**ORANGE COUNTY BAR ASSOCIATION**
**PROFESSIONALISM AND ETHICS COMMITTEE**

**FORMAL OPINION NO. 95-001**

## STATEMENT OF FACTS

A physician faces concurrent legal problems: (1) A criminal prosecution, and (2) An administrative action aimed at revoking his license to practice medicine. At a noticed hearing on the license revocation issue, the deputy attorney general assigned to prosecute the matter failed to appear. The Administrative Law Judge, after determining that court staff had received no communication from the deputy attorney general about his non-appearance, inquired of the attorney for the doctor, who was present to defend the doctor, as follows: "Were you contacted by the deputy attorney general about why he is not at this hearing?" The attorney responded truthfully: "No your honor, the deputy attorney general has not contacted me about this." The attorney for the doctor, however, was then aware from other sources that the deputy attorney general was at that very hour appearing at the doctor's arraignment in the criminal matter in the local Superior Court, (in which a different lawyer represented the doctor). Immediately thereafter the Administrative Law Judge, noting the non-appearance of the deputy attorney general, dismissed the license revocation matter with prejudice.

## APPLICABLE RULES

California Rules of Professional Conduct, Rule 5-200, provides in part:

"In representing a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth;
(B) Shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law."

California Rules of Professional Conduct, Rule 5-220 states:

"A member shall not suppress any evidence that the member or member's client has a legal obligation to reveal or to produce."

California Business and Professions Code, section 6068, provides in part:

"It is the duty of an attorney to do all of the following:
(a) To support the Constitution and laws of the United States and of this state.
(b) To maintain the respect due to the courts of justice and judicial officers.
(c) To counsel or maintain such actions, proceedings, or defense only as appear to him or her legal or just, except the defense of a person charged with a public offense.
(d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or

any judicial officer by an artifice or false statement of fact or law.

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.".

## ISSUE

DID THE PHYSICIAN'S ATTORNEY IN THIS SITUATION HAVE A LEGAL OR ETHICAL DUTY BEYOND TRUTHFULLY ANSWERING THE SPECIFIC QUESTION ASKED BY THE ADMINISTRATIVE LAW JUDGE?

## ANALYSIS

While there is no doubt counsel cannot ethically make a false statement to a court, when the question is whether the attorney should voluntarily disclose information there are three possible answers. One is that ethically counsel must disclose, the second is that counsel may disclose, and the third is that ethically counsel may not disclose. (i.e. Bus. and Prof. Code § 6068, subd.(e).) As to any particular information or set of circumstances, there may be no clear rule as to which of the three possible answers is correct. The discussion below illustrates how legislators and bar associations have tried to draft general rules governing these issues, and how various courts have dealt with the ethical questions posed when lawyers actually had to make a choice either to disclose, or not disclose, in the real world.

I.

### THERE ARE SITUATIONS WHERE FAILURE TO PROVIDE INFORMATION TO THE COURT VIOLATES THE CANONS OF ETHICS.

California Rules of Professional Conduct, Rule 5-200(B) admonishes attorneys "not [to] seek to mislead the judge, judicial officer or jury by any artifice or false statement of fact or law." (See also Bus. & Prof. Code § 6068, subd.(d).) The law recognizes that in some situations, "concealment of material facts is just as misleading as explicit false statements, and... is misconduct calling for discipline." (*DiSabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163.) In *DiSabatino* the court, in a 4-3 opinion, upheld discipline imposed upon a lawyer who brought a bail reduction motion before a superior court bail commissioner, and got bail reduced from $50,000 to $10,000, *without* informing the Commissioner that he had made two bail reduction motions earlier that day that had been denied. (*Id.* at 161.) The court majority said, "[petitioner clearly had an affirmative duty to inform Commissioner Ziskrout fully and completely as to all relevant facts and circumstances regarding his request for bail reduction." (*Id.* at 163.)

In *Sullens v. State Bar* (1975) 15 Cal.3d 609, the court affirmed discipline of public reproval for an attorney who represented the estate in a contested will case, because he failed to inform the court, or counsel for the person contesting the will, of a letter he received from the "sole devisee" in which the sole devisee renounced all interest in the estate in favor of the relative contesting the will. (*Id.* at 613-617.) The court rejected the lawyer's claim that he had a duty to the creditors of the estate to withhold the letter from the court as, "no defense to the charge that he intentionally deceived the court[,]" and a violation of Business and Professions Code sections that prohibit misleading a court. (*Id.* at 620-621.)

