CONFIDENTIALITY: PART III (NON-CLIENTS' MISUNDERSTANDING AND MISTAKES)

Hypotheticals and Analyses*

Thomas E. Spahn
McGuireWoods LLP

* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Hypothetical 1

You and your law school roommate meet every month or so for lunch to discuss your careers. Yesterday your former roommate said that she was tempted to file a bar complaint against a lawyer on the other side of a case she is handling. That lawyer knew that your former roommate's box of trial exhibits had been accidentally delivered to the wrong floor in the courthouse. When your former roommate could not find the exhibits, she had to ask the court for a short delay in the trial -- which she had found embarrassing and which she feared had angered the judge who later ruled against her on some evidentiary matters.

When she later learned that the adversary's lawyer knew that the exhibits had been delivered to the wrong floor, she confronted him -- asking why he had not been courteous enough to let her know of the delivery person's mistake. The other lawyer replied that his knowledge was "information relating to the representation" of his client, and thus protected by Rule 1.6.

Your former roommate's experience prompted a lunch-time discussion between you and her about the intersection of ethics and professionalism.

Should the ethics rules prohibit unprofessional behavior?

MAYBE

Analysis

It is important to distinguish between ethics and professionalism/civility.

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up -- disclosing a client's past crime, warning the victim of some possible future crime, etc. In less dramatic contexts, lawyers generally

must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, ethics principles focus on lawyers' duties to their clients, and the limited ways in which those duties can be "trumped" by duties to others.

In contrast, professionalism has a much more modest focus. Professionalism speaks to lawyers' day-to-day interactions with other lawyers, with clients, with courts, and with others. Professionalism involves courtesy, civility, and the Golden Rule. When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable.

Applicable Ethics Rules

To be sure, the bar can discipline lawyers for extreme misconduct amounting to a lack of courtesy.

For instance, under ABA Model Rule 4.4(a),

> [i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a) (emphasis added). The ABA Model Rules Preamble similarly explains that

> [a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

ABA Model Rules Preamble [5] (emphasis added).

The ethics rules thus set a very low minimum standard of conduct. They do not condemn all actions that "embarrass, delay, or burden" third persons. Instead, the

ethics rules only prohibit actions that "have no substantial purpose" other than to prejudice third persons in that way. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

Ethics Rules Allowing Lawyers to Act Professionally

The ethics rules describe several occasions during the course of an attorney-client relationship when lawyers have more power than they might realize to act professionally -- without falling short of their clear ethical duty to act as diligent client advocates.

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

- Third, although lawyers must diligently represent their clients, "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client." ABA Model Rule 1.3 cmt. [1].

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence <u>does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect</u>." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

All of these provisions provide a framework for lawyers to act professionally while fulfilling their ethical duties.

Best Answer

The best answer to this hypothetical is **MAYBE**.

b 12/10, 1.16

Disclosing Lawyers' Role

Hypothetical 2

You represent an oil refinery accused by a local newspaper of generating emissions that make local residents ill. None of the residents have filed lawsuits or even contacted your client, but you worry that the articles might stir up local opposition to your client's operations. You plan to interview residents in several nearby neighborhoods, and ask them whether they have experienced any problems -- but you wonder about any disclosure obligations about your role.

What must or may you tell a local resident before beginning a substantive conversation?

(A) You must disclose to the resident your role in representing the oil refinery.

(B) You must disclose to the resident your role in representing the oil refinery, but only if you know or reasonably should know that the resident misunderstands your role.

(C) You may not disclose to the resident your role in representing the oil refinery, unless your client consents.

(B) YOU MUST DISCLOSE TO THE RESIDENT YOUR ROLE IN REPRESENTING THE OIL REFINERY, BUT ONLY IF YOU KNOW OR REASONABLY SHOULD KNOW THAT THE RESIDENT MISUNDERSTANDS YOUR ROLE

Analysis

The ethics rules' treatment of lawyers' communications with unrepresented persons seems counterintuitive and open to mischief.

1908 ABA Canons

A 1908 ABA Canon dealt with ex parte communications with represented and unrepresented persons in the same canon -- entitled "Negotiations with Opposite Parties."

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise

> the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

ABA Canons of Professional Ethics, Canon 9 (emphasis added). Thus, ABA Canon 9 prohibited lawyers' misrepresentation when dealing with unrepresented persons, and prohibited lawyers from advising such persons "as to the law."

In two 1930s opinions, the ABA provided some guidance.

In 1931, the ABA explained that a lawyer could not provide legal advice to a divorce adversary.

- ABA LEO 58 (12/14/31) ("A member of the Association asks whether a lawyer who is consulted by a client who desires to procure a divorce, may properly confer with the adverse party in an attempt to get the adverse party to agree to a divorce and whether he may, at a conference with his client and the adverse party, give the adverse party legal advice in an attempt to secure the adverse party's consent to what will, in effect, be an agreed action. It is, of course, assumed that the adverse party is not at the time represented by counsel. . . . It would be a violation of Canon 9 for a lawyer consulted by a client who desires to procure a divorce to confer with the adverse party in an attempt to get the adverse party to agree to the divorce. A conference of the nature indicated in the question might easily lead to the giving of advice to the adverse party. Canon 9 provides that 'it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.' The proper procedure for the lawyer representing a party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel. But the disapproval herein expressed should not be understood as condemning the laudable and proper efforts which an attorney may make to bring about a reconciliation between his client and an adverse spouse not represented by counsel, when such efforts involve no discussion of the facts which furnish, or might furnish, grounds for divorce." (emphasis added)).

Two years later, the ABA issued another opinion in a non-divorce setting. The ABA again warned the lawyer against giving advice to an unrepresented injured worker, but somewhat surprisingly explained that the lawyer could provide a settlement document for the worker to sign.

- ABA LEO 102 (12/15/33) ("A member of the Association requests an opinion from the committee on the following question: 'Under the Workmen's Compensation Law of this state, compromise and lump sum settlements must be made on the joint petition of the employee and employer and with the approval of a court of competent jurisdiction. In rare instances is the employee ever represented by an attorney. Usually, the attorney for the employer, or the employer's insurer, prepares the petition, agreement of settlement and judgment; the employee appears in proper person and the employer through his or its attorney. Is it unethical or professionally improper for the attorney to so act?' . . . The question presented is not difficult to answer as to professional propriety. Cannon 9, among other things, provides, 'It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law.' It is not professionally improper for the master's attorney to prepare settlement papers between master and servant in a personal injury claim of the servant where the statute compensating the servant for personal injuries provides that compensation for the injury may be made in a lump sum settlement on the joint petition of the master and servant, and approved by a court of competent jurisdiction. When the servant has no attorney, and the master's attorney is called upon by the master to prepare the papers to effectuate the agreed settlement, the attorney in drafting the settlement papers should refrain from advising the servant about the law, and particularly must avoid misleading the servant concerning the law or the facts. The attorney also should advise the court that he represents the master, or insurer; that he has prepared the papers in settlement, which had theretofore been agreed upon between the master and the servant; that the servant has no counsel; and that the servant is present in court in proper person. Within these limitations, the committee sees no professional impropriety in an attorney so acting." (emphases added)).

1969 ABA Code of Professional Responsibility

The 1969 ABA Model Code of Professional Responsibility also combined lawyers' communications with represented and unrepresented person in the same rule, although the latter appeared in a separate subsection.

> During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

ABA Model Code DR 7-104(A)(2) (footnote omitted).

A Mississippi Supreme Court decision discussed the difference between Canon 9 and the ABA Model Code provision.

> Canon 9 was succeeded by DR 7-104 of the Code of Professional Conduct and Ethical Consideration 7-18. DR 7-104's prohibitory language expresses essentially the same mandate as did Canon 9, but there are noticeable differences. The language in DR 7-104(A)(2) speaks in terms of an unrepresented "person" rather than Canon 9's "party," omits the proscription against "misleading" such a person and, while Canon 9 proscribed giving an unrepresented person "advice" as to the "law," DR 7-104(A)(2) speaks merely of "advice" without the qualifying language. Nevertheless, ABA Informal Opinion No. 1140 (adopted January 20, 1970) declares that the effect of former Canon 9 and DR 7-104(A)(2) "appears to be substantially the same," and DR 7-104(A)(2) ["]therefore simply carries forward the meaning and intent" of Canon 9. See ABA Informal Opinion #1140.

Attorney Q v. Miss. State Bar, 587 So. 2d 228, 232 (Miss. 1991).

Shortly after the ABA adopted its 1969 ABA Model Code, it issued three opinions involving lawyers' ex parte communications with an unrepresented divorce adversary.

In 1970, the ABA held that a lawyer could not ask an unrepresented adversary to sign documents in which the adversary relinquished any rights.

- ABA Informal LEO 1140 (1/20/70) ("'What violation of professional ethics is involved in obtaining from a defendant in a domestic relations case a 'waiver' such as is widely used in (State)? Acopy [sic] of such waiver is attached.' The form in question waives the issuance of and service of summons, waives any right to contest the jurisdiction or venue of the court and agrees that the case be submitted to the court in term time or in vacation and without further

notice to the defendant. The form also waives notice to take depositions and agrees that depositions may be taken at any time without notice and without formality. . . . If the party to whom the waiver is presented is not represented by counsel, then both the present Canon 9 and Disciplinary Rule 7-104(A)(2) would seem to prohibit the procedure regarding which you have inquired. The former states: . . . It is, therefore, the opinion of the Committee under both the present Canons of Ethics and the Code of Professional Responsibility that a violation of proper ethical conduct would be involved in the procedure which you describe." (emphasis added)).

Approximately two years later, the ABA reaffirmed its earlier position, despite a new "no-fault" divorce statute.

- ABA Informal LEO 1255 (12/15/72) [Reconsideration of 1140] ("On July 6, 1972, the Legislature enacted a new 'no-fault' divorce Act (S17, LB-820). You sent us a copy of a form of 'Appearance and Responsive Pleading of Respondent' which has been prescribed by the Supreme Court of under Section 7 of said Act which directed the Supreme Court to prescribe the form of all pleadings required by the Act. Neither the Act nor the Court gave any instruction with regard to the subject of your inquiry: i.e., whether it is ethical to submit or to mail such an Appearance and Responsive Pleading to the other party in a domestic relations case for signature where that other party is not represented by an attorney, if the respondent is simultaneously advised to see the attorney of his choice and the plaintiff's attorney knows of no contested issue. You noted that this appears to be unethical under our Informal Opinion 1140 and ask that we reconsider that Opinion in the light 'of the enclosed pleading prepared by the Supreme Court of .' [sic] Since, on the facts you state, a Responsive Pleading is involved the plaintiff's lawyer would be improperly advising both parties. The fact that the Court prescribed the form of the Responding [sic] Pleading is irrelevant to the issue you present. The question is not before us whether in such a case a plaintiff's lawyer may properly submit to the respondent for signature a waiver of the issuance and service of the summons and complaint and entry of appearance. Your suggestion that in some such instances 'there was really nothing being contested' does not meet the requirement of Disciplinary Rule 7-104(A)(2) that an attorney should not represent both parties even if there is 'a reasonable possibility of . . . conflict' of interests. In our judgment the practice of the plaintiff's lawyer submitting such a pleading to an unrepresented defendant for signature in a domestic relations case is susceptible of abuse and is unethical." (emphasis added)).

About three months later, the ABA backed off a bit from its earlier position, separating prohibited legal advice from the permissible forwarding of documents to an unrepresented person for signature.

- ABA Informal LEO 1269 (5/22/73) ("Our Informal Opinion 1255, dated December 15, 1972, advised your partner that in the opinion of the Committee it would be subject to abuse and unethical for an attorney to submit or mail an appearance and responsive pleadings to the other party in a domestic relations case for signature where the other party is not represented by an attorney. We also reaffirmed Informal Opinion 1140. The preparation and submission of responsive pleadings to an unrepresented party would in the opinion of the Committee constitute the giving of advice in contravention of DR 7-104(A)(2). Your letter of January 6, 1973, now raises the question of whether it would be proper for plaintiff's counsel in a domestic relations case to submit to an unrepresented defendant for signature a waiver of the issuance and service of summons and the entry of an appearance. As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with an unrepresented party and, accordingly, would be ethical and proper as not being violative of the prohibitions of the Code." (emphasis added)).

These three ethics opinions (which dealt with divorce, as did many early legal ethics opinions) started with an understandable position equating lawyers' preparation for signature of legal documents with unethically providing of legal advice to an unrepresented person. But the ABA then shifted, permitting lawyers to provide such legal documents.

1983 ABA Rules of Professional Conduct

ABA Model Rule 4.3. In 1983, the ABA Model Rules took a different approach.

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ABA Model Rule 4.3 (as of 1983).

A comment provided guidance.

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt. (as of 1983) (emphasis added). Thus, the 1983 ABA Model Rules not only dropped the advice prohibition to a comment, it also used the word "should" -- instead of articulating an absolute prohibition.

The Model Code Comparison surprisingly explained that the earlier ABA Model Code provision was not a "direct counterpart to the rule."

> There was no direct counterpart to this Rule in the Model Code. DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel."

ABA Model Rules Code Comparison (as of 1983).

To be sure, there are some differences.

First, the 1969 ABA Model Code required lawyers' initial disclosure of their role -- but in a surprisingly limited set of circumstance. One might have expected the rule to always require such disclosure. But ABA Model Rule 4.3 only requires lawyers to: (1) avoid "state[ing] or imply[ing]" that the lawyer is "disinterested" (which would amount to a misrepresentation); (2) correct the "misunderstanding" of the unrepresented person, but only when the lawyer "knows or reasonably should know" that the

unrepresented person "misunderstand the lawyer's role in a matter." This is a surprisingly narrow disclosure duty.

Second, ABA Model Rule 4.3 dropped into a comment the prohibition on lawyers giving advice. The ABA/BNA Journal cited a 2002 ABA report in explaining the reason for what the Journal describes as a demotion.

> When the Model Rules of Professional Conduct replaced the Model Code in 1983, the prohibition against 'advice' was demoted to the comment because of the 'difficulty of determining what constitutes impermissible advice-giving." ABA Report to the House of Delegates, No. 401 (February 2002); Model Rule 4.3, Reporter's Explanation of Changes.

ABA/BNA Lawyers' Manual on Profession Conduct, 71:505, July 28, 2004.

Whatever the reason for the ABA's relegation to a comment of the prohibition on lawyers giving advice to unrepresented persons, the ABA apparently later regretted that move. A reporter's note in the 2000 Restatement discusses this.

> The scope of ABA Model Rule 4.3 with respect to giving advice to an unrepresented nonclient is unclear. The ABA Model Rule, quoted above, plainly does not carry forward the prohibition of the ABA Model Code. Indeed, absence of such a prohibition has been regretted by the drafter of the ABA Model Rules. See 2 G. Hazard & W. Hodes, The Law of Lawyering § 4.3:102, at 747-48 (1991 supp.) (regretting decision of drafters of ABA Model Rules to omit prohibition against "giving advice" from ABA Model Rule 4.3).

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000) (emphasis added).

As in other areas, many states retained the advice prohibition in their rules.

> [As of 2002], [e]leven of the jurisdictions adopting the Model Rules did, however, retain a version of the Model Code's advice prohibition in their black-letter rule. ABA Report to

> the House of Delegates, No. 401 (February 2002); Model Rule 4.3, Reporter's Explanation of Changes.

ABA/BNA Lawyers' Manual on Profession Conduct, 71:505, July 28, 2004.

The 2000 Restatement noted the same phenomenon.

> On the other hand, the Comment to ABA Model Rule 4.3 states that "during the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." Whether the Comment is merely advisory or, if mandatory, whether it is consistent with the Rule itself has not been frequently determined in decided cases. . . . Several jurisdictions have explicitly retained the prohibition of the ABA Model Code against giving legal advice.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000) (emphasis added).

As explained below, the ABA moved the advice prohibition back into the black letter rule in 2002.

Third, it was unclear whether the comment prohibited lawyers from giving advice ("other than the advice to obtain counsel") to unrepresented persons applied only to adverse unrepresented persons. The pertinent comment sentence does not explicitly state that, but the previous sentence implies it.

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt. (as of 1983) (emphasis added).

Some critics noted ABA Model Rule 4.3's confusion about the role of adversity in analyzing the communications.

The reporter's note in the 2000 Restatement (which is discussed more fully below) noted the first issue.

> The heading of DR 7-104 refers to "one of adverse interest" (emphasis supplied). No similar language is found in either subpart of its operative text, and apparently no court has so limited the rule. ABA Model Rules of Professional Conduct, Rule 4.3 (1983) contains no similar heading. . . . On the other hand, the operative provisions of those rules, as well as the Section, come into play when the unrepresented nonclient is prejudicially misled. That presumably would occur only in the context of adverse interests between the nonclient and the lawyer's client.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. c (2000).

ABA Model Rule 1.13. In another ABA Model Rule adopted in 1983, the ABA applied ABA Model Rule 4.3's basic principle in a specific setting -- when lawyers communicate with a corporate client's constituent.

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing

ABA Model Rule 1.13(d) (as of 1983).

A comment provided some guidance.

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure

> that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
>
> When such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

ABA Model Rule 1.13 cmt. (as of 1983) (later numbered as cmt. [10], [11]).

Restatement

In 2000, the American Law Institute adopted its Restatement (Third) of Law Governing Lawyers (2000).

As in other areas, the Restatement articulated an approach that the ABA eventually adopted (the ABA Model Rules' 2002 changes are discussed below).

The Restatement predictably prohibits lawyers' representation when communicating with unrepresented parties, and then describes lawyers' disclosure obligation -- which follow the ABA Model Rules in recognizing the obligation only in certain circumstances.

> In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:
>
> (1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and
>
> (2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.

The Restatement (Third) of Law Governing Lawyers § 103 (2000).

The Restatement explains the rule's purpose.

> Active negotiation by a lawyer with unrepresented nonclients is appropriate in the course of representing a client. In dealing with an unrepresented nonclient, a lawyer's words and actions can result in a duty of care to that person, for example, if the lawyer provides advice . . . . Lawyers should in any event be trustworthy. Moreover, by education, training, and practice, lawyers generally possess knowledge and skills not possessed by nonlawyers. Consequently, a lawyer may be in a superior negotiating position when dealing with an unrepresented nonclient, who therefore should be given legal protection against overreaching by a lawyer.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000) (emphasis added).

A comment explains the obvious prohibition on lawyers' misrepresentations.

> This Section states two general requirements. First, the lawyer must not mislead the unrepresented nonclient to that person's detriment concerning the identity and interests of the person whom the lawyer represents. For example, the lawyer may not falsely state or imply that the lawyer represents no one, that the lawyer is disinterestedly protecting the interests of both the client and the unrepresented nonclient, or that the nonclient will suffer no harm by speaking freely. Such a false statement could disarm the unrepresented nonclient and result in unwarranted advantage to the lawyer's client.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000) (emphasis added).

The comment also addresses lawyers' surprisingly narrow disclosure obligation.

> Second, the lawyer is subject to a duty of disclosure when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter and when failure to correct the misunderstanding would prejudice the nonclient or the nonclient's principal.

Id. (emphasis added).

As in other areas, the Restatement offers a more subtle analysis than the ABA Model Rules' comments. For instance, the Restatement makes the understandable point that lawyers' disclosure obligation depends in part on the unrepresented person's sophistication.

> Application of the rule of this Section depends significantly on the lawyer's role, the status and role of the unrepresented nonclient, and the context. For example, a lawyer for an employee dealing with an official of an employer in a dispute over compensation may typically assume that the official will understand the lawyer's role once it is stated that the lawyer represents the employee. A lawyer dealing with a sophisticated business person will have less need for caution than when dealing with an unsophisticated nonclient.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. b (2000).

The Restatement next explains the basic principle's application even in nonadversarial settings. As explained above, the Restatement's reporter's note indicates that the ABA Model Rule dropped the explicit reference to adversity that had appeared in the ABA Model Code.

> This Section applies to a lawyer's dealings with both unrepresented nonclients of adverse interest and those of apparently congruent interest. The Section applies to a lawyer's work in litigation, transactions, and other matters. It also applies to a lawyer representing a corporation or other organization in dealing with an unrepresented nonclient employee or other constituent of the organization.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. c (2000).

Turning to real-life scenarios, the Restatement confirms that lawyers may negotiate transactions with unrepresented adversaries.

> In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer . . . . The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role. See also § 116, Comment d (lawyer has no obligation to inform unrepresented nonclient witness of privilege to refuse to testify or to answer questions that may incriminate).

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added).

Interestingly, the Restatement supports the removal of a "legal advice" reference, explaining that lawyers are essentially giving "legal advice" when they provide information or documents to unrepresented persons.

> Formerly, a lawyer-code rule prohibited a lawyer from giving "legal advice" to an unrepresented nonclient. That restriction has now been omitted from most lawyer codes in recognition of the implicit representations that a lawyer necessarily makes in such functions as providing transaction documents to an unrepresented nonclient for signature, seeking originals or copies of documents and other information from the nonclient, and describing the legal effect of actions taken or requested.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added).

The Restatement then provides several illustrations.

> Lawyer represents Insurer in a wrongful-death claim asserted by Personal Representative, who is not represented by a lawyer. The claim concerns the death of Decedent assertedly caused by an insured of Insurer. Under applicable law, a settlement by Personal Representative must be approved by a tribunal. Personal Representative and Insurer's claims manager have agreed on a settlement

> amount. Lawyer prepares the necessary documents and presents them to Personal Representative for signature. Personal Representative, who is aware that Lawyer represents the interests of Insurer, asks Lawyer why the documents are necessary. Lawyer responds truthfully that to be effective, the documents must be executed and filed for court approval. Lawyer's conduct is permissible under this Section.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 1 (2000) (emphasis added). One might have thought that the lawyer's explanation that courts must approve any settlement documents amounts to "legal advice." But as explained above, the Restatement deliberately avoided any prohibition on giving legal advice -- instead extending the prohibition to misrepresentations.

The next illustration involves an adversary who seems to misunderstand the lawyer's role.

> Lawyer represents the financing Bank in a home sale. Buyer, the borrower, is not represented by another lawyer. Under the terms of the transaction, Buyer is to pay the legal fees of Lawyer. Buyer sends Lawyer a letter stating, "I have several questions about legal issues in the house purchase on which you are representing me." Buyer also has several telephone conversations with Lawyer in which Buyer makes similar statements. In the circumstances, it should be apparent to Lawyer that Buyer is assuming, perhaps mistakenly, that Lawyer represents Buyer in the transaction. It is also apparent that Buyer misunderstands Lawyer's role as lawyer for Bank. Lawyer must inform Buyer that Lawyer represents only Bank and that Buyer should not rely on Lawyer to protect Buyer's interests in the transaction.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 2 (2000). This illustration presents a fairly obvious case. It would have been interesting if the Restatement had offered a more subtle and difficult scenario. Perhaps the Restatement

would not have known how to describe a lawyer's disclosure obligation if the adversary had not so clearly seemed to believe the lawyer was advising him or her.

The Restatement then focuses on lawyers' disclosure obligation within a corporate client entity -- offering a parallel to ABA Model Rule 1.13.

One comment warns that lawyers' failure to describe their role to a possibly adverse corporate constituent might result in a constituent's reasonable argument that the lawyer also represented the constituent.

> A lawyer for an organizational client, whether inside or outside legal counsel . . . , may have important responsibilities in investigating relevant facts within the organization. In doing so, the lawyer may interview constituents of the organization, who in some instances might have interests that differ from those of the organization and might be at personal risk of criminal prosecution or civil penalties. A constituent may mistakenly assume that the lawyer will act to further the personal interests of the constituent, perhaps even against the interests of the organization. Such a mistake on the part of the constituent can occur after an extended period working with the lawyer on matters of common interest to the organization and the constituent, particularly if the lawyer has formerly provided personal counsel to the constituent, and may be more likely to occur with inside legal counsel due to greater personal acquaintanceship. Such an assumption, although erroneous, may be harmless so long as the interests of the constituent and the organization do not materially conflict. However, when those interests do materially conflict, the lawyer's failure to warn the constituent of the nature of the lawyer's role could prejudicially mislead the constituent, impair the interests of the organization, or both.
>
> An adequate clarification may in some instances be required to protect the interest of the organization client in unencumbered representation. Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the organization if the lawyer, even if unwittingly, thereby undertakes concurrent representation of both the organization and the constituent. Such a finding

> could be based in part on a finding that the lawyer's silence had reasonably induced the constituent to believe that the lawyer also represented the constituent. On forming a client-lawyer relationship with a constituent of an organization client . . . . Among other consequences, the lawyer may be required to withdraw from representing both clients because of the conflict.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000) (emphases added).

The Restatement then essentially warns lawyers not to go overboard the other way -- because emphasizing the lawyers' role unnecessarily might impede the lawyers' ability to obtain information the corporate client needs.

> The lawyer's duty to clarify the nature of the constituent-lawyer relationship depends on the circumstances, and assessing the nature of such a duty requires balancing several considerations. In general, the lawyer may deal with the unrepresented constituent without warning provided the lawyer reasonably believes, based on information available to the lawyer at the time, that the constituent understands that the lawyer represents the interests of the organization and not the individual interests of the constituent . . . . In such a situation, no warning to the nonclient constituent is required even if the constituent provides information or takes other steps against the constituent's own apparent best interests and even if the lawyer, were the lawyer representing only the constituent, would advise the constituent to be more guarded. The absence of a warning in such a situation will often be in the interests of the client organization in assuring that the flow of information and decisionmaking is not impaired by needless warnings to constituents with important responsibilities or information.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000).

A parallel reporter's note criticizes ABA Model Rule 1.13 as possibly going too far.

> On the duty not to mislead a constituent, two general questions arise: (1) in what circumstances does a duty to warn arise; and (2) what is the minimal content of a warning when required? On the first issue, ABA Model Rules of Professional Conduct, Rule 1.13(d) (1983) provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Rule 1.13(d) is susceptible of a reading that mandates warning in every instance of adversity between organization and constituent, without regard to whether the constituent misapprehends the situation or to any lack of threatened prejudice to the constituent.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000) (emphasis added).

The Restatement notes a mismatch between what was then ABA Model 1.13 and a comment -- explicitly adopting what it perceives as the black letter rule's narrower disclosure obligation.

> On the second issue -- what is the required content of a warning when one is mandated -- the above-quoted Comment to Rule 1.13 mentions several warnings: (1) that the lawyer cannot provide legal services to the constituent (although such a warning could be literally misleading, because consent of both organization and constituent may cure any conflict that otherwise bars representation by the lawyer); (2) that the constituent may wish to retain independent counsel (which may be true in some instances while not true and needlessly alarming in many others); and (3) that discussions between the lawyer and the constituent are not privileged (which is true as to the constituent, but, if the communication is privileged at all, not as to the organization). Each of the warnings may be problematical in many settings and should be regarded as suggestive only. None seems specifically required by ABA Model Rule 1.13(d) itself. The present Section and Comment follow ABA Model Rule 1:13(d) rather than its arguably more expansive

> Comment with respect to the content of a required warning and require only that the lawyer's role be clarified.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000).

The Restatement describes the circumstances requiring disclosure.

> The present Section and Comment take the position that such a duty arises only when the lawyer is or reasonably should be aware that the constituent mistakenly assumes that the lawyer is representing or otherwise protecting the personal interests of the constituent, that the lawyer will keep their conversation confidential from others with authority in the organization, or that there is no material divergence of interest between constituent and organization -- and when failure to warn would materially and detrimentally mislead the person.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. e (2000).

The Restatement then shifts back to a scenario in which corporate clients' lawyers must correct a corporate constituent's confusion.

> When the lawyer does not have a reasonable belief that the constituent is adequately informed, the lawyer must take reasonable steps to correct the constituent's reasonably apparent misunderstanding, particularly when the risk confronting the constituent is severe. For example, the constituent's expression of a belief that the lawyer will keep their conversation confidential from others with decisionmaking authority in the organization or that the interests of the constituent and the organization are the same, when they are not, would normally require a warning by the lawyer. In all events, as required under this Section, a lawyer must not mislead an unrepresented nonclient about such matters as the lawyer's role and the nature of the client organization's interests with respect to the constituent.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. e (2000) (emphasis added).

The Restatement then closes with a discussion of lawyers' vulnerability to ethics charges or disqualification if they violate the disclosure obligations.

