

Advisory Opinion 1987-12

An attorney asks whether he has an obligation to disclose to the court its apparent error under the following circumstances. The attorney filed suit on behalf of his client. The defendant chose to appear pro se. Instead of filing an answer, the defendant filed a document detailing what he wanted in settlement. The attorney filed a motion for default or for summary judgment. The court scheduled a hearing on the presentment of judgment. At the hearing, the defendant indicated that he would file an affidavit later. The court took plaintiff's form of judgment pending receipt of the affidavit. The affidavit was filed in timely fashion. In the attorney's opinion, the affidavit controverted the allegations of the complaint sufficiently to preclude summary judgment. Nonetheless, the judge signed and filed the judgment.

It is the opinion of the committee that the attorney has no obligation to call the court's attention to what may or may not be an apparent error in entering the judgment. This situation is not covered by any of the subparagraphs of SCRA 1986, Rule 16-303.

Moreover, in *State ex rel. State Highway Commission v. Sherman*, 82 N.M. 316, 319, 481 P.2d 104, 107 (1981), the court said, "Those who choose to plead or appear pro se are bound by all of the applicable procedural rules and enjoy no greater rights than those who employ counsel." If defendant were represented by counsel, we would not expect plaintiff's counsel to assist him in trying defendant's case or otherwise assist him in meeting procedural deadlines. See South Carolina Bar Advisory Opinion 81-3 (summarized at *A.B.A./B.N.A. Lawyers' Manual on Professional Conduct* 71:112 (1987)) (lawyer should not remind opposing counsel of time deadline if client has instructed lawyer not to grant any extensions).

We note that a different answer might be given if defendant had given plaintiff's counsel any reason to believe that defendant were relying on the attorney to protect defendant's rights. See *Lyons v. Paul*, 321 S.W.2d 944 (Tex. Civ. App. 1959). In that case, the defendant sent plaintiff's counsel her papers which should have been filed in court. Knowing that defendant was proceeding erroneously, plaintiff's counsel nonetheless obtained a default judgment. In contrast, in this attorney's case, defendant filed his own pleadings and made his own court appearances. The attorney did nothing to expressly or impliedly mislead the court. In fact, the matter was out of the attorney's hands at the time the court entered judgment.