Correcting Errors

In its recent MSBA Ethics Opinion 2016-04, the Ethics Committee took the position that an attorney's ethical obligation to correct a Commitment Record that erroneously favored his client is limited. The attorney in question brought the mistake to the attention of a courtroom clerk who erroneously insisted that the record was correct. The Ethics Committee found that "when the competing interests are properly weighed" the attorney had "done all that [(s)he] had to do." The Committee's analysis included a review of Rules of Professional Conduct 1.6 and 3.3. It found that the "situation did not fit squarely into either of the pertinent rules." Since there was no false statement by the attorney nor was there fraudulent conduct by the client, Rule 3.3 was found to be inapposite. The Committee also opined that the Rule 1.6 disclosure exceptions did not apply. The Committee, apparently, did not consider the attorney's attempt to correct the record with the clerk as a violation of that rule. The Opinion led us to consider an attorney's duty to her colleagues to correct a drafting error that favors her client.

It is axiomatic that an attorney may not induce another to commit a drafting error that favors her client. The situation is not quite as clear when the error is "unforced." ABA Informal Opinion 86-1518 emphatically states that when there is a scrivener's error, the lawyer for the unintentionally advantaged client should contact the drafting lawyer to correct the error. Furthermore, the attorney need not consult her client about the error. The Ethics Committee found that in this situation, the meeting of minds has already occurred and, pursuant to Rule 1.2, the client's right to expect committed and dedicated representation is not unlimited. The ABA Committee determined that while the attorney has an obligation to notify the client of material developments, a scrivener's error is "neither a relevant consideration nor a material development and therefore does not establish an opportunity for a client's decision." This appears to be an appropriate result: the client should not reap the benefit of a mistake when the determination of the benefits and burdens has already been fully established by the parties. In 1989, the MSBA Ethics Committee took what appears to be a contrary position.

MSBA Ethics Opinion 89-44 asserts that the non-drafting attorney is under no obligation to reveal an omission of a material term to opposing counsel where neither the attorney nor the client induced opposing counsel to make the mistake. In the Committee's view, where opposing counsel made the mistake due to negligence or the belief that the error was actually part of the agreement, the Rules do not require the advantaged client's attorney to reveal the error to the other side. Instead, the Committee found Rules 1.4(b) and 1.6 to control the attorney's ethical responsibilities. The Committee suggested that Rule 1.4(b) requires an attorney to inform *her client* of the omission by opposing counsel and the consequences of the omission, such disclosure thereby allowing the client to make an informed decision about the course to take. If the client instructs the attorney not to reveal the mistake, the Committee determined that the confidentiality requirements of Rule 1.6 require the attorney to obey the client's instruction.

The State Bar of California, in Ethics Opinion 11-0002, addresses an attorney's ethical obligation to alert opposing counsel in two situations: first, a material drafting error made by opposing counsel in a contract, and second, a material change made by the attorney representing

the advantaged client. Both situations involve an important factual difference from the scenarios outlined above; the parties to the transaction have only agreed to some, but not all, of the material terms. In the first situation, after soliciting input on the initial draft of a contract and receiving pushback on one of the material terms, the drafting attorney's revised version includes an apparent error with respect to the material term in question. In the second, the attorney intentionally makes a change to the material term that benefits her client, yet unintentionally fails to highlight this change for opposing counsel. The California Committee found that where the attorney has not engaged in any conduct to induce the error and there is no agreement as to the material term, the attorney is under no obligation to reveal the error. In the second instance, the Committee held that once the attorney realizes her error, she has an ethical obligation to disclose the change to opposing counsel. The Committee's decision turns on an attorney's obligation to inform her client of significant developments relating to the transaction. Both the error in the first scenario and the change in the second constitute significant developments. However, an *agreed upon* "contract provision which is inadequately reflected in the draft contract" does not constitute a significant development and therefore, the attorney can inform opposing counsel of the error without first discussing it with the client. Although not squarely before it, the California Committee appears to agree with the ABA's analysis concerning a scrivener's error.

It seems to us that where negotiations have ended, both parties have assented to the terms of the document and all that remains to do is memorialize the agreement, the non-drafting attorney has an obligation to inform opposing counsel of a mistake in the drafting if she knows of it. How can it be otherwise? The parties have agreed, the contest is over and to permit the execution of a faulty instrument that unfairly advantages one's client smacks of duplicity. If all that is left to do is to memorialize, should not the attorney's assent to the document be taken as her warranting that it reflects the parties' understanding of the agreement to the best of her knowledge? The alternative would engender distrust among members of the Bar and would cause needless and possibly expensive disputes between or among the parties. Our ethics rules should promote cooperation, not gamesmanship, in the contracting process, particularly when the parties have already reached an agreement. Rule 1.16 (b)(4) of the Maryland Lawyers' Rules of Professional Conduct recognizes that a lawyer may withdraw from representation if "the client insists upon action or inaction that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." We do not believe that zealous advocacy requires an attorney to act without regard for fairness; a client's direction to keep mum on a drafting error should be resisted and, if necessary, cause the attorney to withdraw.

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