

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

Hypotheticals

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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?

YES

NO

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.

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?

YES

NO

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?

YES

NO

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.

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?

YES NO

- (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?

YES NO

- (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"?

YES NO

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.

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.

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.

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) 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.

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.

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.

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.

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.
- (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.

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.

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.

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.

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.
- (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.

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.
- (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.

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.
- (b) If the prosecutor turns to your client and asks "Right?" may you and your client remain silent?

YES NO

- (c) If the judge asks "Is that right?" may you and your client remain silent?

YES NO

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.