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Silence is Golden…Or is it? Thorny Issues Involving the Concealment of Information from Opposing Counsel

ABA Model Rule 3.4(a), *Fairness to Opposing Party and Counsel,* prohibits a lawyer from unlawfully obstructing another party's access to evidence or from unlawfully altering, destroying or concealing any material having potential evidentiary value, or from counseling or assisting another person from doing the same. Moreover, concealment from your adversary can be unethical even where there is no specific legal obligation to disclose if the concealment is otherwise found to be dishonest or misleading. Perhaps as a result of the more recent emphasis on professional civility, disciplinary authorities seem more likely to sanction lawyers for failing to volunteer information to adversaries even when no specific legal duty of disclosure exists.

The question of legitimate nondisclosure to an adversary creates infinite challenging ethical scenarios. For example, what if you know that your opposing counsel incorrectly drafted an agreement in such a way that it may inure to your client's benefit and you fail to correct the mistake? Or, what if you negotiate a settlement for your client in relation to his tort claim, but fail to advise your opponent that the statute of limitations has run on the claim and your client recently died? Finally, what if your client seeks to eliminate potentially damaging posts from his social media immediately before you file his lawsuit? Have you violated Rule 3.4(a) if you give him the green light to do so? Rather than being a fully comprehensive discussion of these scenarios, this article is intended to highlight various scenarios in which non-disclosure issues may arise.

Tension Between Duties to Client and Obligations to Opposing Counsel

The obligations to opposing counsel under Rule 3.4 may, at times, create tension with a lawyer's duties of undivided loyalty and zealous advocacy to his client. However, even Rule 1.3, which imposes the duty of diligence, recognizes that the duty is not unlimited. As noted in the Comments to Rule 1.3, a lawyer should take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Nevertheless, a lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer "is not bound, however, to press for every advantage that might be realized for a client."

Reconciling the lawyer's duties to the client with the ethical obligation imposed pursuant to Rule 3.4(a) initially involves determining what type of conduct constitutes the "unlawful" obstruction or concealment of potential evidence. Clearly, the failure to comply with a discovery obligation or to turn over evidence of a client's crime may constitute a violation of Rule 3.4(a).

Rule 3.4 does not impose upon a lawyer a duty to volunteer all relevant information to an adversary. See ABA Annotated Model Rules, Rule 3.4. However, lawyers also must be scrupulous in determining that any concealment or omission could not be characterized as false or misleading, irrespective of whether a specific legal duty to disclose exists. Courts and disciplinary bodies have taken different positions on whether nondisclosure constitutes deceitful conduct in a variety of contexts, even where no apparent legal obligation to provide the information exists. Such cases are highly fact-specific. If you have any question regarding the withholding of information or potential evidence, you should obtain the advice of an ethics/professional liability attorney before determining how to proceed.

California Considers Alternative Concealment Scenarios In Agreement Drafting

What disclosure, if any, must be made to an adversary if errors or changes are made in the context of drafting written agreements? One ethics opinion from the State Bar of California Standing Committee on Professional Responsibility and Conduct considers two interesting, alternative scenarios involving nondisclosure. *See State Bar of Ca. Formal Op. Interim No. 11-0002* (2011). This opinion highlights the issue that unethical concealment often turns on whether the non-disclosing attorney could be found to have taken an active role in the concealment.

Buyer and Seller are affecting the sale of a Company. The parties have agreed to the essential terms, including the sale price of $5 million and that the agreement will include a provision that the Seller will comply with a covenant not to compete with the Company after the sale. Buyer's attorney prepares the initial draft agreement, indicating that $3 million of the total amount will be allocated to the purchase price, with the remaining $2 million being allocated as consideration for the covenant not to compete. Seller's attorney offers comments on the draft, including that payments received by Seller for the covenant not to compete are disfavored from a tax perspective as opposed to payments allocated for the purchase price. Buyer's attorney then redrafts the agreement, allocating only $1 for consideration on the covenant not to compete and the rest of the $5 million toward the purchase price. Seller's attorney realizes that this effectively renders the covenant not to compete meaningless, since Seller would only be on the hook for $1 if he violates it. Seller's attorney advises his client of the apparent error regarding the redrafting, but the client instructs him not to disclose it to the Buyer's Attorney. Seller's attorney does not raise the issue, and the agreement is entered as redrafted by Buyer's Attorney.

