

ADVISORY ETHICS OPINION 91-14

SYNOPSIS:

Where parties agreed to disclose all financial information, and this information was used in entering into a separation agreement, a lawyer has the duty to disclose to the opposing party the existence of newly found mutual funds which had been earlier omitted by inadvertence.

FACTS:

In a divorce case, a settlement agreement was entered into by A and B. During the course of discovery, the parties had sought and disclosed all assets. After the terms of the settlement have been satisfied, and a final order entered, A's broker has found two additional mutual funds in A's name, which were inadvertently omitted from the answers to interrogatories.

The issue presented by A's lawyer is whether he is required to disclose the existence of these two funds to B's lawyer.

DISCUSSION:

This case raises the concerns addressed by DR 7-102(A) and DR 1-102. DR 7-102(A)(30) mandates that a lawyer shall not conceal or knowingly fail to disclose that which he/she is required by law to reveal. DR 1-102 provides, in relevant part, that a lawyer shall not:

- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.

It is plain from the facts in this case that, during the course of discovery, the parties had agreed to disclose all assets to the opposing party. DR4-101(C) sets forth certain circumstances under which a lawyer may reveal confidences or secrets of a client, such as, when the client consents after full disclosure, or when permitted under the Disciplinary Rules, or when required by law or court order.¹

In this case, the parties relied upon the rules of discovery and their agreement to disclose all assets. The rules of discovery pertaining to the supplementation of responses impose a duty upon a party to:

seasonably amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.²

Inasmuch as the rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law, a lawyer should be diligent to guard against even an unintentional violation of them.³ Moreover, so as not to interfere with the proper administration of justice, a lawyer should not suppress evidence that the lawyer or client has a legal obligation to reveal or produce.⁴

While not expressly stated, it appears from the facts, that in entering into the separation agreement the parties also agreed in essence to a consent judgment in the divorce matter. Thus, A's lawyer may have a duty not only to the opposing party, but also to the Court, to correct the now erroneous information which, by mistake of fact, presumably formed the basis of the Court's Order. A knowing concealment at this time would be contrary to DR1-102(4) and (5) and DR7-102(A)(3). Further, we believe that for A's lawyer to conceal the two funds would do violence not only to the teachings of Canon 9, that a lawyer should always strive to avoid even the appearance of impropriety, *see* EC9-8, but also to the duty to supplement discovery responses imposed by V.R.C.P. 26(e)(2).

Although this Committee does not purport to give opinions on questions of law, we believe that, in the facts presented, A would be unjustly enriched should A's lawyer fail to disclose the existence of the new-found monies.

¹ See DR4-101 (C)(1) and (2).

² V.R.C.P. 26(e)(2).

³ See EC7-25.

⁴ See EC7-27.

A lawyer's duty to disclose additional new facts to an opposing party is not absolute. For example, in Opinion No. 82-7, we found that a lawyer may not disclose additional information learned from the client subsequent to settling a personal injury claim with an insurance carrier, where the lawyer had no information clearly establishing that the client had perpetrated a fraud under DR7-102(B), and where the information constituted a confidence or secret under DR4-101(B).

The facts as set forth in Opinion No. 82-7 can be distinguished from those in the instant case. Here, the parties had agreed to complete disclosure of *all* assets. The parties entered into a separation agreement with the clear understanding that all assets had been accounted for. V.R.C.P. 26(e)(2) imposed a duty to supplement and correct incorrect information. And it is likely that the Court issued an Order based upon incorrect information.

As we have stated in the past, we interpret the Code of Professional Responsibility as enjoining both actively and passively fraudulent conduct.⁵ For the reasons expressed herein, we believe, therefore, that A's lawyer is required to disclose the existence of the two additional mutual funds to B's lawyer.

⁵ See Opinion 89-2.