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Lawyers' Manual on Professional Conduct℠

Formal Opinion 94-387
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Disclosure to Opposing Party and Court That Statute of Limitations Has Run

A lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent. It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground, in the absence of agreement by her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it. There is no basis in the ethics rules for holding a lawyer representing a government agency to a different standard in these circumstances than that applicable to a lawyer representing a private client.

The Committee has been asked to address the following questions:

1. Is it unethical for a lawyer to negotiate with an opposing party about a civil claim that may not be susceptible of judicial enforcement because the statute of limitations has run?

2. Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?

3. Is it unethical for a lawyer to file a civil action knowing that it is time-barred?

4. Do the ethics rules require a different analysis or lead to a different conclusion on any of these questions because the lawyer represents a government agency?

For the reasons stated below, the Committee believes that all four of the above questions should be answered in the negative.

I. The Duty of Candor in the Context of Negotiations.

As a general matter, the Model Rules of Professional Conduct (1983, amended 1994) 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 [1] ("Diligence") and 1.6 [2] ("Confidentiality of Information"). *See* Formal Opinion 93-375 ("The Lawyer's Obligation to Disclose Information Adverse to a Client in the Context of a Bank Examination"). By the same token, a 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. *See* Rule 4.1 [3] ("Truthfulness in Statements to Others"). Rules 3.1 [4] ("Meritorious Claims and Contentions") and 3.3 [5] ("Candor Toward the Tribunal") impose additional obligations on a lawyer if she seeks to enforce her client's claim in court. *See* Formal Opinion 93-376 (1993) ("The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests").

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[1] Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

[2] Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[3] Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[4] Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[5] Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Applying these general principles where the lawyer knows that her client's claim may not be susceptible of judicial enforcement because the statute of limitations has run, we conclude that the ethics rules do not preclude a lawyer's nonetheless negotiating over the claim without informing the opposing party of this potentially fatal defect. Indeed, the lawyer may not, consistent with her responsibilities to her client, refuse to negotiate or break off negotiations merely because the claim is or becomes time-barred.

The lawyer in this situation must, of course, be careful not to make any affirmative misrepresentations about the facts showing that the claim is time-barred, or suggest that she plans to do something to enforce the claim (e.g., file suit) that she has no intention of doing. *See* Rule 4.1. However, we see no reason why a lawyer should be ethically constrained in negotiating over a claim solely because the opposing party has available to him an argument that would defeat it, but fails either through lack of knowledge or by design to use it.

This is not a situation that brings into play a lawyer's duty to disclose a material fact to a third person in order to avoid assisting a fraudulent act by the client, *see* Rule 1.2(d), [6] since the expiration of the limitations period for filing a lawsuit does not affect the validity of the underlying claim or raise any question about the client's entitlement to try to persuade the other party to settle the matter without recourse to a court proceeding.

[6] Rule 1.2 Scope of Representation

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(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

While the lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations, she does have an obligation to inform her own client of this fact, and of the likelihood that the action will be defeated if the defendant realizes that the statute has run and asserts this defense. *See* Rule 1.4 [7] ("Communication"). *See also* Rule 2.1 [8] ("Advisor"). The facts that the client's claim is time-barred, and that the opposing party appears to be unaware of this circumstance, are obviously both substantial and relevant to the representation, and the client is entitled to be advised of them so as to be able to make an informed choice about whether to continue to negotiate, and whether to file suit if negotiations fail.

[7] Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[8] Rule 2.1 Advisor

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

II. The Duty of Candor in the Context of Filing a Lawsuit

We turn next to the question whether it is unethical for a lawyer to file a time-barred claim in court. This scenario brings into play the lawyer's duty not to file a "frivolous" claim under Rule 3.1, and the lawyer's duty of candor toward the tribunal set forth in Rule 3.3. *See* notes 4 and 5, *supra.* We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction.

The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentations in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either. A mere failure to disclose that her client's claim is time-barred does not constitute "an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement." *See* Formal Opinion 93-376, *supra.* This Committee reached the same conclusion under the Canons of Professional Ethics in Informal Opinion 694 (1963)("Instituting Suit Barred by Statute of Limitations"), relying on the statement in Canon 15 that "in the judicial forum the client is entitled to the benefit of any and every remedy or defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." *See also* Hazard & Hodes, *The Law of Lawyering*, 1992 Supplement §3.1:204-2 ("the whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponent").

The result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit; if it constituted the sort of substantive insufficiency in the claim that would result in its being dismissed without any action on the part of the opposing party; [9] or if the circumstances surrounding the time-barred filing indicated bad faith on the part of the filing party. [10] Short of such additional defects, however, and in the absence of any affirmative misstatements or misleading concealment of facts, we do not believe it is unethical for a lawyer to file suit on a time-barred claim.