The California Committee concluded that Seller's attorney did not have an affirmative duty to disclose the apparent error by Buyer's Attorney. It noted that the Seller's attorney engaged in no conduct or activity that induced the apparent error. Further, there had been no meeting of the minds on the allocation of the purchase price to the covenant, and the agreement did contain a covenant not to compete consistent with the parties' understanding. Thus, the seller's attorney did not engage in dishonest conduct by failing to disclose the apparent error.

The Committee also considered an alternative scenario utilizing the same basic facts. In the second scenario, after Seller receives the initial draft from Buyer, he prepares a redraft that only allocates $1 of the purchase price as consideration for the covenant not to compete. Although Seller's attorney had no intention of hiding the change from Buyer's Attorney, he generates a "redline" of the agreement that mistakenly does not highlight the change in the allocation of the funds. Subsequently, Seller's Attorney notices the defect in the redline and notifies his client, but the client directs him not to otherwise point out the change to Buyer's Attorney. Seller's attorney says nothing to Buyer's attorney, and allows the agreement to be finalized by the parties in that form.

The California Committee concluded that the second scenario poses an ethical problem for the Seller's Attorney. While the Seller's Attorney may have unintentionally provided a defective redline version of the draft agreement that failed to highlight the change, once he was aware of his error he was obligated to correct it or bring it to the attention of the Buyer's Attorney. The failure of the Seller's Attorney to advise Buyer's Attorney of the material change in the agreement was conduct constituting deceit, active concealment, and possible fraud, in violation of his ethical duties. Therefore, attorneys should be wary of engaging in any conduct that induces an apparent material error or misunderstanding by opposing counsel.

ABA Opines No Duty to Disclose Statute of Limitations Issue in Settlement Negotiations

In the context of settlement negotiations, there are varying opinions as to whether lawyers have a duty to volunteer adverse information to the other side. The ABA Standing Committee on Ethics and Professional Responsibility opined that a plaintiff's lawyer engaged in settlement negotiations was not required to disclose to defense counsel that the statute of limitations had run on his client's claim. *See* ABA Formal Op. No. 94-387. The ABA Committee stated as follows, with respect to that scenario:

> As a general matter, the Model Rules of Professional Conduct…do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to represent her client diligently, and possibly her obligation to keep client confidences. See Rules 1.3 ("Diligence") and 1.6 ("Confidentiality of Information")…By the same token, the lawyer may not ethically break off negotiations with an opposing party simply because she has doubts about the viability of her client's case, unless of course the client directs her to do so. At the same time, a lawyer may not make a false statement to, or intentionally mislead, a third party.

Yet, even the Committee did not agree on the conclusion that concealment in this context was proper. The Opinion included a strong dissent that noted efforts to improve the public perception of lawyers as to perceived sharp practices, and conversely concluded that nondisclosure of the statute of limitations issue would constitute dishonest conduct.

Lawyers may be surprised that their duties of zealous advocacy and confidentiality to their clients do not always carry the day, even where voluntary disclosure may harm the client's interests. …[S]ilence will not always be golden, even in the absence of a specific duty of disclosure to your opponent.

