Enduring Ethics Opinions - By William D. Robitzek, Esq. - Professional Ethics Commission

In 1980 the Professional Ethics Commission issued Opinion #9 regarding prospective limitations of liability by attorneys. Maine Bar Rule 3.6(b), in effect at that time, indicated quite clearly that:

A lawyer shall not attempt to exonerate himself from, or limit, his liability to his client for his personal malpractice or that of his partners or salaried employees. This rule shall not prevent a lawyer from settling or defending a malpractice claim.

The Commission confirmed that, although an attorney may deny that malpractice has occurred "even if it seems obvious to others that he erred" the attorney may not limit prospectively his liability "as would occur, for example, if the lawyer incorporated such a limitation in their retainer agreement." The above is consistent with the current Maine Rules of Professional Conduct, Rule 1.8(h):

A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice . . .

This position had also been reinforced in Opinion #68 as it approved the validity of subsequent settlements of malpractice claims as not violative of Bar Rule 3.6(b). The opinion did note, however, that it would nonetheless violate Maine Bar Rule 3.2(f)(1) if a lawyer were "to request or to accept" a release of ethical misconduct. Violations of the ethics rule may not be the subject of limitations or settlements either prospectively or after they occur.
The Commission issued a recent opinion in response to an inquiry from the Bar about the appropriateness of a jury waiver provision in an engagement agreement between attorney and client. See Opinion No. 202, January 9, 2011. The Commission concluded that the Maine Rules of Professional Conduct do not prohibit counsel from proposing in the engagement agreement that the parties waive a trial by jury in the event of a dispute between them that ends up in court. The Commission's analysis involved a review of a number of prior opinions issued under the then applicable Maine Code of Professional Responsibility about attorney liability in engagement agreements and other contexts. Despite the adoption of the Maine Rules of Professional Conduct on August 1, 2009, many of those opinions endure to this day.

The first such opinion was issued on April 2, 1980. Opinion No. 9, entitled "Limiting Liability," answered the question of whether an attorney violates the Maine Bar Rule 3.6(b) if he refuses to acknowledge and correct a disputed error in the distribution of real estate during the settlement of a probate estate. The Commission observed that the prohibition on prospective limitations of liability in engagement agreements does not restrict an attorney's ability to deny or to limit his liability retrospectively in response to an allegation that he made an error. In other words, the prohibition on limiting liability for theoretical malpractice that may or may not occur in the future does not impact that attorney's ability to defend herself by denying liability to the client after the fact. The operative language in the 1980 version of Maine Bar Rule 3.6(b) could be found in Maine Bar Rule 3.4(f)(2)(v) just prior to the adoption of the new M. R. Prof. Conduct 1.8(h).

The issue of an attorney limiting her liability to a client arose again in Ethics Opinion No. 26 issued on April 2, 1981. Still operating under then-existing Maine Bar Rule 3.6(b), the Commission decided that it was unethical to include in an engagement agreement a clause that read, "Our liability to you as a consequence of this opinion shall not exceed the amount of $30,000.00. Our liability to you shall not extend beyond the time during which you are the owner of the property in question." Distinguishing attorneys from title insurance companies, the latter of which issue policies limiting liability, the Commission noted that attorneys, unlike insurers, are only subject to liability if they fail to exercise due care. While an attorney cannot prospectively manage the risk of malpractice by limiting her liability in that fashion, she may do so by adjusting the amount of her fee based on the responsibility he assumes.

On January 7, 1986, the Commission issued Opinion No. 66 about a proposed waiver of a client's ethics grievance against the attorney. The attorney sought advice from the Commission about including a clause in a malpractice settlement agreement whereby the client agreed to withdraw the pending grievance and not pursue any further grievances in the future. The Commission pointed out that informing Bar Counsel of the settlement of the underlying malpractice claim or testifying before the Grievance Commission about the settlement would not violate any of the Bar Rules. However, any statement beyond the mere fact of the settlement would put the attorney at risk of violating Maine Bar Rules 3.2(f)(3) and 3.7(e)(1)(i) prohibiting conduct involving dishonesty and misrepresentation and enjoining her to employ only means consistent with the truth in appearing before a tribunal. The Commission expressed its concern that the client's withdrawal of the grievance, statement of satisfaction, or unwillingness to proceed with
the grievance made pursuant to a condition of the malpractice settlement could be less than completely honest and violate the Bar Rules. The Commission's concerns are as relevant today as they were back in 1986. See M. R. Prof. Conduct 3.3(a) & 8.4(c). Furthermore, the promise of payment in exchange for the client's noncooperation with the Grievance Commission would be a violation of Maine Bar Rule 3.2(f)(1), prohibiting the direct or indirect circumvention or subversion of the Maine Bar Rules. Today, a similar prohibition appears in M. R. Prof. Conduct 8.4(a). See also M. Bar R. 7.3(b).

