

New York State Bar Association

Committee on Professional Ethics

Opinion 734 (11/1/00)

Topic: Attorney's obligation to report to a client a significant error or omission that may give rise to a possible malpractice claim.

Digest: A legal services organization is subject to the same ethical standards as other law offices, and therefore must report to the client a significant error or omission that may give rise to a possible malpractice claim, and depending on the circumstances, it may be required to withdraw its representation of the client.

Code: DR 5-101(A); DR 6-102; DR 2-110(A)(2); EC 2-6; EC 2-8; EC 2-32; EC 5-1; EC 5-11; EC 7-7; and EC 7-8.

QUESTIONS

1. Is a Legal Aid Society ("Society"), which provides legal services to low-income clients, bound by the ethical standards which require attorneys to disclose significant errors and omissions to their clients?

2. If so, may the Society continue as counsel if, after having made full disclosure of such an error, a client still wants the organization to continue its representation?

OPINION

As a general rule, whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients reasonably informed about the matter and to provide information that their clients need to make decisions relating to the representation, the Society's lawyer would have an obligation to disclose to the client the possibility that they have made a significant error or omission. See N.Y. State Op. 396 (1975); EC 7-7, EC 7-8.

DR 5-101(A) governs the question of whether the Society and its lawyers have a conflict of interest arising out of their personal interest in avoiding civil liability and, if so, whether the lawyers may nevertheless continue the representation with "the client's consent to the representation after full disclosure of the implications of the lawyer's interest." In general, under DR 5-101(A), the lawyers would have a conflict of interest if "the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own" interest, and, in that event, the Society could continue the representation with the client's informed consent only if "a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby."

This Committee's prior opinions provide guidance about how these principles generally apply when a lawyer has made a significant error or omission in the course of the representation, although their application will obviously vary depending on the facts of the particular case. For example, in N.Y. State 275 (1972), we addressed the situation of a lawyer who failed to file a claim within the statute of limitations period. We held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages. Because the error could not be remedied and the representation was all but concluded, we further held that the lawyer should withdraw from the matter after having made the necessary full disclosure. In such a situation, not only was there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued. We advised that, upon withdrawing, the lawyer should recommend that the client retain other counsel. See *also* DR 5-101(A); DR 6-102; EC 5-1; EC 2-6; and EC 5-11; N.Y. State 295 (1973) (reaffirming N.Y. State 275); N.Y. City 1995-2 (1995) (a lawyer failed to settle a judgment within time period prescribed by procedural rules).

Of course, not every possible error creates a possible claim for malpractice. Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be

affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

Earlier opinions also make clear that the Society is subject to the same general standard as other law offices, even though its clients, who have limited financial resources, may find it more difficult to retain other counsel. See N.Y. City 1995-2 (1995) (holding that a legal services organization that may have committed malpractice should withdraw its representation and advise an indigent client to obtain legal advice from an attorney not employed by the organization); DR 5-101(A); EC-5-1; and EC 5-11. If the Society is required to withdraw from the representation because of the possibility that its lawyers' representation will be adversely affected by their own or the Society's interest, another legal services organization may be willing to undertake representation of the client or the client may be able to retain a private attorney on a contingency fee or on a pro bono basis. Unfortunately, it is also possible that the client may go unrepresented if another attorney is unavailable or unwilling to assume the matter. In any case, the Society cannot withdraw its representation until it "has taken steps to the extent reasonably practical to avoid foreseeable prejudice to the rights of the client," the specifics of which would depend on the circumstances of a particular case. See DR 2-110(A)(2); DR 6-102; EC 2-6; EC 2-8; and EC 2-32. However, if the matter is in litigation, the Society must seek permission from the Court before withdrawing. DR 2-110(A)(1).

CONCLUSION

The Society is bound by the same ethical standards as other law offices, and therefore has an obligation to report to the client that it has made a significant error or omission that may give rise to a possible malpractice claim. In such a situation, the Society will be required to withdraw as counsel if its continued representation would be adversely affected by its interest in avoiding civil liability.

(5-00)
