

Advisory Opinion 1987-11

An attorney asks whether he has an obligation to disclose to the opposing party its apparent error under the following circumstances. The attorney represents the plaintiff in a personal injury case. Prior to filing suit, the attorney attempted to settle with the insurance company. The attorney demanded \$20,000. The company was willing to settle for \$1,000. The attorney countered with a proposal for \$10,000. The company countered with its own proposal for \$1,400. The attorney wrote the company a letter, threatening suit unless the matter were settled for \$10,000. The company tendered him a check for \$14,000 in settlement of the matter.

It is the opinion of the committee that the attorney should disclose to the company its apparent error. The ABA Committee on Ethics and Professional Responsibility recently addressed a similar question. In ABA Informal opinion 86-1518, the committee opined that a client does not have a right to take unfair advantage of a scrivener's error in omitting an important provision from a contract.

Based on the facts of this attorney's case, it is obvious that the insurance company erroneously tendered a check with an extra zero. While we do not condone the insurance company's tactic of tendering a check in settlement for an amount which the client has already rejected (perhaps hoping that the client would endorse the check in error), we do not believe that this permits the attorney to engage in similar dishonorable behavior. Knowing that the check was mistakenly tendered, we believe that the attorney's duty is to act with honesty and to avoid a possible fraud. See SCRA 1986, Rules 16-102(D), 16-401, and 16-804(C).