

LEGAL ETHICS OPINION 1477

ZEALOUS REPRESENTATION:
CONDUCTING SETTLEMENT
NEGOTIATIONS BASED ON
UNAMENDED ANSWERS TO
INTERROGATORIES.

You have presented a hypothetical situation in which an attorney represents a client in products liability litigation. The client's answers to interrogatories were believed to be accurate when signed under oath. Subsequently, however, the attorney learns the answers are incorrect and, under Rule 4:1(E)(2) of the Rules of the Supreme Court of Virginia, the answers will have to be seasonably amended. The client, however, wishes to attempt a settlement before amending interrogatory answers or otherwise disclosing the correct facts, which disclosure will adversely affect the settlement value of the case.

You have asked the Committee to opine whether, under the facts of the inquiry, (1) the attorney may attempt a settlement without first amending the incorrect interrogatory answers, and (2) whether the attorney is permitted to enter settlement negotiations as long as he does not verbally reaffirm the incorrect interrogatory answers, but rather remains silent.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on his fitness to practice law; DR:7-102(A)(3), (5), (6), and (7) which provide, respectively, that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal; knowingly make a false statement of law or fact; participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; or counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

The facts you provide indicate that the answers were signed under oath and that the attorney has knowledge that the answers are inaccurate. The committee opines that it would be improper and violative of DRs 1-102(A)(4), 7-102(A)(5), (6), and (7) for the attorney to attempt a settlement without first amending the incorrect interrogatory answers. The Committee further opines that because the attorney is obligated under the Rules of the Supreme Court of Virginia to seasonably amend the incorrect interrogatory answers, any attempt to settle before such amendment would also be violative of DR:7-102(A)(3). See LE Op. 743.

With regard to your second inquiry, the Committee is of the opinion that it would be improper and violative of the above-named Disciplinary Rules for the attorney to remain silent, as to the interrogatory answers, in settlement negotiations. The Committee believes that a settlement entered into in reliance on sworn, yet incorrect, answers would be fraudulently induced, whether the attorney verbally reaffirms the incorrect answers or simply remains silent as to their inaccuracy during the negotiations process. See LE Op. 1289, LE Op. 1331, LE Op. 1429.

Committee Opinion
August 24, 1992

Legal Ethics Committee Notes. – Rule 3.3(a)(2) and Rule 4.1(b) require a lawyer to disclose facts if disclosure is necessary to avoid assisting a client's criminal or fraudulent acts.