

Advisory Opinion 1987-2

Facts: Attorney A represents Client A-1. Attorney A learns of a statute of limitation which could defeat A-1's claim (or counterclaim) against Client B-1, but Attorney A does not believe the statute of limitation applies. Attorney B, representing Client B-1, is unaware of the statute of limitations.

Question Presented: Does Rule 7-106(B)(1) of the Code of Professional Responsibility require Attorney A to disclose the statute of limitation to the court?

Discussion: Rule 7-106(B)(1) states:

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

The committee unanimously agrees that Attorney A has no duty to disclose the statute of limitation. The reasoning of the committee members varied.

One view held that Rule 7-106(B)(1) did not apply because Attorney A had a basis for arguing that the statute of limitation did not apply. The statute of limitation would not then be "directly adverse." Additionally, that a statute of limitation could be waived was also significant to this view.

A second view held that Attorney A had no duty to disclose the statute of limitation to the court because Attorney A was not "presenting" the issue of the statute of limitation to the court. If, for example, Attorney B asserts an inapplicable three year statute of limitation, then Attorney A would be required to disclose an applicable two year statute of limitation.

The third, and most extreme, view was that "legal authority," and therefore Rule 7-106(B)(1), applies only to decisional law. A search of virtually every reported decision interpreting Rule 7-106(B)(1) found cases involving appellate decisions, see, e.g., *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (1985); *State v. Gardner*, 91 N.M. 302, 573 P.2d 236 (1977); or cases involving a failure to disclose the history of the pending case. See, e.g., *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985).¹ Additionally, it was felt that including statute of limitation within the definition of "legal authority" would cause an irreconcilable conflict with a lawyer's duty of loyalty and duty to represent his client zealously.

¹ One court suggested that Rule 7-106(B)(1) and other rules, were implicated where an attorney failed to admit the truth of a matter known to be true, but which would result in defeating his client's claim. *Chemical Engineering Corp. v. Essef Industries, Inc.*, 795 F.2d 1565 (Fed. Cir. 1986).