DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1994 - 2

May 6, 1994

Disclaimer: This opinion is merely advisory and is not binding on the inquiring attorney or the courts or any other tribunal.

Statement of Facts

The inquiring attorney is the Executive Director of a legal services organization. Because of staffing limitations and other reasons, lawyers of the organization sometimes agree to provide services on a limited basis. Apart from the provision of such limited services, the litigants are expected to proceed pro se. Some litigants are simply advised how to represent themselves. Often, litigants have cases in Family Court or Justice of the Peace Court, which use forms for most pleadings. In such cases, litigants are sometimes given instructions on how to complete the forms; and sometimes the forms are completed by staff attorneys and signed by the litigants, who then proceed on a pro se basis.

If the litigant's case is in the Court of Common Pleas or is an appeal to Superior Court, as in unemployment compensation cases, the litigant may be advised as to how to answer the complaint or file an appeal, or the staff attorneys may prepare the answer or appeal for the litigant's signature. The litigants are also advised how to file and serve the completed documents.

In all instances, the litigant signs a limited retainer describing the extent of the services that will be provided. If a decision is made to provide full representation, a new retainer is signed.

In cases where full representation is not provided, the staff attorneys who have prepared or aided in the preparation of the pleadings do not sign the pleadings or give any other indication that the litigant has received the aid of an attorney.

The inquiring attorney has requested an opinion as to (1) whether the legal services organization can limit its involvement to advice, and, in some instances, to the preparation of documents; and (2) whether the organization must disclose on pleadings or other documents prepared by its attorneys the fact that the documents were prepared by them and that the litigant is otherwise proceeding pro se.

Conclusion

The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court.

Relevant Ethical Rules

The following rules of the Delaware Lawyers' Rules of Professional Conduct are considered in this opinion:

Rule 1.2. Scope of Representation.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

Discussion

Providing Limited Assistance to Pro Se Litigants

Rule 1.2 permits a lawyer to provide limited representation to a client, if the client consents after consultation. Delaware Lawyers' Rules of Professional Conduct (hereinafter, "Rules"), Rule 1.2(c). Several jurisdictions have issued ethics opinions addressing the questions presented by the inquiring attorney. The opinions generally agree that it is permissible for an attorney to limit his or her representation of a litigant to advice and the preparation of documents. For example, in Maine Opinion No. 89 (8/31/88), an attorney was requested to represent a plaintiff in an employment discrimination suit. The discrimination claim had been denied by the state human rights commission, but the attorney believed that the claim was not frivolous. Nevertheless, he declined the representation because he felt that the claim would be difficult to prove and that the plaintiff was an individual with whom it would be difficult to work. After the claimant was unable to find other representation, the attorney, in order to protect the claimant's rights from being barred by the statute of limitations, agreed to draft a complaint that the claimant could sign and file herself. The ethics opinion stated that the attorney had not acted unethically in

so limiting his representation. The opinion did not specifically address the issue of disclosure, although it did conclude that the attorney was not required to sign the complaint or enter his appearance in court. However, the attorney was still required to ensure that the complaint was adequate and that it did not violate Rule 11.

In Utah Opinion 74 (2/13/81), the Ethics Committee decided that it was acceptable for an attorney to prepare an answer to a complaint for a litigant, and to allow the litigant to sign the complaint and proceed pro se, where the litigant had indicated that he was not in a financial position to pay for full representation and wished only to have an answer filed to protect his position.

In Virginia Opinion 1127 (11/21/88), the Ethics Committee indicated that it was permissible for an attorney to limit his representation of a pro se litigant to providing general legal advice, recommendations of courses of action to take in discovery, legal research, and redrafting of pleadings initially prepared by the litigant. The committee opined that the lawyer-client relationship was established by such a course of conduct, and that accordingly, the ethical requirements relating to limitation of liability for malpractice and the acceptance and termination of employment would be applicable. The committee also cautioned the attorney that the client must not be advised to disregard any rules of or rulings by a tribunal.

New York City Formal Opinion 1987-2 involved a fact pattern similar to that in the Virginia Opinion. The opinion stated:

> We begin by noting that there is no ethical impediment to the client representing himself. If he does not wish, or cannot afford, full legal representation, he is free to proceed without it. EC 3-7. Nor is it improper for the lawyer to make available to the client such legal services as the client can comfortably afford. On the contrary,

> in doing so, the lawyer is taking action consistent with the duty of the legal profession to meet the needs of the public for legal services. EC 2-25.

Slip op. at 1.

The New York State Bar Association Committee on Professional Ethics concurred that limited representation was permissible in a situation factually similar to the one presented here. In Ethics Opinion 613, the inquirer was the managing attorney of a legal services office, which had been unable to obtain enough attorneys to provide representation to indigent persons who were sued for divorce. The inquirer proposed in such cases to prepare responsive pleadings and a demand for financial disclosure, leaving the litigant to proceed pro se from that point forward. The opinion stated:

> We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be prepared for a pro se litigant unless it is adequately investigated and can be prepared in good faith.

Slip op. at 5. The Committee further stated, "We firmly believe that the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession." Id.

