Ethically Speaking

By Charles Slanina, Esquire

When Does Duty Trump Loyalty?

Attorneys often cite the penumbral duties of loyalty and zealousness to justify violations of the Professional Conduct Rules. Those same Rules dictate that duties to the court, profession, and public may supersede duties to clients. When these situations arise, the attorney can be left with some very difficult choices.

Duty to Disclose Death of Client

If a lawyer's client dies in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the court in the lawyer's first communication with either after the lawyer has learned of that fact. ABA Formal Ethics Opinion 95-397 (9/18/95).

Citing the Rule 4.1 duty of a lawyer to be truthful when dealing with others on a client's behalf, the ABA noted that an attorney generally has no affirmative duty to inform an opposing party of relevant facts. However, they concluded that a misrepresentation can occur if the lawyer incorporates or affirms the statement of another person that the lawyer knows to be false and that misrepresentations can also occur by a failure to act. In reaching their conclusion, the Committee also found that Rule 3.3 applies which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal; failing to disclose a material fact to a tribunal; or from offering evidence that the lawyer knows to be false.

The Committee reasoned that prior to the death, the lawyer acted on behalf of an identified client. When, however, the death occurred, the lawyer ceased to represent that client and, therefore, subsequent communication to opposing counsel or the court which did not disclose that fact would be the equivalent of a knowing, affirmative misrepresentation. See *In re Forrest*, N.J., No. D-16, (6/11/99). 15 Law. Man. Prof. Conduct 320 (07/07/1999) in which a New Jersey lawyer was suspended for six months following a failed nine-month effort to conceal a client's death from the court, arbitrator, and opposing counsel. When the arbitrator inquired about the client's absence, the attorney replied that the client was "unavailable." The court concluded that Forrest's failure to disclose a material fact to a tribunal violated Rule 3.3(a)(5) and cited, with approval, ABA Formal Opinion 95-397. The court also found the attorney's conduct to violate the Rule 3.4(a) prohibition against obstructing another parties' access to evidence when the death was not disclosed in discovery and, finally, a Rule 8.4(c) violation for conduct involving dishonesty, deceit, and misrepresentation. The New Jersey attorney had defended his tactics as "bluffing" or "puffing," but the court responded that "[m]isrepresentation of a material fact to an adversary or a tribunal in the name of 'zealous representation' never has been nor ever will be a permissible litigation tactic."

The Lawyer's Obligation Where a Client Lies in Response to Discovery Responses

A lawyer in a civil case who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court. In this context, the normal duty of confidentiality in Rule 1.6 is explicitly superseded by the obligation of candor towards the tribunal in Rule 3.3. ABA Formal Opinion 93-376 (8/6/93).

In the facts presented to the Committee, a lawyer was representing the agent for an insurance company in a contract action filed by an insured against both the company and that agent. The policy required proof of claim within sixty days of loss. The agent was deposed and testified that the proof of claim was not received within sixty days.

Later, the agent advised the lawyer that he had lied about when the insured's notice of claim was received. In fact, it had arrived in his office on the sixtieth day; however, the agent had shredded the letter and altered the office mail log to conceal the fact of the timely receipt.

The ABA opined that the attorney's first effort should be to attempt to persuade the client to withdraw the perjured testimony. Failing that, the Committee discussed the merits of a "noisy withdrawal" by the attorney in a way that might suggest the reasons for that withdrawal. However, the Committee also noted the limitations of such a withdrawal in that if the plaintiff failed to take the "hint," they might be dissuaded from proceeding on the claim thereby rewarding the former client's perjury. As a result, the Committee concluded that direct disclosure to opposing counsel and the court might be required if the other alternatives failed or were inappropriate under the circumstances.

Disclosure Obligations of a Lawyer Who Discovers That Her Client Has Violated a Court Order During Litigation

A lawyer who discovers that a client has violated a court order prohibiting or limiting transfer of assets must reveal that fact to the court if necessary to avoid or correct an affirmative misrepresentation by the lawyer to the court. ABA Formal Opinion 98-412 (9/9/98).

