

LITIGATION ETHICS: KEY ISSUES

Hypotheticals and Analyses*

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Lawyers' Communications about Cases: Basic Principles

Hypothetical 1

You occasionally have lunch with your favorite law school professor, and enjoy a vigorous "give and take" on abstract legal issues that you never face in your everyday practice. Yesterday you spent the entire lunch discussing whether lawyers lose their First Amendment rights when they join the profession.

Should there be any limits on lawyers' public communications about matters they are handling (other than their duty of confidentiality to clients, duty to obey court orders, avoiding torts such as defamation, etc.)?

YES

Analysis

Surprisingly, the ABA did not wrestle with the issue of lawyers' public communications until the 1960s. The 1964 Warren Commission investigating President Kennedy's assassination recommended that the organized bar address this issue. The move gained another impetus in 1966, when the United States Supreme Court reversed a criminal conviction because of prejudicial pre-trial publicity. Sheppard v. Maxwell, 384 U.S. 333 (1966).

ABA Model Rules

The ABA finally adopted a rule in 1968. ABA Model Rule 3.6 (entitled "Trial Publicity") starts with a fairly broad prohibition.

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

ABA Model Rule 3.6(a). The ABA adopted the "substantial likelihood of material prejudice" standard after the United States Supreme Court used that formulation in Gentile v. State Bar, 501 U.S. 1030, 1075 (1991).

ABA Model Rule 3.6 cmt. [1] acknowledges in its very first sentence that "[i]t is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression." As Comment [1] explains, allowing unfettered public communications in connection with trials would bypass such important concepts as the "exclusionary rules of evidence." On the other hand, there are "vital social interests" served by the "free dissemination of information about events having legal consequences and about legal proceedings themselves." Thus, the limitations only apply if the communications will be disseminated to the public, and might prejudice the proceeding.

ABA Model Rule 3.6 then lists what amount to "safe harbor" statements that lawyers may publicly disseminate.

Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that

there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

ABA Model Rule 3.6(b).

Comment [5] contains an entirely separate list of public statements that would generally be prohibited under the ABA Model Rules standard.

There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to

an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

ABA Model Rule 3.6 cmt. [5].

Thus, the ABA Model Rules' approach to this issue involves a unique mix of: a general prohibition; a specific list of generally acceptable statements; and a specific list of generally unacceptable statements.

Restatement

The Restatement articulates the same basic prohibition.

(1) In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness in the proceeding.

Restatement (Third) of Law Governing Lawyers § 109 (2000).

The Restatement explains the competing public policy principles in much the same way as the ABA Model Rules.

Restrictions on the out-of-court speech of advocates seek to balance three interests. First, the public and the media have an interest in access to facts and opinions about litigation because litigation has important public dimensions. Second, litigants may have an interest in placing a legal dispute before the public or in countering adverse publicity about the matter, and their lawyers may feel a corresponding duty to further the client's goals through contact with the media. Third, the public and opposing parties have an interest in ensuring that the process of adjudication will not be distorted by statements carried in the media, particularly in criminal cases. The free-expression rights of advocates, because of their role in the ongoing litigation, are not as extensive as those of either nonlawyers or lawyers not serving as advocates in the proceeding.

Restatement (Third) of Law Governing Lawyers § 109 cmt. b (2000).

The Restatement also provides some insight into how court or bar disciplinary authority could apply the prohibition.

Subsection (1) prohibits trial comment only in circumstances in which the lawyer's statement entails a substantial likelihood of material prejudice, that is, where lay factfinders or a witness would likely learn of the statement and be influenced in an inappropriate way. If the same information is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice. For example, if the lawyer for a criminal defendant simply repeats to the media outside the courthouse what the lawyer said before a jury, the lawyer's out-of-court statement cannot be said to have caused prejudice. However, the fact that information is available from some other source is not controlling; the information must be both available and likely in the circumstances to be reported by the media.

Restatement (Third) of Law Governing Lawyers § 109 cmt. c (2000).

State Approaches

Every state has adopted some limitation on lawyers' public communications. As in so many other areas, states often adopt their own variation on the ABA Model Rules

approach. A few examples suffice to show the great variation among the states' positions.

For instance, Florida follows a dramatically different approach -- applying the prohibition to lawyers who are not working on the matter.

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

Florida Rule 4-3.6(a). The Florida rules do not list either the "safe harbor" or the prohibited types of statements.

Virginia also applies a different standard.

A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

Virginia Rule 3.6(a) (emphases added).¹ Virginia does not have any specific list of "safe harbor" or prejudicial statements.

Courts' Gag Orders

Courts fashioning traditional gag orders necessarily balance the same competing interests.

¹ Virginia did not take this approach voluntarily. In 1979, the Fourth Circuit found the then-current Virginia publicity rule unconstitutional. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). As Virginia's Committee Commentary explains, "one lesson of Hirschkop v. Snead . . . is that a rule, such as the ABA Model Rule, which sets forth a specific list of prohibited statements by lawyers in connection with a trial, is constitutionally suspect." Virginia Rule 3.6, Comm. Commentary.

- United States v. McGregor, 838 F. Supp. 2d 1256, 1267 (M.D. Ala. 2012) (declining to enter a gag order, but reminding the lawyers of their ethical duty not to make certain public statements; "The court declined to grant the government's proposed gag order because it was not the least restrictive alternative and it would not have been fully effective in curbing trial publicity. Instead, the court adopted a middle-ground approach: instructing the attorneys to follow the guidelines embodied in Alabama Rule of Professional Conduct 3.6. The court emphasized that comments about a witness's credibility would be disfavored and presumptively prejudicial."; "A gag order is a prior restraint on speech. As such, the court engaged in a rigorous First Amendment inquiry. Because the government's proposed gag order targeted only the attorneys and not the defendants or the media, the court had to determine whether extrajudicial comments created a substantial likelihood of material prejudice to the proceedings. Furthermore, a gag order had to be narrowly tailored and could only be granted if less burdensome alternatives were ineffective."; "The court declined to impose the government's proposed gag order. The court, however, attempted to strike a balance between defense counsel's First Amendment rights and the government's interest in a fair trial."; "Accordingly, rather than granting the government's motion for a gag order . . . , the court employed the less restrictive alternative of requiring the attorneys and their trial teams to comply with Alabama Rule of Professional Conduct 3.6. The court found that the Rule 3.6 alternative worked well.").

Courts' Other Restrictions

In addition to wrestling with traditional gag orders, some courts have addressed other possible restrictions on lawyers' public statements that might impact ongoing litigation.

Somewhat surprisingly, the Eastern District of Michigan enjoined well-known Michigan lawyer Geoffrey Fieger from publishing certain advertisements before his criminal trial on alleged campaign contribution violations (on which he was ultimately acquitted).

- United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008) (addressing Fieger's advertisements which, among other things, compared the Bush Administration to the Nazi party; noting that the advertisements began to appear before Fieger's criminal trial on alleged campaign contribution

violations involving his support for Democratic primary candidate John Edwards;"The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.")

Not surprisingly, new forms of communications such as social media increase the stakes in such judicial scrutiny.

- Richard Griffith, A Double-Edged Sword For Defense Counsel, Law360, July 31, 2012) ("If you have been following the national news, you know that Florida prosecutors have charged George Zimmerman, a Florida neighborhood watch volunteer, with second-degree murder in the shooting death of an unarmed teenager, Trayvon Martin. You may have also seen images of the injuries Zimmerman purportedly received during his struggle with Martin prior to the shooting, and you may have heard conflicting arguments and conclusions as to whether the images are consistent with Zimmerman's claim of self-defense. What you may not know, however, is that Zimmerman's counsel, Mark O'Mara, is engaged in a social media campaign to manage a flood of incoming inquiries and to provide real-time damage control for negative reports and publicity against his client. As part of that effort, O'Mara has launched Facebook and Twitter accounts and created a blog about the case. While the use of social media may provide additional information about the defendant and his side of the case and assist with damage control, O'Mara's approach also creates risks and obligations. The risks include violating restrictions placed on attorneys related to commenting on an active legal matter, potentially in violation of state ethics rules. In addition, O'Mara risks tainting the jury pool (although this could be a calculated risk if O'Mara believes the jury pool is already contaminated against his client to a point where he could not reasonably expect an unbiased jury of his peers). Further, while one of O'Mara's goals may be to manage or balance adverse publicity, his social media efforts may actually generate new evidence in the case, some of which could be damaging to Zimmerman's defense.").

In 2013, a court declined to order a lawyer to remove references on his website to avoid the possibility that jurors might find them during some improper internet search.

- Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 157, 165 (Cal. Ct. App. 2013) (holding that a court could not order a lawyer handling the case before

the court to remove references on his website; "An attorney's Web site advertised her success in two cases raising issues similar to those she was about to try here. The trial court admonished the jury not to 'Google' the attorneys or to read any articles about the case or anyone involved in it. Concerned that a juror might ignore these admonitions, the court ordered the attorney to remove for duration of trial two pages from her website discussing the similar cases. We conclude this was an unlawful prior restraint on the attorney's free speech rights under the First Amendment. Whether analyzed under the strict scrutiny standard or the lesser standard for commercial speech, the order was more extensive than necessary to advance the competing public interest in assuring a fair trial. Juror admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case."; "The trial court properly admonished the jurors not to Google the attorneys and also instructed them not to conduct independent research. We accept that jurors will obey such admonitions. . . . It is a belief necessary to maintain some balance with the greater mandate that speech shall be free and unfettered. If a juror ignored these admonitions, the court had tools at its disposal to address the issue. It did not, however, have authority to impose, as a prophylactic measure, an order requiring Farrise [lawyer] to remove pages from her law firm website to ensure they would be inaccessible to a disobedient juror. Notwithstanding the good faith efforts of a concerned jurist, the order went too far.").

Best Answer

The best answer to this hypothetical is **YES**.

n 12/11; b 1/13; B 1/15

Lawyers' Communications about Cases: Defining the Limits

Hypothetical 2

Your state's chief justice just appointed you to a commission reviewing your state's ethics rules provision dealing with lawyers' public communications. You wrestle with some basic issues as you prepare for the commission's first meeting.

- (a) Should limits on lawyers' public communications about their cases apply to all lawyers, (rather than just lawyers engaged in litigation)?

NO

- (b) Should limits on lawyers' public communications about their cases apply only to criminal cases?

NO

- (c) Should limits on lawyers' public communications about their cases apply only to jury cases?

NO

- (d) Should limits on lawyers' public communications about their cases apply only to pending cases?

YES

- (e) Even if it would otherwise violate the limit on lawyers' public communications, should lawyers be permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES

Analysis

- (a) The ABA Model Rules apply the prohibition to a lawyer who "is participating or has participated in the investigation or litigation of a matter." ABA Model

Rule 3.6(a). Although the term "investigation" extends the prohibition beyond ongoing litigation, the rule clearly focuses on lawyers engaged in litigation, or the preparation for litigation.

(b) Interestingly, the original ABA Code applied the limit on lawyers' public communication only to criminal matters. ABA Model Code of Prof'l Responsibility DR 7-107(A) (1980).

However, neither ABA Model Rule 3.6 nor the Restatement (Third) of Law Governing Lawyers § 109 (2000) limits the general prohibition on lawyers' public communications to criminal matters.

A comment to ABA Model Rule 3.6 discusses the difference between criminal and civil cases.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

ABA Model Rule 3.6 cmt. [6].

Nearly all of the case law involves criminal rather than civil cases, and most criminal cases involve statements by prosecutors rather than defense lawyers.

However, some criminal defense lawyers have also faced sanctions for making public statements or otherwise disclosing potentially litigation-tainting information.

- In re Gilsdorf, No. 2012PR00006, Hearing Board of Ill. Attorney Registration & Disciplinary Comm'n (June 4, 2013) ("This matter arises out of the Administrator's two-count Complaint, filed on February 6, 2012, as amended by the Administrator's motions on April 5, 2012, and September 28, 2012.

The charges of misconduct arose out of the Respondent knowingly posting on an Internet site, and showing to others, a DVD video he received from the state's attorney while representing a criminal defendant. The video showed the undercover drug transaction between Respondent's client and a confidential police source. The Respondent entitled the video 'Cops and Task Force Planting Drugs,' which was false. By posting the video while his client's criminal case was pending, Respondent intended to persuade residents of the county that the police or other government officials acted improperly in the prosecution of his client. The Hearing Board found that the Respondent engaged in the misconduct charged in both counts. Specifically, he revealed information relating to the representation of a client without the informed consent of his client and without the disclosure being impliedly authorized in order to carry out the representation; failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished; made extrajudicial statements that the lawyer reasonably knows will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding; engaged in conduct prejudicial to the administration of justice; and engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Respondent be suspended from the practice of law for a period of five (5) months.").

- In re Litz, 721 N.E.2d 258, 259-60 (Ind. 1999) (publicly reprimanding a criminal defense lawyer was publicly reprimanded for writing a letter to the editor containing such improper information as his client's passing a lie detector test, his opinion that his client was innocent, and his characterization of the prosecution's decision to retry the case against his client as "abominable.").

Courts occasionally address the application of these rules to lawyers involved in civil cases.

In 2011, the Massachusetts Supreme Court held that a law firm representing a malpractice client against another law firm had not violated Rule 3.6.

- PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 320, 321 (Mass. 2011) (finding that a lawyer from Bickel & Brewer had not violated Mass. Rule 3.6 by publicly commenting on a malpractice case that Bickel & Brewer was pursuing against Seyfarth Shaw; concluding that the Bickel & Brewer's public statements essentially tracked the complaint; "A review of the record establishes that Brewer's remark quoted in the National Law Journal falls well within these two exceptions. Brewer's statement that Seyfarth Shaw, 'in an

attempt to relieve itself of its responsibility to . . . Converge [defunct company whose assets were bought by plaintiff], ' filed court papers 'that not only misstated the facts, but stated the facts in a way' that supported Costigan's [former Converge employee who had won a judgement against it] notion of PCG's successor liability, in large measure tracks directly the allegations of PCG's complaint."; "To the extent the complaint itself does not allege that Seyfarth Shaw's motion to withdraw 'misstated' facts, the public court filings in the Norfolk County action do reflect the misstatement to which Brewer referred. Those court filings are matters of 'public record.'" (citation omitted); rejecting Seyfarth Shaw's efforts to prevent a Bickel & Brewer lawyer from being admitted pro hac vice).

In one widely-publicized opinion, a Rhode Island court fined Rhode Island's Attorney General for criticizing several lead paint manufacturers during a civil case.

- Eric Tucker, Court papers: AG held in contempt for comments in lead paint case, Associated Press (May 5, 2006 10:44PM) ("A judge fined [Rhode Island] Attorney General Patrick Lynch \$5,000 and held him in civil contempt after he publicly accused former lead paint makers of twisting the facts during the state's landmark lawsuit against the companies, according to newly unsealed court documents. In a ruling dated Dec. 6, Superior Court Judge Michael Silverstein said Lynch's remarks violated Rhode Island rules of professional conduct regulating what lawyers may say publicly about cases. The judge weeks earlier had issued a written ruling ordering Lynch to comply with those rules. . . . The first contempt finding came after Lynch referred to the companies as 'those who would spin and twist the facts' during comments made outside court, according to a Nov. 17 article in The Providence Journal. Lynch made the comment after Silverstein rejected mistrial motions filed by the four defendants a few weeks after the trial began. After the Nov. 17 article, Millennium Holdings filed a motion to have Lynch held in contempt, arguing that Lynch's comments represented a 'direct and unambiguous assault upon the very character and credibility of the defendants' and the words 'spin' and 'twist' were prejudicial. The state argued against the fine, saying that the companies were focused on a 'half sentence' in a newspaper article and that it was not even clear to whom Lynch was referring in his remark. The state also said Lynch was responding to an accusatory remark allegedly made by a spokesperson for the companies.").

Several years earlier, the Iowa Supreme Court dealt with a civil defense lawyer's letter to the editor about a case brought against an insurance agency that the lawyer represented. Iowa Supreme Court Bd. of Prof'l Ethics v. Visser, 629 N.W.2d 376 (Iowa 2001). The letter initially summarized his client's defense, criticized the lawsuit and

indicated that he and his client expected the client would be exonerated "from the claims of this unhappy and confused former employee." Id. at 379. The State Disciplinary Board recommended a public reprimand, but the Iowa Supreme Court found no violation, based in large part on the absence of any evidence that the letter to the editor would cause prejudice.

In applying the rule as so interpreted, we look to the facts surrounding the statements at the time they were made, but we also look at the ex post evidence that relates to the likelihood of prejudice. See Gentile, 501 U.S. at 1047, 111 S. Ct. at 2730, 115 L. Ed. 2d at 905 (plurality opinion). The newspaper article spawned by the respondent's letter was published in Waterloo, which is over fifty miles from Cedar Rapids, where the trial was held. This article, which was the only one published in connection with the case, was published on November 6, 1998 -- almost two years before the trial. None of the jurors had even heard of the parties. Patrick Roby, an attorney testifying for Visser before the commission, said he did not believe the Courier article had any impact on the trial, stating "I don't know where you'd find a Waterloo Courier in Cedar Rapids."

Id. at 382. The Iowa Supreme Court found that Visser had violated the general prohibition on deceptive statements by incorrectly stating in the letter to the editor that "one judge has already determined that [the former employee] is unlikely to succeed on the merits of his far-fetched claims." Id. at 383. The court found this statement deceptive, because the ruling was in the injunction phase of litigation and the judge expressed no opinion on the merits of the lawsuit in connection with which Visser sent the letter. The Supreme Court admonished Visser for violating the anti-deception rule.

More recently, a named partner in the well-known litigation firm Quinn Emmanuel faced judicial scrutiny after publicly disclosing evidence that the trial court had excluded from the widely-publicized litigation between Apple and Samsung.

- Ryan Davis, Samsung Attorney Defends Release Of Banned Apple Trial Evidence, Law360, Aug. 1, 2012 ("Quinn Emanuel managing partner John Quinn on Wednesday defended his decision as Samsung Electronics Company Ltd's attorney to publicly release evidence that had been excluded from the company's patent trial with Apple Inc., telling the judge irritated by the move that the release was protected by the First Amendment."; "As the trial got underway Tuesday, United States District Judge Lucy Koh refused to allow evidence that Samsung says proves it could not have copied the design for the iPhone, as Apple alleges it did, because it had a similar phone in the works before the Apple device was released. Later in the day, Samsung sent the evidence to media outlets and issued a statement complaining about its exclusion."; "The statement angered Judge Koh, who demanded in court that Quinn, of Quinn Emanuel Urquhart & Sullivan LLP, explain who drafted and authorized it."; "In a declaration filed Wednesday, Quinn said that he authorized the release and maintained that he had done nothing wrong, since all the evidence was available in publicly filed court documents. Moreover, statements to the press by attorneys are protected free speech, he said."; "In an order on Sunday, Judge Koh excluded both pieces of evidence, ruling that their disclosure was untimely. In court on Tuesday, Quinn implored the judge to reconsider, arguing that the exclusion threatened the integrity of the trial."; "'In 36 years, I've never begged the court. I'm begging the court now,' he said."; "Judge Koh refused to admit the evidence, telling Quinn, 'Please don't make me sanction you. I want you to sit down, please.'"; "Later in the day, Samsung sent the excluded evidence to media outlets, along with a statement arguing that Judge Koh's decision to keep it out means that Samsung would 'not allowed to tell the jury the full story.'"; "'The excluded evidence would have established beyond doubt that Samsung did not copy the iPhone design. Fundamental fairness requires that the jury decide the case based on all the evidence,' the statement said."; "Apple's attorneys immediately complained to Judge Koh that Samsung's release could influence the jurors. The judge told Samsung's attorneys in court that she wanted to know who authorized the release."; referring to the Declaration of John B. Quinn, which stated as follows: "Samsung's brief statement and transmission of public materials in response to press inquiries was not motivated by or designed to influence jurors. The members of the jury had already been selected at the time of the statement and the transmission of these public exhibits, and had been specifically instructed not to ready any form of media relating to this case. The information provided therefore was not intended to, nor could it, 'have a substantial likelihood of material prejudicing an adjudicative proceeding.' See Cal. R. Prof. Res. 5-120(A)"; "[E]ven courts that have chosen to restrict the parties' communications with the public have recognized that '[a]fter the jury is selected in this case, any serious and imminent threat to the administration of justice is limited' because 'there is an 'almost invariable assumption of the law that jurors will follow their instructions.'""").

The court ultimately declined to sanction Quinn.

(c) Neither the ABA nor the Restatement limits the prohibition to jury trials.

ABA Model Rule 3.6 cmt. [1] explains that some restrictions are justified, "particularly where trial by jury is involved." ABA Model Rule 3.6 cmt. [6] acknowledges that "[c]riminal jury trials will be most sensitive to extrajudicial speech. . . . Non-jury hearings and arbitration proceedings may be even less affected."

The Restatement also provides some guidance.

There may be a likelihood of prejudice even if the tribunal can sequester the jury because sequestration may be imposed too late and, in any event, inflicts hardship on members of a jury. Taint of a lay jury is of most concern prior to trial, when publicity will reach the population from which the jury will be called. When a statement is made after a jury has rendered a decision that is not set aside, taint is unlikely, regardless of the nature of the statement. Additional considerations of timing may be relevant. For example, a statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or ongoing proceeding.

Restatement (Third) of Law Governing Lawyers § 109 cmt. c (2000).

(d) The ABA, the Restatement and every state impose limits only if the public communications could affect a proceeding. Thus, any limit by definition applies only before the proceeding. The possibility of retrial, remand, related proceedings, etc., obviously might affect the limit's applicability in a particular matter.

(e) The United States Supreme Court's seminal decision in Gentile v. State Bar, 501 U.S. 1030 (1991) involved a criminal defense lawyer attempting to rebut statements that others had made about his client.

Three years later, the ABA added what amounts to a self-defense exception.

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

ABA Model Rule 3.6(c).

Comment [7] explains this exception.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

ABA Model Rule 3.6(c) cmt. [7].

The Restatement includes a similar exception, as the second sentence in the general rule.

However, a lawyer may in any event make a statement that is reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer's client.

Restatement (Third) of Law Governing Lawyers § 109(1) (2000).

Best Answer

The best answer to **(a)** is **NO**; the best answer to **(b)** is **NO**; the best answer to **(c)** is **NO**; the best answer to **(d)** is **YES**; the best answer to **(e)** is **YES**. n 12/11; b 1/13; B 1/15

Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 3

You represent a plaintiff injured when she was hit by a truck. The trucking company lawyer has been "running you ragged" in an effort to force a favorable settlement. You are trying to think of ways that you can gather evidence without the cost of depositions.

Without the trucking company lawyer's consent, may you interview:

- (a) The trucking company's chairman?

NO

- (b) The trucking company's vice chairman, who has had nothing to do with this case and who would not be involved in any settlement?

MAYBE

- (c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?

YES (PROBABLY)

- (d) A truck driver who has worked for the trucking company for the same number of years as the driver who hit your client (to explore the type of training she received)?

YES (PROBABLY)

- (e) The trucking company's mechanic, who checked out the truck the day before the accident?

MAYBE

- (f) The truck driver who hit your client?

NO

Analysis

Introduction

Of all the ex parte contact issues, the permissible scope of ex parte contacts with employees of a corporate adversary has the most practical consequences, and (unfortunately) the most subtle differences from state to state.

The ABA Model Rules address this issue in a comment.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

Significantly, the Ethics 2000 changes deleted an additional category of corporate employees that had formerly been off-limits:

or whose statement may constitute an admission on the part of the organization.

Thus, the ABA Ethics 2000 changes liberalized the Rule, expanding the number of corporate employees who are fair game for ex parte contacts.

The Restatement defines a "represented nonclient" who is off-limits to ex parte contacts as follows:

[A] current employee or other agent of an organization represented by a lawyer:

(a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

(b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or

(c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Restatement (Third) of Law Governing Lawyers § 100(2) (2000). The first two categories match ABA Model Rule 4.2 cmt. [7], but the third category is quite different.

