ADVISORY ETHICS OPINION 89-02

SYNOPSIS:

An attorney must disclose to an opposing party facts having a negative impact on a client's position where a failure to disclose would involve the attorney in misrepresentation.

FACTS:

Our advice is sought as to the following ethical dilemma: An attorney has been representing a client in a personal injury claim. No suit has been filed and the attorney has been negotiating settlement directly with an insurance carrier.

During the pendency of negotiations, the client has died, for reasons unrelated to the personal injury. The carrier is unaware of the client's death and the attorney believes that disclosure of the same would weaken the former client's position for purposes of settlement and trial, particularly as it concerns claims for future pain and suffering.

We are asked if any disciplinary role requires disclosure to the insurance carrier of the client's untimely demise.

ANALYSIS:

Two sections of the Code of Professiona1 Responsibility provide guidance. DR 1-102(4) states:

> A lawyer shall not:
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> * * *
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> Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In addition, DR 7-102(5) states:

> In his representation of a client, a lawyer shall not:
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> Knowingly make a false statement of law or fact.

By their terms, these provisions apply to conduct both within and without the courtroom.

We do not read these provisions to broadly mandate disclosure to an opposing party of weaknesses of a client's case or facts which might affect a case's settlement value.[1] Nonetheless, DR 1-102(4) and 7-102(5) limit an attorney's zealous representation of his or her client by prohibiting dishonesty, fraud, deceit, misrepresentation and falsity.

In the instant case, the failure to disclose a client's death crosses the line into impermissible conduct. We are told that disclosure of the client's death would negatively affect claims for future pain and suffering. Stated differently, if the carrier were aware of the true facts (that future pain and suffering had ceased), the case would be worth less than if the carrier continued to believe (erroneously) that the claimant was alive.

While the attorney's contemplated conduct involves passive nondisclosure of the death of the client, rather than an active misrepresentation as to the client's well-being, we do not find that distinction ethically significant. Just as the tort of fraudulent misrepresentation comprehends both misstatements of fact and nondisclosure of material facts,[2] we view the Code of Responsibility as precluding both actively and passively fraudulent conduct. In zealously representing a client's interests, an attorney should not become an instrument of fraud.

Here, where claims have been asserted for future pain and suffering, the attorney has an ethical obligation to disclose the client's demise.

[1] *Cf:* Opinion 82-7 (no post-settlement obligation to reveal newly discovered facts that might have reduced settlement, unless fraud has been perpetrated).
[2] See Restatement of Torts (Second) §§ 525, 551.