

# Professional Responsibility

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## Problems: Candor & Fairness in Litigation

1. Attorney Alpha filed a personal injury suit on behalf of Plaintiff against Defendant. Defendant was personally served with process. Alpha knows that Defendant is insured by Insurance Corp. and that Attorney Beta has been retained by Insurance Corp. to represent Defendant. No responsive pleading has been filed on behalf of Defendant, and the time for filing expired over ten days ago. Is Alpha subject to discipline if Alpha proceeds to have a default judgment entered?
  - a. Yes, because Alpha knew that Beta had been retained by Insurance Corp. to represent Defendant.
  - b. Yes, because Alpha failed to extend professional courtesy to another lawyer.
  - c. No, because Alpha is properly representing her client's interests.
  - d. No, because any judgment will be satisfied by Insurance Corp..
2. Client hired Attorney Alpha to file a lawsuit against Client's former employer, Big Corp., for wrongful discharge. Alpha filed the suit in federal district court based upon three grounds. It turned out that a unanimous US Supreme Court decision had recently eliminated the third ground as a theory available to plaintiffs in wrongful discharge cases. Attorney Beta, who represents Big Corp., filed a motion alleging that the complaint was based upon a theory (the third ground) that is no longer supported by existing law and cited the new decision. Within ten days after filing of the complaint, Alpha withdrew the third ground and continued with the litigation.
  - a. Is Alpha subject to litigation sanctions?
  - b. Is Alpha subject to discipline or litigation sanctions if Alpha believes that the second ground has only a 25% chance of success?
  - c. Is Alpha subject to discipline or litigation sanctions if the first ground is contrary to recent case law, but Alpha believes those cases are distinguishable?

3. Attorney represents D, who is charged with burglary. D admits to Attorney that he committed the crime and has no excuses or defenses. May Attorney represent D and require the prosecution to prove each of the elements of burglary beyond a reasonable doubt?
4. An attorney is defending a large company against a lawsuit brought in federal court by a plaintiff, a consumer injured by one of the company's products. The plaintiff is seeking both compensatory and punitive damages. During discovery, the plaintiff's lawyer served a set of interrogatories on the company, including requests for financial data of the company. The president of the company directed the attorney to resist providing this information, although the attorney has informed him that, under the rules of discovery, the plaintiff is entitled to the information requested. The president then demanded that the attorney assert that the information is confidential, privileged, work product, and a trade secret, but the attorney correctly informed him that it was well settled that such claims would be regarded as frivolous by the courts. The president nonetheless directed the attorney to file objections on the bases stated, so that at least the plaintiff will have to incur the expense of compelling discovery. The attorney filed the objections as directed by the president.
  - a. Is the attorney is subject to discipline?
  - b. Is the attorney is subject to litigation sanctions under Rule 11?
5. An attorney, a member of the state legislature, is allowed to engage in private practice under state law. The attorney represents a plaintiff in a personal injury case. The attorney reasonably believes that the trial of the case will last at least two weeks. When the case was first scheduled for trial, the attorney requested a continuance, truthfully stating, "As the court knows, I am a member of the legislature, which will be going into special session next week. Because of my legislative duties, I must be in the state capitol for the duration of the session." The defendant objected to the continuance, but the court granted it. Is the attorney subject to discipline?
  - a. Yes, because the defendant objected to the continuance.
  - b. Yes, because the attorney used her public position to influence a tribunal.
  - c. No, because the attorney's statements to the court were truthful.
  - d. No, unless the continuance will give the plaintiff an advantage in the litigation.

