

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 593**

February 2010

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to enter into an agreement with a client, who is not represented by independent counsel, for the settlement of the client's malpractice claim against the lawyer?

STATEMENT OF FACTS

A lawyer failed to timely file a lawsuit on behalf of a client, resulting in the client's claim being barred by the statute of limitations. This was the only matter in which the lawyer was representing the client. The lawyer, recognizing the malpractice, presented to the client an agreement to settle the malpractice claim. The client entered into the settlement agreement and accepted the lawyer's payment. The client was not represented by independent counsel in the settlement of this matter.

DISCUSSION

The occurrence of malpractice in the fact situation presented, namely the failure to file suit before the statute of limitations ran, raises the question of whether the lawyer-client relationship may continue between the lawyer and the client concerned. Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not represent a person if the representation of that person reasonably appears to be or becomes adversely limited by the lawyer's own interests. Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose. It should be noted that, in the factual situation considered in this opinion, the lawyer is not representing the client in any other matters.

In these circumstances, as promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated. These obligations arise from several Rules. Rule 2.01 provides that in representing a client, a lawyer shall render candid advice. Rule 1.15(d) provides that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests including giving reasonable notice to the

client of the termination. Rule 8.04(a)(3) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: "A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith."

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may settle a malpractice claim with a client not represented by independent counsel if the lawyer: (1) discloses the malpractice and the termination of the lawyer-client relationship to the client, (2) advises the now former client in writing that independent representation is appropriate with respect to the client's consideration of the lawyer's offer to settle the malpractice claim, and (3) does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the malpractice claim.