*Davidson v. State Bar* (1976) 17 Cal.3d 570 arose from litigation in a dissolution of marriage matter in which conflicting custody orders were obtained by the different parties from separate judges. In trying to sort it out, a Superior Court judge inquired of counsel for one of the parties about the location of his client, and the minor child. In response, the lawyer said he "know the telephone number of a child psychologist who may or may not be able to reach [the client]" (id. at 573), but he did not inform the court of a message from his client to the effect that the client had taken the child to Los Angeles, and could be reached at a certain telephone number, nor did the lawyer reveal the telephone number to the judge. The Supreme Court found this failure to disclose to be "[concealment] of material facts [that] cannot be condoned." (*Id.* at 574.)

In *Arm v. State Bar* (1990) 50 Cal.3d 763, discipline was imposed upon an attorney for, among other things, failing to inform a juvenile court referee during a hearing that nine days hence he was to begin a 60-day suspension from the practice of law, and by indicating he might be available to appear on the case on a date when the suspension would be in effect. (*Id.* at 774.) In rejecting the lawyer's argument that concealing the fact of suspension when seeking an appropriate court date was in the best interests of the client, the court said:

> "Petitioner's concealment of the reason for his unavailability, however, cannot be justified on the theory that the juvenile court would have made the same determination if it had been told the truth. In granting continuances, a trial court must exercise its discretion with due regard to all interests involved. [Citations.] If the ground advanced for continuance is the unavailability of a party's attorney, the reasons for that unavailability must be carefully considered. [Citations.] Thus, the true reason for petitioner's unavailability...his forthcoming suspension, was a factor for the court, not petitioner, to consider in setting the hearing date. It does not matter whether the court...would or would not have been willing to set the hearing for...(the date actually chosen),... We conclude the record supports the review department's determination that petitioner misled the court in violation of section 6068 subdivision (d), and former rule 7-105(l) (now rule 5-200)." (*Id.* at 776.)

In *People v. Nilsen* (1988) 199 Cal.App.3d 344, the Court of Appeal overturned a trial court finding of present "ability to pay" (Pen. Code §987.8) against a defendant convicted of murder because at the time of the finding he had already used the proceeds from a large civil suit settlement and the sale of real property to pay off pre-existing loans and attorney fees. In dicta, however, the court said:

> "Another matter of concern is whether Nilsen's counsel in the criminal case was aware of the settlement but failed to bring it to the attention of the court. The record. . .does not disclose whether his attorney had such knowledge....if appointed counsel becomes aware of a significant change in a defendant's financial circumstances, he has a duty as an officer of the court to disclose that fact to the court. (Cf. ABA Model Rules Prof. Conduct, rule 3.3(a)(2) [Candor Toward the Tribunal, 'A lawyer shall not knowingly: fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client']" (*Id.* at 351.)"

It is not clear, however, what "criminal or fraudulent act" can be attributed to a defendant, as long as the defendant does not lie about his assets or ability to pay if a hearing pursuant to Penal Code section 987.8 is held.

If our case the deputy attorney general had contacted counsel for the physician and requested a continuance, under *Grove v. State Bar* (1965) 63 Cal.2d 312 there would appear to be an affirmative duty to mention the request to the judge. In *Grove*, counsel for the wife in a divorce case served an order to show cause on the husband, returnable on a specific date. Husband's lawyer telephoned counsel for the wife asking for a continuance, but wife's lawyer would not agree. Later, on the date of the hearing, husband's counsel again telephoned, spoke to a secretary, indicating he could not fly from Los Angeles to Alameda County in time for the hearing, and asked for a one week delay. According to testimony of the Judge elicited in the state bar disciplinary proceedings, when Mr. Grove appeared in court he "failed to advise [the judge] of [opposing counsel's] telephone call and the request for a continuance, and thus [the judge] treated the case as a default matter." (*Id.* at 313-314.) The state Supreme Court said:

> "Petitioner contends that failure to convey Mr. Coleman's request for a continuance does not constitute misleading 'the judge or any judicial officer by an artifice or false statement of fact or law.' (Bus. & Prof. Code, § 6068, subd. (d).) There is no merit to this contention. The concealment of a *request for a continuance* misleads the judge as effectively as a false statement that there was no request. No distinction can therefore be drawn among concealment, half truth, and false statement of fact. (See *Green v. State Bar*, 213 Cal. 403, 405...) 'It is the endeavor to secure an advantage by means of a falsity which is denounced.' (*Pickering v. State Bar*, 24 Cal.2d 141, 145..."" (*Id.* at 315; emph. added.)

