

PLEASE RELEASE ME: SEEKING LIMITATION OF LIABILITY FROM A CLIENT

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If a lawyer in private practice practices law long enough, chances are very good that, eventually, a client will complain about the lawyer's services. When this occurs, it may be prudent to resolve the claim early, before it becomes a formal complaint. Frequently, client complaints are really fee disputes, in which the client asserts that the fee is "too high," or that the net amount the client will receive is "too low." Can a lawyer resolve such an early dispute without violating the California Rules of Professional Conduct?

Consider this hypothetical: Lawyer has represented client in a Personal Injury matter for 3 years. The fee is a contingent percentage of the recovery. Liability was contested and a lawsuit was filed. After extensive discovery, a policy limits offer is accepted by the client. The defendant has no assets that could satisfy a larger judgement. Client accepts the policy limit settlement. Lawyer negotiates significant reductions in the numerous medical liens, including a Medicare lien, which requires many hours. Client is provided a distribution summary which details the attorney fees, costs, reduced lien amounts, and net recovery to be paid to client. Client objects and demands more money.

Lawyer is willing to reduce the contractual attorney fee, but only if the client waives all claims against lawyer in a formal release agreement. Is this ethical? The answer rests on California Rules of Professional Conduct, rule 1.8.8.

Current CRPC rule 1.8.8, effective November 1, 2018, is significantly revised from prior iterations of the rule governing limitations on a lawyer's right to avoid civil liability to a client for malpractice.¹

Rule 1.8.8 provides:

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*² by the lawyer to seek the

¹ The one-year statute of limitations for legal malpractice governs all claims by clients against their attorneys, except claims based on actual fraud, whether sounding in breach of contract, breach of fiduciary duty, or tort. Claims of excessive fees are also subject to the one-year statute. *Levin v. Graham* (1995), 37 Cal. App. 4th 798, 805; *Lee v. Hanley* (2015) 61 Cal. 4th 1225, 1237..

² "Writing" is defined in CRPC 1.0.1(n) with reference to CA Evidence Code sec. 250.

advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable*³ opportunity to seek that advice.

Comment [1] to CRPC 1.8.8 notes that:” Subparagraph (b) does not absolve the lawyer of the obligation to comply with other laws. (See, e.g., Bus. & Prof. Code, § 6090.5.)” B & P §6090.5 prohibits a lawyer from conditioning settlement of a malpractice claim upon the client's agreement to forego bringing, or to withdraw a previously made, State Bar complaint.⁴) Notably, rule 1.8.8 does not preclude the lawyer from contracting to provide limited scope legal services. (CRPC 1.2(b).)

Regarding the limitation of liability issue, current rule 1.8.8 is similar, but not identical to, former rule 3-400. Rule 3-400 was analyzed in *In The Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 760, where it was explicitly found that the rule did not apply “to exposure for past malpractice.” Fonte had been substituted out of an estate planning matter by his clients, after he had drafted a trust in which he named himself as a successor trustee with certain unfettered powers. Upon being requested to resign as successor trustee, Fonte sought to negotiate a release of all claims and withdrawal of the former clients' State Bar complaint. The Review Department of State Bar Court applied the then-current rule 3-400(A), which provided that State Bar members shall not "contract with a client prospectively limiting the member's liability ... for professional malpractice." ⁵

There are no cases that conclude that the settlement of a claim sounding in professional negligence, breach of contract or tort is ethically precluded, *after* the legal services at issue have been performed. Thus, the prior and current versions of the rule governing limiting civil liability to a client recognize that a lawyer is ethically permitted to settle a legal malpractice claim if the rules are complied with. As *Fonte* makes clear, this refers to exposure for liability for past acts. The question whether a waiver is or is not “prospective” is important. As currently drafted, rule 1.8.8(a) precludes the lawyer from “prospectively limiting the lawyer's liability to the client,” regardless whether the waiver is informed, written, or granted following the opportunity to seek advice from independent counsel.

The only logical interpretation of CRPC 1.8.8(a) is that a lawyer is absolutely prohibited from contracting for a prospective waiver *before* the lawyer begins to provide legal services. However, after the lawyer has begun to provide services, once the client raises any issue relating to the lawyer's performance, including objecting to the outcome of the legal matter, the lawyer is free to negotiate a settlement of the dispute and enter into a settlement with the client, so long as

³ “Reasonable” is defined in CRPC rule 1.0.1(h) as the “conduct of a reasonably prudent and competent lawyer.”

⁴ For a discussion of compliance with *Bus. & Professions Code* § 6090.5, see, State Bar of California Formal Ethics Opinion 2012-185.

⁵ Prior to the adoption of rule 3-400(A), Former rule 6-102 read as follows: "A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State Bar from settling or defending a malpractice claim."

the lawyer complies with subparagraph (b) of rule 1.8.8 (including advising the client of the right to independent legal counsel).

Finally, it must be noted that, while a fee dispute which arises during the pendency of the attorney-client relationship *does not* create a *per se* conflict of interest, at the point at which the lawyer institutes a civil action against the client, a conflict of interest exists. (L.A. County Bar Assn. Formal Ethics Opinion 521 (2007).) A lawyer may not sue a current client, and must withdraw from representation before pursuing a lawsuit against the client. (See, State Bar of California Formal Ethics Opinion 2009-178 and L.A. County Bar Assn. Formal Ethics Opinion 476 (1994) and 212 (1953).) If the relationship between the lawyer and the client becomes so acrimonious that a reasonably prudent lawyer would recognize that the relationship is irretrievably broken, then the lawyer must consider whether it is possible to continue to provide competent, diligent, and loyal legal services to the client; if this is not reasonably possible, then the lawyer should withdraw from representation in compliance with CRPC 1.16, avoiding prejudice to the client. However, if a simple fee dispute can be resolved during the course of representation, then the lawyer may settle the dispute, so long as the requirements of CRPC 1.8.8 are met, and may also continue representing the client.

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