6. Attorney represents ABC Corp. in litigation against X, a pro se personal injury plaintiff. Knowing that X has limited resources, ABC instructs Attorney: “Delay and stall at every stage of the litigation. Let’s make X spend so much money in discovery and other pretrial proceedings that he will have to give up.” Will Attorney be subject to discipline if she follows ABC’s instructions?
7. Lawyer represents A, who is being prosecuted for driving while intoxicated. Two years ago, A was convicted of a DWI, a fact known by Lawyer. In this state, the first DWI is a misdemeanor; the second DWI is a felony. In the current trial, the jury convicts A of DWI. At the sentencing, the judge states: “Since this is your first DWI, I am sentencing you to probation.” Although Lawyer realized that the judge was mistaken, neither A nor Lawyer did anything to cause the mistake.
  - a. Must A correct the judge’s error?
  - b. Same facts, but assume that prior to the judge making the erroneous statement, the judge asked Lawyer, “Has A ever been convicted of DWI in this state?” Lawyer replied, “Not that I know of.” Is Lawyer subject to discipline?
8. Attorney Alpha, a partner in the law firm of Alpha & Beta, was retained by Plaintiff, the plaintiff in a personal injury action against D. The jury rendered a verdict in favor of D, and Alpha filed an appeal on Plaintiff’s behalf. Alpha reviewed the trial transcript and wrote the brief. The brief stated, “It is uncontroverted that D failed to signal before turning left into the intersection.” In fact, Witness, a witness called by D, testified that D did signal before turning. Alpha was aware of this testimony, having read it while reviewing the trial transcript. Is Alpha subject to discipline for making this statement in the brief?

9. Three days before the appeal was scheduled to be argued in the state's intermediate appellate court, Alpha suffered a heart attack. Attorney Beta, one of Alpha's partners, agreed to argue the appeal. Beta knew nothing about the case and had no opportunity to confer with Alpha. In preparing for the argument, Beta read Alpha's brief thoroughly and read as much of the trial transcript as was possible in the limited amount of time available, but he did not read Witness's testimony. In oral argument, Beta stated to the court, "Your honors, as stated in our brief, it is uncontroverted that D failed to signal before turning left into the intersection." Beta assumed that Alpha's statement in the brief was correct. Is Beta subject to discipline for making this statement during oral argument?
10. A is suing B for medical malpractice in a trial court in NC. A is represented by Lawyer. B files a motion for summary judgment. Unbeknownst to B (who is represented by counsel), the NC Supreme Court recently issued an opinion on the exact same issue; the new opinion is supportive of B's motion. B failed to cite the opinion. Lawyer is aware of the NC Supreme Court opinion.
  - a. Must Lawyer cite the opinion in A's brief in opposition to the motion for summary judgment?
  - b. What if the opinion was issued by the NC Court of Appeals?
  - c. What if the new law was a NC statute?
  - d. What if the opinion was issued by the South Carolina Supreme Court?
  - e. What if the opinion was issued by the US Supreme Court in a diversity case involving Maryland law?
11. A is suing B for breach of contract in a diversity action pending in the U.S. District Court for the W.D. of Virginia. The action is governed by Virginia law. A is represented by Lawyer. B files a motion for summary judgment. Unbeknownst to B (who is represented by counsel), the Virginia Supreme Court recently issued an opinion on the exact same issue; the new opinion is supportive of B's motion. B failed to cite the opinion. Lawyer is aware of the Virginia Supreme Court opinion.
  - a. Must Lawyer cite the opinion in her brief in opposition to the motion for summary judgment?
  - b. What if the opinion was issued by the Virginia Court of Appeals?
  - c. What if the opinion was issued by the N.C. Supreme Court?
  - d. What if the opinion was issued by the Fourth Circuit Court of Appeals in a diversity case involving Virginia law?

12. An attorney represents a client in an action by the client against the client's former partner to recover damages for breach of contract. During the representation, the client presented the attorney with incontrovertible proof that the partner committed perjury in a prior action that was resolved in the partner's favor. Neither the attorney nor the client was involved in any way in the prior action. The attorney believes that it would be detrimental to the client's best interests to reveal the perjury because of the implication that might be drawn from the former close personal and business relationship between the client and the partner. Would it be proper for the attorney to disclose the perjury to the tribunal?
- Yes, because the information is unprivileged.
  - Yes, because the attorney has knowledge that the partner perpetrated a fraud on the tribunal.
  - No, because neither the client nor the attorney was involved in the prior action.
  - No, because the attorney believes that the disclosure would be detrimental to the client's best interests.
13. Driver consulted Attorney and asked Attorney to represent Driver, who was being prosecuted for driving while intoxicated in a jurisdiction in which there is an increased penalty for a second offense. Driver told Attorney that his driver's license has been obtained under an assumed name because his prior license had been suspended for driving while under the influence of alcohol. Driver asked Attorney not to disclose Driver's true name during the course of representation and told Attorney that, if called as a witness, he would give his assumed name. Attorney informed Driver that, in order to properly defend the case, Attorney must call Driver as a witness. Attorney called Driver as a witness and, in response to Attorney's question "what is your name?" Driver gave his assumed name and not his true name. Is Attorney subject to discipline?
- Yes, because Attorney knowingly used false testimony.
  - Yes, if Driver committed a felony when he obtained the driver's license under an assumed name.
  - No, because Attorney's knowledge of Driver's true name was obtained during the course of representation.
  - No, unless Driver's true name is an issue in the proceeding.

