

## Settle Issues, Not Complaints

by

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**Minnesota Office of Lawyers Professional Responsibility**

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Roughly half of all complaints that the Director's Office receives alleging attorney misconduct come from attorneys' clients or former clients. It is not unusual for such a complaint to include a reference to a dispute surrounding attorney fees, that the client wants his or her file returned or some other affirmative action.

Nothing prohibits lawyers from taking action to satisfy a client or otherwise respond to a client concern outside the ethics investigation process. Lawyers should not, however, condition responsive or corrective action on dismissal of the ethics complaint or the client's refusal to participate in the disciplinary investigation.

The fact that a client's dissatisfaction has been eliminated by the lawyer's remedial measures may be communicated to the investigator so it can be considered in determining whether discipline is warranted or what level of discipline is appropriate. Once complaints are referred for investigation, however, the client cannot withdraw them.

### **Unsettling matter**

The Director's Office refers most fee disputes to arbitration, because generally the issue does not implicate the Minnesota Rules of Professional Conduct. Often a complaint will include allegations in addition to the fee dispute warranting an investigation.

The lawyer may attempt to resolve the fee dispute issue outside the disciplinary process. This will not, however, resolve the entire complaint. Investigation of the remainder of the complaint will proceed.

Sometimes, attorneys make the mistake of viewing the complainant and the respondent (attorney) as "parties" to the ethics complaint and similarly view the investigation as "litigation," which the "parties" direct and control.

Not only is this assumption flawed, but it can also lead to an additional problem – a lawyer attempting to induce certain conduct on the part of the complainant in exchange for some conduct or other "consideration" from the lawyer.

The complainant cannot "settle" an ethics complaint with the attorney. Although it is perfectly reasonable and acceptable for an attorney to make efforts to resolve certain matters with the client that are part of the investigation, the attorney must be careful not to ask for or imply that there is an expectation of certain

conduct in exchange for the attorney's concession with respect to that issue. An attempt to induce specific conduct from the complainant that threatens the disciplinary process can constitute separate grounds for discipline.

An egregious example of this quid pro quo misconduct occurred in the public discipline case of *In re Hetland*, 275 N.W.2d 582 (Minn. 1978). In that case, the respondent had committed a variety of serious misconduct, including appropriating clients' funds, presenting false evidence in the ethics investigation and "attempt[ing] to bribe and coerce [another client] into withdrawing the ethics complaint."

The Supreme Court affirmed the determination that this behavior constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5), the predecessor to rule 8.4(d) of the Minnesota Rules of Professional Conduct (MRPC). The combination of serious misconduct resulted in the respondent's disbarment.

### **Attorney admonition**

In a recent nonpublic matter, an attorney received a private admonition for discussing the "resolution" of the client's complaint via the lawyer's agreement to reimburse some of the attorney fees complainant had paid. The matter was being investigated because the information the complainant had submitted to the Director's Office indicated possible violations of rules 1.3 and 1.4 of the MRPC (failure to exercise proper diligence and failure to reasonably communicate with the client).

The investigation indicated that the attorney had not, in fact, violated these rules. The complainant referenced his request for a partial refund of the fees he had paid to the attorney, however, and the lawyer viewed the client's complaint as simply surrounding the fees.

The attorney decided to grant the complainant's request for a partial refund; he discussed the matter with the complainant and the two came to an agreement as to the appropriate amount of the refund. This was perfectly acceptable behavior for the attorney to undertake.

The attorney indicated to the complainant that the refund check would be sent after the complainant had notified the investigator that the attorney and the client "have resolved this [them]selves." The complainant reasonably took this communication to mean that the refund was contingent upon the "withdrawal" of the ethics complaint.

The attorney followed with a confirming letter to the client, and copied to the investigator, stating that the client's accepting of the refund "hereby closes the matter." The evidence thus supported complainant's understanding, and the lawyer received a private admonition for violating Rule 8.4(d) of the MRPC.

Attorneys may make efforts to resolve disputes with clients before, during, and after investigations and proceedings involving the Director's Office. They should be aware, however, that the complainant does not control the investigation and proceedings, and attorney should never attempt to manipulate the process by

requesting or demanding the “withdrawal” of an ethics complaint.