

Ohio Grievance Board Finds that Attorneys Cannot Negotiate Release of Ethical Grievance as Part of Settlement in Legal Malpractice Claim



By: David M. Krueger

Conduct giving rise to claims of legal malpractice can often also serve as the basis for an ethical violation. Recognizing this, it is not unusual for the attorney against whom a claim of malpractice is made, to desire that any possible claim against him be resolved, in the event of settlement. Such claims might include not only claims for legal malpractice, but ethical grievances that may arise from the same conduct. The question arises, however, can an attorney ethically require a plaintiff to withdraw or agree to refrain from filing an ethical grievance as part of a settlement in a legal malpractice claim?

The Ohio Board of Commissioners on Grievances and Discipline recently addressed the use of grievance waivers in Opinion 2010-3, concluding that it is unethical for an attorney to require a plaintiff to agree to a grievance waiver in a legal malpractice settlement. Ohio Professional Conduct Rule 8.4 establishes that it is ethical misconduct for an attorney to “engage in conduct that is prejudicial to the administration of justice” or conduct that adversely reflects on an attorney’s fitness to practice law. While Rule 8.4 does not specifically address the use of grievance waivers, case law interpreting Rule 8.4 (and its predecessor inception as Disciplinary Rule 1-102) holds that the use of grievance waivers in a malpractice settlement constitutes conduct prejudicial to the administration of justice.

This view is consistent with the national trend of states that follow the Professional Model Rules in finding that attempts to include a grievance waiver in a legal malpractice settlement constitute an ethical violation. Most courts examining this issue, however, have only found that a grievance waiver constitutes a violation of Rule 8.4. Opinion 2010-3 goes further than previous law or other states’ ethics opinions by finding that a grievance waiver additionally constitutes a violation of Professional Rule 8.1.

Rule 8.1 prohibits an attorney from failing to disclose information that is material in a disciplinary proceeding. Like Rule 8.4, this Rule does not address the ethics of a grievance waiver. Regardless, Rule 8.1 has been found to impart a general duty on a lawyer to cooperate in all disciplinary matters. Accordingly, the Board reasoned that a lawyer’s attempt to avoid discipline by having a plaintiff agree to a grievance waiver constitutes an unethical attempt to hinder the disciplinary process under Rule 8.1.

Thus, if an attorney attempts to avoid an ethical charge with a grievance waiver, two additional violations are committed (in addition to failing to discharge the underlying violation). Attorneys in legal malpractice claims are therefore well advised to ensure that grievance waivers are not part of a legal malpractice settlement agreement. Most importantly, attorneys are cautioned to avoid even the appearance of impropriety as an indirect attempt to include a grievance waiver as part of a settlement can still violate the Professional Rules, even if the grievance waiver is not ultimately (or officially) part of the settlement agreement.

Should you desire a full text of Board of Commissioners on Grievances and Discipline Opinion 2010-3 or if you have any questions regarding professional liability or grievance exposure applicable to attorneys, please contact one of our Professional Liability Practice Group members.

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