Elsewhere, the Restatement explains that

[m]odern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

Restatement (Third) of Law Governing Lawyers § 100 cmt. e (2000). Thus, the Restatement takes the same position as the ABA Ethics 2000 change.

In a 2009 article, Professors Hazard and Irwin explained the confusion about permissible ex parte communications with employees of a corporate adversary. After a lengthy discussion, they proposed to add a Comment to Rule 4.2 to explain the standard.

In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 840 (Mar. 2009).

In 2002, the Nevada Supreme Court issued an opinion which provided an excellent summary of the principles involved in this issue, the competing approaches and the advantages and disadvantages of those approaches. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

The Nevada Supreme Court listed various interests furthered by restricting contacts between the corporation's adversary and corporate employees.

- "[P]rotecting the attorney-client relationship from interference." Id. at 1242.
- "[P]rotecting represented parties from overreaching by opposing lawyers." Id.
- "[P]rotecting against the inadvertent disclosure of privileged information." Id.
- "[B]alancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information." Id.

The Nevada Supreme Court also listed the interests that would justify some ex parte contacts between a plaintiff's lawyer and corporate employees.

- "[T]he lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely." Id.
- "[P]ermitting more equitable and affordable access to information pertinent to a legal dispute." Id.
- "[P]romoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation." Id.
- "[P]ermitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11." Id.
- "[E]nhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely." Id.

The Nevada Supreme Court described the pros and cons of six possible tests.

First, the "blanket test" prohibits all ex parte contacts with employees of a corporate adversary.

The blanket test has the advantages of clarity, and offering the most protection to the organization. However, the blanket test limits or eliminates counsel's opportunity to "properly investigate a potential claim before a complaint is filed," and also forces all discovery to be taken through expensive depositions. Id. at 1243.

Second, the "party-opponent admission test" prohibits ex parte contacts with
any employee whose statement might be admissible as a
party-opponent admission under FRE 801(d)(2)(D) and its
state counterparts.

Id.

Under this approach, an employee's statement "is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment." Id. The party-opponent admission test has the advantage of protecting the organization "from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence." Id. The organization's interest in avoiding such a situation is "particularly strong because such admissions are generally recognized as a very persuasive form of evidence." Id.

The party-opponent admission test has a disadvantage of "essentially cover[ing] all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included

within the Rule." Id. This means that the test can "effectively serve as a blanket test."

Id.

Third, the "managing-speaking agent test" prohibits ex parte contacts with those employees who have "speaking" authority for the organization, that is, those with legal authority to bind the organization.

Id. at 1245 (footnote omitted).

Identifying such off-limits employees must be "determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law." Id. The managing-speaking agent test has the advantage of balancing the competing policies of "protecting the organizational client from overreaching . . . and the adverse attorney's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery." Id. The managing-speaking agent test has the disadvantage of "lack of predictability." Id.

Fourth, the "control group test" prohibits ex parte contacts with

only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion.

Id.

The control group test has the advantage of reducing discovery costs by increasing the number of fair-game employees. The control group test has the disadvantage of being narrower than the attorney-client privilege rule expressed in

Upjohn. It also lacks predictability, because it is not easy to tell who is within the "control group." Id.

Fifth, the "case-by-case balancing test" looks at each case and determines which ex parte contacts would be appropriate. According to the Nevada Supreme Court, "this test has been applied only when a lawyer seeks prospective guidance from a court." Id. at 1246.

Sixth, the "New York test" prohibits ex parte communications with

corporate employees whose acts or omissions in the matter under inquiry are binding on a corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.

Id. This is the approach adopted by the Restatement, and is also called the "alter ego test." This approach "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued." Id. The advantages of the New York test are its balancing of protection of the organization and the need for informal investigation. Its disadvantages are its unpredictability, and the possibility that it provides too much protection for the organization.

The Nevada Supreme Court ultimately selected the "Managing-Speaking Agent Test." The court explained that this approach does not prohibit ex parte contacts with "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. at 1248. The off-limits employees under this test are only those whose statements can "bind" the corporation in a "legal evidentiary sense." Id. An employee is not deemed off-limits "simply because his or her statement may be admissible as a party-opponent admission." Id.

States take varying approaches to this common situation. For instance, some jurisdictions include their approach in the black-letter rule.

For purposes of this Rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2(c). In a comment, D.C. Rule 4.2(c) explains that "the Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." D.C. Rule 4.2 cmt. [4].

Some states include their approach in a comment to their ethics rules.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

Most states follow the basic ABA Model Rule and Restatement approach -- considering "off-limits" corporate employees with managerial responsibility or involvement in the pertinent incident.

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See, e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter.").
- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?").
- North Carolina LEO 97-2 (1/16/98) (finding that a lawyer for an employee may not communicate ex parte with an adjuster for an insurance workers' compensation insurance carrier; "Although an adjuster for an insurance

company may not be considered a 'manager' or 'management personnel' for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.").

However, the ABA Model Rules' dramatic changes in its approach (essentially rendering "fair game" for ex parte communications large numbers of corporate employees) and variations among states' ethics rules have generated considerable confusion in many states.

Examining federal and state courts' decisions in just two states -- Illinois and Virginia -- shows how confusing all of this can be. In some ways, this confusion plays to the advantage of corporations' lawyers, because it certainly might deter ex parte communications by lawyers representing the corporation's adversaries.

Illinois

Illinois seems to have a mismatch between its federal courts and its state courts. (As explained below, the Illinois Bar issued an opinion that provides at least some consistency.)

In Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001), the Seventh Circuit upheld the Southern District of Illinois's adoption of the ABA approach.

The Seventh Circuit acknowledged that an earlier Illinois court decision applied Illinois Rule 4.2

only to those members of a corporate defendant's "control group" who have "the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice."

Id. at 881-82 (quoting Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill. App. Ct. 1984)).

The Seventh Circuit half-heartedly explained that federal courts were free to take a different approach than Illinois courts in applying the same Illinois rule.

Nonetheless, the district court considered the Fair Automotive test in its order denying Shane's Rule 60(b) motion and concluded that, because Fair Automotive was decided under a prior version of the Illinois Rules, it is not clear that the Illinois courts would still apply the control group test. In any event, the district court was construing its own local rule, and even though in this case the district court has incorporated Illinois's rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate Illinois court. (We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretations of the Illinois rules, much less to follow decisions from other Illinois courts.) The district court was within its discretion in choosing to follow the ABA test rather than the control group test, and we will not disturb that decision.

Id. at 882.

Illinois federal court decisions issued since Weibrecht follow the same approach -- ignoring the Illinois state court interpretation of Rule 4.2 in favor of the ABA version. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878-79 (N.D. Ill. 2002) (finding that managers at a gas station were within the "off-limits" category of Rule 4.2; "In

determining whether Rule 4.2 covers non-managerial employees, courts have recognized the tension between a party's need to conduct low-cost informal discovery, and an opposing party's need to protect employees from making ill-considered statements or admissions The conduct of station attendants is at the heart of this litigation, and it is being offered as an example of the alleged discrimination of the defendants. As a result, the employees fall under the second category of Rule 4.2: employees whose acts or omissions in the matter at issue can be imputed to the organization."); Mundt v. U.S. Postal Serv., No. 00 C 6177, 2001 U.S. Dist. LEXIS 17622, at *12 (N.D. Ill. Oct. 25, 2001) ("In Weibrecht, the Seventh Circuit upheld the District Court's adoption of a three-part test, set out in the American Bar Association's official commentary to the Model Rules of Professional Conduct, to determine whether an employee is to be considered represented. See ABA Model Rules of Professional Conduct Rule 4.2 cmt. 4 (1995). Under that test, a defendant's employee is regarded as being represented by the defendant's lawyer if any of three conditions are met: (1) the employee has 'managerial responsibility' in the defendant's organization, (2) the employee's acts or omissions can be imputed to the organization for purposes of liability, or (3) the employee's statements constitute an admission.").

To make matters even more complicated, the ABA has changed its Model Rule 4.2 since the Seventh Circuit issued this opinion. One is left to wonder whether an Illinois federal court would follow the old ABA approach or the new ABA approach.

In at least one respect, the Illinois Bar provided some clarification. In Illinois LEO 09-01, the Illinois Bar rejected its earlier "control group" analysis and adopted the ABA Model Rule approach. Illinois LEO 09-01 (1/2009) (rejecting earlier Illinois law

which placed off-limits ex parte communications by a corporation's adversary only those within the corporate "control group"; instead adopting the ABA Model Rule 4.2 standard; "A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication."; also explaining that "a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization"; holding that former employee could be contacted ex parte).

However, this still leaves a mismatch between the federal and the state courts. As explained above, the Illinois federal courts' adoption of the ABA Model Rule approach included the prohibition on ex parte contacts with a corporate employee whose statements would be admissible against the corporation.

The Illinois Bar's current approach does not include that prohibition, but instead adopts the post-2000 ABA Model Rule approach -- which renders those employees fair game for ex parte contacts.

Virginia

Virginia has had trouble reconciling its Bar's approach with its federal courts' approach.

The Virginia ethics rules contain a unique comment describing folks who are off-limits to ex parte communications with representatives of a corporate adversary.

In the case of organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

The "control group" reference seems fairly clear -- because it piggybacks on the Upjohn United States Supreme Court case. However, the comment does not describe who "may be regarded as the 'alter ego' of the organization." That term usually comes up in cases involving plaintiffs' efforts to pierce the corporate veil and hold others responsible for a corporation's liabilities.

Neither the "control group" nor "alter ego" phrase would seem to include some corporate employees or other representatives who should clearly be off-limits -- defined

in ABA Model Rule 4.2 cmt. [7] as those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In essence, that exclusion includes the bus company employee who ran over a plaintiff's client. The bus driver clearly is not in the bus company "control group." In traditional corporate terms, the bus driver clearly is not the "alter ego" of the bus company. Thus, the Virginia Bar and Virginia courts have had to deal with this obvious hole in the Virginia rules' definition of those immune from ex parte communications by the corporation's adversary.

On a number of occasions, the Virginia Bar held that a lawyer may contact the employee of a corporate adversary unless the employee could "commit the corporation to specific courses of action" or could be characterized as the corporation's "alter ego." See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 530 (11/23/83); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82); Virginia LEO 347 (12/4/79). The Virginia Bar has even referred to the pre-Upjohn "control group" test. See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86).

Although the Virginia Bar has not explained exactly where the line should be drawn, it has provided some hints. For instance, in Virginia LEO 507 (3/30/83), the Virginia Bar held that a lawyer could not contact his corporate opponent's "regional manager." Accord Virginia LEO 459 (7/21/82) (store managers deemed off-limits).

On the other hand, in one Legal Ethics Opinion the Virginia Bar indicated that lawyers initiating such ex parte contacts must disclose their adversarial role, and then try "to ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity." Virginia LEO

905 (3/17/89). A lawyer concluding that the employee "feels" this way must presumably end the communication.

Virginia court decisions are hopelessly confused. Four cases decided in a little over ten months in the mid-1990s would leave any practitioner perplexed.

In Queensberry v. Norfolk & Western Railway, 157 F.R.D. 21 (E.D. Va. 1993), the Eastern District of Virginia dealt with a railroad's motion to prohibit plaintiff (an injured railroad worker proceeding under the Federal Employers' Liability Act ("FELA")) from conducting ex parte communications with the railroad's employees. The court acknowledged that its local rule adopted as the applicable ethics standards the then-current Virginia Code of Professional Responsibility. The court quoted Virginia Code of Prof'l Responsibility DR 7-103(A), and then noted that its language was "identical" to what was then the ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). For some reason, the court did not rely on the Virginia Code comment describing who is fair game and off-limits within an organization, but instead relied on ABA LEO 359 (3/22/91). The ABA approach has always been different from Virginia's approach.

Focusing on what was then the ABA prohibition on ex parte contacts with those "whose statement may constitute an admission on the part of the organization" -- a prohibition that has never appeared in the Virginia Code or the Virginia Rules -- the court then turned to Federal Rule of Evidence 801(d)(2) in concluding that "'virtually any employee may conceivably make admissions binding on his or her employer.'" Queensberry, 157 F.R.D. at 23. Thus, the court granted the railroad's motion, and prohibited the plaintiff from conducting ex parte interviews of railroad workers.

Just a few months later, the Roanoke (Virginia) Circuit Court dealt with an identical request by the same railroad to prohibit a plaintiff from conducting ex parte interviews of railroad employees. Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). The state court explained that "while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia's Disciplinary Rules in this situation and therefore do not follow his guidance on the point." Id. at 328.

Though there is no Virginia appellate decision on point, the standing committee on Legal Ethics of the Virginia State Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's control[] group and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. See, e.g., Legal Ethics Opinion Nos. 347, 530, 795; Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)." Legal Ethics Opinion No. 1504, December 14, 1992.

While the Virginia State Bar's "control group" test may not be the one followed in the majority of jurisdictions, the overwhelming weight of authority rejects the Railway Company's argument that the Disciplinary Rules prohibit contact with any employee of the corporate defendant. See, e.g., Niesig v. Team I, et al., 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), a persuasive opinion by the current chief judge of New York's highest court.

The railway company relies for support of its interpretation of DR 7-103(A)(1) on a memorandum opinion of another trial judge. Queensberry v. Norfolk and Western Railway Company, 157 F.R.D. 21 (E.D. Va. 1993). The plaintiff argues, and I agree, that in deciding that case, the federal district judge was justifiably concerned with the effect, under the Federal Rules of Evidence, of any admission that even the lowest-level employee might make. As the plaintiff notes, such a concern does not exist in Virginia's state courts, where the Federal Rules do not apply.

Thus, the plaintiff suggests, Queensberry should be distinguished from the case at bar.

Id. at 327-28. The court therefore denied the railroad's motion.

A few months after that, another Eastern District of Virginia judge addressed an identical request by the same railroad. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096 (E.D. Va. 1994). The court followed what it called the "thoughtful" opinion in Queensberry in granting the railroad's request. Id. at 1099. Interestingly, the court indicated that "both parties in this action agree" that the ex parte prohibition applies only "after a lawsuit is filed." Id. at 1098. This is an incorrect statement of the law in every state. The court therefore allowed the plaintiff to re-interview employees his lawyer had spoken with before litigation began, although they would not be able to obtain any "new information" from them. Id. at 1101.

Several months later, the Winchester, Virginia Circuit Court addressed this issue in connection with a hospital's motion to prevent plaintiff from engaging in ex parte communications with the hospital's nurses about a malpractice case. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). The state court judge cited the Virginia Rule, but quoted from the ABA comment -- as well as noting the Queensberry and Tucker cases. The court found that the hospital's nurses were not the "alter ego" of the hospital, but that they would be off-limits under either the Virginia precedent or the ABA approach.

However, the nurses' negligent acts may make the Medical Center vicariously liable in that the nurses may "act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation." LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the

Plaintiff. This LEO 905 language, which LEO 1504 characterizes as "dispositive," is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee's relationship to the corporation ("make decisions on behalf"), which is the traditional control group analysis, or the employees's participation in the events giving rise to the cause of action ("act on behalf of the corporation"), which is closely akin to the substance of the official comment to ABA Rule 4.2.

Id. at 108. As the court explained,

[w]here the employees are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego. A corporation may have many heads and even more hands, and any one or more of the heads and hands may bind the corporation. There is no reason why a corporation or other organization, which must act through surrogates, should be afforded less protection under the rules of discovery than a natural person. Therefore, the better rule to be applied in the context of permissible discovery and ex parte contacts would be that of the official comment to ABA Model Rule 4.2 and LEO 905. Accordingly, the plaintiff may not contact The Medical Center's nurses who were, or may be, directly involved in the sponge issue in this case outside the discovery process. However, to the extent that employees of the Medical Center are not persons "whose act or omission in connection with that matter [in litigation] may be imputed to the organization for purposes of civil . . . liability or whose statement may constitute an admission on the part of the organization," those corporate employees may be contacted ex parte by the Plaintiff.

Id. at 108-09. The court entered an order prohibiting the plaintiff from ex parte contacts with

the nurses who attended to the physician and who may have negligently placed the sponges. However, to the extent that there are other nurses or employees who are not involved in the sponge placement process of this particular plaintiff, then the plaintiff is free to talk to such nurses outside the discovery process so long as traditional rules of patient

confidentiality and the principles discussed in this order are not transgressed.

Id. at 109-10.

A federal court decision in Virginia on this topic also followed the ABA approach rather than the Virginia approach. In Lewis v. CSX Transportation, Inc., 202 F.R.D. 464 (W.D. Va. 2001), the court addressed CSX's motion to enjoin a plaintiff's lawyer from conducting ex parte interviews of CSX employees. The court relied on the Tucker and Queensberry approach. The court acknowledged that the Western District of Virginia Local Rules adopt the Virginia ethics rules, but noted that the court can "'look to federal law in order to interpret and apply those rules.'" Id. at 466 (quoting McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993)). The court also cited Federal Rule of Evidence 801 -- noting that an employee's statement can amount to an admission.

Of course, all of these cases were decided under the old ABA approach, which placed off-limits corporate employees whose statements were admissible as admissions against their corporate employer's interest. In fact, that was the explicit provision on which all three federal district court decisions rested. Now that the ABA has changed its approach, and rendered those corporate employees fair game for ex parte contacts, there is simply no telling what the federal courts would do in Virginia.

In 2005, a Virginia state court decision dealing with this topic followed the Virginia rules. Pruett v. Virginia Health Servs., Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005) (permitting plaintiff's lawyer to initiate ex parte communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting ex parte contacts even with those nursing home employees, as long as the communications "do not relate

to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting ex parte contacts with former nursing home "control group" and non "control group" employees).

The most recent Virginia state court to deal with this topic extensively analyzed both the "control group" and "alter ego" definition in Virginia Rule 4.2 cmt. [7]. In Yukon Pocahontas Coal Co. v. Consolidation Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), defendant's lawyer communicated briefly with several limited partners of plaintiffs' limited liability partnerships. The court concluded that the limited partners were not members of the plaintiffs' "control group," because "[b]y definition, a limited partner cannot bind or act on behalf of" plaintiffs. Id. at 91.

However, the court held that the limited partners were somehow "alter egos" of the plaintiffs, because the plaintiffs' partnership agreements allowed them to "make decisions on behalf of [plaintiffs] in the particular area which is a subject matter in the underlying litigation" -- voting on the general partner's proposed partnership agreement amendments dealing with his power to act on plaintiffs' behalf (which the court described as the issue being litigated). Id. at 92. The court pointed to several old Virginia legal ethics opinions, which defined as "alter egos" of a corporation those agents who can commit the organization because of their authority or some other law providing that power. The court also pointed to the Pruett case, in which another circuit court found off-limits to ex parte communications floor nurses who obviously were not in the nursing home's "control group," but who allowed the nursing home to carry on its business through their "'hands on' interaction." Id. (quoting Pruett v. Virginia Health Servs., Inc. at 84-85).

This strange definition of "alter ego" does not come from any standard corporate law jurisprudence. Instead, it appears to be a judicial effort to plug the hole left in Virginia Model Rule 4.2 cmt. [7], which does not include the obvious prohibition on ex parte contacts with those (as characterized in ABA Model Rule 4.2 cmt. [7]) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, this definition of "alter ego" does not exactly match with the ABA Model Rule definition of those off-limits lower level employees. It makes sense to prevent ex parte contacts with non-control group corporate employees whose "act or omission" might put the corporation at risk, but these Virginia courts' definition of "alter ego" employees goes beyond that group and apparently includes witnesses whose acts or omissions would not have that effect.

The most recent Virginia federal court opinion takes the same inexplicable approach as an earlier federal court decision.

- Smith v. United Salt Corp., Case No. 1:08cv00053, 2009 U.S. Dist. LEXIS 82685, at *9-10, *9, *11 (W.D. Va. Sept. 9, 2009) (analyzing a corporate defendant's effort to enjoin lawyers for a sexual harassment and discrimination plaintiff from ex parte contacts with company employees; declining to apply the holding in Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) because that case involved ex parte contact with "the very employees who used and maintained the piece of equipment at issue," which meant that their statements would "be an admission of liability imputable to the employer"; inexplicably analyzing the issue as the Lewis court had done, in light of the standard found in an earlier version of ABA Rule 4.2 (which prohibited ex parte communications with persons "whose statement[s] may constitute an admission on the part of the corporate party"); ultimately declining to enjoin ex parte contacts by the plaintiff's lawyer with employees "whose statements could not be used to impute liability upon the employee," but prohibiting "ex parte contact in this context with any supervisory or managerial employee").

All in all, Virginia case law presents a confusing and contradictory amalgam of current and obsolete Virginia and ABA principles.

Best Answer

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY YES**; the best answer to (d) is **PROBABLY YES**; the best answer to (e) is **MAYBE**; the best answer to (f) is **NO**.

n 12/11

Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 4

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

- (a) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

YES (PROBABLY)

- (b) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.¹

This hypothetical addresses the "[i]n representing a client" phrase.

¹ The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Introduction

It is difficult enough in a case of individual lawyers to properly characterize them as "clients" or as "lawyers" for purposes of analyzing Rule 4.2, but trying to assess the role of in-house lawyers complicates the analysis even more.

The ABA Model Rules and Comments are silent on the issue of in-house lawyers. However, the ABA issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers.

- ABA LEO 443 (8/5/06) (explaining that Rule 4.2 is designed to protect a person "against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding the representation"; concludes that the protections of Rule 4.2 "are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization," so "inside counsel ordinarily are available for contact by counsel for the opposing party"; noting that adverse counsel can freely contact an in-house lawyer unless the in-house lawyer is "part of a constituent group of the organization as described in Comment [7] of Rule 4.2 as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute" or the in-house lawyer "is in fact a party in the matter and represented by the same counsel as the organization"; acknowledging that "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; not analyzing the circumstance in which an in-house lawyer is "simultaneously serving as counsel for an organization in a matter while also being a party to, or having their own independent counsel in, that matter").

The Restatement similarly explains that

[i]nside legal counsel for a corporation is not generally within Subsection (2) [those off limits to ex parte communications], and contact with such counsel is generally not limited by § 99.

Restatement (Third) of Law Governing Lawyers § 100 cmt. c (2000).

Both the ABA legal ethics opinions and the Restatement deal with ex parte communication to an in-house lawyer.

Most states follow the same approach as the ABA and the Restatement take.

- Wisconsin LEO E-07-01 (7/1/07) ("A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.").
- Virginia LEO 1820 (1/27/06) (holding that an in-house lawyer "is not a party to the dispute but instead is counsel for a party").
- District of Columbia LEO 331 (10/2005) (concluding that "[i]n general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity's other counsel"; explaining that "if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel's personal lawyer").

Other states disagree.

- Rhode Island LEO 94-81 (2/9/95) (indicating that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents).
- North Carolina LEO 128 (4/16/93) (explaining that "a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel").

The ABA legal ethics opinions and the Restatement do not address communications by an in-house lawyer who is not otherwise clearly designated as a lawyer representing the corporation in litigation or some transactional matter. Because clients can always speak to clients, characterizing an in-house lawyer as a "client" rather than a lawyer presumably frees such in-house lawyers to communicate directly with a represented adversary of the corporation -- without the adversary's lawyer's consent. This seems inappropriate at best (although presumably corporate employees

with a law degree may engage in such ex parte communications as long as they are not "representing" their corporation in a legal capacity).

In any event, at least one bar has forbidden such communications by in-house lawyers.

- Illinois LEO 04-02 (4/2005) (holding that a company's general counsel may not initiate ex parte contacts permitted by Rule 4.2).

Of course, lawyers and their clients must consider other issues as well. For instance, in-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than as lawyers might jeopardize their ability to have communications protected by the attorney-client privilege.

(a) Although the answer might differ from state to state, it seems likely that ex parte contacts would be appropriate with an in-house lawyer who has signed on as "counsel of record" on the pleadings -- because that lawyer should appropriately be seen as representing the corporation.

