Raising the Bar in Ethics

Limiting Liability to The Client - The Ethical Concerns

By Charles H. Hite

HRPC 1.8(h) states that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice and shall not 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." The provision therefore addresses prospective limitation (*i.e.*, limiting *future* malpractice liability at the *outset* of representation), and "subsequent" limitation (*i.e.*, settling potential malpractice claims for *past* acts occurring during the representation).

Historically, Disciplinary Rule ("DR") 6-102(A) of former Hawaii Code of Professional Responsibility ("HCPR") simply stated that "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for malpractice." Although somewhat differently worded, the first clause of current HRPC 1.8(h) is similar in concept. The rationale behind prohibiting agreements prospectively limiting malpractice liability is that an advance agreement limiting a lawyer's liability to a client is against public policy. Such an agreement may undermine competent and diligent representation, and many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen. ABA/BNA Lawyer's Manual on Professional Conduct ("Lawyer's Manual"), § 51:1104 (2008).

The former HCPR contained no counterpart to the second clause (the "subsequent" limitation clause). *See* Michie's Hawaii Revised Statutes Annotated, Court Rules, HRPC 1.8 (Hawaii Code Comparison) (2010). HRPC 1.8(h)'s second clause allows a lawyer to settle a client's or former client's malpractice claim, even if the client or former client does not have new counsel. Of course, a *former* client will typically (but not always) have new counsel when suing a lawyer for malpractice or when raising malpractice as a defense to a claim (such as a claim for unpaid fees) asserted by the lawyer. The second clause does require a lawyer, however, to advise a client or former client *in writing* of the appropriateness of independent counsel. The rationale behind the writing requirement is to prevent a lawyer from taking unfair advantage of an unrepresented client or former client. Lawyer's Manual, § 51:1112.

It is beyond the scope of this article to discuss in detail how HRPC 1.8(h) and comparable provisions in other jurisdictions have been interpreted. Generally, however, the rule does not prohibit agreements to arbitrate legal malpractice. *See generally*, ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct, at 149 (6th Ed. 2007) ("Annotated Model Rules"), *citing* ABA Formal Ethics Op. 02-425 (2002). Arbitration concerns remedy, not liability.

Additionally, the rule does not prohibit lawyers from practicing in limited liability entities (provided of course that Hawaii's rules applicable to limited liability entities are complied with). *See generally*, Annotated Model Rules, at 149. Nor does the rule prohibit limited scope agreements which comply with HRPC 1.2. *See generally*, Annotated Model Rules, at 149. Furthermore, HRPC 1.8(h) does not apply to agreements regarding limitations on the ability of any person to file a *disciplinary* complaint or to cooperate with a *disciplinary* proceeding or investigation. The prohibition against such agreements is in another provision of the HRPC. *See* HRPC 8.3(d).

There is an arguable ambiguity in HRPC 1.8(h), because there is no comma or other separation of the two clauses. The end of the provision after the prospective and "subsequent" liability clauses sets forth the requirement of advising "that person" in writing of the appropriateness of independent representation. So is a lawyer also able to *prospectively* limit liability if he/she advises a client in writing of the appropriateness of independent counsel, or is the writing requirement limited only to the second clause (the settlement of a claim for malpractice for *past* acts)?

Former HCPR 6-102(A) did not specifically allow prospective limitation of malpractice liability if a lawyer advised a client of the appropriateness of independent counsel. Additionally, agreements limiting prospective malpractice liability are greatly disfavored, and there are numerous cases finding ethical violations for such agreements. *See generally, e.g.*, Lawyer's Manual, §§51:1104-51:1106. Finally, Hawaii has not yet adopted ABA Model Rule 1.8(h)(1), which allows prospective limitation for malpractice liability if the client is *independently represented.* Note here, however, that ABA Model Rule 1.8(h)(1) requires actual independent representation. Merely encouraging a client to consult another lawyer does not satisfy this provision. Lawyer's Manual, §§ 51:1106-51:1107.

Absent a Hawaii Supreme Court Opinion, a Disciplinary Board Opinion, or a change in HRPC 1.8(h), the Office of Disciplinary Counsel's position is that the blanket prohibition against prospective malpractice liability still applies, and that the requirement of advising a client in writing of the appropriateness of independent representation applies only to the second clause (the "subsequent" liability clause).

Charles H. Hite is Deputy Chief Disciplinary Counsel.