Problem #1: Spectator Sport and Walking Through the Valley

Read “Spectator Sport” (course web page, “Reading Packet #2) and “Walking Through the Valley” (Life in the Law).

Before your section meeting, meet in person with your working group and discuss the following questions. Appoint a reporter for your group (this duty should rotate throughout the semester). The reporter will be expected to speak for the group, but all students should be prepared to participate in the discussion in the section meeting.

1. Do you think the lawyers acted with professionalism?

2. Why or why not?

3. What motivated the lawyers to act as they did?

4. How do you think the lawyers could have resolved the professionalism issues they faced differently?

5. Should they have done so? What harm did they do?

6. What would they have had to do in order to implement a decision to resolve the professionalism issues differently?
Problem #2: In the Pink room

Read “In the Pink Room” (Legal Ethics Law Stories).

Before your section meeting, meet in person with your working group and discuss the following questions. Appoint a reporter for your group (this duty should rotate throughout the semester). The reporter will be expected to speak for the group, but all students should be prepared to participate in the discussion in the section meeting.

1. Do you think the lawyers acted with professionalism?

2. Why or why not?

3. What motivated the lawyers to act as they did?

4. How do you think the lawyers could have resolved the professionalism issues they faced differently?

5. Should they have done so? What harm did they do?

6. What would they have had to do in order to implement a decision to resolve the professionalism issues differently?
Problem #3

Your section will convene as the Board of Governors of the State Bar of Georgia. In your working groups, discuss the following two resolutions that will be before the Board at the section meeting. You will debate and vote on these resolutions at the section meeting. Amendments to the resolutions may be proposed and voted on as well.
RESOLUTION #1

(mandatory pro bono for applicants for admission to the bar)\(^1\)

\(^1\) This proposal is based upon a recently enacted requirement for admission in New York. For more detailed information on the New York proposal, see http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf.
Whereas, although Georgia has made significant strides in meeting the needs of indigent criminal defendants, for many of its poorest citizens requiring assistance in civil legal matters, the promise of meaningful access to justice has been slow in coming; and

Whereas, in any given year, nearly 40% of the Georgia’s poorest citizens have at least one civil legal need, but only 1 in 10 is able to secure legal representation; and

Whereas, legal services programs, pro bono legal organizations, and volunteer lawyers are currently working to meet the needs of indigent civil litigants, but their efforts have been hampered by inadequate resources; and

Whereas, legal services programs are often restricted in the types of cases they are authorized to handle, and their geographical reach usually does not extend to those requiring assistance in the more isolated areas of the state; and

Whereas, more must be done in order to answer the requirements of Equal Justice Under Law.

Now, therefore, be it resolved:

That the State Bar of Georgia urges the Supreme Court of Georgia adopt the following amendment to the Rules Governing Admission to the State Bar of Georgia:

Admission to the practice of law in Georgia is under the jurisdiction of two separate and distinct boards, the Board to Determine Fitness of Bar Applicants and the Board of Bar Examiners. To be admitted, an applicant must have been certified by the Board to Determine Fitness of Bar Applicants and must have taken and passed the Bar Examination administered by the Board of Bar Examiners. In order to be eligible, an applicant also must have:

... 

9. Completed at least 50 hours of qualifying pro bono service, which is pre-admission law-related work that:

(1) assists in the provision of legal services without charge for

   (i) persons of limited means;
   (ii) not-for-profit organizations; or
   (iii) individuals, groups or organizations seeking to secure or promote

access to justice, including, but not limited to, the protection of civil rights, civil liberties or public rights; or

(2) assists in the provision of legal assistance in public service for a judicial, legislative, executive or other governmental entity.

All qualifying pre-admission pro bono work must be performed under the supervision of:

(1) a member of a law school faculty, including adjunct faculty, or an instructor employed by a law school;

(2) an attorney admitted to practice and in good standing in the jurisdiction where the work is performed; or

(3) in the case of a clerkship or externship in a court system, by a judge or attorney employed by the court system.

