

OPINION 523

October 1997

Question

What obligations does an associate in a law firm have under the Texas Disciplinary Rules of Professional Conduct when he discovers that another attorney in his law firm clearly gave negligent legal advice to a client for whom the associate has personally performed legal services? Is the associate obligated to inform the State Bar disciplinary authorities?

Statement of Facts

During the course of performing legal work for a client, a recently employed associate in a law firm discovered that within the past year and prior to the associate's employment, another attorney in the law firm clearly gave incorrect and negligent tax advice to such client, which if discovered in an audit by the IRS would result in adverse tax consequences to the client. The associate performed legal work for the client, some of which was related to the prior negligent legal work. The attorney who provided the negligent services has not informed the affected client.

The associate notified the shareholders of the law firm of the negligence and resigned from the firm. When the associate resigned, he demanded that the shareholders inform the client of the negligence, take remedial action, and provide the associate with proof of such actions. The associate warned that if no proof of corrective action was provided to him, he would be obligated to notify the affected client and file a grievance against the lawyer performing the negligent work. The associate received written assurances from the shareholders of the law firm that unspecified "remedial action" would be taken. However, the nature of the future remedial action was not specified and the associate was not given assurances prior to his resignation from the firm that the fact of the negligence would be clearly communicated to the client. Moreover, the associate was told that after his resignation no written proof would be supplied to him of a communication to the client on the matter because, in the shareholders' view, such communication would violate the law firm's duty of confidentiality to the client. The associate was also told not to contact the client.

Discussion

Are the associate attorney and the shareholders in the law firm who have knowledge of the negligent legal services obligated to inform the affected client? Although there is no rule directly addressing this issue, [Rule 1.03](#)(b) provides that a lawyer shall communicate with a client to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." [Rule 8.04](#)(a)(3) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Under Texas law, the relationship between an attorney and client is a fiduciary relationship that obligates an attorney to "render a full and fair disclosure of facts material to the client's representation." (*Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)). It is a relationship that has been described as requiring "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception." (*Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991)). The foregoing rules require that if a lawyer clearly knows that negligent legal advice has been given to a client by another lawyer in the law firm, the lawyer is obligated to take appropriate action to ensure that the client is informed so that remedial action can be taken.

What are the ethical obligations of the associate attorney who has resigned from the law firm? [Rule 5.02](#) addresses the ethical obligations of a supervised attorney as follows:

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct.

Under Rule 5.02, an associate must assume responsibility for his or her own conduct. However, the rule provides the associate with a limited special defense to an asserted violation of the Texas Disciplinary Rules by providing that a supervised lawyer may acquiesce in a senior lawyer's reasonable decisions on arguable questions involving the requirements of the Texas Disciplinary Rules. As comment five to [Rule 5.02](#) indicates, this can place an associate in a difficult position: "Nevertheless, the supervised lawyer is not permitted to accept an unreasonable decision as to the propriety of professional conduct. The rule obviously provides no defense to the supervised lawyer who participates in clearly wrongful conduct. Reliance can be placed only upon a reasonable resolution made by the supervisory lawyer."

Under this particular fact situation, the associate, who was supervised by another lawyer, was correct to first inform shareholders of the law firm and provide them with an opportunity to handle the problem. Each shareholder of the law firm has a responsibility in this situation, because [Rule 5.01\(b\)](#) provides that a partner (which in the terminology section of the Texas Disciplinary Rules includes shareholders in a law firm organized as a professional corporation) in a law firm violates the rules if "with knowledge of the other lawyer's violation of these rules [the partner] knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation."

In these circumstances, it was also prudent and proper for the former associate to insist that the shareholders in the law firm assure him in writing that the affected client was told about the negligent legal services so that remedial action could be taken. Otherwise, the former associate attorney would not have an adequate basis for concluding that he had complied with his obligations under the disciplinary rules. If the shareholders refuse, within a reasonable time, to provide to the former associate written assurances that the client in fact has been told of the negligence, then the associate would be obligated to inform the client about the specific negligent legal services.

Is the former associate obligated to report the negligent conduct to the disciplinary authorities?

The answer is "no." [Rule 8.03\(a\)](#) provides:

(a) A lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

The reporting requirement under Rule 8.03(a) applies only to conduct that raises "a substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A mistake or isolated incident of negligent legal services does not satisfy that standard.

Conclusion

If, when performing legal work for a client, an associate in a law firm discovers that another lawyer in the law firm clearly has performed negligent legal services for the client, the associate is obligated to inform the partners or shareholders of the law firm of such negligence. If the associate then resigns from the firm before confirming that the client has been informed of the negligence, the former associate is entitled to insist that the partners or shareholders inform him in writing that the client has been told of

the negligent representation. If the partners or shareholders refuse to give a written assurance, the former associate is obligated to inform the client about the negligent representation. Under these particular facts, the former associate is not obligated to report the negligent representation to the State Bar disciplinary authorities.