14. Client, who is under indictment for homicide, is represented by Attorney. In the course of representation, Client told Attorney that Client had previously killed two other persons in homicides completely unrelated to the murder indictment for which Attorney is providing representation. Attorney, with Client's consent, made a tape recording of Client's confession regarding the unrelated homicides. At Attorney's request, Client also drew a map on which he designated the remote locations of the graves of the victims of the unrelated killings. Those bodies had not been found by the police, and Client is not a suspect in those crimes, both of which remain unsolved.
- Is Attorney subject to discipline for failing to disclose voluntarily to the authorities his knowledge of the two prior murders and the locations of the bodies of the victims?
  - Would your answer change if Attorney went to the site where the bodies were disposed and viewed—but did not disturb—the bodies?
  - Is Attorney subject to discipline if he discloses voluntarily to the authorities his knowledge of the two prior murders and the locations of the bodies of the victims?
15. Client, who is under indictment for homicide, is represented by Attorney. In the course of representation, Client attempts to hand Attorney the gun that Client used to commit the murders.
- What should Attorney do?
  - Assume Attorney takes possession of the gun. What are Attorney's ethical obligations?
16. Attorney is representing D on a charge of armed robbery. D claims that the prosecution witness is mistaken in her identification. D has produced Baker, who will testify that D was in another city 500 miles away when the robbery occurred. Attorney knows that Baker is lying, but D insists that Baker be called on D's behalf.
- Is Attorney subject to discipline if she calls Baker?
  - May Attorney refuse to call Baker if she reasonably believes—but does not know—Baker will lie?

17. Attorney is defending Client, who has been indicted for burglary. During an interview, Client stated to Attorney that before he had consulted Attorney, Client had committed perjury while testifying before the grand jury that indicted him. Attorney is subject to discipline if she:
  - a. Continues to represent Client.
  - b. Continues to represent Client unless Client admits his perjury.
  - c. Does not inform the authorities of the perjury.
  - d. Informs the authorities of the perjury.
18. Attorney represents D in his murder trial. D tells Attorney that he (D) intends to lie when he testifies at trial. Attorney is convinced that D will lie.
  - a. What are Attorney's ethical obligations?
  - b. Assume Attorney tells D that if D lies on the stand, Attorney will inform the judge. D testifies but does not lie. D is convicted. Does D have a valid ineffective assistance of counsel claim?
  - c. Assume D has already testified and, at the next break, tells Attorney that he (D) lied on the stand. What are Attorney's ethical obligations?
  - d. What if D informed Attorney of the perjury two years after the trial (and all appeals) ended?
19. Attorney represents D in his murder trial. Attorney reasonably believes—but does not know for sure—that D will lie if called to testify.
  - a. What are Attorney's ethical obligations?
20. Attorney represents a plaintiff in civil litigation. In the course of interviewing Witness, Attorney realizes that Witness is making false statements. Attorney decides not to place Witness on the stand because of the false statements. However, Defense Lawyer does place Witness on the stand and Witness gives the false statements.
  - a. Does Attorney have a duty to the court to remedy the false statements of Witness?
  - b. Does Attorney owe plaintiff such a duty?