> Professional codes provide for discipline of lawyers . . . for violation of the rule of the Section. A statement of an unrepresented nonclient induced by a lawyer's violation of this Section may be excluded from evidence in a subsequent proceeding. A document or other agreement induced by a lawyer's violation of the Section may be denied legal effect if found to have been obtained through misrepresentation or undue influence or otherwise in violation of public policy. In some situations, a lawyer's activities in violation of this Section may require the lawyer to exercise care to protect the interests of the unrepresented nonclient to the extent stated in other Sections . . . . When necessary in order to remedy or deter particularly egregious violations of this Section, a court may order disqualification of an offending lawyer or law firm.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. f (2000).

2002 ABA Model Rules Changes

The ABA did not revise ABA Model Rule 4.3, the comment, or the Model Code Comparison until 2002.

At that time, the ABA moved back into the black letter rule the prohibition on lawyers giving advice to unrepresented persons -- explicitly indicating that the prohibition only applied when lawyers deal with adverse unrepresented persons.

The current rule reads as follows:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure

> counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3 (emphasis added to show the 2002 addition).

Also in 2002, the ABA expanded what had previously been the sole comment -- deleting the sentence about lawyers providing legal advice (which had been moved to the black letter rule), and apparently expanding the occasions on which lawyers must identify their role. Thus, the first comment indicates as follows:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

ABA Model Rule 4.3 cmt. [1] (emphasis added to show the sentence added in 2002).

Finally, in 2002 the ABA added a lengthy second comment providing additional guidance.

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse

> party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2] (emphasis added).

Although this new comment warns lawyers about the danger of providing legal advice to adverse unrepresented persons, it somewhat surprisingly confirms that lawyers may still prepare documents for adverse unrepresented persons' signature.

State Rules

Most states adopted the basic ABA Model Rule 4.3 approach. But several states retained the prohibition on lawyers' advice to unrepresented persons left out of ABA Model Rule 4.3 in 1983.

> Several jurisdictions have explicitly retained the prohibition of the ABA Model Code against giving legal advice.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000). As also explained above, the ABA added that prohibition back to the black letter rule in 2002, which eliminated any divergence between the ABA Model Rules and those states.

As in other situations, some states have adopted a variation of ABA Model Rule 4.3.

- New Jersey Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also

ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.").

Case Law

The case law reflects courts' differing positions on lawyers' freedom to communicate with unrepresented persons.

Older case law tended to emphasize lawyers' disclosure obligations when communicating with unrepresented parties.

Some decisions even required that lawyers use prescribed "scripts" when engaging in such communications.

- McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 112, 113 (M.D.N.C. 1993) (finding plaintiffs' lawyer violated Rule 4.3 when communicating with an unrepresented person; "The ABA Model Rule 4.3 imposes an obligation on an attorney to convey to the unrepresented witness the truth about the lawyer's role, representative capacity, and that he is not disinterested."; "In the instant case, the Court finds that plaintiffs' investigator not only failed to take these precautions but violated them in some instances (at least with MidSouth) by not fully disclosing his representative capacity and the true nature of the interview, and by not informing the employees of their right to refuse to be interviewed and to have their counsel present. It is not clear that this occurred with all of the employees. However, further exploration of this matter is not needed. The Court declines to impose any sanctions other than that which have already been imposed with respect to the similar violations with regard to MidSouth employees.").

- Neil S. Sullivan Assocs., Ltd. v. Medco Containment Svcs., 607 A.2d 1386, 1390 (N.J. Super. Ct. 1992) (approving plaintiffs' lawyer's ex parte telephone interview with defendant's former employee, but only under strict guidelines; "Plaintiff's counsel must abide by the guidelines of RPC 4.3 which dictate how an attorney should conduct an interview with an unrepresented person. Plaintiff's counsel should disclose her role in this litigation, the identity of her client, and the fact that the former employer is a party adverse to her client. Likewise, plaintiff's attorney may not seek to elicit any privileged information.").

- In re Envtl. Ins. Declaratory Judgment Actions, 600 A.2d 165, 171, 173 (N.J. Super. Ct. 1991) (allowing lawyers for plaintiff and defendant to conduct informal interviews of plaintiffs' former employees, but only following guidelines; "In short, RPC 4.3 requires more than the investigator identifying himself to the party being interviewed. '. . . Rule 4.3, read in conjunction with Rule 4.2, requires more than a simple disclosure by the investigator of his identity qua investigator. To hold otherwise would in my judgment violate at least the spirit of the Rules. Rule 4.2 suggests that a relevant inquiry is whether an individual is represented since the Rule is only applicable if the lawyer 'knows' that the individual is 'represented by another lawyer.' The Rules contemplate that former employees, unrepresented by counsel, be warned of the respective positions of the parties to the dispute. [Monsanto, supra, 593 A.2d at 1017-18]'"; "[T]his court will require all parties to this action who intend to interview former employees to abide by the guidelines set by this court as a prerequisite to any interview. No interview of any former employee shall be conducted unless the following script is used by the investigator or attorney conducting the interview: '(1) I am a (private investigator/attorney) working on behalf of _____. I want you to understand that _____ and several other companies have sued their insurance carriers. That said action is pending in the Union County Superior Court. The purpose of the lawsuit is to determine whether _____ insurance companies will be required to reimburse _____ for any amounts of money _____ must pay as a result of environmental property damage and personal injury caused by _____. I have been engaged by _____ to investigate the issues involved in that lawsuit between _____ and _ ___, its insurance company; (2) Are you represented by an attorney in this litigation between _____ and _____?'"; "'If answer is 'YES,' end questioning.'"; "'If answer is 'NO,' ask: (3) May I interview you at this time about the issues in this litigation?'"; "'If answer is 'NO,' end questioning.'"; "'If answer is 'YES,' substance of interview may commence.'").

- Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013, 1017 & n.3, 1018, 1019, 1019-20. 1020 (Del. Super. Ct. 1990) (granting plaintiff's motion for a protective order following defendants' lawyer's violations of Rule 4.3; "The defendants assert that an investigator whose firm has been retained by a lawyer complies with Rule 4.3 by simply stating that he is an investigator seeking information. To support this contention the defendants have submitted the affidavits of two ethics experts, Professor Stephen Gillers and Professor Geoffrey C. Hazard, Jr. The defendants also assert that Rule 4.3 is designed to protect unrepresented persons from receiving legal advice or divulging information to an attorney whose interests are actually or potentially adverse to those of the unrepresented person."; "'I am mindful of additional affidavits filed by Professors Gillers and Hazard in the Motion for Reargument filed in the National Union [Nat'l Union Fire Ins. Co. of Pittsburgh v. Stauffer Chem. Co., Del. Super. C.A. No. 87C-SE-11-1-CV (filed Sept. 2, 1987)]

matter discussed supra at footnote 1. I am simply not persuaded by the analysis of these respected academicians. Indeed, I choose to accept an earlier analysis of Professor Hazard developed in a context removed from the heat of partisan litigation.'" (emphasis added); "In my view Rule 4.3, read in conjunction with Rule 4.2, requires more than a simply disclosure by the investigator of his identity . . . . To hold otherwise would in my judgment violate at least the spirit of the Rules. Rule 4.2 suggests that a relevant inquiry is whether an individual is represented since the Rule is only applicable if the lawyer 'knows' that the individual is 'represented by another lawyer.' The Rules contemplate that former employees, unrepresented by counsel, be warned by the respective positions of the parties to the dispute. Indeed, Professor Hazard recognized that 'suitable controls and correctives can be envisioned that would prevent unjust advantage being realized from . . . unfair tactics.' Hazard Aff. Para. 13." (emphasis added); noting that the court had ordered defendant to send the following letter to any unrepresented person the defendant's lawyer wished to interview; "[R]ecognizing the need to take control of the process, the court further ordered that Aetna could not interview any former employee unless it first delivered to such employee a letter written by the magistrate which reads as follows: 'ATTACHMENT A'; '(Investigator's Letterhead)'; '"Dear: This letter is being delivered to you pursuant to an order of a federal court. Please read the letter carefully so that you can decide whether or not you would be willing to allow me to interview you at a location of your convenience regarding your former employer, Upjohn."'; "'I am a private investigator who has been retained by certain insurers who are defendants in a lawsuit brought by your former employer. The lawsuit concerns Upjohn's efforts to obtain insurance coverage for certain environmental claims that have been made against Upjohn concerning various sites."'; "'In connection with the lawsuit, I am attempting to gather information about the manner in which Upjohn operated these sites. Such information may help my clients support their position against Upjohn that there is no insurance coverage for the environmental claims that are involved in the lawsuit. For that reason, I would like to interview you about these subjects."'; "'You have no obligation to agree to an interview. On the other hand, there is nothing that prevents you from agreeing to be interviewed. Whether or not you agree to an interview, you may be asked to give testimony in this case."'; "'Upjohn is willing to answer any questions you may have about this request for an interview, and to provide a lawyer to be with you for the interview if you desire or in the event that you are subpoenaed to testify. You are under no obligation to contact Upjohn if you do not want to. However, if you wish to do so, you may call [Upjohn's telephone number]."'; "'If you are agreeable to an interview, you will be asked to sign a copy of this letter acknowledging that you have read the letter and have voluntarily agreed to be interviewed."'; "I am satisfied that it is appropriate to conclude that when the investigators did not determine if former employees were represented by counsel, when the investigators did not clearly identify themselves as working

> for attorneys who were representing a client which was involved in litigation against their former employer, when investigators did not clearly state the purpose of the interview and where affirmative misrepresentations regarding these matters were made, Rule 4.2 and Rule 4.3 were violated.'").

In 2000, the Restatement noted that some decisions required what could be characterized as a Miranda warning.

> [A] number of decisions have stated an obligation on the part of the lawyer to advise the unrepresented nonclient to obtain the assistance of independent counsel, a requirement that goes beyond those stated in the Section or Comment.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000).

More recent case law tends to take exactly the opposite position -- deemphasizing lawyers' disclosure obligation when dealing with unrepresented adversaries.

- Todd v. Montoya, No. Civ. 10-0106 JB/WPL, 2011 U.S. Dist. LEXIS 14435, at *41, *44-45, *45 (D.N.M. Jan. 12, 2011) (concluding that a plaintiff's lawyer and his investigator did not violate Rule 4.3 in communicating with the father of a corrections officer involved in an incident for which the plaintiff sued; "The Defendants argue that rule 16-403 also requires a lawyer to state the reason for the interview and inform the unrepresented person that counsel may be present in the interview, and that he or she may refuse to give the interview. . . . The Court does not find the cases upon which the Defendants rely persuasive in its interpretation of rule 16-403's requirements." (emphasis added); "[The Court] will not interpret rule 16-403 to require that a lawyer inform an unrepresented person that counsel may be present in the interview and that he may refuse to give the interview. The Court believes that the New Mexico Rules of Professional Conduct require only that a lawyer make clear that he is not disinterested and the nature of his or her role when dealing with an unrepresented person whose interests conflict with his or her client's interests' and that a lawyer not give legal advice to the unrepresented person, other than the advice to secure counsel." (emphasis added); "It is important for the Court not to add requirements that the Rules of Professional Conduct do not contain, even if, in a particular circumstance, the Court might wish there had been a little more clarity. The ABA and the New Mexico courts have carefully struck a balance between the right to seek the truth and the right to counsel. A freewheeling court, adding requirements, could upset that balance. The Court should not disturb the balance the ABA and the New

Mexico courts have struck by adding requirements, then confusing what conscientious and professional lawyers and investigators may do, and perhaps chilling informal discovery, which often informs pre-filing whether there is a case or not, quickly and relatively inexpensively, two things formal discovery often does not do." (emphasis added)).

- In re Jensen, 191 P.3d 1118, 1129 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role it was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion (emphasis added); ultimately issuing a public censure of the lawyer).

- Andrews v. Goodyear Tire & Rubber Co., Inc., 191 F.R.D. 59, 79, 79-80 (D.N.J. 2000) (finding that a plaintiff employee's lawyer did not violate Rule 4.3 in communicating with non-party management employee of defendant corporation; "If the approaching attorney ascertains that the person is neither actually represented by the organization's attorney nor has a right to such representation, the attorney has an obligation to 'make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney'" (citation omitted); "Nowhere in RPC 4.3 is there an obligation to secure any of this information before initiating contact with a potential witness. The Special Committee on RPC 4.2 clearly anticipated direct communication between an approaching attorney and the potential fact witness under RPC 4.3. Thus, the Magistrate Judge's ruling with respect to whether, pursuant to RPC 4.3, Bergenfield [Plaintiff's lawyer] was obligated to determine if Guffey [Manager for Defendant] was in the litigation control group or otherwise represented by counsel 'before making contact' with Guffey is clearly erroneous." (emphases added); "Prior to addressing the substantive conversation between Bergenfield and Guffey in order to determine if Bergenfield violated the RPCs, this Court must first note that Bergenfield was not obligated to follow an exact script when speaking with Guffey. If that were the case, the Special Committee on RPC 4.2 would have suggested a general script to be universally applied by practitioners. Furthermore, it is simply impractical to suggest, as Goodyear does, that every attorney, seeking to determine if a current employee of an organization is represented, is required to read in robot-like fashion from the same script. In fact, this Court believes such a requirement would seriously hinder an investigation by an attorney into the merits of the case. In spite of that belief,

this Court recognizes that there should be a general format to which an approaching attorney should adhere in confronting a current or former employee of an organization which would insured that an attorney is abiding by his ethical obligations." (emphasis added)).

- Pritts v. Wendy's of Greater Pittsburgh Inc., 37 Pa. D. & C.4th 158, 167 (C.P. Allegheny, 1998) (denying defendant's motion for a protective order requiring that plaintiff's lawyer give what the court called a "Miranda" warning to unrepresented persons with which the plaintiff's lawyer communicates; "Obviously, an attorney violates Rule 4.3 if the attorney causes an unrepresented person to believe that he or she has an obligation to submit to an interview or if the attorney disregards the request of an unrepresented person that the interview be terminated. However, Rule 4.3 does not impose a 'Miranda' requirement that unrepresented persons be advised that they have the right to refuse to be interviewed or to be interviewed only with the company's attorney present. Furthermore, since Rule 4.2 does not extend to former employees, this rule cannot be the source of any 'Miranda' requirement. Consequently, there is no source for this 'Miranda' requirement in the Rules of Professional Conduct." (emphases added)).

- Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 418 (D. Utah 1991) (granting plaintiff's motion to conduct ex parte interviews of defendant bank's former tellers; "[M]entioned by the ABA Committee on Ethics and Professional Conduct were the ethical rules regarding the attorney-client privilege and Rule 4.3 which governs an attorney's dealings with an unrepresented party. It should be noted, however, that these two ethical restraints do not exhaust the list of potential rules which may apply to ex parte contact with former employees of a corporate party. Fortunately, the court is not called upon to compile such a list. Suffice it to say that the full spectrum of ethical requirements that bind the attorney in any other situation is equally binding when the attorney engages in ex parte contact with an unrepresented former employee of an opposing organizational party.").

Best Answer

The best answer to this hypothetical is **(B) YOU MUST DISCLOSE TO THE RESIDENT YOUR ROLE IN REPRESENTING THE OIL REFINERY, BUT ONLY IF YOU KNOW OR REASONABLY SHOULD KNOW THAT THE RESIDENT MISUNDERSTANDS YOUR ROLE**. B 10/15

Distinguishing Between Legal Advice and Opinion

Hypothetical 3

You represent the father of a young man who committed suicide while incarcerated in the county jail. You contacted a county corrections officer, who knew that you would probably add him to the litigation you plan to file. Although there is some dispute about your conversation with the officer, he later claimed that you told him that he would be covered by the county's insurance policy. The county has claimed that you violated the ethics rules prohibiting lawyers from giving any legal advice to adverse unrepresented persons.

If you told the corrections officer that he would be covered by the county's insurance policy, have you violated an ethics rule?

(B) NO (PROBABLY)

Analysis

The 1908 ABA Canons indicated that lawyers

> should not undertake to advise [an unrepresented party] as to the law.

ABA Canons of Professional Ethics, Canon 9.

The 1969 ABA Model Code similarly indicated that

> a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel.

ABA Model Code DR 7-104(A)(2). Thus, the ABA Model Code's prohibition extended to any advice, not just advice about the law.

The 1983 ABA Model Rules did not include the advice prohibition in the black letter rule ABA Model Rule 4.3 (as of 1983). A comment included that prohibition.

> During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

ABA Model Rule 4.3 cmt (as of 1983).

The Code Comparison inexplicably indicated that

> There was no direct counterpart to this Rule in Model Code. DR 7-104(A)(2) provided that a lawyer shall not '[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel. . . .'

ABA Model Rules Code Comparison (as of 1983).

Under current ABA Model Rule 4.3, a lawyer communicating ex parte with unrepresented person.

> The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3 (emphasis added).

A comment provides additional guidance.

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2].

For obvious reasons, it can be very difficult to distinguish between lawyers' impermissible advice and ethically permitted opinions or explanations.

In some cases, courts find that lawyers have crossed the line -- violating Rule 4.3 by giving advice to unrepresented persons.

- In re Tun, Bar Dkt. No. 2009-D381, at 2 (D.C. Office of Bar Counsel Oct. 10, 2013) (issuing an informal admonition against a lawyer who advised an adverse witness that she had no Fifth Amendment grounds to avoid testifying; "When you interviewed SB, you were acting on behalf of your client, Mr. Smith. In addition, you knew that SB was unrepresented and that there was a 'reasonable possibility' that her interests would be 'in conflict' with your client's interests. Therefore, when SB asked you for advice regarding her constitutional rights, you should have said that you could not advise her, or advised her to secure her own counsel. Instead, you advised her that she had no Fifth Amendment grounds to avoid testifying against Mr. Smith. By doing so, you violated Rule 4.3(a)(l).").

- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role is was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion (emphasis added); ultimately issuing a public censure of the lawyer).

- Hopkins v. Troutner, 4 P.3d 557, 558, 560 (Idaho 2000) (affirming a judge's order setting aside a settlement, based on the defendant's lawyer's misconduct; relying on Rule 4.3; "Hopkins [Plaintiff, sexually abused by Defendant] expressed to Julian [Defendant's lawyer] a desire to settle the case and stated that he would do so for less than the offers of judgment tendered to other plaintiffs in similar cases filed against Troutner. Julian's affidavit filed in this case provided the following description of their discussion: 'He then solicited what I believe to be the value of this case, after informing me that he would certainly take much less than the Offer of Judgment previously filed herein to the other Plaintiffs. I told him, in my

opinion, the case was worth $3,000 to $4,000.'"; "The following statement by the district judge reflects his analysis of what was impermissible about Julian's conduct and why that supported a decision to set aside the order of dismissal: 'I'm not sure I know precisely what overreaching is, because I think it's more on the equitable side of the Court's jurisdiction and less on the legal side. Again I think Mr. Julian has been honest, not unethical and straightforward in this case. But I think when -- if he were to have said, 'You need to get your own -- form your own opinion about that, or find somebody to give you an opinion about that. My client would only pay you three or $4,000,' that's different. But Mr. Hopkins was asking him, 'What's this case worth?' Under circumstances that should have led, I think, Mr. Julian to believe that his answer was going to be relied upon by Mr. Hopkins.'" (emphasis added); a dissenting judge disagreed; "I respectfully dissent from the opinion of the Court. In this case Hopkins made the decision to represent himself. He was competent to understand the nature of the proceedings in which he was involved. It is unrealistic under these circumstances to characterize the statements of Troutner's attorney as legal advice to Hopkins. It was a method of stating how much his client would pay as part of the negotiations initiated by Hopkins. Regardless, even treating the statements as legal advice, the settlement still should not be set aside."; also finding that plaintiff did not rely on defendant's lawyer's statement, because he insisted on more money than the lawyer had mentioned).

- Attorney Q v. Mississippi State Bar, 587 So. 2d 228, 232, 233 (Miss. 1991) (issuing a private reprimand of a lawyer for violation of Rule 4.3; "Canon 9 was succeeded by DR 7-104 of the Code of Professional Conduct and Ethical Consideration 7-18. DR 7-104's prohibitory language expresses essentially the same mandate as did Canon 9, but there are noticeable differences. The language in DR 7-104(A)(2) speaks in terms of an unrepresented 'person' rather than Canon 9's 'party,' omits the proscription against 'misleading' such a person and, while Canon 9 proscribed giving an unrepresented person 'advice' as to the 'law,' DR 7-104(A)(2) speaks merely of 'advice' without the qualifying language. Nevertheless, ABA Informal Opinion No. 1140 (adopted January 20, 1970) declares that the effect of former Canon 9 and DR 7-104(A)(2) 'appears to be substantially the same,' and DR 7-104(A)(2) therefore simply carries forward the meaning and intent' of Canon 9. See ABA Informal Opinion #1140."; "It is important to realize that we interpret Attorney Q's statements from the perspective of a reasonably intelligent non-lawyer in Robinson's position. We are not so much concerned with what Attorney Q may have intended; rather, our focus is upon what Robinson may reasonably have heard and understood. So viewed, we think the only fair interpretation of what Attorney Q said to Robinson is that, once served with the summons, she did not need to worry about the matter and did not need to do anything about it. Attorney Q compounded his felony some forty days later when he had a default judgment entered against Robinson, although he has

> been formally charged with no disciplinary offense in this regard. . . . In sum, we hold that on January 15, 1985, the Mississippi State Bar had in full force and effect a valid rule providing that, during the course of his representation of a client, a lawyer may not give advice to another who may be reasonably perceived to have conflicting interests where the other is not represented by counsel, other than advice to secure counsel. We find by clear and convincing evidence that Attorney Q committed the acts described in the Complaint and in Part II above and that these acts constitute a violation of the rule.").

In contrast, some courts take a surprisingly forgiving view about whether lawyers have impermissibly provided advice to unrepresented persons, or merely offered their opinions or explanations.

- Hanlin-Cooney v. Frederick Cnty., Md., Civ. Case No. WDQ-13-1731, 2014 U.S. Dist. LEXIS 93602, at *22-23 (D. Md. July 9, 2014) (analyzing the implications of Rule 4.3 in connection with a plaintiff's lawyer's communications with a Frederick County, Maryland corrections officer, in connection with the plaintiff's lawsuit against a county and eventually the officer in connection with plaintiff's deceased son's suicide while an inmate; ultimately finding that plaintiff's lawyer did not violate Rule 4.3; "I do not find that Plaintiff's counsel violated Rule 4.3 by failing to properly identify their client or her interests. Mr. DeGrange [Correctional Officer] readily admitted at the hearing that not only did he understand that Plaintiff's counsel represented the family of Mr. Hanlin, he also understood that he would be sued in connection with Mr. Hanlin's suicide. . . . Similarly, I find no violation of Rule 4.3 by virtue of Plaintiff's counsel's alleged statements to Mr. DeGrange concerning insurance. It is quite clear that, in the present lawsuit, the interests of Plaintiff's counsel and the interests of Mr. DeGrange are adverse. However, as noted above, the Defendants have not established any specific instance where Plaintiff's counsel made a definitive statement concerning insurance. Even if the Defendants were to prove that Plaintiff's counsel affirmatively told Mr. DeGrange that he would be covered by the county's insurance, such a statement would not rise to the level of 'legal advice.' Plaintiff's counsel did not advise Mr. DeGrange to take any action on account of alleged statements concerning insurance. Indeed, any action that Mr. DeGrange would have taken in reliance on such statements is immaterial to his alleged conduct giving rise to his lawsuit." (emphasis added)).

- Zichichi v. Jefferson Ambulatory Surgery Ctr., LLC, Civ. A. No. 07-2774 SECTION "R" (5), 2008 U.S. Dist. LEXIS 63133, at *14-15, *15-16 (E.D. La. July 22, 2008) (finding that a lawyer did not violate Rule 4.3 when communicating with an unrepresented person; "Plaintiff has also questioned

whether it was appropriate for Mr. Blankenship [Defendant's lawyer] to communicate with plaintiff, when he was unrepresented, regarding the termination of his JASC membership."; "Although Mr. Blankenship informed Dr. Zichichi of his client's position on plaintiff's membership interest in JASC, the Court does not find that by doing so Mr. Blankenship was giving plaintiff legal advice in violation of Rule 4.3. Comment 2 of the ABA Annotated Model Rules of Professional Conduct provides: 'So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may . . . explain the lawyer's own view of . . . the underlying legal obligations.' Ann. Mod. Rules Prof. Cond. Rule 4.3 (6th Ed. 2007). Dr. Zichichi was aware that Mr. Blankenship represented JASC, and Dr. Zichichi's own affidavits and declarations indicate that he knew his interests were adverse to JASC before he called Mr. Blankenship on January 25, 2007. Furthermore, Mr. Blankenship did nothing more than give his opinion of the underlying legal obligations and told plaintiff to obtain counsel." (emphasis added)).

- Barrett v. Va. State Bar, 611 S.E.2d 375, 377078, 378, 379 (Va. 2005) (reversing the Virginia State Bar's three year suspension of a lawyer who communicated ex parte with his unrepresented wife after the they separated; finding that the lawyer did not violate Rule 4.3, but affirming the Bar's finding that the lawyer had violated other rules; remanding; "The Board found that Barrett [husband] violated this rule because it concluded certain statements in two electronic mail ('e-mail') communications he wrote to Rhudy [wife] after the separation, but before she retained counsel, constituted legal advice. On July 25, 2001, Barrett sent an e-mail to Rhudy containing the following: 'Venue will not be had in Grayson County. Virginia law is clear that venue is in Virginia Beach. . . . Under the doctrine of imputed income, the Court will have to look at your skills and experience and determine their value in the marketplace. . . . You can easily get a job . . . [making] $2,165.00 per month. . . . In light of the fact that you are living with yourparents [sic] and have no expenses . . . this income will be more than sufficient to meet your needs. I . . . just make enough to pay my own bills . . . Thus, it is unlikely that you will . . . obtain spousal support from me. I . . . will file for . . . spousal support to have you help me pay you [sic] fair share of our $200,000+ indebtedness. Since I am barely making it on my income and you have income to spare, you might end up paying me spousal support. . . . In light of the fact that . . . I . . . am staying in the maritial [sic] home . . . I believe that I will obtain the children. . . . You will have to get a job to pay me my spousal support. . . . The Court will prefer the children staying with a [parent], . . . there is no question that I can set up a home away from home and even continue to home school our kids. Therefore, it is likely that you will lose this fight. And of course, if I have the kids you will be paying me child support. . . . I am prepared for the fight.'" (emphases added);; "Barrett sent Rhudy another e-mail on September 12, 2001, in which he included the following: 'I will avail

myself of every substantive law and procedural and evidentiary rule in the books for which a good faith claim exists. This means that you, the kids and your attorney will be in Court in Virginia Beach weekly. . . You are looking at attorney's expenses that will greatly exceed $10,000. . . . I will also appeal . . . every negative ruling . . . causing your costs to likely exceed $30,000.00. . . . You have no case against me for adultery. . . . [The facts] show[] that you deserted me. . . . Your e-mails . . . show . . .that you were cruel to me. This means that I will obtain a divorce from you on fault grounds, which means that you can say goodbye to spousal support. . . . I remain in the marital [sic] home . . . I have all the kids [sic] toys and property, that your parents' home is grossly insufficient for the children, that I can home school the older kids while watching the younger whereas you will have to put the younger in day care to fulfill your duty to financially support the kids, I believe that I will get the kids no problem. . . . The family debt . . . is subject to equitable distribution, which means you could be socked with half my lawschool [sic] debt, half the credit care [sic] debt, have [sic] my firm debt, etc.'" (emphases added); "[U]pon our independent review of the entire record, we find that there was no sufficient evidence to support the Board's finding that Barrett's e-mail statements to Rhudy were legal advice rather than statements of his opinion of their legal situation. Therefore, we will set aside the Board's findings that Barrett violated Rule 4.3(b).").

- Maryland LEO 2002-17 (2002) ("You have inquired as to whether it is permissible for an attorney to send a notice of default under a lease and a draft of a complaint for breach of that lease to a party to a lease who is not represented by counsel. Your intention in sending the communication in this form is to induce that party into compliance with the terms of the lease."; "Since your communications with the unrepresented party to the lease are nothing more than a transmission of your client's position that there has been a breach by that party for which your client intends to sue if that party fails to take steps to comply therewith, there is nothing improper in communicating that information to the unrepresented party, provided Rules 4.1 and 4.3 are adhered to." (emphasis added)).

