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The Duty or Option of Silence

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On page 261 Professor Simon states that "when the [Kaye Scholer] firm chose to invoke his authority directly before the mass media . . . Hazard had a duty to clarify ambiguities, correct mischaracterizations, and supply any reservations." Simon cites no authority for this proposition, and I know of none.

I understood my initial engagement by Kaye Scholer to have been that of legal adviser. My engagement also could be interpreted as that of informally consulted expert, in contemplation that I might provide an opinion that supported the firm in anticipated proceedings brought by the RTC. On either interpretation of my involvement I know of no basis for a duty to clarify.

I met with people from the Kaye Scholer firm and with the outside counsel the firm had retained to deal with the RTC. At that point information about what the RTC would assert was quite incomplete, and hence, there was uncertainty as to what the issues might be. RTC had provided no written statement of its contentions but only outlined them orally to the lawyer Kaye Scholer had engaged. The RTC formulated different charges in writing over a weekend and, on a Monday as I recall, issued an impoundment order that effectively forced the firm immediately to capitulate. Kaye Scholer then issued its press release. The various versions of the facts were never joined or resolved.

If my role is interpreted as that of legal adviser, I assume it is indisputable that I had no duty to say anything more. More than that, under the duty of confidentiality to client, Connecticut Rules of Professional Conduct, Rule 1.6(b)(2), I had a professional obligation not to say anything unless and until my opinion was drawn in question in "a criminal charge or civil

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claim against the lawyer based on conduct in which the client was involved, or [in response] to allegations in any proceeding concerning the lawyer's representation of the client." Neither of those eventualities occurred. Hence I had a duty to preserve the client's confidences.

If my role is interpreted as that of an informally consulted expert, the governing rule is to the same effect. Such an expert has duties of loyalty and confidentiality that survive termination of the relationship (see, e.g., *Cordy v. Sherwin-Williams*, 156 F.R.D. 575 [D.N.J. 1994], and authorities cited there; *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067 [1994]; compare *Erickson v. Newmar Corp.*, 87 F.3d 298 [9th Cir. 1996]). All these decisions are predicated on a rationale that the expert has a duty of continuing loyalty and confidentiality. If an initial opinion of an expert is drawn in question by the client in a proceeding, the expert certainly has a right to insist that it be corrected. However, the opinion I provided was sent out into the forum of public opinion, which is quite different. The mass media are not a legal forum.

When Kaye Scholer disseminated the opinion, the firm was then under withering fire from the government. If my engagement is considered to have been that of informally consulted expert witness, I may have had discretion to amplify the opinion. However, I concluded that Kaye Scholer didn't need any more trouble originating from me. That judgment may have been wrong, certainly so in terms of my self-interest. I make mistakes in judgment all the time, and have learned, among other things, that no good deed goes unpunished. In any event, it is clear to me that I did not have an obligation to speak and that I still have a moral option to maintain my silence.