The 50 hours of pro bono service may be performed at any time after the commencement of the applicant's legal studies.
Resolution #2: Legal Technicians
RESOLUTION

Whereas, although Georgia has made significant strides in meeting the needs of indigent criminal defendants, for many of its poorest citizens requiring assistance in civil legal matters, the promise of meaningful access to justice has been slow in coming; and

Whereas, in any given year, nearly 40% of the Georgia’s poorest citizens have at least one civil legal need, but only 1 in 10 is able to secure legal representation; and

Whereas, legal services programs, pro bono legal organizations, and volunteer lawyers are currently working to meet the needs of indigent civil litigants, but their efforts have been hampered by inadequate resources; and

Whereas, legal services programs are often restricted in the types of cases they are authorized to handle, and their geographical reach usually does not extend to those requiring assistance in the more isolated areas of the state; and

Whereas, more must be done in order to answer the requirements of Equal Justice Under Law.

Now, therefore, be it resolved:

That the State Bar of Georgia supports the implementation in Georgia of a program under which nonlawyers may provide certain legal services, under the conditions as specified in the attached rule (adapted from the State of Washington’s Rule 28). The State Bar particularly supports initial implementation of this program in the area of family law.
Limited Practice Rule for Legal Technicians

A) **Purpose.** The legal needs of the consuming public are not currently being met. The purpose of this rule is to authorize certain persons to render legal assistance or advice in defined areas of law. This rule shall prescribe the conditions and limitations upon the provision of such services in order to ensure that only trained and qualified legal practitioners may provide the same. This rule is intended to permit trained legal technicians to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest.

B) **Certification Requirements.** An applicant for certification as a Legal Technician shall:

1) **Age.** Be at least 18 years of age.

2) **Moral Character.** Be of good moral character.

3) **Education.** Have graduated from a paralegal/legal assistant program that is approved by the American Bar Association or the State Bar of Georgia and is:

   a) An associate degree or other paralegal/legal assistant program that consists of a minimum of 60 semester hours of which at least 45 semester hours are substantive legal courses; or

   b) A bachelor's degree program in paralegal/legal assistant studies; or

   c) A post-baccalaureate certificate program in paralegal/legal assistant studies.

4) **Experience.** Possess the following substantive legal experience as a paralegal/legal assistant under the supervision of a lawyer:

   a) Those with an associate's degree from an American Bar Association approved institution or who hold a bachelor's degree need a minimum of 2 years experience; or

   b) Those who are graduates of any other program need 3 years experience.

5) **Examination.** Satisfactorily complete an examination which shall, at a minimum, cover the rules of professional conduct applicable to Legal Technicians, rules of ethics, rules relating to the attorney-client privilege,
procedural rules and substantive law issues related to one or more discrete areas of practice.

C) **Scope of Practice Authorized by Limited Practice Rule.** The Legal Technician may undertake the following only in the defined area(s) of law for which the Legal Technician has been certified:

1) Ascertain whether the problem is within the defined practice area, and if so, obtain relevant facts, and explain the relevancy of such information to the client;

2) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;

3) Inform the client of applicable procedures for proper service of process for motion papers, and proper filing procedures;

4) Provide the client with self-help materials prepared by a lawyer or approved by the Commission, which contain information as to statutory requirements, case law basis for the client’s claim, and venue and jurisdiction requirements;

5) Review pleadings or exhibits presented by the client from the opposing side, and explain the documents;

6) Select and complete forms that have been approved by the State of Georgia or the content of which is specified by statute; federal forms; forms prepared by a lawyer; and advise the client of the significance of the selected forms to the client’s case;

7) Perform legal research and draft legal letters and pleadings, if the work is reviewed and approved by a lawyer.

8) Advise client as to other documents which may be necessary (such as exhibits, witness declarations, or party declarations), and explain how such additional documents or pleadings may affect the client’s case;

9) Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates.

While acting within the scope of authority set forth in this rule, the relationship between the Legal Technician and the client shall be governed by all rules, expectations, privileges and considerations that govern the relationship between lawyers and their clients.
We will meet as the Board to Determine Character and Fitness and will discuss and vote on the following applicants to take the Georgia bar exam.