(b) This scenario presents a more difficult analysis, because the in-house lawyer has not signed on as the corporation's representative in the lawsuit. Therefore, the answer to this hypothetical would depend on the state's approach.

Although the pertinent ABA legal ethics opinion and the Restatement would permit such ex parte communications, lawyers would be wise to check the applicable state's approach.

Best Answer

The best answer to **(a)** is **PROBABLY YES**; the best answer to **(b)** is **MAYBE**.

Request to Avoid Ex Parte Communications

Hypothetical 5

You are the only in-house lawyer at a consulting firm with several hundred employees. A former employee just sued your company for racial discrimination, and you suspect that her lawyer will begin calling some of your company's current and former employees to gather evidence. You would like to take whatever steps you can to protect your company from these interviews.

- (a) May you send a memorandum to all current employees "directing" them not to talk with the plaintiff's lawyer if she calls them?

NO (PROBABLY)

- (b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

YES

- (c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

MAYBE

- (d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

YES (PROBABLY)

Analysis

Introduction

The ABA permits some defensive measures as an exception to the general prohibition on lawyers providing any advice to unrepresented persons.

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rule 3.4(f) (emphases added).

The Rule seems self-evident, although the ABA added a small comment.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

ABA Model Rule 3.4 cmt. [4] (emphasis added). The ABA has not reconciled its use of the term "request" in the black-letter rule and its use of the term "advise" in the comment. The former seems weaker than the latter, and the distinction might make a real difference in the effect that the lawyer's communication has on the client employee/agent. An employee receiving an ex parte contact from an adversary might think that she can ignore her employer's lawyer's "request" to refrain from talking to the adversary's lawyer, but might feel bound if the employer's lawyer has "advised" her not to give information to the adversary's lawyer.

The Restatement addresses this issue as part of its ex parte contact provision. The Restatement uses the "request" standard, and even specifically warns that lawyers may run afoul of other rules if they "direct" their client employees/agents not to speak with an adversary's lawyer. The Restatement also answers a question that the ABA Model Rules leave open -- whether lawyers' requests that their client employees/agents not give information to the adversary limit in any way the adversary's lawyers from trying to obtain such information. The Restatement indicates that it does not.

A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so (see § 116(4) & Comment e thereto). In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. However, even when lawful, such an instruction is a matter of intra-organizational policy and not a limitation against a lawyer for another party who is seeking evidence. Thus, even if an employer, by general policy or specific directive, lawfully instructs all employees not to cooperate with another party's lawyer, that does not enlarge the scope of the anti-contact rule applicable to that lawyer.

Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphases added).

Most states take this approach.

- See, e.g., New York City LEO 2009-5 (2009) ("In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (e.g., bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel." (emphasis added); "The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved."; "Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena. Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer."; "[T]his rule does not

prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer's adversary."; "The Rules also do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer's adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.").

Lawyers going beyond this fairly narrow range of permitted activity risk court sanctions or bar discipline.

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of professional conduct."; "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").
- Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd., 284 F. App'x 826 (2d Cir. 2008) (unpublished opinion) (affirming a district court's order reprimanding the law firm of Cleary Gottlieb and ordering Cleary Gottlieb to pay \$165,000 as a sanction for one of Cleary Gottlieb's lawyer's (a member of the law firm's executive committee based in Paris) efforts to persuade a potentially damaging witness from providing testimony against Cleary's client in the Congo; [in the district court opinion, Kensington Int'l Ltd. v. Republic of Congo, No. 03 Civ. 4578 (LAP), 2007 U.S. Dist. LEXIS 63115, at *8 (S.D.N.Y. Aug. 23, 2007), the court noted that the Cleary Gottlieb lawyer advised the

witness that he would be taking a great risk by appearing at a deposition without a lawyer, but that Cleary Gottlieb could not represent him at the deposition, and that the Cleary Gottlieb lawyer had told the witness that he should not testify "out of patriotism" (citation omitted); the district court noted that the witness testified that the Cleary Gottlieb lawyer "told me as such not to go" to the deposition, 2007 U.S. Dist. LEXIS 63115, at *8 (citation omitted); the district court also ordered that the formal reprimand "should be circulated to all attorneys at Cleary," 2007 U.S. Dist. LEXIS 63115, at *34]).

- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role he was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion; ultimately issuing a public censure of the lawyer).

(a) The ABA and state ethics rules only allow a lawyer to "request" that current client employees not provide information to the corporation's adversaries. The Restatement explains that "[i]n certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law." Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphasis added).

(b) The ABA, the Restatement and state ethics rules allow company lawyers to take this step. Another option is for the company's lawyers to advise company employees that they are free to meet with lawyers for the company's adversary, but that the company lawyers would like to attend such meetings.

(c) The ABA and Restatement provisions allow such "requests" only to current company employees and agents. To the extent that a former employee does not count as a company agent, presumably a lawyer could not request former

employees to refrain from providing information to the company's adversary. Some states explicitly allow company lawyers to make similar requests to "former" employees or agents. Virginia Rule 3.4(h)(2).

(d) Lawyers may find themselves facing another ethics rule if they do more than "request" that an employee or former employee not voluntarily provide facts to an adversary. For instance, lawyers advising an employee or former employee that they do not have to speak with the adversary's lawyer almost surely are giving legal advice to an unrepresented person.

The ABA Model Rules provide that

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3. A comment provides further guidance.

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

ABA Model Rule 4.3 cmt. [2].

Lawyers should be very careful to document the type of direction they give to any current or former employee who might misunderstand the "request," or turn on the company and its lawyer. To the extent that the witness incorrectly remembers that he

or she was "told" by the company's lawyer not to provide information, the lawyer might face court or bar scrutiny.

Best Answer

The best answer to (a) is **PROBABLY NO**; the best answer to (b) is **YES**; the best answer to (c) is **MAYBE**; the best answer to (d) is **PROBABLY YES**.

n 12/11

Threatening Criminal Charges

Hypothetical 6

You represent a worker fired by a local engraving company. Your client claims that the company fired her because she complained about other employees dumping chemicals down a nearby storm sewer. The dumping would violate various criminal laws. You filed a lawsuit against the company for back wages.

May you threaten to report the company's unlawful dumping unless it settles the civil case your client has brought against it?

YES (PROBABLY)

Analysis

Introduction

This issue provides a fascinating insight into the national and state bars' approach to ethics -- and provides another excellent example of why lawyers cannot follow their "moral instinct" or "smell test" when making ethics decisions.

The old ABA Model Code contained a fairly straight-forward prohibition. The ABA Model Rules dropped its prohibition on such actions nearly thirty years ago, but Virginia and many other states have retained it.

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Model Code of Professional Responsibility DR 7-105(A) (1980).

When the ABA adopted its Model Rules in 1983, it deliberately dropped this provision.

The ABA explained its reasoning in a LEO issued about ten years later.

The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters'

position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C. W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

ABA LEO 363 (7/6/92) (footnote omitted).

In defending its decision, the ABA first dealt with the possibility that such threats could amount to extortion. ABA LEO 363 provides that

[i]t is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.*" Model Penal Code, sec. 223.4 (emphasis added); see also sec. 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:

A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.

Id. (emphases added; emphases in original indicated by italics). See Model Penal Code § 223.4 ("Theft by Extortion") ("It is an affirmative defense to prosecution based on

paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services."); Model Penal Code § 242.5 ("Compounding") ("A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.").

The ABA concluded as follows:

The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

ABA LEO 363 (7/6/92).

The ABA also explained that wrongful threats of criminal prosecution could amount to violations of other ABA Model Rules, such as:

Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability improperly to influence a government official or agency.

Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person. . . ." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. See also Hazard & Hodes, supra, § 4.4:104.

Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.

Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

ABA LEO 363 (7/6/92).

The Restatement also deliberately excluded this prohibition -- dealing with the issue in an obscure comment to the rule governing statements to a non-client.

Beyond the law of misrepresentation, other civil or criminal law may constrain a lawyer's statements, for example, the criminal law of extortion. In some jurisdictions, lawyer codes prohibit a lawyer negotiating a civil claim from referring to the prospect of filing criminal charges against the opposing party.

Restatement (Third) of Law Governing Lawyers § 98 cmt. f (2000).

Even as of 1992, the ABA explained that a number of states had chosen to continue the prohibition on such threats even after they shifted to a Model Rules format.

The ABA listed the following states as having made this decision: Illinois; Texas;

Connecticut; Maine; D.C.; and North Carolina. The ABA also noted that the following states continued to follow the basic rule, but by way of legal ethics opinion rather than black-letter rule or comment: New Jersey and Wisconsin.

The ABA/BNA Lawyers' Manual on Professional Conduct § 71:601 provides a list (current as of 2003) of those states which have continued the prohibition in their rules, expanded the prohibition to include disciplinary charges, and adopted the prohibition by way of legal ethics opinion rather than by rule.

Some states follow the ABA approach.

- Delaware LEO 1995-2 (12/22/95) ("Attorney may use the threat of presenting criminal charges against Opposing Party in order to gain relief for Client in her civil claim without violating the applicable ethical standards if the criminal matter is related to Client's civil claim; Attorney has a well founded belief that both the civil claim and the criminal charges are warranted by Delaware law and the facts; Attorney is not attempting to exert or suggest improper influence over the criminal process; and Attorney and/or Client actually intend to proceed with presenting the charges if the civil claim is not satisfied. In addition, Attorney may agree to, or have Client agree to, refrain from reporting criminal charges in return for satisfaction of Client's civil claim."; explaining the meaning of extortion; "We note that extortion is defined as compelling or inducing another person to deliver property by means of instilling in him a fear that the threatener will 'accuse anyone of a crime or cause criminal charges to be instituted against him.' 11 Del. C. §846(4). It is an affirmative defense to this crime, however, if the attorney believes the threatened criminal charge is true and his or her only purpose is to induce the opposing party to make good the wrong. 11 Del. C. §847(b). Accordingly, where threatened criminal charges relate to a client's civil matter and an attorney seeks to recover from the opposing party no more than the amount the attorney believes the client is entitled to, an attorney will likely not violate 11 Del. C. §846 by threatening criminal prosecution."; "Finally, in reaching its conclusion, the Committee notes that the New Jersey Committee on Professional Ethics has reached a contrary conclusion. N.J. Comm. on Prof. Ethics, Op. 595 (1986) (ABA/BNA Law. Manual on Prof. Conduct 901:5804). The New Jersey Committee concluded that the omission of DR 7-105(A) from the New Jersey Rules on Professional Conduct was not deliberate because there is no record that its omission was affirmatively intended by the committee that recommended the New Jersey Model Rules and the New Jersey Supreme Court's explanatory comments do not refer to DR 7-105(A)'s non-adoption or explain the reasons

therefore. Moreover, the New Jersey Committee concluded that the rule set forth in former DR 7-105(A) derives not from any formal cannon or code of ethics, but from generally accepted standards of professional conduct long enforced by the New Jersey Supreme Court. ABA Formal Op. 92-363 expressly rejects the New Jersey Committee's opinion and an 'incorrect' interpretation of the Model Rules. Id. at 7.").

Because the ABA has dropped the prohibition, states deciding to retain it must determine where in their rules they will insert the prohibition. Of course, states do not have this problem when adopting a variation of an ABA Model Rule -- because they use the same rule number, but include a different substance. With the prohibition on threatening criminal prosecution, there is no ABA Model Rule to use as a guide.

This makes it very difficult for practitioners to determine if a particular state continues to prohibit such conduct.

- At least one state includes the provision in its Rule 1.2 (entitled "Scope of Representation and Allocation of Authority Between Client and Lawyer"). Ohio Rule 1.2(e).
- Some states include the provision in their Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).
- Some states include the provision in their Rule 4.4 (entitled "Respect for Rights of Third Persons"): Tennessee Rule 4.4(a)(2).
- Some states include the provision in their Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g); Illinois Rule 8.4(g).
- Those states having unique numbering also must find a place to put a prohibition that they wish to retain: California Rule 3.10; Texas Rule 4.04(b).

Some states follow essentially the same approach, but use legal ethics opinions rather than rules.

- North Carolina LEO 2009-5 (1/22/09) ("[A] lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."; "It is unlikely that Lawyer's impetus to report

Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.").

- North Carolina LEO 98-19 (4/23/99) ("Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.").
- West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

The answer to this hypothetical obviously depends on the applicable jurisdiction's ethics rules. To make matters even more complicated, it may be necessary to analyze a lawyer's home state ethics rules' choice of law provision to determine whether the lawyer has engaged in misconduct.

Interestingly, one bar has taken what could be seen as a counterintuitive (or overly risky) approach -- finding ethically permissible a lawyer's participation in a civil settlement that includes a non-reporting provision in which the civil plaintiff agrees not to report wrongful conduct to the law enforcement authorities.

- North Carolina LEO 2008-15 (1/23/09) ("Provided the agreement does not constitute the criminal offense of compounding a crime, is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence (including witness testimony), a lawyer may participate in a

settlement agreement of a civil claim that includes a provision that the plaintiff will not report the defendant's conduct to law enforcement authorities.").

Many states would probably take a different approach, and prohibit such an arrangement.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

Tape Recording Telephone Calls

Hypothetical 7

You and your partner have debated the ethical propriety of lawyers tape recording telephone calls, or directing their clients to do so.

May lawyers tape-record (or direct their clients to tape-record) telephone calls in the following situations:

- (a) Without the other lawyer's consent, in a state where both parties' consent is required?

NO

- (b) Without the other lawyer's consent, in a state where one party's consent suffices?

YES (PROBABLY)

Analysis

Bars, courts, and commentators have for several decades vigorously debated what role non-governmental lawyers can play in tape recording telephone calls.

At the extremes, the answers seem easy. It might be tempting to simply say that lawyers can engage in legal conduct on behalf of their clients. The vast majority of states allow one telephone call participant to secretly tape-record the call. In those states, this approach would allow lawyers to do so.

Given the dramatic differences between states' approach to this issue, courts sometimes must deal with a choice of laws analysis -- when different states are involved in the tape recording. See, e.g., Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006) (assessing a situation in which someone in the Atlanta, Georgia, branch of

Salomon Smith Barney tape-recorded a plaintiff in California without advising the plaintiff of the recording; explaining that such tape recording was acceptable in Georgia but not California; entering an injunction against such future tape recording, but declining to award damages and declining to apply the California prohibition retroactively).

At the other extreme, tape recording a telephone call without all participants' consent seems somehow "sleazy" or "underhanded." Most commentators say that lawyers should do more than simply comply with the law.

All bars and courts agree on a few basic principles. Because a lawyer cannot conduct discovery that violates the legal rights of another person (ABA Model Rule 4.4(a)), they cannot themselves, or direct their client to, engage in illegal tape recording. In states where all telephone call participants must consent to a tape recording, a lawyer cannot record a call without everyone's consent.

Because lawyers cannot engage in knowingly deceptive conduct,¹ a lawyer who is otherwise acting ethically in tape recording a telephone call generally cannot lie if one of the other participants asks if she is being recorded.²

¹ ABA Model Rule 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.").

ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

² In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 7, 9, 12, 14, 15, 17, 19 (Vt. 2009) (issuing a private admonition in the case of a criminal defense lawyer who lied to a witness asking whether the lawyers were tape recording their telephone call with the witness; "We also agree that respondents knowingly made a false statement about the recording and thus violated Rule 4.1. One respondent stated in plain terms that she was not recording the conversation, when in fact she was. The second respondent attempted to distract the witness from the issue of recording entirely, by making a statement about the speakerphone. Furthermore, she did not disagree with or correct the misrepresentation made by the first respondent. Both respondents' actions, therefore, violate Rule 4.1."; also finding that the lawyers had not violated Rule 8.4, which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation"; "[W]e are not prepared to believe that any dishonesty, such as giving a false reason

Apart from those basic concepts, the ethics rules and case law have generally evolved in favor of a more permissive attitude about tape recording telephone calls -- but with plenty of stops and starts, and with some bars and courts holding out for a very strict view.

The basic chronology shows the course of this interesting debate.

In 1974, the ABA adopted a per se approach banning lawyer participation in tape recording telephone calls without all participants' consent.

The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee

for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct 'involving dishonesty, fraud, deceit or misrepresentation' that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life. V.R.Pr.C. 8.4(c). This affirms the hearing panel's conclusion the subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.'"; "Admittedly, some false statements made to a third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules. However, not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If Rule 8.4 is interpreted to automatically prohibit 'misrepresentations' in all circumstances, Rule 4.1 would be entirely superfluous. There must be some meaning for Rule 8.4(c) independent of Rule 4.1 -- for we presume that the drafters meant every rule to have some meaning."; "Reading Rule 8.4 as applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law is additionally supported by authority from other jurisdictions. Sister courts have acknowledged that Rule 8.4(c) cannot reasonably be applied literally -- and with the same reasoning we have employed. See, e.g., Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475-76 (1998) (rejecting 'the literal application' of 8.4(c) on the grounds that it renders Rule 4.1 'superfluous'); see also D.C. Bar Legal Ethics Comm. Op. 323 (2004) ('Clearly [Rule 8.4(c)] does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.'; ultimately concluding that '[i]n the course of zealously representing a client who was the defendant in a serious criminal matter, the respondents in this case engaged in an isolated instance of deception. All indications are that respondents earnestly believed that their actions were necessary and proper. Indeed, the panel found that respondents violated the rules of a 'determination to defend their client against serious criminal charges,' and nothing else. Under such circumstances, respondents' actions simply do not reflect adversely on their fitness to practice.'; setting up a group to consider possible Rule amendments dealing with "investigatory misrepresentations"; "[W]e will establish, by separate administrative order, a joint committee comprised of members from the Civil Rules Committee, the Criminal Rules Committee, and the Professional Conduct Board, to consider whether the rules should be amended to allow for some investigatory misrepresentations, and, if so, by whom and under what circumstances. We make no comment today on the merits of the questions that we will charge the committee to consider.").

concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

ABA LEO 337 (8/10/74). The only exception identified by the ABA involved "extraordinary circumstances" involving government investigations.

The ABA addressed the issue again twenty-seven years later. In the meantime, here is a brief review of just some of the various bar and court approaches.

- In 1990, the California Supreme Court adopted a per se ban on lawyer participation and tape recording telephone calls without everyone's consent. Kimmel v. Goland, 793 P.2d 524 (Cal. 1990).
- Perhaps not surprisingly, the first bar to take a different position was the New York County Bar -- in 1993, that Bar rejected a per se prohibition on lawyers tape recording their telephone calls because such a prohibition is "no longer viable in today's day and age."³
- Several years later, the Texas Bar indicated that a lawyer (1) may not herself record a telephone call without every participant's consent; (2) may ethically advise her client to do so; (3) may not request his client to tape-record a conversation in which the lawyer is a participant unless all the participants consent. Texas LEO 514 (2/96) (see below for Texas' reversal in 2006, Texas LEO 575 (11/06)).
- Several months later, the Utah bar permitted its lawyers to tape-record a telephone call if the recording was legal under Utah law. The Utah Bar addressed the "unseemly" argument as follows: "Some have expressed an intuitive feeling that the use of tape recorders by attorneys in this type of circumstance is 'bush league' or 'unseemly.' Although we do not condone

³ New York County LEO 696 (3/11/93) (rejecting a per se prohibition on secret recording of telephone calls to which one party to the conversation has consented; noting that such conduct does not violate New York criminal law, and is sometimes acceptable in criminal investigations; "Former pronouncements that secret recordings by lawyers are inconsistent with standards of candor and fairness are no longer viable in today's day and age. Perhaps, in the past, secret records were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings. Today, recording a telephone conversation may be accomplished by the touch of a button, and we do not believe that such an act, in and of itself, is unethical."; holding that lawyer may not falsely answer questions about whether they are recording the telephone call, and may not use any recorded statements in a misleading way; ultimately concluding that lawyers may secretly record telephone conversations with third parties (including other lawyers and even their own clients) — as long as the recording does not violate the law, and as long as one party to the conversation consents to the recording).

deceptive, deceitful or fraudulent actions, we see no principled reason to find it to be unethical for an attorney, within the limits discussed elsewhere in this opinion, to tape-record a conversation when it is expressly permitted by Utah law for all other persons." Utah LEO 96-04 (7/3/96).

- Two years later, the Michigan Bar noted "a trend in other states to permit the recording of conversations by lawyers." The Michigan Bar specifically rejected the per se ABA approach, with an odd analysis: "'The time has come' the Walrus said, 'to talk of many things. . . ." The committee believes that ABA Formal Opinion 337 is over broad, and the rationale which supported its statement some twenty-four years ago has weakened. Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis." Michigan LEO RI-309 (5/12/98).
- That same year, the Restatement (Third) of Law Governing Lawyers indicated that "[w]hen secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form." Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (the Restatement was finally published in 2001).
- In 2000, the Arizona Bar indicated that a lawyer may not herself tape-record a conversation unless all participants consented, but may advise her client to engage in lawful tape recording of telephone calls. Arizona LEO 00-04 (11/2000).

The ABA finally reversed course in 2001. In ABA LEO 422 (6/24/01), the ABA noted the trend in favor of permitting the lawful tape recording of telephone calls. The ABA explained that "[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation." Not surprisingly, the ABA indicated that lawyers may not engage in illegal tape recording, and may not lie when a participant asks whether the lawyer is recording the telephone call. Interestingly, the ABA Ethics Committee was "divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client

concerning the subject matter of the representation without the client's knowledge." The Committee did indicate that "such conduct is at the least, inadvisable."

Even after the ABA reversed its earlier opinion, the debate has continued to rage. For instance, the Northern District of Illinois held in 2001 that it is "inherently deceitful" for a lawyer to tape-record a telephone call, even if the recording is legal. Anderson v. Hale, 159 F. Supp. 2d 1116 (N.D. Ill. 2001). The court explained that "the law recognizes, in countless areas, that omitting material facts can be as misleading as affirmative misstatements." Id. Citing the lawyers' "particularly high standard of candor," the court explained "[t]hat a conversation . . . being recorded is a material fact that must be disclosed by an attorney." Id.

The trend clearly follows the ABA approach.

- New York City LEO 2003-02 (2003) (holding that "[a] lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good"; acknowledging that "undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice").
- Missouri LEO 123 (3/8/06) (allowing a lawyer/participant to tape-record a telephone communication if it is not prohibited by law, does not involve any explicit or implicit statement by the lawyer that she is not recording the call, and the lawyer is not recording a current client).
- Texas LEO 575 (11/2006) ("The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is

not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled.").

- Ohio LEO 2012-1 (6/8/12) (withdrawing an earlier legal ethics opinion and finding that a secret tape recording of a conversation is not per se unethical; "A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place. Because surreptitious recording is regularly used by law enforcement and other professions, society as a whole has a diminished expectation of privacy given advances in technology, the breadth of exceptions to the previous prohibition on surreptitious recording provides little guidance for lawyers, and the Ohio Rules of Professional Conduct are based on the Model Rules of Professional Conduct, the Board adopts the approach taken in ABA Formal Opinion 01-422. Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof. cond. R. 8.4(c) or other Rules of Professional Conduct. Examples of misconduct may include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud. As a basic rule, Ohio lawyers should not record conversations with clients without their consent. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is ordinarily not consistent with these overarching obligations. Similar duties exist in regard to prospective clients, and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients as defined in Prof. Cond. R. 1.8(a).").

Thus, the law clearly trends in favor of permitting lawyers to themselves record (or advise their clients to record) telephone calls in states allowing such activity.⁴ As with most trends, some states do not follow along.

Some courts have adopted an awkward middle ground. For instance, a Colorado legal ethics opinion allowed Colorado lawyers to tape-record communications "in

⁴ Courts also deal with such tape recordings in assessing work product doctrine protection. For instance, the Eastern District of Virginia has held that the work product doctrine does not protect a client's tape recording of telephone calls with other individuals who had not consented to the recording. Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332 (E.D. Va. 1987).

connection with actual or potential criminal matters" and in their personal lives -- but presumably not in other situations.⁵

The Virginia experience represents a microcosm of this evolution.

