Owning Up to Your Own Mistakes

Of all the things we dread having to tell clients from time to time, surely news of our own negligent acts during representation has to be one of them. If our continuing duties as a lawyer may be impaired because of our mistakes, our ethics rules require that the client be told.

ER 1.4(a)(5)[1] requires a lawyer to consult with her client about any limitations on the lawyer's conduct where the lawyer knows the client expects assistance not permitted by our ethical rules or other law. This usually is the rule discussed when a client asks us to do something illegal, such as assisting a client in criminal or fraudulent conduct.[2] But this rule can apply to prohibit conflicts of interest, including the proscriptions found in ER 1.7(a)(2) that include not representing a client if there is a significant risk that the representation will be materially limited by the lawyer's personal interest.[3] The desire to avoid a malpractice claim, if it impairs the ongoing representation of a client, is generally considered a personal interest.[4]

A recent federal appellate case is instructive.[5] There, a law firm represented the lead lender in a loan to build a casino on a Mohawk reservation in New York State. The firm gave its client incorrect legal advice to the effect that the loan did not have to be approved by the Native Indian Gaming Commission (NIGC). The loan was sold to participating lenders and then closed without NIGC approval. When the borrower defaulted, the law firm represented the lead lender in a collection action against the borrower and the Mohawk Tribal Council. One of the participating lenders drafted a complaint against the lead lender seeking rescission of its part in the deal based on an alleged misrepresentation made by the lead lender concerning the need for NIGC approval. The law firm induced the client to drop claims against the council and, when the participating lender filed suit against the client, had the client file for bankruptcy protection.

The newest Ethics Opinion is on p. 93. Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

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The bankruptcy court initially took the lawyers to task for not disclosing to their client the potential claims their client had against them for the improper advice concerning NIGC approval. These claims could have been asserted, the court held, as third-party claims against the lawyers in the case where the participating lender had sued the client for rescission. The court also pointed out that the suit against the council had been dismissed at the lawyers' urging simply to avoid the NIGC issue, but at the ultimate expense of their client.

The Eighth Circuit reversed, saying that it was a legal malpractice case where no damages had been proven by the lead lender against the lawyers. This included a finding that the Tribal Council (which had been dismissed from the state court litigation) wasn't liable to the plaintiff anyway. What would have happened if the matter had been a disciplinary proceeding is open to question: The appellate court tacitly acknowledged that there may have been an ethics violation, but refused to translate that into a cause of action for legal malpractice because there were no damages incurred by the plaintiff.

Few authorities are directly on point,[6] but trouble can be incurred by the lawyer when he tries to hide his errors from a client who should be advised of the consequences and of the options available, including the hiring of a new lawyer.

Keep in mind: ER 1.8(h)(3) prohibits settling a potential malpractice claim with a client unless the client (1) is represented by a new lawyer, or (2) is advised in writing of the desirability of seeking, *and* given a reasonable opportunity to seek, the advice of independent counsel.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. ER 1.2 (d).
3. ER 1.7(a)(2) prohibits representation if it involves a concurrent conflict of interest, which includes cases where the representation will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a person of interest of the lawyer.
4. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 20 (A Lawyer's Duty to Inform and Consult with a Client) at Comment (if the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client).
5. *Leonard et al. v. Dorsey & Whitney*, 553 F. 3d 609 (8th Cir. 2009).
6. *See* Colorado Ethics Op. 113, *Ethical Duty of Attorney to Disclose Errors to Clients* (Nov. 19, 2005). *See also Circle Chevrolet Co. v. Giordano, Halloran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (attorney has ethical obligation to advise client of potential claim against attorney, even if such advice flies in the face of attorney's own interests); and *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982) (lawyer has a professional duty to properly notify client of lawyer's failure to act and of any possible claims client may have against him).