Agenda for Board to Determine Character and Fitness

At our next meeting, we need to discuss and take action on the following applicants. Please be prepared to discuss their applications in light of our policies, copies of which I have distributed to you. The question before us with respect to each case will be whether to: (1) certify the applicant as fit; (2) table the application for rehabilitation or treatment; or (3) issue a Tentative Order of Denial of Certification of Fitness to Practice Law. The informal meetings with each applicant have all occurred. As you know, the next step for any applicants who receive a tentative order of denial would be a formal adversary hearing on the application, if the applicant chooses to invoke that process.

1. Allison Anderson. Ms. Anderson has admitted falsifying her fitness questionnaire. While she was in law school, Ms. Anderson was arrested for public intoxication following a law school social event to mark the halfway point of a semester. Although the fitness questionnaire clearly calls for revelation of all arrests, including any that have been expunged, Ms. Anderson did not reveal her arrest. You will recall that, at her informal interview, Ms. Anderson explained her failure to reveal the arrest by stating that she did not believe she had to reveal it because she completed a diversionary program and the record of her arrest was “expunged.”

2. Barry Boswell. Mr. Boswell has approximately $20,000 of credit card debt that is in default. At his interview, Mr. Boswell explained that the debt consists of money he borrowed for living expenses while he was in law school and the fees and interest that have accumulated on the debt. He told us that he had to use credit cards because he had “maxed out” his student loans. He acknowledged at our meeting with him that he should have realized that the credit card bills would go into default because he had insufficient means even to pay the minimum balances, even though he worked as many part-time hours as he could while he was a student. Our impression at the meeting was that Mr. Boswell did not borrow this money to support a lavish lifestyle. Mr. Boswell has tried repeatedly but has been unable to make any arrangements with his creditors to repay or reduce the debt. Mr. Boswell also has approximately $130,000 in student loan debt from college and law school. That debt is not in default.

3. Catherine Caldwell. Ms. Caldwell’s application revealed that she took a semester off during law school. In her application, she explained that the reason for the leave of absence was that she entered a 30-day inpatient rehabilitation program for alcoholism and addiction to prescription pain killers. She has no criminal record and entered rehab on her own initiative, with the support and encouragement of her family. Since her release from rehab, Ms. Caldwell has regularly attended meetings (average of four per week) of Alcoholics Anonymous and has passed drug tests that were administered as part of her aftercare program with the rehab facility. She has been free of drugs and alcohol for nine months. She is under the care of a certified specialist in addiction medicine.
4. David Demarest. Mr. Demarest is an older student who entered law school at age 40. His fitness questionnaire revealed that he pled guilty under the First Offender Act twenty years ago to multiple sales of controlled substances. All of the charges were felonies. Mr. Demarest served six months in a detention facility and then successfully completed five years of probation. As a result, under our state’s laws he technically has no criminal record. Before entering law school, Mr. Demarest ran a successful business, married, and started a family. He has three children, ages 12, 10, and 8. He has not been in trouble with the law since the drug arrests, and he has an exemplary record of community service. We discovered, however, that Mr. Demarest did not reveal his criminal history on his law school application, even though the question clearly calls for revelation of such information. At his informal interview, Mr. Demarest explained the omission by stating candidly that he did not reveal the information because he was afraid that he would not have been admitted to law school. Only after the staff of the Office of Bar Admissions inquired about the discrepancy between the school application and the bar questionnaire, Mr. Demarest was permitted by the law school to amend his law school application, and the law school decided not to revoke his admission. Mr. Demarest has expressed remorse for his actions.