21. Lawyer represents ABC Corp. in a trade secret dispute. ABC is concerned that X, a former employee, is misusing a trade secret. Consequently, Lawyer files a motion for a TRO on the day she files the complaint. Lawyer attempts to notify X's lawyer of the TRO proceeding, but to no avail. Thus, X is not represented at the TRO proceeding.
  - a. At the TRO proceeding, must Lawyer voluntarily disclose material facts that are adverse to ABC's motion for a TRO?
  - b. What if X's lawyer appears at the TRO proceeding?
22. Lawyer represents A in a medical malpractice action. A receives a document production request from her opponent. A encourages Lawyer to destroy or hide some very damaging documents.
  - a. Would Lawyer be subject to discipline if Lawyer destroys or hides documents?
  - b. Would Lawyer be subject to litigation sanctions?
  - c. May Lawyer withdraw if A insists that Lawyer destroy the documents?
  - d. Must Lawyer withdraw?
23. Attorney represents Client, a plaintiff in a personal injury action. Witness was an eyewitness to the accident. Witness lives about 500 miles distant from the city where the case will be tried. Attorney interviewed Witness and determined that Witness's testimony would be favorable for Client.
  - a. Which of the following may Attorney properly pay to Witness (in addition to statutory witness fees):
    - i. Reimbursement for actual travel expenses while attending the trial.
    - ii. Reimbursement for lost wages while present at the trial.
    - iii. An amount equal to 5% of any recovery in the matter.
    - iv. \$400 per hour of testimony.
  - b. What if Witness were an expert witness?



24. Defendant was on trial for the murder of Victim, who was killed during a barroom brawl. In the course of closing arguments to the jury, Prosecutor said, "Defendant's whole defense is based on the testimony of Witness, who said that Victim attacked Defendant with a knife before Defendant struck him. No other witness testified to such an attack by Victim. I don't believe Witness was telling the truth, and I don't think you should believe him either." Was Prosecutor's statement proper?
- Yes, if Prosecutor accurately stated the testimony of the case.
  - Yes, if Prosecutor, in fact, believed Witness was lying.
  - No, because Prosecutor alluded to the beliefs of the jurors.
  - No, because Prosecutor asserted his personal opinion about Witness's credibility.
25. In Attorney's closing statement to the court in a bench trial, she said, "Your honor, I drive on the street in question every day and know that a driver cannot see cars backing out of driveways as the one did in this case. I believe that my client was not negligent, and I ask you to find so." Was Attorney's closing argument proper?
- Yes, if Attorney was speaking truthfully and not trying to deceive the court.
  - Yes, because the rules of evidence are very liberal when the trial is before a judge without a jury.
  - No, because Attorney asserted her personal knowledge of facts in issue.
  - No, if there is no other evidence in the record about the facts asserted by Attorney.
26. During the closing argument to the jury in a civil tax fraud case, Attorney, representing the government, quoted a portion of Defendant's testimony. Which of the following statements by Attorney would be proper:
- "That testimony of Defendant directly contradicts the testimony of two witnesses for the government."
  - "I ask you, who has the reason to lie, the two witnesses for the government or Defendant?"
  - "I can truthfully say I have never seen a witness less worthy of belief."

27. Attorney represents XYZ Corp., a defendant in a products liability case. Engineer, an XYZ Corp. employee nearing retirement, was likely to be a key witness in the case, as she had been in charge of all of XYZ's product safety testing during the relevant period. Engineer had been very critical of XYZ's safety testing procedures during that time period and had repeatedly complained that the product at issue had not been adequately tested. Because of the early stage of the case, however, plaintiff's counsel was not yet aware of Engineer's existence or her views. Aware of Engineer's views, Attorney approached XYZ's officials and recommended that it offer Engineer a special package of severance benefits if she would retire immediately and move to the Bahamas. Attorney believed that if Engineer accepted this offer, she would be beyond the subpoena power of the court in which the suit against XYZ was pending. XYZ adopted Attorney's recommendation and made the offer. Engineer accepted it. Attorney did not disclose Engineer's identity to plaintiff's counsel.
- a. Is Attorney subject to discipline?
  - b. Would it be proper for Attorney to ask Engineer not to voluntarily speak to plaintiff's counsel (instead of arranging Engineer's retirement)?