- Brown v. Lange, 21 P.3d 822, 832 (Alaska 2001) (noting the difference between the ABA Model Rules and Alaska Rule 4.3, and finding that a plaintiff's lawyer did not improperly give "advice" to an unrepresented defendant; "Rule 4.3 and its Alaska commentary address the issue of communicating with unrepresented litigants in a way that might cause them to misunderstand the opposing lawyer's true intentions and interests. But compliance with Cook [Cook v. Aurora Motors, Inc., 503 P.2d 1046 (Alaska 1972)], Salomon [City of Valdez v. Salomon, 637 P.2d 298 (Alaska 1981)] and Hertz [Hertz v. Berzanske, 704 P.2d 767 (Alaska 1985)] creates no such danger. These cases require a plaintiff's attorney, before applying for default, 'to inquire into [the defendant's] intent to proceed and to inform [the

defendant] of [plaintiff's] intent to seek a default.' Because the core purpose of this requirement is to ensure full disclosure of an impending conflict, nothing in Rule 4.3 or the Alaska commentary could conceivably bar such inquiry and notice." (footnote omitted); "The court nonetheless suggests possible problems arising from a sentence of commentary that appears in Model Rule 4.3; this Model Rule commentary warns: 'During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.' But Alaska's commentary to Rule 4.3 conspicuously omits this sentence of the Model Rule commentary, even though the Alaska rule incorporates the rest of Model Rule 4.3's commentary. Because the omitted commentary strays so far from the text of the Rule itself, Alaska's decision to omit the commentary is hardly surprising. Moreover, even if the Model Rule's comment did apply in Alaska, it would not advance the court's position, since a plaintiff's attorney who notifies a pro se defendant that the plaintiff intends to apply for a default cannot plausibly be deemed to be giving the kind of 'advice to an unrepresented litigant' that the commentary forbids." (emphasis added; footnotes omitted)).

- First Nat'l Bank of St. Bernard v. Assavedo, 764 So. 2d 162, 163, 164(La. Ct. App. 2000) (finding a debtor was not improperly given "advice" by an employee of the creditor's law firm, who suggested that the debtor call the bank; "The defendants- reconvenors- relators, the Assavedos, were sued by bank on a promissory note. Dolores Assavedo was served with the citation and petition. She telephoned the attorney for the bank to inquire about the lawsuit (apparently using the attorney's name and telephone number appearing on the petition). She did not reach the attorney himself but spoke instead to an unnamed employee in the attorney's law firm office. The law firm employee told Mrs. Assavedo to have her son, Lonnie Assavedo, call a Mr. Rodney Loar at the bank."; "We do not believe that the employee who told Mrs. Assavedo to have her son call the bank gave 'advice' within the meaning of Rule 4.3. The term 'advice,' in the legal context, contemplates something of more substance than occurred in the discussion between the law firm employee and Dolores Assavedo in the present case. In this case, all that occurred of substance (allegedly) was later discussion between the bank employee and the Assavedos. Further, it is neither unusual nor undesirable for debtors to negotiate directly with their creditors without the intervention of counsel, so it cannot be said that the law firm acted maliciously. If the bank employee did act improperly, that was not the fault of the law firm employee. Also, Mrs. Assavedo sought to discuss the bank's lawsuit and, in terms of attorneys not taking advantage of unrepresented lay persons (the apparent policy of Rule 4.3), it probably was best that the law office directed Mrs. Assavedo to the bank rather than the law office dealing more extensively with Dolores Assavedo.").

Best Answer

The best answer to this hypothetical is **(B) PROBABLY NO**.

B 10/15

Preparing Legal Documents for Unrepresented Persons' Signature

Hypothetical 4

You represent the wife in a divorce case. The husband has not retained a lawyer. You plan to communicate with the husband, and explain to him that you represent his wife. You would also like to send him a property settlement agreement, and ask him to sign it.

May you ask an unrepresented person to sign legal documents as long as you describe your role in representing the adversary?

(A) YES

Analysis

The 1908 ABA Canon dealing with lawyers' communications with unrepresented persons did not address those lawyers' preparation of documents for presentation to the unrepresented persons. ABA Canons of Professional Ethics, Canon 9.

In 1933, an ABA legal ethics opinion indicated that lawyers could prepare settlement papers for presentation to and signing by an unrepresented person.

- ABA LEO 102 (12/15/33) ("A member of the Association requests an opinion from the committee on the following question: 'Under the Workmen's Compensation Law of this state, compromise and lump sum settlements must be made on the joint petition of the employee and employer and with the approval of a court of competent jurisdiction. In rare instances is the employee ever represented by an attorney. Usually, the attorney for the employer, or the employer's insurer, prepares the petition, agreement of settlement and judgment; the employee appears in proper person and the employer through his or its attorney. Is it unethical or professionally improper for the attorney to so act?' . . . The question presented is not difficult to answer as to professional propriety. Cannon 9, among other things, provides, 'It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law.' It is not professionally improper for the master's attorney to prepare settlement papers between master and servant

> in a personal injury claim of the servant where the statute compensating the servant for personal injuries provides that compensation for the injury may be made in a lump sum settlement on the joint petition of the master and servant, and approved by a court of competent jurisdiction. When the servant has no attorney, and the master's attorney is called upon by the master to prepare the papers to effectuate the agreed settlement, the attorney in drafting the settlement papers should refrain from advising the servant about the law, and particularly must avoid misleading the servant concerning the law or the facts. The attorney also should advise the court that he represents the master, or insurer; that he has prepared the papers in settlement, which had theretofore been agreed upon between the master and the servant; that the servant has no counsel; and that the servant is present in court in proper person. Within these limitations, the committee sees no professional impropriety in an attorney so acting." (emphases added)).

The 1969 ABA Model Code did not explicitly discuss lawyers' preparation of documents for presentation to unrepresented persons. ABA Model Code DR 7-104(A)(2).

A year after adopting the ABA Model Rules, the ABA took a narrow view of what lawyers could do in these circumstances.

- ABA Informal LEO 1140 (1/20/70) ("'What violation of professional ethics is involved in obtaining from a defendant in a domestic relations case a 'waiver' such as is widely used in (State)? Acopy [sic] of such waiver is attached.' The form in question waives the issuance of and service of summons, waives any right to contest the jurisdiction or venue of the court and agrees that the case be submitted to the court in term time or in vacation and without further notice to the defendant. The form also waives notice to take depositions and agrees that depositions may be taken at any time without notice and without formality. . . . If the party to whom the waiver is presented is not represented by counsel, then both the present Canon 9 and Disciplinary Rule 7-104(A)(2) would seem to prohibit the procedure regarding which you have inquired. . . . It is, therefore, the opinion of the Committee under both the present Canons of Ethics and the Code of Professional Responsibility that a violation of proper ethical conduct would be involved in the procedure which you describe." (emphasis added)).

Approximately two years later, the ABA reaffirmed its earlier position, despite a new "no-fault" divorce statute.

- ABA Informal LEO 1255 (12/15/72) (Reconsideration of 1140) ("On July 6, 1972, the Legislature enacted a new 'no-fault' divorce Act (S17, LB-820). You sent us a copy of a form of 'Appearance and Responsive Pleading of Respondent' which has been prescribed by the Supreme Court of under Section 7 of said Act which directed the Supreme Court to prescribe the form of all pleadings required by the Act. Neither the Act nor the Court gave any instruction with regard to the subject of your inquiry: i.e., whether it is ethical to submit or to mail such an Appearance and Responsive Pleading to the other party in a domestic relations case for signature where that other party is not represented by an attorney, if the respondent is simultaneously advised to see the attorney of his choice and the plaintiff's attorney knows of no contested issue. You noted that this appears to be unethical under our Informal Opinion 1140 and ask that we reconsider that Opinion in the light 'of the enclosed pleading prepared by the Supreme Court . . . .' Since, on the facts you state, a Responsive Pleading is involved the plaintiff's lawyer would be improperly advising both parties. The fact that the Court prescribed the form of the Responding Pleading is irrelevant to the issue you present. The question is now before us whether in such a case a plaintiff's lawyer may properly submit to the respondent for signature a waiver of the issuance and service of the summons and complaint and entry of appearance. Your suggestion that in some such instances 'there was really nothing being contested' does not meet the requirement of Disciplinary Rule 7-104(A)(2) that an attorney should not represent both parties even if there is 'a reasonable possibility of . . . conflict' of interests. In our judgment the practice of the plaintiff's lawyer submitting such a pleading to an unrepresented defendant for signature in a domestic relations case is susceptible of abuse and is unethical." (emphasis added)).

About three months later, the ABA backed off a bit from its earlier position, separating prohibited legal advice from the permissible forwarding of documents to an unrepresented person for signature.

- ABA Informal LEO 1269 (5/22/73) ("Our Informal Opinion 1255, dated December 15, 1972, advised your partner that in the opinion of the Committee it would be subject to abuse and unethical for an attorney to submit or mail an appearance and responsive pleadings to the other party in a domestic relations case for signature where the other party is not represented by an attorney. We also reaffirmed Informal Opinion 1140. The preparation and submission of responsive pleadings to an unrepresented party would in the opinion of the Committee constitute the giving of advice in contravention of DR 7-104(A)(2). Your letter of January 6, 1973, now raises the question of whether it would be proper for plaintiff's counsel in a domestic relations case to submit to an unrepresented defendant for signature a waiver

> of the issuance and service of summons and the entry of an appearance. As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with an unrepresented party and, accordingly, would be ethical and proper as not being violative of the prohibitions of the Code." (emphasis added)).

The 1983 ABA Model Rules did not explicitly address lawyers' preparation of documents. ABA Model Rule 4.3.

The 2000 Restatement permits lawyers to prepare transactional documents for unrepresented persons' signature.

> In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer . . . . The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role.

The Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000) (emphasis added). An illustration confirms this approach.

> Lawyer represents Insurer in a wrongful-death claim asserted by Personal Representative, who is not represented by a lawyer. The claim concerns the death of Decedent assertedly caused by an insured of Insurer. Under applicable law, a settlement by Personal Representative must be approved by a tribunal. Personal Representative and Insurer's claims manager have agreed on a settlement amount. Lawyer prepares the necessary documents and presents them to Personal Representative for signature. Personal Representative, who is aware that Lawyer represents the interests of Insurer, asks Lawyer why the documents are necessary. Lawyer responds truthfully that to be effective, the documents must be executed and filed for court approval. Lawyer's conduct is permissible under this Section.

The Restatement (Third) of Law Governing Lawyers § 103 illus. 1 (2000) (emphasis added).

A Restatement reporter's note expressly indicates that the Restatement rejects some states' prohibition on preparing such documents.

> Some authorities interpret their lawyer code to prohibit a lawyer from preparing substantive legal documents for the unrepresented nonclient's signature -- again, a position not followed here.

The Restatement (Third) of Law Governing Lawyers § 103 reporter's note cmt. b (2000).

In 2002, the ABA revised ABA Model Rule 4.3. Among other things, a new comment explicitly permits lawyers to prepare documents for unrepresented persons.

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2] (emphasis added).

Most states seem to follow the new ABA Model Rule approach, which permits lawyers' preparation of documents for unrepresented persons' signatures.

Several North Carolina legal ethics opinions reflect the general trend in favor of lawyers' document preparation in such settings.

A 2003 North Carolina legal ethics opinion adopted a per se prohibition on lawyers preparing demonstrably harmful pleadings for unrepresented persons' signatures.

- North Carolina LEO 2002-6 (1/24/03) ("The Ethics Committee has been asked, on a number of occasions, whether a lawyer representing one spouse in an amiable marital dissolution may prepare for the other, unrepresented, spouse simple responsive pleadings that admit the allegations of the complaint. It is argued that, if this practice is allowed, the expense of additional legal counsel will be avoided and the proceedings will be expedited. The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an 'acceptance of service and waiver' form waiving the defendant's right to answer the complaint. . . . The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel." (emphasis added)).

Two lengthy 2015 North Carolina legal ethics opinions issued on the same day take a more subtle approach.

The first legal ethics opinion explained that lawyers may prepare pleadings for an unrepresented persons' signature and filing unless the pleadings would amount to relinquishment of the unrepresented persons' "significant rights."

- North Carolina LEO 2015-1 (4/17/15) (explaining that lawyers may prepare court documents for unrepresented adversaries, but not if the documents amount to providing legal advice to the adversaries or if the documents involve the adversaries relinquishing "significant rights"; "The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party."; "However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if

the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of 'means' that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer must avoid using tactics that intimidate or harass the unrepresented opposing party." (emphasis added); "In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document." (emphasis added); "[A] lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel." (emphasis added); "A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the

unrepresented opposing party to relinquish significant rights without obtaining some benefit." (emphasis added); "Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above." (emphasis added)).

On the same day, another North Carolina legal ethics opinion similarly tried to "thread the needle" in connection with lenders' lawyers' preparation of foreclosure waiver documents for unrepresented mortgage borrowers.

- North Carolina LEO 2015-2 (4/17/15) (explaining a lender's lawyer may prepare and obtain a signature from an unrepresented borrower on a waiver of foreclosure notice and right to a foreclosure hearing, unless the waiver was part of the borrower's primary residence mortgage's loan modification package; noting that "[i]t is common practice for lenders dealing with defaulted loans in excess of $100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement" -- which allow the borrowers to waive the right to notice and hearing in a non-judicial foreclosure; posing the question as follows: "May a lawyer who represents the lender on a debt of $100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice of Parties for execution?"; answering as follows: "Yes, provided the lawyer complies with the requires of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (Dealing with Unrepresented Persons). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower."; noting the North Carolina Bar's earlier application of Rule 4.3; "The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice."; also noting that North Carolina LEO 2002-6 (1/24/03) and other earlier legal ethics opinions "held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party"; ultimately approving the lender's lawyer's preparation of the

waiver documents; "Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the lender's lawyer may draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested."; noting an exception to this general rule; "There is an exception to this holding in the consumer context. When the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person -- the borrower's right to notice of foreclosure upon default on the new or modified loan -- and there is a substantial risk that an unsophisticated, distressed borrower will not understand this."; also concluding that the analysis would be the same if the lawyer prepared and delivered the waiver "in conjunction with other lender prepared documents"; "Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender's lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.") (emphases added)

Best Answer

The best answer to this hypothetical is **(A) YES**.

B 10/15 1/16

Application to Prosecutors

Hypothetical 5

In your new position as a prosecutor, you have been increasingly dealing with undocumented immigrant defendants. Some of them do not have lawyers, and you wonder whether you can propose plea agreements to unrepresented criminal defendants if their acquiescence to the agreement would render them vulnerable to deportation.

What do you do?

(A) You must disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.

(B) You may disclose to the undocumented immigrant the risks of acquiescing to the plea agreement, but you don't have to.

(C) You may not disclose to the undocumented immigrant the risks of acquiescing to the plea agreement.

(A) YOU MUST DISCLOSE TO THE UNDOCUMENTED IMMIGRANT THE RISKS OF ACQUIESCING TO THE PLEA AGREEMENT

Analysis

The ABA Model Rules have always recognized that prosecutors' duties differ in at least some ways from lawyers in other contexts.

ABA Model Rule 3.8 is entitled "Special Responsibilities of a Prosecutor," and lists some of those different duties. And ABA Model Rule 3.8 cmt. [1] articulates the conceptual basis for the different duties.

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

ABA Model Rule 3.8 cmt. [1].

In addressing prosecutors' communications with unrepresented persons, ABA Model Rule 3.8(c) provides that

> The prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

ABA Model Rule 3.8(c). A comment provides additional guidance.

> In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

ABA Model Rule 3.8 cmt. [2].

Not surprisingly, the country's focus on undocumented immigrants implicates ethics principles.

One of the complicating factors involves federal statute defining "deportable" aliens those convicted of a broad series of crimes, including state crimes.

> Any alien who -- (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

8 U.S.C. § 1227(a)(2)(A)(i)(I-II) "Moral turpitude" standard can be very difficult to analyze.

The key United States Supreme Court case comes from the private side, not the prosecutorial side. In Padilla v. Kentucky, the United States Supreme Court held that a

private lawyer provided ineffective assistance of counsel by not advising his client who faced deportation by pleading guilty in a marijuana-related offense.

- Padilla v. Kentucky, 559 U.S. 356, 359-60 & n.1 (2010) ("Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. . . . Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "'did not have to worry about immigration status since he had been in the country so long.'" . . . . Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney. Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction. . . . In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief. We granted certiorari . . . to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

Since Padilla, courts have set aside undocumented immigrants' sentences based on such ineffective assistance of counsel claims.

- Xia v. United States, Nos. 14-CV-10029 & 12-CR-934-9 (RA), 2015 U.S. Dist. LEXIS 94058, at *1, *10-11, *11, *11-12, *13, *13-14 (S.D.N.Y. July 20, 2015) ("Shu Feng Xia, a noncitizen now serving a sentence of a year and a day after pleading guilty to conspiracy to commit immigration fraud, moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Although he makes many arguments in support of his motion, Xia's principal

claim is that his counsel was constitutionally ineffective for failing to direct the Court's attention to the deportation consequences of a sentence of one year or more. Xia argues that a sentence of less than a year -- that is, even two fewer days than what he received -- would have prevented him from being designated an 'aggravated felon' under federal immigration law and thus could have saved him from mandatory deportation. For the reasons that follow, Xia's motion will be granted."; "Beginning in the mid-1980s, Congress enacted a series of laws that have increasingly favored the deportation of noncitizens who commit crimes. . . . The Supreme Court has recognized that these changes in the law 'have dramatically raised the stakes of a noncitizen's criminal conviction.' Padilla v. Kentucky, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)."; Padilla thus recognized that the Sixth Amendment guarantee of the effective assistance of counsel requires that a lawyer 'inform her client whether his plea carries a risk of deportation.'" (citation omitted); "The question in this case concerns not convictions (resulting from guilty pleas or otherwise), but sentencing -- the second of the twin triggers that can lead to a noncitizen's deportation for committing a crime. Specifically, the question is whether the Sixth Amendment's guarantee of the effective assistance of counsel requires that a noncitizen's lawyer inform the sentencing judge that a given sentence carries an increased risk of deportation. On the facts of this case, the answer must be yes."; "Padilla makes plain that criminal defense attorneys cannot reasonably be tasked with the responsibility of becoming immigration law experts. Where, however, the adverse deportation consequences of a particular sentence are 'truly clear,' the logic of Padilla instructs that the obligation to alert a sentencing judge to those consequences is 'equally clear.'" (citation omitted); "This case falls into the latter category. While counsel did apprise the Court that Xia faced deportation, he characterized that prospect as certain, leading the Court to believe that the exercise of its discretion in imposing sentence had no bearing on the likelihood of Xia's deportation. That characterization was mistaken, and the Government does not now contend otherwise. As explained below, 'the terms of the relevant immigration statute are succinct, clear, and explicit,'. . . in providing that the risk of deportation for someone in Xia's shoes is directly affected by the term of his sentence -- with the one-year mark serving as a bright line between possible deportation and certain deportation. As a consequence of counsel's failure to draw the Court's attention to that unambiguous provision of federal immigration law, Xia now faces mandatory removal when he might have avoided it. And because he has established that his sentence would likely have been lower had the Court been told of that consequence, his sentence must be set aside.").

Not surprisingly, some of these ineffective assistance claims have failed.

- Wisconsin v. Ortiz-Mondragon, 866 N.W.2d 717, 720-21 (Wis. 2015) ("We conclude that Ortiz-Mondragon is not entitled to withdraw his no-contest plea

> to substantial battery because he did not receive ineffective assistance of counsel. Specifically, his trial counsel did not perform deficiently. Because federal immigration law is not 'succinct, clear, and explicit' in providing that Ortiz-Mondragon's substantial battery constituted a crime involving moral turpitude, his attorney 'need[ed] [to] do no more than advise [him] that pending criminal charges may carry a risk of adverse immigration consequences.' See Padilla [v. Kentucky, 559 U.S. 356, 369 (2010)]. Ortiz-Mondragon's trial attorney satisfied that requirement by conveying the information contained in the plea questionnaire and waiver of rights form -- namely, that Ortiz-Mondragon's 'plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.' Counsel's advice was correct, not deficient, and was consistent with Wis. Stat. § 971.08(1)(c) (2011-12). In addition, Ortiz-Mondragon's trial attorney did not perform deficiently by failing to further research the immigration consequences of the plea agreement. Because Ortiz-Mondragon failed to prove deficient performance, we do not consider the issue of prejudice." (footnote omitted)).

Prosecutors also have to deal with this issue. Specifically they must determine if they may enter into plea agreements with undocumented immigrants without disclosing the possible effect on the undocumented immigrants' status in the United States. This can be very complicated, because many state offenses can trigger deportation.

> State criminal offenses that trigger mandatory deportation include, for example, a shoplifting offense with a one year suspended sentence; misdemeanor possession of marijuana with the intent to sell; or sale of counterfeit DVDs with a one year suspended sentence.

Heidi Altman, Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants, 101 Geo. L.J. , 10-11 (footnotes omitted. This article described many states' requirement that judges disclose the deportation implication of a plea bargain -- but argued for a similar obligation by prosecutors.

> Prior to Padilla, approximately half of the fifty states already had a statute on the books requiring judges to issue advisals regarding immigration consequences to noncitizen defendants entering a plea of guilty, and this number has subsequently increased. Judicial inquiries into immigration

> consequences of a plea or into counsel's advice regarding immigration consequences of a plea or into counsel's advice regarding immigration consequences demand scrutiny for various reasons. By engaging in inquiries into citizenship or immigration status, judges run the risk of compelling disclosure of privileged attorney-client communication or violating noncitizen defendants' Fifth Amendment right against self-incrimination. Apart from these legal considerations, there is the practical consideration that a nervous defendant taking a plea in front of a criminal judge will rarely be able to meaningfully process the many formalized warnings included in the plea colloquy. While these warnings may be administered in a way that is supportive of the spirit of Padilla, they are no replacement for meaningful advice by counsel.

Id. at 21 (footnotes omitted).

Some state legal ethics opinions impose such a requirement on prosecutors as an ethics mandate.

- Virginia LEO 1876 (3/19/15) (prosecutors aware that non-citizen defendants without court-appointed counsel in a court which does not conduct plea colloquies may not offer a plea deal in exchange for a guilty plea without advising the defendant to obtain legal advice, or request that the court conduct a colloquy, about the plea deal's deposition implications).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE TO THE UNDOCUMENTED IMMIGRANT THE RISKS OF ACQUIESCING TO THE PLEA AGREEMENT**.

B 10/15, 1/16

Negotiation/Transactional Adversaries' Misunderstanding of Clients' Intent

Hypothetical 6

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

(a) May you advise the adversary that you think that your case is worth $250,000, although you really believe that your case is worth only $175,000?

(A) YES

(b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

(A) YES (MAYBE)

(c) Your client (the defendant) has instructed you to accept any settlement demand that is less than $100,000. If the plaintiff's lawyer asks "will your client give $90,000?," may you answer "no"?

MAYBE

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless

statements of intent and wrongful statements of fact. Most authorities label the former "puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

> [i]n the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

> A lawyer is required to be truthful when dealing with others on a client's behalf, <u>but generally has no affirmative duty to inform an opposing party of relevant facts.</u>

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. <u>Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or</u>

> value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.[1]

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

> A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law . . . . Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related

[1] ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

> communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

A 2015 California legal ethics opinion distinguished between statements that amount to harmless "puffery" and those that cross the line into knowing misrepresentations.

Some statements obviously violate the ethics rules, because they involve demonstrably false statements of objectively provable facts.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff's wage loss claim. Attorney tells the settlement officer that Plaintiff was earning $75,000 per year, which is $25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does." (emphasis added); "Attorney's statement that Plaintiff was earning $75,000 per year, when Plaintiff was actually earning $50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney's statement constitutes an improper false statement and is not permissible." (emphasis added)).

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is $50,000. In fact, Defendant has a $500,000 insurance policy." (emphasis added); "Defendant's lawyer's inaccurate representations regarding Defendant's policy limits is an intentional misrepresentation of fact intended

> to mislead Plaintiff and her lawyer. See Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] (plaintiffs 'reasonably relied on the coverage representations made by counsel for an insurance company'). As with Example Number 1, above, Defendant's lawyer's intentional misrepresentation about the available policy limits is improper." (emphasis added)).

Some statements are also demonstrably false, but seem somewhat less objective than the easily analyzed misstatements.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In the settlement conference brief submitted on Plaintiff's behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness's account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness's credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident." (emphasis added); "Attorney's misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having the Defendant rely on them. The attorney has no factual basis for the statements made. Further, Attorney's misrepresentation is not an expression of opinion, but a material representation that "a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . ." (Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115], quoting Rest.2d Torts § 538). Thus, Attorney's misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a) . . ., and Business and Professions Code section 6106 . . ., which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension." (emphasis added)).

The existence of an eyewitness can be proven true or false. The question would presumably be closer if the lawyer directly testified that an eyewitness saw the accident,

but stretched a bit when proclaiming to the adversary that the eyewitness will support the lawyer's client's version of the facts.

The 2015 California legal ethics opinion also included an illustration of classic permissible "puffery."

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted puffery; "While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's 'bottom line' settlement number. Plaintiff advises Attorney that Plaintiff's 'bottom line' settlement number is $175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney says, 'Plaintiff needs $375,000 if you want to settle this case.'" (emphasis added); "Statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or 'puffery,' are among those that are not considered verifiable statements of fact. A party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise. Here, Attorney's statement of what the client will need to settle the matter is allowable 'puffery' rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Client's 'bottom line' settlement number." (emphasis added)).

The California legal ethics opinion also analyzed a statement that could fall into either category, depending on the facts.

- California LEO 2015-194 (2015) (finding that a lawyer's threat of bankruptcy when bankruptcy was not available to the client constituted an impermissible false representation of fact; "Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy." (emphasis added); "Whether Defendant's lawyer's representations regarding Defendant's plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant's lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally

> eligible to file for bankruptcy. A statement by Defendant's lawyer that expresses or implies that Defendant's financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different[,] however, if Defendant's lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge." (emphasis added)).

The California legal ethics opinion's analysis left two issues unaddressed. First, one might think that the defendant's lawyer could ethically state that the defendant intends to declare bankruptcy -- even if a creditor could seek to have the bankruptcy action dismissed or could resist the discharge of any judgment. As long as the bankruptcy filing was not frivolous, one might think that the adversary's ability to challenge the filing (and even have it dismissed) would not prevent the filing itself. Every bar seems to take the position that a plaintiff can file a knowingly time-barred claim, even if the defendant could easily rely on the statute of limitations in seeking the action's dismissal. Perhaps that basic principle does not apply in the bankruptcy setting, but the California Bar could have explained why.

Second, the California legal ethics opinion indicated that its "conclusion may be different" if defendant's lawyer "does not know whether or not his client intends to file for bankruptcy." Id. In that scenario, one might wonder how the defendant's lawyer could "state[] that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict." Id. Lawyers generally cannot make such a definite statement if the defendant has not authorized it.

(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

> It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for

> one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

An ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

> For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $ 200, when, in reality, it is willing to accept as little as $ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.
>
> A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier

> with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

> [S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

> In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

> Assume that the defendant has instructed his lawyer to accept any settlement offer under $100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think $90,000 will settle this case. Will your client give $90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of $90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

> It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the

> other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

Best Answer

The best answer to **(a)** is **(A) YES**; the best answer to **(b)** is **(A) MAYBE YES**; the best answer to **(c)** is **MAYBE**.

B 8/11, 1/15, 10/15, 2/16

Negotiation/Transactional Adversaries' Legal Misunderstanding

Hypothetical 7

You are trying to settle a complex case involving both automobile liability policies and workers compensation coverage. The lawyer representing your adversary clearly does not understand her client's right to subrogation in connection with proceeds of an uninsured motorist policy. You conclude that she does not understand the law in this area.

What do you do?

(A) You must disclose the adverse law to your adversary.

(B) You may disclose the adverse law to your adversary, but you don't have to.

(C) You may not disclose the adverse law to your adversary, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY, UNLESS YOUR CLIENT CONSENTS

Analysis

Lawyers sometimes assess whether they must or may disclose protected client information to correct a negotiation/transactional adversary's misunderstanding about the law. Although ethics rules and authorities have debated knowledge of the law's protection under ABA Model Rule 1.6 and other confidentiality rules, the issue is largely mooted by the majority approach concluding that lawyers generally have no duty to correct adversaries' misunderstanding of the law that was not induced by some misrepresentation.

