Committee Opinion
October 20, 1993

LEGAL ETHICS OPINION 1550

ZEALOUS REPRESENTATION - LIMITING LIABILITY TO CLIENT: ATTORNEY SETTLING POTENTIAL LEGAL MALPRACTICE CLAIM BY FORMER CLIENT.

You have presented a hypothetical situation in which a lawyer had failed to file suit on behalf of a former personal injury client, allowing the two-year statute of limitations period to expire. The lawyer negotiates and has his former client execute a settlement agreement releasing the lawyer from any liability for negligence. The former client executes a written "full and final release" in exchange for a sum of money paid by the lawyer to the former client. Throughout the negotiations, the former client was not represented by independent legal counsel, nor was he advised to secure independent counsel.

You have asked the committee to opine whether, under the facts of the inquiry, Disciplinary Rule 6-102(A) prohibits the lawyer from settling a potential malpractice claim by his former client, or does the Rule operate prospectively, i.e., prohibit agreements limiting the lawyer's liability when executed at the outset of the representation. In addition, you ask, if DR:6-102(A). does not per se prohibit this conduct, does Canon 5 impose any duties or restrictions before the lawyer may ethically settle the malpractice claim with the client.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:6-102(A) which precludes a lawyer from limiting his liability to his client for his personal malpractice; and DR:7-103(A)(2) which prohibits a lawyer from giving advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client. /1 The committee has previously opined that it is not ethically improper for an attorney to include in a retainer agreement with a client a provision for binding arbitration or nonbinding but admissible arbitration of any malpractice claim which may arise out of the professional employment, provided that the client consents after full disclosure of the effect of such a provision and after the client is advised to seek independent counsel in regard to the advisability of such a provision. See LE Op. 638. However, the committee interprets that Opinion to indicate that the inclusion of such an arbitration provision in retainer agreements is not violative of the prohibited limitation of liability since any such arbitration does not specifically limit the liability but merely identifies a procedure by which the liability (and damages) may be determined.

In the facts you present, the committee believes that it would not be improper for a lawyer to secure from his client a release from liability for specific completed acts, in exchange for consideration paid to the client, provided, however, that (1) there is full disclosure to, and consent received from, the client; (2) the client is first advised to seek

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independent counsel as to whether to sign such an agreement; and (3) provided that the transaction was not unconscionable, unfair or inequitable when made.

Conversely, however, the committee reiterates its earlier conclusions, predicated on the plain language of the Rule, finding that it would be improper and violative of DR:6-102(A) for a lawyer to prospectively limit his liability to a client at the outset of the attorney-client relationship or through a general release for prospective conduct during the course of the relationship. See LE Op. 1487.

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