5. Emory Ellison. Mr. Ellison’s questionnaire reveals that, as a third-year law student, he was found by an internal law school Honor Council to have violated the student honor code at his law school. The underlying facts are these. After his fifth semester exams, Mr. Ellison posted on Facebook that he had only been able to make it through “thanks to my new best friend, Adderall!” His post implied that he had obtained a prescription for Adderall by lying to a doctor about his inability to concentrate and about other symptoms that, he had read online, might lead a doctor to prescribe Adderall. A classmate who read the post alerted the law school’s honor court chief justice and alleged that Mr. Ellison had violated the honor code, which defines misconduct to include “any conduct pertaining to Law School matters, including but not limited to academic matters, that evidences fraud, deceit, dishonesty, or an intent to obtain unfair advantage over other Students.” After an investigation and a formal hearing, Mr. Ellison was found by clear and convincing evidence to have purposefully violated this part of the honor code when he lied to the doctor to obtain Adderall and when he used it to obtain an unfair advantage over other students. The presumed “advantage” was deemed unfair because Mr. Ellison in fact does not have any condition that would have warranted a prescription for Adderall. His punishment was a public reprimand and a period of probation that included the rest of his law school career. In our informal meeting, Mr. Ellison admitted that he had obtained the Adderall by lying to a doctor and that he had used it to help in preparation for his exams. He stated that he did it because he was behind in his schoolwork and was afraid that he would fail his fifth semester exams if he did not use the Adderall to help him concentrate. Mr. Ellison expressed remorse for his actions.
General instructions for “practical wisdom” exercises

What follows is the first of the “practical wisdom exercises.” To be sure that you are prepared for the section meetings this week and for the three weeks that follow, here are some important instructions for your working groups. For each of these exercises, you have to decide what you are going to do and how you are going to do it. You have to be able to articulate why you made the choices you made. Your goal is to do the “right” thing, in the “right” way, for the “right” reasons. Be sure to play out the possible scenarios before you decide and ask “what if” you choose a particular path. For example, next week you have to decide what, if anything, to do when you suspect a partner of overbilling a client. You might choose to do nothing, or you might choose to talk to the partner, or you might choose to report your suspicions within the firm or to the bar. For each possibility (and any others you generate), your working group discussions must include how you will go about implementing the decision and the anticipated consequences of each decision and a plan for dealing with those possible consequences. If playing out the scenario might involve five steps, you should have thought through step five before you choose step one. Remember that multiple values will be in play and in tension with each other. Remember that there is uncertainty about what has happened or what will happen, depending on your choices. Remember that at all times you have to be asking yourself why you are choosing a particular path or method of implementation. These working group discussions need to be in depth. Set aside enough time to do this right, and you will be prepared for rich discussions in the next four weeks.
Problem 5: Week of February 19

You are a new non-equity partner in a 300+ member law firm with offices in many major American cities and several foreign countries. You have been practicing for nine years and specialize in representing oil companies before federal agencies. You are in the Washington, D.C. office of the firm. The Washington office is one of the branch offices. Almost all of your work comes from Buddy Dial, the managing partner of the D.C. office. All of the work that comes from Buddy is for BigOil, Inc. You are busy and work long hours, but Buddy and BigOil seem pleased with your work. You were made a non-equity partner based upon recommendations from Dial and BigOil. You consider Buddy to be a professional mentor, although he is not a close personal friend. BigOil is a major client of the firm and the major client of Buddy and the Washington office. Your compensation as a new non-equity partner is $400,000 per year.

As a partner, you receive monthly reports of the hours billed by all the lawyers in the firm. You become concerned because the number of hours reported by Buddy appears to you to be excessive. You are aware that many lawyers work long hours remotely, but in your experience Buddy does not do this. Buddy always taught you to work in the office to maximize “face time.” Lately it has appeared to you that Buddy is not working very hard.

As a partner, you are permitted to have electronic access to the documentation that underlies any bills that are sent to a client. It is unusual for anyone other than the “billing partner” (in this case, Buddy) to access the information, and you have never done so. Nevertheless, you have the appropriate password, and you review the information for a recent bill sent to BigOil. Your understanding of the agreement between BigOil and your firm is that the firm will bill on an hourly basis, although you were not privy to the negotiation of the fee agreement. You see that for January 12 Buddy recorded eight hours of billable time, all for BigOil. The diary shows phone calls on specific matters for specific (and various) lengths of time to specific people. The diary also shows a thirty-minute “CI,” or “Conference in Office,” between you and Buddy regarding a BigOil matter. You also notice that for January 13, 16, 19, 20, 21, and 22, Buddy’s time entries read in their entirety “same as 12th.” You find it highly unlikely that Buddy spoke to the exact same people for exactly the same amount of time on the dates subsequent to the 12th. You know that you did not have thirty-minute conferences in the office with Buddy about BigOil on any of those days because you were traveling on business. You strongly suspect that Buddy is inflating his hours and the client’s bills. You consult the relevant rules of conduct and find only these rules to be relevant:

- “It shall be a violation of the Rules of Professional Conduct for a lawyer to engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation.” You know that such professional misconduct subjects a lawyer to discipline such as suspension and disbarment.