Not surprisingly, bar groups and others which stress lawyers' confidentiality duty deemphasize or even prohibit lawyers' disclosure of some legal development that benefits the adversary but harms the client.

For instance, in the run-up to the ABA's 1983 adoption of its ABA Model Rules, the American Trial Lawyers issued its own proposed ethics principles. One example indicated that a lawyer representing a real estate buyer would violate the ethics rules by advising the seller about a zoning change (successfully sought by that lawyer) that would obviously have increased the real estate's value.

> A lawyer represents a client negotiating the purchase of real estate. During negotiations, the parties and their lawyers discuss the adverse effect of existing zoning restrictions, which prevent commercial development of the property. Just prior to formalizing an agreement of sale, however, the buyer learns that his lawyer has persuaded the zoning board to change the zoning to permit commercial use. The buyer decides not to tell the seller about the imminent zoning change. The buyer's lawyer would commit a disciplinary violation by informing the seller.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, illus. 1(d), Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Most authorities hold lawyers do not have a duty to disclose adverse law to a negotiation adversary.

- Philadelphia LEO 2005-2 (4/2005) ("The inquirer represents a truck driver who suffered serious injuries in a motor vehicle accident during the course of his employment. The driver of the other vehicle was at fault. The inquirer pursued three sources of recovery for the client: (1) workers compensation benefits; (2) a third party claim against the driver of the other vehicle who has a policy limit of $25,000, and (3) underinsured motorist benefits with a policy limit of $100,000. The workers compensation insurer is paying lost wage and medical benefits. The insurance company for the other driver has tendered

the $25,000 policy limit. Inquirer has not yet settled the underinsured motorist claim, but inquirer believes that the full $100,000 will be offered to the client. The workers compensation insurance adjuster, in discussing with the inquirer the workers compensation subrogation lien, limited the discussion of the lien to the $12,000 net proceeds to the client from the third-party action and stated that there could be no subrogation lien in the underinsured motorist action. This, according to the inquirer, is wrong as a matter of law. In fact, according to the inquirer, workers compensation carriers have the right to a subrogation lien in the proceeds of an uninsured motorist action. The inquirer's question is whether he or she has an ethical obligation to disclose to the workers compensation insurance adjuster that the law permits the carrier to have a subrogation lien in the proceeds from the underinsured motorist claim. Of course, if inquirer made this disclosure, the adjuster would demand a share of the client's recovery from the underinsured motorist claim. Pennsylvania Rule of Professional Conduct 4.1 (the 'Rules') does not compel disclosure because the inquirer has not made a false statement of material fact or law. The omission at issue, i.e., the failure to correct the mistake of law, is not the kind of false statement Rule 4.1 would prohibit. Furthermore, the committee concludes that Rule 8.4's prohibition of dishonesty, fraud, deceit or misrepresentations does not require the correction of the adjuster's mistake of law. Finally, Rule 3.3 does not compel disclosure because there have been no representations of law made to a tribunal in the facts presented. For these reasons, the committee has concluded that the inquirer has no ethical duty to comment on the adjuster's mistake of law." (emphasis added).

- ABA LEO 387 (9/26/94) (posing the following question: "Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?"; answering as follows: "[T]he lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations").

- Rhode Island LEO 94-40 (7/27/94) ("The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law. . . . A lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated." (emphasis added)).

As in other areas, courts tend to be more result-driven, and occasionally recognize such a duty.

- Hamilton v. Harper, 404 S.E.2d 540, 542 n.3, 544 (W. Va. 1991) (invalidating a settlement agreement in which plaintiff's lawyer accepted a $100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide's possible liability; "While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons' attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons' counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal."; finding that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct.).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY, UNLESS YOUR CLIENT CONSENTS**.

B 1/15, 10/15

Negotiation/Transactional Adversaries' Factual Misunderstanding

Hypothetical 8

On behalf of your client, you just made a $100,000 offer to buy land from a farmer and his wife (who are represented by an unsophisticated lawyer). You know that the farmer thinks that your client's offer contains a provision under which your client would assume an existing mortgage -- although the offer does not.

What do you do?

(A) You must disclose the absence of the provision.

(B) You may disclose the absence of the provision, but you don't have to.

(C) You may not disclose the absence of the provision, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE ABSENCE OF THE PROVISION, UNLESS YOUR CLIENT CONSENTS (MAYBE)

Analysis

The ABA Model Rules recognize a limited duty by lawyers to correct a negotiation adversary's misunderstanding not resulting from the lawyer's or the client's factual misstatements.[1]

> In the course of representing a client a lawyer shall not knowingly:

[1] Authorities agree that lawyers must correct their own misstatements or their client's misstatements that might mislead a transactional counterparty. Restatement (Third) of Law Governing Lawyers § 98 cmt. d (2000) ("A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. . . . Disclosure, being required by law . . . , is not prohibited by the general rule of confidentiality . . . . Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement."); Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, ABA Litigation Ethics 1 (Summer 2005) (explaining that a lawyer learning that her client had lied to a transactional counterparty must correct the client's lie before consummating a settlement).

> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1(b).

Comment [1] provides some explanation.

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

The Restatement deals in several places with a lawyer's silence in the face of a negotiation/transactional adversary's misunderstanding of facts.

In one section, the Restatement explains that

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
>
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a

> writing, evidencing or embodying an agreement in whole or in part.
>
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of the Law (Second) Contracts, § 161 (1981). A comment sets a fairly high disclosure duty.

> One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief . . . . In the case of standardized agreements, these rules supplement that of § 211(3), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

Restatement of the Law (Second) Contracts, § 161 cmt. e (1981).

The Restatement includes an illustration of this concept.

> A, seeking to induce B to make a contract to sell a tract of land to A for § 100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage, and he knows that it does not contain such a provision but does not disclose this to B. B signs the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164. Whether, at the request of B, the court will decree that the writing be reformed to add the provision for assumption is determined by the rule stated in § 166.

Restatement of the Law (Second) Contracts, § 161 cmt. e, illus. 12 (1981).

Another Restatement section states a more obvious rule -- requiring lawyers to comply with any legal compulsion requiring disclosure of facts.

> A lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law.

Restatement (Third) of Law Governing Lawyers § 98(3) (2000).

A Restatement comment bluntly states that

> In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Bars and courts have taken differing positions on a lawyer's duty in this setting.

Some states have seemingly increased lawyers' disclosure obligation by removing the confidentiality reference. For instance, Virginia's Rule 4.1(b) indicates as follows:

> [i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Virginia Rule 4.1(b). Deleting the phrase "unless disclosure is prohibited by Rule 1.6" removes the confidentiality duty's ability to "trump" the disclosure duty.

Most authorities go the other way -- requiring lawyers to stay silent in the face of an adversary's factual misunderstanding that the lawyer or the lawyer's client did not induce.

For instance, a 1965 ABA legal ethics opinion emphasized lawyers' duty of confidentiality in describing lawyers' approach to negotiations.

- ABA LEO 314 (4/27/65) (explaining that lawyers who learn that their clients have provided false information to the IRS may withdraw, but may not disclose the client's deception, because the IRS is not a tribunal; "The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it."; "The Internal Revenue Service is neither a true tribunal, nor even a quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute."; "The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances."; "Fundamentally, subject to the restrictions of the attorney-client privilege imposed by Canon 37 [emphasizing "the duty of a lawyer to preserve his client's confidences"], the lawyer may have the duty to withdraw from the matter. If for example, under all circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very fact of disassociation would have the effect of violating Canon 37. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer." (emphasis added); withdrawn in ABA LEO 352 (7/7/85), which explained the criticism of ABA LEO 314's position that lawyers may take positions with the IRS "just as long as there is a reasonable basis" for doing so; concluding that lawyers "may advise reporting a position on a [tax] return" even though the lawyer "believes the position probably will not prevail," there is no "substantial authority" supporting the position -- as long as the position satisfies ABA Rule 3.1's requirement that lawyers may assert a position "which includes a good faith argument for an extension, modification or reversal of existing law.").

A thoughtful 1980 article published by the American Bar Foundation bluntly stated that all settlement negotiations involve deception.

> On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in

> a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 927 (1980).

Thus, some ethics opinions take a narrow view of lawyers' duty to correct a negotiating counterparty's misunderstanding.

- N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (holding that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure; "A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead. If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction." (emphases added); "It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.").

- New York County LEO 686 (7/9/91) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is

still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.").

Some ethics opinions seem to require such disclosure. A 2015 California legal ethics opinion presented one scenario in which a lawyer would violate the ethics rules by failing to disclose a material fact unknown to the adversary. The scenario involved a lawyer scheduling settlement negotiations in an unemployed client's case against a former employer seeking lost wages, among other things. In the Bar's scenario, the lawyer deliberately scheduled the settlement negotiations the day before the client was to begin a new job, which allowed the client and lawyer to honestly say to the adversary that the client was still unemployed. However, the Bar explained that a wage-loss claim assumes continuing losses in the future -- which would be inconsistent with the lawyer's knowledge that the client would start a new job the next day.

- California LEO 2015-194 (2015) (finding that a lawyer making a true but misleading statement about a client's employment had a duty to disclose additional facts to avoid an impermissibly misleading statement to an adversary; "The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be $75,000.00. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component."; "This example raises two issues: the

failure to disclose the new employment, and client's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, assuming that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job, including in the list of Plaintiff's damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because the Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. See, e.g., Scofield v. State Bar (1965) 62 Cal.2d 624, 629 [43 Cal.Rptr. 825] (attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant, disciplined for making affirmative misrepresentations with the intent to deceive); Pickering v. State Bar (1944) 24 Cal.2d 141, 144 [148 P.2d 1] (attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)). Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client's instructions, rule 3-700(B)(2) requires withdrawal if an attorney's representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff's instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If the client refuses, Attorney must withdraw under rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Formal Opn. No. 2013-189; 8/ see also Los Angeles County Bar Association Opn. No. 520).").

Other bars have also indicated that lawyers in some situations must affirmatively disclose adverse facts to the adversary.

- Pennsylvania LEO 97-107 (8/21/97) (analyzing a settlement agreement that was premised on a client's inability to convey a timeshare by deed; explaining that after negotiating a settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the timeshare by deed; holding that the lawyer must disclose that fact; "Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I

> am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false." (emphasis added)).

Courts show the same dichotomy.

Some courts find that lawyers need not disclose adverse facts to an adverse party entering into settlement negotiations before the completion of discovery.

- Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").

- Brown v. County of Genesse, 872 F.2d 169, 173, 175 (6th Cir. 1989) (reversing a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement); first noting that "counsel for Brown could have requested this information from the County, but

neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct."; criticizing the lower court's analysis; "[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. 'An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to "fraud upon the court" for purposes of vacating a judgment under Rule 60(b).'" (emphasis added) (citation omitted); also noting that the county's lawyer was not certain that the claimant misunderstood the facts; "The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.").

In contrast, several courts either criticized, imposed liability, refused to dismiss cases or otherwise condemned lawyers who did not disclose adverse facts.

- Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28-29, 32 n.6, 33, 38 (Cal. Ct. App. 2004) (reversing a dismissal of a fraud action against Jones Day for representing a buyer in a corporate transaction who did not advise the seller of shares of a "toxic" financing deal that adversely affected the value of the shares in the new company that the seller obtained; affirming dismissal of a negligent misrepresentation claim against Jones Day, but declining to find against Jones Day on the fraud claim; noting in the description of the case that Jones Day won summary judgment in other similar cases against it; "A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his valuable stock in the acquired company for 'toxic' stock in the acquiring company. The law firm demurred. It contended it made no affirmative

misstatements and had no duty to disclose the terms of the third party investments to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction." (emphases added); "The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. . . . Since no positive assertions are alleged, other than the comments that the financing was 'standard' and 'nothing unusual,' no claim for negligent misrepresentation is stated."; "Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.'" (citation omitted) (emphasis added); "Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in MonsterBook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree."; "While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits.").

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735 (Conn. App. Ct. 2001) (suspending for five years a lawyer for making a true but misleading statement -- providing lenders copies of his tax return, but failing to explain that he had not actually paid the taxes; "As a condition to receiving the loans, the defendant provided Sanborn [mortgage company] and the Picards [couple whose property defendant purchased, who also made a $30,000 loan to him] with copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of $93,603 and a tax liability of $26,210. His 1993 federal income tax return stated that the adjusted gross income was $116,950, with a tax owing of $31,389."; "As of the date of the closing, however, the defendant had in fact not paid, not even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax obligations.").

- Neb. v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who knew that an unrepresented counterparty was unaware of a $1,000,000 insurance policy that the lawyer's client had available; "On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for $45,000 of the State Farm settlement of $100,000, and an additional $15,000 if and when Medina settled with Allstate, plus another $5,000 if the settlement proceeds from Allstate exceeded $40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent Addison."; "In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).").

- Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a $1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

In 1999, the District of New Mexico dealt with what the court found was "sharp practice." A plaintiff's lawyer, who had deliberately picked an effective date of a release knowing the release would not cover an additional claim that his client eventually asserted. The court held that the plaintiff had not acted unethically, but decried the unprofessional conduct.

> Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 640, 638, 640-41, 641 (D.N.M. 1999) (rejecting defendant's claim for sanctions based on "a material misrepresentation by Plaintiff's attorney as to why he sought the change in the effective date of the release in CIV 96-1472."; finding that defendant's argument procedurally defective; also finding plaintiff's claim for sanctions against defendant procedurally defective; describing the background of the

parties' competing claims for sanctions: "Defendant's counsel drafted the settlement documents in the prior action unaware of the CNMCF Warden's August 28, 1997 letter or Plaintiff's retaliation claim. As drafted, the effective date of the release was to be the date Plaintiff executed the document. On September 2, 1997, Plaintiff's counsel (Mr. Mozes) requested that the release be effective only through August 21, the date of the settlement conference. When questioned why, Plaintiff's counsel responded that such was his normal practice. Defendant contends that based on this representation, its counsel agreed to the request. Plaintiff's counsel discussed the change in a September 2, 1997 letter indicating that 'we will release the "State" up through the date of the Settlement Conference, August 21, 1997.'" (emphases added); "Although Rule 11(c)(1)(A) provides that 'if warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [for sanctions]' (emphasis added), the court does not believe that such fees are warranted, even in the face of Defendant's non-compliance with the safe-harbor provisions of Rule 11, because of the sharp practices engaged in by the Plaintiff's counsel."; "As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, 'it's a short road that doesn't have a bend in it.' The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. See 2 N.M. R. Ann. (1998), Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities ('As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.'); id. § 16-401 ('In the course of representing a client a lawyer shall not knowingly [] make a false statement of material fact or law to a third person.'); id § 16-804(C); ABA/BNA Lawyers' Manual on Professional Conduct, § 71:201 ('An omission of material information that is intended to mislead a third person may constitute a 'false statement.'). The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. See Restatement (Second) of Torts § 529 & cmt. A ('A statement containing a half-truth may be as misleading as a statement wholly false.') (1977)."; "What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse." (emphasis added); "Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while

trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE ABSENCE OF THE PROVISION, UNLESS YOUR CLIENT CONSENTS (MAYBE)**.

B 1/15, 2/15, 4/15, 10/15

Transactional Adversaries' Substantive Mistakes

Hypothetical 9

You are representing the seller in negotiating a complex transaction memorialized in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

What do you do?

(A) You must disclose the buyer's mistake.

(B) You may disclose the buyer's mistake, but you don't have to.

(C) You may not disclose the buyer's mistake, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

In some situations, a negotiation/transaction adversary makes a substantive mistake. For instance, the adversary might forget to ask for an indemnity in a situation which would normally call for an indemnity. Or the adversary might make changes in one part of a lengthy contract that has implications in another part of the contract, which the adversary does not realize. These mistakes differ from what might be considered drafting mistakes (sometimes called "scrivener's errors"), such as overlooking a necessary comma, or failing to include a provision that the negotiating parties agree to add to a contract, etc.

Courts and bars seem to agree that lawyers generally have no duty to transactional adversaries, other than to avoid fraudulent representations or asserting clients' misconduct.

In 2015, a Michigan appellate court vigorously rejected plaintiff's argument that she should be entitled to recover from defendant Progressive $28,000 to cover a hospital bill -- which arrived after she had given Progressive a full release in return for a $78,000 settlement on a personal injury claim. The court repeatedly blamed the plaintiff's predicament on her lawyer rather than defendant Progressive or its lawyer.

> When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. . . . Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge. . . . If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. . . . If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement. . . . Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her

> of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts. . . . Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.

Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-20 (Mich. Ct. App. Mar. 5, 2015)[1] (emphasis added).

[1] Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-4, *4-5, *5, *16, *19-20, *20 (Mich. Ct. App. Mar. 5, 2015) (analyzing efforts by a car accident plaintiff who settled her personal injury protection claim against defendant Progressive for $78,000 for which she gave Progressive a full release; noting that days after the settlement she received a $28,000 from the hospital at which she was treated, which was in addition to the surgeon's bill; explaining that plaintiff sought to void the settlement agreement because Progressive was aware of the hospital bill but that she was not aware of it at the time she settled with Progressive; reversing the trial court's order voiding the settlement; noting plaintiff's lawyer could have handled the settlement differently, but had failed to protect his client; "When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. There are many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the slate clean of any claims incurred prior to the date of settlement. But they did not do so. Instead, they settled for a complete waiver of claims for $78,000, and Progressive paid this sum to buy its peace and achieve finality in this litigation." (footnote omitted); "Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge." (footnotes omitted); "If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. And, were we to credit the theory that opposing counsel had a duty to notify plaintiff of the $28,000 charge, then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer. It is the obligation of plaintiff's attorney to ensure his client knows that a settlement, like the one at issue here, encompasses all claims. If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of

Other courts take the same approach, although perhaps without the vehement language.

- Lighthouse MGA, L.L.C. v. First Premium Ins. Grp., Inc., 448 F. App'x 512, 516, 517, 518 (5th Cir. 2011) (holding that the general counsel of a party in a transaction did not jointly represent the counterparty, and did not engage in an affirmative misrepresentation about a forum selection clause in the contract; concluding that the lawyer did not have a duty to tell the unrepresented counterpart about the forum selection provision; finding that the lawyer did not have a conflict under Rule 1.7; "Lighthouse's Director of Marketing has affirmed that the general counsel was 'the attorney for First Premium,' and there is no evidence in the record that the general counsel ever undertook to give legal advice to Lighthouse or purported to draft the contract on Lighthouse's behalf. As First Premium notes, even if Lighthouse subjectively believed that First Premium's general counsel was also Lighthouse's attorney, such a belief would not be reasonable." (footnote omitted); finding the lawyer did not violate Rule 4.3 by providing advice to an unrepresented party; "As First Premium notes, no authority supports Lighthouse's contention that First Premium's general counsel provided legal advice to Lighthouse merely by drafting the contract."; concluding that the lawyer did not violate Rule 8.4(c)); "There is no evidence that the general counsel made any false or misleading statements to Lighthouse. To the extent that Lighthouse's argument is based on the general counsel's failure to point out of explain the forum selection clause to Lighthouse, First Premium's general counsel did not have a fiduciary relationship with Lighthouse that would give rise to a duty to convey that information under Louisiana law.").

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settlement."; "Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts."; finding that the settlement did not result from a "mutual mistake," but rather because plaintiff's lawyer had not protected his client; "Here, plaintiff seeks to engage in exactly this sort of obligation shifting: because her trial attorney did not consider that she might face additional (and perhaps unknown) charges for PIP benefits incurred before November 5, 2013 -- i.e., the $28,942 Synergy billing -- she argues that Progressive had a duty to inform her of this billing during the settlement negotiation. Of course, Progressive has no such duty. Progressive, as a defendant in litigation, is in an adversarial position with plaintiff, and, as such, has every right to protect its interest and to expect that courts will uphold a settlement freely entered into by the parties. Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.").

- Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (holding that a lawyer did not have a duty of professional care to an unrepresented counterparty in a real estate transaction).

This hypothetical comes from a 2013 California legal ethics opinion. California LEO 2013-189 (2013)[2] started with a basic scenario:

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[2] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney.

> Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete.

California LEO 2013-189 (2013).

Scenario A involves an adversary's substantive mistake.

> Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about

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Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

> the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.

Id.

The legal ethics opinion started its analysis with a general statement:

> Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. (emphasis added). On the other hand,

> an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of this scenario:

> In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an

> affirmative duty to disclose the apparent error to Buyer's Attorney.

Id. (emphasis added).

Scenario B involved what would be considered an adversary's scrivener's error -- which raises different issues.

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**.

B 1/15, 10/15

Transactional Adversaries' Scrivener's Errors

Hypothetical 10

Since late yesterday afternoon, you have been furiously exchanging draft contracts with a transactional counterparty. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the office this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

(a) What do you do when dealing with your client?

(A) You must disclose the adversary's mistake to your client.

(B) You may disclose the adversary's mistake to your client, but you don't have to.

(C) You may not disclose the adversary's mistake to your client.

(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)

(b) What do you do when dealing with the adversary's lawyer?

(A) You must disclose the adversary's mistake to the adversary's lawyer.

(B) You may disclose the adversary's mistake to the adversary's lawyer, but you don't have to.

(C) You may not disclose the adversary's mistake to the adversary's lawyer, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER

Analysis

In some situations, lawyers or their clients make what could be called a scrivener's error. These differ from substantive mistakes, such as forgetting to negotiate a provision that would normally be found in a contract, etc.

A scrivener's error often involves a typographical mistake, a failure to highlight a change, etc. In today's fast-paced and electronic communication-intensive world, such mistakes can occur easily.

- Jim Carlton, Fresh Dispute Mars Bay Area Transit Deal, Wall St. J., Nov. 18, 2013 ("An unusual dispute threatens to undo a contract agreement between management and labor leaders of the Bay Area Rapid Transit (BART) system, raising the possibility of another crippling public-transit strike."; "The dispute centers on a provision in the contract that allows workers to take up to six weeks of paid family leave. Management says the provision was never agreed to and was left in as a result of a clerical error. Representatives of the two unions, Amalgamated Transit Union (ATU) Local 1555 and Service Employees International Union (SEIU) Local 1021, say BART negotiators were fully aware of it."; "Labor experts said that, while unusual, it isn't unprecedented for a dispute to arise over the terms of a labor contract after it has been ratified. 'There are a number of cases that arise in arbitration over the allegation that something is in the agreement as a result of a mutual mistake,' said William B. Gould IV, emeritus professor of law at the Stanford Law School and former chairman of the National Labor Relations Board."; "In the BART case, 'there is certainly some kind of screw-up,' Mr. Gould added. 'The question is really going to be, if they are unable to resolve this through discussion and negotiations, was this a mutual mistake?'").

- BBC News (Europe), Bank Clerk Falls Asleep On Keyboard And Accidentally Transfers £189 Million To Customer, June 10, 2013 ("A German labour court has ruled that a bank supervisor was unfairly sacked for missing a multi-million-euro error by a colleague who fell asleep during a financial transaction. The clerk was transferring 64.20 euros (£54.60) when he dozed off with his finger on the keyboard, resulting in a transfer of 222,222,222.22 euros (£189Million). His supervisor was fired for allegedly failing to check the transaction. But judges in the state of Hesse said she should have only been reprimanded.").

- Brad Heath, Small Mistakes Cause Big Problems, USA Today, March 30, 2011 ("If you're reading this in New York, you're probably too drunk to drive. That's because lawmakers accidentally got too tough with a get-tough drunken-driving law, inserting an error that set the standard for 'aggravated driving while intoxicated' below the amount of alcohol that can occur naturally. The one-word mistake makes the new law unenforceable, says Lieutenant Glenn Miner, a New York State Police spokesman. However, drivers with a blood-alcohol content of 0.08% or higher can still be prosecuted under other state laws. In the legislative world, such small errors, while uncommon, can carry expensive consequences. In a few cases around

the nation this year, typos and other blunders have redirected millions of tax dollars or threatened to invalidate new laws. In Hawaii, for instance, lawmakers approved a cigarette-tax increase to raise money for medical care and research. Cancer researchers, however, will get only an extra 1.5 cents next year -- instead of the more than $8 million lawmakers intended. That's because legislators failed to specify that they should get 1.5 cents from each cigarette sold, says Linda Smith, an adviser to Governor Linda Lingle."; "New York's mistake came in a bill meant to set tougher penalties and curb plea bargains for drivers well above the legal intoxication standard. Instead of specifying blood alcohol as a percentage, as most drunken-driving laws do, New York set its threshold as 0.18 grams --'so low you can't even measure it,' Miner says.").

- Anahad O'Connor, New York State Backs Remorseful Buyers at Rushmore Tower, The New York Times, April 9, 2010 ("Call it the multimillion-dollar typo. On Friday, the New York State attorney general's office ruled in favor of a group of buyers who were looking to back out of their multimillion-dollar contracts at The Rushmore, an expensive Manhattan condominium building along the Hudson River. The buyers found an unusual loophole -- a seemingly minor typo in a date in the densely worded 732-page offering plan -- and used it to argue that they deserved their hefty deposits back."; "In this case, the typo got in the way. Instead of stating that buyers had the right to back out if the first closing did not occur before September 1, 2009, the offering plan stated that buyers had the right to back out if the first closing did not occur before September 1, 2008, which was the first day of the budget year, not the last. Ultimately, the first closing took place in February 2009. The sponsors argued that they made a trivial mistake -- a typo that lawyers refer to as a 'scrivener's error' -- that should be overlooked. But the attorney general's office disagreed. It sided with the buyers.").

- Mizuho Securities Sues Tokyo Stock Exchange Over 41 Billion Yen Trade Fiasco, Kyodo News, Oct. 28, 2006 ("Mizuho Securities Company filed a lawsuit Friday against Tokyo Stock Exchange (TSE) Inc. at the Tokyo District Court for 41.5 billion yen in damages, claiming the bourse caused it huge losses when the TSE computer system failed to process a correction to an erroneous order the brokerage placed last December. The suit brought by Mizuho Securities, a unit of Mizuho Financial Group Inc., marks the first time a brokerage has sued the operator of the Tokyo Stock Exchange over equity trading. Last December, a Mizuho Securities clerk mistakenly entered a sell order for 610,000 shares in staffing company J-Com Company for 1 yen each. The actual order was one share for 610,000 yen. As soon as the brokerage noticed the mistake, it tried to withdraw the sell order but the TSE's computer system took time to process the cancellation order. Sources said earlier this month that Mizuho lost about 40.7 billion yen buying back all the shares from people who bought at the erroneous price and said the

brokerage has calculated 40.4 billion yen of that loss was due to a system failure at the TSE.").

- Grant Robertson, Comma Quirk Irks Rogers Communications, The Globe & Mail, Aug. 6, 2006 ("It could be the most costly piece of punctuation in Canada. A grammatical blunder may force Rogers Communications Inc. to pay an extra $2.13-million to use utility poles in the Maritimes after the placement of a comma in a contract permitted the deal's cancellation. The controversial comma sent lawyers and telecommunications regulators scrambling for their English textbooks in a bitter 18-month dispute that serves as an expensive reminder of the importance of punctuation. Rogers thought it had a five-year deal with Aliant Inc. to string Rogers' cable lines across thousands of utility poles in the Maritimes for an annual fee of $9.60 per pole. But early last year, Rogers was informed that the contract was being cancelled and the rates were going up. Impossible, Rogers thought, since its contract was iron-clad until the spring of 2007 and could potentially be renewed for another five years. Armed with the rules of grammar and punctuation, Aliant disagreed. The construction of a single sentence in the 14-page contract allowed the entire deal to be scrapped with only one-year's notice, the company argued. Language buffs take note -- Page 7 of the contract states: The agreement 'shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.'"; "Had it not been there, the right to cancel wouldn't have applied to the first five years of the contract and Rogers would be protected from the higher rates it now faces. 'Based on the rules of punctuation,' the comma in question 'allows for the termination of the [contract] at any time, without cause, upon one-year's written notice,' the regulator said. Rogers was dumbfounded. The company said it never would have signed a contract to use roughly 91,000 utility poles that could be cancelled on such short notice. Its lawyers tried in vain to argue the intent of the deal trumped the significance of a comma. 'This is clearly not what the parties intended,' Rogers said in a letter to the CRTC.").