It seems opposing counsel's request for a delay triggered the duty to disclose, because in *Bellm v. Bellia* (1984) 150 Cal. App.3d 1036, the court, after "decry[ing] this lack of professional courtesy," held plaintiff's lawyer was under "no legal obligation: to tell the lawyer who represented the defendant in similar cases of the impending default against the client, when the defendant neglected to tell his lawyer about being served with that particular summons and complaint. (*Id.* at 1038.) The Court of Appeal affirmed the order denying the defendant's motion to set aside the default judgement, (ibid.), without even hinting there might have been an obligation on the part of plaintiff's counsel to provide further information to the court (such as telling the judge that defendant had counsel in a similar case who was apparently unaware of the default situation in the case before the court).

II.

FAILURE TO VOLUNTEER INFORMATION TO THE COURT DOES NOT VIOLATE THE CANONS OF ETHICS WHERE THERE IS NO DUTY TO PROVIDE THE INFORMATION.

In *Crayton v. Superior Court* (1985) 165 Cal.App.3d 443, the petitioner obtained a peremptory writ of prohibition compelling dismissal of a felony prosecution, because while the felony was pending, he entered a plead of nolo contendere in a separate misdemeanor case arising out of the "identical underlying criminal conduct..." (*Id.* at 445, 452.)

> "The issue is whether a defendant, who has in no way manipulated prosecutorial procedures nor judicial proceedings to conceal the fact of dual prosecution, perpetrates a fraud upon the court by entering a guilty plea to misdemeanor charges *without* informing the court of the pending felony prosecution.
>
> The critical question...is whether a defendant has an *affirmative duty* to *volunteer* the fact of dual prosecution to the court before entering a plea." (*Id.* at 445; emph. added.)

The deputy city attorney did not object to the misdemeanor plea because she "...omitted to take the case file to court...and...thus failed to see the 'large note written in the file, "Dismiss this case because felony proceedings are pending"'" (*Id.* at 446.) The record was silent on whether the defendant or his lawyer was aware the prosecutor did not consult her file, or whether they know she did not know about the pending felony, but the People did not contend the defense was aware of those facts. (*Id.* at 447.)

The Court of Appeal noted that none of the cases relied upon by the prosecution "indicate that defendant had a duty to volunteer information which the prosecution was responsible for knowing..." (*Id.* at 447-448), and to the extent the cases cited by the People suggested such a duty, the *Crayton* court distinguished them. (These cases include *In re Hayes* (1969) 70 Cal.2d 604, *Gail v. Superior Court* (1967) 251 Cal.App.2d 1005 [defendant lied to police about status of driver's license], and *Hampton v. Superior Court* (1966) 242 Cal.App.2d 689, [defendant lied to arresting officer, then pleaded guilty to the inappropriate lesser charge].)

In *Kellett v. Superior Court* (1966) 63 Cal.2d 822, Chief Justice Traynor said, in writing for a unanimous court:

> "When the responsibility for the prosecution for the higher offense lies with a different public law office there is also the risk that a *well advised* defendant may plead guilty to a misdemeanor to foreclose a subsequent felony prosecution the misdemeanor prosecutor may be unaware of..." (*Id.* at 827-828; emph. added.)

The *Crayton* court quoted from this passage, and made the following observation: "This discussion suggests that a defendant has no affirmative duty to advise the misdemeanor court of a pending or a potential future related felony prosecution. The burden is, instead, upon the

prosecutorial agencies. . ." (165 Cal.App.3d at 449.)

Neither *Kellett* nor *Crayton* suggest the hypothetical "well advised" defendant receives that advice from a defense lawyer who acts unethically in so counseling the client. The cases dealing with Penal Code section 654 issues in this context seem to say that while it is unethical to *lie* to police to bring about a prosecution for a lesser crime, and unethical to *manipulate* the justice system to immunize a client from a more serious charge, (*People v. Hartfield* (1970) 11 Cal.App.3d 1073, [defense counsel secured an ex parte misdemeanor sentencing, without notifying the prosecutor, causing the hearing to be advanced to a date prior to the trial date on the related felony case to get the felony dismissed]), it is not only ethical, but perhaps required of competent counsel, to advise a client of the advantages of a guilty plea to the misdemeanor, and there is no duty to inform the court of the pending felony, unless specifically asked. If there is burden, it is on the prosecutor.

