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SPECIAL COVERAGE

PROPOSED RULES OF PROFESSIONAL CONDUCT



PROPOSED RULE 1.8.8

Limiting liability to client

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Proposed Rule 1.8.8 clarifies requirements to settle a malpractice claim with a current or former client, and keeps a complete bar from prospectively limiting malpractice claims intact should the new rule be adopted by the Supreme Court, which is expected to take place in 2018.

Rule 3-400 is the current rule that applies to limiting liability with clients. Rule 1.8.8 revises Rule 3-400, largely maintaining the two substantive portions of the current rule which (1) preclude a lawyer from prospectively limiting malpractice claims, and (2) ensure the current or former client has an opportunity to seek independent counsel before settling a malpractice claim against their lawyer.

Rule 1.8.8(a) remains largely unchanged from Rule 3-400(A), which prohibits lawyers from contracting with clients for the purpose of limiting liability to the client for potential or future professional malpractice. Essentially, a lawyer is barred from entering into an agreement to prospectively eliminate a client's ability to sue for professional malpractice. Provisions that attempt to contract away malpractice claims would be voidable, and the lawyer could be disciplined by the State Bar for violating Rule 1.8.8. Good practice dictates using legal service agreements that do not include a provision restricting a client's ability to sue or make a claim for professional malpractice.

This longstanding absolute prohibition of prospectively limiting

Proposed Rule 1.8.8 requires lawyers to be mindful of the restrictions imposed upon them in seeking to limit their client's prospective professional malpractice claims by written agreement.

malpractice liability underscores the client-protective nature of the California Rules of Professional Conduct. In contrast, the ABA's Model Rules permit a lawyer to contract with a client to prospectively limit malpractice liability where the client is independently represented in making the agreement.

Rule 1.8.8(b) expands and clarifies Rule 3-400(A)'s requirements for settling malpractice claims. Specifically, Rule 1.8.8(b) provides that a lawyer may not settle a claim or potential claim for the lawyer's professional malpractice liability to a current or former client unless the client is either (1) represented by an independent lawyer concerning the settlement, or (2) advised by the lawyer in writing to seek the advice of an independent lawyer of the client's choice regarding the settlement and the client is provided with a reasonable opportunity to seek that advice. The revisions clarify that the requirements apply equally to both current and former clients, and that written notice to seek independent counsel is not required if the current or former client is represented by counsel in settling the claim.

Comment 1 to the proposed rule reiterates that the rule does not absolve a lawyer from the obligation to comply with other laws, including

California Business and Professions Code Section 6090.5. That statute provides that a lawyer may not (1) restrict, as part of a settlement of a malpractice claim, the client or former client from reporting a misconduct claim to the disciplinary agency (e.g., the State Bar), or (2) seek to have an existing claim with the disciplinary agency withdrawn or sealed.

Based upon these clarifying requirements related to settlements, which would generally arise as a result of a fee dispute, a lawyer should set forth as part of a settlement agreement with clients or former clients a specified term of the agreement stating either of the following based upon the circumstances:

(1) [Client] was represented by [Independent Counsel] concerning the terms of this settlement; or

(2) [Client] acknowledges and agrees [Client] is advised to seek independent advice from a separate attorney of your choice related to this Settlement. By signing this Agreement, [Client] represents that [Client] has had a reasonable opportunity to seek advice from an independent lawyer of [Client's] choice but has voluntarily waived the right to do so, and that [Client] consents in writing to the terms set forth in this Settlement related to the release of lawyer's professional malpractice. By signing this Agreement, [Client] also acknowledges that [Client] understand this paragraph and its legal significance with regard to [Client's] rights to seek independent counsel.

Proposed Rule 1.8.8 requires lawyers to be mindful of the restrictions imposed upon them in seeking to limit their client's prospective pro-

Rule 1.8.8 Limiting Liability to Client (Proposed rule adopted by the board Nov. 17, 2016)

A lawyer shall not:

(a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:

(1) represented by an independent lawyer concerning the settlement; or

(2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

fessional malpractice claims by written agreement. Lawyers should be familiar with this revised rule because most will run into a fee dispute or professional malpractice claim over the course of their career. Following this rule will help to limit their exposure to civil claims or disciplinary complaints and investigations.

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