

## To Tell the TRUTH

**ATTORNEY MORGAN HAS BEEN RETAINED BY AN INSURANCE COMPANY** to defend client Chris in a personal injury action in which Chris struck a pedestrian while driving.

In the initial attorney-client interview, Morgan asks if Chris was impaired in any way. Chris says no. In response to a follow-up question about smoking marijuana, Chris then says, “OK, you’re my lawyer, and everything I tell you is confidential, right?” When Morgan agrees that is generally true, Chris says, “OK look, I’m not gonna lie to you, I smoked a little weed earlier that afternoon. But that didn’t have anything to do with this accident because I smoke weed pretty much every day and I can drive just fine with it. Besides, this accident was caused by that idiot darting out in front of me at the last minute where I had no time to react.”

Plaintiff’s counsel, Parker, takes Chris’ deposition and specifically asks Chris about drug usage on the day of the accident. Chris admits to “only occasionally smoking weed if someone has it at a party, but that hasn’t happened in a year or two.” Morgan knows that Chris has given false testimony about a fact that could become critical in the litigation.

Which of the following is most accurate?

- A. Morgan has a duty as an officer of the court to correct testimony known to be false by informing opposing counsel on the record.
- B. Morgan has no duty to correct testimony known to be false and doing so would violate a client confidence.
- C. Morgan has a duty to suggest that Chris correct the false testimony on the record, but if Chris refuses to do so, Morgan’s ethical duties have been satisfied and Morgan can proceed in the litigation without further restrictions.
- D. Morgan has a duty to suggest that Chris correct the false testimony on the record, but if Chris refuses to do so, Morgan is prohibited from affirmatively using the false testimony in any way.
- E. Morgan has a duty to suggest that Chris correct the false testimony on the record, but if Chris refuses, Morgan must withdraw from Chris’ representation.



### ABOUT THE CENTER

The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer’s Creed, and a variety of other online ethics resources by computer or smart device at [legalethictexas.com](https://www.legalethictexas.com).

### DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.

**ANSWER:** The issue of a client lying in a deposition was recently addressed in Ethics Opinion 692 (October 2021).<sup>1</sup> The Professional Ethics Committee for the State Bar of Texas conceded that this situation “present[s] very difficult issues,” citing the balance between a lawyer’s duty of candor to the court and the duties of loyalty and confidentiality to the client. The committee focused on Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct, which requires candor toward the tribunal. Citing Comment 13 to that rule, which addresses false evidence that is not introduced by the lawyer, the committee found that “a lawyer does not have a duty to correct intentionally false statements made by the client while being cross-examined by the opposing party’s counsel during a deposition,” though they do have a duty to suggest that the client correct the false testimony.

The outcome would be different if this involved trial testimony. Likewise, the analysis would be different if counsel elicited false deposition testimony during direct examination or if counsel subsequently used the false testimony to respond to a motion for summary judgment or argue before a jury. But an attorney passively failing to correct a client’s false deposition testimony does not, on its own, violate Rule 3.03(a). The best answer is D. For further analysis, go [legalethictexas.com/ethics-question-of-the-month](https://www.legalethictexas.com/ethics-question-of-the-month).

### NOTES

1. Opinion 692, Texas Center for Legal Ethics, <https://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-692>.