Virginia is a one-party state (Va. Code § 19.2-62(B)(2)), but another Virginia law indicates that even a legally recorded telephone call cannot be used as evidence in a civil action (other than a divorce or annulment proceeding) unless all of the participants knew they were being recorded, or if one of the participants knew the call was being recorded and the conversation serves as an admission of criminal conduct which is the basis for the civil suit. Va. Code § 8.01-420.2.

In Gunter v. Virginia State Bar, 238 Va. 617, 385 S.E.2d 597 (1989), the Virginia Supreme Court condemned a lawyer's participation in his client's interception of the client's wife's telephone calls (including some with her lawyer). Because the client did not participate in those calls, his actions were clearly illegal under Virginia law. Still, commentators treated Gunter as condemning any lawyer's participation in any tape recording of telephone calls -- perhaps based on the Virginia Supreme Court's statement that "conduct may be unethical . . . even if it is not unlawful." Id. at 621, 385 S.E.2d at 600.

⁵ Colorado LEO 112 (7/19/03) ("The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life. The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants. The Committee recognizes a 'private conduct exception' because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful.").

In the next seventeen years, the Virginia Bar moved from a per se test to a gradual relaxation of the prohibition on lawyer participation in recording telephone calls.

- Virginia LEO 1324 (2/27/90) (even if it is not illegal, a lawyer cannot tape-record conversations without the other party's consent, or assist the client in doing so; a lawyer may use such a recording made by the client before the client retained the lawyer, and must keep the client's activity confidential).
- Virginia LEO 1448 (1/6/92) (even if non-consensual tape recordings are not illegal, a lawyer may not participate in such tapings or advise a client to do so; "advising one's client to initiate a conversation under possibly false pretenses and to secretly record such conversation is improper deceptive conduct" that must be reported to the Bar).

LEO 1448 represents the Virginia Bar's most extreme statement on this issue. A lawyer's client had been sexually abused by her father for an extended period of time during her childhood. As a result of the abuse, the client "suffers from several significant psychiatric disorders and has required extensive therapy, including several periods of hospitalization." The lawyer wanted to represent his client in a civil action against her father, but there "is little corroborating evidence." The lawyer asked the bar if he can suggest that his client meet with her father (who does not have a lawyer in the matter) "and surreptitiously record their conversation, since [the father has] . . . in some conversations, . . . freely admitted his sexual abuse of [the client]." The bar held that advising the client to tape-record her conversation with her father was a flat ethics violation.

- Virginia LEO 1635 (2/7/95) (a company officer (who is also a lawyer) tape-records a telephone conversation the officer has with a terminated corporate employee; because the Code provision prohibiting lawyers from engaging in misrepresentation is "not specifically applicable to activities undertaken in an attorney-client relationship," the lawyer's tape-recording was improper even if the officer were acting only as a corporate officer and not as the corporate lawyer; after citing the familiar list of factors for determining whether a lawyer's misconduct must be reported, the Bar concluded that the tape-recording without consent "may raise a substantial question" as to the lawyer's honesty, trustworthiness, or fitness to practice law in other respects).

In 2000, the Virginia Bar finally started to move in the other direction.

- Virginia LEO 1738 (4/13/00) (lawyers may secretly record telephone conversations in which they are participants, as long as the recordings are legal and are made in connection with criminal or housing discrimination

investigations, or involve "threatened or actual criminal activity when the lawyer is a victim of such threat"; the Bar "recognizes that there may be other factual situations where such recordings would be ethical," but will address those in response to specific questions).

- Virginia LEO 1765 (6/13/03) (lawyers working for a federal intelligence agency may ethically perform such undercover work as use of "alias identities" and non-consensual tape recordings).

In 2006, the Virginia Ethics Committee revisited the issue (as explained below, the Virginia Supreme Court ultimately rejected the Virginia Ethics Committee's proposed revisions). Among other things, the Committee's research showed that states continue to be divided.

In some states undisclosed tape-recording involving an attorney has been held to be generally permissible in the absence of some type of actual, affirmative misrepresentation. See, e.g., Alaska Ethics Op. 2003-1; Michigan Informal Ethics Op. RI-309 (1998); New York County Ethics Op. 696 (1993); Okla. Bar Ass'n Ethics Op. 337 (1994); Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981) . . . Indiana State Bar Ass'n Op. 1 (2000); Missouri Bar Op. 97-0022 . . . New York City Ethics Op. 2003-2 (undisclosed tape-recording only appropriate where it promotes a generally accepted societal benefit); Hawaii Sup. Ct., Formal Op. 30 (modification 1995) (whether undisclosed recording by an attorney is unethical must be determined on a case-by-case basis); Wisconsin Bar Op. E-94-5 (determination of whether Rule 8.4 has been violated must be fact-specific on a case-by-case basis).

Va. State Bar, Standing Committee on Legal Ethics: Report on Nonconsensual Tape-Recording (Jan. 12, 2006).

The Virginia ethics committee recommended that the Virginia Supreme Court adopt rules changes occasionally permitting tape recording as part of such investigations. February 25, 2009, the Virginia Supreme Court rejected the proposed

rules change. The court acted on a 4-3 vote, which reflects the national debate about this difficult issue.

In 2011, the Virginia Bar adopted a legal ethics opinion that nudged the state in the direction of allowing tape recording in certain circumstances.

- Virginia LEO 1814 (5/3/11) (holding that a criminal defense lawyer may directly or through an agent engage in legal undisclosed recording of a telephone call with an unrepresented witness whom the lawyer worries might change his story and implicate the lawyer's client; explaining that because such tape-recording involves "a higher risk of the unrepresented party misunderstanding the lawyer or the lawyer's agent's role," the lawyer or the agent "must assure that the unrepresented third party is aware of the lawyer or agent's role" in order to comply with the Rule 4.3 provision governing a lawyer's communication with an unrepresented person; noting that although many states previously found a lawyer's participation even in lawful tape-recording of telephone calls to be unethical, "more recently a number of states have reversed or significantly revised their opinions to allow undisclosed recording" (describing many of those states' approaches in a footnote)).

Of course, such recordings implicate other areas of the law as well.

Best Answer

The best answer to **(a)** is **NO**; the best answer to **(b)** is **PROBABLY YES**.

b 11/14

Using Arguably Deceptive Means to Gain Access to a Witness's Social Media

Hypothetical 8

You have read about the useful data a lawyer can obtain about an adverse party or witness by searching social media sites. One of your partners just suggested that you have one of your firm's paralegals send a "friend request" to an adverse (and unrepresented) witness. The paralegal would use his personal email. He would not make any affirmative misstatements about why he is sending the "friend request," but he likewise would not explain the reason for wanting access to the witness's social media.

May you have a paralegal send a "friend request" to an adverse witness, as long as the paralegal does not make any affirmative misrepresentations?

NO (PROBABLY)

Analysis

This hypothetical involves the level of arguable deception that a lawyer or lawyer's representative may engage in while conducting discovery.

The Philadelphia Bar was apparently the first to address this issue, and found such a practice unacceptable.

- Philadelphia LEO 2009-02 (3/2009) (analyzing a lawyer interested in conducting an investigation of a non-party witness (not represented by any lawyer); explaining the lawyer's proposed action: "The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages. The third person would only state truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation."; finding the conduct improper; "Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c)

because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony."; "The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker."; "The Committee is aware that there is a controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.").

Since then, several bars have taken the same approach.

- San Diego LEO 2011-2 (5/24/11) (holding that a lawyer may not make a "friend request" to either an upper level executive of a corporate adversary (because even the request is a "communication" about the subject matter of the representation), or even to an unrepresented person; "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication 'about the subject of the representation.' We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: '[Name] wants to have access to the information you are sharing on your Facebook page.' If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with

the represented party is about the subject matter of that representation."; "[W]e conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members of the network and the lawyer neither 'friends' the other party nor directs someone to do so."; "We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not."; "We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion [Philadelphia LEO 2009-02], notwithstanding the value in informal discovery on which the City of New York Bar Association [New York City LEO 2010-02] focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request."; "Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove."; "We have concluded that those [ethics] rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have 'friends' like that and no one -- represented or not, party or non-party -- should be misled into accepting such a friendship.").

- New York LEO 843 (9/10/10) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation."; "Here . . . the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rules 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the

Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so.").

Ironically, in the very same month that the New York State Bar indicated that a lawyer could not send a "friend request" to the subject of searching, the New York City Bar held the opposite.

- New York City LEO 2010-2 (9/2010) ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."; "[W]e address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses. . . . [W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements." (footnote omitted) (emphasis added); "Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse."; "[A]bsent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website."; "We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that 'the evidence sought is not reasonably and readily obtainable through other lawful means'); see also ABCNY Formal Op. 2003-2 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social

networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort. For this reason we conclude that lawyers may not use or cause others to use deception in this context." (footnote omitted); "While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a 'friend request.'"; "Rather than engage in 'trickery,' lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."; "Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.").

At least some lawyers have faced bar scrutiny and perhaps discipline for such activities.

- Mary Pat Gallagher, When "Friending" is Hostile, N.J. L.J., Sept. 8, 2012 ("Two New Jersey defense lawyers have been hit with ethics charges for having used Facebook in an unfriendly fashion."; "John Robertelli and Gabriel Adamo allegedly caused a paralegal to 'friend' the plaintiff in a personal injury case so they could access information on his Facebook page that was not available to the public."; "The 'friend' request, made 'on behalf of and at the direction of' the lawyers, 'was a ruse and a subterfuge designed to gain access to non-public portions of [the] Facebook page for improper use' in defending the case, the New Jersey Office of Attorney Ethics (OAE) charges."; "The OAE says the conduct violated Rules of Professional Conduct (RPC) governing communications with represented parties, along with other strictures. The lawyers are fighting the charges, claiming that while they directed the paralegal to conduct general Internet research, they never told her to make the request to be added as a 'friend,' which allows access to a Facebook page that is otherwise private."; "At first, Cordoba [paralegal] was able to freely grab information from Hernandez's [plaintiff] Facebook page, but after he upgraded his privacy settings so that only friends had access, she sent him the friend request, which he accepted, the complaint says.").

The trend seems to be against permitting such "friending" in the absence of a disclosure of the request's purpose.

Best Answer

The best answer to this hypothetical is **PROBABLY NO.**

B 8/12

Deception: Commercial and Other Causes

Hypothetical 9

You recently represented a furniture manufacturer in terminating its relationship with a large retailer. Your client and the retailer entered into a consent decree in which the retailer agreed to stop selling your client's furniture at its stores. You and your client have heard rumors that the retailer is violating the consent decree by buying your client's furniture from other retailers and selling it at their stores. From what you hear, the retailer does not advertise that it sells your client's furniture, but arranges for sales to consumers who ask about the furniture when they visit the retailer's stores.

May you arrange for one of your law firm's associates, a paralegal and your son-in-law to visit one of the retailer's stores and pose as consumers interested in buying your client's furniture?

YES (PROBABLY)

Analysis

The ABA and state bars have long debated the ethical propriety of deceptive conduct undertaken for socially worthwhile goals, such as housing discrimination tests. However, there seems to have been a mismatch between courts' and bars' efforts to reconcile the explicit prohibition on deceptive conduct and the type of activity that goes on nearly every day.

Courts throughout the country have either implicitly or explicitly approved the use of deceptive conduct in pursuing commercial rather than socially worthwhile goals.

In some cases that do not even deal with ethics issues, courts blithely describe such deceptive conduct. For instance, in one Virginia decision by a very well-respected Circuit Court Judge (Charles Poston), the court addressed a defamation claim brought by a former employee who claimed that her former employer made false and defamatory statements about her. Sarno v. Johns Bros., Inc., 62 Va. Cir. 343 (Norfolk

2003). The court's statement of facts indicates that a former employee and her employer settled her wrongful termination claim with a settlement agreement requiring the employer to state in response to any job reference checks that she "stopped work as a result of her pregnancy and her desire to take care of her children." Id. at 343.

The court explained what happened next.

After the agreement has been executed, Cladeen Clanton, Sarno's former supervisor at Johns Brothers, was contacted by Sarno's private investigator and her brother. Both posed as potential employers seeking references for Sarno. When asked if Johns Brothers would rehire Sarno, Clanton answered: "No, absolutely not, there were numerous problems with her." Sarno v. Clanton, 59 Va. Cir. 384, 386 (Norfolk, 2002). When asked about Sarno's job performance, Clanton responded that she "did not find complete honesty in Sarno's work." Id.

Id. at 343-44 (emphasis added). The court did not even comment on the deception, thus implicitly finding it appropriate.

Two cases decided at about the same time and the same place dealt with and clearly accepted such deceptive conduct.

Apple Corps Ltd. v. International Collectors Soc'y, 15 F. Supp. 2d 456

(D.N.J. 1998). In Apple Corps, plaintiffs (which included Yoko Ono Lennon and related companies) hired a private investigator to determine if defendants were improperly selling Beatles-related products. Defendants claimed that plaintiffs' lawyer had improperly engaged in ex parte contacts, and also had violated the prohibition on deceitful conduct by arranging for investigators to pretend that they were interested in buying defendants' products.

The court first held that New Jersey ethics rules applied (because the investigation related to a New Jersey court's consent order), even though the pertinent lawyers practiced principally in New York.

The court rejected the defendants' argument that the plaintiffs' lawyer had engaged in improper ex parte contacts by arranging for investigators to communicate with defendants' sales representatives. The court explained that the investigators "posed as normal consumers," and that "the only misrepresentations made were as to the callers' purpose in calling and their identities." Id. at 474.

RPC 4.2 [New Jersey's prohibition on certain ex parte contacts] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule.

Id. at 474-75.

The court also found that plaintiffs' lawyers had not violated the general prohibition on deceitful conduct. Citing the common use of "undercover agents" in criminal cases and in civil "discrimination tests," the court held that

[t]his limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. . . . The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Id. at 475. The court explained that the plaintiffs were entitled to determine if the defendants were complying with an earlier court order, and could not have determined the defendants' compliance otherwise.

Gidatex S.r.L. v. Campaniello Imports Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999). In Gidatex, the plaintiff company wanted to determine if defendants were violating trademark and other similar laws. The plaintiff's counsel Breed, Abbott & Morgan, hired two private investigators "to pose as interior designers visiting [defendant's] showrooms and warehouse and secretly tape-record conversations with defendants' salespeople." Id. at 120.

The court found that plaintiff's lawyers had not violated the prohibition on deceptive conduct, because "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation." Id. at 122.

While it might have been annoying and time-consuming for [defendant's] sales clerks to talk with phony customers who had no interest in buying furniture, the investigators did nothing more than observe and record the manner in which [defendant's] employees conducted routine business.

Id.

Citing earlier cases in which companies investigated possible "passing off" and other violations of intellectual property law, the court explained that

enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof. It will be difficult, if not impossible, to prove a theory of "palming off" without the ability to record oral sales representations made to consumers. Thus, reliable reports from investigators posing

as consumers are frequently recognized as probative and admissible evidence in trademark disputes.

Id. at 124.

The court acknowledged that under relevant New York ethics rules, the salesclerks with whom the plaintiff's investigators spoke were "represented parties" for purposes of the prohibition on ex parte contacts. However, the court refused to find that plaintiff's lawyer had violated the prohibition.

Although Bailey's [plaintiff's lawyer] conduct technically satisfies the three-part test generally used to determine whether counsel has violated the disciplinary rules [governing ex parte contacts], I conclude that he did not violate the rules because his actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of litigation, does not constitute an end-run around the attorney/client privilege. [Plaintiff's] investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [defendant's] showroom and warehouse.

Id. at 125-26. The court also refused to exclude the evidence captured by the investigators.

Several more recent cases reached the same conclusion.

In Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002), plaintiffs were pursuing a class action alleging that Shell gas stations discriminated against African-Americans. The plaintiffs arranged for a videotaping of normal transactions between private investigators and Shell employees.

The court described Gidatex and Midwest Motor Sports as representing the two ends of a spectrum. Id. at 879.

[W]e think there is a discernible continuum in the cases from clearly impermissible to clearly permissible conduct. Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course. That is akin to surveillance videos routinely admitted.

Id. at 880. The court held that the videotaping of the transactions with the Shell employees fell within the acceptable range.

Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera.

Id. The court held that the conversations "do not rise to the level of communications" protected by the prohibition on ex parte contacts under Rule 4.2. Id. The court denied defendants' motion for a protective order prohibiting further videotaping.

In A.V. by Versace, Inc. v. Gianni Versace, S.p.A., Nos. 96 Civ. 9721 (PKL)(THK) & 98 Civ. 0123 (PKL)(THK), 2002 U.S. Dist. LEXIS 16323 (S.D.N.Y. Sept. 3, 2002), plaintiff Gianni Versace sought to hold defendants in civil contempt for violating a preliminary injunction prohibiting them from improperly using the name "Versace."

The court rejected defendants' complaint about Versace's use of a private investigator, who posed as a buyer in the fashion industry.

The investigator's actions conformed with those of a business person in the fashion industry, and Alfredo Versace [defendant] makes no allegation that the private investigator

gained access to any non-public part of [his company]. . . . [C]ourts in the Southern District of New York have frequently admitted evidence, including secretly recorded conversations, gathered by investigators posing as consumers in trademark disputes.

Id. at *30 (citing Gidatex and several cases that did not involve a lawyer's role in the use of investigators).

In Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003), the Eighth Circuit confirmed the District Court's exclusion of evidence obtained by the secret tape recording of in-person conversations with plaintiff franchisees by investigators hired by defendant's lawyers.

The court held that the investigators had engaged in improper ex parte contacts with the plaintiff's president/owner during litigation.

The Eighth Circuit noted that the ABA issued ABA LEO 422 (6/24/01) shortly after the district court issued its opinion (which relied on the earlier ABA LEO 337 (8/1/74) -- which was withdrawn by ABA LEO 422). The Eighth Circuit nevertheless found that the nonconsensual recording was unethical, because of the separate violation of the prohibition on ex parte contacts. The court explained that the investigators'

unethical contact with [the plaintiff's owner/president salesman] combined with the nonconsensual recording presents the type of situation where even the new [ABA] Formal Opinion would authorize sanctions.

Id. at 699 (emphasis added).

The Eighth Circuit noted that defendants' lawyer had directed the investigators to "elicit specific admissions" that "could have been obtained properly through the use of formal discovery techniques." Id. The court rejected the defendant's excuse that it had

retained the investigator only "after traditional means of discovery had failed." Id. at 700. The court explained that defendant's "frustration does not justify a self-help remedy. It is for this very reason that our system has in place formal procedures, such as a motion to compel, that counsel could have used instead of resorting to self-help remedies that violate the ethics rules." Id.

Because "South Dakota law was not fully developed" on permissibility of such deceptive conduct, the Eighth Circuit did not impose any monetary sanctions against the defendant or its lawyers. Id. at 701. Thus, courts have had no trouble treading where bars have feared to go. Although lawyers should be wary of taking their cue from case law rather than ethics rules and opinions, these many decisions clearly reflect societal acceptance of minimally deceptive conduct.¹

In 2006, the Southern District of New York upheld Cartier's use of undercover investigators to catch those selling counterfeit watches. Cartier v. Symbolix, Inc., 454 F. Supp. 2d 175, 183 (S.D.N.Y. 2006) (upholding Cartier's use of undercover investigators to catch defendants selling counterfeit watches; denying defendants' argument that Cartier is not entitled to injunctive relief because it had used undercover investigators; undercover investigators are "'an effective enforcement mechanism for detecting and proving anticompetitive activity which might otherwise escape discovery or proof'" (citation omitted)).

¹ In contrast, Congress has been quick to condemn more serious types of deception -- such as that undertaken by investigators in the recent "pretexting" scandal at Hewlett Packard. Telephone Records and Privacy Protection Act of 2006, 109 Pub. L. No. 476, § 3, 120 Stat. 3568 (enacted Jan. 12, 2007; to be codified at 18 U.S.C. § 1039(a)(1)) (prohibiting anyone from obtaining another individual's confidential phone records by "making false or fraudulent statements or representations to an employee of a covered entity").

In contrast to these court endorsements of mildly deceptive conduct in commercial settings, bars traditionally limited their analysis to socially worthwhile contexts such as housing discrimination tests.

In what might become a groundbreaking analysis, the New York County Lawyers' Association endorsed lawyers' supervision of others who engage in mildly deceptive conduct in "a small number of exceptional circumstances." Interestingly, the New York County Lawyers' Association apparently could not bring itself to use the word "deception" -- or any of the other terms used in ABA Model Rule 8.4 or the analogous New York ethics rule DR-102(A)(1) ("a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Instead, the New York County Lawyers' Association used the word "dissemlance."² It will be interesting to see if other bars follow New York's lead.

² New York County Law. Ass'n LEO 737 (5/23/07) (addressing a non-government lawyer's use of an investigator who employs "dissemlance"; explaining that the word "dissemble" means: "To give a false impression about (something); to cover up (something) by deception (to dissemble the facts).") (citation omitted); explaining that "dissemlance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemlance. For purposes of this opinion, dissemlance refers to misstatements as to identity and purpose made solely for gathering evidence. It is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful. Dissemlance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violation of the Code . . . or in evidence-gathering conduct that unlawfully violates the rights of third parties." (footnote omitted); not addressing lawyers' own dissemlance, but permitting a lawyer-directed investigator's dissemlance under "certain exceptional conditions," which lawyers "should interpret . . . narrowly"; "In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemlance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemlance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemlance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

'Code') or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.").

Inadvertent Transmission of Communications

Hypothetical 10

A lawyer on the other side of one of your largest cases has always relied on his assistant to send out his emails. He must just have hired a new assistant, because several "incidents" in the past few months have raised some ethics issues.

- (a) A few weeks ago, you received a frantic call from the other lawyer saying that his assistant had accidentally just sent you an email with an attachment that was intended for his client and not for you. He tells you that the attachment contains his litigation strategy, and warned you not to open and read it. You quickly find the email in your "in box," and wonder about your obligations.

May you open and read the attachment?

MAYBE

- (b) Last week you opened an email from the other lawyer. It seems to be some kind of status report. About halfway through reading it, you realize that it is the other lawyer's status report to her client.

Must you refrain from reading the rest of the status report?

MAYBE

- (c) You just opened an email from the other lawyer. After you read several paragraphs, you realize that the email was intended for a governmental agency. The email seems very helpful to your case, but would not have been responsive to any discovery requests because your adversary created it after the agreed-upon cut-off date for producing documents.

Must you refrain from reading the remainder of the email?

NO (PROBABLY)

- (d) Must you advise your client of these inadvertently transmitted communications from the other lawyer, and allow the client to decide how you should act?

YES (PROBABLY)

(e) Must the other lawyer advise his client of the mistakes he has made?

YES (PROBABLY)

Analysis

This issue has vexed the ABA, state bars and state courts for many years.

ABA Approach

(a)-(b) In the early 1990s, the ABA started a trend in favor of requiring the return of such documents, but then shifted course in 2002. In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.

In ABA LEO 368, the ABA indicated that

as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the materials ["that appear on their face to be subject to the attorney-client privilege or otherwise confidential"] once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

ABA LEO 368 (11/10/92).

As explained below, many bars and courts took the ABA's lead in imposing some duty on lawyers receiving obviously privileged or confidential documents to return them forthwith.

However, ten years later the ABA retreated from this position. As a result of the Ethics 2000 Task Force Recommendations (adopted in 2002), ABA Model Rule 4.4(b) now indicates that

[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or

reasonably should know that the document was
inadvertently sent shall promptly notify the sender.

ABA Model Rule 4.4(b) (emphasis added).

Comment [2] to this rule reveals that in its current form the ABA's approach is
both broader and narrower than the ABA had earlier announced in its Legal Ethics
Opinions.

ABA Model Rule 4.4(b) is broader because it applies to documents "that were
mistakenly sent or produced by opposing parties or their lawyers," thus clearly covering
document productions. ABA Model Rule 4.4 cmt. [2] (emphasis added).

