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## RELEASE AND SETTLEMENT OF LEGAL MALPRACTICE CLAIMS

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Addendum issued 1995.

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### *Introduction and Scope*

The Colorado Bar Association Ethics Committee (“Committee”) is aware that difficulties often arise in attempting to harmonize DR 6-102(A), which prohibits an attempt by a lawyer to exonerate himself or herself from or limit his or her liability to a client for the lawyer’s personal malpractice, with the public policy which favors the settlement of legal disputes. A strict reading of DR 6-102(A) might lead to the conclusion that a legal malpractice claim by a client or former client can never be settled short of a trial. On the other hand, the respective interests of the client, the lawyer and the judicial system often are best served by an out-of-court settlement of a legal malpractice claim.

The purpose of this opinion is to provide guidance to the members of the bar regarding the nature of the conduct proscribed by DR 6-102(A) and the circumstances under which a legal malpractice claim may permissibly be settled.

### *Syllabus*

A lawyer may negotiate and enter into a release and settlement agreement of a client’s legal malpractice claim against the lawyer only if the following conditions are met:

- (1) The lawyer must disclose to the client the facts and circumstances underlying the client’s potential malpractice claim against the lawyer and the nature and extent of the claim;
- (2) The lawyer must advise the client, preferably in writing, to retain independent counsel to represent the client in the negotiation and consummation of the settlement and release;
- (3) The terms of the settlement and release must be fair and reasonable; and
- (4) The settlement and release can relate only to past, and not future, conduct of the lawyer

In addition, if the attorney-client relationship still exists as of the time the settlement is contemplated, and if both lawyer and client desire that the attorney continue to represent the client thereafter, the lawyer should carefully consider whether, under the specific circumstances, the lawyer can ethically negotiate a settlement and release of a past malpractice claim without first withdrawing from the representation.

A lawyer may not engage in any conduct intended to conceal the facts and circumstances relating to the client’s potential malpractice claim against the lawyer. The lawyer may not insist on a release from liability or an agreement to arbitration of a malpractice claim as a prerequisite to the lawyer’s returning papers and property the client is entitled to receive, or to the lawyer’s completing the employment or providing additional legal services for the client, or to the lawyer’s withdrawal from the representation. A lawyer cannot require a client to refrain from filing or to withdraw a grievance as a condition of settling a dispute with the client.

### *Opinion*

It is unethical for a lawyer to attempt to exonerate himself or herself from or limit his or her liability for personal malpractice prospectively. *People v. Foster*, 716 P.2d 1069 (Colo. 1986); DR 6-102(A). If a potential claim for malpractice arises in the course of a lawyer’s representation of a client, however, DR 6-102(A) should not be construed to prohibit the lawyer from settling the malpractice claim, provided certain conditions are met for the protection of the client.

A lawyer may not, at any time, engage in any conduct to conceal the facts and circumstances relating to the client's potential malpractice claim against the lawyer. DR 1-102(A)(4); Colorado Bar Association Ethics Committee, Informal Opinion V (April 27, 1974). Therefore, prior to negotiating a settlement or release, the lawyer must disclose to the client all the facts and circumstances relating to the client's potential malpractice claim, and inform the client as to the nature and extent of such claim, so that any settlement agreement is entered into by the client knowingly. *See, Matter of Christian*, 709 P.2d 987 (Kan. 1985); *Matter of Discipline of Schmidt*, 402 N.W.2d 544 (Minn. 1987).

Furthermore, prior to entering into any negotiations or settlement agreement regarding a client's potential or existing malpractice claim, the lawyer must advise the client, preferably in writing, to retain independent counsel to represent the client in the negotiation and consummation of the settlement.

The terms of the settlement must be reasonable and fair. The settlement should be negotiated and consummated with the client's full knowledge and understanding of the claims being released, for adequate consideration, and with an opportunity to seek independent legal advice.

A lawyer may include a refund or credit for fees paid or owed to the lawyer by the client as part of the resolution of a malpractice claim or potential malpractice claim. A lawyer may not, however, insist on the client's releasing the lawyer from liability for malpractice as a prerequisite to a refund or credit, or to the return of any property of the client. DR 9-102(B)(4); *People v. Good*, 195 Colo. 177, 576 P.2d 1020 (1978). The withdrawing or discharged lawyer should return to the client all papers and property the client is entitled to receive. *See, In re Preston*, 523 P.2d 1303 (Ariz. 1974); *Matter of Darby*, 426 N.E.2d 683 (Ind. 1981).

It is improper for a lawyer to require a client to refrain from filing or to withdraw a grievance against the lawyer, or to refuse to cooperate with the disciplinary proceedings, as a condition of settlement of a malpractice claim. Colorado Bar Association Ethics Committee, Formal Opinion No. 56 (March 22, 1980); *Matter of Goldberg*, 82 A.D.2d 572, 442 N.Y.S.2d 551 (1981).

A lawyer cannot ethically condition the provision of legal services for a client on the client's agreement to waive any claims the client may have or acquire against the lawyer for malpractice. Thus, a lawyer should not require, in a retainer agreement or other contract with a client, or in connection with any legal services performed for a client, the client to agree to exonerate the lawyer or limit the lawyer's liability for malpractice claims which may arise in the future. *People v. Foster; supra*.

