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SETTLEMENT OF LAWYER MALPRACTICE, WITHDRAWAL OF GRIEVANCE COMPLAINT

Adopted March 22, 1980.

Addendum Issued 1995.

Addendum Issued 1998.

Syllabus

It is unethical for an attorney to condition settlement of a civil action for malpractice against his lawyer-client upon the withdrawal by the plaintiff of a grievance complaint filed against the lawyer-client.

Facts

An informal complaint was filed with the Grievance Committee of the Colorado Supreme Court directed to the conduct of an attorney. The particular conduct in question also provided the basis of a civil action alleging malpractice by the attorney. A settlement of the civil action was negotiated during the Grievance Committee's consideration of the grievance. As a part of such settlement, counsel for the lawyer-defendant in the civil action interposed the requirement that the plaintiff write a letter to the Grievance Committee

- (1) requesting that the grievance he had instituted against the attorney be withdrawn as improvidently instituted
- (2) representing that the plaintiff, through discovery, had ascertained that the facts affirmatively alleged in his Complaint to the Grievance Committee were no longer true and that discovery established that no impropriety had actually occurred in the course of lawyer-defendant's representation of plaintiff.

Opinion

DR 7-105 of the Colorado Code of Professional Responsibility prohibits an attorney from presenting, directly or indirectly, or threatening to present criminal charges for the sole purpose of obtaining an advantage in a civil case. The rationale for this prohibition is that the civil adjudicative process is designed to resolve fairly disputes between parties free of intimidation or coercion that can subvert the process. Threats of criminal prosecution can unjustifiably deter the person threatened from fully and freely asserting rights he may have in the civil action. EC 7-21. Conduct of attorneys violative of DR 7-105 or its predecessor canons has formed the basis for severe public censure or suspension from the practice of law. See, e.g., *People v. Hertz*, 608 P.2d 335 (Colo. 1979) (*The Colorado Lawyer*, Jan. 1980, at 176); *Matter of Gelman*, 230 App. Div. 524, 245 N.Y.S. 416 (1930).

The logic of DR 7-105 and EC 7-21 has been extended to cases involving threats of disciplinary action in order to effect a civil settlement. Drinker, *Legal Ethics* (1953), at 153. Informal Opinion C-734 (1964) of the ABA Standing Committee on Ethics and Professional Responsibility found unethical two types of threatening conduct by attorneys not involving criminal charges. In one instance a lawyer threatened a debtor with proceedings under a municipal licensing ordinance if he did not pay an alleged debt. In the other, the debtor received a letter from the creditor's lawyer threatening the pursuit of remedies with the State Real Estate Commission in the event the debtor failed to pay a certain amount to the creditor. In each case the threat, although not raising the spectre of criminal charges, raised fears of the debtor as to his ability to continue to conduct a business which required licensing. Threats to a person's economic livelihood can have as deleterious an effect on the debtor's willingness and ability to freely and fully litigate the issues in a civil action on the debt as the threat of criminal charges.

The facts presented here are the converse of those discussed above in that they involve a refusal by defense counsel to settle a malpractice suit against a lawyer-client unless the plaintiff effectively withdraws the complaint he filed against the lawyer-client with the Colorado Supreme Court Grievance

Committee. The effect of counsel's insistence upon the cessation of the grievance procedure, however, has the same dampening effect on the willingness and ability of the plaintiff layman to pursue fully his legal right to question the conduct of an attorney through the Colorado Supreme Court grievance procedure.

Of perhaps even greater significance in these facts are the objectives of the Colorado Supreme Court and the Bar of this State in ensuring that unethical conduct of attorneys is disciplined. Once a complaint is filed with the Grievance Committee, an investigation is undertaken to determine whether the complaint is well-founded. If the investigation reveals that the case has merit and is of a serious nature, prosecution of the grievance against the attorney respondent is launched not on behalf of the individual complainant but on behalf of the people of the State of Colorado. Such prosecution proceeds regardless of whether the lawyer's conduct may have also given rise to potential civil liability as a result of damages sustained by the client-complainant.

To permit counsel for the lawyer-client here to insist upon effective withdrawal of the grievance complaint as a condition of the civil settlement would subvert the purpose of the Colorado Supreme Court's grievance process and permit possible unethical conduct to go undisciplined. Such insistence by counsel is prejudicial to the administration of justice and is unethical conduct that violates DR 1-102(A)(5). The plaintiff-complainant is entitled to negotiate a settlement of the civil action he instituted free of the condition that he not pursue his legal rights in a discrete disciplinary action.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 4.5, including Comment (regarding threatening prosecution, which rule against threatening prosecution is more comprehensive than the rule contained in the Code of Professional Responsibility); Rule 3.1 (regarding meritorious claims and contentions); Rule 3.3(a)(1), (2) and (4) (regarding candor toward the tribunal); Rule 3.4 (regarding fairness to opposing party and counsel); Rule 8.1(b) (regarding bar admission and disciplinary matters); and Rule 8.4(d) and (f) (regarding misconduct).

The Ethics Committee directs attorneys to Opinion 85 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 85 which should be reviewed in conjunction with the Rules.

1998 Addendum

Effective July 1, 1997, the Colorado Supreme Court established a grievance mediation process in which relatively minor grievances filed against lawyers by former clients may, in appropriate circumstances, be resolved and dismissed pursuant to written Mediation Agreements signed by the lawyer, the former client, and the mediator. *See* C.R.C.P. 241.4(c)(11) [to be repealed and reenacted as C.R.C.P. 251.3(c)(11), effective January 1, 1999] and 251.13 [effective July 1, 1998]. Under the rules promulgated by the Mediation Committee to govern that process, the resolution of threatened or pending civil disputes between lawyer and former client is appropriate and encouraged as part of the mediation process. It is therefore not a violation of Colo. RPC 8.4(d) or any other Colorado Rule of Professional Conduct for an attorney to seek or obtain the resolution of all pending or contemplated civil disputes between an attorney and a former client, including legal fee and malpractice disputes, as part of a settlement reached in a mediation conducted pursuant to the Colorado Rules of Civil Procedure cited above.