- Gladwin Hill, For Want of Hyphen, N.Y. Times, July 27, 1962 ("The omission of a hyphen in some mathematical data caused the $18,500,000 failure of a spacecraft launched toward Venus last Sunday, scientists disclosed today. The spacecraft, Mariner I, veered off course about four minutes after its launching from Cape Canaveral, Florida, and had to be blown up in the air. The error was discovered here this week in analytical conferences of scientists and engineers of the National Aeronautics and Space Administration, the Air Force and the California Institute of Technology Jet Propulsion Laboratory, manager of the project for N.A.S.A. Another launching will be attempted sometime in August. Plans had been suspended pending discovery of what went wrong with the first firing. The hyphen, a

spokesman for the laboratory explained, was a symbol that should have been fed into a computer, along with a mass of other coded mathematical instructions. The first phase of the rocket's flight was controlled by radio signals based on this computer's calculations. The rocket started out perfectly on course, it was stated. But the inadvertent omission of the hyphen from the computer's instructions caused the computer to transmit incorrect signals to the spacecraft.").

Ethics authorities usually do not deal with such drafting errors, but rather with more substantive mistakes or misunderstanding.

(a) In 1986, the ABA explained that a lawyer in this situation did not have to advise a client of the adversary's scrivener's error.

- Informal ABA LEO 1518 (2/9/86) (analyzing the following situation: "A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance." (emphasis added); concluding that the lawyer must advise the adversary of the mistake but need not advise the lawyer's client of the mistake; "The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation. A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983)." (emphases added); "The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by A and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."; providing a further explanation in a footnote; "The delivery of the erroneous document is not a

'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer." (emphasis added); also analyzing the impact of ABA Model Rule 1.6, and the opinion's deliberate lack of an analysis if the client wanted to take advantage of the adversary's mistake; "Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion' -- in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to expl[oi]t the error.").

(b) The next question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA LEO 1518 (2/9/86). As explained above, the ABA concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

Predictably, courts have little patience with transactional or litigation adversaries' attempt to exploit a scrivener's error.

- Cadbury UK Ltd. v. Meenaxi Enterprise, Inc., Cancellation No. 92057280, Trademark Trial & Appeal Board,at 3, 4, 9, 10, 11, 13 (USTPO July 21, 2015) (compelling responses to document requests, and rejecting the recipient's delay in responding to the document requests based on requesting party's obviously incorrect designation of the entity from which it sought the document; "As to the merits, this dispute centers on a typographical error. Respondent concedes that it made a typographical error in its document requests, inadvertently referring in the preamble to Petitioner as 'Venture Execution Partners, Inc.,' instead of 'Cadbury UK Limited.'"; "Petitioner argues that the typographical error was a crucial mistake, the result of which is that the document requests were never directed to Petitioner."; "The isolated reference to Venture Execution Partners, Inc., was clearly a typographical error; it did not cause a matter of real confusion or misunderstanding. The motion to compel is the result of Petitioner's attorney apparently concluding, upon the discovery of a typographical error, that he had found an excuse to become pedantic, unreasonable, and uncooperative. The Board expects each party to every case to use common sense and reason when faced with what the circumstances clearly show to be a typographical error." (emphasis added); "Although the mistake of mentioning a third party in the preamble to Respondent's First Set of Requests for the Production of Documents and Things suggests that the document requests were modeled from another case in which Respondent or its prior counsel was involved, the refusal of Petitioner to provide any response to the requests is untenable. If Petitioner had any doubt as to the document requests, it should have contacted Respondent for clarification rather than simply refusing to respond."; "The Board expects that when there is an obvious and inadvertent typographical error in any discovery request or other filing -- particularly where, as here, the intended meaning was clear—the parties will not require the Board's intervention to correct the mistake." (emphasis added); "It also must be stressed that Petitioner's conduct has not demonstrated the good faith and cooperation that is expected of litigants during discovery. Such conduct has delayed this proceeding, unnecessarily increased the litigation costs of the parties, wasted valuable Board resources, and interfered with Respondent's ability and, indeed, its right, to take discovery. If Respondent perceives Petitioner as not having complied with the terms of this order, or can establish any further abusive, uncooperative, or harassing behavior from Petitioner, then Respondent's remedy will lie in a motion for entry of sanctions. Sanctions the Board can order, if warranted, may include judgment against Petitioner.").

- Stare v. Tate, 98 Cal. Rptr. 264, 266, 267 (Cal. Ct. App. 1971) (analyzing a situation in which a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement; noting that the husband nevertheless signed the settlement without notifying his former wife of the errors; explaining the predictable way in which the issue arose: "The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: 'PLEASE NOTE $100,000.00 MISTAKE IN YOUR FIGURES. . . .' The present action was filed exactly one month later."; pointing to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected."; revising the property settlement to match the parties' agreement).

A lawyer may even face bar discipline for trying to take advantage of an adversary's drafting error.

- Alan Cooper, Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 ("Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than $11,000, but the order switched the parties, and stated the man owed the money. McGarry's position was that the order had been entered and had become final. The judge later corrected the order. The VSB [Virginia State Bar] 8th District Disciplinary Committee issued a public reprimand without terms, citing the disciplinary rule that prohibits taking action that 'would serve merely to harass or maliciously injure another.' . . . The husband's attorney, Stacey Strentz, drafted the final order, but inadvertently said in it that the husband owed the sister the child's support arrearages. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia Code § 8.01-428.2. The provision is an exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill. Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. . . . On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected. He cited cases in support of his position that the findings of fact . . . did not support that conclusion. . . .

> The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false state[ment] of fact or law. Although McGarry said he believed the committee strayed across the line and considered a legal matter rather than an ethical one, he emphasized that he has no criticism of the committee. 'I don't want anybody to think I'm trying to re-chew this bitter cabbage,' he said."

In 2013, a California legal ethics opinion[1] dealt with a similar situation, although the lawyer seeking the opinion had made a scrivener's error by not highlighting a

[1] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's

change that the lawyer intended to point out to the transactional adversary as part of the negotiation process.

> After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

California LEO 2013-189 (2013) (emphasis added).

The legal ethics opinion started its analysis with a general statement:

> Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. On the other hand,

> an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of Scenario B:

> Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing. . . . Where an attorney has engaged in no conduct or activity that induced

> an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.

Id. (emphases added) (footnote omitted).

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Not all authorities agree that lawyers must disclose an adversary's mistake of this sort.

In 1989 a Maryland legal ethics opinion seemed to take the opposite position -- in an analogous situation.

- Maryland LEO 89-44 (1989) ("The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client?"; "[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears

> that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the transaction. In either case, Rule 5.1(a), based on these facts, does not require you to bring the omission to the other side's attention." (emphasis added)).

This situation fell somewhere between a pure scrivener's error (such as those discussed above) and a more substantive error such as failing to negotiate for an indemnity provision that most parties would normally have included in an agreement.

Best Answer

The best answer to **(a)** is **(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)**; the best answer to **(b)** is **(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER**.

B 1/15, 10/15

Transactional Adversaries' Post-Agreement Mistakes

Hypothetical 11

You generally represent plaintiffs in personal injury cases. Months ago, you reached a very complicated settlement arrangement with an insured defendant and its insurance company, which involves the latter making monthly payments to your client over the course of ten years. You told your client what payments to expect from the insurance company. After your client told you the first few checks from the insurance company exceeded what you told the client to expect, you determine that the insurance company apparently has miscalculated the amount it should pay under the complicated settlement agreement.

What do you do?

(A) You must disclose the miscalculation to the insurance company.

(B) You may disclose the miscalculation to the insurance company, but you don't have to.

(C) You may not disclose the miscalculation to the insurance company, unless your client consents.

(A) YOU MUST DISCLOSE THE MISCALCULATION TO THE INSURANCE COMPANY (PROBABLY)

Analysis

In some situations, adversaries make mistakes in implementing an agreement rather than during the negotiation process. Despite every parent's admonition to a child to give back any overpayment the child receives from a store clerk, lawyers' duties involve a more complicated analysis -- given lawyers' confidentiality duty.

Within just about a year of each other, two well-respected bar associations reached opposite conclusions about lawyers' duties in such a situation.

In 2006, the Philadelphia Bar pointed to several likely factors that would require lawyers to disclose overpayments to their clients.

- Philadelphia LEO 2006-2 (4/2006) (analyzing a lawyer's obligation to notify an insurance company that was overpaying the lawyer's client; analyzing the following scenario: "The inquirer represents an individual whose parents (now deceased) were allegedly victims of a fraudulent estate planning and annuities scheme. A lawsuit has been filed against the insurance company, among others. Although the lawsuit has been pending for about one year, the insurance company has been making payments on the annuity and has continued to do so. . . . The payments made and retained thus far by inquirer's client have been sufficient to fully compensate him for all damages sustained plus attorney's fees and costs through the filing of the Complaint. . . . The inquirer has requested an opinion as to whether he has an affirmative obligation to inform counsel for the insurance company that monthly payments continue to be made over and above the compensatory damages claim." (emphasis added); analyzing the applicability of Rules 3.3, 3.4 and 4.1.; "Rule 3.3 requires a lawyer to correct any misstatement of material fact. If the complaint is no longer accurate with respect to the claims, the inquirer may have an obligation to amend pursuant to the Pennsylvania Rules of Civil Procedure. Also, to the extent that representations have been made to the tribunal that are inaccurate, the inquirer is under an obligation to correct these misstatements. This would include discovery as well. If the issue arises at a deposition or in response to discovery requests, the inquirer must ensure that the information regarding payments made and the amounts of those payments is disclosed. Should this issue have already been addressed during discovery, the inquirer also has an affirmative obligation to amend or supplement any such discovery if the responses are no longer accurate."; "Looking at Rule 3.4, in this case, it is the insurance company itself that is the best source for information regarding payments and amounts of payments. Therefore, counsel for the insurance company has access to the best source for this evidence and the inquirer is not obstructing access to evidence regarding payment amounts or the schedule of payments by not making disclosure of the additional payments. The provisions of Rule 4.1 may have a significant impact on the inquirer[']s situation. To the extent that the continued payments have been made in error, the criminal law on conversion, including but not limited to Pa. C.S.A. Title 18 §3924, may be implicated where the inquirer and/or his client know the payments were made by mistake but have nevertheless retained the payments. If the retention of this money paid in error is, in fact, considered criminal, then Rule 4.1(b) is implicated and disclosure to the carrier is necessary to avoid aiding and abetting a criminal or fraudulent act. Under these circumstances, disclosure would be specifically allowed by the exceptions to confidentiality as contained in Rules 1.6 (c)(2) and (c)(3)."; "The Committee advises that Rule 1.15(c) requires the placement of the excess funds in escrow and that distributions from those funds not be made. In fact, to disburse payments made in error to the inquirer's client might be aiding and abetting a criminal act." (emphasis added)).

In contrast, one year later the Los Angeles Bar reached the opposite conclusion (which was not surprising, given California's very strong confidentiality duty).

- Los Angeles County LEO 520 (6/18/07) (addressing a plaintiff's lawyer's ethics obligations upon discovering that pursuant to a complicated settlement defendant had overpaid; explaining that plaintiff's lawyer first had an obligation to advise the plaintiff of the erroneous payment, including "the possible risks of keeping the funds paid to Plaintiff in error"; also dealing with the possible duty to advise the defendant of its error; "The scope of this duty of secrecy is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which likely would be detrimental or embarrassing to the client. . . . The rule applies even where the facts are already part of the public records or where there are other sources of information."; "where counsel has obtained information detrimental to the client and the client asks counsel to keep that information confidential, the duty to preserve secrets obligates counsel to abide by his or her client's wishes not to disclose the overpayment."; directing that the lawyer "use every effort to cause the client to disclose the overpayment," but ultimately holding that "the duty to preserve secrets obligates Counsel to abide by his or her client's wishes not to disclose the overpayment" (emphasis added); also concluding that "Counsel is not obligated to continue representing the client," (emphasis added) and therefore may withdraw; "To assist the client in committing a fraud on the adverse party would be a violation of the State Bar Act. Cal. Bus. & Prof. Code §6106; see also Cal. Rules of Prof. Conduct, Rule 3-210. However, the issue of whether the facts presented here constitute fraud by the client is a legal issue and, in keeping with its longstanding policy, the committee declines to address legal issues raised by an inquiry." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE MISCALCULATION TO THE INSURANCE COMPANY (PROBABLY)**.

B 1/15, 10/15

Clients' Silence About Litigation Tactics

Hypothetical 12

You have not seen a judge quite as angry as this morning, when he asked you why you had not told the court and the litigants about your plan to declare bankruptcy late yesterday afternoon. The court had set aside three weeks for a trial which was set to start today, but which has now been put off by the bankruptcy filing. The court pointed out that your client's adversary had brought in witnesses from across the country, including very expensive expert witnesses. The court also noted the jury panel's inconvenience. The court bluntly tells you that she is inclined to severely sanction you for what you did -- unless you can convince her that your confidentiality duty prevented you from disclosing your client's bankruptcy plans.

What do you do?

(A) You must disclose your client's bankruptcy plans to the court.

(B) You may disclose your client's bankruptcy plans to the court, but you don't have to.

(C) You may not disclose your client's bankruptcy plans to the court, unless your client consents.

(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S BANKRUPTCY PLANS TO THE COURT, UNLESS YOUR CLIENT CONSENTS

Analysis

Predictably, trial courts and even some appellate courts sanction or otherwise criticize lawyers for not having disclosed their client's litigation plans -- if the silence interfered with the court's docket or otherwise burdened the court.

- Sessner v. Merck Sharp & Dohme Corp., 89 A.3d 191, 191-92, 192-92, 193 (N.J. Super. Ct. App. Div. 2014) (chastising a lawyer for not having advised the court of an earlier settlement; reported in an April 23, 2014, Law 360 article by Joshua Alston under the headline NJ Court Skins Attys for Divulging Merck Deal Months Later; "We were on the eve of filing a comprehensive opinion on the many issues raised in this appeal when, on April 9, 2014, respondent's counsel advised the matter had settled. Upon further inquiry, we learned the parties reached a settlement months ago.

Despite our discretion to file an opinion when notified at such a late hour, we have decided not to file our opinion on the merits and now write to dismiss the appeal with the emphatic reminder that counsel must advise this court in a far more timely manner of a settlement or serious settlement discussions so that scarce judicial resources are not needlessly wasted."; "In the last Court Term more than 6200 appeals and 8400 motions were filed. Some of the appellants are incarcerated and a favorable result could result in their freedom. In other cases the welfare of children is at stake. For attorneys in a civil case in an appeal with a voluminous record to neglect to notify us of a settlement for four months is unconscionable."; "Because of the enormous amount of time needlessly expended in this matter, we have seriously considered the imposition of sanctions against both counsel pursuant to Rule 2:9-9, but instead have determined that the publication of this decision is sufficient deterrent to repetition. It is within our discretion to issue an opinion when notified of a settlement shortly before an opinion is scheduled to be released, and we have done so many times. We nonetheless dismiss this appeal.").

- In re Squire, Ch. 7 Case No. 13-62070, 2014 Bankr. LEXIS 1291, at *2-3, *3-4, *4 n.4, *8, *9, *9-10, *13, *15-16, *16 (N.D.N.Y. Mar. 26, 2014) (acknowledging that a lawyer did not have a duty to return a creditor's call before claiming that the creditor had violated the bankruptcy stay in attempting to collect from the debtor, but nevertheless criticizing the lawyer, as reported in an April 11, 2014, article by John Caher in the New York Law Journal under the headline: Lawyer's 'Tactic' in Bankruptcy Cases Draw Judge's Ire; "On January 14, an employee of Berkshire [Bank] telephoned Debtor's counsel, James Selbach, to inquire if the Debtor wanted the ACH [Automated Clearing House] payments to continue and left the specific message on his voicemail with information for a return call. . . . At the hearing, Attorney Selbach acknowledged that he received Berkshire's message on his voicemail but never returned the phone call nor did his office otherwise respond to Berkshire's inquiry as to discontinuance of the ACH payments. Attorney Selbach stated that it is not unusual for debtors to want to continue ACH payments on a loan for various reasons including, for example, when there is a non-filing co-debtor on a loan, the loan is secured, or a loan is to be reaffirmed. Attorney Selbach indicated that it is his practice to instruct clients at the outset of filing bankruptcy to affirmatively communicate with any financial institution if they wish to have ACH payments continue so as not to interrupt the flow of payments." (footnote omitted); "Sixteen days after Berkshire initiated contact with Debtor's counsel, on January 30, 2014, an attempted $199.53 ACH transfer from Debtor's Citizens Bank account to Berkshire failed due to insufficient funds in Debtor's account, for which Debtor was assessed a $35.00 service charge. At 12:55 p.m. that same day, Debtor's counsel filed the subject motion, supported by counsel's boilerplate memorandum of law seen frequently in support of like

motions brought by Attorney Selbach in other cases before this court. Among other recitals, the attorney's affirmation in support of the motion states: 'On January 30, 2014 Berkshire took . . . ($199.53) from the Debtor's bank account, . . . causing the account to have a negative balance. This confused the Debtor and obviously caused a great inconvenience. Debtor has suffered actual damages in the form of emotional distress.'" (internal citation and footnotes omitted); "In 2013, Attorney Selbach filed in this District 43 motions alleging violations of the automatic stay or discharge injunction. For the first 3 months of this year, he has filed 22 such motions."; "There was still time for Berkshire to terminate the ACH payments had it received a timely negative response to its January 14 inquiry, or, after having received no response, before the anticipated January 30 deduction."; "While the automatic stay puts a kibosh on postpetition collection activities, it should not be interpreted to eliminate appropriate civil discourse regarding postpetition financial intentions. Debtor cites no authority to support the position that a creditor may not freely inquire of a debtor's counsel regarding a debtor's intention with respect to a particular obligation."; "The free flow of information between a creditor and counsel for a debtor should be encouraged and not discouraged for the system to function properly. Accordingly, Berkshire did not willfully violate the automatic stay simply by calling Debtor's counsel to inquire about the Debtor's intentions regarding the ACH payments."; "Within the time that counsel took to write down his notes and task his paralegal with contacting the client, counsel could have picked up the phone and communicated to Berkshire to terminate the ACH payments. Notwithstanding Berkshire's misguided inquiry, it would, in this court's opinion, have been better practice for counsel to have returned the phone call and nipped in the bud the events which followed. This court emphasizes that counsel did not have an affirmative obligation to do so, nor, by virtue of Berkshire's phone call, did the burden shift to the Debtor to terminate the ACH payments. However, in this court's opinion, when presented with a clear opportunity to intervene and preclude aggravation and potential emotional distress to one's client, good advocacy suggests that counsel intervene. By electing not to return Berkshire's phone call, Mr. Selbach does not negate the creditor's ultimate violation. At the same time, this court will not reward tactics intent upon generating anticipated attorneys' fees."; "[G]iven counsel's frequent refrain that it takes a sanctions motion to get a creditor's attention, there is an irony not lost on the court that when, in the present instance, this creditor reached out to get debtor-counsel's attention, the response came by motion alleging a violation."; "Apart from tailoring the affirmation by specifically referring to the creditor as Berkshire and inserting the specific date that this case was commenced, the numbered paragraphs of the affirmation contain identical language to similar motions filed in this court. The one exception is paragraph 6 which, in its specific recitals, misstates the operative facts.").

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property;

holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

On the other hand, some courts have found such tactics acceptable, even if frustrating.

- Wolters Kluwer Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, 114, 115 (2d Cir.), cert. denied, 130 S. Ct. 625 (2009) (upholding sanctions against a former Dorsey & Whitney lawyer for several inappropriate actions, but also addressing another action taken by the Dorsey lawyer, which the district court had sanctioned: "The district court found that Dorsey's main purpose in filing a Rule 41 voluntary dismissal of the Wolters litigation was to judge-shop in order to conceal from its client 'deficiencies in counsel's advocacy' that had been noted by the district judge in New York. The district court reasoned that this sort of judge-shopping was an improper purpose and was accordingly sanctionable."; reversing this sanction; explaining that plaintiffs may freely dismiss actions under Rule 41; "It follows that Dorsey was entitled to file a valid Rule 41 notice of voluntary dismissal for any reason, and the fact that it did so to flee the jurisdiction or the judge does not make the filing sanctionable. Accordingly, because the district court made no finding that Dorsey acted in bad faith in voluntarily dismissing the case under Rule 41, and because Dorsey was entitled by law to dismiss the case, the district court's sanction against Dorsey for filing the voluntary dismissal must be reversed." (emphasis added)).

- Saltire Indus., Inc. v. Waller, Lansden, Dortch & Davis, PLLC, 491 F.3d 522, 525, 530 (6th Cir. 2007) ("In its complaint, Saltire alleges that Waller Lansden made a secret agreement with the IDB [co-defendant] to voluntarily dismiss the IDB from the Norman case once the action was remanded back to state court. According to Saltire, Waller Lansden added the IDB as a sham defendant solely to defeat diversity jurisdiction and thus force the case back to state court because '[Waller Lansden] believed the State Court Action to be much more valuable in the State Court -- where it would be tried before an elected local judge -- rather than in the Federal Court, where it would be tried before a judge appointed by the President for a lifetime term.'"; "What Waller Lansden's actions boil down to, in our view, is litigation strategy. Litigation strategy cannot, without more, support an action for fraud." (emphasis added)).

In 2011, the North Carolina Bar similarly found nothing improper about an aggressive litigation tactic.

- NC LEO 2011-3 (4/22/11) (finding that an immigration lawyer could file an appeal to essentially buy more time, which might allow his client to be deported rather than convicted of a crime in the United States; "Client A is arrested for driving while impaired. The magistrate sets a secured bond of $2000, schedules the trial for district court and notifies U.S. Immigration and Customs Enforcement (ICE) that Client A may be in the country illegally. Client A is taken to the county jail to wait for trial. At Client A's first appearance, the judge appoints Attorney A to defend him. ICE determines that Client A is an undocumented alien and gives the jail notice that it should be advised when Client A is released. Once Client A's bond is paid, Client A will be held in the jail for an additional 48 hours to give ICE the opportunity to begin proceedings. If ICE does not serve Client A with a notice to appear within this time period, the jail will release him. Client A tells Attorney A that he wants to be deported as soon as possible and does not want a conviction on his record. Attorney A discusses Client A's options with him. If Client A pays the bond, ICE will probably come to the jail, transport him to a federal holding facility and begin removal proceedings within 48 hours of paying the bond. Once Client A is deported, the State might dismiss Client A's DWI charge. Attorney A knows that, should Client A someday choose to re-enter the United States legally, a DWI conviction would be detrimental to an immigration application or an application for a work permit. Attorney A is aware that the existence of an ICE detainer is only an indication that Client A might be removed before the resolution of the case. ICE may choose not to pick Client A up; it may serve him and then release him pending a removal hearing; it may offer him an immigration bond which can be posted so that he can secure his release during immigration proceedings; or he may be eligible for a remedy, such as cancellation of removal, which would allow him to receive permanent residency in the United States."; posing the following question: "<u>May Attorney A enter a notice of appeal knowing that Client A's pending deportation may result in the dismissal of the superior court case</u>?" (emphasis added); analyzing the issue as follows: "Rule 3.1 prohibits a lawyer from advancing frivolous or meritless proceedings or arguments but permits a lawyer in a criminal proceeding that may result in incarceration the leeway to 'so defend the proceeding as to require that every element of the case be established.' Comment [1] to the rule observes that '[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.' Rule 3.2 requires a lawyer to make reasonable efforts to expedite litigation 'consistent with the interests of the client'. However, comment [1] to this rule adds, '[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.' <u>Filing a notice of appeal</u>

> for Client A is not, in itself, frivolous or meritless because Client A has a constitutional right to a trial de novo in superior court before a jury. The question is whether the pleading is interposed for an improper purpose which would violate not only Rule 3.1 but also the prohibition on conduct prejudicial to the administration of justice set forth in Rule 8.4(d). Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact to a court. This prohibition applies to statements in pleadings as well as to statements in open court. Rule 3.3, cmt. [3]. Comment [3] to the rule adds that '[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.' Although Attorney A believes that Client A may not be available for trial in superior court, a client's presence is not always necessary to resolve a case in superior court. If a trial is necessary, it can be done by written waiver if the court permits. Moreover, by the time the case is reached for trial, the client may, in fact, be available. Lastly, it is unlikely that the State will actually dismiss the charges simply because the defendant has been removed. Therefore, filing a notice of appeal for Client A does not violate the rules." (emphasis added)).

This hypothetical comes from a 2008 Virginia Supreme Court decision -- reversing a trial court's sanction of a lawyer who did not disclose the client's intent to declare bankruptcy.

- McNally v. Rey, 659 S.E.2d 279, 281, 283 (Va. 2008) (holding that a lawyer does not have a duty to advise the adversary if the lawyer's client is planning to declare bankruptcy; explaining that defendant declared bankruptcy the evening before a scheduled Virginia Circuit Court trial, and that the Circuit Court had imposed sanctions upon the lawyer; explaining that the client's lawyer had asserted the attorney-client privilege in declining to answer the Circuit Court's questions about the circumstances of the bankruptcy filing; "McNally filed a letter with the circuit court on November 20, 2006, responding to the circuit court's consideration of sanctions against him for the bankruptcy filing. He stated 'it would have been an ethical violation for me to disclose my client's intention to file a bankruptcy (which was clearly a client confidence) unless the client specifically authorized me to do so.' McNally also asked that he be subject to a 'properly file[d]' motion and be given an opportunity to respond: 'I respectfully believe that I am entitled to due process on this issue.'" (emphasis added); noting that the court awarded sanctions against the lawyer after finding that "'the conduct of Mr. McNally in filing pleadings indicating an intent to try the case while in fact knowing that bankruptcy was to be filed was not in good faith and was for an improper purpose including to needlessly increase the cost of litigation to the Plaintiffs. As a result, Plaintiffs incurred unnecessary legal and expert fees and costs in preparing the case for trial. The Court on its own initiative as permitted by law believes the

> appropriate sanction is that Counsel for Defendant, John [J.] McNally personally pay the legal fees, expert charges, and costs incurred by Plaintiffs from November 8, 2006 until notified of the bankruptcy on the evening of November 14 as well as the cost of the jury.'"; finding that the lower court had abused its discretion in imposing sanctions; "There is simply nothing in the record before this Court that supports this finding. There is no evidence in the record that McNally's act of filing the witness and exhibit list was not well grounded in fact. There is nothing in the record before this Court that supports a finding that the witness and exhibit list was interposed for an improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation. . . . Simply stated, the record before this Court is devoid of any evidence that supports the circuit court's award of sanctions. McNally's act of filing the witness and exhibit list, as required by the circuit court's own pretrial order, did not violate Code § 8.01-271.1. Additionally, counsel of record in a state court proceeding, who represents a litigant contemplating filing a petition in bankruptcy in a federal bankruptcy court, does not have an obligation to inform opposing counsel or the circuit court that the attorney's client is considering filing a petition in bankruptcy. A litigant's decision to file a petition in bankruptcy while litigation is pending does not constitute a violation of Code § 8.01-271.1 provided such filing is in compliance with the federal Bankruptcy Code, 11 U.S.C. § 101, et seq. To hold otherwise would have a chilling effect upon the rights of litigants and their attorneys when such litigants seek to avail themselves of their statutory rights set forth in the federal Bankruptcy Code. Therefore, we hold that the circuit court abused its discretion by imposing sanctions upon McNally." (emphases added)).

Best Answer

The best answer to the hypothetical is **(C) YOU MAY NOT DISCLOSE YOUR CLIENT'S BANKRUPTCY PLANS TO THE COURT, UNLESS YOUR CLIENT CONSENTS**.

B 1/15, 10/15

Litigation Adversaries' Factual Misunderstanding

Hypothetical 13

You are defending a young mother against a charge that she murdered her infant daughter because her childcare responsibilities impeded her social life. The prosecution has gathered damaging entries from your client's home computer, but appears to have overlooked some even more incriminating entries -- showing that someone used your client's computer to do a Google search for "fool-proof suffocation methods" on the day that your client's daughter was last seen alive.

What do you do?

(A) You must disclose the incriminating searches to the prosecution.

(B) You may disclose the incriminating searches to the prosecution, but you don't have to.

(C) You may not disclose the incriminating searches to the prosecution, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE INCRIMINATING SEARCHES TO THE PROSECUTION, UNLESS YOUR CLIENT CONSENTS

Analysis

The litigation context involves somewhat subtle and often contradictory disclosure issues. On one hand, the intensely adversarial nature of litigation would tend to diminish most lawyers' possible impulse to be charitable to an adversary who has made a mistake. On the other hand, at least in civil litigation, various rules require pre-trial disclosures and supplemental discovery responses have largely eliminated lawyers' ability to take advantage of an adversary's mistake.