In another case involving a legal aid agency, the Kentucky Ethics Committee opined that it was permissible to limit representation of a pro se litigant to preparation of the initial pleadings, and also that the agency could prepare a handbook containing forms of pleadings and practice information for use by pro se litigants. Kentucky Ethics Opinion E-343 (1/91).

We also agree that attorneys do not violate the Rules of Professional Responsibility by agreeing to provide services on a limited basis as long as the clients are fully informed of the limited scope of the representation and agree to receive services on this basis.

Disclosure of Assistance to Pro Se Litigants

While there is general agreement that there is no ethical reason precluding an attorney from providing limited representation to a client who agrees to accept services on that basis, the issue of disclosure of the representation to the courts or other tribunals and to opposing parties is more difficult and has produced a broader range of responses from ethics committees and courts.

Rule 8.4(c) provides: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . . " Rule 8.4(c) is essentially the same as DR 1-102(A)(4), which states, "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The problem created by the provision of undisclosed, albeit limited, services to a litigant who is otherwise proceeding pro se is, of course, that the tribunal and the opposing party may be erroneously led to believe that the litigant has received no professional legal help at all. A litigant may receive some advantage, in the form of more lenient treatment concerning procedural matters, for example, if the tribunal perceives the litigant to be unrepresented. The seriousness of the ethical problem increases in proportion to the extent to which services are provided.

The New York City Bar Opinion explained that pro se litigants are afforded special treatment by the courts to compensate for their lack of sophistication in legal matters. Pro se litigants are generally held to less stringent standards than parties represented by counsel, which may both disadvantage their opponents and put the court to additional trouble. If the purportedly pro se litigant is in fact receiving behind-the-scenes help and advice from an attorney, nondisclosure of this fact "may amount to conduct involving dishonesty, fraud, deceit or misrepresentation."

On the other hand, there does not seem to be a bright-line rule regarding when disclosure is necessary, although there is general agreement that substantial and extensive involvement by an attorney must be disclosed to opposing counsel and the court. ABA Informal Opinion 1414 (1978) indicates that whether disclosure is required would depend on the facts of the case, but that "extensive undisclosed participation" would be unethical. The opinion states that it was improper for an attorney to have given advice and counsel and drafted court papers and memoranda without disclosure, but also cautions: "We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting pro se." The Virginia opinion states only that "under certain circumstances" where the assistance is "active and substantial," disclosure is required. The Utah opinion is somewhat more specific, and seems to say that an attorney need not disclose that he or she gave initial advice and prepared or assisted in the preparation of initial pleadings, but that if the assistance continues and becomes more extensive, then disclosure to the court and opposing counsel is required. The

Maine opinion states that the inquiring attorney, who had done no more than prepare the complaint, was not required to sign the complaint or enter his appearance in court as plaintiff's counsel.

The New York City opinion is more restrictive, stating that drafting any pleading, except for assisting a litigant in filling out a form designed for use by pro se litigants or making available manuals and pleading forms, is "active and substantial legal assistance" that requires disclosure to opposing counsel and the court. At a minimum, where pleadings are prepared, the New York City opinion would require disclosure when the pleading or other attorney-prepared document is filed, or when the litigant otherwise makes use of the attorney's assistance, that the litigant has received assistance from an attorney. However, the litigant would not be required to disclose the attorney's identity. If the client will not agree to make the disclosure, or if he agrees to make the disclosure but does not, then the attorney must discontinue assistance to the client.

The New York State opinion is in basic agreement with the New York City opinion, although it requires, in addition, disclosure of the identity of the lawyer who is providing assistance to the pro se litigant. The opinion approves the practice, suggested by the inquiring legal aid office, of mailing the papers that it prepares to the office of opposing counsel with a cover letter to counsel and the court explaining the extent of the legal aid office's participation in the preparation of the pleadings, and indicating that the client would be proceeding pro se apart from that assistance.

The Kentucky opinion concurs that where an attorney prepares a pleading for an otherwise pro se litigant, the attorney's name should be diclosed, although the attorney providing

such limited assistance should not be compelled to enter an appearance on behalf of the litigant, since such a requirement "would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants."

A few judicial opinions have addressed situations in which the court suspected that a pro se litigant was actually receiving advice and assistance of counsel. In Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971), the court stated that if a brief is prepared for a pro se litigant (in the case before it, the plaintiff was a pro se prisoner), the attorney must sign the brief. In Klein v. Spear, Leeds & Kellogg, 301 F. Supp. 341, 342-43 (S.D.N.Y. 1970), a case involving an "habitual litigant" who had filed over 30 lawsuits in the previous five or six years, the court suspected that an attorney had prepared the supposedly pro se plaintiff's papers in opposition to two motions for summary judgment, and strongly objected to the attorney's failure to sign the papers.

We do not recommend that an attorney sign pleadings, motions or other papers where the attorney and client have agreed that the attorney will not be representing the client in litigation. The attorney's signature in such a case would misleadingly indicate that the attorney would be representing the client in the litigation.

On the other hand, we agree that it is improper for an attorney to fail to disclose the fact that he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By "significant assistance," we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If an attorney drafts court papers (other than an initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that

disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required. In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c).

We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined.[1]

134710

[1] As the inquiry relates to the representation of pro se litigants, no opinion is expressed concerning the limited representation of clients in a non-litigation context.