- “A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority. There is no disciplinary penalty for a violation of this Rule.” You know that “the appropriate professional authority” is the Office of General Counsel of the Bar, the group that prosecutes lawyers for violations of the rules of conduct.

What should you do?
Problem 6

Reminder of instructions regarding the “practical wisdom” exercises:

For each of these exercises, you have to decide what you are going to do and how you are going to do it. You have to be able to articulate why you made the choices you made. Your goal is to do the “right” thing, in the “right” way, for the “right” reasons. Be sure to play out the possible scenarios before you decide and ask “what if” you choose a particular path. For each proposed course of action, your working group discussions must include how you will go about implementing the decision and the anticipated consequences of each decision and a plan for dealing with those possible consequences. If playing out the scenario might involve five steps, you should have thought through step five before you choose step one. Remember that multiple values will be in play and in tension with each other. Remember that there is uncertainty about what has happened or what will happen, depending on your choices. Remember that at all times you have to be asking yourself why you are choosing a particular path or method of implementation. These working group discussions need to be in depth. Set aside enough time to do this right.
Problem 6

You are a senior associate in a law firm that is defending a product liability case. You report to a partner in charge of the case but you have the day-to-day responsibility for the case. Part of your job is to respond to discovery requests and assemble the documents of your client that are to be given to the plaintiff’s lawyers. Your firm’s client is BigPharma, Inc. The suit claims that a two-year old girl died after being given a drug for her asthma. The drug was produced by your client under the trade name “Somophylline Oral Liquid,” the active ingredient of which is known generically as “theophylline” (like “Tylenol” is the trade name for a pain reliever, the active ingredient of which is acetaminophen). The suit claims that the girl’s doctor prescribed Somophylline Oral Liquid even though its use was contraindicated because the girl had a viral infection. The suit is against the doctor for medical malpractice and against BigPharma, Inc. for marketing an unreasonably dangerous product. Crucial issues in the case will be whether in fact the use of Somophylline Oral Liquid caused the death of this child and what your client knew about the risks to pediatric patients with viral infections from using Somophylline Oral Liquid. You have reviewed your client’s records and have found the following two documents:

(1) Document #1: A marketing letter sent to two hundred doctors before the girl died. The letter states that, for asthma patients with viral infections, the doctors should prescribe another BigPharma drug, Intal, a cromolyn-based drug (rather than a theophylline-based drug) rather than Somophylline Oral Liquid. The letter discusses a study that showed “life-threatening theophylline toxicity when pediatric asthmatics … contract viral infections.” It is clear from your review of the files that this letter was NOT sent to the girl’s doctor. Nor was it sent, or its contents otherwise made public, to the tens of thousands of doctors who from time to time might prescribe the drug for pediatric asthma patients.

(2) Document #2: An internal memo from the marketing department, dated before the little girl in this case was prescribed Somophylline Oral Liquid, that reports a “dramatic increase in reports of serious toxicity to theophylline…” and urges that the company should stop promoting theophylline for asthma, and promote Intal instead, because of risks for patients with viral infections.

You receive a written document request from the lawyers for the plaintiff. The request directs you to:

(1) “Produce genuine copies of ‘Dear Doctor’ letters sent by your company to physicians concerning theophylline toxicity in children, including but not limited to any such letter concerning Somophylline Oral Liquid.”

(2) “Produce genuine copies of any internal reports or memoranda particularly concerning toxicity of Somophylline Oral Liquid in children.”
The plaintiff’s obligation in framing a document request is: “The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with **reasonable particularity**” (emphasis added). Your obligation in responding is: “The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated.”

