

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No. 14-02

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| Topic: | Limitation of client's claim for lawyer malpractice. |
| Digest: | Lawyer may not require client, in a retainer agreement, to limit the lawyer's liability to the client, or to hold the lawyer harmless for acts constituting malpractice. |
| Rules: | 1.3(a), 1.8(h)(1), 8.4(a) |

QUESTIONS

May a lawyer's retainer letter require that the client notify the lawyer of any change in his telephone number and/or address and, in the event the lawyer decides to withdraw as counsel and discontinue representation, agree that notice of withdrawal may be sent to the client's last known address?

May the retainer agreement further require that the client agree to hold the lawyer harmless from any issues arising as a result of the client's failure to notify the lawyer of a change of address, including the lawyer's failure to commence a legal action before the expiration of the applicable statute of limitations?

OPINION

No disciplinary rule prohibits a lawyer from requiring that the client notify him of a change of address or telephone number.

New York Rule of Professional Conduct 1.3(a), however, requires that a lawyer shall act with reasonable diligence and promptness in representing a client. Although not expressly defined, "diligence" in connection with Rule 1.3 means that a lawyer should do whatever is reasonably necessary to represent a client competently. In the instance presented, the obligation of diligence extends to the lawyer making reasonable efforts to locate the client, rather than relying solely on the agreement to accept his "last known address" as proper notification.

The proposed provision in the retainer agreement, in which the client agrees to hold the lawyer harmless from a failure to commence legal action before the expiration of the statute of limitations, is expressly prohibited by Rule 1.8(h)(1). That rule states that "a lawyer shall not (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice" This prohibition is absolute, and does not permit a lawyer to obtain a client's advance agreement to limit malpractice liability under any circumstances.

Moreover, Rule 8.4(a) provides that a lawyer shall not “attempt to violate the Rules of Professional Conduct.” Accordingly, a lawyer should not even ask a client to enter into an agreement in violation of Rule 1.8(h)(1). As such, even proposing an agreement limiting a lawyer’s liability for malpractice is violative of Rule 8.4(a).

CONCLUSION

The lawyer may require the client to give prompt notification of any change of address or telephone number.

The lawyer should nonetheless exercise due diligence and reasonable efforts to locate the client before withdrawing from representation, and should not rely on the client’s agreement to accept delivery at the last known address.

The lawyer may not require the client to agree, in advance, to limit the lawyer’s liability to the client for acts of malpractice.