[9] *See, e.g., Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F. Supp. 507, 509 (E.D. Mich. 1983) (fact that client had died should have been disclosed to opposing counsel in pretrial settlement negotiations).

[10] In several cases Rule 11 sanctions have been imposed on a lawyer who had filed a time-barred claim. However, in these cases the default was aggravated by other circumstances. *See Brubaker v. Richmond*, 943 F.2d 1363 (4th Cir. 1991) (plaintiff's assertion of a defamation claim, after being informed that it was time-barred and at a time when the plaintiffs did not intend to seek reversal of existing precedent, constituted the making of a claim "groundless in law" in violation of Rule 11); *Dreis & Krump Manufacturing Co. v. International Association of Machinists and Aerospace Workers*, 802 F.2d 247 (7th Cir. 1986) (Rule 11 sanctions imposed where employer had "no ground" for challenging arbitrator's decision in court, and time for filing suit had passed); *Baker v. Citizens State Bank*, 661 F. Supp. 1996 (D. Minn. 1987) (Rule 11 sanctions imposed where multiple claims against bank "clearly barred" by applicable statute of limitations; court upheld several other grounds for dismissal, including failure to state a claim, lack of standing, and res judicata).

III. The Government Lawyer's Duty of Candor to Opposing Parties and to the Tribunal

The Committee sees no reason to reach a different conclusion respecting the lawyer's ethical obligations simply because she represents a governmental agency as opposed to a private party. While some courts have held that ethical codes impose different requirements of advocacy on government litigators, [11] we find no basis in the Model Rules for doing so, [12] at least in the context of a noncriminal matter. [13] The government lawyer has no less a duty zealously to represent her client within the bounds of the law than does a lawyer representing a private litigant. *See generally* Lanctot, "The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions," 64 So.Cal.L.Rev. 951 (1991). By the same token, the lawyer's ethical duties under Rules 3.3 and 4.1 to be candid with the court and fair to third parties apply to private lawyers with the same force as they do to government lawyers. And the government lawyer operating within the adversarial system has no greater or lesser right or duty than the private lawyer to sit in presumptive judgment of the client's cause. [14]

[11] The authority most often cited for holding government lawyers to a higher ethical standard is Ethical Consideration 7-14 of the Model Code of Professional Responsibility (1980), which provides:

> A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer

not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

See, e.g., Freeport-McMoRan Oil Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992) relying on EC 7-14 in faulting government lawyers' "failure to take easy and obvious steps to avoid needless litigation," and rejecting the government's "remarkable assertion" that "government attorneys ought not be held to higher standards than attorneys for private litigants"); *Williams v. Sullivan*, 779 F. Supp. 471, 472 (W.D.Mo. 1991) ("It is the court's view that there is a special duty imposed on government lawyers to 'seek justice and to develop a full and fair record,'" quoting from EC 7-14.).

[12] There is no counterpart in the Model Rules to EC 7-14, and no mention of this provision in their legislative history. Indeed, EC 7-14 had no corresponding disciplinary rule, and was not mentioned in the legislative history of the Model Code. The Preliminary Statement to the Model Code stated that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." The Model Rules contain several provisions applicable specifically to government lawyers, most notably Model Rules 1.11 ("Successive Government and Private Employment") and 3.8 ("Special Responsibilities of a Prosecutor"), but no suggestion that rules otherwise generally applicable to all lawyers should be interpreted to impose different requirements of advocacy on government lawyers.

[13] The role of the prosecutor in a criminal case raises problems peculiar to the criminal justice system, including a defendant's constitutional right to a fair trial. Since we are here concerned only with civil matters, we do not address the special ethical duties of a prosecutor under Rule 3.8.

[14] Professor Lanctot has written:

> Government lawyers should not ignore the questions of justice or fairness inherent in the cases they handle. The Model Rules require a lawyer to render "candid advice" and permit a lawyer to "refer not only to law but to other considerations as well, such as moral, economic, social and political factors, that may be relevant to the client's situation." [Rule 2.1] Moreover, the duty to consider the public good is a duty of all public servants, not just lawyers. But in the American political system, the responsibility to decide which government policy will serve the public good ordinarily rests with elected officials, not with the government lawyers. Ultimately, the agency's decision whether or not to assert [a] technical defense is a matter of government policy, not of legal ethics.

See Lanctot, *supra*, at 985-86.