In most situations, at the time a settlement of a pending or potential malpractice claim is contemplated, the lawyer will no longer be representing the client in the matter which is the subject of the settlement. However, there may be circumstances when the lawyer and the client both desire for the attorney to continue to represent the client in that matter, or in other matters, and both are willing to enter into a settlement and release of a potential malpractice claim which has arisen in the course of the past representation. In these circumstances, the lawyer must consider carefully whether such a settlement and release can ethically be negotiated and entered into while the attorney-client relationship continues to exist.

The Committee on Professional Ethics of the New York State Bar Association, in Opinion 591 (May 1988), concluded that an attorney may negotiate ethically with a client for a settlement or release of potential malpractice claims arising from past conduct of the lawyer, but only after the lawyer takes the following specific steps to ensure that the negotiations are fair:

- (1) The client must be fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer;
- (2) The lawyer has been discharged or must withdraw from the representation in accordance with DR 2-110; and
- (3) The lawyer must advise the client, preferably in writing, to secure independent counsel in the negotiation and consummation of such an agreement.

*See also, Matter of Tallon*, 86 A.D.2d 897, 447 N.Y.S.2d 50 (1982).

This Committee can envision circumstances where mandatory withdrawal from representation of the client, as required by the New York ethics opinion, might frustrate the needs or desires of the client. On the other hand, if the attorney has not completed the representation in the matter giving rise to the

potential malpractice claim, the possibility of undue pressures on the client in the negotiation and consummation of a settlement or release is increased. In addition, a purported settlement and release of such a claim might be both ineffectual and unethical as implicating a release of future claims against the lawyer in that matter. *See, People v. Foster; supra.*

In considering whether withdrawal from representing the client is necessary prior to negotiating and entering into a settlement and release of a potential malpractice claim, the lawyer should bear in mind that a principal purpose of DR 6-102(A) is the protection of the client from unfairness. It is clear that a lawyer cannot ethically attempt to make a release from potential malpractice claims a condition or prerequisite to the lawyer's withdrawal from the representation or a condition of the lawyer's continuing to represent the client in that or any other matter. *People v. Dwyer*, 652 P.2d 1074 (Colo. 1982), *The Florida Bar v. Cohen*, 331 So.2d 306 (Fla. 1976).

Further, the lawyer who continues to represent the client during and after the negotiation of a settlement or release of a potential malpractice claim should consider whether such negotiations ethically may be undertaken at all in the absence of independent counsel to represent the client in the negotiation and consummation of the settlement and release. *See, e.g., DR 5-104(A); see also, State v. Tadych*, 230 N.W.2d 162 (Wis. 1975).

To avoid the possibility of undue influence or unfairness to the client in the negotiation and consummation of a settlement or release of a potential malpractice claim, in any circumstances where both lawyer and client desire that the attorney continue to represent the client, the lawyer should carefully consider whether protection of the client demands that the lawyer forego negotiating and entering into such a settlement and release until the attorney's representation of the client, at least in the matter which is the subject of the settlement and release, has been concluded.

### **Conclusion**

A lawyer may settle a potential or asserted malpractice claim against the lawyer only under circumstances where (1) the client is fully informed of the facts and circumstances underlying the claim and the nature and extent of the claim, (2) the client is advised to seek independent legal advice regarding the settlement of the claim and (3) the settlement is fair and reasonable. The lawyer should carefully consider, under the particular circumstances, whether it is ethical to negotiate or agree to a release of malpractice claims while the attorney-client relationship continues to exist with respect to the matter giving rise to the malpractice claim, or other matters. The lawyer may not require settlement of a malpractice claim as a prerequisite to the lawyer's withdrawal from the representation, return of property, reduction of fees or continuing to provide legal services, nor may the lawyer require the client to withdraw or refrain from filing a grievance.

### **1995 Addendum**

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(h) (prohibiting prospective limitations on a lawyer's liability to a client for malpractice unless otherwise permitted); Rule 1.15(b) (which replaced and expanded DR 9-102(B)(4) concerning prompt delivery and accounting of funds held by lawyer); Rule 1.15(c) (disputes over property or funds held by lawyer); Rule 1.16(a) (concerning mandatory withdrawal); Rule 1.8(a) (concerning business transactions with a client); and Rule 8.4(c) (prohibiting lawyer dishonesty, fraud, deceit or misrepresentation).

***1998 Addendum***

Effective November 21, 1998, the Ethics Committee adopted an addendum to Formal Opinion 56 stating that it is not a violation of any Colorado Rule of Professional Conduct for an attorney to seek or obtain the resolution of all pending or contemplated civil disputes between the attorney and a former client, including legal fee and malpractice disputes, as part of a settlement reached in a grievance mediation held under C.R.C.P. 241.4(c)(11) [to be repealed and reenacted as C.R.C.P. 251.3 (c)(11), effective January 1, 1999] and 251.13 [effective July 1, 1998]. That Addendum modifies this Formal Opinion 85 as well.