

Table 5.1. *The apparent distinction between active and passive deceit*


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It is no surprise to state that as lawyers we cannot deceive a court in an effort to get some extra advantage for our client. But sometimes real problems arise when, instead of lying verbally to a court, a lawyer passively allows a lie to emerge or be communicated to another party or to a tribunal, or produces forged documents, in an effort to gain that advantage.

Four situations illustrate this temptation:

### **1 *Pretending to follow a client's instructions***

In *Law Society of Singapore v. Nor'ain bte Abu Bakar and Others* [2008] SGHC 169, two Singapore lawyers acting for one group of claimants to a large deceased estate were struck off the role of solicitors in Singapore after the High Court found they knowingly deceived a court into releasing over S\$4 million that had been paid into court, pending resolution of many contested claims over the relevant estate.

In respect of the claim made by one solicitor that she was acting on her client's instructions and had obtained the advice of a senior lawyer that she could not ignore such instructions, the court was contemptuous: she '... may not hide behind the shield that is [her] client's instructions if such instructions are contrary to [her] overriding duty to the court'.<sup>a</sup>

### **2 *Hiding the truth by silence*<sup>b</sup>**

In this scenario, a local law firm acts for a relatively young man injured in a construction accident on a major hydro-electric dam in a Chinese province. The case is sent to mediation and the law firm pretends that the worker will lose his entire earnings from a long life of work, and hides the fact that the worker is already dying from cancer and only has a year or two to live. The construction company pays a large sum to the worker, and the law firm is hailed by the local law association for its work in protecting the worker and his family.<sup>c</sup>

**What would you do if, as an official working for the local law association, you discover the truth?**

### **3 *Preparing forged documents and false statements***

Xia was a lawyer in China. In 2015, Zhang was convicted of accepting bribes and appealed to the Intermediate People's Court. Zhang entrusted Xia to act as his lawyer at the appeal. Zhang promised to give Xia a big reward if the latter could help in getting a judgement in his favour. Xia contacted Li (then head of the local public security bureau) and the two agreed to prepare a forged document to support Zhang's case and submit them to the Intermediate People's Court. In return, Xia agreed to pay Li a fee of RMB 10,000. Later, Xia submitted the forged documents prepared for Zhang to the Intermediate People's Court. He also,

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together with Li, produced another forged supplementary statement to support Zhang's case and submitted it to the Intermediate People's Court. It was later adjudged that Xia had falsified evidence in criminal proceedings as a lawyer and received a sentence of 10 months' imprisonment.<sup>d</sup>

#### ***4 Dangerous driving is not as dangerous as lying***

Hou was suspected of dangerous driving while Shen was suspected of permitting others to take drugs. Sun was a trainee lawyer who represented both Hou and Shen. Sun asked Cui, an officer in the local public security bureau, to forge documents to support the cases of Hou and Shen respectively. Cui prepared two forged documents and submitted them to the local court in support of a reduction in criminal penalties for Hou and Shen respectively. Sun was eventually sentenced to 10 months' imprisonment for committing the offence of forging evidence.<sup>e</sup>

These cases illustrate that if you know that the effect of your silence as a lawyer – even if you have said nothing incorrect – or you forge documents to allow an opposing party, a tribunal or even the public at large to treat as fact something you know to be wrong, you will be crossing the line between an acceptable silence and an active fraud or deception. But these issues get harder still.

#### ***A lawyer who will not pay tax – scenario<sup>f</sup>***

A lawyer pleads guilty to misconduct for failing to lodge income tax returns for eight years and not paying any tax for nine years. There are no mitigating circumstances. He lodges tax returns only after he is prosecuted for the failure to do so. The disciplinary tribunal has to decide on his penalty but the lawyer says nothing, while still arguing through his own lawyer that he should not be suspended from practice. He acknowledges that while he had had a lavish lifestyle, he insists that he is now a reformed person. He also tries to impress the tribunal with the fact that he is well liked in the profession, submitting character evidence from a judge and senior lawyers. Arguing that he has substantially repaid his original tax debt, he appeals against a reprimand and a 3-year suspension of his right to practice law. An appeal court reduces the period of his suspension to 6 months, subject to a number of conditions.<sup>g</sup>

A lawyer who claims to be rehabilitated but refuses to give personal evidence, or allow themselves to be questioned, having pleaded guilty to serious charges, is asking a lot from a disciplinary tribunal in relation to his credibility and their credulity. It is difficult to see how an appeal court, which had also not heard from the appellant personally, could wind back a tribunal's decision. The

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lawyer's retreat into silence was lawful, but not ethical. There appears no reason why he was allowed to, in effect, tell the tribunal and an appeal court that he was not willing to be cross-examined as to the true extent of his claimed reformation. In several of these cases and scenarios, the lawyers involved had no moral problems in deciding to lie for money or because they wanted to please others, in order to support a silence that effectively kept a tribunal, another party or the community as a whole ignorant as to the reality of the underlying situation. General morality can play a role in strengthening such lawyers' moral purpose.

