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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Not long after reaching a settlement agreement at mediation, but before the case is officially dismissed, our client discovered a cache of additional material documents responsive to discovery requests, that were not timely produced. The client does not wish to disclose them now because of the settlement agreement, saying that the case is now over with the negotiated resolution.

But the client did come forward to disclose the discovery to us as counsel. It is clear to us from the circumstances that the client did not know of the documents until the recent discovery, and acted in good faith in connection with the earlier production. May or must we make a disclosure to the opposing party, or the court?

A: The somewhat complicated answer to this problem likely depends upon additional facts and circumstances, as you consider the interplay of various rules. Model Rule 3.3 requires remedial measures to be taken (such as disclosure) if the lawyer knows a client is engaging in fraudulent conduct "related to the proceeding" before a tribunal, such as intentionally concealing responsive documents that would be material to a mediation or settlement agreement. This duty would continue until "conclusion of the proceeding," Rule 3.3(c), presumably the entry of an actual order of dismissal by the court, which has not. But here, the client did not act with that intent, so this rule does not apply (at least unless substantive law of the jurisdiction would make post-mediation, post-settlement failure to disclose a fraud).

On the other hand, Rule 3.4(a) prohibits the lawyer from concealing a document or other material with potential evidentiary value, and Rule 3.4(d) requires the lawyer to make a "reasonably diligent effort" to comply with a proper discovery request. Here, the facts suggest that there was no effort to conceal documents at the time of the original discovery response and that a "reasonably diligent effort" to comply was made. You should reconsider whether that was the case. You should also consider any duty to supplement discovery responses in the applicable jurisdiction. Given that the case (and discovery requests) is still pending/alive

(no order of dismissal has been entered), a duty to supplement would suggest an obligation by the lawyer to now produce the newly found documents, unless perhaps there has been an agreement or understanding to stay or suspend remaining discovery obligations, either at the time of the mediation, or because of the settlement agreement. One avenue here might be for the lawyer to confirm such an agreement or understanding with opposing counsel (carefully, without making any false or misleading statements).

Status of the settlement agreement may also be important—is the agreement complete and enforceable, or is it an "agreement in principle" with terms remaining to be addressed, such that it could be affected by disclosure of the documents in question, and the failure to disclose them now could give rise to a later claim of fraud involving both the client and lawyer? In addition, the status of discovery overall may be relevant—was the settlement agreement made with an understanding of a complete discovery record, or with an understanding that there was likely still material information undiscovered, *i.e.*, whether each side was willing to make the agreement knowing that they were foregoing additional information that could come to light in further discovery? A prudent lawyer should seek independent counsel in light of the specific facts and circumstances and the specific law of the jurisdiction.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.