It may be that the government client itself has duties to members of the public and to the justice system generally that courts will enforce in the context of particular cases. *See, e.g., Young v. United States*, 315 U.S. 257, 258 (1942) ("[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent"). Such duties could reasonably be thought to include forbearance from filing a time-barred suit in the interest of justice. But any such duty would not derive from the ethical rules applicable generally to lawyers, and should not be viewed or enforced as such. "Requiring government lawyers to substitute their own judgments of 'fairness' and 'justice' for those made by the officials they represent would be incompatible with the idealized model of the adversary system ... [and] with fundamental principles of representative government." Lanctot, *supra*, at 958. [15]

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[15] Lanctot goes so far as to suggest that "imposing on government lawyers a greater duty to the courts than on their private counterparts could present a serious interference with the separation of powers between the judicial and executive branches." Lanctot, *supra*, at 994.

Of course the government lawyer retains the right and may have a duty, like any other lawyer, to advise her client respecting obligations the client may have towards the court and opposing parties, and may discuss with the client whether its goals are "fair" or "just." [16] Indeed, the lawyer representing a government agency may determine that she herself has obligations derived from her oath of office that would compel a course of action contrary to her duties to the client under the rules of legal ethics. In the rare case where a lawyer believes that her own obligations as a government official conflict with her ethical duties to her government client, she should consult with the client to determine whether to continue the representation. [17] *See* Model Rule 1.16(b)(3). [18]

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[16] *See* Model Code of Professional Responsibility, EC 7-8 (1980) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.").

[17] The question of client identification is an important one for the government lawyer, and has been the subject of some discussion by the organized bar. *See, e.g.*, Report by the District of Columbia Bar Special Commission on Government Lawyers and the Model Rules of Professional Conduct (1985).

[18] Rule 1.16 Declining or Terminating Representation

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(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

* * * *

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent....

Conclusion

In sum, we conclude that a lawyer has no ethical duty to inform an opposing party that her client's claim is time-barred; to the contrary, it may well be unethical to disclose such information without the client's consent. It follows that a lawyer may be constrained from discontinuing negotiations over a claim simply because the limitations period for its judicial enforcement has run, in the absence of directions from her client that she do so. Nor is a lawyer constrained by the rules of ethics from filing a time-barred claim, assuming no affirmative misrepresentations have been made, unless the rules of the jurisdiction preclude it. Finally, we find no basis in the ethics rules for reaching a different result where a lawyer represents a government agency in a civil matter, since a lawyer in these circumstances has the same ethical obligations to her government client and to the court and as does a lawyer representing a private client.

Dissent

I dissent.

I look upon this opinion as Julia Child would regard a fly in her soup. It is unneeded, unwanted, and too much to swallow. In short, a practice note for the lawyer interested in developing a "sharp" practice.

In my view, Model Rule 8.4(c) [19] dealing with deceit covers the facts described in the opinion and requires a different answer. Looked at in any light, these facts show a sly and deceitful lawyer.

[19] "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

The American Bar Association is presently implementing another of its periodic and expensive campaigns to improve the image of lawyers. The effort focuses, in part, on how lawyers abuse the process and one another. The opinion here serves as a real counterpoint to that effort.

Even if the perceived deceit may be put aside under the theory that one person's deceit is another's brilliant litigation technique, that does not end the matter. The worst part of the opinion is its theory that government lawyers do not owe a greater duty to the public than other lawyers, particularly the pettifogger described in the opinion. This is so because there is not a Model Rule that states specifically that government lawyers owe a higher duty.

A Rule on that point was suggested at the culmination of the Watergate investigations twenty years ago. The lawyers involved were giving and following orders. They were the government. Since then, the American Bar Association has changed from the Model Code of Professional Responsibility to the Model Rules of Professional Conduct and changed the Model Rules several times. The need is still there. This is the Committee that promulgates Model Rules. It has not promulgated one and instead now unleashes a hoard of government lawyers upon the public who, in turn, get to pay for this benefit.

It is my view that government lawyers owe a higher duty to the public. This duty transcends those found in the Model Rules. Frequently government lawyers are, in fact, the government. They have great power. Their position in the scheme of things far transcends the day-to-day market place ethical problems the Model Rules deal with and reaches into political and constitutional areas. They cannot be allowed to hide behind the old excuse: "I was only following orders."

The Model Code of Professional Responsibility Ethical Consideration 7-14 (1980) provided that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair." For whatever reason, this language was not carried over to the Model Rules.

Some courts agree that government lawyers should be held to a higher standard. In *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45 (D.C. Cir. 1992), the court stated: "We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." Even this Committee in Formal Opinion 342 (1975) recognized "the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by the client."

If the Committee needs a Model Rule to operate within its mission, and it does, it should write one. Following the inner logic of the opinion leads to the conclusion that the government is free to abuse its citizens through its lawyers with the imprimatur of the American Bar Association Committee on Ethics and Professional Responsibility. I would not issue the opinion.

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