Your obligation under the rules of conduct is: “A lawyer shall not fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

If you fail to produce discoverable documents that are properly requested, and that failure is detected, you and/or your client may be subject to sanctions. Depending upon the court’s view of the seriousness of any such failure, the sanctions could range from a mild reprimand from the judge to payment of the plaintiff’s attorneys fees to a default judgment against your client (judgment for the plaintiff’s alleged damages without the chance to contest liability).

The scope of proper discovery includes any matter, not privileged, that is relevant to a claim or defense of a party. That means that the plaintiff is entitled to request and, on request, to receive any document that falls within that scope.

As you consider whether to produce Document #1 and/or Document #2, you note with interest the following:

- Document #2 does not mention Somophylline Oral Liquid by name. Nor does it mention children in particular.

Your client contact for Bug Pharma is the general counsel.

What should you do about Document #1 and Document #2 in light of the requests that you have received from plaintiff’s counsel?
Problem 7 2018

You are an attorney who represents a defendant in a personal injury case that arises from an automobile accident. Your client is the individual who was driving one of the cars, and your client has his auto insurance with Gecko Insurance Co. Under the insurance contract, your client is entitled to have Gecko hire and pay a lawyer to defend him, and that is how you became the defense lawyer in this case. In other words, you were hired by and are being paid by Gecko. Approximately 40% of your yearly billings come from work that you receive from a steady stream of auto accident cases that are assigned to your firm by Gecko. Assume that the insurance company is not also your client.

Under its contract with your client, the defendant (the insured party), Gecko has the power to approve or reject any settlement within the policy limits of $250,000. Any judgment or settlement in excess of $250,000 would have to be paid by your client personally.

The plaintiff is an 18-year-old man who seeks damages for a bruised sternum that he allegedly suffered as a result of the accident. You are entitled under the rules of civil procedure to have the plaintiff examined by a doctor of your choosing. That doctor will serve as a consultant to you, and perhaps testify as an expert witness about the extent of the plaintiff’s injuries and the plaintiff’s prognosis. That doctor is not in a doctor-patient relationship with the plaintiff.

The doctor you hire examines the plaintiff. The doctor confirms that the plaintiff has a bruised sternum. Based upon your experience and prior cases, a reasonable estimate of the plaintiff’s damages for a bruised sternum would be $15,000.

To your surprise, however, the doctor also tells you that the plaintiff has an aortic aneurysm that may or may not have resulted from the accident. There is no way to be sure whether the aneurysm was a preexisting condition, although you suspect that a jury likely would find that it was not preexisting but rather was caused by the accident. Based upon your experience and prior cases, a reasonable estimate of the plaintiff’s damages for an aortic aneurysm would be $400,000.

You estimate that it will be approximately two years before the case could come to
The aneurysm is life threatening but has no current symptoms. It could rupture at any time, and death would almost inevitably follow quickly. It might never rupture. It is remediable with surgery, which would cost the plaintiff $15,000 out of pocket (his health insurance would cover the rest of the cost). The odds of it rupturing on any given day are positive but infinitesimal.

As far as you can tell, the plaintiff and his lawyer have no idea about the aneurysm. Assume that the doctor you hired has no professional obligation or personal inclination to reveal the aneurysm to anyone except you.

The plaintiff’s lawyer has the absolute right to receive your doctor’s report if the lawyer requests it. Otherwise, you have no obligation under the rules of civil procedure to deliver your doctor’s report. The plaintiff’s lawyer does not request your doctor’s report. The plaintiff’s lawyer appears to be young and inexperienced. It is clear to you that neither the plaintiff nor the plaintiff’s lawyer know about the aneurysm. The plaintiff’s treating physicians must have missed it.

Under the rules of professional conduct that apply to you, the information you have about the aortic aneurysm is confidential. You may reveal it to others (besides to the client and the insurance company) only: (1) if you obtain informed consent of the client or (2) if you reasonably believe that disclosure is reasonably necessary to prevent death or substantial bodily harm. The rules of professional conduct place no obligation on you to reveal the information to the plaintiff.

