

Los Angeles County Bar Association Professional Responsibility and Ethics Committee

FORMAL ETHICS OPINION NO. 505

August 21, 2000

Engagement Agreement Restrictions On Client Settlement Authority

SUMMARY

Attorney seeks to negotiate an initial engagement agreement providing for a waiver of specified attorney fees if the client agrees not to accept a confidentiality clause in any settlement. In the event the client does agree to a confidentiality clause, the fee agreement provides for the payment of the attorney's services at the attorney's full fee.

Attorneys generally are entitled to negotiate freely the terms of an initial fee agreement with a client. An attorney may ethically include in an engagement agreement terms that include a reduction of the attorney's fee as long as the client does not agree to keep any settlement confidential, provided the client retains the authority to settle the case without the lawyer's consent and without the imposition of any penalty that would constitute an unconscionable fee.

AUTHORITIES CITED

Cases:

Calvert v. Stoner (1948) 33 Cal.2d 97

Hall v. Orloff (1920), 49 Cal.App.745

Hawk v. State Bar (1988) 45 Cal.3d 589, 247 Cal.Rptr. 599

Klein v. Lange (1928) 91 Cal. App. 400

Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904

Rosenberg v. Lawrence 1938) 10 Cal.2d 590

Others:

Cal. Rules of Professional Conduct Rule 4-200

FACTS AND ISSUES PRESENTED:

In the present case the attorney, a retired physician, became an attorney for the purpose of creating a nonprofit organization to represent patients denied medical care or given inadequate care by managed health care organizations. Through his organization, the attorney hopes to improve the standards of care throughout the managed care industry by alerting regulators to violations and exposing fraudulent practices to consumers.

To that end, the attorney seeks to include a clause in the initial engagement agreement which provides that, under certain conditions, the client will not agree to a confidentiality clause in any settlement. The provision reads in pertinent part as follows:

3. GAG CLAUSE SETTLEMENTS RULED OUT

[Attorney's firm] and I agree that acceptance of money in return for silence about wrong-doing is repugnant, immoral, and possibly illegal. Therefore, as a matter of policy and in return for the very advantageous fee structure herein, I agree that neither [Attorney's firm] nor its attorneys will be required to agree to any clause in any proffered settlement which requires that they refrain from disclosing, to regulatory agencies or consumer groups, information about any acts or policies of HMO which they reasonably believe may adversely affect public health or safety, represent consumer fraud, or violate any regulations or laws. I authorize [Attorney's firm] to make this limitation known in advance to opposing counsel.

I realize and accept that this may result in loss of an otherwise beneficial settlement, and I have been given the opportunity to seek alternate counsel.

If I nevertheless accept a settlement containing such a gag clause, as I have a right to do, and I cooperate in obtaining a judicial order binding [Attorney's firm] or its attorneys to it as well, then the waiver of fees outlined below will not occur, and I will pay [Attorney's firm], as the reasonable value of its services, its full fee for all the time spent on my case, plus reimbursement of its expenses, for which it will have a lien upon the settlement recovery.

Attorney claims that most of the attorney's clients are unable to obtain legal representation and typically must pay large medical bills. The clients cannot pay hourly fees and are often seeking only equitable remedies leaving little chance for a contingency fee. The attorney, therefore, is providing free or reduced fee legal services to clients who are otherwise unable to obtain representation on the condition that the client does not agree to keep the results of any settlement confidential.

DISCUSSION:

The only ethical issue potentially implicated by the attorney's proposal is whether the "gag clause settlements ruled out" and alternative fee provision improperly restricts the client from settling the case.

Generally, the negotiation of an initial engagement agreement is an arm's-length transaction. Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 913. Absent issues of duress, unconscionability, or the like, the attorney is "entitled to negotiate the terms on which he would accept employment" and the client has "no cause to complain that the terms [the attorney] negotiated were favorable to him." Id.

However, an agreement between a client and lawyer which prohibits the client from settling the action without the attorney's consent is against public policy and void. Calvert v. Stoner (1948) 33 Cal.2d 97, 103. In Hall v. Orloff (1920), 49 Cal.App.745, the attorney's engagement agreement with the client prohibited

the settlement of the case by the client without the attorney's knowledge and consent and provided for the payment to the attorney of a minimum \$1,000 fee in the event the client settled without attorney's consent. The client dismissed the action without the attorney's consent and without receiving any consideration. Thereafter, the attorney sought to enforce the \$1,000 minimum fee provision. The Court found that the minimum fee provision amounted to the imposition of a penalty and found the contractual penalty to be void as contrary to public policy. However, the Court held that the attorney's measure of recovery when the client abandoned the action was the reasonable value of the services rendered, which could be pursued in either an action for breach of contract or one for quantum meruit. Hall v. Orloff, 49 Cal. App. at 750.

In Klein v. Lange (1928) 91 Cal. App. 400, the court determined that a contingent fee agreement which provided for payment of an agreed amount in case of settlement, but did not prevent the client's settling the case at any time was not illegal. Moreover, even "assuming the invalidity of the entire contract by reason of the inclusion of [an illegal] provision," the attorney "would be entitled to compensation based on the reasonable value of services performed." Calvert v. Stoner, 33 Cal 2d at 105 (citing Rosenberg v. Lawrence (1938) 10 Cal.2d 590). Hence, the ultimate issue is whether the provision to provide for payment of a reasonable attorney fee (as opposed to waiving a claim to any fee) illegally prohibits or restrains the client from settling the matter.

In the present case, the attorney offers a very advantageous fee structure, possibly a complete waiver of fees, in return for the client honoring the provision prohibiting confidentiality clauses. The provision, however, does not prevent or restrict the client's ability to accept an advantageous settlement with a confidentiality clause. The provision does not require the consent of the attorney to any settlement. In fact, the contract provides that in the event the client agrees to a confidentiality clause, the "waiver of fees" will not occur and the client simply pays the attorney the reasonable value of the attorney's services.

Since the engagement agreement does not improperly restrict the client from settling the matter and provides for the payment limited to the "reasonable value of services" should the client chose to settle with a confidentiality clause, the provision is not against public policy and is properly negotiated by the attorney. However, the attorney's fee agreement should make full disclosure of the nature of the alternative fee to the client in order for the client to make an informed decision.