***Analysis from a virtue ethics perspective (the relevant virtues are italicized)***

The virtues of *honesty* and a love of *justice* are important in ensuring that a court, tribunal or opposing party to a negotiation are aware of all material information that will affect a decision. *Prudence* is also called for, since a decision or determination that is based on misinformation or passive deceit may be unstable and unsustainable. If a case decision unravels, there may be a financial claim against the lawyer responsible for any passive deceit on the basis that the decision to remain silent was negligent or amounted to misconduct. If there is active deceit – lying – there will almost certainly be major financial loss for the lawyer involved. The prudent lawyer will wish to avoid deceit that could lead to subsequent decision reversal, claims for damages or loss of their own reputation. Lawyers' unsurprising desire to assert their 'right' to acceptable silence wherever possible (exploiting zealous advocacy at the cost of responsible lawyering) lacks *courage*. That approach also lacks the *foresight* to recognize that the wider rule of law is damaged in the eyes of the community when, as lawyers, we lie or try to take advantage of other principles in order to restrict tribunals' or public access to full information.

***Confucian teaching***

A Confucian lawyer will ask themselves, to whom do they owe a greater loyalty? Is the greater loyalty owed to the client, or to wider society, or to neither? Confucian teaching emphasizes duty to family members and, to a lesser extent, those to whom the family as a whole is connected through employment or historical obligation. A client's right to their lawyer's loyalty is well-established and fits into a Confucian understanding of role and obligations easily. But a wider duty *not* to lie in pursuit of financial gain is arguably another Confucian obligation.

***Consequentialism***

The consequences of silence (as passive deceit) or lying depend on the calculus of possible gain and possible loss. On the one hand, if the deceit is effective in the

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sense that the lawyer’s client is advantaged and either gains a financial return or avoids a negative finding as to conduct, then the calculation of gain justifies the silence or lying. But if the loss in community regard for the rule of law is greater – as it must be – then there will be a negative impact on the confidence of the community in dispute resolution that outweighs the positive gain of the single advantaged client. Losses to insurers may also be a factor where deceit contributes to undermine just insurance claims. The consequentialist will ask which result is more likely, but will have the usual difficulty (within consequentialism) of predicting and comparing the outcomes.

**Kantian ethics**

A Kantian will be strongly influenced by the sense of unfairness that accompanies passive deceit, lying or forgery by an individual or a corporation and will be inclined to judge silence in negative terms. In this decision, a lawyer who insists on truth-telling will also reflect a relationship of care for everyone, including themselves, since many cases of deceit are eventually exposed and result in shame and punishment for all concerned.

**Applicable law and conduct rules re active and passive deceit**

Judges in many countries have examined lawyers’ deceit and there is a general international conduct rule that attempts to spell out the priority of justice over silence. The International Bar Association’s *International Principles on Conduct for the Legal Profession* 2019, Principle 2: **Honesty, integrity and fairness**, states: ‘A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer’s clients, the court, colleagues and all those with whom the lawyer comes into professional contact.’<sup>h</sup>

The formal rules about lawyers’ honesty in each part of Greater China are set out below.

PRC	HKSAR	Taiwan
The <i>Lawyers Law of the People’s Republic of China</i> (2017 Amendment), <b>Article 32:</b> ‘... a lawyer shall not refuse to defend or represent a client without good reasons. However, if the authorized matter violates the law, the client makes use of the services	The <i>Law Society of Hong Kong Professional Guide</i> – 2013, <b>Sec. 10.3(4)</b> ‘... there is no duty upon a solicitor to enquire in every case where he is	The Taiwan Bar Association, <i>Code of Ethics</i> , <b>Article 23</b> ‘When performing his/her duties, a lawyer may not engage in any intentional act of

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provided by the lawyer to engage in illegal activities or deliberately conceals a material fact related to the case, the lawyer shall have right to refuse to defend or represent the client.’	instructed as to whether his client is telling the truth and it will be for the court, and not the solicitor, to assess the truth or otherwise of the client’s statement’.	concealment or deception, and he/she may not fabricate or alter evidence, instigate perjury or engage in other intentional acts of obstructing the discovery of the truth.’
<b>Article 38:</b> ‘... a lawyer shall keep confidential the relevant condition and information that is known by the lawyer in practicing law and the client and other persons are reluctant to disclose ... except facts and information on a crime compromising the national security or public security or seriously endangering the safety of the body of a person, which a client or other person prepares to commit or is committing’.	... In Hong Kong, it is therefore permissible for a lawyer to remain silent and avoid telling the truth, providing they do not allow false evidence to be given by their client or their witnesses.	... Effectively therefore, the position in Taiwan is similar to Hong Kong.
<b>Article 40:</b> ‘... A lawyer shall not have any of the following conduct in practicing law: ... 6. Deliberately providing false evidence or threatening or inducing others to provide false evidence. ...’.		
<hr/> All China Bar Association, <i>Rules on the Handling of Criminal Cases by (Defence) Lawyers</i> – 2017,		
<b>Article 7:</b> ‘A lawyer participating in criminal proceedings shall not help a criminal suspect or defendant conceal, destroy, or forge evidence. ...’		

