

NEW HAMPSHIRE BAR ASSOCIATION
Foregoing Professional Conduct Complaints
Ethics Committee Advisory Opinion #2011-12/04

ABSTRACT:

A lawyer may not condition settlement of a dispute with a client upon the client agreeing not to file professional conduct complaint against the lawyer.

ANNOTATIONS:

A lawyer may not condition a settlement of a dispute between the lawyer and the client upon an agreement that the client will not file a professional conduct complaint against the lawyer.

Permitting such settlements is prohibited because the ethics rules serve a purpose beyond rectifying a particular wrong to an individual client. The rules are designed to protect the bar and public generally.

A question exists about whether a lawyer-mediator may be subject to discipline for failure to report a professional conduct violation by another lawyer if the violation rises to the thresholds set forth in NHRPC 8.3(a).

NH RULES OF PROFESSIONAL CONDUCT:

NHRPC 1.6

NHRPC 1.7(a)

NHRPC 1.8(h)

NHRPC 8.3(a)

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

See Tessier v. Rockefeller, 162 N.H. 324, 33 A.3d 1118 (2011) (court found plaintiff stated a cause of action for fraudulent representation against attorney who broke promise not to report attorney misconduct to the Attorney Discipline Office).

QUESTION PRESENTED:

In a settlement of a dispute between a lawyer and a client, may a lawyer condition the settlement upon an agreement that the client will not file a professional conduct complaint against the lawyer?

FACTS:

A lawyer-mediator is mediating a dispute between a lawyer and that lawyer's client involving the fees charged and the work performed by that lawyer in a matter. The lawyer and client have

generally reached agreement on the resolution of all issues. However, the lawyer insists that as a condition of settlement, the client must agree not to file any professional conduct complaints against the lawyer.

ANALYSIS:

It may come as a surprise that there are no rules of professional conduct that deal directly with this issue. Perhaps the closest rule is NHRPC 1.8(h), which prohibits lawyers from *prospectively* limiting a lawyer's liability for malpractice unless the client is independently represented in making such an agreement. It also prohibits a lawyer from settling a claim or potential claim for malpractice liability with a former client or unrepresented client unless that person is advised in writing of the desirability of seeking the advice of independent counsel, and is given the opportunity to do so.

However, for those courts and ethics committees that have examined this issue, the consistent finding is that settlement of a fee or malpractice dispute can never be conditioned on the client's promise not to file a grievance against the lawyer or report the lawyer's misconduct to the appropriate disciplinary authority. *See* ABA/BNA Lawyers Manual on Professional Conduct, §51:114. *See People v. Moffitt*, 801 P.2d 1197 (Colo. 1990); *In re Freeman*, 835 N.E.2d 494 (Ind. 2005); *In re Wallace*, 518 A.2d 740 (N.J. 1986); *In re Goldberg*, 442 N.Y.S.2d 551 (N.Y. App. Div. 1981); *State ex rel. Oklahoma Bar Ass'n v. Colston*, 777 P.2d 920 (Okla. 1989). *See also* Arizona Ethics Op. 91-23 (1991); District of Columbia Ethics Op. 260 (1995); North Carolina Ethics Op. 84 (1988). This position holds true even if the lawyer believes the grievance to be unjustified. Connecticut Informal Ethics Op. 97-13 (1997).

The reasoning behind such rulings is that the ethics rules serve a purpose beyond rectifying a particular wrong to an individual client. The rules are also designed to regulate the bar and protect the public generally. *See* Michigan Informal Ethics Op. RI-257 (1996) (agreement may not provide that disputes over lawyer's professional conduct will be submitted to alternative dispute resolution). *See also In re Wallace, supra.* ("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.") At least one court has characterized such conduct as prejudicial to the administration of justice. *See In re Freeman*, 835 N.E.2d 494, *supra.* Thus, in resolving a dispute between a lawyer and a client, the lawyer should not propose a release of misconduct claims.

One other issue stemming from this inquiry is of note. If one of the issues in dispute involves conduct by the lawyer proposing a release of claims which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, a question arises as to whether the lawyer-mediator could be exposed to disciplinary action for failure to report that lawyer's misconduct. NHRPC 8.3(a) requires that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must report that lawyer to the Attorney Discipline Office. The failure to do so is a professional conduct violation itself. There are exceptions to this requirement if the information is otherwise protected by professional conduct rules pertaining to confidentiality (NHRPC 1.6), as well as for work by lawyers on the

New Hampshire Bar Association Ethics Committee and the New Hampshire Lawyers Assistance Committee. See NHRPC 8.3(c). However, none of those exceptions applies here. Likewise, there are court rules and generally accepted principles concerning mediation which require that mediators maintain the confidentiality of all information obtained in mediation unless otherwise required by law. *See e.g.* ABA Model Rules of Conduct for Mediators, Standard V, Confidentiality (adopted September 8, 2005) and Superior Court Rule 170(E)(1). As of the issuance of this opinion, there has been no determination by the New Hampshire Supreme Court or the Professional Conduct Committee analyzing the interplay of NHRPC 8.3(a) upon lawyer-mediators.

CONCLUSION:

A lawyer may not condition a settlement of a dispute between the lawyer and the client upon an agreement that the client will not file a professional conduct complaint against the lawyer.

SUBJECTS:

Confidentiality
Conflicts of Interest
Settling Malpractice Claims
Reporting Misconduct

By the NHBA Ethics Committee

This opinion was submitted for publication to the NHBA Board of Governors.