28. Attorney represented Plaintiff, who sued Defendant for injuries Plaintiff sustained in a car accident. Prior to trial, Attorney interviewed Witness, who stated that she had observed Defendant drinking heavily hours before the accident. Unfortunately, on the eve of trial, Witness informed Attorney that Witness was ill and could not testify at trial. Attorney tried but could not obtain a continuance. As a result, Plaintiff's direct case rested solely on Plaintiff's testimony that Defendant was speeding and that Deft's car crossed the center line and hit Plaintiff's car. Defendant testified that he was driving safely in compliance with all rules and that the accident was entirely Plaintiff's fault. On cross examination, Attorney asked Defendant, "Isn't it a fact that you were drinking prior to the accident?" Defendant answered that he had not consumed alcoholic beverages on the day of the accident. In summation to the jury, Attorney states "Ladies and gentlemen of the jury, you and I know that Defendant lied when he stated that he had not consumed alcoholic beverages on the day of the accident. We know that he was impaired." On which of the following grounds, if any, is Attorney subject to discipline?
- Attorney's question to Defendant implying that Defendant had consumed alcoholic beverages when Attorney knew that he could not offer evidence of Deft's drinking.
  - Attorney's statement to the jury asserting that Attorney knew that Deft was drunk when no evidence in the record supported this allegation.
  - Attorney's statement asserting a personal belief that Defendant was drunk and lying.

### **Impartiality & Decorum of the Tribunal**

29. Lawyer represents A, who is charged with burglary. At trial, the prosecutor puts on a very strong case. Believing that A will be convicted if the case goes to the jury, Lawyer feigns a heart attack just before closing arguments. Lawyer is taken away in an ambulance and a mistrial is declared. Is Lawyer subject to discipline?

30. After both parties had completed the presentation of evidence and arguments, Judge took under advisement a case tried in Judge's court without a jury in which Attorney had represented Plaintiff. The case involved a difficult issue of law. After the case was under advisement for several weeks, Attorney heard rumors that Judge was having difficulty determining the complex issue of law. Immediately after hearing these rumors, Attorney telephoned Judge and asked if Judge would like to reopen the case for additional briefing from both parties. Thereafter, Judge reopened the case. Was it proper for Attorney to communicate with Judge?
31. Attorney has been retained to defend an adult charged with a sex offense involving a minor. Attorney believes that, in order to win the case, she must keep parents of minor children off the jury. Attorney instructed her investigator as follows:
- "Visit the neighborhood of those prospective jurors on the panel with minor children. Ask the neighbors if they know of any kind of unusual sex activity of the prospective juror or any member of the family. This will get back to the prospective jurors, and they will think of excuses not to serve. But don't under any circumstances talk directly with any prospective juror or member of the family."
- Is Attorney subject to discipline for so instructing her investigator?
- a. Yes, unless the prospective jurors investigated are, in fact, selected to serve on the jury in the case.
  - b. Yes, because the investigation is intended to harass prospective jurors and members of their family.
  - c. No, if the matters inquired into might be relevant to a prospective juror's qualifications to serve in the case.
  - d. No, because no prospective juror was directly contacted

32. Attorney is a long-time member of the state legislature and serves on the legislative budget committee that funds the local trial courts in the state. Attorney also maintains a part-time law practice as permitted in the state. Able, an influential businessperson, who regularly makes significant contributions to Attorney's political campaigns, asked Attorney to help Able's uncle, Baker, who was involved in a bitter divorce. Attorney called the trial judge sitting on Baker's case, a personal friend of Attorney. In discussing some upcoming votes for the budget committee with the judge, Attorney mentioned that Baker was the type of solid citizen and influential person who could help garner support for the budget and thus ensure the economic health of the judiciary system. Is Attorney subject to discipline?
- Yes, if the trial judge ruled in Baker's favor.
  - Yes, because Attorney used her public position to attempt to influence a tribunal in a pending matter.
  - No, if Attorney called the trial judge in her capacity as a legislator and not as Baker's attorney.
  - No, because members of the state legislature are permitted by law to engage in part-time legal practice.
33. Lawyer represents A in the civil case of A v. B. The jury finds in favor of B. The judge then releases the jury. Two weeks later, Lawyer sees one of the jurors at a cocktail party. Lawyer asks the juror: "I hate to bother you, but I'd like to ask you why the jury ruled as it did. I'm hoping to learn for future trials." Is Lawyer subject to discipline?
34. Attorney represents Client, a well-known contractor, before Agency, a state administrative agency. Agency has ordered Client to show cause why Client's license as a contractor should not be revoked for violation of agency regulations. Attorney gives a newspaper interview prior to the administrative hearing. Which of these statements (if true) would be proper?
- "Client denied the charge made by Agency that Client engaged in conduct constituting grounds for revocation of Client's license as a contractor."
  - "The next step in the administrative process is the administrative hearing; if Agency is successful, we will appeal, and Agency still cannot revoke Client's license until a court affirms the finding for Agency."
  - "Client needs witnesses who are aware of the incidents that are the subject of the hearing."

