint. SCR 107 (Refusal of grievant or complainant to proceed, compromise, etc.) states that:

Neither unwillingness nor neglect of a grievant or complainant to sign a grievance or complaint or to prosecute a charge, nor settlement or compromise between the grievant or complainant and the attorney, nor restitution by the attorney, shall require abatement of the processing of any grievance or complaint. Such factors may be considered in determining whether to abate.

Further, in *Ching v. State Bar of Nevada*,<sup>3</sup> the Nevada Supreme Court explicitly stated that the state bar has standing to be a complaining party, and thus prosecuting a discipline proceeding is not contingent upon the client's cooperation.

However, given the difficulty of investigating and/or prosecuting cases without client cooperation, requiring a client not to file a bar complaint, to withdraw a grievance or otherwise not cooperate with the state bar is deemed interference with a bar investigation and a violation of RPC 8.4(d) (Misconduct; conduct prejudicial to the administration of justice).

The Nevada Supreme Court, in an unpublished 1996 discipline order,<sup>4</sup> found that the attorney engaged in conduct prejudicial to the administration of justice by "contacting his client's daughters in an effort to persuade them to dismiss the state bar action they had filed against him."

In *In the Matter of Finn*,<sup>5</sup> a New York disciplinary case, the respondent attorney was found to have violated Nevada's equivalent of RPC 8.4(d) when he improperly attempted to condition the settlement of his client's claim against him upon an assurance that no complaint of professional misconduct would be made to the grievance committee.

Similarly, in the *People v. Bennett*,<sup>6</sup> a Colorado disciplinary decision, the respondent attorney was found to have violated the equivalent of RPC 8.4(d) for simply requesting, but not requiring, that a client withdraw the grievance filed against him. In rendering the decision, the Supreme Court of Colorado rejected the attorney's contention that RPC 8.4 is violated "only when the attorney conditions settlement of the civil action on withdrawal of the grievance."

In conclusion, resolving a client's claims or potential claims against you is laudable. In doing so, however, remember not to condition the settlement upon the client withdrawing or not filing a bar complaint. Not only are such conditions unenforceable, they also violate the Rules of Professional Conduct. **NL**

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1 8 So.3d 526 (La. 2009)

2 *Raspanti*, 8 So.3d at 534, quoting *Model Rules for Lawyer Disciplinary Enforcement*, Rule 12: Immunity, Commentary (1993 ed.).

3 111 Nev. 779, 895 P.2d 646 (1995).

4 *In re Mirch*, Supreme Court Case No. 26444 (1996). The Nevada Supreme Court found that the conduct violated SCR 203(4), the prior version of RPC 8.4(d).

5 223 A.D.2d 333 (N.Y. Sup. Ct. 1996)

6 810 P.2d 661 (Colo. 1991)