The rule is narrower than the earlier legal ethics opinion because it explains that:

If a lawyer knows or reasonably should know that such a
document was sent inadvertently, then this Rule requires the
lawyer to promptly notify the sender in order to permit that
person to take protective measures. Whether the lawyer is
required to take additional steps, such as returning the
original document, is a matter of law beyond the scope of
these Rules, as is the question of whether the privileged
status of a document has been waived. Similarly, this Rule
does not address the legal duties of a lawyer who receives a
document that the lawyer knows or reasonably should know
may have been wrongfully obtained by the sending person.

ABA Model Rule 4.4 cmt. [2] (emphasis added).

A comment to ABA Model Rule 4.4 contains a remarkable statement that would
seem to allow lawyers to read inadvertently transmitted documents that they know were
not meant for them.

Some lawyers may choose to return a document unread, for
example, when the lawyer learns before receiving the
document that it was inadvertently sent to the wrong
address.

ABA Model Rule 4.4 cmt. [3] (emphasis added).¹

Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts.

As a result of these changes in the ABA Model Rules, the ABA took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.²

Restatement

The Restatement would allow use of inadvertently transmitted privileged information under certain circumstances.

If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony The same legal result may follow when divulgence occurs inadvertently outside of court The receiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse. If the person whose information was disclosed is entitled to have it suppressed or excluded . . . , the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege

¹ ABA Model Rule 4.4 cmt. [3] ("Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.").

² ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes; withdrawing ABA LEO 368; holding that ABA Model Rule 4.4(b) governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party; noting that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.").

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim. Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage A tribunal may also order suppression or exclusion of such information.

Restatement (Third) of Law Governing Lawyers § 60 cmt. m (2000).

State Bar Opinions

States began to adopt, adopt variations of, or reject the ABA Model Rule version of Rule 4.4(b).

States are moving at varying speeds, and (not surprisingly) taking varying approaches.

First, some states have simply adopted the ABA version. See, e.g., Florida Rule 4-4.4(b).³

Second, some states have adopted a variation of the ABA Model Rule that decreases lawyers' responsibility upon receipt of an inadvertently transmitted communication or document. For instance, as of January 1, 2010, Illinois adopted a version of Rule 4.4(b) that only requires the receiving lawyer to notify the sending

³ Interestingly, despite adopting the ABA "simply notify the sender" approach, Florida has also prohibited a receiving lawyer from searching for metadata in an electronic document received from a third party (which at best could be characterized as having been "inadvertently" included with the visible parts of such a document). Florida LEO 06-2 (9/15/06).

lawyer if the lawyer "knows" of the inadvertence -- explicitly deleting the "or reasonably should know" standard found in the ABA Model Rule 4.4(b).⁴

Third, some states have adopted the ABA Model Rule approach, but warn lawyers that case law might create a higher duty. For instance, the New York state courts adopted the ABA version of Rule 4.4(b), but the New York State Bar adopted comments with such an explicit warning.⁵

Fourth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer. For instance, Washington, D.C. Rule 4.4(b) uses only a "knows" and not a "knows or reasonably should know" standard -- but require receiving lawyers who know of the inadvertence to stop reading the document. D.C. Rule 4.4(b) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall

⁴ Illinois Rule 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender.").

Interestingly, Illinois formerly prohibited lawyers from reading and using inadvertently transmitted communication once the lawyer realized the inadvertence. Illinois LEO 98-04 (1/1999). Thus, Illinois moved from a variation of the "return unread" approach beyond the ABA "simply notify the sender" approach to a much more harsh approach -- which requires the receiving lawyer to notify the sender of the receipt only if the receiving lawyer actually "knows" of the inadvertent nature of the communication.

Somewhat ironically, despite the Illinois Bar's move in that direction, one Illinois federal court pointed to the new Illinois rule's simply "notify the sender" approach in prohibiting lawyers receiving inadvertently produced documents in litigation from using the documents -- explaining that "[r]equiring the receiving lawyer to notify the sending lawyer is clearly at odds with any purported duty on the part of the receiving lawyer to use the information for the benefit of his or her client." Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009).

⁵ New York Rule 4.4 cmt. [2] (2009) "Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."); New York Rule 4.4 cmt. [3] (2009) ("[T]his Rule does not subject a lawyer to professional discipline for reading and using that information." Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the reader, or both.").

notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.").⁶

Fifth, some states have not adopted any variation of ABA Model Rule 4.4(b), and continue to address the issues through legal ethics opinions. See, e.g., Virginia LEO 1702 (11/24/97) (adopting the reasoning of ABA LEO 368; explaining that once the lawyer recognizes a document as confidential, the lawyer "has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions"); Virginia LEO 1786 n.7 (12/10/04) (acknowledging that the ABA has changed its Model Rules to replace a "return unread" policy with a notice requirement, but reiterating Virginia's approach articulated in Virginia LEO 1702).

Courts' Approach

Court decisions have also reached differing conclusions. Some courts have allowed lawyers to take advantage of their adversary's mistake in transmitting privileged or confidential documents. These courts normally do not even mention the ethics issues, but instead focus on attorney-client privilege or work product waiver issues.

Other decisions indicate that lawyers who fail to notify the adversary or return inadvertently transmitted privileged documents risk disqualification or sanctions.

- Greg Mitchell, E-Mail "Oops" Ends With General Counsel Being Booted From Case, The Recorder, Jan. 4, 2011 ("Hagey represents a handful of engineers in Oakland who in September left engineering and design firm Arcadis to start

⁶ A comment to that rule provides more explanation. D.C. Rule 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").

their own shop. Apparently worried their former employer would try to interfere, they hired Braun Hagey and later conferred by e-mail -- with autocomplete inserting an old Arcadis address for one of the former employees. So four message threads, including one attaching a draft declaration, were delivered to Arcadis, where an e-mail monitoring system routed them to legal."; "In a declaration, Hagey said the plaintiffs didn't realize their e-mails had been intercepted until lawyers at Gordon & Rees filed a counterclaim that references the day the former employees held a meeting -- a date, he said, Gordon & Rees could only have learned from the e-mails. Reached Wednesday, Hagey declined to comment publicly."; "In a declaration, Elizabeth Spangler, an in-house lawyer at Arcadis, acknowledged receiving the threads and reviewing the draft complaint -- at which point she said she realized the material was probably privileged. She said, however, that there were no great revelations in the material, and she didn't share it with anyone. She did say, though, that she must have inadvertently given Gordon & Rees the date on which the exiting employees met. She also said she later learned her boss, Arcadis' general counsel Steven Niparko, had also briefly reviewed the e-mail."; "On December 17, United States District Judge Jeffrey White ordered that Arcadis replace Gordon & Rees with new, untainted counsel. He also ordered Spangler off the case, and said the General Counsel must be 'removed from all aspects of the day-to-day management.' And he ordered Arcadis to pay fees and costs of \$40,000.").

- Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his own thoughts and comments, further inextricably intertwining his personal impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report; "Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify

as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's lawyer's argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "'once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"'; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- Conley, Lott, Nichols Mach. Co. v. Brooks, 948 S.W.2d 345, 349 (Tex. App. 1997) (although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered"; disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow").
- American Express v. Accu-Weather, Inc., Nos. 91 Civ. 6485 (RWS), 92 Civ. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call and letter advising that the sender had inadvertently included a privileged document in the package and asking that the package not be opened).

Conclusion

Thus, lawyers seeking guidance on the issue of inadvertently transmitted communications must check the applicable ethics rules, any legal ethics opinions analyzing those rules (remembering that some of the old legal ethics opinions might

now be inoperative), and any case law applying the ethics rules, other state statutes, or any governing common law principles that supplement or even trump the ethics rules. Lawyers should remember that many judges have their own view of ethics and professionalism -- and might well consider lawyers seeking to diligently represent their clients in reviewing inadvertently transmitted communications as stepping over the line and thus acting improperly.

(c) The 1992 ABA ethics opinion articulating a "do not read" rule applied that principle only to materials "that appear on their face to be subject to the attorney-client privilege or otherwise confidential" privileged communications. In contrast, ABA Model Rule 4.4(b) on its face applies to any document meeting the Rule 4.4(b) standard. In other words, it is not limited to documents containing the other client's confidences, or to privileged communications between the other client and her lawyer.

(d) Only one state has articulated a principle that probably most lawyers would not welcome -- that they have a duty to communicate with their client about how the lawyer should treat an inadvertently transmitted communication he or she receives.

- Pennsylvania LEO 2011-010 (3/2/11) (addressing the following situation: "You advised that during the course of settlement negotiations, opposing clients and opposing counsel have on several occasions copied you on e-mails between them which related to the litigation matter. You properly advised opposing counsel of these emails, and you erased them and asked him to advise his clients to stop copying you on emails."; noting that the lawyer properly complied with Rule 4.4(b) by advising the opposing lawyer of the inadvertence, but also finding that the lawyer was obligated to consult with his client about what steps to take; "You are required by PA rule of Professional Conduct ("RPC") 1.1 to represent your client effectively and competently. In order to do so, you must evaluate the nature of the information received in the emails, the available steps to protect your client's interests in light of this information, and the advantages and disadvantages of disclosing this information to the client and utilizing the information."; "These rules require that you make the decision whether and how to use the

information in the emails from opposing counsel in consultation with your client. It is necessary to advise the client of the nature of the information, if not the specific content, in order to have that discussion." (emphasis added)).

No other state has taken this position, although it certainly seems consistent with lawyers' general duty of disclosure to their clients.

Under ABA Model Rule 1.4,

a lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3). On the other hand, the version of ABA Model Rule 4.4 adopted in 2002 seems to give lawyer's discretion about how to proceed.

Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer.

ABA Model Rule 4.4 cmt. [3] (emphasis added).⁷

If the client insists on his or her lawyer reading the inadvertently transmitted communication, the lawyer might try to talk the client out of such a hardline position. Of course, clients probably would not be impressed with such a lawyer's argument that he or she might make the same mistake in the future and should build up sufficient "good will" with the adversary's lawyer in case the client's lawyer needs a similar favor in the future. Many clients would dismiss such an argument, justifiably pointing out that in that circumstance the client can simply sue his or her lawyer for malpractice -- so the client does not need any "good will" from the adversary.

⁷ ABA Model Rule 4.4 cmt. [3] ("Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.").

If the lawyer cannot dissuade the client from insisting that the lawyer read the inadvertently transmitted communication, the lawyer might withdraw from the representation. Under ABA Model Rule 1.16(b)(4) the lawyer may withdraw even if the withdrawal will have a "material adverse effect on the interests of the client" if (among other things)

the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

ABA Model Rule 1.16(b)(4). It is difficult to imagine a complete rupture of the relationship based on such a disagreement, but one is certainly theoretically possible.

(e) Lawyers who accidentally transmit a communication to an adversary might have a duty to advise their client of the mistake. Under ABA Model Rule 1.4,

[a] lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3).

Authorities generally agree that lawyers' duty of communication requires them to advise their clients of their possible malpractice to clients.

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan." (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").
- California 12009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvice the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter,

whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.');
 - Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.');
 - Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.');
 - N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.');
 - N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.');
- also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation

about the material risks of and reasonably available alternatives to the continued representation.").

- New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition. However, it seems equally clear that a lawyer would have to advise his client if the lawyer accidentally transmitted to the adversary a document containing some critical litigation or settlement strategy.

Best Answer

The best answer to (a) is **MAYBE**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY NO**; the best answer to (d) is **PROBABLY YES**; the best answer to (e) is **PROBABLY YES**.

N 1/13

Metadata

Hypothetical 11

You just received an email with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

What do you do?

- (A) You must check for any metadata (to diligently serve your client).
- (B) You may check for any metadata, but you don't have to.
- (C) You may not check for any metadata.

(B) OR (C), DEPENDING ON THE STATE

Analysis

This hypothetical situation involves "metadata," which is essentially data about data. The situation involves the same basic issue as the inadvertent transmission of documents, but is even more tricky because the person sending the document might not even know that the "metadata" is being transmitted and can be read.

Ethics Opinions

New York. In 2001, the New York State Bar held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "get[ting] behind" electronic documents sent by adversaries who failed to disable the "tracking" software. New York LEO 749 (12/14/01).

Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

Florida. The Florida Bar followed the New York approach -- warning lawyers to be careful when they send metadata, but prohibiting the receiving lawyer from examining the metadata. Florida LEO 06-2 (9/15/06) (lawyers must take "reasonable steps" to protect the confidentiality of any information they transmit, including metadata; "It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit."; not reconciling these positions with Florida Rule 4-4.4(b), under which the receiving lawyer must "promptly notify the sender" if the receiving lawyer "inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient" but not preventing the recipient from reading or relying upon the inadvertently transmitted communication; explicitly avoiding any discussion of metadata "in the context of documents that are subject to discovery under applicable rules of court or law").

ABA. In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the receiving lawyer did not obtain an electronic document in an improper manner, the

lawyer may ethically examine the document's metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission of such metadata is "inadvertent,"¹⁷ but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

Maryland. Maryland then followed this ABA approach. Maryland LEO 2007-09 (2007) (absent some agreement with the receiving lawyer, the sending lawyer "has an

¹⁷ In 2011, the ABA explained its definition of the term "inadvertent" in a legal ethics opinion indicating that an employee's electronic communication with his or her own personal lawyer was not "inadvertently" transmitted to an employer who searches for and discovers such personal communications in the company's computer system. ABA LEO 460 (8/4/11) (despite some case law to the contrary, holding that a lawyer's Rule 4.4(b) duty to advise the sender if the lawyer receives "inadvertently sent" documents does not arise if the lawyer's client gives the lawyer documents the client has retrieved "from a public or private place where [the document] is stored or left"; explaining that a document is "inadvertently sent" when it is "accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery"; concluding that a lawyer representing an employer does not have such a disclosure duty if the employer retrieves and gives the lawyer privileged emails between an employee and the employee's lawyer that are stored on the employer's computer system; noting that such lawyers might face some duty or even punishment under civil procedure rules or court decisions, but the ethics rules "do not independently impose an ethical duty to notify opposing counsel" in such situations; holding that the employer client's possession of such employee documents is a confidence that the employer's lawyer must keep, absent some other duty or discretion to disclose it; concluding that if there is no law requiring such disclosure, the employer-client must decide whether to disclose its possession of such documents, although "it often will be in the employer-client's best interest to give notice and obtain a judicial ruling" on the admissibility of the employee's privileged communications before the employer's lawyer reviews the documents).

ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery" (although not every inadvertent disclosure constitutes an ethics violation); there is no ethical violation if a lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from another person] without first ascertaining whether the sender intended to include such metadata"; pointing to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted privileged material to notify the sender; a receiving lawyer "can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate"; noting that the 2006 Amendments to the Federal Rules will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) as being "prejudicial to the administration of justice").

Alabama. In early 2007, the Alabama Bar lined up with the bars prohibiting the mining of metadata. In Alabama LEO 2007-02 (3/14/07), the Alabama Bar first indicated that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." The Alabama Bar then dealt with the ethical duties of a lawyer receiving an electronic document from another person. The Bar only cited New York LEO 749 (2001), and did not discuss ABA LEO 442. Citing Alabama Rule 8.4 (which is the same as ABA Model Rule 8.4), the Alabama Bar concluded that:

[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire

confidential and privileged information in order to obtain an unfair advantage against an opposing party.

Alabama LEO 2007-02 (3/14/07).

The Alabama Bar did not address Alabama's approach to inadvertently transmitted communications (Alabama does not have a corollary to ABA Model Rule 4.4(b)). The Bar acknowledged that "[o]ne possible exception" to the prohibition on mining metadata involves electronic discovery, because "metadata evidence may be relevant and material to the issues at hand" in litigation. Id.

District of Columbia. The D.C. Bar dealt with the metadata issue in late 2007. The D.C. Bar generally agreed with the New York and Alabama approach, but noted that as of February 1, 2007, D.C. Rule 4.4(b) is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent."

District of Columbia LEO 341 (9/2007).

The D.C. Bar held that:

[a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

Id. (emphases added).

After having explicitly selected the "actual knowledge" standard, the D.C. Bar then proceeded to abandon it.

First, the D.C. Bar indicated that lawyers could not use "a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the

disclosure of which was unintended by some hapless sender." Id. n.3. The Bar warned that "a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks 'actual knowledge' in an individual case." Id.

Second, in discussing the "actual knowledge" requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the inadvertence "before the receiving lawyer reviews the document." District of Columbia LEO 341. However, the D.C. Bar then gave another example that appears much closer to a negligence standard.

Such actual knowledge may also exist where a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included. These situations will be fact-dependent, but can arise, for example, where the metadata includes a candid exchange between an adverse party and his lawyer such that it is "readily apparent on its face," . . . that it was not intended to be disclosed.

Id.

The D.C. Bar indicated that "a prudent receiving lawyer" should contact the sending lawyer in such a circumstance -- although the effect of District of Columbia LEO 341 is to allow ethics sanctions against an imprudent lawyer. Id.

Third, the Bar also abandoned the "actual knowledge" requirement by using a "patently clear" standard. The D.C. Bar analogized inadvertently transmitted metadata to a situation in which a lawyer "inadvertently leaves his briefcase in opposing counsel's office following a meeting or a deposition." Id. n.4.

The one lawyer's negligence in leaving the briefcase does not relieve the other lawyer from the duty to refrain from going through that briefcase, at least when it is patently clear

from the circumstances that the lawyer was not invited to do so.

Id.

After describing situations in which the receiving lawyer cannot review metadata, the Bar emphasized that even a lawyer who is free to examine the metadata is not obligated to do so.

Whether as a matter of courtesy, reciprocity, or efficiency, "a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary."

Id. n.9 (citation omitted).

Unlike some of the other bars which have dealt with metadata, the D.C. Bar also explicitly addressed metadata included in responsive documents being produced in litigation. Interestingly, the D.C. Bar noted that other rules might prohibit the removal of metadata during the production of electronic documents during discovery. Thus:

[i]n view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally.

District of Columbia LEO 341. Even in the discovery context, however, a receiving lawyer must comply with D.C. Rule 4.4(b) if she has "actual knowledge" that metadata containing protected information has been inadvertently included in the production.

Arizona. In Arizona LEO 07-03,¹⁸ the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take "reasonable precautions" to prevent the disclosure of confidential information.

The Arizona Bar nevertheless agreed with those states prohibiting the receiving lawyer from mining metadata -- noting that Arizona's Ethical Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." The Arizona Bar acknowledged that the sending lawyer might not have inadvertently sent the document, but explained that the lawyer did not intend to transmit metadata -- thus triggering Rule 4.4(b). The Arizona Bar specifically rejected the ABA approach, because sending lawyers worried about receiving lawyers reading their metadata "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely."

Pennsylvania. In Pennsylvania LEO 2007-500, the Pennsylvania Bar promised that its opinion "provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials" -- but then offered a totally useless standard.

¹⁸ Arizona LEO 07-03 (11/2007) (a lawyer sending electronic documents must take "reasonable precautions" to prevent the disclosure of client confidential information; also explicitly endorsing the approach of New York, Florida and Alabama in holding that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it"; noting that Arizona's version of Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures"; finding that any client confidential metadata was inadvertently transmitted, and thus fell under this rule; "respectfully" declining to adopt the ABA approach, under which lawyers "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely"; also disagreeing with District of Columbia LEO 341 (9/2007), although misreading that LEO as generally allowing receiving lawyers to examine metadata).

[I]t is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.

Pennsylvania LEO 2007-500 (2007). The Pennsylvania Bar's conclusion was equally useless.

Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy.

Id. As explained below, the Pennsylvania Bar returned to this topic two years later.

New York County. Another legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics in 2008.

In N.Y. County Law. Ass'n LEO 738, the Committee specifically rejected the ABA approach, and found that mining an adversary's electronic documents for metadata amounts to unethical conduct that "is deceitful and prejudicial to the administration of justice."¹⁹

¹⁹ New York County Law. Ass'n LEO 738 (3/24/08) (holding that a lawyer "has the burden to take due care" in scrubbing metadata before sending an electronic document, but that the receiving lawyer may not seek to discover the metadata; "By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the

Colorado. Colorado dealt with this issue in mid-2008.

Relying on a unique Colorado rule, the Colorado Bar explained that a receiving lawyer may freely examine any metadata unless the lawyer received an actual notice from the sending lawyer that the metadata was inadvertently included in the transmitted document. In addition, the Colorado Bar explicitly rejected the conclusion reached by jurisdictions prohibiting receiving lawyers from examining metadata. For instance, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." The Colorado Bar also concluded that "an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."²⁰

administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. See NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5)."; specifically excluding from its analysis electronic documents produced during litigation discovery; specifically rejecting the ABA approach, and instead agreeing with New York LEO 749 (12/14/01); "While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document. This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.").

²⁰ Colorado LEO 119 (5/17/08) (addressing a receiving lawyer's right to review metadata in an electronic document received from a third party; explaining that the receiving lawyer should assume that any confidential or privileged information in the metadata was sent inadvertently; noting that Colorado ethics rules require the receiving lawyer to notify the sending lawyer of such inadvertent transmission of privileged communications; "The Receiving Lawyer must promptly notify the Sending Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver."; relying on a unique Colorado ethics rule to conclude that "[i]f, before examining metadata in an electronic document or file, the

Maine. The next state to vote on metadata was Maine. In Maine LEO 196,²¹ the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that:

an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated.

Maine LEO 196 (10/21/08). The Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice."

Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata"; rejecting the conclusion of jurisdictions which have forbidden receiving lawyers from reviewing metadata; "First, there is nothing inherently deceitful or surreptitious about searching for metadata. Some metadata can be revealed by simply passing a computer cursor over a document on the screen or right-clicking on a computer mouse to open a drop-down menu that includes the option to review certain metadata. . . . Second, an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."; concluding that "where the Receiving Lawyer has no prior notice from the sender, the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. See RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance.").

²¹ Maine LEO 196 (10/21/08) (reviewing most of the other opinions on metadata, and concluding that "an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated"; explaining that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice"; also explaining that "the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.").

Not surprisingly, the Maine Bar also held that:

the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.

Id.

Pennsylvania. Early in 2009, the Pennsylvania Bar issued another opinion dealing with metadata -- acknowledging that its 2007 opinion (discussed above) "provided insufficient guidance" to lawyers.²²

²² Pennsylvania LEO 2009-100 (2009) (revisiting the issue of metadata following a 2007 opinion that "provided insufficient guidance" to lawyers; emphasizing the sending lawyer's duty to preserve client confidences when transmitting electronic documents; explaining that Pennsylvania's Rule 4.4(b) required a lawyer receiving an inadvertent document to "promptly notify the sender"; "When applied to metadata, Rule 4.4(b) requires that a lawyer accessing metadata evaluate whether the extra-textual information was intended to be deleted or scrubbed from the document prior to transmittal. In many instances, the process may be relatively simple, such as where the information does not appear on the face of the document sent but is accessible only by means such as viewing tracked changes or other mining techniques, or, in the alternative, where a covering document may advert to the intentional inclusion of metadata. The resulting conclusion or state of knowledge determines the course of action required. The foregoing again presumes that the mere existence of metadata confirms inadvertence, which is not warranted. This conclusion taken to its logical conclusion would mean that the existence of any and all metadata be reported to opposing counsel in every instance."; explaining that despite the possible ethics freedom to review metadata, the client might be harmed if the pertinent court would find such reading improper; describing the duty of the receiving lawyer as follows: "The receiving lawyer: '(a) must then determine whether he or she may use the data received as a matter of substantive law; (b) must consider the potential effect on the client's matter should the lawyer do so; and (c) should advise and consult with the client about the appropriate course of action under the circumstances.'"; "If the attorney determines that disclosure of the substance of the metadata to the client may negatively affect the process or outcome of the case, there will in most instances remain a duty to advise the client of the receipt of the metadata and the reason for nondisclosure. The client may then make an informed decision whether the advantages of examining or utilizing the metadata outweigh the disadvantages of so doing."; ultimately concluding "that an attorney has an obligation to avoid sending electronic materials containing metadata, where the disclosure of such metadata would harm the client's interests. In addition, an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.").