35. A, B, and C are charged with sexually assaulting Z. A few days later, Prosecutor holds a press conference outside the residence where the assault allegedly occurred. For which of the following statements will Prosecutor be subject to discipline:
- “I am satisfied that Z was sexually assaulted at this residence.”
  - “It was essentially a gang rape.”
  - “Why were A, B, and C’s DNA not found? I would not be surprised if they wore condoms. Probably an exotic dancer would not be your first choice for unprotected sex.”
36. Attorney represents Client, a famous politician, in a libel action against Newspaper. The case has attracted much publicity, and a jury trial has been demanded. After one of the pretrial hearings, as Attorney left the courthouse, news reporters interviewed Attorney. In responding to questions, Attorney truthfully stated: “The judge has upheld our right to subpoena the reporter involved, identified in our motion as Repo, and question her on her mental impressions when she prepared the article.” Is Attorney subject to discipline for making this statement?
- Yes, because Attorney identified a prospective witness in the case.
  - Yes, because prospective jurors might learn of Attorney’s remarks.
  - No, because the statement related to a matter of public record.
  - No, because the trial has not commenced.
37. Attorney represents Defendant, a prominent businessman, in a civil paternity suit brought by Plaintiff, who was formerly Defendant’s employee. Blood tests did not exclude Defendant’s paternity, and the case is being tried before a jury. The result turns on questions of fact. Defendant has steadfastly denied that he had sexual relations with Plaintiff, while Plaintiff has testified that they had sexual relations while on business trips and in her home. The trial has generated great public interest and is closely followed by the news media. When Plaintiff completed her testimony, Attorney was interviewed by a newspaper reporter. Which of the following statements, if believed by Attorney to be true, would be proper for Attorney to make?
- “As stated in our pleadings, we expect to prove that other men could be the father of Plaintiff’s child.”
  - “We have scientific medical tests proving that Defendant is sterile.”
  - “We have been unable to locate several people whose testimony will be helpful to us, and I implore them to contact me immediately.”

38. Attorney represents D, who is charged with murder. Shortly after D is indicted, the Prosecutor tells the press: "D confessed to the crime." A few days later, Attorney tells the press: "D was illegally coerced by police to confess. He took and passed a polygraph test yesterday." Is either Prosecutor or Attorney subject to discipline?
39. Attorney, who had represented Client for many years, prepared Client's will and acted as one of the two subscribing witnesses to its execution. The will gave 10% of Client's estate to Client's housekeeper, 10% to Client's son and sole heir, and the residue to charity. Upon Client's death one year later, the executor named in the will asked Attorney to represent him in probating the will and administering the estate. At that time, the executor informed Attorney that Client's son had notified him that he would contest the probate of the will on the grounds that Client lacked the required mental capacity at the time the will was executed. Attorney believes that Client was fully competent at all times and will so testify, if called as a witness. The other subscribing witness to Client's will predeceased Client. Is it proper for Attorney to represent the executor in the probate of the will?
- Yes, because Attorney is the sole surviving witness to the execution of the will.
  - Yes, because Attorney's testimony will support the validity of the will.
  - No, because Attorney will be called to testify on a contested issue of fact.
  - No, because Attorney will be representing an interest adverse to Client's heir.
40. Attorney is the lead trial attorney for A in the case of A v. B. Attorney just learned that she will be a key witness for A at the trial. May Attorney serve as trial counsel in the case of A v. B?
- May Attorney perform pretrial work (e.g., depositions) in the case?
  - May Attorney handle the appeal?
  - May Attorney's partner serve as trial counsel in A v. B?

