

Recent Decisions On Professional Responsibility

BY ROY SIMON

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Law Firm's Neglect Of Case — *Brotman v. Dickstein, Shapiro & Mann*

You probably have a high degree of trust in the lawyers who work at your firm, and that trust is probably justified. But as President Reagan used to say about the Soviet Union, "Trust, but verify." That's the thrust of Disciplinary Rule 1-104, which was significantly amended in May of 1996. That rule requires law firms to supervise all lawyers at the firm and makes every partner and every other lawyer with "supervisory authority" over another lawyer — "responsible for a violation of the disciplinary rules by another lawyer" if the partner or supervisory lawyer "knows of such conduct, or in the exercise of reasonable management or supervisory authority *should have known* of the conduct" in time to take "reasonable remedial action."

If you are a partner in a law firm, or if you are an associate with enough seniority to supervise other lawyers, DR 1-104 is aimed straight at you. You are responsible for ethics violations by other lawyers if you "should have known" about their misconduct in time to do something about it. That means you may be responsible if lawyers in your firm are neglecting their cases. That may not happen very often, but the recent case of *Brotman v. Dickstein, Shapiro & Morin*, Index No. 117570/97 (Sup. Ct. N.Y. County July 2, 1998) (Weissberg, J.), ought to send chills down your spine.

Fraud Suit Survives Motion to Dismiss

In 1981, the plaintiff in *Brotman v. Dickstein, Shapiro & Morin* was raped by four men who surprised her as she was entering her building. In 1982 the plaintiff sued the City of New York, claiming that the rape would not have occurred if the street light outside her building had been functioning. The City filed a third-party complaint against Welsbach Electric Company, which had contracted to maintain the light. In 1983, the plaintiff retained Dickstein, Shapiro & Morin, to prosecute her action against the City and to commence a separate action against Welsbach Electric. Judge Weissberg stated that for the next fourteen years, in response to the plaintiff's numerous inquiries about the litigation:

[The firm repeatedly assured her that she had a viable claim, that it was taking all necessary and appropriate steps to ensure that the litigation would be successful and that she would be advised when there were any significant developments. In fact, the defendant neither prosecuted the plaintiff's pending action against the City nor brought a new action against Welsbach. On the contrary, the firm abandoned the case against the City, failed to respond to the City's discovery requests, failed to oppose the City's motion to dismiss, and failed to inform the plaintiff that the

action had been dismissed and that a judgment had been entered against her in which she had been assessed costs.

The plaintiff learned that her action had been dismissed only when she learned that her credit rating had been lowered because she had not paid the judgment in favor of the City for costs. Plaintiff then sued the Dickstein firm for (1) legal malpractice, (2) fraud, (3) grossly negligent and reckless conduct (which, if proven, would entitle her to punitive damages), and (4) intentional infliction of emotional distress and physical injury. The Dickstein firm moved to dismiss. The court began its analysis by stating: "There is no question that the defendant law firm committed malpractice and acted reprehensibly. Clearly, it failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community. Indeed, its actions are an embarrassment to the legal community."

The court nevertheless dismissed the malpractice action because it concluded that the plaintiff could not have won her suits against the City or Welsbach Electric even if they had been timely prosecuted. But the court denied the motion to dismiss the fraud claim because the plaintiff submitted an affidavit from her doctor stating that she suffered injuries requiring medical treatment as a result of the Dickstein firm-(s "admittedly fraudulent" conduct. The court dismissed the cause of action for grossly negligent and reckless conduct under § 487 of the Judiciary Law because the complaint did not cite or track that section, but the court granted plaintiff leave to amend her complaint to allege a violation of § 487, which provides for treble damages. Finally, the court dismissed the plaintiff's action for intentional infliction of emotional distress because it found that the Dickstein firm's conduct was neither "so extreme and outrageous in degree and character as to go beyond all possible bounds of decency" nor "atrocious and utterly intolerable in a civilized society."

Not an Isolated Instance

We all hope that the *Brotman* case is an isolated and rare instance of brazen neglect. But it certainly isn't the only instance. The September 7, 1998 National Law Journal carried a front page story entitled *It's Every Firm's Nightmare* detailing the secret abandonment of fourteen high-stakes medical malpractice cases by a respected Philadelphia plaintiff's lawyer who had settled two malpractice cases for more than \$2.5 million each in the prior year. The lawyer deceived both his partners and his clients, meeting with one client to discuss a supposed multi-million dollar settlement offer after the case had actually been dismissed.

What can you do to make sure your partners and associates are not neglecting their cases? There isn't any magic formula, but if you are a partner or if you supervise the work of other lawyers, the *Brotman* case and the National Law Journal story should be a loud wake-up call. To comply with DR 1-104, your firm should have in place strict measures for monitoring the progress of every matter in the firm. A full discussion of how you can most effectively monitor the cases and lawyers in your firm must wait another day, but you should sit down with your partners soon to discuss the measures your firm already takes to monitor cases and how those measures could be improved. Otherwise, your firm could end up on the front page of the New York Law Journal as "an embarrassment to the legal community."