The Committee was offered a set of facts in which the lawyer learned of the client's

misconduct after it occurred and that the Client had, but was no longer, continuing to dispose of assets in violation of a court order. (A lawyer's knowledge that a client is engaging in ongoing criminal acts raises a different question. A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent. Rule 1.2(d).) Again, citing the Rule 3.3 duty of candor to the tribunal in relation to the duty to maintain client confidences (Rule 1.6), the ABA concluded that there is a limited attorney duty to disclose the client's misconduct only to the extent necessary to avoid a past false statement by the lawyer to the court. Otherwise, Rule 1.6(a) would preclude the lawyer from revealing the client's past misconduct to the court without the client's consent. The Opinion cautions that the lawyer must avoid or correct affirmative false statements made by the lawyer to the court. The Committee noted that a lawyer's continued appearance before the court is not an affirmative representation that her client is in compliance with all court orders, regardless of their nature. Again, the ABA weighed the value of noisy withdrawal with a discussion of the limits to the curative effect that such an action would have. The Committee concluded that disclosure against the client's interest and without the client's consent may be required.

Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud

A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client, and may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy" withdrawal may have the collateral effect of inferentially revealing client confidences.

When a lawyer's services have been used in the past by a client to perpetrate a fraud, but the fraud has ceased, the lawyer may but is not required to withdraw from further representation of the client; in these circumstances, a "noisy" withdrawal is not permitted. ABA Formal Opinion 92-366 (8/8/92).

The Committee admitted that it had a difficult time reconciling the Rule 1.6 duty to maintain client confidences and the 1.2(d) prohibition against assisting a client in a crime or fraud. Added to the mix was the Rule 1.16(a)(1) requirement of withdrawal from representation where continued representation would be a violation of the Professional Conduct Rules. In balancing the attorney's obligations, the Committee adopted a hybrid approach. Withdrawal, even a noisy withdrawal, is required to protect against ongoing fraud. However, withdrawal is merely permissive to address past client wrongs.

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. ABA Formal Opinion 94-387 (9/26/94).

Notwithstanding the ABA's advice, this is definitely a trap for the unwary. While an attorney is not only permitted but required to continue to press a claim barred by the statute of limitations, (despite vigorous and lengthy dissent) few protections are afforded an attorney as to how such a barred claim is presented. The Committee warns attorneys to be careful not to make any affirmative misrepresentations about the facts as to whether the claim is time-barred.

The Committee also concluded that filing a time-barred suit is neither "frivolous" nor violative of the Rule 3.3 duty of candor to the tribunal. The ABA reasoned that the running of the time period in a civil claim creates an affirmative defense which must be asserted by the opposing party and is not a bar to the court's jurisdiction over the matter. A time-barred claim may still be enforced by a court if no objection is raised by the other party.

Notice to Opposing Counsel of Inadvertent Omission of Contract Provision

Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the Lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error. ABA Informal Opinion 86-1518 (2/9/86).

The Committee concluded that the above situation constitutes a mere scrivener's error and that a meeting of the minds had already occurred. They concluded that the error is appropriate for correction between the lawyers without client consultation or consent. Specifically, they found that the delivery of the erroneous document was not a "material development" of which the client need be informed, but the omission of the provision from the document constitutes a "material fact" which Rule 4.1(b) requires to be disclosed to B's lawyer. In other words, the duties and loyalties owed to the client do not preclude the attorney from being decent and honorable.

***Charles Slanina is an attorney in private practice specializing in professional responsibility issues. Additional information about the author is available at www.delawgroup.com.*

**"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association.*

HIRING A PARALEGAL?

Log on to
www.deparalegals.org

For more information about posting jobs on DPA's website, contact the Job Bank Director, Anthony Iannini, at (302) 421-6849.

DELAWARE PARALEGAL ASSOCIATION 1978