Civil Adversarial Proceedings

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each

side to use available discovery to uncover helpful facts, then present them to the court or the fact finder

Some courts apply the majority rule (allowing lawyers to stay silent even in the face of an adversary's misunderstanding) if the adversary does not have a lawyer.

- Illinois LEO 12-07 (1/2012) ("Attorney does not have an obligation under R.P.C. Rule 3.3 to tell the court that the unrepresented adversary has a defense based on a written agreement that the attorney's client signed with the adversary and which the attorney now believes in good faith is unenforceable." (emphasis added); presenting the factual situation; "Attorneys representing party A in litigation against unrepresented party B is aware that the two parties entered into a written agreement that would constitute a potential defense in favor of B, but the attorney has a good faith belief that the agreement is unenforceable. Client A did not consult with the attorney before entering into the agreement."; "In the situation at hand, the lawyer is aware that the signed agreement between the lawyer's client and the unrepresented party constitutes a potential defense to the lawyer's client's claim; however, the lawyer also has good faith belief that the agreement is unenforceable. Under these circumstances the lawyer need not advise the court of the potential defense. Rule 3.3 (a) (2) provides that a lawyer shall not knowingly fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client or offer evidence that is false. In the case at hand, the attorney has a good faith belief that the contract is unenforceable. This good faith belief supports the conclusion that the lawyer's failure to disclose the existence of the agreement does not contravene Rule 3.3." (emphasis added); "Moreover, sub-section (a)(2) prohibits a lawyer from failing to disclose 'legal authority' which is adverse to his or her client's position. The rule does not require the lawyer to disclose facts which are contrary to the client's position. Such disclosure, of course, would be an onerous burden in litigation, since a lawyer would generally be aware of 'facts' contrary to his or her client's position. Here, the existence of an agreement which might exonerate the adversary is a fact which his [sic] not required to be disclosed by the lawyer. The lawyer, of course, could be in violation of sub-sections (a)(1) or (a)(3) if her [sic] or she makes false statements about the agreement or its existence.").

In contrast, lawyers may not point to their confidentiality duty as an excuse for not disclosing misstatements to the court or other deceptive conduct.

- People v. Petsas, 262 Cal. Rtpr. 467, 468, 469, 472 (Cal. Ct. App. 1989) (reversing the dismissal of an insurance crime charge against a lawyer,

> whose client was harmed in two separate accidents on the same day; explaining that the lawyer had arranged for a doctor to prepare two separate reports about the client's injury, each of which referred to one of the accidents but not the other; noting that the doctor had earlier indicated that it was impossible to separate the injuries caused by the two separate accidents; further explaining that the lawyer used the two separate reports to settle both cases; "Following the first accident, Banks made an appointment to see Dr. Terry Forward, a chiropractor in Foster City. Banks saw Forward the following day and told her that he had been involved in two automobile accidents, and that he had been injured in both. Neither Banks nor Forward was able to segregate the injuries to a particular accident."; "On February 2, 1984, respondent asked Forward to prepare medical reports covering Bank's injuries. Respondent asked for two reports, with separate cover pages identifying the accidents. In response Forward furnished respondent with two reports. Each report contained cover pages narrating the history of a single accident. . . . Each report then contained identical medical statements of diagnosis, treatment and prognosis. Neither report contained any reference to diagnosis of, treatment for, prognosis concerning, or any history of injuries received by Banks in two separate accidents on the same day. The section of the identical medical statement contained in each report concerning past medical history indicated that Banks had 'none.'" (footnote omitted); "[I]t is true an attorney has an ethical obligation not to disclose information adverse to his client which is obtained in confidence. We agree, however, with the finding implicit in the magistrate's order holding respondent to answer that his acts in this case cannot be so characterized. Here, respondent *affirmatively* represented that his client's injuries were the result of a single accident when in fact he knew they were not. Further, he submitted claims for all damages resulting from two successive accidents on the same day to the carriers of two separate insureds, concealing from each of them the fact that the damages he thus sought for his client stemmed from the trauma of both accidents. There is a distinct difference between restricting an attorney from divulging information learned in confidence from a client, and proscribing him from knowingly making affirmative false representations regarding a claim or claims of that client." (emphases added; emphasis in original indicated by italics)).

Ex Parte Proceedings

Interestingly, the ethics rules apply quite differently in ex parte proceedings.

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d).

A comment to ABA Model Rule 3.3 explains the basis for this important difference.

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

> In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

> An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in

> absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.
>
> Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.
>
> To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

The Restatement acknowledges that lawyers in certain types of proceedings have a higher duty of candor.

> In some special proceedings, public policy requires unusual candor from an advocate. The candor required is determined by the legal requirements applicable to such a proceeding. In some jurisdictions, for example, unusual candor is required in proceedings seeking custody of a child, in applications for the involuntary commitment of a person for mental disability, and in reports by trustees or executors. Similarly, a lawyer representing a class in a class action has duties of care toward the class and may be taking a position that requires an informed decision by the tribunal. In such circumstances (as in an application for a fee to be awarded out of the class recovery), the lawyer must disclose information necessary for the tribunal to make an adequately informed decision. That may be particularly true where the lawyer's position is supported by the opposing party, as following a settlement agreement between the parties.

Restatement (Third) of Law Governing Lawyers § 112 cmt. c (2000).

Not surprisingly, courts take the same approach.

- In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court).

- Time Warner Entm't Co., L.P. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

> Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

> [a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

> [A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Criminal Proceedings

In contrast to civil litigation, criminal litigation frequently involves a mismatch of disclosure obligations. Prosecutors usually must disclose exculpatory evidence, while

defense lawyers can normally stand silent in the face of prosecutors overlooking incriminating evidence.

The highly publicized Casey Anthony case highlighted this issue.

- Casey Anthony: Did She Do A Google Search For "Fool-Proof Suffocation"?, Associated Press, Nov. 26, 2012 ("The Florida sheriff's office that investigated the disappearance of Casey Anthony's 2-year-old daughter overlooked evidence that someone in their home did a Google search for 'fool-proof' suffocation methods on the day the girl was last seen alive." (emphasis added); "Orange County sheriff's Captain Angelo Nieves said Sunday that the office's computer investigator missed the June 16, 2008, search. The agency's admission was first reported by Orlando television station WKMG. It's not known who performed the search. The station reported it was done on a browser primarily used by the 2-year-old's mother, Casey Anthony, who was acquitted of the girl's murder in 2011."; "Anthony's attorneys argued during trial that Casey Anthony helped her father, George Anthony, cover up the girl's drowning in the family pool."; "WKMG reports that sheriff's investigators pulled 17 vague entries only from the computer's Internet Explorer browser, not the Mozilla Firefox browser commonly used by Casey Anthony. More than 1,200 Firefox entries, including the suffocation search, were overlooked." (emphasis added); "Whoever conducted the Google search looked for the term 'fool-proof suffication,' misspelling 'suffocation,' and then clicked on an article about suicide that discussed taking poison and putting a bag over one's head."; "The browser then recorded activity on the social networking site MySpace, which was used by Casey Anthony but not her father." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE INCRIMINATING SEARCHES TO THE PROSECUTION, UNLESS YOUR CLIENT CONSENTS**.

B 1/15, 10/15

Clients' or Witnesses' Death

Hypothetical 14

You represent the plaintiff in a personal injury case. After several months of intense negotiations, it appears that you are nearing a settlement agreement with the defendant. However, you just learned that your client and his brother (whom the defendant recently deposed, and whom you envisioned as a key trial witness) were killed in a car accident.

(a) What do you do about your client's death?

(A) You must disclose your client's death to the adversary.

(B) You may disclose your client's death to the adversary, but you don't have to.

(C) You may not disclose your client's death to the adversary.

(A) YOU MUST DISCLOSE YOUR CLIENT'S DEATH TO THE ADVERSARY

(b) What do you do about the witness's death?

(A) You must disclose your witness's death to the adversary.

(B) You may disclose your witness's death to the adversary, but you don't have to.

(C) You may not disclose your witness's death to the adversary.

(B) YOU MAY DISCLOSE YOUR WITNESS'S DEATH TO THE ADVERSARY, BUT YOU DON'T HAVE TO (PROBABLY)

Analysis

This hypothetical raises the issue of a litigant's duty to update the adversary on potentially material facts as they develop.

(a) The ABA has explicitly indicated that a lawyer engaged in settlement discussions with an adversary must disclose his client's death to opposing counsel.

In 1995, the ABA noted that a lawyer whose client has died immediately begins acting on behalf of another principal (normally, the executor). The ABA explained that the presence of a new principal amounted to the type of material fact that a lawyer must disclose to the attorney and the court.

- ABA LEO 397 (9/18/95) ("The Committee agrees with the . . . conclusion that counsel has a duty to disclose the death of her client to opposing counsel and to the court when counsel next communicates with either. The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a failure to disclose that occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a).6. (As noted above, Comment [1] to Rule 4 states that misrepresentations can "occur by failure to act.") Prior to the death, the lawyer acted on behalf of an unidentified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client." (emphasis added)).

Most bars take the same approach.

- Illinois LEO 96-3 (7/96) ("The Committee believes that the ABA's conclusion regarding the lawyer's duty under ABA Model Rule 4.1(a) would be the same under Illinois Rule 4.1(a). In addition, if the lawyer is authorized to continue the prosecution of whatever claim or claims exist on behalf of the decedent's estate, the Committee believes that the death of the claimant is a 'material fact' within the meaning of Illinois Rule 4.1(b) as well. Therefore, disclosure to the adverse party is necessary to avoid assisting a fraudulent act on the part of the lawyer's new client, the executor or administrator of the decedent's estate. Finally, the failure to make such disclosure might well be considered conduct involving "deceit or misrepresentation" within the meaning of Rule 8.4(a)(4). For these reasons, the lawyer must make timely disclosure of the client's death with respect to the pending personal injury matter." (emphasis added)).

An older ethics opinion took the opposite approach.

- Virginia LEO 952 (7/31/87) ("A client authorized an attorney to settle his personal injury case within a range of values. A demand was made and a counteroffer was received from the insurer. Following receipt of the

counteroffer, the client died and the administrator of the estate authorized the attorney to accept the last settlement offer which was within the range authorized by the client. It is not improper, given the above, for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client's health. The committee opines that in order to avoid an appearance of impropriety, the attorney should disclose the death of his client at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range for settlement prior to his death and that the estate's administrator has also authorized the settlement.").

Courts generally agree that lawyers face sanctions or discipline if they keep their client's death secret.

- Robison v. Orthotic & Prosthetic Lab, Inc., 27 N.E.3d 182, 185, 186, 186-87 (Ill. App. Ct. 2015) (voiding a product liability case settlement, because the plaintiff's lawyer had not advised the defendant that his client had died; "An attorney's employment and his authority are revoked by the death of his client, and an attorney cannot proceed where he does not represent a party to the action. . . . Generally, the attorney-client relationship is terminated by the death of the client, and thereafter, the authority of the attorney to represent the interests of a deceased client must come from the personal representatives of the decedent."; "In this case, the plaintiff, Randy Robison, died on January 20, 2013. Upon Randy Robison's death the product liability action was without a plaintiff, and the Crowder firm's authority to act on behalf of Randy Robison terminated. Under our procedural rules, this cause of action is one that survives the death of a party, and the personal representative of the decedent's estate is permitted to file a motion for substitution. . . . The motion for substitution is to be filed within 90 days after the party's death is suggested of record, and the date of the actual death is not a factor."; "Settlement negotiations commenced in September 2013, and an agreement was ostensibly reached on September 24, 2013. The defendant, however, had no knowledge about the plaintiff's death or the appointment of a personal representative throughout the period of settlement negotiations. Mr. Gilbreth acknowledged that he did not disclose these facts to the defendant until November 15, 2013, weeks after the settlement was reached and months after the plaintiff's death. Mr. Gilbreth also acknowledged that the disclosure of the plaintiff's death would have adversely impacted the settlement value of the case. He stated that he believed that the decision to withhold the information was in his clients' best interest and was in keeping with the rules of professional responsibility. We strongly disagree. We find that the arguments expressed by Mr. Gilbreth are specious and incredible, and we are concerned about his professional judgment in this case. In failing to disclose the fact of the plaintiff's death,

Mr. Gilbreth intentionally concealed a material fact that would have reduced the overall value of the claim for damages. In addition, and equally troubling, Mr. Gilbreth led the defendant to believe that he had authority to negotiate a settlement of the litigation on behalf of the party plaintiff, when the action was without a plaintiff as the plaintiff had died and a representative had not been submitted. Given Mr. Gilbreth's intentional misrepresentations and material omissions prior to and during the settlement negotiations, we conclude that the settlement agreement is invalid and unenforceable, and that the trial court erred in granting the motion to enforce it. Accordingly, we hereby vacate the order granting the motion to enforce settlement and remand the cause of the circuit court for further proceedings."; "Rule 8.3 requires a lawyer to report unprivileged knowledge of misconduct involving fraud, dishonesty, or deceit, or misrepresentation by another lawyer to the Illinois Attorney Registration and Disciplinary Commission (ARDC). See Ill. R. Prof. Conduct (2010) R. 8.3 (eff. Jan. 1, 2010); In re Himmel, 125 Ill. 2d 531, 539, 533 N.E. 2d 790, 793 (1988)."; "In this case, we believe that the material omissions and misrepresentations made by Mr. Gilbreth, which were detailed earlier in this decision, constitute serious violations of Rule 8.4. We also believe that defense counsel possessed sufficient knowledge to trigger a duty to report Mr. Gilbreth's misconduct to the ARDC, and that the failure to report the misconduct constitutes a potential violation of Rule 8.3. See Himmel, 125 Ill. 2d 540-43, 533 N.E.2d at 793-94. Therefore, we will direct the clerk of this court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for its consideration of the actions of the attorneys in this case.").

- In re Lyons, 780 N.W.2d 629, 631, 631-32, 632, 633, 634-35 (Minn. 2010) (indefinitely suspending a lawyer, and barring the lawyer from seeking a reinstatement for one year, for (among other things) failing to disclose the death of his client; "Lyons was admitted to practice law in Minnesota on October 28, 1994. At all times relevant to these proceedings, Lyons was engaged in the practice of law at a law firm known as the Consumer Justice Center, P.A., in Vadnais Heights, Minnesota. Lyons has been disciplined on seven previous occasions."; "In 2006, Lyons was retained by a man who had been erroneously reported by Trans Union, LLC, a credit reporting agency, to be dead. In September 2006, a complaint against Trans Union under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2000), was filed in the United States District Court for the District of Montana."; "The client died on October 9. On October 26, 2007, Trans Union sent an email to Lyons offering to settle the claim for $ 19,000. The following day, Lyons accepted the offer by email and requested that opposing counsel '[d]raft the release and order the check made payable to [the Consumer Justice Center] trust account.' Lyons did not inform Trans Union of the client's death. On November 6, Trans Union sent Lyons a settlement agreement and release. The following week, Lyons emailed Frampton, asking whether the client's

wife could sign the agreement as 'power of attorney.' Frampton replied that the client's wife could sign the settlement agreement because she was the personal representative of the estate."; "In an email to Trans Union dated January 7, 2008, Lyons noted that he was '[s]till working on [the client] who was hospitalized and I think the release is being signed by his wife or power of attorney.'"; "Upon receiving the signed settlement agreement, Trans Union emailed Lyons asking if the client had passed away. Two days later, Lyons responded, 'Yes -- HOW IRONIC.' The referee found and Lyons does not dispute that this e-mail on January 31, 2008, was Lyons's first disclosure to Trans Union that the client had died. The day following Lyons' disclosure, Trans Union asked, 'When did he die? When did you find out?' Lyons replied, 'Unsure. Recently.' Trans Union responded by asking, 'Did he die before or after we agreed to settle?' Lyons replied, 'We settled before I found out he passed away.' Trans Union again asked, 'Did [the client] die before or after we agreed to settle?' Lyons replied that the client 'died after we agreed to settle.' Trans Union demanded to know, 'On what date did [the client] die? On what date did you find out?' Lyons replied, 'Unsure of exact dates -- sorry. I learned about it from local counsel afterwards -- that is why we had to redo the signature block to estate after you sent it to us with only [the client's] name.'"; "Trans Union indicated that it would not be bound by the settlement and, as a result, Frampton filed an action in Montana state court to enforce the settlement agreement."; "Lyons does not challenge the referee's finding that he failed to disclose the client's death to Trans Union before accepting Trans Union's settlement offer. Nor does Lyons challenge the referee's finding that he made a number of misrepresentations to Trans Union regarding when the client died and when he learned of the client's death.").

- Edison v. Hearing Panel of the Disciplinary Bd. of the N.D. Supreme Court, 724 N.W.2d 579, 580, 581, 583 (N.D. 2006) (reprimanding a defendant's lawyer who did not disclose the death of his client, and relied on the statutes of limitations defense in seeking to dismiss the plaintiff's automobile accident case against his client; concluding that the lawyer had no duty to disclose the client's death, and improperly filed a pleading on behalf of the dead person; "On March 14, 2002, Harrie [respondent lawyer] was retained by the insurance company to defend the lawsuit. On March 18, 2002, Harrie received a file from the insurance company which included a letter from Welch's insurance agent to the insurance company indicating Ellen Welch had died. The file did not indicate when Ellen Welch had died or how Muhammed [opposing party in underlying suit] had served process on her. On March 27, 2002, Harrie served an answer on Muhammed on behalf of 'Defendant Ellen Welch.'"; "On May 23, 2002, Harrie informed Muhammed's attorney that 'Ellen Welch's surviving husband, Patrick [Welch], signed for the certified mail' and 'it appears that service was improper and that the claim against Ellen Welch is barred by the statute of limitations.'"; "The district court

subsequently granted summary judgment dismissal of Muhammed's action against Welch, concluding the action was barred by the statute of limitations. In Muhammed v. Welch, 2004 ND 46, P12, 675 N.W.2d 402, we concluded the service of process was insufficient. However, we reversed the summary judgment and remanded for further proceedings to determine whether Welch was equitably estopped from claiming the statute of limitations as a defense."; "The official comment to Rule 4.1 makes clear that an attorney generally does not have an affirmative duty to inform an opposing party of relevant facts, and we reject disciplinary counsel's assertion that Harrie had an affirmative duty to immediately disclose Ellen Welch's death before serving any pleadings in this case. However, Harrie served an answer and amended answer on behalf of Ellen Welch, and at least by the time of the amended answer, Harrie had actual knowledge that Welch had died.").

- Harris v. Jackson, 192 S.W.3d 297, 306 (Ky. 2006) (holding that a lawyer had acted improperly in failing to disclose a death of one of his clients "until the period to revive the action against Harris's estate had lapsed. Not only did he fail to disclose, he continued to participate in discussions, negotiations, depositions, and other pre-trial activities, even with the court, as if Harris was still alive.").

- In re Becker, 804 N.Y.S.2d 4, 5 (N.Y. App. Div. 2005) (suspending a New York lawyer for three months for failing to disclose his client's death before settling a slip and fall case against the City; "Respondent's misconduct occurred while handling a personal injury matter for Ruth Kurtz as a result of her 1993 trip and fall on a sidewalk and consequent ankle fracture. Mrs. Kurtz died in 1994 as a result of bone cancer, but respondent did not discover this until 1997 after he received a $55,000 settlement offer from the defendant, the City of New York, and forwarded the proposed settlement to Mrs. Kurtz."; explaining that the lawyer submitted settlement documents to New York City without disclosing that his client had died nearly three years earlier; also noting that the lawyer endorsed the settlement check along with the deceased client's son).

- In re Hayes, No. 6192974, 2004 Ill. Atty. Reg. Disc. LEXIS 126, at *1-3, *3-4 (Ill. Attorney Disciplinary Comm'n Hearing Bd. Mar. 24, 2004) (censuring a lawyer who did not disclose the death of her client to a workers' compensation board or the adversary's lawyer; "On June 19, 1999, Cook died of causes unrelated to the above claim. Cook's workers' compensation claim abated on his death, pursuant to 820 ILCS 305/8(e)(19), because he left no surviving spouse or dependents. The Respondent learned of Cook's death on or about June 21, 1999. On July 16, 1999, the Respondent telephoned Dollar General's lawyer, William Hardy, for the purpose of settling Cook's workers' compensation case. The Respondent represented to Hardy that she was calling on behalf of Cook, and she did not disclose that Cook

was deceased. The Respondent intentionally failed to disclose Cook's death to Hardy because she knew his death would adversely impact the workers' compensation claim. During the telephone conversation on July 16, 1999, the Respondent and Hardy agreed to settle Cook's claim for $8,890.22, which included $5,237 for Cook's 'man as a whole' claim. Also, on July 16, 1999, the Respondent sent Hardy a letter in which she identified Cook as her client and confirmed the terms of the settlement agreement. She did not disclose in the letter that Cook had died. The Respondent knew or should have known that both her statement to Hardy on July 16, 1999, that she was representing Cook and her failure to disclose Cook's death to Hardy were false and/or misleading."; "On May 24, 2001, the Respondent filed a motion in the workers' compensation case (No. WC 56002) to enforce the settlement agreement she had reached with Hardy. The motion was filed on behalf of the estate of Cook. The Respondent knew or should have known that her assertion in the motion that she was representing the estate of Cook was false because attorney Reed had represented the executor of Cook's estate, and the estate had been closed in October 2000. Additionally, the Respondent's claim in the motion that the settlement with Hardy, on behalf of Dollar General, should be enforced was frivolous because Cook's workers' compensation claim, with the exception of medical benefits that had been paid, abated upon Cook's death.").

- Kingsdorf v. Kingsdorf, 797 A.2d 206 (N.J. Super. Ct. App. Div. 2002) (holding that a lawyer must tell the adversary about the client's death; noting that the lawyer was representing the husband in various matters, including a divorce, and reached a settlement after his client had died; concluding that the failure to disclose the client's death amounted to fraud on the court because the death abated a pending divorce action, terminated the decedent's son's guardianship, and automatically resulted in joint tenancy property passing to the surviving wife; referring the matter to the bar to deal with the lawyer's conduct, but not reaching any conclusions about the lawyer's possible ethics violations; reversing an order enforcing the settlement agreement reached after the client had died but before the lawyer advised the counterparty of the client's death).

- In re Forrest, 730 A.2d 340, 342 (N.J. 1999) (suspending for six months a lawyer who did not disclose the death of his client to the court, an arbitrator and the adversary's lawyer; "In December 1993, knowing of Mr. Fennimore's death, respondent served unsigned answers to interrogatories . . . on his adversary, Christopher Walls, Esq. Neither the answers nor the cover letter indicated that Mr. Fennimore had died. On June 8, 1994, respondent and Mrs. Fennimore appeared at a mandatory automobile arbitration proceeding . . . . Before to the proceeding, respondent advised Mrs. Fennimore that she should not voluntarily reveal her husband's death in her testimony before the arbitrator. When the arbitrator inquired about Mr.

Fennimore's absence, respondent replied that he was 'unavailable.' The arbitrator awarded $ 17,500 to Mrs. Fennimore and $ 6000 to Mr. Fennimore. At no time before, during, or after the arbitration proceeding did respondent or Mrs. Fennimore inform the arbitrator that Mr. Fennimore had died.").

- Ky. Bar Ass'n v. Geisler, 938 S.W.2d578, 578-79, 580 (Ky. 1997) (issuing a public reprimand of a lawyer who did not disclose her client's death to the court or the adversary's lawyer; "McNealy died on January 26, 1995. Shortly thereafter respondent contacted Ford and stated that her client wanted to settle the case and asked him to forward an offer of a settlement. After an exchange of offers and counter-offers, a settlement was reached on February 9, 1995. On February 23, 1995, McNealy's son, Joe, was duly appointed as the administrator of his father's estate. Ford eventually forwarded the settlement documents along with a settlement check to respondent on March 13, 1995. On March 22, 1995, Ford received back the settlement documents which had been executed by Joe. Upon receipt of the signed documents, Ford learned for the first time of McNealy's death. Ford took no further action to bring the court's attention to the settlement documents that were signed by the Administrator, but instead, sent the agreed order of dismissal to the circuit court which was signed and entered by the court. No appeal was taken. Thereafter, Ford filed a bar complaint against respondent on May 5, 1995 due to her failure to advise Ford that her client, McNealy, had passed away during the settlement negotiation period of January 26, 1995 through February 9, 1995."; "[W]e hold that the respondent's failure to disclose her client's death to opposing counsel amounted to an affirmative misrepresentation in violation of our SCR 3.130-4.1."; "While the comments to SCR 3.130-4.1 do indicate that there is no duty to disclose 'relevant facts,' those same comments go on to state that: 'A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.' Consequently, respondent cannot reasonably argue that her failure to reveal this critical piece of information constituted ethical conduct within the framework of SCR 3.130-4.1." Thus, a lawyer must disclose his client's death in the course of settlement negotiations.).

- Virzi v. Grank Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 508, 512, 512-13 (E.D. Mich. 1983) ("On June 2, 1983, plaintiff's attorney prepared and filed a mediation statement for plaintiff with the mediation panel. Three days later, plaintiff died unexpectedly from causes unrelated to the lawsuit. On June 14, 1983, the case was mediated, and the mediation panel placed an evaluation of $35,000 on the case. At the time of the mediation hearing, plaintiff's attorney did not know that his client had died."; "On July 5, 1983, counsel for plaintiff and defendants appeared before this Court at a pretrial conference and, after negotiations, entered into a settlement of the lawsuit for the amount of the mediation award -- $35,000.

> At no time, from the time plaintiff's attorney learned of the plaintiff's death until the agreement to settle the case for $35,000 at the pretrial conference, did plaintiff's attorney notify defendants' attorney or the Court of the death of the plaintiff."; "There is no question that plaintiff's attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of a client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask whether the client was still alive. Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness to the Court and to opposing counsel when such a major event as the death of the plaintiff has taken place."; "This Court feels that candor and honesty necessarily require disclosure of such a significant fact as the death of one's client. Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel. At the same time, counsel has a duty to zealously represent his client's interests. That zealous representation of interest, however, does not justify a withholding of essential information, such as the death of the client, when the settlement of the case is based largely upon the defense attorney's assessment of the impact the plaintiff would make upon a jury, because of his appearance at depositions. Plaintiff's attorney clearly had a duty to disclose the death of his client both to the Court and to opposing counsel prior to negotiating the final agreement. For the foregoing reasons, the settlement will be set aside and the case reinstated in the docket for trial.").

(b) It is not as clear that a witness's death is the type of material fact that a lawyer must disclose during settlement negotiations.

Depending on the witness's importance, it would be easy to envision a court or bar reaching the same conclusion about a witness's death as it would about the client's own death. In addition, it might be necessary for a lawyer to update discovery responses, lists of possible trial witnesses, etc.

On the other hand, a witness's death does not dramatically alter the attorney-client relationship, and therefore would not as clearly fall into the category of material facts that require disclosure as does the client's death.

Best Answer

The best answer to **(a)** is **(A) YOU MUST DISCLOSE YOUR CLIENT'S DEATH TO THE ADVERSARY**; the best answer to **(b)** is **(B) YOU MAY DISCLOSE YOUR WITNESS'S DEATH TO THE ADVERSARY, BUT YOU DON'T HAVE TO (PROBABLY)**.

B 4/15, 10/15

Litigation Adversaries' Minor Litigation Mistakes

Hypothetical 15

As the other side in a trial closes its case, you realize that the adversary's lawyer forgot to move into evidence a fairly important exhibit. You quickly huddle with your co-counsel to see what (if anything) you should do. From your experience, the judge handling the case would almost always allow a party to temporarily reopen its case to admit an exhibit like this.

What do you do?

(A) You must disclose the mistake to the adversary.

(B) You may disclose the mistake to the adversary, but you don't have to.

(C) You may not disclose the mistake to the adversary, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE MISTAKE TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

The 1908 ABA Canons of Professional Ethics included a provision granting lawyers responsibility with what the provision called "incidents of the trial."

> As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

ABA Canons of Professional Ethics, Canon 24 (emphasis added).

The 1969 ABA Model Code of Professional Responsibility emphasized clients' power, while acknowledging lawyers' normal role in determining how to advance clients' interests.

