

Client Communication Regarding Proposals for Settlement Can Prevent Legal Malpractice Claims

by Dena B. Sacharow

It seems like every week a new opinion is published regarding the enforceability of proposals for settlement. While attorneys are constantly trying to keep up with the law to determine when a proposal is appropriate or enforceable, they often overlook a key issue – whether a proposal they receive or serve can subject them to a claim for legal malpractice.

A. Serving Proposals for Settlement

An attorney can be subject to a claim for legal malpractice where the client prevails and should be able to recover attorney's fees pursuant to a proposal, but the proposal is deemed to be unenforceable. To minimize this possibility, proposals should be carefully drafted. Regardless of familiarity with the law, Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 should be reviewed to ensure that the proposal includes the correct language and properly accounts for the 25 percent differential (which is different if you represent the Plaintiff or the Defendant). Counsel should fully advise the client in a detailed *written* communication about the purpose of the proposal, the basis for the settlement amount included in it, the likelihood that it would be enforceable, and the consequences of its acceptance or rejection. It is worth mentioning to a client that the case law on these proposals is fluid and ever changing, so there is the possibility that a proposal that is ostensibly valid when served may be found to be unenforceable in the future. Finally, a release should not be included unless there is a very good reason to do

so. While attorneys like to condition proposals on the execution of a release, which is generally permitted, a release can render a proposal unenforceable.

B. Receiving Proposals for Settlement

A malpractice claim can also arise where a judgment is entered against a client based on an enforceable proposal, and the client alleges that it was not adequately appraised of the meaning and consequences of the proposal and the merits of its claims or defenses. When receiving a proposal, it is imperative not only to provide the client with sufficient information to make an informed decision, but also to document having done so. When a proposal is served against a client, it is important to: (1) immediately calendar the 30-day deadline and a date before the 30 days to follow up with the client; (2) promptly provide the client with a copy of the proposal; and (3) send a detailed written communication analyzing the strengths and weaknesses of the client's case, an evaluation of the amount of the proposal and the potential consequences of accepting and rejecting the proposal.

The bottom line is that an uninformed client who goes through a case blissfully, but unrealistically, believing that it will be recovering its attorney's fees or a large judgment at the end of the case only to find out that the proposal it made is unenforceable or that it could have accepted a proposal and received payment but instead now has to pay the opponent's attorney's fees, will not be happy. Following the pointers set out

above will hopefully reduce the client's expectations and if not, at least reduce the likelihood of being sued because of those unrealistic expectations.

To learn more about protecting against legal malpractice claims, we invite practitioners to attend the Broward County Bar Association's 2017 Legal Malpractice Summit Seminar being held on Oct. 27, 2017, from 8:30 a.m. to 1:05 p.m. Broward County Judges and Attorneys will serve as panelists in presentations which address: how to protect law firms and clients from liability for data hacks; how to reduce malpractice claims based on engagement letters, due diligence on clients, withdrawing from representation and firm breakups; how to avoid malpractice claims following mediation, settlements and proposals; and common ethical and malpractice issues among various practice areas. **B**



Dena B. Sacharow is a Senior Associate at Keller Landsberg PA, where she defends lawyers and law firms in malpractice claims, represents lawyers in grievance matters before the Florida Bar and defends personal injury, property damage and bad faith claims