

Avoiding Problems When Settling Malpractice Claims

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Unfortunately, not all clients will be completely satisfied with your services. Some clients threaten to, or do, bring malpractice claims. A lawyer may settle a potential or actual malpractice claim. In doing so, however, the lawyer has to meet requirements beyond those in settling a "typical" civil claim.

Rule 1.8(h) of the Minnesota Rules of Professional Conduct provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith."

Case in point

The following is an illustration of these points. A client discharges his or her trial counsel and hires a second lawyer to handle the appeal of a civil matter. After the appeal is decided, the client asks the lawyer for a reduction in fees. The lawyer meets with the client, who does not have separate counsel, and the lawyer proposes a resolution.

The lawyer proposes that he will retain counsel to negotiate with and/or file a lawsuit against the lawyer who originally represented the client, and any amounts recovered will be paid to the second lawyer toward the client's bill for his representation. The proposed agreement also contains the following provision: "[Client] hereby agrees not to pursue any action against [the second lawyer] for any purpose, and any cause or action, real or imagined, now or in the future, specifically waiving her right to do so."

The unrepresented client agrees. Unfortunately, this violates Rule 1.8(h), because the former client neither has counsel nor is advised to get counsel.

In a similar matter before the Director's Office, the lawyer argued that his conduct was proper because when the lawyer presented the client with the agreement, the lawyer was not aware that the client was considering making any claims against the lawyer.

Rule 1.8(h), however, is not limited to an actual, or known potential, claim. Otherwise, lawyers could routinely ask clients to sign waivers of claims at the conclusion of every case. Such an interpretation would render Rule 1.8(h) meaningless.

Further, in most cases of malpractice, the lawyer is likely to recognize the basis for such a claim before the client. Under a different interpretation of this rule, lawyers could obtain a client's waiver of a malpractice claim before the client became aware of the basis for such a claim. Therefore, lawyers could insulate themselves in virtually every case from liability for any acts of malpractice or other improper conduct without advising the client to secure counsel. Again, this would defeat the intent of Rule 1.8(h).

Although a lawyer may not prospectively limit her malpractice liability, she may prospectively limit the

forum in which such a claim may be brought. A lawyer and a client may agree in advance that a malpractice claim will be resolved by binding arbitration. *Fields v. Maslon, Edelman, Borman & Brand, LLP*, No. C1-02-940 (Minn. Ct App., Jan. 14, 2003) (unpublished). In *Fields* the retainer agreement provided for binding arbitration of any dispute between the lawyer and client. After the client sued for malpractice, the District Court judge dismissed the complaint without prejudice and compelled arbitration.

The Court of Appeals affirmed, rejecting the argument that the retainer agreement was an unenforceable contract of adhesion. The Restatement (Third) of the Law Governing Lawyers sec. 54, cmt. b, also recognizes that arbitration clauses in retainer agreements generally are enforceable.

Like many of the Rules of Professional Conduct, Rule 1.8(h) is a simple, but important, technical requirement. Compliance will prevent a possible malpractice claim from including a lawyer discipline offense.