NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 969 (6/12/13)

Topic: Limiting an attorney's liability

Digest: A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

Rules: 1.8(h)

FACTS

1. A client has requested that an opinion letter to be written by the inquirer be addressed not only to the client but also to the client's lessee.

QUESTION

2. May the attorney ethically request prospectively that the client indemnify the attorney against a lawsuit brought by the third-party lessee?

OPINION

3. Rule 1.8(h)(1) of the New York Rules of Professional Conduct provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Comment [14] to this Rule notes: "Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation." Thus, it is clear that the attorney could not prospectively enter into an agreement with the client that would require the client to indemnify the lawyer against a judgment in favor of the client, or otherwise hold the lawyer harmless for any liability to the client, arising from legal malpractice.

4. In the instant case, however, the lawyer seeks indemnity against any malpractice or other claims that might be brought by a non-client, that is, the client's lessee who is the third-party addressee on the opinion letter. The Rules contemplate that a lawyer at the request of a client may provide an opinion that will be provided to a third party: "A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." Rule 2.3(a). As Comment [3] notes, a legal duty to the third party "may or may not arise," and that is a question of law. *See, e.g., Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y. 2d 377, 605 N.E.2d 318, 590 N.Y.S.2d

831 (1992). Whether or not a legal duty to the third party arises, however, the third party, absent other facts, is not a client of the attorney.

5. Given that the prohibition of Rule 1.8(h) applies only to prospective agreements limiting liability to the lawyer's *client*, we conclude that a lawyer may prospectively request indemnity against potential malpractice or other claims that could be asserted by a third party. *See* Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, 67 Bus. Law. 99 (2011) ("While professional ethics rules normally prohibit lawyers from prospectively limiting their liability to clients, these prohibitions do not apply to non-clients."); Michigan Opinion RI-258 (1996) (lawyer serving as guardian ad litem may negotiate for release of liability from families and other interested persons because the lawyer's duty is to the child only).

6. We note that the potential harm expressed in Comment [14] to Rule 1.8 does not arise where the client agrees to indemnify the lawyer against a malpractice judgment or other claims arising from harm to the third party. Such indemnification seems unlikely to undermine competent and diligent representation of the client, because the lawyer may not prospectively enter into an agreement limiting malpractice liability to such client.

CONCLUSION

7. A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

(66-12)