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Getting Crosswise: Bar Complaints by Current Clients

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One of the most vexing situations a lawyer can face is a current client who files a bar complaint against the lawyer. Client motives vary, ranging from comparatively benign pique at not having a phone call returned to more fundamental disagreements that go to the heart of the attorney-client relationship. The difficulty for both lawyer and client is magnified if the complaint is filed in the heat of litigation with long-scheduled court events looming. In this column, we'll look at two questions lawyers confront in this situation. First, must you withdraw? Second, even if you are not technically required to withdraw, should you withdraw?

Must You Withdraw?

The Oregon State Bar answered our first question last year in Formal Ethics Opinion 2009-182: "not necessarily." The opinion, which is available on the Bar's web site at www.osbar.org, begins by noting that in most (but not all) situations a bar complaint by a current client creates a conflict under RPC 1.7(a)(2) because it may affect the lawyer's judgment in handling the matter.

If the client discharges the lawyer at the same time, RPC 1.16(a)(3) requires the lawyer to withdraw (or if in a court proceeding, to seek leave to withdraw under, as applicable, UTCR 3.140/ORS 9.380 or U.S. District Court LR

83-11). Somewhat perversely, however, discharge does not always follow a bar complaint.

If the client has not also discharged the lawyer, 2009-182 finds that withdrawal is not always mandatory. In reaching this conclusion, 2009-182 relies primarily on *In re Obert*, 336 Or 640, 646-48, 89 P3d 1173 (2004), and *In re Knappenberger*, 337 Or 15, 26-30, 90 P3d 614 (2004), where the Supreme Court declined to impose a per se withdrawal rule in the analogous context of potential malpractice claims against current counsel.

Conflicts under RPC 1.7(a)(2) are waiveable under RPC 1.7(b) if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation” and the client gives informed consent. The Supreme Court in *Obert* and *Knappenberger* did not draw a bright line in the malpractice setting delineating when it would be appropriate for a lawyer to remain, and 2009-182 doesn’t either for bar complaints. Rather, each (assuming client consent) turns on case-specific facts in light of RPC 1.7(b)’s reasonable belief standard.

Should You Withdraw?

Notwithstanding the theoretical ability to remain, it usually makes good practical sense to withdraw (or, again, if in court, to seek leave to withdraw) for two basic reasons.

First, even if comparatively “benign,” a bar complaint usually signals a fundamental rift between lawyer and client over the conduct of the representation. And, even if it doesn’t, most lawyers don’t take kindly to clients who file bar complaints against them. Given these near universal circumstances, it is difficult on a practical level to say that a lawyer’s professional judgment won’t be affected by a bar complaint.

Second, even if a client is willing to consent, it is too easy to be “second guessed” later. It is worth noting, for example, that although the Bar’s Legal Ethics Committee and Board of Governors issued the thoughtfully nuanced 2009-182, the Bar’s Office of Disciplinary Counsel argued aggressively for the per se withdrawal rule the Supreme Court rejected in *Obert and Knappenberger*. Neither a later disciplinary prosecution nor a civil damage claim for malpractice or breach of fiduciary duty is necessarily bound by 2009-182. Therefore, remaining on the case opens the lawyer to being “second guessed” on whether (a) a waiver was necessary, (b) any waiver obtained was effective or (c) any conflict was even waiveable.

Having said that, there are situations where a court may order a lawyer to stay even when the client has filed a bar complaint. *State v. Taylor*, 207 Or App 649, 142 P3d 1093 (2006), and *State v. Estacio*, 208 Or App 107, 144 P3d 1016 (2006), are ready examples. In both, criminal defendants filed bar complaints on the eve of trial. The respective trial courts concluded in light of the timing and the

nature of the defendants' complaints that the lawyers involved should remain. The Court of Appeals affirmed in each. Although *Taylor* and *Estacio* focused on constitutional effective assistance because they were criminal cases, their results also have more general application. RPC 1.16(c) requires lawyers to comply with court rules governing withdrawal *and* allows them to remain on a case notwithstanding an otherwise disqualifying conflict if ordered by the court: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Summing Up

The safest practical approach for lawyers faced with this uncomfortable dilemma is often to seek leave to withdraw and to follow the court's directive if ordered to remain on the case.

ABOUT THE AUTHOR

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