SELECT ETHICAL ISSUES IN NEGOTIATING AND DRAFTING CONTRACTS

Hypotheticals and Analyses*

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* 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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Disclosing Lawyers' Role

Hypothetical 1

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 2

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 3

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 4

In your new position as a prosecutor, you have been increasingly dealing with illegal alien 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 illegal alien the risks of acquiescing to the plea agreement.

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

(C) You may not disclose to the illegal alien the risks of acquiescing to the plea agreement.

(A) YOU MUST DISCLOSE TO THE ILLEGAL ALIEN 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 illegal aliens -- the term used by the IRS code[1] -- 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

[1] As of December, 2015, an official Internal Revenue Service document used and defined the term "Illegal Alien." IRS Immigration Terms and Definitions Involving Aliens, Internal Revenue Service ("A general summary of U.S. immigration terminology follows": "Illegal Alien": "Also known as an 'Undocumented Alien,' is an alien who has entered to United States illegally and is deportable if apprehended, or an alien who entered the United States legally but who has fallen 'out of status' and is deportable.").

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 illegal aliens' 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 illegal aliens without disclosing the possible effect on the illegal alien's 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 counse.

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 ILLEGAL ALIEN THE RISKS OF ACQUIESCING TO THE PLEA AGREEMENT**.

B 10/15, 1/16

Negotiation/Transactional Adversaries' Misunderstanding of Clients' Intent

Hypothetical 5

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 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</u>, 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 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.

[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.")

> 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 6

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 7

On behalf of your client, you just made a $100,000 offer to buy land from a farmer and his wife. 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)."; "<u>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.</u>" (emphasis added); "<u>Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference.</u> 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)).

<u>Best Answer</u>

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 8

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 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,

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.").

- 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).

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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.").

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

[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. 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

> 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 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.

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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.").

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 9

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 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

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.

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

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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.").

> 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 10

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