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

ABA Model Code of Professional Responsibility, EC 7-7 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct seem to stress lawyers' ability to make certain decisions. As one rule explains, clients set the ultimate objectives after consulting with a lawyer, but

> normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

ABA Model Rule 1.2 cmt. [2].

Thus, lawyers

> may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

ABA Model Rule 1.3 cmt. [1]. The same comment indicates that "[a] lawyer is not bound . . . to press for every advantage that might realized for a client." Id.

Discovery and trials obviously can generate a spectrum of situations in which a lawyer's adversary might make some mistake, overlook an argument or fact, etc. States generally emphasize lawyers' duties as advocates in such contexts.

- Virginia LEO 920 (6/11/87) (assessing a situation in which a lawyer representing an employer in appealing the award of unemployment compensation to three company employees saw one of the employees outside the Virginia Employment Commission office while preparing for a hearing on another employee's unemployment benefits; explaining that the employee told the lawyer that he intended to be a witness at his colleague's hearing; noting that the employee preparing for his hearing knew that his colleague was present, but represented himself pro se at the hearing and indicated at the end that he had no other evidence to present; further noting that when the Commission ruled in favor of the company, the losing employee hired a lawyer, who asked for the hearing to be re-opened, arguing that the company's lawyer should have disclosed the availability as a witness of the other employee whom the lawyer saw outside the hearing room; concluding that the lawyer was not obligated to tell the Virginia Employment Commission about the unhelpful witness, and in fact had a duty not to make this disclosure -- because it would have hurt the lawyer's client (the company)).

In many situations, lawyers familiar with the pertinent court can predict that the court will grant the adversary's request for relief from a mistake. Perhaps the most common example involves an adversary's minor delay in answering a complaint, which theoretically could result in a default judgment -- but which nearly always results in the court's grant of relief permitting the tardy filing of a response. It is probably fair to say that the less dispositive the adversary's mistake, the more likely a court is to provide such relief.

In 1995, a North Carolina legal ethics opinion explained that lawyers could ethically advise the adversary of such a missed answer deadline.

- North Carolina RPC 212 (7/21/95) (analyzing a lawyer's ability to notify the opposing party's lawyer that 30 days had passed since the filing of the complaint without an answer being filed; ultimately posing the question:

> "May Attorney A call Attorney X to remind him to file the answer or must Attorney A proceed with obtaining an entry of default against the defendant?"; explaining that the lawyer could notify the other lawyer; "A lawyer may contact an opposing lawyer who failed to file a pleading on time in order to remind the other lawyer of his error and to give the other lawyer a last opportunity to file the pleading. Such conduct is not unethical but rather illustrates the level of professional courtesy and consideration that should be encouraged among the members of the bar. Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to represent a client zealously 'by avoiding offensive tactics or by treating with courtesy and consideration all persons involved in the legal process.' Furthermore, Rule 7.1(b)(1) authorizes a lawyer 'where permissible, [to] exercise his or her professional judgment to waive or assert a right or position of the client.' It is also observed in the Comment to Rule 7.1 that '. . . a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. . . .' Thus, the rule does not require the client's consent prior to notifying the opposing lawyer."; "<u>In many situations, professional courtesy urges notification to the other lawyer of the failure to file a pleading.</u> However, <u>a lawyer is not ethically required to do so.</u> In some situations, for example where opposing counsel is known to procrastinate or delay or the interests of the client will be materially prejudiced by notifying opposing counsel, a lawyer may determine that the appropriate tactic is to proceed with obtaining an entry of default or other appropriate remedy." (emphasis added)).

Lawyers might find themselves trying to convince their clients that seeking some material advantage based on an adversary's fairly minor mistake could well frustrate or even anger the court. Such tactics ultimately tend to work to clients' detriment.

Lawyers unable to convince their clients not to seek some advantage based on an adversary's minor mistake might well end up in court. Lawyers in that position must remember to submerge their own interest to that of the clients'. As tempting as it would be for the lawyer to essentially tell the court, "I realize that this is stupid, but my client has insisted that I seek default judgment based on a one-day delay in the adversary's response," such a lawyer cannot make such a statement. The lawyer's own personal

interest in preserving his or her reputation and standing with the court cannot affect the lawyer's duty to diligently represent the client.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE MISTAKE TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**.

B 4/15, 10/15

Litigation Adversaries' Major Case-Dispositive Mistakes

Hypothetical 16

Your client asked you to check with the other side's lawyer (with whom you have a very friendly relationship) to see if the other side intends to appeal a trial victory that you won several weeks ago. When you call the other lawyer to ask about her intent, you learn that the other side intends to appeal -- but quickly realize that the other lawyer has miscalculated the appellate deadline. You do not say anything about it during the call, but reflect upon this issue immediately after hanging up.

What do you do?

(A) You must disclose the miscalculation to the adversary.

(B) You may disclose the miscalculation to the adversary, but you don't have to.

(C) You may not disclose the miscalculation to the adversary, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE MISCALCULATION TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS

Analysis

Some situations involve the unfortunate conflict between most lawyers' laudable desire to act professionally and their ethics duties to their clients.

Interestingly, analyzing lawyers' ethical obligations in such situations might depend on the tribunal's role in the process.

Lawyers' Discretion to Notify Adversaries of Their Mistakes Without a Tribunal's Involvement

If a tribunal has not yet focused on some case-dispositive claim or affirmative defense, litigators generally have no duty to advise their adversaries of some fatal mistake. Perhaps the most stark example involves the adversary missing a statute of limitations or (in a perhaps even more likely dispositive error) missing an appellate filing

deadline. A party missing a statute of limitations might seek relief under some estoppel or other theory, but missing an appellate filing deadline often presents a nearly impossible hurdle to overcome.

The ABA Model Rules' analysis of such situations begins with ABA Model Rule 1.2. That Rule emphasizes clients' right to set a representation's ultimate goal, then acknowledges that lawyers have some discretion in determining how to achieve that goal.

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

ABA Model Rule 1.2(a) (emphasis added).

ABA Model Rule 1.2's comments continue this theme -- recognizing but strictly limiting lawyers' discretion.

The first comment emphasizes clients' right to define the representation's goal.

> Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

ABA Model Rule 1.2 cmt. [1].

The second comment notes that lawyers have some discretion to select the means by which they can meet the client's goal, but ultimately concluding that lawyers must either defer to their clients' judgment or withdraw from the representation.

> On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

ABA Model Rule 1.2 cmt. [2] (emphases added).

ABA Model Rule 1.3 parallels this approach. The rule itself indicates that

> [a] lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Model Rule 1.3.

The first comment to that rule emphasizes the duty's strength and breadth.

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the

> interests of the client and with zeal in advocacy upon the client's behalf.

ABA Model Rule 1.3 cmt. [1] (emphases added).

The rest of this comment contains an odd dichotomy.

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Id.

The first sentence explains that lawyers do not have to seek every advantage. However, the next sentence indicates only that lawyers "may" have some discretion to determine how to achieve clients' stated goal. That seems inconsistent with ABA Model Rule 1.2 cmt. [2], which explains that lawyers must withdraw if they cannot resolve any "fundamental disagreement" with the client "about the means to be used to accomplish the client's objectives." The sentence after that focuses on lawyers' professionalism rather than substance.

Thus, it is unclear why a lawyer is not "bound . . . to press for every advantage that might be realized for a client" -- other than perhaps whatever "advantage" would come from incivility or unprofessional conduct. After all, ABA Model Rule 1.2 demands that lawyers must press for every advantage, and withdraw if they cannot follow the client's direction about whether and how to do that.

Two comments later, the ABA Model Rules again acknowledge a very limited amount of lawyer discretion in pursuing their clients' chosen objective.

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

ABA Model Rule 1.3 cmt. [3] (emphasis added). Thus, this comment extends some discretion to lawyers, but limited to scheduling -- and even then only if exercising such discretion "will not prejudice" the client. In contrast to comments that use words like "fundamental" and "unreasonable," that sentence contains no modifier in prohibiting lawyers from taking any steps that will prejudice the client (presumably in any way).

ABA Rule 1.3 and its accompanying comments seem to permit lawyers' agreement (without the client's explicit consent) to minor delays in depositions, moving the location of meetings, etc. The Rule does not on its face support lawyers' acts of "professionalism" or "civility" that would prejudice the client -- apparently to any degree. Thus, a lawyer could not point to these provisions in justifying a call to the adversary's lawyer reminding her of some important argument she has overlooked, deadline she is about to miss, etc.

To be sure, lawyers might have some power at the beginning of a representation to assume such authority, as long as they can do so while competently, diligently, and loyally representing their client.

Lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Lawyers can either make their services available only under this condition, or agree with the client to such a limit. ABA Model Rule 1.2(c) cmt. [6].

Thus, presumably lawyers may make their services available only if they retain the discretion to take actions that might prejudice the client but satisfy the lawyer's sense of professionalism. Similarly, lawyers and clients can agree that the lawyer may exercise such discretion. Of course, presumably no bar would permit such an arrangement if the lawyer could materially prejudice the client in using such discretion. Thus, even that recognized possibility would not allow lawyers to alert an adversary of some dispositive mistake -- absent the client's consent at the time, rather than in advance.

And the rules indicate what lawyers must do during a representation if they feel uncomfortable in pressing for an advantage on which the client insists.

Lawyers may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1), (4) (emphasis added).

All of these ethics rules and comments apply only at the margins -- and do not justify lawyers alerting an adversary who is about to commit a dispositive mistake that benefits the lawyer's client.

The issue is closer if the court would be likely to preclude the client from taking advantage of the adversary's mistake. For instance, many courts will vacate a default judgment if the adversary fails to answer, as long as the adversary has a legitimate excuse for not doing so. In that situation, a lawyer representing the client who would benefit from the default judgment might decide not to push that point, because it would be unavailable and perhaps even counterproductive -- if it would annoy or anger the judge. But the lawyer presumably must discuss the issue with the client.

But a lawyer will not find any justification in the ethics rules for relieving the adversary of a case-dispositive error that a court might not or cannot forgive.

Lawyers Obligations and Discretion when Dealing with Tribunals

If these types of issues play out in front of a tribunal, the ethics rules' application becomes much more complicated.

Lawyers' duty to protect their clients' interest then might conflict with the duty to affirmatively disclose unhelpful law to the tribunal, or to avoid misrepresentations to the tribunal.

ABA Model Rule 3.3 indicates that

> [a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphasis added). A comment provides some guidance.

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an

> advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4]. This comment seems to focus on an advocate's affirmative false statement of legal principles. It clearly focuses on presentations of the law to the tribunal.

The Restatement takes essentially the same approach as the ABA Model Rules.

> In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000) (emphasis added).

The Restatement explicitly indicates that

> "[l]egal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Restatement (Third) of Law Governing Lawyers §111 cmt. d (2000) (emphasis added).

This principle focuses on advocates' description of the law to the tribunal. However, it is less clear how the principle applies in other tribunal-related contexts, such as pleadings that do not purport to describe the state of the law.

Perhaps most significantly, neither the ABA Model Rules nor the Restatement have attempted to reconcile this disclosure obligation with the universally accepted principle that lawyers may file on their clients' behalf knowingly time-barred claims, as long as the claim still exists.

The ABA and the Restatement approach recognizes the statute of limitations as an affirmative defense that litigants may or may not assert. Thus, the ABA has indicated that lawyers may file a knowingly time-barred claim, as long as it still exists.

- ABA LEO 387 (9/26/94) ("We conclude that it is generally not a violation . . . to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of the civil claim creates an affirmative defense which must be asserted by the opposing party . . . . [W]e do not believe it is unethical for a lawyer to file suit to a time-barred claim.").

State bars have taken the same approach. New York LEO 475 (10/14/77); Oregon LEO 2005-21 (8/05); North Carolina LEO 2003-13 (1/16/04); Pennsylvania LEO 96-80 (6/24/96).

Although several courts have disagreed with this approach, as a matter of ethics it seems clear that lawyers may file knowingly time-barred claims.

These legal ethics opinions do not deal with this well-recognized principle's arguable inconsistency with lawyers' ethical obligation to disclose adverse law (including adverse statutory law). Presumably that latter obligation does not apply because the tribunal has not yet become involved in assessing the litigants' legal rights. If the defendant raises a statute of limitations defense, it means that its lawyer already knows about that law. And the plaintiff's lawyer obviously could not deny its existence.

If the defendant's lawyer does not realize that the plaintiff's claim might be time-barred, the issue never comes before the tribunal. In other words, plaintiffs' lawyers never have the opportunity to advise the tribunal about the adverse statute of limitations that bars their clients' claims, because the statute of limitations runs before the tribunal deals with that issue. Neither the rules nor common sense would require plaintiffs'

lawyers to notify defendants' lawyers of the adverse statute of limitations when filing the complaint.

The same process presumably plays out if an adversary is about to miss an appellate filing deadline. If a litigant's lawyer knows that the adversary is about to miss the deadline, the litigant's lawyer presumably does not have a duty to tell the adversary -- let alone tell the tribunal.

In contrast, the tribunal's involvement in the process might trigger some disclosure duty under state versions of ABA Model Rule 3.3(a)(2). For instance, the adversary might seek some relief from either the trial court or an appellate court after having missed an appellate filing deadline. In that setting, if the adversary overlooks an applicable statute (such as a law extending the appellate filing deadline for a party in the hospital or serving in the military overseas, etc.) or case law recognizing some other forgiving argument, the litigant's lawyer presumably would have to disclose that to the tribunal.

Although it is unclear why the rules don't require litigators to make the same disclosure in the absence of the adversary's request for judicial relief, courts and bars apparently have not required litigators to do so.

Legal Ethics Opinions

Interestingly, there appear to be no widely-publicized legal ethics opinions dealing with lawyers' duty of confidentiality in such settings.

A 1989 Virginia legal ethics opinion indicated that a criminal defense lawyer must remain silent if the prosecutor sets a trial date past the time at which the law permits the

prosecution to proceed -- after emphasizing that the criminal defense lawyer had nothing to do with setting his client's trial date.

- Virginia LEO 1215 (1/31/89) (explaining that a lawyer may not disclose to the court or the prosecutor that the court had granted a continuance at the prosecutor's request and set the lawyer's client's first degree murder trial one day after the expiration of the time during which the prosecution could proceed; noting that the lawyer's client's case was originally set for trial within the permissible time limit, but that the prosecution later sought to rearrange trial dates of various co-defendants, and had arranged for a trial on a day that the lawyer had earlier advised the court he was available; "You were not consulted before the request for the continuance, nor have you consented to the continuance of this case. You allege that the time limitation for the prosecution of this felony will expire on February 8, 1989, one day before the case is set for trial pursuant to § 19.2-243 of the Code of Virginia."; "It is the opinion of the Committee that since you have no legal obligation to reveal the expiration of the limitations period, you may not reveal it to the detriment of your client.").

In 2007, the Philadelphia Bar dealt with such a similar situation -- requiring a lawyer to stay silent even in the face of an adversary's misunderstanding that the lawyer could accept service of process. That issue was case-dispositive, because of the statute of limitations' running.

- Philadelphia LEO 2007-5 (3/2007) (analyzing the following situation: "While the inquirer was in the process of finalizing the inquirer's client's complaint, a complaint was filed by the landlord's counsel, a copy of which was forwarded to the inquirer by facsimile. The inquirer has never agreed to accept service of original process on behalf of the inquirer's client, and in fact, does not have permission to do so." (emphasis added); holding that the lawyer did not have to disclose his lack of authority to accept service of process, despite the impending running of the statute of limitations; "In the inquirer's professional opinion, the statute of limitations on those claims runs in May 2007. Further, in the inquirer's opinion, the filing of the complaint will not toll the statute because of opposing counsel's failure to act to effectuate proper service. The inquirer has thoroughly discussed the situation with the inquirer's client who has declined to give the inquirer authority to accept service of the complaint or authority to advise opposing counsel of the inquirer's lack of authority." (emphasis added); "[T]he choice as to whether to authorize one's lawyer to accept original process is simply a prerogative of the client which involves no criminal or fraudulent act. Further, subject to exceptions not relevant here,

> Rule 1.6 governing confidentiality, prohibits a lawyer from revealing information relating to the representation of a client. As a result, in the absence of permission from the client, the inquirer would commit a violation of Rule 1.6 by notifying opposing of the inquirer's lack of authority to accept service." (emphasis added)).

The paucity of ethics guidance on this issue seems odd. One would think that lawyers wishing to act "professionally" would ask ahead of time if they can alert adversaries' lawyers about some case-dispositive mistake. It would be distressing to think that lawyers do not face at least some temptation to help a brother or sister lawyer avoid per se malpractice, loss of employment, or destruction of a reputation. But few if any lawyers ask bars where to draw the line between permissible disclosure and impermissible prejudice to the client.

Perhaps the profession does not want to articulate the extent of lawyers' duty to stand silent while the adversary's lawyer takes an action or fails to take an action a result of which that lawyer's "client's legal position may be destroyed" (in the words of ABA Model Rule 1.3 cmt. [3]).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE MISCALCULATION TO THE ADVERSARY, UNLESS YOUR CLIENT CONSENTS**.

B 4/15, 10/15

Lawyers' Duty to Correct Their Earlier Misstatements to Courts

Hypothetical 17

You have spent years earning a good reputation in your local court, but you worry that a troublesome client's actions might destroy it. In a hearing yesterday, you made several material factual representations to the court based on what your client had earlier told you. After the hearing, he confessed that some of the factual representations were wrong. Although your representations to the court did not constitute evidence, you immediately told your client that you had to correct your misstatements. However, he knew enough about your ethics duties to insist that you maintain the confidentiality of your post-hearing discussion and his confession -- and not correct your earlier representations.

What do you do?

(A) You must disclose the correct facts to the court.

(B) You may disclose the correct facts to the court, but you don't have to.

(C) You may not disclose the correct facts to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE CORRECT FACTS TO THE COURT

Analysis

The ABA Model Rules prevent lawyers from knowingly making false statements of fact to the tribunal, or failing to correct material false statements they made to the court thinking them to be true.

> A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February 2002), the prohibition only precluded lawyers' knowingly false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

> [i]n the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Not all states take the same approach. For instance, D.C. Rule 3.3(a)(1) recognizes such a duty only if the correction would not require the lawyer to violate D.C. Rule 1.6.

> A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

D.C. Rule 3.3(a)(1) (emphasis added). A Comment provides additional guidance on this unique D.C. Rule.

> If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement, unless correction would require a disclosure of information that is prohibited by Rule 1.6. This provision in paragraph (a)(1) differs from ABA Model Rule 3.3(a)(1), which requires a lawyer to disclose information otherwise protected by Rule 1.6 if necessary to correct the lawyer's false statement. If Rule 1.6 permits a lawyer to disclose a client confidence or secret, D.C. Rule 3.3(a)(1) requires the lawyer to disclose that information to the extent reasonably necessary to correct a false statement of material fact or law. Nothing in D.C. Rule 3.3(a)(1) limits any disclosure duty under Rule 4.1(b) when substantive law requires a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud.

D.C. Rule 3.3(a)(1) cmt. [2] (emphasis added).

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE CORRECT FACTS TO THE COURT.** B 1/16

Courts' Factual Misunderstanding Based on the Absence of Material Facts

Hypothetical 18

You know that you cannot knowingly make false statements to courts, but you now face a more subtle issue. You have scheduled a TRO hearing for tomorrow morning -- and you do not know whether the adversary or his lawyer will be there. Your client has told you about several material and very damaging facts that would weaken your effort to obtain a TRO. Your client has asked you not to disclose those facts to the court if the other side fails to raise them.

(a) What do you do if the adversary and her lawyer appear at the hearing?

(A) You must disclose the adverse material facts to the court if the other side does not.

(B) You may disclose the adverse material facts to the court if the other side does not, but you don't have to.

(C) You may not disclose the adverse material facts to the court if the other side does not, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT IF THE OTHER SIDE DOES NOT, UNLESS YOUR CLIENT CONSENTS

(b) What do you do if the adversary and her lawyer do not appear at the hearing?

(A) You must disclose the adverse material facts to the court.

(B) You may disclose the adverse material facts to the court, but you don't have to.

(C) You may not disclose the adverse material facts to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT

Analysis

Lawyers' obligation or discretion to disclose unfavorable facts to courts depends in most jurisdictions on whether an adversary is present.

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts.

The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other side to facts that might assist its case. Of course, litigants must respond to discovery, unless the court sustains an objection. And most rules require litigants to supplement discovery if they learn of responsive facts. But generally lawyers have no duty to assist their adversaries by voluntarily telling them about harmful facts.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's [lawyer] silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and

Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving courts sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

At least one jurisdiction takes a different approach -- sometimes requiring lawyers to disclose unfavorable facts even in an adversial proceeding.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

New Jersey Rule 3.3(a)(5) (emphasis added). This apparently unique provision requires lawyers to disclose unfavorable facts if the court might be misled in the absence of knowing those unfavorable facts.

Notably, the New Jersey Rule's exception to this disclosure duty is much more limited than one might think at first blush. The Rule allows lawyers to refrain from disclosing material facts protected by "a recognized privilege" (presumably such as the attorney-client privilege or the work product doctrine). However, those evidentiary protections are far more narrow than the ethics confidentiality duty. This means that the New Jersey rule may require lawyers to disclose material facts that deserve only confidentiality protection, but not privilege or work product protection.

(b) Interestingly, the ethics rules are dramatically different in ex parte proceedings.

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d).

A comment to ABA Model Rule 3.3 explains the basis for this important distinction.

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

> In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

> An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.
>
> Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative,

> requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.
>
> To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

> Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

> [a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

> [A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter

indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Surprisingly, at least one jurisdiction's ethics rules do not contain this exception for ex parte proceedings. D.C. Rule 3.3.

BEST ANSWER

The best answer to **(a)** is **(C) YOU MAY NOT DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT IF THE OTHER SIDE DOES NOT, UNLESS YOUR CLIENT CONSENTS**; the best answer to **(b)** is **(A) YOU MUST DISCLOSE THE ADVERSE MATERIAL FACTS TO THE COURT**.

B 1/16

Courts' Legal Misunderstanding Based on Litigants' Failure to Cite Relevant Law

Hypothetical 19

Through several years of extensive discovery and frequent hearings in state court litigation, you and your colleagues have always been more diligent than your adversary's lawyers. The latest upcoming hearing is no exception. Your adversary's brief fails to cite several unfavorable decisions that one of your brightest new associates has found. One of the unfavorable decisions is from the circuit court where you are litigating, and another even worse decision is from a circuit court in another part of your state.

When you advised your client of the bad decisions, she asked you to keep that research confidential -- relying on some of your own statements to her about the breadth of your state's confidentiality duty.

(a) What do you do about the unfavorable law from your circuit court?

(A) You must disclose the adverse law to the court.

(B) You may disclose the adverse law to the court, but you don't have to.

(C) You may not disclose the adverse law to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSE LAW TO THE COURT

(b) What do you do about the unfavorable law from the other circuit court?

(A) You must disclose the adverse law to the court.

(B) You may disclose the adverse law to the court, but you don't have to.

(C) You may not disclose the adverse law to the court, unless your client consents.

(B) YOU MAY DISCLOSE THE ADVERSE LAW TO THE COURT, BUT YOU DON'T HAVE TO (PROBABLY)

Analysis

(a)-(b) As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes, weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.[1]

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[1] Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo ex rel. Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's Cnty., 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. Cnty. of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

> Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?
>
> . . . .

> We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

> The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

> We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.
>
> Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions

> from other states where there is no local case in point . . . . A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.
>
> Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)[2] (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

[2] ABA Model Code of Prof'l Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The 1983 ABA Model Rules apparently presume that legal research and the resulting knowledge of adverse decisions are not subject to lawyers' confidentiality duty.

However, that presumption stands on shaky ground. Under ABA Model Rule 1.6(a), lawyers may not "reveal information relating to the representation of a client" unless some exception applies. Legal research clearly uncovers "information relating to the representation of a client." The ABA Model Rules comment describing the broad scope of lawyers' confidentiality duty explains that

> [t]he confidentiality rule, for example, appies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

ABA Model Rule 1.6 cmt. [3] (emphasis added). That description seems to cover legal research.

However, that Comment's next sentence explains that lawyers may not disclose "such information" -- "except as authorized or required by the Rules of Professional Conduct or other law." Id. (emphasis added). That Comment (as well as common

sense) means that lawyers' separate duty to disclose adverse authority trumps any confidentiality duty.

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

> [D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." Id. He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case. Id.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

> [T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."

. . . .

> While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

> In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

> A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

> "Legal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

> Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but

> fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

> Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach.

Only one state appears to have explicitly indicated what the ABA Model Rules and most states presume -- that legal research does not fall within lawyers' confidentiality duty.

> "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

New York Rule 1.6(a) (emphasis added).

Although most states follow the ABA Model Rules approach, some take a different approach. For instance, New York does not require disclosure of "legal authority in the controlling jurisdiction" that is adverse to the client, but instead requires disclosure of an apparently narrower range of adverse authority.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

New York Rule 3.3(a)(2) (emphasis added). Although New York's Comments do not explain the distinction between this approach and the ABA Model Rules' approach, it seems to be different. For instance, law from another state circuit or district might fall within the ABA Model Rules' definition of "legal authority in the controlling jurisdiction" (the state) -- but not the "controlling legal authority." In some states, various circuit courts at the trial or the appellate level take differing approaches to issues such as the required imminence of litigation required to claim work product protection. So in that setting, the ABA Model Rules would require lawyers to disclose a sister court's adverse authority, while the New York formulation would not.

Another state uses a different formulation that seems to fall somewhere between the New York approach and the ABA Model Rules approach.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Yet another jurisdiction takes a unique approach which is not obvious on its face.

> A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.

D.C. Rule 3.3(a)(3) (emphasis added). The reference to "legal authority in the controlling jurisdiction" follows the ABA Model Rules formulation, and presumably includes law that does not control in the case -- as does the language of other jurisdictions mentioned above. However, the unique phrase "known to the lawyer to be dispositive of a question at issue" would seem to exclude from lawyers' disclosure duty adverse authority that does not control in the case. In other words, legal authority that does not control in the case but is instead from a sister court (for example) would not be "dispositive of a question at issue" in the case.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, Case No. 99-1707, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

> The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

> The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.". . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

> Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.
>
> . . .
>
> In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

> It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's

> view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.
>
> . . .
>
> This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

> At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water [Scioto Cnty. Reg'l Water Dist. No. 1 Auth. V. Scioto Water, 103 F,3d 38 (6th Cir. 1996)] decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

Best Answer

The best answer is **(a) is (A) YOU MUST DISCLOSE THE ADVERSE LAW TO THE COURT; (b) is (B) YOU MAY DISCLOSE THE ADVERSE LAW TO THE COURT, BUT YOU DON'T HAVE TO (PROBABLY)**

B 1/16

Courts' Factual Misunderstanding Based on Litigation Adversaries' Mistakes

Hypothetical 20

You have been worried for weeks about your client's fate in an upcoming hearing. She had already been convicted of one check-kiting crime and the judge has a reputation for toughness on repeat offenders. To your surprise, when the judge asks the prosecutor if your client has any prior convictions, the prosecutor tells the judge that there have been no prior convictions. Your mind starts to race as you consider what you should do.

(a) What do you do?

(A) You must disclose the prosecutor's mistake to the court.

(B) You may disclose the prosecutor's mistake to the court, but you don't have to.

(C) You may not disclose the prosecutor's mistake to the court, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE PROSECUTOR'S MISTAKE TO THE COURT, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

(b) If the prosecutor turns to your client and asks "Right?" may you and your client remain silent?

(A) YES (PROBABLY)

(c) If the judge asks "Is that right?" may you and your client remain silent?

(B) NO (PROBABLY)

Analysis

Lawyers face a very difficult dilemma when dealing with a court's mistaken reliance on an adversary's innocent misstatement.

To serve their clients, lawyers may wish to leave the court's mistake uncorrected. However, lawyers would also justifiably worry that judges would think less of them by allowing the judge to make rulings or take other actions based on a mistake. Lawyers must be careful not to let those worries outweigh their duty to diligently serve a current client -- because lawyers must place the current client's interests above the lawyer's own reputational interest or their desire to avoid the judge's doubts about the lawyer's ability to represent future clients.

In 1951, Boston lawyer Charles Curtis wrote a law review about lawyers' duty to advocate for their clients. Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (Dec. 1951).

Among other things, Curtis explained lawyers had no duty to correct a court's mistaken understanding of the facts.