Your obligations under the rules of professional conduct to communicate with your client include the following:

You must:

(1) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(2) keep the client reasonably informed about the status of the matter;

(3) explain a matter to the extent reasonably necessary to permit the client to make
informed decisions regarding the representation.

By custom and by contract, you are authorized to reveal this information to Gecko, even though it is not your client. Your routine is to advise the Gecko insurance adjuster of any important developments in a case that you are handling for a Gecko policyholder.

What should you do?
Note: This is the same problem we discussed the first day of orientation. We thought it would be interesting to revisit it now that you have substantial experience in law school.

Professor Longan wrote this script with Professor Sneddon and with Professor Sue Chesler of Arizona State College of Law.

In this course, we have spent almost all of our time talking about issues that arise in litigation. This problem arises in a transactional setting, where many lawyers spend their entire careers. Assume that no rule of professional conduct dictates what the lawyers should do in this situation. The lawyers are free to choose any of the options discussed. In your working groups, prepare to pick up the conversation where it ends in the script.

**Scene Summary**

A senior lawyer, Donna, and an associate, Adam, meet together to go over a draft of a contract that they have just received from Amanda, the lawyer on the other side of the deal. Donna and Adam represent Sam Jenkins, a successful businessman. Sam is undertaking a new business, the manufacture and sale of baseball bats made from bamboo. Sam recognizes that the demand for wood bats is about to grow as a result of safety concerns about metal bats. He also believes that making bats from bamboo will make them more durable (a common complaint about traditional bats made from ash or maple is how easily they break) and will have the added appeal of being more eco-friendly. Bamboo grows much more quickly than ash or maple trees. With Donna’s help, Sam has been negotiating a contract with his brothers, Jim and Bob, who run an import-export business. The contract calls for Jim and Bob to supply Sam with all the bamboo that Sam requires for his new venture for the next five years at a set price.

In the negotiation of the contract, one sticking point has been the desire of Jim and Bob to have an “escape clause.” Under the “escape clause,” Jim and Bob would be excused from their obligation to fulfill Sam’s requirements for bamboo in the event of “political unrest” in the country of origin. Unbeknownst to Sam, his brothers intend to obtain the bamboo primarily from Ethiopia. The price of Ethiopian bamboo is low, but Jim and Bob fear that unrest could disrupt the supply or drive their costs up. Through their lawyer Amanda, Jim and Bob have insisted on this clause. Sam eventually concedes the point. Donna and Adam are now reviewing what purports to be a final version of the contract, which has just arrived from Amanda's office. They realize that Amanda omitted from the draft the clause that had been vigorously negotiated and reluctantly agreed to. Donna and Adam discuss how to respond to this “scrivener’s error.” In particular, they discuss the following options: (1) conferring with their client about what to do; (2) telling Amanda, the lawyer for
the opposing party, about the mistake without discussing it with their client first; and (3) advising the client to sign the contract without advising the client or the other lawyer about the mistake.

**Script for Scene 1**

[Scene opens with Donna and Adam looking over a draft contract in a conference room.]

Adam: [Flipping through pages, appearing confused] Donna, where is the escape clause supposed to be? I can’t seem to find it in the section on delivery obligations, which is where I thought Amanda was going to put it.

Donna: That’s where it should be. [looking at her version of the agreement]. Are you sure it’s not there?

Adam: Definitely not there. She must have stuck it in here somewhere. Let me search the document quickly and see where she put it. [turns to laptop and uses the “find” feature to search for words in the draft agreement...waits several seconds...tries another term...waits several seconds..] You’re not going to believe this, but I think she left it out.

Donna: You’ve got to be kidding me. After all the fuss she made about getting that into the contract, she leaves it out? What kind of an idiot are we dealing with?

Adam: It’s not here. I don’t know what to tell you. I searched terms from the language we agreed to – “escape” “political unrest” “relieved of obligation” – none of it comes up. She left it out. Now what?