Unlike other legal ethics opinions, the Pennsylvania Bar reminded the receiving lawyer that his client might be harmed by the lawyer's review of the adversary's metadata -- depending on the court's attitude. However, the Bar reminded lawyers that the receiving lawyer must undertake this analysis, because:

an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.

Pennsylvania LEO 2009-100 (2009).

New Hampshire. New Hampshire dealt with metadata in early 2009. In an April 16, 2009 legal ethics opinion,²³ the New Hampshire Bar indicated that receiving lawyers may not ethically review an adversary's metadata. The New Hampshire Bar pointed to the state's version of Rule 4.4(b), which indicates that lawyers receiving materials inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal."

²³ New Hampshire LEO 2008-2009/4 (4/16/09) ("Receiving lawyers have an ethical obligation not to search for, review or use metadata containing confidential information that is associated with transmission of electronic materials from opposing counsel. Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material. To the extent that metadata is mistakenly reviewed, receiving lawyers should abide by the directives in Rule 4.4(b)."; noting that under New Hampshire Rule 4.4(b), a lawyer receiving "materials" inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal"; finding that this Rule applies to metadata; "The Committee believes that all circumstances, with the exception of express waiver and mutual agreement on review of metadata, lead to a necessary conclusion that metadata is 'inadvertently sent' as that term is used in Rule 4.4(b)."; analogizing the reading of metadata to clearly improper eavesdropping; "Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.").

Interestingly, although the New Hampshire Bar could have ended the analysis with this reliance on New Hampshire Rule 4.4(b), it went on to analogize the review of an adversary's metadata to clearly improper eavesdropping.

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.

New Hampshire LEO 2008-2009/4 (4/16/09) (emphasis added).

West Virginia. In West Virginia LEO 2009-01,²⁴ the West Virginia Bar warned sending lawyers that they might violate the ethics rules by not removing confidential metadata before sending an electronic document.

²⁴ West Virginia LEO 2009-01 (6/10/09) (warning lawyers that "it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be reviewed as a violation of the Rules of Professional Conduct."; also explaining that "[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) [which prohibits 'conduct involving dishonesty, fraud, deceit or misrepresentation'] for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences."; noting that lawyers producing electronic document in "a discovery or a subpoena context" might have to deal with metadata differently, including asserting privilege for protected metadata; "In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue."; ultimately concluding that "[t]he Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata").

On the other hand:

[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences.

West Virginia LEO 2009-01 (6/10/09). West Virginia Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The West Virginia Bar also explained that:

[i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

West Virginia LEO 2009-01 (6/10/09).

Vermont. In Vermont LEO 2009-1, the Bar pointed to its version of Rule 4.4(b) -- which takes the ABA approach -- in allowing lawyers to search for any hidden metadata in electronic documents they receive.²⁵

²⁵ Vermont LEO 2009-1 (9/2009) (holding that lawyers must take reasonable steps to avoid sending documents that contain client confidential metadata; also holding that lawyers who receive electronic documents may search for metadata; "The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process."; "This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file."; noting that Vermont Rule 4.4(b) follows the ABA approach, and was effective as of September 1, 2009; declining to use the word "mine" in describing the search for metadata, because of its "pejorative

North Carolina. In early January 2010, the North Carolina Bar joined other bars in warning lawyers to take "reasonable precautions" to avoid disclosure of confidential metadata in documents they send.

The Bar also prohibited receiving lawyers from searching for any confidential information in metadata, or using any confidential metadata the receiving lawyer "unintentionally views."²⁶

characterization"; "[T]he Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." (footnote omitted); "The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section's authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review."; also explaining that Federal Rule of Evidence 502 provides the substantive law that governs waiver issues, and that documents produced in discovery (which may contain metadata) must be handled in the same way as other documents being produced).

²⁶ North Carolina LEO 2009-1 (1/15/10) (in an opinion issued sua sponte, concluding that a lawyer "who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients."; also concluding that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."; analogizing the presence of embedded confidential metadata in a document received by the lawyer to "a faxed pleading that inadvertently includes a page of notes from opposing counsel"; noting that under North Carolina Rule 4.4(b), the receiving lawyer in that situation must "promptly notify the sender," and not explaining why the receiving lawyer must do anything more than comply with this rule when receiving an electronic document and discovering any metadata that the sender appears to have inadvertently included; later reiterating that "a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party."; explaining that a lawyer searching for metadata would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice"; concluding that "a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.").

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic document received from another lawyer would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice" -- because such a search "interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other parallels to ABA Model Rule 4.4(b), the North Carolina Rule does not prohibit receiving lawyers from searching for confidential information in a document or documents received from an adversary, and likewise does not address the receiving lawyer's use of any confidential information the receiving lawyer discovers.

Minnesota. In March 2010, Minnesota issued an opinion dealing with metadata. Minnesota LEO 22 (3/26/10).²⁷

²⁷ Minnesota LEO 22 (3/26/10) (analyzing the ethics issues raised by lawyers' use of metadata; warning the sending lawyer to avoid inadvertently including metadata, and pointing to Minnesota's Rule 4.4(b) (which matches the ABA version) in simply advising the receiving lawyer to notify the sending lawyer; providing some examples of the type of metadata that could provide useful information; "Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept."; concluding that "a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents."; pointing to Minnesota's Rule 4.4(b) in holding that "[i]f

The court pointed to some examples of the type of metadata that a receiving lawyer could find useful.

Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Id. The Minnesota Bar then emphasized the sending lawyer's responsibility to "scrub" metadata.

In discussing the receiving lawyer's ethics duty, the Minnesota Bar essentially punted. It cited Minnesota's version of Rule 4.4(b) (which matches the ABA Model Rule version) -- which simply requires the receiving lawyer to notify the sending lawyer of any inadvertently transmitted document. In fact, the Minnesota Bar went out of its way to avoid taking any position on the receiving lawyer's ethics duty.

Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a

a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC."; not pointing to any other state's approach to the receiving lawyer's ethics duty; explicitly indicating that "Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.").

lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.

Id. It is difficult to imagine how the receiving lawyer's decision is "fact specific." The Minnesota Bar did not even indicate where the receiving lawyer should look for ethics guidance.

Amazingly, the Minnesota Bar did not point to any other state's opinion on metadata, or even acknowledge the national debate.

Oregon. In November 2011, Oregon took a novel approach to the metadata issue, articulating an ethics standard that varies with technology.

In Oregon LEO 2011-187 (11/2011),²⁸ the bar started with three scenarios. The first scenario involved a lawyer receiving a draft agreement from another lawyer. The receiving lawyer was "able to use a standard word processing feature" to reveal the document's metadata. That process showed that the sending lawyer had made a number of revisions to the draft, and later deleted some of them.

²⁸ Oregon LEO 2011-187 (11/2011) (holding that lawyers may use a "standard word processing feature" to find metadata in documents they receive, but that using "special software" to thwart metadata scrubbing is unethical; explaining that lawyers' duties of competence and confidentiality require them to take "reasonable care" to prevent the inadvertent disclosure of metadata; noting that Oregon's Rule 4.4(b) at most requires a lawyer to notify the sender if the receiving lawyer "knows or should have known" that the document contains inadvertently transmitted metadata; concluding that the receiving lawyer (1) may use "a standard word processing feature" to find metadata; (2) does not have to comply with the sender's "urgent request" asking that the receiving lawyer delete a document without reading it because the sender "had mistakenly not removed the metadata" -- even if the lawyer receives the request "shortly after opening the document and displaying the changes" using such a "standard word processing feature"; (3) "should consult with the client" about "the risks of returning a document versus the risks of retaining and reading the document and its metadata"; (4) may not use special software "designed to thwart the metadata removal tools of common word processing software"; acknowledging that it is "not clear" whether the receiving lawyer has a duty to notify the sender if the receiving lawyer uncovers metadata using such "special software"; although answering "No" to the short question "[May the receiving lawyer] use special software to reveal the metadata in the document," describing that prohibition elsewhere as conditioned on it being "apparent" that the sending lawyer attempted to scrub the metadata; "Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute 'conduct involving dishonesty, fraud, deceit or misrepresentation' in violation of Oregon RPC 8.4(a)(3).").

The next scenario started with the same facts, but then added a twist. In that scenario, "shortly after opening the document and displaying the changes" the receiving lawyer received an "urgent request" from the sending lawyer asking the receiving lawyer to delete the document because the sending lawyer had "mistakenly not removed the metadata."

In the third scenario, the receiving lawyer wanted to search for metadata using "software designed to thwart the metadata removal tools of common word processing software."

In sum, the Oregon Bar concluded that the receiving lawyer (1) could use "a standard word processing feature" to search for metadata, and at most must notify the sending lawyer of the metadata's existence; (2) could ignore the sending lawyer's request to delete the document; and (3) could not use "special software" to find the metadata that the sending lawyer intended to remove before sending the document.

The Oregon Bar started its analysis by emphasizing the sending lawyer's duty to take "reasonable care" to avoid inadvertently including metadata in an electronic document. The Oregon Bar relied on both competence and confidentiality duties.

The Oregon Bar next pointed to its version of Rule 4.4(b), which matches the ABA's Model Rule 4.4(b).

In turning to the receiving lawyer's duties, the Oregon Bar presented another scenario -- involving a sending lawyer's inadvertent inclusion of notes on yellow paper with a hardcopy of a document sent to an adversary. The Oregon Bar explained that the receiving lawyer in that scenario "may reasonably conclude" that the sending lawyer inadvertently included the yellow note pages, and therefore would have a duty to notify

the sending lawyer. The same would not be true of a "redline" draft transmitted by the sending lawyer, given the fact that "it is not uncommon for lawyers to share marked-up drafts."

If the receiving lawyer "knows or reasonably should know" that a document contains inadvertently transmitted metadata, the receiving lawyer at most has a duty to notify the sending lawyer. The Oregon Bar bluntly explained that Rule 4.4(b):

does not require the receiving lawyer to return the document unread or to comply with the request by the sender to return the document.

Id. (emphasis added). In fact, the receiving lawyer's duty to consult with the client means that the receiving lawyer:

should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Id. Other bars have also emphasized the client's right to participate in the decision-making of how to treat an inadvertently transmitted document. The Oregon Bar acknowledged the language in Comment [3] to ABA Model Rule 4.4(b) that such a decision is "a matter of professional judgment reserved to the lawyer,"²⁹ but also pointed to other ethics rules requiring lawyers to consult with their clients.

The Oregon Bar then turned to a situation in which the sending lawyer has taken "reasonable efforts" to "remove or screen metadata from the receiving lawyer." The Oregon Bar explained that the receiving lawyer might be able to "thwart the sender's efforts through software designed for that purpose." The Oregon Bar conceded that it is

²⁹ Interestingly, the Oregon Bar did not fully quote ABA Model Rule 4.4(b), cmt. [3], which indicates that the decision is "a matter of professional judgment ordinarily reserved to the lawyer" (emphasis added).

"not clear" whether the receiving lawyer learning of the metadata's existence has a duty to notify the sending lawyer in that circumstance. However, the Oregon Bar concluded with a warning about the use of such "special software."

Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation in Oregon RPC 8.4(a)(3).

Id.

Although this conclusion indicated that such conduct "may be" analogous to improper conduct, the Oregon Bar offered a blunt "No" to the question: "May Lawyer B use special software to reveal the metadata in the document?" The short answer to that question did not include the premise that it be "apparent" that the sending lawyer tried to scrub the metadata. Thus, the simple "No" answer seemed to indicate that in that circumstance it would clearly be improper (rather than "may be" improper) for a receiving lawyer to use the "special software."

The Oregon Bar's analysis seems sensible in some ways, but nearly impossible to apply. First, it assumes that any metadata might have been "inadvertently" transmitted, and thus trigger a Rule 4.4(b) analysis. It is equally plausible to consider the metadata as having been intentionally sent. Perhaps the sending lawyer did not intend that the receiving lawyer read the metadata, but the sending lawyer surely directed the document to the receiving lawyer, unlike an errant fax or even the notes on yellow paper that the sending lawyer did not mean to include. The metadata is part of the document that was intentionally sent -- it is just that the sending lawyer might not

know it is there. Considering that to be an "inadvertent" transmission might let someone argue that a sending lawyer "inadvertently" made some admission in a letter, or "inadvertently" relied on a case that actually helps the adversary, etc.

Second, if someone could use "special software" to discover metadata, it would be easy to think that the sending lawyer has almost by definition not taken "reasonable effort" to avoid disclosure of the metadata. The sending lawyer could just send a scanned PDF of the document, a fax, a hard copy, etc.

Third, the Oregon Bar makes quite an assumption in its conclusion about the receiving lawyer's use of "special software" that not only finds the metadata, but also renders it "apparent that the sender has made reasonable efforts to remove the metadata." The Oregon Bar did not describe any such "special software," so it is unclear whether it even exists. However, the Oregon Bar's conclusion rested (at least in part of the opinion) on the receiving lawyer discovering that the sending lawyer has attempted to remove the metadata. As explained above, however, the short question and answer at the beginning of the legal ethics opinion seems to prohibit the use of such "special software" regardless of the receiving lawyer's awareness that the sending lawyer had attempted to scrub the software.

Fourth, it is frightening to think that some lawyer using "a standard word processing feature" to search for metadata is acting ethically, but a lawyer using "special software designed to thwart the metadata removal tools of common word processing software" might lose his or her license. It is difficult to imagine that the line between ethical and unethical conduct is currently defined by whether a word

processing feature is "standard" or "special." And of course that type of technological characterization changes every day.

Washington. The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012).³⁰ In essence, Washington followed Oregon's lead in distinguishing between a receiving lawyer's permissible use of "standard" software to search for metadata and the unethical use of "special forensic software" designed to thwart the sending lawyer's scrubbing efforts.

The Washington LEO opinion posed three scenarios. In the first, a sending lawyer did not scrub metadata, so the receiving lawyer was able to use "standard word processing features" to find metadata in a proposed settlement document. Id.

Washington state began its analysis of this scenario by noting that the sending lawyer:

has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable

³⁰ Washington LEO 2216 (2012) (analyzing both the sending and the receiving lawyers' responsibilities in connection with metadata; analyzing three hypotheticals: (1) a receiving lawyer uses "standard word processing features" to view metadata; concluding that the receiving lawyer's sole duty is to notify the sending lawyer of the metadata's presence; (2) "shortly after opening the document and discovering the readily accessible metadata, [receiving lawyer] receives an urgent email from [sending lawyer] stating that the metadata had been inadvertently disclosed and asking [receiving lawyer] to immediately delete the document without reading it"; concluding that the receiving lawyer "is not required to refrain from reading the document, nor is [receiving lawyer] required to return the document to [sending lawyer]. . . . [Receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect to the document."; explaining that absent a legal duty governing the situation, the receiving lawyer must consult with the client about what steps to take; (3) a sending lawyer makes "reasonable efforts to 'scrub' the document" of metadata, and believes that he has successfully scrubbed the metadata; concluding that the receiving lawyer's use of "special forensic software designed to circumvent metadata removal tools" would be improper; "The ethical rules do not expressly prohibit [receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.").

efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically

Id. The Bar pointed to the Washington version of Rule 4.4(b) in explaining that the receiving lawyer could read the metadata. The Bar indicated that the receiving lawyer in that scenario simply had a duty to notify the sending lawyer "that the disclosed document contains readily accessible metadata." Id.

In the second scenario:

shortly after opening the document and discovering the readily accessible metadata, [the receiving lawyer] receives an urgent e-mail from [the sending lawyer] stating that the metadata had been inadvertently disclosed and asking [the receiving lawyer] to immediately delete the document without reading it.

Id. Somewhat surprisingly, the Washington Bar indicated that in that scenario the receiving lawyer:

is not required to refrain from reading the document, nor is [the receiving lawyer] required to return the document to [the sending lawyer]. . . . [The receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect the document.

Id. The Bar explained that if there were no such separate legal duty applicable, the receiving lawyer would have to decide what steps to take in a consultation with the client.

In the third scenario, the sending lawyer had taken "reasonable efforts to 'scrub' the document" of metadata and believed that he had done so. Id. However, the receiving lawyer "possesses special forensic software designed to circumvent metadata removal tools." Id. The Washington Bar found that a receiving lawyer's use of such "special forensic software" violated Rule 8.4.

The ethical rules do not expressly prohibit [the receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Id.

New Jersey. The New Jersey Supreme Court articulated that state's approach to metadata on April 14, 2016.³¹

Unlike states which provide complete freedom for receiving lawyers to check for metadata or flatly prohibit lawyer from checking for metadata, the New Jersey standard contained a potentially confusing subjective element.

³¹ New Jersey Supreme Court, Administrative Determinations on the Report and Recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents, Apr. 14, 2016, (adopting a change in New Jersey Rule 4.4(b); Official Comment (Aug. 1, 2016); "A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata."), available at <http://www.judiciary.state.nj.us/notices/2016/n160809a.pdf>.

The New Jersey rule permitted receiving lawyers to check for metadata, under certain conditions.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent.

Id. (emphasis added). New Jersey's explanation of this subjective element did not provide any certainty, but offered some guidance.

When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.").

Id.

Lawyers governed by this New Jersey standard would be wise to avoid searching for any metadata in other lawyers' correspondence or in mediation statements, although the New Jersey Supreme Court approach did not even totally prohibit such review.

Similarly, such lawyers should probably not rely on special forensic metadata mining software, although New Jersey does not flatly prohibit such software's use.

Interestingly, the New Jersey approach also focused on the metadata's content as a factor in determining whether the sending lawyer inadvertently included it. That seems odd, because the receiving lawyer cannot assess that content without first finding and reviewing the metadata.

Texas. A Texas legal ethics opinion stated that state's metadata approach in December 2016.³²

³² Texas LEO 665 (12/16) (holding that lawyers must take reasonable steps to prevent the inadvertent transmission of metadata to adversaries, but also noting that the receiving lawyers may read such metadata -- although they should keep in mind the risk of disqualification; "Lawyers . . . have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed pursuant to the provisions of Rule 1.05. Commonly employed methods for avoiding the disclosure of confidential information in metadata include the use of software to remove or 'scrub' metadata from the document before transmission, the conversion of the document into another format that does not preserve the original metadata, and transmission of the document by fax or hard copy."; "[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata. For example, a Texas lawyer, in responding to a question, is not permitted to give an answer that would be truthful in the absence of metadata reviewed by the lawyer but that would be false or misleading when the lawyer's knowledge gained from the metadata is also considered." (emphasis added); "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." (citation omitted); "To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered." (emphasis added); "The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision. See Rule 1.03(b) ('A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.')." (emphasis added); "This opinion applies only to the voluntary transmission of electronic documents outside the normal course of discovery. The production of electronic documents in discovery is governed by court rules and other law, which may prohibit the removal or alteration of metadata. Court rules may also

The Texas legal ethics opinion allowed lawyers to search for metadata in documents they receive, but included a series of warnings – some of which were obvious, and some of which were unique.

After reminding sending lawyers about the risk of including metadata in their communications, the Texas legal ethics opinion coupled its statement freeing Texas lawyers to review such metadata with a warning that they cannot lie about it.

[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata.

Texas LEO 665 (12/16) (emphasis added).

The Texas legal ethics opinion then understandably warned lawyers that other states' ethics rules might apply.

govern the obligations of a lawyer who receives inadvertently transmitted privileged information in the course of discovery. See, e.g., Tex. R. Civ. P. 193.3(d)." (emphasis added); "The Texas Disciplinary Rules of Professional Conduct require lawyers to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons other than the lawyer's client. Whether a lawyer has taken reasonable measures to avoid the disclosure of confidential information in metadata will depend on the factual circumstances."; "While the Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct for a lawyer who receives from another lawyer an electronic document containing confidential information in metadata that the receiving lawyer believes was not intended to be transmitted to the lawyer, court rules or other applicable rules of conduct may contain requirements that apply in particular situations. Regardless, a Texas lawyer is required by the Texas Disciplinary Rules to avoid misleading or fraudulent use of information the lawyer may obtain from the metadata. In the absence of specific governing provisions, a lawyer who is considering the proper course of action regarding confidential information in metadata contained in a document transmitted by opposing counsel should determine whether the possible course of action poses material risks to the lawyer's client. If so, the lawyer should explain the risks and potential benefits to the extent reasonably necessary to permit the client to make informed decisions regarding the matter.").

To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered.

Id.

Implicitly acknowledging that courts may take a different attitude about lawyers' search for metadata, the Texas legal ethics opinion also warned receiving lawyers about the risk of their disqualification should they review metadata, and advised lawyers to review such risks with their clients.

The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision.

Id.

Current "Scorecard"

A chronological list of state ethics opinions dealing with metadata highlights the states' widely varying approaches.

The following is a chronological list of state ethics opinions, and indication of whether receiving lawyers can examine an adversary's electronic document for metadata.

2001

New York LEO 749 (12/14/01) -- **NO**

2004

New York LEO 782 (12/18/04) -- **NO**

2006

ABA LEO 442 (8/5/06) -- **YES**

Florida LEO 06-2 (9/5/06) -- **NO**

2007

Maryland LEO 2007-9 (2007) -- **YES**

Alabama LEO 2007-02 (3/14/07) -- **NO**

District of Columbia LEO 341 (9/2007) -- **NO**

Arizona LEO 07-3 (11/2007) -- **NO**

Pennsylvania LEO 2007-500 (2007) -- **YES**

2008

N.Y. County Law. Ass'n LEO 738 (3/24/08) -- **NO**

Colorado LEO 119 (5/17/08) -- **YES**

Maine LEO 196 (10/21/08) -- **NO**

2009

Pennsylvania LEO 2009-100 (2009) -- **YES**

New Hampshire LEO 2008-2009/4 (4/16/09) -- **NO**

West Virginia LEO 2009-01 (6/10/09) -- **NO**

Vermont LEO 2009-1 (10/2009) -- **YES**

2010

North Carolina LEO 2009-1 (1/15/10) -- **NO**

Minnesota LEO 22 (3/26/10) -- **MAYBE**

2011

Oregon LEO 2011-187 (11/2011) -- **YES** (using "standard word processing features") and **NO** (using "special software" designed to thwart metadata scrubbing).

2012

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).

2016

New Jersey Rules change (4/14/16) – **YES** (if receiving lawyers reasonably believe the metadata was not inadvertently sent).

Texas LEO 665 (12/16) -- **YES**

Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

About six months later, New Hampshire took the same basic approach (relying on its version of Rule 4.4(b)), and even went further than Maine in condemning a receiving lawyer's mining of metadata -- analogizing it to a lawyer "peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client." New Hampshire LEO 2008-2009/4 (4/16/09).

However, another New England state (Vermont) reached exactly the opposite conclusion in 2009. Pointing to its version of Rule 4.4(b), Vermont even declined to use

the term "mine" in determining the search, because of its "pejorative characterization."
Vermont LEO 2009-1 (9/2009).

Basis for States' Differing Positions

In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata.³³

Other jurisdictions have not adopted any version of Rule 4.4(b), and therefore were free to judge the metadata issue without reference to a specific rule. See, e.g., Alabama LEO 2007-02 (3/14/07).

On the other hand, some states examining the issue of metadata focus on the basic nature of the receiving lawyer's conduct in attempting to "mine" metadata. Such conclusions obviously do not rest on a particular state's ethics rules. Instead, the different bars' characterization of the "mining" reflects a fascinating dichotomy resting on each state's view of the conduct.

³³ Florida LEO 06-2 (9/16/06).

- On March 24, 2008, the New York County Bar explained that mining an adversary's electronic documents for metadata amounted to unethical conduct that "is deceitful and prejudicial to the administration of justice." N.Y. County Law. Ass'n LEO 738 (3/24/08).
- Less than two months later, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." Colorado LEO 119 (5/17/08).
- A little over five months after that, the Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice." Maine LEO 196 (10/21/08).

Thus, in less than seven months, two states held that mining an adversary's electronic document for metadata was deceitful, and one state held that it was not.

