

Discussion Problems

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Confidentiality

Problem 1

Your law practice provides professional responsibility advice and representation to other lawyers. Lawyer retained you for advice. Lawyer supplied these facts:

Lawyer represented Client in a contested divorce case. Lawyer and Client agreed to limited scope representation, where Lawyer would assist Client with paperwork and documentation to prepare the case, but would not appear in court on Client's behalf. Lawyer and Client agreed that Client would remain pro se in court, including on all issues relating to discovery.¹ One day while in family court on another matter, Lawyer encountered Client who was attending court on his case. After a brief conversation, Client said to Lawyer, "This judge is treating me really unfairly. I am not following the judge's orders on discovery. I want to give this judge a hard time, and I don't want my ex-spouse to know about all my assets. You of course won't say anything as my lawyer. Don't worry, your name is not on anything relating to discovery, as we agreed."

Lawyer advised you that she wants to disclose Client's discovery violations to counsel for the ex-spouse, both to protect the ex-spouse's legitimate interests and to alert the judge. Lawyer presented these questions to your firm: (1) Did Client's statement to Lawyer about his discovery misconduct constitute confidential information protected by Model Rule 1.6(a)?; (2) If this information was confidential, would Model Rule 1.6(b) permit disclosure of this information to counsel for the ex-spouse?²; and (3) What course of action do you recommend to Lawyer about whether to disclose this information?

Problem 2

You are a public defender representing Jimmy Dale, who has been charged with murder. Based on witness statements, the police and prosecutor believe that another man, Lee Wayne, planned the murder and that Dale acted as Wayne's accomplice in carrying out the killing. To avoid any potential conflict, the court has appointed another lawyer to represent Wayne.

During your initial meeting with Dale, he tells you, "I killed that guy all on my own. Wayne didn't have anything to do with it." Based on the details that Dale provides about the crime, and the lack of any apparent motive to falsely claim sole responsibility, you conclude that Dale is telling the truth.

What are your obligations under Rule 1.6(a)? Do any of the exceptions under Rule 1.6(b) apply at this point?

Dale and Hunt are tried separately. At Hunt's trial, he testifies that he had no role in the crime. Nevertheless, Hunt is convicted and sentenced to life imprisonment.

Following Hunt's conviction, you reach an agreement with the prosecution under which Dale will plead guilty to the murder charge and receive a life sentence. The prosecutor tells you they are offering this deal, "because we know Dale & Wayne acted together". You notify Dale of the plea offer and explain to him that, if he goes to trial and it comes out that he acted alone, he would likely face the death penalty. Dale accepts the deal and enters a guilty plea. At Dale's allocution, he does not reveal that Wayne had no involvement.

Do you have any obligation to correct the prosecutor's mistaken belief about Wayne's involvement in the murder? Do you have any obligation to inform the court that Wayne was not involved?

About ten years later, Dale commits suicide in prison. Wayne remains in prison serving his life sentence.

May you reveal Dale's admission of sole responsibility to Wayne's attorney now that Dale is dead? If you offer or are subpoenaed to testify at Wayne's hearing for post-conviction relief, will the attorney-client communication privilege apply?