OPINION NO. 91-23
November 25, 1991

FACTS:

The inquiring attorney has instituted litigation against a client to recover fees. He would like to settle the case, and has worked out a proposed settlement agreement with the client. However, he is willing to compromise his fee claim only if the compromise is a final disposition of all matters concerning this particular client. Therefore, the inquiring attorney wishes to put a clause in the settlement agreement in which he reserves the right to pursue the fee claim if the client subsequently files a bar complaint against him.

QUESTION PRESENTED:

May the inquiring attorney settle a fee dispute with a client, but reserve the right to pursue the claim for the difference between what he considers a reasonable fee and what was paid under the settlement, if a disciplinary complaint is subsequently filed by the client?

ETHICS RULES:

ER 1.8 Conflict of Interest - Prohibited Transactions

* * *

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

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ER 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * *

(d) Engage in conduct that is prejudicial to the administration of justice[.]

* * *

OPINION:

Although ER 1.8(h) prohibits an attorney from prospectively limiting his liability for malpractice, except in very rare situations, nothing in the Code specifically prevents an attorney from limiting his exposure to disciplinary proceedings.

The case law concerning this subject is rather limited; only one ethics opinion addresses the question directly. The Ethics Committee of the State Bar of Maine held that agreements which prevent a client from filing a bar complaint are "ineffective and prohibited by the Code." See Maine Ethics Opinion 68 (March 14, 1986). No opinions state that it is ethically permissible for an attorney to enter into an agreement limiting his exposure to possible disciplinary action.

However, there is much case law prohibiting agreements of a more general nature. For example, in In Re Preston, 111 Ariz. 102, 523 P.2d 1303 (1974), the Arizona Supreme Court held that a lawyer could not ethically condition the return of a client's documents on the client's release of "any and all claims" that might arise from the representation. See also In Re Darby, 426 N.E.2d 683 (Ind. 1981). Similarly, a lawyer may not put a proviso on a check returning the unused portion of a retainer fee to a client, which releases the lawyer from all claims arising from the representation. People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978). Additionally, a lawyer may not condition an agreement to withdraw on the client's signing a release of all claims arising from the representation. People v. Dwyer, 652 P.2d 1074 (Colo. 1982). See also Annot., 14 A.L.R.4th 209 (1982), "Attorney's Conduct in Connection with Malpractice Claim Against Himself as Meriting Disciplinary Action."

None of these cases specifically addresses claims other than malpractice claims; therefore, the basis for all of these cases could be either ER 1.8(h) or its predecessor, DR 6-106 of the American Bar Association's Code of Professional Responsibility, both of which prohibit an attorney from limiting his malpractice liability only. However, agreements such as the one the inquiring attorney proposes involve the very same evils that ER 1.8(h) is designed to prevent: the strong potential of coercion and overreaching on the attorney's part, and the potential conflict between the lawyer's interests and those of his client. Additionally, and more importantly, agreements limiting an attorney's exposure to disciplinary action have the effect of undermining the Bar's efforts at self-regulation. It is one thing to say that an attorney can conduct an arm's-length transaction with a client (who is represented by independent counsel) which will limit the client's monetary damages in a potential malpractice case, and another to say an attorney can "limit" the integrity of the profession by preventing a complaint from being filed with the

State Bar. As a matter of public policy, every attorney must be accountable for his misconduct, and should not be able to contract his way out of it. In this regard, we refer the inquiring attorney to former Ethical Consideration EC 6-6, which elaborated on DR 6-106, the predecessor to our current ER 1.8(h):

> A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to [limit his liability for his professional activities].

To the extent such agreements do thwart the disciplinary process, they may potentially violate ER 8.4(d), which prohibits an attorney from engaging in conduct "prejudicial to the administration of justice."

In addition, we note that the proposed agreement would be problematic in light of Drummond v. Stahl, 127 Ariz. 122, 618 P.2d 616 (1980), where the Arizona Supreme Court held that an absolute immunity from civil liability is granted to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney. See also In Re: Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988) (attorney who entered into an agreement with another lawyer, in which he agreed not to report the serious misconduct of the other lawyer, is suspended for one year by the Illinois Supreme Court).

In conclusion, the Committee advises the inquiring attorney to refrain from using the proposed clause since the same dangers addressed by ER 1.8(h) are present, and additionally, the clause tends to undermine the State Bar's self-regulation.