

Settlement Agreements Requiring Complainants to Withdraw Ethics Complaint

FACTS

It has come to the Committee's attention that, when a complainant or other witness in a disciplinary action also has a potential civil action against an attorney, the attorney may attempt to settle the civil action, and as a condition of settlement, may attempt to require the complainant or witness to request the Committee to drop the ethics complaint or not cooperate with the Committee in pursuing the complaint.

ISSUE

May an attorney request, require or agree to withdrawal of an ethics complaint or potential ethics complaint, as a condition of settlement of a parallel or underlying legal action against him?

DISCUSSION

Disciplinary processes are intended to protect the public, not punish an individual. Although an individual complainant may be satisfied by a settlement in parallel or underlying litigation, the interests of the public will not be served by the circumvention of the Committee's duty and function.

DR 1-103(A) states that "A lawyer possessing unprivileged knowledge of a (disciplinary rule) violation shall report such knowledge to a tribunal or other authority empowered to investigate or act upon the conduct of lawyers . . ." The spirit of that disciplinary rule suggests that no lawyer should be involved in a dismissal of an ethics complaint if a tribunal has a continuing interest in the matter. But even more binding upon the Committee is the holding by the West Virginia Supreme Court of

Appeals in Committee on Legal Ethics of The West Virginia State Bar v. Smith, 194 S.E.2d 665 (W.Va. 1973), in which the Court held that "Once alleged misconduct on the part of an attorney has come to the attention of the Committee, it must pursue it. . .".

Other jurisdictions have most often addressed this issue in the context of the attorney making restitution to the complainant in return for the complainant's agreement to withdraw his ethics complaint. Restitution made after disciplinary proceedings have been commenced has been called the "honesty of compulsion" (In re Harris, 88 N.J.L. 18, 22-23, 95 A.761, 762 (Sup.Ct. 1915) (en banc); it has traditionally been considered a mitigating circumstance, at most, in disciplinary proceedings. The Committee will not terminate disciplinary proceedings based upon these "conditions of settlement" but may direct Counsel to proceed with disciplinary procedures, in spite of attempts by a complainant to withdraw his complaint.

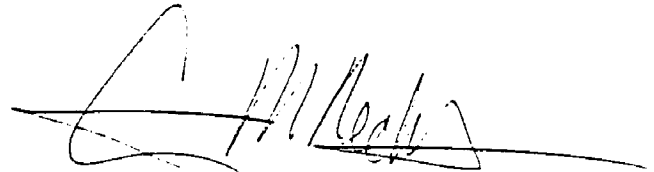
Additionally, the Committee finds that requiring an ethics complainant or witness to withdraw his or her complaint as a condition for settlement of a parallel legal action is an unethical practice. This is true whether or not the "condition of settlement" is agreed upon orally or in writing. Such a request for withdrawal is not binding on the Committee and the complaint may be continued by Bar Counsel, and prosecuted by using subpoena power.

This holding by the Committee is for the protection of both the lawyer and the public. An offer that a complainant or witness will "drop" an

ethics complaint may be tantamount to blackmail; it may force the lawyer to settle a civil action when he would not otherwise do so. The complainant does not, and should not, have the authority to make such an offer.

Holding

An attorney who requests or enters into an agreement to have one or more ethical complaints against him or her "dropped" by the complainant in exchange for money, may be considered by the Committee to have committed a separate and distinct ethical violation. The Committee will not automatically honor requests of complainants or witnesses to drop ethics complaints against attorneys, because of agreements to do so, written or oral, regardless of which party initiates such agreement.

A handwritten signature in dark ink, appearing to read 'A. M. Recht', is written over a horizontal line. The signature is fluid and cursive.

Arthur M. Recht, Chairman  
Committee on Legal Ethics