Illinois Lawyer Disciplined for Concealing Death of Client

Notably, attorneys have been disciplined for failing to disclose other material information in the course of settlement negotiations. *See In re Gilberth*, 2015PR00100, M.R. 28008 (2016). *Gilberth* involved an Illinois attorney who had filed a product liability lawsuit on behalf of his client against the manufacturer of his client's prosthetic leg. After discovery was completed, the client died. The client's son agreed that the lawyer's firm also would handle the probate case, and the son was appointed as the independent administrator for the estate. Thereafter, the attorney and his adversary agreed to settle the case for $110,000. The attorney did not disclose his client's death, and opposing counsel was otherwise unaware of that fact. The attorney later acknowledged that he concealed the fact of his client's death because he knew that it would reduce the value of any claim for damages. He also believed that it would be improper to disclose his client's death because it was confidential information and its revelation would harm his client's claim.

Before the settlement was finalized, however, the attorney sent defense counsel an amended release. He informed counsel that the client had died, and his son had been appointed administrator of the estate. Defense counsel then refused to proceed with the settlement. The trial court granted plaintiff's motion to enforce the settlement, but the Appellate Court reversed. The Appellate Court concluded that due to the client's death, there was no plaintiff in the case as of the date of the settlement agreement. It also rejected the attorney's arguments for failing to disclose the death, finding that the attorney acted improperly by intentionally concealing a material fact. He was ultimately censured by the Illinois Supreme Court, and other Illinois lawyers have been sanctioned for similar conduct.

This precedent, which is not unique to Illinois jurisprudence, nevertheless represented a surprise result to members of the plaintiffs' personal injury bar. For example, a similar result occurred in California, where the lawyer was suspended for failing to disclose the death of one of his clients, even after trial had commenced. *State Bar of California v. Pabros,* Case No. 17-O-05369 (Jan. 15, 2019). In that case, opposing counsel became suspicious after the party failed to appear at trial, and he discovered that person's death via an internet search during a break in the trial.

These cases underscore, once again, that while an attorney should be a zealous advocate for his client, the attorney must consider whether an omission of information to opposing counsel may be viewed as deceitful or misleading given the specific facts involved. Moreover, if there is pending litigation, the duty of candor to the tribunal also may be implicated.

Concealment In the Context of Social Media

For a final concealment conundrum, consider the question of whether a lawyer may advise a client to delete social media posts that may be detrimental to the client's claim. Not surprisingly, lawyers have been sanctioned and disciplined for such conduct where it occurred after litigation commenced and spoliation of evidence or discovery violations were found. In Virginia, a lawyer was suspended for five years for advising his client to deactivate his Facebook account and remove certain photos during discovery, concealing the photos from opposing counsel, and withholding emails regarding the deletion of the photos from the court. *In the Matter of Murray,* 2013 WL 5630414 (Va. State Bar Disc. Bd. 2013). Part of the misconduct involved the lawyer's assistant, who sent the client an email referencing a picture on the client's Facebook page and stating, "You have something (maybe plastic) on your head and are holding a bud with your I Love Hot Moms shirt on…Do you know the pic? There are some other pics that should be deleted."

However, you may be able to ethically suggest that your client restrict access to his social media and/or remove a compromising picture from his Facebook page, if you do so pre-litigation. Several state ethics committees have concluded that lawyers may advise their clients to adjust their social media privacy settings and to remove postings, unless the lawyer has a duty under law to preserve and/or avoid the spoliation of such evidence. Nonetheless, these opinions advise the lawyer to preserve the social media data if the information is known by the lawyer (or reasonably should be known) to be relevant to the future legal proceeding. *See, e.g., Penn. Bar Assoc. Formal Opinion 2014-300; Fla. Ba Ethics Opinion 14-1* (2015); *NC Bar 2014 Formal Ethics Opinion 5* (2015).

Concealment and the Cautionary Tale

The issue of legitimate nondisclosure or concealment from an adversary is not simply a matter of determining whether an express legal obligation is involved. Lawyers must balance their duties to their client against both express legal duties to adversaries and general duties of truthfulness. Lawyers may be surprised that their duties of zealous advocacy and confidentiality to their clients do not always carry the day, even where voluntary disclosure may harm the client's interests. As demonstrated above, silence will not always be golden, even in the absence of a specific duty of disclosure to your opponent.

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