Best Answer

The best answer to this hypothetical is **(b) or (c), DEPENDING ON THE STATE.**

B 4/17

Paying Fact Witnesses

Hypothetical 12

Your largest client recently downsized its upper management. Unfortunately, now you find that you need the testimony of several retired senior executives. Perhaps a bit bitter about being laid off, several of them have demanded that you reimburse them for their travel expenses, and that you pay for their time.

- (a) May you reimburse the executives for their travel expenses?

YES

- (b) One of the retired executives has started a consulting firm. May you agree to his demand that you pay for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

YES (PROBABLY)

- (c) May you pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

YES (PROBABLY)

- (d) Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can you pay him an hourly rate for the time he spends preparing for his testimony?

YES (PROBABLY)

- (e) Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded \$5,000 "to tell the truth" when he testifies. Can you pay him \$5,000 to "tell the truth"?

NO

Analysis

As in so many other situations involving ethics considerations, the issue of paying fact witnesses seems easy to analyze at the extremes.

The ethics rules clearly prohibit paying money in return for favorable testimony. At the other extreme, the ethics rules undoubtedly allow parties to pay a witness's parking charge, mileage or other out-of-pocket expense. If the witness will forfeit a salary for the time that she spends preparing to testify, it also seems fair to reimburse her for this amount (because it also essentially avoids the witness's out-of-pocket loss).

ABA Model Rule 3.4(b) indicates that lawyers shall not "offer an inducement to a witness that is prohibited by law." A comment to ABA Model Rule 3.4 explains that "[w]ith regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." ABA Model Rule 3.4 cmt. [3].

The ABA dealt with this issue in ABA LEO 402 (8/2/96). The ABA first rejected an earlier Pennsylvania LEO that had held that the ethics rules "can be read to disfavor compensation to non-expert witnesses for time invested in preparing for testimony." Pennsylvania LEO 95-126 (1995). As the ABA explained,

As long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules.

ABA LEO 402 (8/2/96). Not surprisingly, the ABA explained that any payment must be "reasonable," so it does not influence the witness's testimony.

[T]he amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work -- as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony -- the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances. Once that determination has been made, nothing in the Model Rules prohibits a lawyer from making payments to an occurrence witness as discussed herein.

Id.³⁴

³⁴ Several jurisdictions approved such payments before the ABA issued ABA LEO 402 in 1996. See, e.g., New York LEO 668 (6/3/94) ("There is no ethical limit on the amount an individual may be paid for assistance in the fact finding process, so long as the client consents after full disclosure. The attorney should keep in mind that such pay may affect the amount the attorney may recover in attorneys' fees. An individual testifying at trial may receive a reasonable rate, determined by the fair market value for the time, regardless of whether the individual suffered actual financial loss."; "The term 'loss of time in attending or testifying' has been interpreted to mean 'loss of time in testifying or in otherwise attending court proceedings and preparing therefor.' N.Y. State 547 (1982). The witness' 'loss of time' then must be translated into dollars. Id. A witness who loses wages because of his or her role as a witness may be reimbursed for the money lost. A witness who is unemployed, self-employed, or on salary, also may be compensated since even 'recreation time is susceptible to valuation.' Id. A witness who is reimbursed for loss of free time, or does not lose money as a result of the role as a witness, is still entitled to compensation, but the amount should be given 'closer consideration' than it is when the witness is being reimbursed for lost wages. Id. Thus, 'reasonable compensation' is not merely out-of-pocket expenses or lost wages."; "The amount of compensation that is to be considered 'reasonable' will be determined by the market value of the testifying witness. For example, if in the ordinary course of individual's profession or business, he or she could expect to be paid the equivalent of \$150/hour, he or she may be reimbursed at such rate."); Illinois LEO 87-5 (1/29/88) (citing what was then the Illinois ethics rule's provision allowing payment of "reasonable compensation to a witness for loss of time in attending or testifying" -- Illinois Rule 7-109(c)(2); "It appears clear that the above provisions permit reimbursement to a subpoenaed witness for sums lost by reason of being required to appear at trial. To the same effect, we believe such provisions to permit the payment of reasonable compensation to a witness for time spent in being interviewed. The provisions of Rule 7-109 are not on their face limited to attendance at trial or for purposes of deposition. Nor are they limited to permitting compensation only for time lost from a job or profession. Rather, they are written generally to permit compensation to a witness for loss of time in attending or testifying. We believe such provisions to be broad enough to permit, although certainly not mandate, the payment of reasonable compensation to a witness for time spent in being interviewed. However, to the extent that such compensation is in fact for the purpose of influencing testimony, rendering a prospective witness 'sympathetic' to one's cause, or suborning perjury, it is indefensible. See In re Howard, 69 Ill.2d 343, 372 N.E.2d 371 (1977); In re Rosen, 438 A.2d 316 (N.J. 1981); In re Robinson, 136 N.Y.S. 548 (1912). Thus, an attorney must be wary in instances where the true purpose of payments made may be subject to question.").

The Restatement follows essentially the same approach.

A lawyer may not offer or pay to a witness any consideration:

(1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;

(2) contingent on the content of the witness's testimony or the outcome of the litigation

Restatement (Third) of Law Governing Lawyers § 117 (2000). A comment provides more explanation.

A lawyer may pay a witness or prospective witness the reasonable expenses incurred by the witness in providing evidence. Such expenses may include the witness's reasonable expenses of travel to the place of a deposition or hearing or to the place of consultation with the lawyer and for reasonable out-of-pocket expenses, such as for hotel, meals, or child care. Under Subsection (1), a lawyer may also compensate a witness for the reasonable value of the witness's time or for expenses actually incurred in preparation for and giving testimony, such as lost wages caused by the witness's absence from employment.

Restatement (Third) of Law Governing Lawyers § 117 cmt. b (2000).

The Florida Supreme Court also approved such payments. Florida Bar v. Cillo, 606 So. 2d 1161, 1162 (Fla. 1992) (suspending for six months a Florida lawyer for various misconduct; analyzing among other things, the lawyer's payment to a former client to testify truthfully; "Clearly to induce a witness to testify falsely would be misconduct and more but this is not the issue here. The factual scenario, as I have found it, raised this question. Is it misconduct to induce a witness to tell the truth by offering and giving money or some other valuable consideration? I think not"; "We are concerned, however, that the payment of compensation other than costs to a witness can adversely affect the credibility and fact-finding function of the disciplinary process. We are also concerned with the use of the Bar's disciplinary process for the purpose of extortion. While we do not believe that Cillo's conduct was a violation of the Rules of Professional Responsibility, we do believe that a rule should be developed to make clear that any compensation paid to a claimant or an adverse witness is improper unless the fact-finding body has knowledge and has approved any such compensation.").

Thus, the ABA and the Restatement agree that a litigant may reimburse a fact witness for her travel expenses, and pay a reasonable hourly rate for the time that the witness spends preparing for her testimony and testifying.³⁵

Since the ABA issued its opinion in 1996, most state bars have taken the same approach.

- Alabama LEO RO-97-02 (10/29/97) ("An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income."; "Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute 'expenses of litigation' within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to 'advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.'").
- California LEO 1997-149 (1997) ("An attorney may pay a non-expert witness for the time spent preparing for a deposition or a trial, but the attorney must comply with the requirements of rule 5-310(B) of the California Rules of Professional Conduct. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness' testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned, if currently unemployed, or what others earn for comparable activity."; "We conclude that it is not inappropriate to compensate a witness for otherwise uncompensated time necessary for preparation for or testifying at deposition or trial, as long as the compensation is reasonable in conformance with rule 5-310(B), does not violate applicable law, and is not paid to a witness contingent upon the content of the witness' testimony, or the outcome of the case. . . . This applies whether the witness is currently employed, unemployed, retired, suspended or in any other employment status.").
- South Carolina LEO 97-42 (1997) (permitting payment to fact witnesses of expenses and reimbursement for lost time).

³⁵ To be sure, paying a fact witness for the time that she spends actually testifying might seem somewhat "unseemly." Many litigants choose not to pay a fact witness for that time. This prevents the adversary from noting that the fact witness is earning money during her testimony. A clever fact witness asked by the adversary's lawyer whether she is receiving payment while testifying might respond with an answer such as: "Yes I am, but I bet it is less than you are earning right now."

The Delaware Bar offered a thoughtful analysis in a 2003 opinion. Delaware LEO 2003-3 (8/14/03) (holding that a lawyer may pay out-of-pocket travel expenses to witnesses; explaining that a company may compensate a retired employee of another company for his time (at the rate that the retired employee charges in his full-time independent consulting business), but may not compensate a retired company employee for his time at the rate that the employee was paid when last employed at the company -- because the former employee was presently unemployed; noting that there was no evidence that the witness "will lose an economic opportunity by spending time preparing for his testimony and testifying" at the trial; acknowledging that the witness might be entitled to a "somewhat reduced rate of compensation for the burden of devoting his time to prepare for the Delaware Trial rather than enjoying his retirement," but noting that such an inquiry was not before the bar.").

Case law has tended to take the same approach.

- Prasad v. Bloomfield Health Servs., Inc., No. 04 Civ. 380 (RWS), 2004 U.S. Dist. LEXIS 9289, at *5, *15-17, *19 (S.D.N.Y. May 24, 2004) (finding nothing improper in a company's payment of \$125 per hour to a former employee who testified at an arbitration; noting that the former employee "testified that he was not paid to testify in any particular manner" and that the former employer reimbursed him at the \$125 per hour rate "because he was self-employed and that was the rate he received in his consulting business"; "Although the federal courts have reached varying conclusions as to the circumstances in which payments to a fact witness will be deemed improper, they are generally in agreement that a witness may properly receive payment related to the witness' expenses and reimbursement for time lost associated with the litigation. . . . A witness may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or at trial."; "That a fact witness has been retained to act as a litigation consultant does not, in and of itself, appear to be improper, absent some indication that the retention was designed as a financial inducement or as a method to secure the cooperation of a hostile witness, or was otherwise improper.").

- Centennial Management Servs., Inc., v. Axa Re Vie, 193 F.R.D. 671, 682 (D. Kan. 2000) ("[T]he Movants have directed the court to no authority supporting their argument that a person violates the anti-gratuity statute by paying a fact witness reasonable compensation for time spent in connection with legitimate, non-testifying activities such as reviewing documents in preparation for the deposition and meeting with lawyers in preparation for the deposition. In fact, the only authority the court has uncovered on this issue suggests that such compensation is lawful. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996). (Under Rule 3.4(b), occurrence witnesses may be reasonably compensated for time spent in attending a deposition or trial; for time spent in pretrial interviews with the lawyer in preparation for testifying; and for time spent in reviewing and researching records that are germane to his or her testimony).").

To be sure, not every bar and court agree with the ABA's approach. For instance, in 2006 a federal court addressed an award of attorney's fees under a cost-shifting statute that allows the shifting of costs associated with a fact witness. Roemmich v. Eagle Eye Dev., LLC, No. 1:04-cr-079, 2006 U.S. Dist. LEXIS 94320, at *13-14 (D.N.D. Dec. 29, 2006) (awarding only \$3,750 rather than the \$13,250 sought; "While the court is not aware of any North Dakota case law or ethics opinions on point, most jurisdiction[s] have construed similar language as prohibiting payments to fact witnesses for the substance of their testimony, but allowing compensation for time spent in preparation for, and testifying at, trial or deposition, at least when the circumstances warrant such compensation. . . . One of these circumstances is when a fact witness has to spend significant time reviewing records in order to testify. Permitting additional compensation in this situation is fair to the witness. Also, it promotes justice to the extent it results in testimony that is more accurate and meaningful and does not limit the parties to calling only those witnesses who have the resources and the willingness to devout [sic] significant time without compensation.").

A well-known lawyer who deals with ethics issues warns about attaching any conditions to a fact witness's testimony.

Any condition attached to the payments that may be viewed as influencing the testimony of the witness is suspect. For example, in a case in which payment is (1) conditioned on the giving of testimony in a certain way, even if conditioned on "truthful testimony," (2) is made to prevent the witness's attendance at trial, or (3) is contingent to any extent on the outcome of the case, the payment will be deemed unethical. Agreements to protect the former employee from liability, which are made to secure the employee's cooperation as a fact witness, may also be found to constitute "the equivalent of making cash payments to [the witness] as a means of making him sympathetic and securing his testimony."

John K. Villa, Paying Fact Witnesses, ACCA Docket 19, Oct. 2001, at 112, 113 (footnotes omitted).³⁶

Some bars and courts are openly critical of paying for a fact witness's time. As mentioned above, ABA LEO 402 (8/2/96) rejected the analysis of a Pennsylvania Legal Ethics Opinion from the previous year.³⁷ Other courts express even more hostility. In

³⁶ Villa also suggests that the party paying the fact witness disclose the payments to the court and to the adversary. "Once the decision is made to compensate a former employee for his or her time in connection with testifying as a fact witness, counsel should inform the court and opposing counsel of this decision, as well as the basis for the payment. Even though permissible, some jurisdictions permit the fact of such a payment to be considered by the trier of fact in assessing the credibility of the witness and the weight to be accorded his or her testimony. The court may order production of the compensation agreement, as well as the production of any documents related to it and any documents reviewed or prepared by the witness. It may also permit the opposing party to treat the witness as a hostile witness for purposes of cross examination." John K. Villa, Paying Fact Witnesses, ACCA Docket 19, Oct. 2001, at 112, 113-14 (footnotes omitted).

³⁷ Pennsylvania LEO 95 126A (9/26/95) ("In sum, while there is no express prohibition in the language of Rule 3.4 or the Pennsylvania Witness Compensation Statute, it appears that both sources can be read to disfavor compensation to nonexpert witnesses for the time invested in preparing for testimony. At the very least, should you decide to pay such compensation to the fact witness, that witness must be instructed that, if asked on cross examination, he is to be candid about the nature and amount of the compensation he has been paid. Even with that protective measure, we cannot say with certainty that compensating a nonexpert for preparation time is not without risk of disciplinary enforcement action.").

Other authorities share this hostile approach. New York v. Solvent Chem. Co., 166 F.R.D. 284, 290 (W.D.N.Y. 1996) (assessing a consulting agreement between a company and a former employee

re Bruno, 956 So. 2d 577 (La. 2007) (suspending a plaintiff's lawyer for three years (with 18 months deferred), based on his payment of \$5,000 to a long-time employee of defendant Shell); Goldstein v. Exxon Research & Eng'g Co., Civ. A. No. 95-2410, 1997 U.S. Dist. LEXIS 14598 (D.N.J. Apr. 16, 1997) (finding unenforceable as against "public policy" a consulting agreement between Exxon and one of its former employees who was a fact witness; specifically rejecting the ABA approach).³⁸

Not surprisingly, courts everywhere reject fact witnesses' blatant attempt to "sell" certain testimony in return for compensation. See, e.g., United States v. Blaszak, 349 F.3d 881 (6th Cir. 2003) (affirming a conviction under 18 U.S.C.S. § 201(c)(3) for offering to sell testimony in an antitrust case in exchange for \$500,000); In re Complaint

who was an important fact witness; approving some of the payments, but condemning other arrangements; "the court finds nothing improper in the reimbursement of expenses incurred by Mr. Beu in travelling to New York to provide ICC with factual information, or in the payment of a reasonable hourly fee for Mr. Beu's time. But in providing Mr. Beu with protection from liability in the Dover litigation, and in this action, as a means of obtaining his cooperation as a fact witness, ICC and Solvent went too far."; "But it was only after service of the subpoena in July 1995 -- when it became clear that OCC and other parties were intending to obtain both documents and testimony from Mr. Beu -- that ICC moved to acquire Mr. Beu's services as a 'litigation consultant.' The timing of ICC's actions creates, in and of itself, an appearance of impropriety that serves to further undermine the company's claim of work product protection for the consulting agreement and related materials."; ordering the production of all pertinent documents regarding the consulting agreement); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1518, 1526 (S.D. Fla. 1994) (approving a party's payment of expenses to fact witnesses, but finding the payment of \$120,000 to fact witnesses to be a "clear violation" of the Florida ethics rule, and excluding "all evidence tainted by the ethical violations"; "Rule 3.4(b) of the Rules of Professional Conduct, The Florida Bar v. Jackson, *supra*, and the aforementioned cases clearly prohibit a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so."); Wisconsin LEO E-88-9 (1998) ("[W]e believe that inducements to witnesses that exceed their actual out-of-pocket losses would support findings of SCR 20:3.4(b) violations. And, of equal importance, an opposing counsel's eliciting testimony about excessive witness compensation could adversely impact a witnesses's [sic] credibility, a client's case and a lawyer's 'reasonableness' as a practical qualification on SCR 20:3.4(b)'s amorphous prohibition.").

³⁸ National Labor Relations Bd. v. Thermon Heat Tracing Servs., Inc., 143 F.3d 181, 190 (5th Cir. 1998) (in a dissent by Judge Garza, criticizing any payment to fact witnesses; "The common law rule in civil cases in most jurisdictions prohibited the compensation of fact witnesses. . . . The payment of a sum of money to a witness to 'to tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.").

of PMD Enters. Inc., 215 F. Supp. 2d 519, 522 (D.N.J. 2002) (revoking the pro hac vice admission of a lawyer who offered an adversary's key fact witness \$100 per hour to "review and organize certain documents and records"); Florida Bar v. Jackson, 490 So. 2d 935 (Fla. 1986) (suspending for three months a lawyer who sought \$50,000 for clients' testimony in a New York lawsuit); In re Howard, 372 N.E.2d 371 (Ill. 1997) (suspending for two years a lawyer who paid (on two occasions) \$50 to an arresting officer for certain testimony).

(a) Every bar and court allow a litigant to pay a witness's reasonable travel expenses.

(b) Most bars and courts allow payment of a reasonable hourly rate that the witness spends preparing for testimony.

(c) Most also permit the payment of an hourly rate for the time that the witness actually spends testifying.

(d) Bars and courts disagree about whether or how much a litigant can pay a witness who will not be incurring any loss by preparing to testify and testifying. The majority rule would allow such payments even to a retired witness -- who may have worked hard to enjoy a stress-free retirement.

(e) Bars and courts normally condemn a payment not tied to a particular loss, but which instead constitutes some-lump sum payment out of proportion to expenses or any reasonable hourly rate.

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **PROBABLY YES**; the best answer to **(c)** is **PROBABLY YES**; the best answer to **(d)** is **PROBABLY YES**; the best answer to **(e)** is **NO**.

Preparing Fact Witnesses for Testimony

Hypothetical 13

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. The client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES (PROBABLY)

Analysis

Preparing fact witnesses to testify involves some flat ethics prohibitions, but a surprising amount of flexibility in seeking to avoid those prohibitions.

The ABA Model Rules and every state's ethics rules contain several general provisions that might govern a lawyer's witness preparation conduct.

First, some of these general provisions address what lawyers might do themselves.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.4(b).

By referring to "criminal" acts, this rule obviously incorporates various anti-perjury and witness tampering criminal statutes, the violation of which would surely "reflect adversely" on the lawyer's "honesty, trustworthiness or fitness" to practice law.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(c) (emphasis added). This rule is somewhat more vague than ABA Model Rule 8.4(b), because it does not incorporate the criminal statutes, but rather more generic requirements of honesty.

The ABA Model Rules also contain an often-criticized provision prohibiting a lawyer's conduct that is "prejudicial to the administration of justice." ABA Model Rule 8.4(d).

Second, in addition to prohibiting lawyers from themselves engaging in wrongdoing, the ABA Model Rules prohibit lawyers from helping their clients engage in general misconduct.

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (emphases added).

Two comments deal with this general rule.

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

ABA Model Rule 1.2 cmts. [9], [10] (emphases added).

Third, the ABA Model Ethics Rules also contain somewhat more focused provisions dealing with lawyers offering evidence.

Several of these provisions provide guidance to lawyers acting before they offer evidence.

The ABA Model Ethics Rules contain several provisions dealing with lawyers' involvement with evidence that the lawyer knows to be false.

Starting with the most general prohibition,

[a] lawyer shall not: . . . falsify evidence, counsel or assist a witness to testify falsely

ABA Model Rule 3.4(b). This provision prohibits a lawyer's direct involvement in evidence falsification, as well as the lawyer's advice or assistance to any witness (presumably a client or a non-client) to testify falsely.

ABA Model Rule 3.3 indicates that

[a] lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false

ABA Model Rule 3.3(a)(3) (emphases added). This prohibition applies to clients and non-clients.

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.

ABA Model Rule 3.3 cmt. [5].

Unlike ABA Model Rule 3.4(c), this provision contains a knowledge requirement.

The Ethics Rules' Terminology section contains the following definition:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). Thus, the prohibition on lawyers offering evidence that the lawyer "knows" to be false requires actual knowledge -- although a disciplinary authority or court could show such actual knowledge without a lawyer's confession.

The ABA Model Rules contain a very useful comment, which provides additional guidance on this issue.

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphases added).

States take varied approaches. For example, a Virginia comment has both a forward-looking and backward-looking (remedial) component.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the

client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Virginia Rule 3.3 cmt. [6] (emphases added).

The ABA Model Rules also contain guidance for lawyers who do not "know" that evidence is false, but suspect that it is false.

In essence, the ABA Model Rules provide a safe harbor for lawyers who refuse to offer such evidence.

A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added).

This provision immunizes the lawyer from criticism under other ethics rules that require the lawyer to diligently represent the client. See ABA Model Rule 1.3.

The ABA Model Rules and every state's ethics rules contain very specific provisions describing a lawyer's responsibility if a client states an intent to commit fraud in a tribunal, or admits to past fraud on a tribunal. Because these deal more with issues of confidentiality (and how a lawyer's duty of confidentiality interacts with the lawyer's duty to the system), this analysis does not deal with that situation.

The Restatement contains essentially the same provisions as the ABA Model Rules and most states' ethics rules.

(1) A lawyer may not:

(a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;

(b) knowingly make a false statement of fact to the tribunal;

(c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

(2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

(3) A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Restatement (Third) of Law Governing Lawyers § 120 (2000).

The Restatement provides a much more detailed and useful discussion than the ethics rules of lawyers' knowledge (and ignorance) that triggers various requirements.

The Restatement first discusses the standard for a lawyer's "knowledge."

A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

The Restatement also addresses lawyers' knowledge in its discussion of false testimony.

False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury"

because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphasis added).

The Restatement also defines the type of wrongful evidence that a lawyer may not participate in offering.

A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify (see § 116(1)). A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it (compare Comment e). However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence (see also Comment e).

Id. (emphasis added).

Interestingly, a lawyer may elicit false evidence for purposes other than assisting a client's case.

It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer's client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to

discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.

Restatement (Third) of Law Governing Lawyers § 120 cmt. e (2000) (emphasis added).

Illustration 4 indicates that a lawyer who settles a case after eliciting false testimony from a witness (not in furtherance of the lawyer's client's case) does not violate Restatement § 120 by failing to disclose the witness's false statement.

The Restatement emphasizes the lawyer's duty to work with clients or witnesses who intend to or who have offered false evidence.

Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment h).

Restatement (Third) of Law Governing Lawyers § 120 cmt. g (2000).¹

In discussing reasonable remedial measures that the lawyer must take if such consultation has not been successful, the Restatement again offers much more detailed guidance than the ethics rules.

If the lawyer's client or the witness refuses to correct the false testimony (see Comment g), the lawyer must take steps reasonably calculated to remove the false impression

¹ Interestingly, the Restatement does not require private lawyers to inform non-client witnesses of their Fifth Amendment rights. Restatement (Third) of Law Governing Lawyers § 106 cmt. c (2000) ("A lawyer other than a prosecutor . . . is not required to inform any nonclient witness or prospective witness of the right to invoke privileges against answering, including the privilege against self-incrimination.").

that the evidence may have made on the finder of fact. (Subsection (2)). Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence (see Comment g). If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal (see Comment k hereto). If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphases added).

The Restatement includes an explicit statement confirming that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Restatement (Third) of Law Governing Lawyers § 116(1) (2000).

Not surprisingly, the Restatement prohibits "[a]ttempting to induce a witness to testify falsely as to a material fact." Restatement (Third) of Law Governing Lawyers § 116 cmt. b (2000) (referring to Comment I of Section 120).