41. Attorney represents Seller in negotiating the sale of his ice cream parlor. Seller told Attorney in confidence that, although the business was once very profitable, recent profits have been stable but modest (i.e., less than 10% annually). As the negotiations proceeded, Buyer appeared to be losing interest in the deal. Hoping to restore Buyer's interest, Attorney stated: "The ice cream business is every American's dream: happy kids, steady profits, and a clear conscience." Buyer bought the ice cream parlor but was disappointed in the profits.
- Is Attorney subject to discipline?
  - What if Attorney told Buyer: "Seller made 50% profit last year?"
  - Assume the ice cream parlor lost \$50,000 last year and that Attorney is aware of such loss. If Attorney and Seller say nothing about profits but Buyer is obviously assuming that the parlor is profitable, does Attorney have an obligation to tell Buyer of the loss?
42. Alpha represents D in protracted litigation. Alpha, at D's request, has made several offers of settlement to P's lawyer, Beta, all of which have been rejected. During a recess at trial, Alpha and P were both present at a cocktail party. P went over to Alpha and said: "Why can't we settle that case for \$50,000." Which of the following is a proper response by Alpha?
- "I can't discuss the matter with you."
  - "If that's the way you feel, why don't you and D get together."
  - "I agree. We have made several offers to settle."
43. Attorney represented Plaintiff in Plaintiff's action for defamation against Defendant. After Defendant's lawyer had filed and served an answer, Attorney, at Plaintiff's direction, hired Inv, a licensed private investigator, and instructed Inv to attempt to interview Defendant without revealing his employment. Inv succeeded in interviewing Defendant privately and obtained an admission from Defendant that the statements Defendant had made were based solely on unsubstantiated gossip. Is Attorney subject to discipline for obtaining the statement from Defendant in this matter?
- No, because Attorney was following Plaintiff's instructions.
  - No, because the statement obtained was evidence that Defendant's allegations were unfounded.
  - Yes, because Attorney should have interviewed Defendant personally.
  - Yes, because Attorney instructed Inv to interview Defendant.



44. Attorney is a lawyer for City and advises City on all tort claims filed against it. Attorney's advice is limited to recommending settlement and the amount thereof. If a claim is not settled and suit is filed, defense of the suit is handled either by a lawyer for City's insurance carrier or by outside counsel specially retained for that purpose. In connection with any notice of claim and before suit is filed, Attorney arranges for an investigator to call upon the claimant at the claimant's home and, with no one else present, to interview the claimant and endeavor to obtain a signed statement of the claimant's version of the facts. Claimant has filed a notice of claim against City. Attorney has sent an investigator to interview Claimant. Is Attorney subject to discipline for arranging an interview with Claimant?
- Yes, if Claimant was known by Attorney to be represented by counsel.
  - Yes, if the statement taken is later used to Claimant's disadvantage.
  - No, because claimant has not filed suit at the time of the interview.
  - No, because Attorney would not be representing City in any subsequent litigation on Claimant's claim.
45. Attorney Alpha filed a complaint on behalf of Client against Agri, a corporation, alleging that Agri has breached a valid oral contract entered into on Agri's behalf by Pres, the president and chief executive officer of Agri, to sell Client certain merchandise for a specified price. Attorney Beta, representing Agri, has filed an answer denying the contract and asserting the statute of frauds as a defense. Attorney Beta has given notice to Alpha that he will take the deposition of Pres on the grounds that Pres will be out of the country on the date the case is set for trial. Pres is not a shareholder of Agri. Alpha would like to interview Pres, prior to taking the deposition, in order to better prepare her cross-examination. Is Alpha subject to discipline if she interviews Pres without Beta's knowledge and consent?
- No, unless Pres will be personally liable to Agri for damages in the event judgment is rendered against Agri.
  - No, because Pres allegedly entered into the contract on behalf of Agri.
  - Yes, because Pres is being called as an adverse witness.
  - Yes, because Pres is the president of Agri.
  - Would your answer change if, at the time of the interview, Pres had retired from Agri?

46. Attorney Alpha represents Plaintiff in a personal injury action against Defendant, the defendant, who is represented by Attorney Beta. Alpha had heard that Defendant was anxious to settle the case and believed that Beta has not informed Defendant of a reasonable settlement offer made by Alpha. Alpha instructed Alpha's nonlawyer investigator, to tell Defendant about the settlement offer so Alpha could be sure that Beta does not force the case to trial merely to increase Beta's fee. The investigator talked to Defendant as instructed. Is Alpha subject to discipline?
- a. Yes, because Defendant was represented by counsel.
  - b. Yes, because Alpha was assisting the investigator in the unauthorized practice of law.
  - c. No, because the investigator is not a lawyer.
  - d. No, if Alpha reasonably believed Beta was not keeping Defendant informed.