In March of 1986, the Commission issued Opinion No. 68, deciding whether it was appropriate for an attorney to seek to be released from actual or threatened claims of ethical misconduct, professional negligence, economic harm, physical injury, and emotional distress in exchange for a return of the client's retainer after the attorney withdrew because of a subsequently discovered conflict of interest. Consistent with Opinion No. 66, the Commission reiterated the impropriety of seeking a release of claims for ethical misconduct, whether past or future. Under Maine Bar Rule 3.6(b) at the time, the Commission opined that the permissibility of the malpractice liability release depended on whether it was for existing claims or future claims. In the case of future claims, it was a violation of the Maine Bar Rules in effect at the time, as it would be under today's Maine Rules of Professional Conduct. If the release was for prior or existing claims, and the release was part of the settlement of a pending malpractice claim, then it was permissible under Bar Rule 3.6(b). However, as in all business transactions a lawyer has with her client, the settlement was appropriate only if the terms were written, fair, and reasonable to the client and fully disclosed and transmitted in a manner reasonably understandable to the client, who must sign the release, all as required by Rule 3.6(i)(1) & (2). The attorney also needed to advise the client of the prudence of getting independent legal counsel and give the client an opportunity to do so. The Rules applicable to attorneys engaged in business transactions with their own clients apply today just as they did in the case of this settlement agreement struck between attorney and client in 1986. See M. R. Prof. Conduct 1.8(a) & (h)(2).

In Opinion No. 151, issued in 1995, the Commission was asked whether a lawyer was prohibited from entering into an agreement compelling the client to submit fee disputes to binding arbitration, either according to Maine Bar Rule 9 or according to some other procedure. Similar to the jury waiver provision addressed by the Commission in Opinion No. 202 in 2011, the question before the Commission was not about a waiver of liability, per se, but about a waiver of certain means to resolve a liability claim. The Commission determined that, regardless of what the engagement agreement stated, if the client subsequently requested fee arbitration in accordance with Rule 9, then the lawyer would have to comply, pursuant to Maine Bar Rule 3.3(c). That Rule exists today in M. R. Prof. Conduct 1.5(g). The Commission also answered the question of whether the attorney could require the client to submit to arbitration, but allow the client the option of some procedure other than Rule 9. Citing the strong public policy favoring arbitration, finding no written prohibition against asking a client to forgo a court action, and agreeing that Rule 9 need not be the exclusive arbitration procedure, the Commission advised that compelling arbitration, as proposed, was ethical. The Commission furthermore expressly refused to apply the series of Rules applicable to "business transactions" in the context of this engagement agreement.

The 1999 Commission Opinion No. 170 addressed whether an attorney can enter into an
engagement agreement with the client in which they agree to submit malpractice claims to arbitration. Restating its earlier conclusion that the engagement agreement does not constitute a "business transaction," the Commission addressed whether the arbitration clause had the effect of limiting the lawyer's liability to the client for malpractice in contravention of Maine Bar Rule 3.4(f)(2)(v). The Commission concluded that it did not. The point of the agreement was not to limit the lawyer's liability, but to limit the means for resolving the lawyer's liability to arbitration, which has as many benefits to offer the client as a forum as the attorney.

Requiring arbitration of malpractice liability claims, as in Opinion No. 170, or agreeing that a jury will not decide liability if the claim is lodged in court, as in Opinion No. 202, beg the same question: Is choosing the forum or fact finder tantamount to limiting a lawyer's liability for malpractice? The Commission has concluded that it is not. Some would argue that the forum and fact finder impact both the likelihood of a liability finding against the attorney and the amount of damages awarded the client, which explains why attorneys seek arbitrators and judges over juries. However, in no given case can it be said with any reliability that a judge or an arbitrator would be more or less likely to find an attorney liable than a jury or that a jury would award more or less money to the client than a judge or an arbitrator. Particularly at the time the engagement agreement is struck with the client and no liability claim yet exists, it is impossible to say that any real limitation of liability is achieved by electing the forum or the fact finder so as to be unethical.