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**Article 12:** ‘A lawyer handling a criminal case shall not refuse to defend or represent any client without justified reason. However, if the authorized matter violates the law, the client makes use of the services provided by the lawyer to engage in illegal activities or deliberately conceals a material fact related to the case, the lawyer shall have right to refuse to defend or represent the client.’

The effect of these provisions in the PRC is that in non-criminal cases that do not affect state security, lawyers can conceal material facts except where there is danger to the ‘body of a person’ in relation to a crime being committed, or intended to be committed.

In other words, a lawyer’s knowledge of financial deception not involving state security can be concealed, providing the lawyer does not permit any false evidence to be given or false documents to be filed.

***Conclusion in relation to truth and silence.***

General morality in the form of both virtue ethics and Kantian approaches is intolerant of ‘acceptable’ silences when legal relationships are in dispute or in negotiation, and there is the potential for silence or lies to allow one party to oppress another or treat them unfairly. Relationships of care and responsible lawyering are evident here. Consequentialism is potentially critical as well, because even a zealous advocate’s desire to achieve clients’ outcomes no matter what hurdles exist must reject actual lying.

With some exceptions, the conduct rules throughout Greater China allow lawyers to remain silent in most cases.

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Increasingly, international best practice offers a negative opinion of the types of silence permitted by the conduct rules. It is however completely clear that a lawyer's lies will not be acceptable by any self-respecting state or legal profession. Both prosecution and defence lawyers are officers of the same court and their highest priority responsibility is to ensure that all courts deal justly with all facts.

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<sup>a</sup> *Law Society of Singapore v. Nor'ain bte Abu Bakar and Others* [2008] SGHC 169, para 91. See also *Meek v. Fleming* [1961] 2 QB 366. In this English case, the plaintiff (claimant) alleged that the defendant had assaulted him. At the time of the alleged assault, the defendant was a police chief inspector. Prior to the court hearing, the defendant was demoted to sergeant for deceiving another court in the course of his duty in another case. The defendant's lawyer decided *not* to make the demotion known to the court. As a result, the plaintiff's lawyer and the judge frequently addressed the defendant as 'Chief Inspector' and nothing was done by the defendant's lawyer to correct the deception. Later, the English Court of Appeal said that the concealment misled the judge and jury on an important matter, namely the defendant's credibility. As a consequence the 'not guilty' verdict of the court below was set aside.

<sup>b</sup> A major international case of 'deception by silence' is the James Hardie affair. James Hardie Industries (JH) made and sold building products from asbestos all over the world for decades (for example, 'Hardiplank' wall cladding), knowing that its workers and consumers were likely to contract fatal lung diseases from even minor exposure. The company was financially very successful. When JH became aware that it faced up to \$2 billion in compensation payments to those who were dying or would die from the diseases, its strategy was to set up a minimally funded compensation fund in Australia in order to give the impression that it had provided sufficient funds for asbestosis compensation and then relocate its corporate headquarters to the Netherlands, where it believed it would be effectively immune from civil action. JH's head in-house lawyer and company secretary, Peter Shafron, asked the then large firm Allens Arthur Robinson (now the leading transnational firm Allens Linklaters) to help the company relocate to the Netherlands. However, JH reckoned without the determination of government to shame them at a political level. When JH were challenged by the Australian state governments, they were forced to restructure and accept full financial liability to the many thousands who had suffered and died (or would suffer and die). When Allens were later asked why they had not stood back and asked themselves what they should be advising their client to do, they responded to the effect that they were advising their client on 'the letter of the law, no more and no less'.

<sup>c</sup> This scenario is not uncommon. See, for example, the Australian case of *Legal Services Commissioner v. Mullins* [2006] LPT 012. A Queensland barrister, Mullins,

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represented a 48-year-old former builder who became a quadriplegic from a car accident. In a 2003 mediation, Mullins allowed the insurer on the other side to assume that his client had a normal lifespan, and the insurer settled for more than \$1 million. In fact, Mullins knew his client had lung cancer and that the cancer had spread to other sites in his body. When prosecuted for his actions, Mullins claimed that he was entitled to remain silent (and not violate any rules relating to candour) as long as he did not positively mislead the insurer as to life expectancy. The Queensland Legal Profession Tribunal disagreed and fined him \$20,000 for a ‘fraudulent deception’. <sup>d</sup>

Judgement of First Instance Court Criminal Trial of Sun Xiao-xi, defender and litigation agent destroying evidence, forging evidence, and obstructing court testimony. (2019) Xin 0103 Criminal First Instance Case No. 232.

<sup>e</sup> Judgement of First Instance Court Criminal Trial of Xia Yong-bian, defender and litigation agent destroying evidence, forging evidence, and obstructing court testimony. (2019) è No. 280, 2801 Criminal First Instance Case No. 152.

<sup>f</sup> Based on the case of *Legal Services Commissioner v. Stirling* (*Legal Practice*) [2012] VCAT 347.

<sup>g</sup> *Stirling v. Legal Services Commissioner* [2013] VSCA 374.

<sup>h</sup> See further, International Bar Association, *International Principles on Conduct for the Legal Profession* 2019 at IBA guides, rules and other free materials | International Bar Association (ibanet.org).