Donna: I have no idea. This is a new one on me. ... I’ll tell you though, Sam never liked this idea of an escape clause to begin with. He told me “the whole point of a contract like this is to put the pressure on them to meet my needs, so I can concentrate on manufacturing and marketing.” He’d be pretty happy to sign an agreement without that clause in it. Remind me: what’s the default rule if we leave the escape clause out of it?

Adam: The default rule is that Jim and Bob can escape their obligation if political stability in their source country was a basic assumption of the contract and their obligation to supply the goods at the agreed price becomes “impracticable” because of political unrest in that country. I’m not sure a court would find that to be so – you can get bamboo from lots of different countries – and I think that since Jim and Bob have contemplated this problem, a court would not be so
willing to let them off the hook. Sam really gave up a lot when he agreed to this clause.

Donna: Wow. Amanda has really messed it up this time. ... I'll tell you, I'm tempted to just say nothing, let the brothers sign the deal, and let the chips fall where they may. It only becomes an issue if some kind of turmoil really does disrupt the supply. Sam will be in a much stronger position with Jim and Bob without that clause in there.

Adam: True enough, but don't you feel a little bad about Amanda? I mean, if we get to that point, it seems to me that her clients aren't going to be very happy. They could sue Amanda for malpractice, or they could sue Sam to reform the agreement on the basis of mistake and make Amanda pay for bringing that case. What a nightmare. There but for the grace of proofreading go I...

Donna: [curtly] What happens to Amanda is not my problem. If it was someone I liked and trusted, maybe I would feel different, but she has been a pain at every step of this process. Serves her right.

Adam: Shouldn't it matter that, really, we already agreed to this clause? Is it right to take advantage of another lawyer's mistake like this?

Donna: [dismissively] I take advantage of other lawyer's mistakes every day. If they don't know the law, I don't educate them. If they don't insist on a provision that I would insist on in their shoes, I don't do their job for them.

Adam: I get that, really I do. But if the shoe were on the other foot, what would you want Amanda to do?

Donna: [conceding]...I'd want her to tell me about my mistake so that I could fix it. And if she didn't tell me about it, I'd put her on my list of lawyers never to trust again and tell anyone who would listen not to trust her.

Adam: So ... shouldn't we just tell her and get the contract put together the way our clients have already agreed to put it together?

Donna: Maybe...but it just doesn't feel right to do something that can only hurt our client.

Adam: Anyway, don't you think a court later on would reform the deal to conform to what the parties really agreed to? I mean – we would have to testify that yes that was the deal and yes we knew there was
a mistake and yes we had our client sign it anyway. Sounds like a
classic case of mistake.

Donna: Maybe, but Jim and Bob would be behind the eight ball if push
came to shove. The contract without the escape clause would give
us leverage, even if we eventually - after years of litigation and lots
of attorney's fees - we would lose on mistake and reformation. It's
still in Sam's interest not to tell. Although I suppose if you're right
about the law, he could be liable for fees if he fought it.

Adam: At the very least, don't you think we should tell Sam about this? He
might not want to take the chance, and after all the other investors
are his brothers. He's been pretty hard-nosed in these negotiations,
and I don't blame him for that, but still - I don't think he would
want to do this to his brothers.

Donna: You'd be surprised. Sam can be hard-headed, and he almost killed
the deal entirely because of this so-called escape clause. But I am
tempted to call him and tell him about it - if for no other reason
than just to cover myself regardless of what happens with this.

Adam: What if he tells us not to tell Amanda? Then what?

Donna: I suppose we'd have to do what he says. Leave Amanda hung out to
dry.

Adam: Is there some ethical obligation for us to do one thing or another?
Should we get some help with that?

Donna: I really don't see an ethical issue here. We didn't do anything
wrong - Amanda did. No, I think this is just one of those situations
where we're going to have to use some judgment and decide what to
do. We can talk to Sam, or we can tell Amanda without talking to
Sam, or we can say nothing. I honestly don't know which is best. I
feel like I should talk to my client, but I do feel some sympathy for
Amanda. And if we do nothing then probably no one will ever know
about the mistake anyway.

Adam: Well, what are we going to do? [Fade out as the lawyers ponder
that question.]