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Home Remedies:
Making a Bad Situation Worse

By Mark J. Fucile
Fucile & Reising LLP

We've all got family favorite "home remedies" for various maladies. Some lawyers occasionally try practice variants of "home remedies" in an effort to extricate themselves from difficult situations. Often, however, these "home remedies" make a bad situation even worse. In this column, we'll look at three. Each is based on the same fact scenario:

> Lawyer and Client have seen happier days. Client owes Lawyer a substantial receivable on a continuing case. When Lawyer reminds Client about the increasing amount owed, Client threatens Lawyer with a malpractice claim, a bar complaint or both. Lawyer would like out and is willing to compromise the receivable. In return, though, Lawyer wants Client to agree to: (a) limit Lawyer's liability for malpractice for the remainder of the case; (b) waive any potential claims that may have already accrued; and (c) forego a bar complaint. Client is not separately represented and Lawyer doesn't suggest that Client talk to another lawyer.

Before we get to each of these "home remedies," two general considerations warrant comment.

First, although routine negotiations with a client over payment of the client's bill ordinarily do not trigger a conflict, a conflict between the interests of a lawyer and a client under RPC 1.7(a)(2)—which governs "material limitation" conflicts—moves front and center if the client has accused the lawyer of malpractice or is threatening a bar complaint. OSB Formal Opinions 2005-61

and 2009-182 address conflicts under RPC 1.7(a)(2) in the respective contexts of malpractice claims and bar complaints.

Second, the "home remedies" discussed do not just increase the risk of regulatory discipline. In analogous circumstances, Oregon courts have refused to enforce contract provisions that violate the professional rules on public policy grounds (*see, e.g.*, *Gray v. Martin*, 63 Or App 173, 181-82, 663 P2d 1285 (1983), and *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or App 700, 703-04, 683 P2d 563 (1984)).

Limitations on Liability

RPC 1.8(h)(1) prohibits a lawyer from entering into "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement[.]" Unlike conflict waivers, which simply require a lawyer to recommend that a client seek independent counsel, RPC 1.8(h)(1) mandates that the client actually be represented by independent counsel. Lawyers in *In re Bowman*, 24 DB Rptr 144 (2010), and *In re Smith*, 9 DB Rptr 79 (1995), were disciplined under, respectively, RPC 1.8(h)(1) and its similar predecessor for including limitations on liability in agreements with clients when the clients involved were not separately represented.

Settling Claims

RPC 1.8(h)(2) prohibits a lawyer from settling "a claim or potential claim for such liability [*i.e.*, for malpractice] with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith[.]" As this passage implies, an "unrepresented client" is one who does not have separate representation. OSB Formal Opinion 2005-61 discusses in detail the difficult issues involved in trying to settle a malpractice claim with a client in an on-going matter.

Foregoing Bar Complaints

RPC 1.8(h)(4) prohibits a lawyer from making "an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar." RPC 1.8(h)(4) did not have a predecessor under the former DRs. It is, however, consistent with prior case law illustrated by *In re Boothe*, 303 Or 643, 653-54, 740 P2d 785 (1987), where a lawyer was disciplined for "conduct prejudicial to the administration of justice" for attempting to extract an agreement not to cooperate with the Bar in connection with the settlement of a civil suit. Bar complainants are also granted "absolute" immunity from civil liability by ORS 9.537(1).

Summing Up

Lawyer in all three of our scenarios took a bad situation and made it worse. Lawyer's "home remedies" exposed Lawyer to regulatory discipline in addition to whatever asserted negligence or professional misconduct led to Client's threats. Moreover, from a contract law perspective, the "home remedies" are likely unenforceable.

Instances where a client has threatened a malpractice claim or a bar complaint outright usually counsel withdrawal. As OSB Formal Opinions 2005-61 and 2009-182 discuss, however, there may be circumstances where—with an appropriate conflict waiver—a lawyer may stay on the matter involved. The Professional Liability Fund, in turn, has a template conflict waiver for the malpractice setting and it can be modified to address the same considerations in the bar complaint context.

With both, however, lawyers usually benefit from talking the situation through with someone other than themselves. The PLF is a ready resource for malpractice issues and, if a client has accused a lawyer of malpractice, that may trigger a contractual duty of notice for the lawyer to the PLF in any event. A client who has accused a lawyer of professional misconduct can present an even more difficult personal dynamic and should be discussed with the firm's in-house

general counsel (to preserve privilege) if available or a trusted colleague (mindful of privilege considerations) if not. Wise counsel will ordinarily lessen the risk of a lawyer making a bad situation even worse through "home remedies."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.