

The Honest Mistake Fact Pattern 1

You represent company C who is selling assets to company B. The two sides have been arguing about representations and warranties as well as survival periods under the agreement. In this agreement, there are three different survival periods for different sets of representations and warranties. During the process of revising the representations, lawyers for company B forgot to change the survival period for the fundamental representations and warranties (which were the mostly hotly contested reps and warranty) such that the fundamental representations and warranties survive for the shorter 9 month period rather than the full 18 month period. While you are not 100% sure that this was a mistake, you strongly suspect that they intended these representations to survive for 18th months.

What is the best course of action? Does this fact pattern present ethical issues or professionalism issues?

Rule 1.2 Scope of Representation

Who has authority to make this decision? Can you tell the opposing counsel about the mistake that you suspect they made without letting your client know first?

Rule 1.4 Communication

Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required.

What if you want to tell the other side but your client does not?

The Misfired Email Fact Pattern 2

You represent Company P which is in the business of selling pet care products. You are working on a deal with a lawyer who represents Bad Dog, one of Company P's competitors, but your deal with that lawyer does not involve Bad Dog. The lawyer sent you a revised asset purchase agreement but accidentally picked up board minutes for the last board meeting for Bad Dog which contains information that would be helpful to Company P. You open up and read the board minutes before you realize what they are and close up the document.

What do you do?

Rule 4.4 (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

What if you also have a broker's license and the inadvertently sent email is from another broker but contains information useful to a customer who has engaged you as a broker.

Advisory Opinion 31 says if a Georgia lawyer is engaged in both the practice of law and another profession, if that other profession is closely related to the practice of law the standards of conduct of the State Bar would apply to the practice of both professions.

Advocacy Versus Candor Fact Pattern 3

Your client is marketing a property for sale and there is only one bidder. They want you to try to help them get the price up by speaking to the one bidder. Your client wants you to tell the bidder that there are lots of competing bids, but if they go up in price, they will win the bid.

What should you do?

An attorney has to balance the principle of getting an advantageous result for your client versus dealing honestly with the opposition.

Rule 4.01 (a)

A lawyer shall not knowingly make a false statement of material fact or law to a third person.

Can you tell the bidder that it's a competitive bidding situation and that they may need to increase their purchase price to win the deal?