



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-07
January 2012

Subject: Court Obligations

Digest: Attorney does not have an obligation under R.P.C. Rule 3.3 to tell the court that the unrepresented adversary has a defense based on a written agreement that the attorney's client signed with the adversary and which the attorney now believes in good faith is unenforceable.

References: Illinois Rules of Professional Conduct, Rule 3.3

FACTS

Attorneys representing party A in litigation against unrepresented party B is aware that the two parties entered into a written agreement that would constitute a potential defense in favor of B, but the attorney has a good faith belief that the agreement is unenforceable. Client A did not consult with the attorney before entering into the agreement.

QUESTIONS

Must attorney advise the court of the agreement and potential defense?

OPINIONS

Rule 3.3 requires attorneys to exercise candor in dealing with the courts. For example, subsection (a)(1) provides that a lawyer "shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," and sub-section (a)(3) prohibits a lawyer from knowingly offering false evidence. Together these sections require candor in dealing with the court.

As comment 2 observes, while a lawyer has a duty to present a client's case with "persuasive force," that duty is qualified by the lawyer's duty of candor to the tribunal. The comment goes on to say that the lawyer "must not allow the tribunal to be misled by false statements of law or fact which the lawyer knows to be false."

In the situation at hand, the lawyer is aware that the signed agreement between the lawyer's client and the unrepresented party constitutes a potential defense to the lawyer's client's claim; however, the lawyer also has good faith belief that the agreement is unenforceable. Under these circumstances the lawyer need not advise the court of the potential defense. Rule 3.3 (a) (2) provides that a lawyer shall not knowingly fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client or offer evidence that is false. In the case at hand, the attorney has a good faith belief that the contract is unenforceable. This good faith belief supports the conclusion that the lawyer's failure to disclose the existence of the agreement does not contravene Rule 3.3.

Moreover, sub-section (a)(2) prohibits a lawyer from failing to disclose "legal authority" which is adverse to his or her client's position. The rule does not require the lawyer to disclose facts which are contrary to the client's position. Such disclosure, of course, would be an onerous burden in litigation, since a lawyer would generally be aware of "facts" contrary to his or her client's position. Here, the existence of an agreement which might exonerate the adversary is a fact which his not required to be disclosed by the lawyer. The lawyer, of course, could be in violation of sub-sections (a)(1) or (a)(3) if her or she makes false statements about the agreement or its existence.

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