If Alpha's suspicion is correct and Beta failed to inform Defendant of Alpha's offers to settle, would Beta be subject to discipline?

47. Wife has retained Attorney to advise her in negotiating a separation agreement with Husband. Even though Husband knew that Wife was represented by Attorney, Husband, who was not a lawyer, refused to obtain counsel and insisted on acting on his own behalf throughout the protracted negotiations. Attorney never met or communicated in any way with Husband during the entire course of the negotiations. After several months, Wife advised Attorney that the parties had reached agreement and presented Attorney with the terms. The attorney prepared a proposed agreement that contained all of the agreed-upon terms. Attorney mailed the proposed agreement to Husband, with a cover letter stating the following: “As you know, I have been retained by your wife to represent her in this matter. I enclose two copies of the separation agreement negotiated by you and your wife. Please read it and, if it meets with your approval, sign both copies before a notary and return them to me. I will then have your wife sign them and furnish you with a fully executed copy.” Is Attorney subject to discipline?
- Yes, because Attorney did not suggest that the husband seek the advice of independent counsel before signing the agreement.
  - Yes, because Attorney directly communicated with an unrepresented person.
  - No, because Attorney acted only as a scrivener.
  - No, because Attorney’s letter did not imply that Attorney was disinterested.
48. Attorney represents A in the case of A v. B. B is acting pro se. Attorney telephones B and states: “Is there some way we can settle this case before trial. My goal is to see that everyone gets a fair deal. I have thoroughly reviewed the case and, in my opinion, you have about a 40% chance of recovery; thus, I’d recommend that you settle.” Is Attorney subject to discipline?
49. Alpha represents X in the case of X v. Z. Beta represents Z. Beta drafts a confidential letter to Z and asks her assistant to fax it to Z. Beta’s assistant mistakenly faxes the letter to Alpha. When Alpha receives the letter, what are Alpha’s ethical obligations?

50. Alpha represents X in the divorce action of X v. Z. X and Z are currently separated and living in different houses. X believes Z has committed adultery. To obtain evidence for trial, Alpha hires a private investigator to place a secret camera in Z's bedroom. Following Alpha's instructions, the investigator breaks into Z's house and installs the camera. Is Alpha subject to discipline?

### **Representing Clients in Non-Adjudicative Proceedings**

51. Attorney was engaged under a general retainer agreement to represent a corporation involved in the uranium industry. Under the agreement, Attorney handled all of the corporation's legal work, which typically involved regulatory issues and litigation. The corporation told Attorney that a congressional committee was holding hearings concerning the extent of regulation in the copper industry. Because the corporation was considering buying a copper mine during the next fiscal year, the corporation wanted Attorney to testify that the industry was overregulated. The attorney subsequently testified before the relevant congressional committee. The attorney registered his appearance under his own name and did not disclose that he was appearing on behalf of a client. Afterward, Attorney billed the corporation for fees and expenses related to his testimony. Was Attorney's conduct proper?
- Yes, because the duty of confidentiality prevented Attorney from disclosing the identity of his client.
  - Yes, because the attorney-client evidentiary privilege prevented disclosure of the identity of his client in this context.
  - No, because Attorney failed to disclose that he was appearing and testifying in a representative capacity.
  - No, because Attorney accepted compensation in return for his testimony.

52. Attorney is a well-known tax lawyer and author. During congressional hearing on tax reform, Attorney testified to her personal belief and expert opinion on the pending reform package. She failed to disclose in her testimony that she was being paid by a private client for her appearance. In her testimony, Attorney took the position favored by her client, but the position was one that Attorney believed was in the public interest. Was it proper for Attorney to present this testimony without identifying her private client?
- a. Yes, because Attorney conscientiously believed the position she advocated before Congress was in the public interest.
  - b. Yes, because Congress is interested in the content of testimony and not who is paying the witness.
  - c. No, because a lawyer may not accept a fee for trying to influence legislative action.
  - d. No, because a lawyer who appears in a legislative hearing should identify the capacity in which the lawyer appears.