> I have said that a lawyer may not lie to the court. But it may be a lawyer's duty not to speak. Let me give you a case from the autobiography of one of the most distinguished and most conscientious lawyers I or any other man has ever know, Samuel Williston. In his autobiography, Life and Law, he tells of one of his early cases. His client was sued in some financial matter. The details of the claim are not important. Willston, of course, at once got his client's letter file and went through it painstakingly, sorting, arranging, and collating it. The letters, we may well believe, told the whole story, as they usually do in such a case. Trial approached, but the plaintiff's lawyers did not either demand to see the correspondence, nor ask for their production. "They did not demand their production and we did not feel bound to disclose them." At the close of the trial, "In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time."

Id. at 9-10 (emphases added) (footnote omitted). Curtis acknowledged that in contrast to this situation, lawyers must advise the court about adverse law.

In 1953, an ABA legal ethics opinion emphasized lawyers' confidentiality duty. In ABA LEO 287 (6/27/83),[1] the ABA dealt with the several scenarios involving a criminal sentencing.[2]

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[1] ABA LEO 287 (6/27/53) (analyzing two situations, one of which involved a client's admitted perjury and the other involved a court's error about a client's criminal record; analyzing the following scenario: "A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you on probation.' Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record? . . . Suppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?"; "Turning to the second inquiry, relative to the convicted client up for sentence, whose lawyer sees the court put him on probation by reason of the court's misinformation as to his criminal record, known to the lawyer: If the client's criminal record was communicated by him to his counsel when seeking professional advice from him, Canon 37 would prevent its disclosure to the court unless the provisions of Canons 22, 29 and 41 require this. If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity. If the fact of the client's criminal record was learned by the lawyer without communication, confidential or otherwise, from his client, or on his behalf, Canon 37 would not be applicable, and the only problem would be as to the conflicting loyalties of the lawyer on the one hand to represent his client with undivided fidelity and not to divulge his secrets (Canon 6), and on the other to treat the court in every case in which he appears as counsel, with the candor and fairness (Canon 22) which the court has the right to expect of him as its officer. In this case we deem the following considerations applicable. If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth. Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the Court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, the lawyer's duty of candor

In the first scenario, the court mistakenly believed that the lawyer's client had no previous record, based on a court employee's incorrect statement to the court:

> [a] convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, 'You have no criminal record, so I will put you

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and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not appease on the basis of loyalty to the client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or 'any manner of fraud or chicane.' (Canon 15). If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out."; a dissenting opinion stated as follows: "We can not subscribe to the majority opinion. Canon 29 expressly provides: The counsel upon the trial of the cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. No good reason exists for ignoring the plain and unmistakable mandate of this Canon. Canon 29 is based upon sound public policy which singles out perjury because perjury strikes at the roots of our American system of jurispurdence [sic]. Perjured testimony poisons the well-springs and makes a mockery of justice. Canon 29 enjoins lawyers, as officers of the court, to protect the cause of justice and to assist public authorities in stamping out perjury, no matter by whom committed. The sweeping provisions of Canon 29 do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but requires him to report any perjury, including that committed by his own client or witnesses. No exception is made in Canon 29 as to the manner in which the knowledge of perjury is acquired by the lawyer. No longer is a trial supposed to be a 'Game' to be played by unscrupulous laymen with lawyers as mere pawns. Canon 29 seeks to make a trial an organized search for the truth -- charging the lawyers with the duty of seeing that no litigant prevails through perjury."; "In the second set of facts, a convicted client stood before the court for sentence. At this critical juncture the court sought information as to whether the defendant had a criminal record. The clerk informed the court that the defendant had no criminal record. The lawyer knew that his client did have a criminal record. Under these circumstances can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In Opinion 280 it was held that a lawyer could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation no matter whether it affects his client adversely. We think that Canons 29, 41, 15 and 22 require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself. Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The method by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under Canons 29 and 41.").

[2] ABA LEO 287 also addressed as separate scenario in which a client committed perjury in seeking a divorce.

> on probation.' Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

ABA LEO 287 (6/27/53) (emphasis added).

The majority held that in this first scenario (where the court did not ask anyone to confirm the court's understanding), the lawyer could remain silent.

> If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out.

Id.

The second scenario involved the lawyer's client affirmatively lying to the court in response to the court's direct question to the client about his criminal record.

> [s]uppose, under the above circumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose the court the true facts as to his client's criminal record?

Id. (emphasis added).

The majority held that the lawyer could remain silent even in this situation.

> If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence.

Id. (emphasis added).[3]

The third scenario involved a court directly asking the defendant's lawyer about the defendant's criminal record.

> Assume further a situation in which the judge following the conviction asks the defendant's lawyer whether his client has a criminal record.

The majority offered a more subtle analysis of this third scenario.

> In this case we deem the following considerations applicable. If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth.
>
> Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the Court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is

[3] In 1987, a ABA legal ethics opinion explained that a lawyer in this situation would have to correct the client's false statement to the court, based on the 1983 ABA Model Rules. ABA LEO 353 (4/20/87).

> involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not appease on the basis of loyalty to the client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or 'any manner of fraud or chicane.' (Canon 15).

Id. (emphases added).

Thus, the ABA LEO 287 majority suggested that the lawyer try to dodge the court's question. And the majority also held that the lawyer must affirmatively "advise the court not to rely on counsel's personal knowledge as to the facts of the client's record" -- if the lawyer believes that the court is relying on the lawyer's silence as "corroborating the correctness of the statement by the clerk or by the client that the lawyer has no criminal record." ABA LEO 287 did not provide any guidance to lawyers attempting to determine if the court was relying on their silence in that way.

This is unfortunate, because it would seem extremely difficult for lawyers to determine whether courts are relying on their silence as some corroboration of a clerk's misstatement to the court.

An ABA LEO 287 a dissenting opinion contended that the lawyer must affirmatively disclose the client's criminal record in all three of the scenarios: (1) when a court employee provided information to the court that the lawyer knew to be inaccurate; (2) when the client affirmatively lied to the court about the lack of criminal record; and (3) when the court either asked the defendant's lawyer whether the defendant had a criminal record, or apparently relied on the lawyer's silence as corroboration that the defendant did not have a criminal record.

> [A] convicted client stood before the court for sentence. At this critical juncture the court sought information as to whether the defendant had a criminal record. The clerk informed the court that the defendant had no criminal record. The lawyer knew that his client did have a criminal record. Under these circumstances can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In Opinion 280 it was held that a lawyer could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation no matter whether it affects his client adversely. We think that Canons 29, 41, 15 and 22 require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself.
>
> Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The method by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under Canons 29 and 41 (emphasis added).

Id. (emphases added).

Over thirty years later, the ABA analyzed the same three scenarios under the 1983 ABA Model Rules. ABA LEO 353 (4/20/87).

ABA LEO 353 came to a different conclusion about the second scenario -- in which the lawyer's client explicitly lied in response to the court's question to him about his criminal record. Relying on ABA Model Rule 3.3, ABA LEO 353 explained that

> [w]hen the lawyer cannot persuade the client to rectify the perjury, [the lawyer must] disclose the client's false statement to the tribunal.

Id.

The other two scenarios involved more subtle issues -- because they did not involve the lawyer's client flatly lying to the court. Instead, they involved the court's misunderstanding based on a court clerk's unintentional misstatement to the court, or the lawyer's failure to directly respond to the court's question to the lawyer about the client's criminal record. Thus, in those scenarios a third party (the court) operated under a misunderstanding through no fault of the client or the lawyer.

ABA LEO 353 came to the same conclusion about the first and the third scenarios addressed in the earlier ABA LEO 287.

In the first scenario,

> [t]he judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him.

Id. ABA LEO 353 explained that in ABA LEO 287's conclusion that the lawyer must remain silent in that setting

> [i]s still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited under Rule 1.6, from disclosing information relating to the representation.

Id.

ABA LEO 353 described the third scenario from the earlier ABA LEO 287 as follows:

> the judge asks the defendant's lawyer whether his client has a criminal record.

Id. Interestingly, ABA LEO 353 lumped that scenario in with the first scenario -- finding that the lawyer may not disclose the client's criminal record to the court.

> In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited under Rule 1.6 from disclosing information relating to the representation.

Id.

In a footnote, ABA LEO 353 provided some guidance to a lawyer put in this awkward position.

> Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

Id. at n5 (emphasis added).

In what presumably was a deliberate move, ABA LEO 353 did not address ABA LEO 287's discussion of the lawyer's obligation (as ABA LEO 287 put it) "even . . . if the court does not directly ask the lawyer" about the client's criminal record, but rather if "such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court."

As explained above, ABA LEO 287 explained that the lawyer must affirmatively "advise the court not to rely on counsel's personal knowledge as to the facts of the client's record" -- if

> the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record.

ABA LEO 287.

ABA LEO 353 presumably would come to the same conclusion as the earlier ABA LEO 287. A lawyer in that situation does not have to disclose the client's criminal record, but must affirmatively warn the court not to rely on the lawyer's personal knowledge of the client's criminal record -- not just if the court directly asks the lawyer, but also in a situation where the lawyer hears the court employee providing inaccurate information to the court. The older ABA LEO 287 did not provide any useful guidance to lawyers trying to determine if courts were relying on the lawyer's silence as some collaboration of the court clerk's misstatement to the court. Perhaps ABA LEO 353 did not know what to say about that either, so it simply ignored that part of the earlier opinion. This silence is just as unfortunate as the earlier ABA LEO 287's failure to explain when lawyers must speak up in that setting.

At least one state takes a different position in its black letter ethics rules, requiring lawyers to disclose facts to avoid their misunderstanding, unless a "recognized privilege" protects the disclosure.

- New Jersey Rule 3.3(5) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.").

Interestingly, one of the few recent decisions on this issue comes from New Jersey, and seems to contradict the New Jersey Rule. In 2015, a New Jersey court

found that a defense lawyer could stand silent rather than inform the court or the prosecutor that his client's license had been suspended for drunk drinking.

- State v. Kane, Dkt. No. A-5773-13TI, 2015 N.J. Super. Unpub. LEXIS 277, at *22-23 (N.J. Super. Ct. App. Div. Feb. 17, 2015) (holding that a lawyer representing a client in a traffic case based on the client's driving with a suspended license did not have to inform the court or the prosecutor that the client's license had been suspended for drunk driving, and thus rendered the client vulnerable to a much more serious charge; "[W]e reject the State's claim that defense counsel was obligated under R.P.C. 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests. The situation here is markedly distinguishable from In re Seelig, 180 N.J. 234, 850 A.2d 477 (2004, in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died. As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the Title 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no 'fraud' or unethical behavior by the defense here.").

A chronological review of state ethics opinions shows an evolution toward disclosure in scenarios like this.

- North Carolina CRP 313 (2/5/82) (assessing the following question: "Client X is charged with driving under the influence on April 27. X is subsequently charged with driving under the influence on May 11. One May 25, X pleads guilty to the April 27 charge of driving under the influence. On June 10, X pleads guilty to the May 11 charge of driving under the influence. At the June 10 hearing the State submits a record check of X's driving history. The conviction on May 25 does not appear on that driving record. At no time does the court ask Attorney A, X's attorney, if there are any other convictions or if the driving record is accurate. Nor does Attorney A in any way insinuate to the court that this is Client X's first offense." (emphasis added); "If the court does not ask Attorney A directly or indirectly about Client X's driving record, is Attorney A under any ethical compulsion to advise the State or the court of the prior conviction not shown on Client X's driving record at the time the State made its check?" (emphasis added); providing the following opinion: "No. Attorney A is obligated to protect the confidences and secrets of his client. DR 4-101. The term "secret" indicates any information gained

in the professional relationship the disclosure of which would be detrimental to the client. DR 4-101(A). Certainly, the disclosure of the prior conviction would be detrimental to Client X. Attorney A is not violating any of the prohibitions of DR 7-102 in his failure to volunteer the information that there had been a prior conviction after the date when the State last checked Client X's driving record and which had not yet shown up at the time the State checked the record. The American Bar Association has ruled that an attorney has no duty to correct the court's misinformation when the court is about to impose a sentence based on misinformation about the client's previous criminal record or lack of a previous criminal record if the attorney's information was received from the client. Formal Opinion 287 (June 27, 1953). This opinion was further discussed in Formal Opinion 341 where the American Bar Association indicated that an attorney should protect any information received in connection with his professional relationship with the client. Only if DR 4-102(C) applies or if the information is obtained outside of the attorney-client relationship would disclosure be appropriate. Formal Opinion 341 (September 30, 1975). If Attorney A had learned about X's prior conviction through discussions in the community or simply by reading of it in the newspaper, the information would not be a secret of the client. But, even though it may be known to the community and may be a matter of public record, it remains a secret which Attorney A is obligated to protect if Attorney A's knowledge of it comes through representation of the client either in the proceeding itself or through the client's communication to him." (emphasis added)).

- Texas LEO 504 (8/1994) ("The judge then asked the prosecutor, 'Does the defendant have any prior convictions?' The prosecutor mistakenly stated to the court that police records reflect that defendant has no prior convictions. Prosecutor turned to the defendant and asked, 'Right?' The defendant and defense counsel make no statement and the court granted probation of defendant's sentence." (emphasis added); "The particular question presented in the Statement of Facts does not involve a lawyer knowingly making a false statement of material fact or law, or a situation where the client has permitted perjury or made a fraudulent statement in which the lawyer's silence may be tantamount to assisting a criminal or fraudulent act. Rather, the situation presents the issue of whether a lawyer may remain silent when neither he nor his client has made a false statement to the tribunal, but the lawyer knows that the court is relying upon mistaken or inaccurate information stated in court to the benefit of his client."; "Since neither lawyer or his client in the Statement of Facts made a false statement to the court, the lawyer has not violated Texas Disciplinary Rule 3.03(a)(1); since the client did not commit fraud or perjury, the lawyer's silence does not constitute assisting a criminal or fraudulent act. The lawyer may remain silent without violating Texas Disciplinary Rule 3.03, and therefore is prohibited under the Texas

Disciplinary Rule 1.05 from disclosing confidential information about his client's prior convictions." (emphases added)).

- North Carolina LEO 98-5 (4/16/98) (holding that a criminal defendant's lawyer can remain silent while the prosecutor gives incorrect information to the court about the client's record, but cannot assist the client in petitioning for a limited driving privileges by implicitly relying on the fact that there had been no prior DWIs; posing the question as follows: "Client was charged with driving while impaired (DWI). Attorney A represented him at trial where Client was convicted. At the sentencing hearing, the prosecutor informed the court that Client had no record of prior convictions for DWI. Attorney A and Client were aware, however, that Client was convicted of DWI in federal court but the federal court failed to forward information regarding the conviction to the North Carolina Department of Motor Vehicles for inclusion in Client's driving record. Therefore, when the prosecutor checked the driving record, he found no record of the prior conviction. At the sentencing hearing, Attorney A and Client remained silent when the prosecutor informed the court that Client had no prior convictions for DWI. Neither Attorney A nor Client made any affirmative misrepresentations to the court about Client's driving record. The judge sentenced Client to punishment level three which can only be imposed if the court determines that the defendant has not been convicted of a prior DWI within the previous seven years." (emphases added); "Was it unethical for Attorney A to remain silent when he heard the prosecutor give erroneous information to the court?"; answering as follows: "No, it was not unethical for Attorney A to remain silent. The burden of proof was on the State to show that the defendant's driving record justified a more restrictive sentencing level. A defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. See Rule 1.6(c) and Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; CPR 313 (lawyer may not volunteer to the court confidential information about a client's prior convictions); and RPC 33 (lawyer may not reveal confidential information about a client's prior criminal record to the court but may not misrepresent the client's criminal record). Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal 'when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,' this rule was not violated because Client's driving record was inaccurate through no fault of Client and Client did not criminally or fraudulently conceal the prior conviction from the prosecutor or the court." (emphases added)).

Most lawyers probably would err on the side of correcting courts' mistakes based on an adversary's innocent misstatement. Outside the criminal setting, most lawyers

would not face any problems even if they arguably violated their confidentiality duty by taking such corrective action. However, the constitutional issues implicated in criminal cases should give lawyers pause if their instincts lead them in the direction of disclosure.

Many lawyers cite their role as "officers of the court" in deciding to speak up and correct the prosecutor's undoubtedly innocent misstatement. But that role does not change the basic nature of lawyers' primary duty to advocate for their clients. In the broad-ranging debate resulting in the ABA's 1983 adoption of the ABA Model Rules, the American Trial Lawyers issued proposed ethics rules that emphasized this advocacy duty. These proposed rules' introduction provided the American Trial Lawyers' stark view of what it means to be an "officer of the court."

> Recognizing that the American attorney functions in an adversary system, and that such a system expresses fundamental American values, helps us to appreciate the emptiness of some clichés of lawyers' ethics. It is said, for example, that the lawyer is an 'officer of the court,' or an 'officer of the legal system.' Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Preamble, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Best Answer

The best answer to **(a)** is **(C) YOU MAY NOT DISCLOSE THE PROSECUTOR'S MISTAKE TO THE COURT, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**; the best answer to **(b)** is **(A) PROBABLY YES**; the best answer to **(c)** is **(B) PROBABLY NO**.

B 4/15, 10/15

Courts' Scrivener's Errors

Hypothetical 21

You represented a criminal defendant in a case tried by a judge without a jury. The judge announced from the bench that she found your client guilty of a felony. However, you were pleasantly surprised, and bit perplexed, when you received the court's final order -- because the judge mistakenly marked the "misdemeanor" box on the post-verdict form.

What do you do?

(A) You must disclose the mistake to the court.

(B) You may disclose the mistake to the court, but you don't have to.

(C) You may not disclose the mistake to the court, unless your client consents.

(A) YOU MUST DISCLOSE THE MISTAKE TO THE COURT (PROBABLY)

Analysis

Lawyers dealing with courts' scrivener's errors must balance their duty of loyalty to their clients and their duties as officers of the court.

Balancing these duties can be very difficult, because lawyers must not forfeit some advantage for a current client because the lawyer is worried about her "image" before the court (which is a personal interest) or the effect it will have on the lawyer's representation of other future clients before that court.

One state's old state ethics opinions concluded that lawyers did not have a duty to disclose courts' scrivener's errors that benefit their clients.

- Virginia LEO 1400 (3/12/91) (explaining that a criminal defense lawyer representing a client found guilty of a felony is under no duty to reveal that the sentencing document later signed by the judge erroneously stated that the defendant was found guilty only of a misdemeanor (assuming that the

lawyer did not endorse the document or otherwise participate in drafting it); concluding that the lawyer was ethically obligated not to reveal the error, because the revelation would damage the client.).

- Virginia LEO 1186 (2/13/89) (assessing a situation in which a court-appointed lawyer represents a criminal defendant, against whom two offenses have been docketed for trial on the same date and time; explaining that the court arraigns only on one charge, and the court does not address the second charge; concluding that even if the client had been in pretrial confinement because of the overlooked second criminal charge, the lawyer had a duty not to reveal the court's failure to address the second charge; acknowledging that determining whether the lawyer must fill out a form (a standard "Time Sheet") that might reveal the court's mistake is a question of law beyond the Bar's jurisdiction, but the lawyer may not "enhance" the time sheet to present a misleading impression; "The Committee would opine that defense counsel is not under any affirmative obligation to reveal that the court has overlooked his client's second criminal charge, even if the client had been in pretrial confinement because of that charge, unless the client requested that he inform the court of the omission. Under DR:7-101(A)(3), it would be unethical for an attorney to reveal information that would prejudice or damage his client.").

- Virginia LEO 561 (4/10/84) (assessing a situation in which after winning a motion, a lawyer prepared a decree accidentally broader than the court's ruling; concluding that because the lawyer had not intentionally misdrafted the decree, the lawyer may now assert a res judicata defense based on the overbroad decree; warning that the lawyer must concede the circumstances of the drafting should the adversary raise it.).

In contrast, another states' older legal ethics opinion took just the opposite approach -- requiring lawyers to advise courts of their factual error.

- Wisconsin LEO E-84-7 (1984) (explaining that a criminal defense lawyer must tell a court of the clerk's error in indicating charges against a lawyer's client had been dismissed; analyzing the following scenario: "An attorney represents a criminal defendant charged with two misdemeanors. At a court appearance, the district attorney indicates to the court that the state will dismiss one of the charges, but wishes to proceed on the other charge. At that time, the matter is set for a jury trial. A week before trial, the attorney learns from the clerk of court that both cases against the defendant are indicated as dismissed on the court's docket. Does the attorney have an obligation to bring this apparent error to the attention of the district attorney, the court or the court's staff?" (emphasis added); explaining the lawyer's duty to disclose the error; "The attorney does not have an obligation to inform the

district attorney of the apparent error on the court's docket. The district attorney has an obligation to represent the state competently and zealously. It is the responsibility of the district attorney in diligently pursuing the obligations of his or her position to discover the discrepancy. . . . However, the attorney has an obligation to inform the court's staff of the apparent error. In State v. Barto, 202 Wis. 329, 331, 232 N.W. 553 (1930), the Wisconsin Supreme Court stated that when a person enters the practice of law, he or she 'thereby assumes certain duties and obligations and is required to conform to certain standards in three principal relations: (1st) in his relation to his client; (2nd) his relation to the courts and fellow practitioners; and (3rd) his relation to the public. . . .' The court further stated that an attorney has a duty of absolute fidelity and loyalty to the cause of his or her client. However, the court added, if a conflict arises between a lawyer's duty to his or her client and the court, his or her duty to the court must prevail. 202 Wis. at 331. An attorney's duty to the court is a result of his or her role as officer of the court. . . . This duty applies in civil and criminal cases. . . . In the present situation, it is most certainly to the client's benefit if the error remains undiscovered. However, in light of the above, the attorney's duty to inform the court of the apparent error must prevail." (emphases added)).

The dichotomy between these two approaches has continued.

A 2011 North Carolina ethics opinion required disclosure.

- North Carolina LEO 2011-12 (10/21/11) (analyzing the following scenario: "Lawyer has a client in custody who has numerous cases pending in district court. Lawyer negotiates a plea agreement with the assistant district attorney (ADA) whereby all but two of the charges will be dismissed. Lawyer asks for the client to be brought into the courtroom to enter his plea. At that time, Lawyer is informed that the client has already been taken back to the jail. Lawyer and the ADA agree to continue the case to the next business day. When Lawyer subsequently goes to visit his client in jail, he is told that the client was released because all of his charges were dismissed. Upon investigation, Lawyer confirms that all of the client's charges had been voluntarily dismissed. The dismissals are clearly the result of an error by the clerk of court and do not reflect the plea agreement entered into by Lawyer and the ADA." (emphasis added); explaining that the lawyer had a duty to disclose the clerk's error; "The preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an 'officer of the legal system.' Rule 0.1. Rule 8.4(d) states that it is professional misconduct for a lawyer to 'engage in conduct that is prejudicial to the administration of justice.' Similarly, Comment [2] to Rule 3.3 (Candor Toward the Tribunal) refers to the special duties of lawyers as officers of the court to 'avoid conduct that undermines the integrity of the adjudicative process.' Under Rule 3.3, for example, a lawyer has a duty to disclose a client's false

> testimony even though it may have grave consequences for the client, where the alternative is that the lawyer cooperate in deceiving the court thereby subverting the truth-finding process which the adversary system is designed to implement. Rule 3.3, Cmt. [11]. Thus, if a conflict arises between a lawyer's duty to his client and his duties as an officer of the court, the lawyer's duty to the court must prevail." (emphasis added); distinguishing the situation from an earlier legal ethics opinion; "This inquiry differs from that addressed in 98 FEO 5, which provides that a defense lawyer does not have a duty to inform the court of an inaccurate driving record presented by the prosecutor. In the situation addressed in 98 FEO 5, both advocates are present in court and each is expected to present evidence and carry his burden of proof. The opinion states that the burden of proof is on the state to show that the defendant's driving record justifies a more restrictive sentencing level and that the defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. In the instant inquiry, Lawyer knows that his client's charges were dismissed in error and that 'justice' (in the form of a negotiated plea to which Lawyer and the client agreed) was not carried out. Therefore, Lawyer has an obligation to inform the court or the clerk of court of the apparent error. Accord Wis. Formal Ethics Op. E-84-7 (1984) (defense attorney has obligation to inform the court or the court's staff of clerk of court's error).").

In 2016, the Maryland Bar dealt with this issue -- and reached a different conclusion. Maryland LEO 2016-04 presented a scenario involving a court clerk repeatedly preparing erroneous records involving a criminal defendant -- and a criminal defense lawyer's rebuffed effort to advise the clerk of a mistake which favored the lawyer's client.

> You advise that you represented a criminal defendant in post-conviction proceedings. The post-conviction court resentenced your client, giving him credit for time he had already served indicating that he should receive credit from date A to date B.
>
> To document this, the court issued a Commitment Record in order to specifically inform the Division of Corrections exactly how much additional time the defendant must serve. This Commitment Record was incorrect because it did not give defendant all of the credit for time served that the court had earlier granted him on the record.

> You then wrote the court asking the judge to correct the Commitment Record. The court did not respond to your letter so you called chambers and were directed to speak with the courtroom clerk. You did so, and the clerk then issued a new Commitment Record.
>
> When you received this new Commitment Record it was still incorrect, but this time the error was in your client's favor, which would allow him to be released earlier than the court had intended. You again spoke with the clerk, who insisted that she had carefully reviewed the record and that it was correct.

Id. (emphases added).

The Maryland Bar's choice of words was interesting. Maryland LEO 2016-04 indicated that the lawyer "again spoke with the clerk" after the lawyer received the erroneous but favorable Commitment Record. Id. Although the legal ethics opinion indicated that after that conversation the clerk "insisted that she had carefully reviewed the record and that it was correct," the factual description did not explicitly indicate that the lawyer told the clerk that she had made a mistake or (especially) that the mistake was in the client's favor. Id. For instance, perhaps the lawyer "spoke with the clerk" in asking the clerk whether she had double-checked the Commitment Record, etc. Id.

Maryland Bar's summary of Maryland LEO 26-04 implied that the lawyer explicitly disclosed the clerk's mistake.

> Whether an attorney has any duty to take steps to correct a sentencing order prepared by the clerk which erroneously states the sentence in his client's favor after the mistake was brought to the attention of the court, referred to, and rejected by, the clerk

Id. (emphasis added).

Later in the legal ethics opinion, the Maryland Bar also indicated that through the lawyer's conversations with the clerk, "all facts, both supportive of, and adverse to [the] client were discussed." This implies that the lawyer's second conversation with the clerk explained the situation -- which involved facts "adverse" to the lawyer's client. But the description is still somewhat ambigious.

Maryland LEO 2016-04 explained the obvious conflict between the lawyer's duty of candor to the tribunal and duty of confidentiality to the client.

> This matter involves the interplay between a lawyer's duty of Candor Toward the Tribunal, MRPC 3.3, and a lawyer's duty of confidentiality concerning information relating to representation of a client, MRPC 1.6. This topic of the proper application of required disclosures under Rule 1.6 has been the subject of much discussion and controversy over the years and has been seen as especially problematic in the context of criminal defense practice (See Hazard and Hodes, The Law of Lawyering, 3d Edition §9.19). While there is no clearly definitive answer, the Committee believes that when the competing interests are properly weighed, the correct response is that you have done all that you have to do.

Id. (emphasis added).

The Maryland Bar concluded that the lawyer did not have to take any further steps to correct the clerk's mistake. The court noted that "[n]o false statement was made to the court and so there is nothing to correct" under Maryland Rule 3.3. Id. Likewise "there was no criminal or fraudulent act committed" by the client. Id. Maryland LEO 2016-4 ultimately concluded that no Maryland Rule 1.6 exception applied to require or even permit disclosure of the clerk's mistake.

It should come as no surprise that bars have had trouble dealing with lawyers' duties in this context. Many judges would be embarrassed by a scrivener's error, and

would think less of a lawyer who knew of the error but did not help the judge avoid such embarrassment. If the scrivener's error has some substantive impact, judges' frustration or even anger at such lawyers could dramatically affect the lawyer's reputation before the judge and perhaps even more widely. As bars have generally loosened lawyers' confidentiality duty, they are more likely to permit or even require lawyers to disclose such scrivener's errors. And it would be safe to assume that a lawyer having discretion to do so would jump at the chance.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE MISTAKE TO THE COURT (PROBABLY)**. B 4/15, 10/15