*Crayton* distinguished *DiSabatino v. State Bar, supra.* 27 Cal.3d 159, (discussed above), in part because, "counsel in that case actually engaged in an affirmative presentation of facts to obtain judicial action...[and] the making of affirmative representations itself created the duty to also disclose other material facts that counsel knew were unknown to the magistrate. (Civ. Code, § 1710, subd. 3.)" (165 Cal.App.3d at 451.) The court then analyzed the question of misrepresentation as it relates to the elements of fraud, and the existence or nonexistence of a "duty" to disclose.

> "...the equation of passive concealment with affirmative misrepresentation to create a duty to disclose is circular reasoning. It ignores consideration of the prerequisite elements of fraud. Specifically, the generally recognized rule is that absent an existing duty to volunteer information, and notice of such duty, mere failure to disclose does not constitute fraud." (*Crayton, supra*, 165 Cal.App.3d at 451; citations omitted.)

The court went on:

> "The general rule is that misrepresentation by passive concealment (as opposed to affirmative concealment) violates a duty to disclose *only where there is a special fiduciary relationship between the parties* or where 'the defendant has special knowledge...not open to the plaintiff...' Thus, affirmative misrepresentation creates a duty of full disclosure, while mere silence is not concealment unless a *preexisting duty to disclose exists*." (*Ibid.*; emph. added, citations omitted; c.f. *People v. Nilsen, supra,* 199 Cal.App.3d 344, discussed above.)

Orange County Bar Association Formal Opinion No. 94-003 addressed an ethical question similar to the question presented here, except that in that opinion it was the deputy attorney general responding to the Administrative Law Judge, and the attorney for the physician who was appearing elsewhere. The opinion discussed what is in effect a "preexisting duty" on the part of a public prosecutor to, "'further the administration of justice...and not subvert our procedures...'"

(OCBA Op. 94-003, p. 3., quoting *In re Ferguson* (1971) 5 Cal.3d 525, 531.) This is consistent with the prosecutor being held to "'a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests...of the state.'" (OCBA Op. 94-003, p. 4, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

## CONCLUSION

No published case has been found that deals specifically with a situation such as the hypothetical facts presented here. However, the obvious cannot be ignored -- in general a lawyer's primary duty is to act in the best interests of the client.[1] Although the duty of loyalty to one's client does not permit a lawyer to act unethically, in this case there appears to be no obvious preexisting duty to compel offering additional information to the Administrative Law Judge. The *Crayton* case suggests the absence of the preexisting duty absolves counsel from any obligation to offer the additional information, particularly since counsel is seeking nothing from the court on behalf of his client. (Although in both *Crayton* and *Kellett*, counsel was seeking, on behalf of the client, a bar to the felony prosecution secured through a guilty plea to the misdemeanor.)

In addition to the legal principles discussed above, the facts and circumstances of individual cases dictate whether disclosure is required, permitted, or prohibited. Certain factors may tip the balance more in one direction than the other. For example, it may be significant that in our hypothetical facts the lawyer was responding to a question, rather than initiating the dialogue. When counsel is actively seeking something from the court, such as bail reduction, the lawyer is more likely to be duty bound to advise the judge of facts arguably relevant to the issue. (*DiSabatino v. State Bar, supra.* 27 Cal.3d 159, 162-163.) It is also relevant in our hypothetical that it is the responsibility of the deputy attorney general to make his court appearance in a timely manner, or notify the court when he cannot. (*Crayton v. Superior Court, supra*, 165 Cal.App.3d 443, 447-448.) Finally, the deputy attorney general did not contact the physician's lawyer to request a continuance, (*Grove v. State Bar, supra*, 63 Cal.2d 312), or even to inform counsel that he would be otherwise engaged.

## CAUTIONARY NOTE

Opinions rendered by the Professionalism and Ethics Committee are given as an uncompensated services of the Orange Counsel Bar Association. Opinions are advisory only and no liability whatsoever is assumed by the committee or the Orange Counsel Bar Association in

---

[1]This opinion does not address a related question. Assuming the lawyer had no duty to disclose that the deputy attorney general was appearing elsewhere, could the attorney have volunteered that additional information, or did the duty of loyalty to the client require limiting the response to truthfully answering the Administrative Law Judge's specific question? Would the answer be any different if the Administrative Law Judge indicated he planned to dismiss the action before asking counsel the specific question?

rendering such opinions. Opinions are relied upon at the risk of the user. Opinions of the Committee are not binding in any manner upon any courts, the State Bar of California, the Board of Governors, any of the disciplinary committees, the Orange Counsel Bar Association or the individual members of the Orange Counsel Bar Association or the Committee.

In using these opinions, you should be aware subsequent judicial opinions and revised rules of professional conduct may have dealt differently with the areas covered.