ETHICS OPINION

RO-90-11

[redacted]

QUESTION:

* * *

"A client approached me with a potential malpractice claim against a lawyer licensed and practicing in the State of Alabama. Specifically, it appears the lawyer did not properly respond to a Motion for Summary Judgment by filing a Motion in Opposition with Affidavits, but filed a Motion for Continuance and never filed anything further and the Motion for Summary Judgment was entered on behalf of Defendant against Plaintiff five months later; and, the lawyer never contacted the client to advise as to the status of the case and the client discovered the case had been dismissed when she telephoned the courthouse some months thereafter.

The question I have is whether I have any obligation to advise the client that she may or may not have a basis for filing a grievance against this lawyer."

* * *

ANSWER:

Ethical Consideration 1-4 says in pertinent part as follows:

> "The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules."
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> * * *

Disciplinary Rule 1-103(B) says as follows:

> "1-103 * * *
>
> (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."

Ethical Consideration 7-8 says in pertinent part as follows:

> "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. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint."
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Section 6-5-578(a) and (b), Code of Alabama, 1975, provides:

> "6-5-578 * * *
>
> (a) Evidence of action taken by a legal service provider in an effort to comply with any provision or any official opinion or interpretation of the rules of professional conduct shall be admissible as a defense to any legal services liability action.
>
> (b) Neither evidence of a charge of a violation of the rules of professional conduct against a legal service provider nor evidence of any action taken in response to such a charge shall be admissible in a legal services liability action and the fact that a legal service provider violated any provision of the rules of professional conduct shall not give rise to an independent cause of action or otherwise be used in support of recovery in a legal service liability action. (Acts 1988, No. 88-262, p. 406, §9.)"

We are of the opinion that you do not have an ethical obligation to advise the client that, in your opinion, there may exist a basis for the filing of a grievance against a lawyer. The Legislature of the State of Alabama in adopting the Legal Service Liability Act has specifically stated that a violation, or an alleged violation, of the Code of Professional Responsibility does not give rise to an independent cause of action and may not otherwise be used in support of recovery in a legal services liability action. On these facts, when your representation involved a "potential malpractice claim against a lawyer licensed and practicing in the State of Alabama" we do not believe that you have an ethical obligation to disclose to the client potential violations of the Code of Professional Responsibility. However, should you have unprivileged information relating to the same matter, then you have, as shown above, an ethical obligation to inform appropriate authorities of the alleged misconduct.

DISCUSSION:

"Malpractice" and unethical conduct are not the same thing. The Supreme Court of the State of Alabama has held in the case of Terry Cove North, Inc. v. Marr and Friendlander, 521 So.2d (1988), that a violation of the Code of Professional Responsibility, in and of itself, does not form the basis of a malpractice action. Likewise, the Disciplinary Commission has held held on many occasions that bare malpractice does not, in and of itself, constitute a violation of the Code of Professional Responsibility.

The Code of Professional Responsibility speaks to the issue of the impropriety of taking an action that is without basis in the law or taking action merely to harass or vex another party. Accordingly, while an attorney is under an affirmative ethical obligation to report unprivileged knowledge of alleged ethical misconduct a reasonableness standard must be applied such that an attorney, for himself or on behalf of a client, should reasonably believe that there has been a breach of the Code of Professional Responsibility before initiating a disciplinary inquiry. In particular when there is related civil litigation the filing of a grievance can be perceived as vexatious and manipulative. While it is entirely possible that both actions may be justified, an attorney should be satisfied to a reasonable standard before initiating the process.

Of course, should the client initiate a discussion regarding the ethical behavior of another attorney then, under the aspirational standards set forth in EC 7-8 an attorney should provide complete advice to the client to enable the client to initiate the decision-making process.

AWJ/vf

2/13/90