



Committee on Professional Ethics

Opinion #275 - 12/14/72 (57-72)

Topic: Duty of lawyer to disclose to client his failure to act; lawyer's settlement of claim which client has against him.

Digest: Lawyer has affirmative duty to advise client of his failure to act resulting in claim being barred by limitations; lawyer may settle claim of client against him only after making full disclosure, withdrawing from the case, and properly advising client to retain other counsel.

Code: Canon 5; 6; 7; 9.
EC 5-1; 5-11; 7-8.
DR 1-102(A)(4); 6-101(A)(3);
7-101(A)(2) and (3).

Former Canon: 15.

QUESTION

1. Does a lawyer, who has allowed a statute of limitations to run on a client's claim, have an affirmative duty to advise his client (a) that his failure to file a timely complaint had permitted the statute to run, and (b) that the client may have a cause of action against him for damages?

2. If having made full disclosure to the client, may the lawyer settle with the client without advising the client to retain other counsel to advise him respecting the settlement?

OPINION

1. Canon 6 of the Code provides that "[a] lawyer should represent a client competently". DR 6-101(A)(3) makes a lawyer subject to professional discipline who "neglect[s] a legal matter entrusted to him". A lawyer who undertakes to bring an action on behalf of a client and then negligently fails to do so, thereby permitting the running of the statute of limitations against his client's cause of action, squarely violates these standards.

Any negligent failure to file a lawsuit so as to prevent the running of the statute of limitations would give rise to a possible

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cause of action in favor of the client against the lawyer. See, e.g. cases collected in 45 A.L.R. 2d 5, 22-26 (1956).

Neither the Code nor the former Canons of Professional Ethics appear to deal directly with the matter of whether there is an affirmative professional duty placed on a lawyer to inform his client as to his own failure to do what he has affirmatively undertaken to do.

Under the former Canons, the existence of such an affirmative duty in a statute of limitations situation was recognized in ABA Inf. 1010 (1967), based on the lawyer's obligation, under former Canon 15, to give his "'entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."

The Code, without significant change, incorporates similar obligations of devotion and zeal in Canon 7, and in the ethical considerations and disciplinary rules under that Canon. See also, Canon 9 and DR 1-102(A)(4). The provisions most directly pertinent to the lawyer's obligation to notify his client of his failure to act, and of possible claims resulting therefrom, appear to be EC 7-8; DR 7-101 (A)(2) and (3), and DR 1-102(A)(4). In pertinent part they provide as follows:

"EC 7-8. A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. * * *"

"DR 7-101. Representing a Client Zealously.

"(A) A lawyer shall not intentionally:

* * *

"(2) Fail to carry out a contract of employment entered into with a client for professional services, * * *"

"(3) Prejudice or damage his client during the course of the professional relationship, * * *"

"DR 1-102. Misconduct.

"(A) A lawyer shall not:

* * *

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

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Thus, we hold, as in ABA Inf. 1010 (1967), that a lawyer who fails to act where he has undertaken to do so, thereby causing his client's claim to be barred by limitations, has a professional duty promptly to notify his client of his failure to act and of the possible claim that the client may thus have against him for damages.

2. We further hold, as in ABA Inf. 1010 (1967), that the lawyer should withdraw from the matter after making the full disclosure called for by this opinion, because of the inherent conflict between the interests of the client and the lawyer's own interests. On withdrawing, the lawyer should advise his former client to retain other counsel. See, Canon 5, EC 5-1, and EC 5-11.

The lawyer would then be free to negotiate a settlement or release with his former client. As recognized in ABA Inf. 1010 (1967):

"If after having withdrawn from the case and made such a full disclosure, you wish to negotiate with your client for a release, we see no reason why you should not do so."