Client's Access To Files — *Deane v. Skadden Arps*

In *Sage Realty v. Proskauer Rose*, decided just last December, the Court of Appeals held that a law firm must, upon request, turn over its "entire file" (with certain relatively narrow exceptions) to a former

client who has paid the law firm's legal fees in full in an ongoing matter. Presumably, a client who has not paid the law firm's bills in full is not entitled to any part of her file (unless she can demonstrate severe prejudice) because the law firm has a common law retaining lien on the file until the bill is paid in full. But what if a client who is in arrears has filed a legal malpractice action against her former lawyers, and now seeks access to the file during discovery?

Supreme Court Judge Jacqueline Silbermann addressed this question and some related questions in *Deane v. Skadden, Arps, Slate, Meagher & Flom*, NYUJ, Aug. 17, 1998 (Sup. Ct. N.Y. County). After Marjorie Deane's complex divorce action ended, she sued Skadden Arps for legal malpractice. Skadden counterclaimed for unpaid legal fees. During discovery in the malpractice case, Ms. Deane asked for the names and last known addresses of all Skadden Arps attorneys and non-lawyers who had ever worked on her case. Skadden Arps said it was "impossible" to name all of the individuals who had worked on the matter. Mrs. Deane also requested her entire file, which consisted of about 70,000 to 80,000 pages of material. Skadden Arps refused to turn over any part of the file but offered to let Ms. Deane copy documents from the file at her own expense. Ms. Deane moved to compel pursuant to CPLR §3024.

Mixed Decision

The court decision was mixed. It directed Skadden Arps to supply the names and addresses of "each lawyer and paralegal that worked on the case," but it refused to order Skadden to supply the names of other non-lawyer employees because "such request would be overly burdensome."

As for the client's right-to-the-file itself, the court distinguished *Sage Realty v. Proskauer* on two grounds. First, in *Sage*, the client had paid all legal fees, but here Skadden had counterclaimed for unpaid legal fees. Second, in *Sage* the case was "ongoing," but here the underlying matrimonial action was over. In light of these distinctions, the court resolved the dispute over ownership of the file as follows:

The court finds that Deane shall be permitted access to the file on a mutually agreed upon date or dates. At that time, counsel shall flag all documents that they wish to be copied and Skadden shall arrange for the copying. Skadden shall produce an itemized bill as to the amount of the copying costs to Deane upon production of the copies. Deane shall be responsible for the payment within thirty (30) days from the receipt of the itemized bill. If counsel cannot agree on the per page cost of copying, said dispute should be submitted to the court by letter or conference call for resolution.

Sensible Rulings

The court's ruling on the request for names and addresses seems sensible. A plaintiff in a legal malpractice case cannot fully develop her case unless she knows which lawyers worked on the matter. The paralegals may also have valuable information, especially in a case that generated more than 70,000 pages of paper. The other non-lawyer employees, however, were not in a position to make important decisions and would be difficult to trace since they were probably on a salary and did not bill for their time. If the plaintiff still wants to know the names and addresses of non-lawyers who worked on her case, she can ask the lawyers and paralegals at their depositions.

The court's ruling regarding access to the file is also sensible. If the client had paid her entire bill, she would undoubtedly have been entitled to her "entire file," as the Court of Appeals defined that phrase

last year in *Sage v. Proskauer Rose*. However, because a legal malpractice action is pending, she is entitled to discovery of relevant information, even if she would not be entitled to the same information if no suit were pending. Her entire file is relevant, so the court quite reasonably gave her access to the entire file — provided she paid for the copies — just as the court would give her access to other discoverable information if she paid the copying costs,

An Open Issue

An open question is whether a client or former client is entitled to inspect and copy a closed file (at her own expense) if the client has not fully paid the legal fees and has not filed a legal malpractice action. On this question the courts ought to exercise discretion. On one hand, a client who is trying to develop a legal malpractice case may have difficulty doing so without access to the file. Law firms and courts have little interest in forcing disgruntled clients to file legal malpractice actions based on speculation and emotion rather than on documents in the case file. On the other hand, a client who is given the right to copy selected documents from a file has little incentive to pay the lawyer's outstanding bill. Routinely granting access and copying rights to clients in arrears would therefore virtually destroy the leverage of an attorney's common law retaining lien.

The retaining lien should ordinarily trump the client's desire to explore claims against a lawyer in a closed action. Most clients probably know enough about their matters and have enough papers in their possession to enable a malpractice lawyer to determine whether an action against the former lawyer is well founded, even without obtaining access to the closed file before commencing suit. Therefore, a court should ordinarily deny a client in arrears the right to see her file before filing suit. But if a client presents extraordinary reasons justifying access to a file — for example, the lawyer's failure or refusal to provide the client with copies of important papers during the case, or a fire that destroyed the client's copies — then the court ought to give the client pre-filing access to the file for the purpose of exploring his action. (Of course, only rarely will a client who is unready to file a malpractice claim nevertheless be ready to file a proceeding seeking access to her file.) In sum, courts should ordinarily deny access to the file unless the client pays the bill (perhaps into escrow) or presents extra ordinary reasons justifying access to the file.

Roy Simon is a Professor of Law at Hofstra University School of Law, and Director of Hofstra's Institute for the Study of Legal Ethics. He is a member of the NYSBA's Committee on Professional Ethics and author of Simon's New York Code of Professional Responsibility Annotated, published by West.