



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 4.1(a) and 8.4(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 95-10
January, 1996**

Topic: Failing to disclose material fact to third person; conduct involving "fraud, deceit or misrepresentation."

Digest: A lawyer who makes a material change in a document submitted by another lawyer for signature should disclose the change when returning the signed document; failure to do so may constitute unprofessional conduct.

Ref.: Illinois Rules of Professional Conduct, Rules 4.1(b) and 8.4(a)
Standards for Professional Conduct within the Seventh Federal Judicial Circuit ("Lawyers' Duties to Other Counsel," No. 7)

FACTS

Lawyer A, representing a client in a personal injury action against his employer under the Federal Employers' Liability Act, engages in settlement discussions with Lawyer B, representing the railroad. Although A's client has a potential claim against the railroad arising out of an unrelated and previously unreported injury, the only claim discussed between counsel is that presently pending. An oral settlement agreement is reached and the railroad's lawyer prepares and forwards to Lawyer A a general release, together with the railroad's check in the agreed amount, requesting that Lawyer A obtain his client's signature on the release and return it to Lawyer B before

negotiating the check. Lawyer A has the general release retyped to omit the general language releasing all claims and restricting it to the specific claim pending, and returns the revised document to Lawyer B without any comment regarding the substantive changes made. Lawyer B discovers the change and accuses A of professional misconduct.

QUESTION

The question addressed by the Committee is whether Lawyer A's failure to call Lawyer B's attention to the substantive changes in the release, when returning the executed (changed) document, violates the Rules of Professional Conduct.

OPINION

It appears that there was never a "meeting of the minds" regarding the scope of the settlement agreement. While it has long been the practice for defense counsel to include in a release language encompassing all claims, whether existing or potential (the so-called "general release" or "release of all claims"), there was no explicit understanding in this case that the plaintiff would agree to such a release. There was no impropriety, therefore, in Lawyer A's revising the tendered "general release" to restrict its scope to the pending injury claim.

Having done so, however, Lawyer A has substantially changed the character of the document, and the Committee believes that he then had a duty to notify Lawyer B of the changes so made as contemplated by the philosophy of Rule 4.1 (Truthfulness in Statements to Others) of the Illinois Rules of Professional Conduct. The Committee believes that disclosure of the changes made could have been accomplished without violating Lawyer A's duty of confidentiality with respect to the undisclosed claim.

Moreover, Rule 8.4(a)(4) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." While it may be debatable as to whether A's silence would constitute "fraud," his failure to call attention to the changes made in the release, and having his client sign the same, appear to have been calculated to cause Lawyer B to believe that the form being returned to him was the same form he had sent. In this regard, the Standards for Professional Conduct Within the Seventh Judicial Circuit are instructive. Under the heading "Lawyers' Duties to Other Counsel," it is provided:

When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition. (Emphasis added.)

While no comparable provision appears in the Illinois Rules of Professional Conduct, the Committee is of the opinion that fairness to opposing counsel demands that substantive changes of the sort indicated be brought specifically to counsel's attention. Failure to do so will, at the very least, be considered "sharp practice" and may, in a proper case, constitute conduct involving "deceit

or misrepresentation" as defined in Rule 8.4(a)(4).

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