

Professional Responsibility:

Quiz 3: Duties to Non-Clients

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Answers & Explanations

Question 1

Attorney represents Defendant, who is charged with armed robbery. Defendant tells Attorney that on the night of the alleged robbery, he was at a basketball game with a friend. To confirm the alibi, Attorney checks the team schedule and finds that there was no game on the night of the robbery, but there was one the night before. Attorney shares this information with Defendant, who tells her he was confused about the dates and that on the night of the robbery he was having dinner with his parents, who live an hour away from where the robbery occurred. Attorney suspects Defendant is lying, and refuses to let Defendant testify that he was with his parents on the night of the robbery.

Is Attorney's conduct proper?

- a. Yes, because she suspects Defendant is lying.
- b. Yes, if she thinks the jury won't believe the alibi.
- c. No, because the prohibition against offering false testimony by a client does not apply in criminal cases.
- d. No, because she is unsure that Defendant is lying.

Answer D is correct. The prohibition against offering false testimony applies when the attorney *knows* the testimony is false. Under the facts here, it is at least plausible that the client was genuinely confused about the dates and the attorney would not have sufficient basis to know the alibi was false.

Answer A is incorrect, because knowledge requires more than mere suspicion.

Answer B is incorrect, because a criminal defendant has a right to testify.

Answer C is incorrect, because a criminal defendant's testimony is still subject to the attorney's

duty not to offer false testimony and to take remedial measures if the attorney knows that the client has testified falsely.

Question 2

Client hired Attorney to represent him in a suit against SocialNet, which operates a successful social media site. Client alleges that he gave the founder of SocialNet \$1000 to help start the site, in exchange for a promise to receive 20% of the company's future earnings. After some investigation, Attorney concludes that Client's story is false. Attorney confronts Client, who admits he made up the story, but says he wants to file the suit anyway, hoping that SocialNet will offer a settlement to avoid bad publicity. Attorney refuses and withdraws from the representation. Client then hires Lawyer, who files the suit.

What is Attorney's proper course of action?

- a. Attorney must inform either Lawyer or the court that Client's claim is fraudulent.
- b. Attorney may inform Lawyer or the court that Client's claim is fraudulent, but is not required to do so.
- c. Attorney must not inform anyone that Client's claim is fraudulent.
- d. Attorney must not inform anyone that Client's claim is fraudulent, unless Client prevails at trial, in which case Attorney must inform the court.

Answer C is correct. Attorney acted properly in withdrawing rather than file a claim the attorney knew was fraudulent. At that point, the attorney-client relationship ended, but Attorney has a continuing duty of confidentiality to the former client. Neither the crime-fraud exceptions under Rule 1.6(b) nor the duty of disclosure under Rule 3.3(b) apply here.

Answer A is incorrect. The duty to disclose under Rule 3.3(b) does not apply here, because Attorney is not representing Client in the suit. If the new lawyer knows, or comes to know, that the claim is fraudulent, that lawyer would have a duty to disclose.

Answer B is incorrect. The exceptions to the duty of confidentiality based on crime or fraud apply only where the client is using or has used the lawyer's services to perpetrate the crime/fraud. Here, Attorney refused to file the fraudulent claim and withdraw, so Client has not used Attorney's services to pursue that claim.

Answer D is incorrect. Where the duty of disclosure under Rule 3.3(b) or permissive disclosure under Rule 1.6(b) do apply, they do not depend on the outcome of a proceeding.

Question 3

Attorney represents Residential Management Company (RMC) in all legal matters involving disputes with tenants in properties that RMC manages. RMC wants to evict Tenant, who has not paid rent in several months. Following her standard practice in such matters, Attorney plans to contact Tenant in an effort to negotiate payment of the past-due rent before commencing eviction proceedings. Attorney's friend, Lawyer, tells Attorney that she has been retained by Tenant to represent him in an employment discrimination suit against his employer (a company with no connection to RMC).

Which of the following is correct?

- a. There are no restrictions at all on Attorney's communication with Tenant.
- b. Attorney may communicate with Tenant directly, as long as he does not know Lawyer is also representing Tenant in his dealings with RMC.
- c. Attorney may not communicate with Tenant directly, because he knows that Tenant is represented by Lawyer in his employment discrimination matter.
- d. Attorney may communicate with Tenant directly, but must first advise Tenant to obtain legal representation in his dealings with RMC.

Answer B is correct. Under the facts here, Attorney does not know that Tenant is represented by counsel in the dispute with RMC.

Answer A is incorrect, because even where direct communication with an unrepresented party is permitted, there are still restrictions against misleading statements and against giving legal advice.

Answer C is incorrect, because Attorney only knows that Lawyer is representing Tenant in another unrelated matter.

Answer D is incorrect, because Rule 4.3 merely permits, but does not require, an attorney to give that advice.

Question 4

Attorney represents Client in a custody dispute against Client's ex-spouse. Attorney knows that Lawyer represents the ex-spouse in this matter. One afternoon, the ex-spouse comes to Attorney's office and says he wants to speak with Attorney about Client's treatment of their children. Attorney tells the ex-spouse she cannot speak with him because he is represented by Lawyer. In response, the ex-spouse tells Attorney, "I know that, but I'd prefer to discuss this

with you directly.”

May Attorney speak with the ex-spouse?

- a. Yes, because the ex-spouse, not Attorney, initiated the communication.
- b. Yes, because the ex-spouse gave informed consent.
- c. No, unless the ex-spouse gives written consent.
- d. No, unless Attorney obtains Lawyer’s consent.

Answer D is correct. Rule 4.2 requires consent of the represented party’s lawyer.

Answer A is incorrect, because Rule 4.2 does not depend on who initiates the communication.

Answers B & C are incorrect, because the represented party’s own consent is not sufficient.

Question 5

Attorney represents Client, who lives in an assisted-living facility for seniors. Client and several other facility residents have developed respiratory infections. Client has noticed that many of the ceiling tiles near the air vents in the facility have turned black, indicating that there is mold in the HVAC system. She suspects that ElderCare Co. (which owns and operates the facility) has been skimping on maintenance to save money, and that this has caused the mold problem. Client suggests that Attorney speak with Employee, an ElderCare employee who does the service and maintenance on the facility’s HVAC system. Under the applicable law, if Employee reveals that he failed to service the HVAC system or change the air filters regularly, ElderCare could be liable for negligence (assuming the mold caused the respiratory problems). Attorney knows that ElderCare is represented by Lawyer in all matters concerning the facility.

May Attorney speak with Sam, without getting Lawyer’s permission?

- a. Yes, because Employee may have relevant information and Attorney has a duty to investigate before bringing a claim.
- b. Yes, because Employee is not an officer or director of ElderCare.
- c. No, because Attorney may not speak to any ElderCare employee unless the company’s lawyer consents.

d. No, because ElderCare may be liable based on Employee's conduct.

Answer D is correct. Where an organizational party is represented by counsel, Rule 4.2 applies to communication with any employee or agent whose conduct or statements could be attributable to the organization for imposing liability on the organization.

Answer A is incorrect, because Rule 4.2 restricts communication with represented parties.

Answer B is incorrect, because the application of Rule 4.2 to organizational parties is not limited to officers and directors, but extends other employees or agents as described above.

Answer C is incorrect because it is overbroad. Rule 4.2 does not apply to communications with all employees of the organization. Only those whose actions or statements are attributable to the organization for purposes of imposing liability.