The Restatement also contains an interesting discussion of actions that lawyers generally may take in preparing witnesses to testify.

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit;

reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see §120(1)(a)).

Id. § 116 cmt. b (emphases added).

Legal ethics opinions from other jurisdictions provide some guidance to lawyers preparing witnesses for testimony.

For instance, the D.C. Bar dealt with these issues in D.C. LEO 79. Interestingly, the D.C. Bar indicated that

[i]t is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.

D.C. LEO 79 (12/18/79). The case law and other authorities belie this statement.

The D.C. Bar indicated, among other things, that lawyers may suggest specific wording of testimony to their clients, as long as the substance remains the client's truthful statement.

[T]he fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view.

Id. (emphasis added). The D.C. Bar also dealt with the propriety of a lawyer's suggestion that the client include information from other sources.

The second question raised by the inquiry -- as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness -- may, again, arise not only with respect to written testimony but with oral testimony as well. In either case, it appears to us that the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance.

Id. (emphasis added). Finally, the D.C. Bar indicated that a lawyer failing to prepare a witness for testimony may not have been sufficiently diligent.

We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony -- whether the testimony is only to be under cross- examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf.

Id. (emphasis added). In reaching these conclusions, the D.C. Bar repeatedly emphasized the curative nature of cross examination. Id.

In 1994, the Nassau County (New York) Bar Association held that the New York Ethics Code (which generally follows the old ABA Model Code rather than the new ABA Model Rules) permits a lawyer to make the following statement "[p]rior to discussing the case" with his client -- "as long as the attorney in good faith does not believe that the

attorney is participating in the creation of false evidence." Nassau County (New York)

LEO 94-6 (2/16/94).

Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.

Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping -- you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

Id. (emphasis added). Accord Nassau County (New York) LEO 91-23 (9/25/91), [1991-1995 Ethics Ops.] ABA/BNA Law. Manual on Prof. Conduct 1001:6253 (holding that a lawyer "may inform a prospective client of relevant law regarding issues of a case before listening to the client's statement").

There are surprisingly few articles dealing with the ethical limits of witness preparation.

Perhaps the most often-cited article is Joseph D. Piorkowski, Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching", 1 Geo. J. Legal Ethics 389 (1987-1988). This article cites an earlier treatise which described what the article calls the "primary objectives" of witness preparation.

One treatise on witness preparation specifies thirteen primary objectives for this procedure: "help the witness tell the truth; make sure the witness includes all the relevant facts; eliminate the irrelevant facts; organize the facts in a

credible and understandable sequence; permit the attorney to compare the witness' story with the client's story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make [sure] the witness understands the importance of his or her testimony; teach the witness to fight anxiety, and particularly to defend him or herself during cross-examination." Although some of these goals are directed at enhancing attorney effectiveness, the overwhelming focus of the procedure is to ensure that the witness testifies truthfully, accurately, concisely, and convincingly.

Id. at 390-91 (footnotes omitted). Elsewhere, the article provides a list of safe instructions that lawyers may give their clients about to testify.

Aron and Rosner [authors of an earlier treatise] recommend that the attorney advise the witness to answer truthfully, to maintain neutrality, to only answer the question asked, to give only the best present recollection, to refrain from volunteering information, to testify only from personal knowledge, to use everyday language, to testify spontaneously, to avoid memorization, to pause before answering, to admit to lack of knowledge where appropriate, and to clarify any unclear questions.

Id. at 391 n.9.

The Georgetown article discusses a number of areas it describes as "gray." For instance, the article discusses testifying witness's use of specific words. The article suggests such "safe" recommendations as avoiding phrases such as "to tell the truth," or "I think I saw." Id. at 399. The article also indicates that lawyers may safely advise their testifying clients to "avoid technical jargon or colloquial expressions," or the use of "sophisticated, 'formal' speech." Id. at 400. Lawyers may also tell their witnesses to avoid pejorative or offensive phrases to refer to certain people.

However, the article warns that lawyers may not change the substance of a witness's statement.

The attorney's recommendation that the witness modify his intended meaning is clearly prohibited conduct. The most difficult issue, therefore, involves whether an attorney can encourage the substitution of words that do not change the witness' intended meaning, but that modify the potential emotional impact associated with the witness' original choice of words.

Id. (emphasis in original). Because of this risk, "[a]ttorneys should exercise the utmost caution . . . in recommending changes in word choice to a witness." Id. at 402.

The article also discusses a lawyer's suggestions about a testifying client's demeanor. Most lawyers would find such suggestions acceptable, but the article warns that there are limits.

It is at least arguable that when an attorney encourages a witness to appear confident, and during testimony the witness displays a sense of confidence while making an assertion about which he is not in fact confident, the attorney has encouraged the witness to testify "falsely" or to engage in "misrepresentation." For example, suppose a witness in a criminal case is fifty-one percent certain that the defendant was the perpetrator of a given crime. If the prosecutor's statement to the witness to "appear confident" results in the jury perceiving a ninety percent certainty, then the outcome of the litigation may well be altered.

Id. at 404-05 (emphases added). The article generally finds acceptable a lawyer's suggestions about what the client should wear, or what mannerisms the client should use while testifying.

This class of conduct is best illustrated by the use of polite mannerisms and speech or by wearing a suit to court. This behavior is usually intended to convey the message that the witness is a fine, upstanding citizen who would never dream of lying in a court of law. Due to the very general nature of the message, it would be difficult to

construe components of demeanor in this category as capable of being falsified or misrepresented.

Id. at 406.

The article also warns of the possible risk in another type of lawyer suggestion about a testifying witness's demeanor.

The last category -- conduct intended to communicate a specific message -- is capable of being false, misrepresentative, or deceitful. Components of demeanor in this class include vocal inflections, emphasis on certain words or phrases, and gestures. Moreover, behavior such as the appearance of surprise or display of emotion may fall within this class to the extent that such conduct is premeditated or feigned. Some aspects of demeanor within this category, such as gestures, clearly cannot be falsified. However, other forms of demeanor intended to convey a specific message may provide a basis for disciplinary liability if a witness were coached to use this demeanor to mislead a jury.

Id. at 406-07 (emphases added).

There is surprisingly little case law providing guidance to lawyers preparing witnesses for testimony.

The United States Supreme Court has provided the absolutely true but remarkably unhelpful directive that

[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.

Geders v. United States, 425 U.S. 80, 90 n.3 (1976).

As would be expected, courts have dealt severely with lawyers who persuade witnesses to testify falsely. See, e.g., In re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (disbarring a lawyer from practicing in federal court after he was disbarred from Missouri state courts for having arranged for a witness's false testimony);

In re Oberhellmann, 873 S.W.2d 851 (Mo. 1994) (disbarring a lawyer who arranged for a client's false testimony).

Maryland's highest court provided useful guidance.

Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call. The process of preparing a witness for trial, sometimes referred to as "horse shedding the witness," takes many forms, and involves matters ranging from recommended attire to a review of the facts known by the witness. Because the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern, attorneys are well advised to heed the sage advice of the Supreme Court of Rhode Island: "[I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be. In some instances, as in the case of an expert witness who will be asked to express an opinion based upon facts related by others, and who is not a factual witness whose testimony could be influenced by reading what others have said under oath, there is little danger in having the witness review the depositions of others. When, however, the testimony in the deposition bears directly on the facts that the reviewing witness will be asked to recount, and particularly when, as here, the testimony is known by the witness to be exactly that which will be used at trial, and is presented in its most graphic form by videotape, the potential for influencing the reviewing witness is great.

State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990) (footnote omitted).

One well-publicized incident provides an interesting insight into how far lawyers may go when preparing witnesses.

In August, 1997, a lawyer from the asbestos plaintiff's firm of Baron & Budd turned over a witness preparation memorandum that the firm used when preparing its asbestos clients to testify. According to an ABA/BNA article about witness preparation, the Baron & Budd memorandum contained the following statements.

How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.

. . .

Remember to say you saw the NAMES on the BAGS.

. . .

The more often you were around it, the better for your case. You MUST prove that you breathed the dust while insulating cement was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

. . .

It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it.

. . .

It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.

. . .

You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still "NO"!

. . .

Do NOT mention product names that were not listed on your Work History Sheets.

. . .

Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another Be CONFIDENT that you saw just as much of one brand as all the others.

. . .

Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff.

. . .

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!

. . .

If there is a MISTAKE on your Work History Sheets, explain that the "girl from Baron & Budd" must have misunderstood what you told her when she wrote it down.

Joan C. Rogers, Special Report, Trial Conduct-Witness Preparation Memos Raise Questions About Ethical Limits, 14 ABA/BNA Law. Manual on Prof. Conduct, No. 2, at 48, 49 (Feb. 18, 1998).

As of the date of that special report (February, 1998), the Texas Bar had already dismissed allegations of wrongdoing by Baron & Budd, and no court had yet found

anything improper in the memorandum (the ABA/BNA article mentions that Baron & Budd took the position that it also provided its witnesses another memorandum advising the witnesses to tell the truth when they testify, ameliorating the impact of the absence of such a specific instruction in the witness memorandum itself).

According to the ABA/BNA article, several national ethics experts disagree about the ethical propriety of the memorandum.

Interestingly, then-Professor William Hodes of Indiana University School of Law - Indianapolis (then and now a noted ethics expert) acted as a consultant for Baron & Budd. According to Hodes, the memorandum "did not violate legal ethics rules." Id. at 51. As paraphrased in the ABA/BNA article, Hodes explained that "[u]nless there is inconsistency with independently established facts, or a radical departure from a client's unequivocal prior statements, a lawyer is obligated to give the client the benefit of the doubt." Id.

Later case law does not indicate any sanctions imposed on Baron & Budd, which means that the law firm apparently avoided all ethical or court-driven punishment or criticism.

More recently, Mitsubishi Motor Manufacturing criticized a letter distributed by the EEOC to Mitsubishi employees. The EEOC letter contained what it called "a short list of 'memory joggers' that we suggest that you begin thinking about." Id. at 52 (Excerpts from EEOC Letters). The ABA/BNA article recites these "memory joggers," which include particular phrases, comments, actions that the plaintiffs might have experienced at Mitsubishi. Although well-known Professor Ronald Rotunda (then at the University of

Illinois) provided an affidavit in support of Mitsubishi's motion for sanctions, a federal judge denied the motion. Id. at 51.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

Ghostwriting Pleadings

Hypothetical 14

One of your sorority sisters just lost her job, and wants to pursue a wrongful termination claim. Your firm would probably not want you to represent the plaintiff in a case like this, although you do not have any conflicts. You offer to help your sorority sister as much as you can.

Without disclosure to the court and the adversary, may you draft pleadings that your sorority sister can file pro se?

MAYBE

Analysis

Bars' and courts' approach to undisclosed ghostwritten pleadings has evolved over the years. This issue has also reflected divergent approaches by bars applying ethics rules and courts' reaction to pleadings they must address.

ABA Approach

As in other areas, the ABA has reversed course on this issue.

In ABA Informal Op. 1414 (6/6/78), the ABA explained that a pro se litigant who was receiving "active and rather extensive assistance of undisclosed counsel" was engaging in a misrepresentation to the court. The lawyer in that situation helped a pro se litigant "in preparing jury instructions, memoranda of authorities and other documents submitted to the Court." Id. The ABA took a fairly liberal approach to what a lawyer could do in assisting a pro se litigant, but condemned "extensive undisclosed participation."

We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se, or that a lawyer could not, for example, prepare or assist in

the preparation of a pleading for a litigant who is otherwise acting pro se.

Obviously, the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation. Extensive undisclosed participation by a lawyer, however, that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

Id. (emphases added).

In 2007, the ABA totally reversed itself.

In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

ABA LEO 446 (5/5/07).

The ABA rebutted several arguments advanced by those condemning such a practice.

Some ethics committees have raised the concern that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.

Id. (footnote omitted). The ABA even explained that the lawyer involved in such a practice may have a duty to keep it secret.

[W]e do not believe that non-disclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleadings and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

Id. (footnotes omitted).

Bars' Approach

Not surprisingly, state bars' approach to ghostwriting mirrors the ABA reversal -- although some state bars continue to condemn ghostwriting.

Bars traditionally condemned lawyers' undisclosed drafting of pleadings for an unrepresented party to file in court.

- New York City LEO 1987-2 (3/23/87) ("Non-disclosure by a pro se litigant that he is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). Accordingly, we conclude that the inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself beforehand to disclose such assistance to both adverse counsel and the court. Less substantial services, but not including

the drafting of pleadings, would not require disclosure." (emphases added); "Because of the special consideration given pro se litigants by the courts to compensate for their lack of legal representation, the failure of a party who is appearing pro se to reveal that he is in fact receiving advice and help from an attorney may be seriously misleading. He may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected."; "If a lawyer is rendering active and substantial legal assistance, that fact must be disclosed to opposing counsel and to the court. Although what constitutes 'active and substantial legal assistance' will vary with the facts of the case, drafting any pleading falls into that category, except where no more is involved than assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants. Such assistance or the making available of manuals and pleading forms would not ordinarily be deemed 'active and substantial legal assistance.'" (footnote omitted)).

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for pro se clients will be called upon by the court, any disregard by either the attorney or the pro se litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a pro se litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).
- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure

requirement. We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a pro se litigant unless it is adequately investigated and can be prepared in good faith." (emphasis added)).

- Kentucky LEO E-343 (1/91) (holding that a lawyer may "limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings"; "On the other hand, the same committees voice concern that the Court and the opponent not be misled as to the extent of the counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Accordingly, the opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by pro se litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleading. It should go without saying that counsel should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the scenes representation. On the 'flip side,' the opponent cannot reasonably demand that counsel providing such limited assistance be compelled to enter an appearance for all purposes. A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.").
- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely

helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. *If an attorney drafts court papers (other than an initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required.* In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c). We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined." (emphasis in italics added)).

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").
- Massachusetts LEO 98-1 (1998) (explaining that "significant, ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"; "An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.
- Connecticut Informal Op. 98-5 (1/30/98) ("A lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs. Whether there is misrepresentation in a particular matter is a question of fact. . . . Counsel who prepare and control the content of pleadings, briefs and other documents filed with a court could evade the reach of these Rules by concealing their identities." (emphasis added)).

- Virginia LEO 1803 (3/16/05) (lawyers practicing at a state prison may type up legal documents for inmates without establishing an attorney-client relationship with them, but should make it clear in such situations that the lawyer is not vouching for the document or otherwise giving legal advice; if the lawyer does anything more than act as a mere typist for an inmate preparing pleadings to be filed in court, the lawyer "must make sure that the inmate does not present himself to the court as having developed the pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

However, a review of state bar opinions shows a steady march toward permitting such undisclosed ghostwritten pleadings as a matter of ethics.

- Illinois LEO 849 (12/83) ("It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding for dissolution of marriage to the preparation of pleadings, without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice to the client's rights.").
- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).
- Alaska LEO 93-1 (5/25/93) ("According to the facts before the Committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance." (emphases added)).

- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis. Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending. If an attorney, who is not 'of record' in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney. Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim." (emphasis added)).
- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).
- New Jersey LEO 713 (1/28/08) (holding that a lawyer may assist a pro se litigant in "ghostwriting" a pleading if the lawyer is providing "unbundled" legal services as part of a non-profit program "designed to provide legal assistance to people of limited means"; however, such activity would be unethical "where such assistance is a tactic by lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance"; specifically

rejecting many other state Bars' opinions that a lawyer providing a certain level of assistance must disclose his role, and instead adopting "an approach which examines all of the circumstances"; "Disclosure is not required if the limited assistance is part of an organized R. 1:21(e) non-profit program designed to provide legal assistance to people of limited means. In contrast, where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

- Utah LEO 08-01 (4/8/08) ("Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals pro se and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention." (emphasis added)).
- Virginia LEO 1874 (7/28/14) (Lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant." After reviewing ABA and other states' legal ethics opinions, "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." Lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court." [overruling inconsistent portions of LEOs 1127, 1592, 1761 and 1803]).

Interestingly, one bar seems to have taken the opposite direction.

In Florida LEO 79-7 (1979; revised 6/1/05), the Florida Bar indicated that "[i]t is ethical for an attorney to prepare pleadings without signing as attorney for a party." The Florida Bar explained that

there is no affirmative obligation on any attorney to sign pleadings prepared by him if he is not an attorney of record. It is not uncommon for a lawyer to offer limited services in assisting a party in the drafting of papers while stopping short of representing the party as attorney of record. Under these circumstances, there is no ethical impropriety if the attorney fails to sign the pleadings.

Florida LEO 79-7 (6/1/05). The Florida Bar reconsidered this opinion on February 15, 2000, and again on June 1, 2005, and did not renumber. In the second version of Florida LEO 79-7, the Florida Bar indicated that

[a]ny pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate "Prepared with the Assistance of Counsel." An attorney who drafts pleadings or other filings for a party triggers an attorney-client relationship with that party even if the attorney does not represent the party as attorney of record.

Florida LEO 79-7 Reconsidered (2/15/00). The Florida Bar explained why it reconsidered its earlier opinion.

County Court Judges who responded to an inquiry from the Committee about Opinion 79-7 expressed concern about pro se litigants who appear before them having received limited assistance from an attorney and having little or no understanding of the contents of pleadings these litigants have filed. Almost unanimously the judges who responded believed that disclosure of professional legal assistance would prove beneficial, at least where the lawyer's assistance goes beyond helping a party fill out a simple standardized form designed for use by pro se litigants. The Committee concurs.

Id.

Court Approach

Courts have usually taken a far more strict view of lawyers ghostwriting pleadings for per se litigants.

This is not surprising, because courts might feel misled by reading a pleading they think has been filed by a pro se litigant herself, but which really reflects the careful preparation by a skilled lawyer.

In contrast to the bars' evolving trend toward permitting lawyers' involvement in preparing pleadings for a pro se plaintiff, courts' analysis has shown a steady condemnation of such practice.

- Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231, 1232 (D. Colo. 1994) ("It is elementary that pleadings filed pro se are to be interpreted liberally. . . . Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party."; "Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P."; "I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.").
- Laremont-Lopez v. Southeastern Tidewater Opportunity Project, 968 F. Supp. 1075, 1077-78, 1078, 1079-80, 1080 (E.D. Va. 1997) ("The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding pro se is inconsistent with the intent of certain procedural, ethical, and substantive

rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers."; "When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation of the Court."; "The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, there is no specific rule which deals with such ghost-writing. Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted."; "This Opinion and Order sets forth this Court's unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.").

- Ricotta v. California, 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper.'; In the instant case it appears to the Court that Ms. Kelly was involved in drafting

seventy-five to one hundred percent of Plaintiff's legal arguments in his oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).

- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank[r]. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and 'interferes with the efficient administration of justice. . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).
- Ostevoll v. Ostevoll, Case No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug.16, 2000) ("Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. . . . We agree. Thus, this Court agrees with

the 1st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. . . . Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. . . . We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.").

- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings, . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and "this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").
- Washington v. Hampton Roads Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 & n.6 (E.D. Va. May 30, 2002) (explaining that pro se plaintiffs are "given more latitude in arguing the appropriate legal standard to the court"; holding that "[g]host-writing is in violation of Rule 11, and if there were evidence of such activity, it would be dealt with appropriately").
- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghostwriting of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghostwriting."; "[G]hostwriting must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the

identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").

- In re West, 338 B.R. 906, 914, 915 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with universal disfavor in the federal courts."; "This Court has been able to Find no authority which condones the practice of ghostwriting by counsel.").
- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghostwriting Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.'. . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by

counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and (improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007.").

- Delso v. Trustees for Ret. Plan for Hourly Employees of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally construe pleadings of pro se litigants liberally. . . . Courts often extend the leniency given to pro se litigants in filing their pleadings to other procedural rules which attorneys are required to follow. . . . Liberal treatment for pro se litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to [D.N.J. Local R. 56.1], and to the review given to stated claims."; "In many of these situations an attorney would not have been given as much latitude by the court. . . . This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires. . . . Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."; "It is clear to the Court that Shapiro's 'informal assistance' of Delso fits the precise description of ghostwriting. The Court has also determined that undisclosed ghostwriting is not permissible under the current form of the RPC in New Jersey. Although the RPC's are restrictive, in that they assume traditional full service representation, all members of the Bar have an obligation to abide by them. In this matter, Shapiro's ghostwriting was not affirmatively disclosed by himself or Delso. Delso's Cross Motion for Summary Judgment, on which Shapiro assisted, was submitted to the Court without any representation that it was drafted, or at least researched, by an attorney. Thus, for the aforementioned reasons the Court finds that undisclosed ghostwriting of submissions to the Court would result in an undue advantage to the purportedly pro se litigant.").

- Anderson v. Duke Energy Corp., Civ. Case No. 3:06cv399, 2007 U.S. Dist. LEXIS 91801, at *2 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical.").
- Kircher v. Charter Township of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007) ("Although attorney Ward may not have drafted the Complaint, it is evident that he provided the Plaintiff with substantial assistance. All three Complaints are similar, and attorney Ward was able to provide Defendants' counsel with the reasoning that motivated Plaintiff to file the pro se Complaint. . . . This shows that he may have spoken with and assisted Plaintiff with his pro se pleading."; "While the Court declines to issue sanctions or show cause attorney Ward, he is forewarned that the Court may do that in the future if he persists in helping Plaintiff file pro se pleadings and papers.").

Thus, courts have uniformly condemned undisclosed lawyer participation in preparing pleadings, while bars have moved toward a more liberal approach.

Many states' experience reflects this continuing mismatch. For instance, as indicated above, several older Virginia legal ethics opinions prohibited ghostwriting. Similarly, several Virginia federal courts condemned ghostwriting.

Seven years after the ABA reversed course, in 2007 the Virginia Bar indicated that certain lawyers could engage in ghostwriting if they do not violate applicable court rules.

- Virginia LEO 1874 (7/28/14) (Lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant." After reviewing ABA and other states' legal ethics opinions, "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." Lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v.

Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court." [overruling inconsistent portions of LEOs 1127, 1592, 1761 and 1803]).

However, as with the national experience, Virginia courts continue to condemn ghostwriting -- even doubling down on their sanctions. In 2014, the Western District of Virginia Bankruptcy Court held that lawyers may not ghostwrite, specifically warning Virginia lawyers not to rely on the then month-old Virginia legal ethics opinion allowing certain ghostwriting under the ethics rules.

- In re Tucker, 516 B.R. 340 n.3 (Bankr. W.D. Va. 2014) ("The Court accepts the Debtor's testimony that she received no undisclosed assistance on the Motion. However, given the nature of the Motion and the manner in which it was drafted, it raised the suspicion of having been 'ghost-written.' The Virginia State Bar recently released Legal Ethics Opinion 1874 ('LEO 1874') on the subject of 'ghost-writing' for pro se litigants, finding it to not be objectionable in certain circumstances. To the extent that the practicing bar may intend to rely on LEO 1874 in the future to 'ghost-write' in this Court, all counsel should be aware that this Court takes a different view. This Court agrees with those courts that find, at a minimum, the practice of ghost-writing transgresses counsel's duty of candor to the Court and such practice is expressly disavowed. See, e.g., Chaplin v. DuPont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 2004) ('[T]he practice of ghost-writing will not be tolerated in this Court.');
- In re Mungo, 305 B.R. 762, 767-70 (Bankr. D.S.C. 2003).").

In 2015, the Eastern District of Virginia adopted an explicit Local Rule designed to smoke out ghostwriting.

- Eastern District of Virginia Local Rule 83.1 (M) (as of 12/1/18) ("(1) Any attorney who prepares any document that is to be filed in this Court by a person who is known by the attorney, or who is reasonably expected by the attorney, to be proceeding pro se, shall be considered to have entered an appearance in the proceeding in which such document is filed and shall be subject to all rules that govern attorneys who have formally appeared in the proceeding."; "(2) All litigants who are proceeding pro se shall certify in writing and under penalty of perjury that a document(s) filed with the Court has not been prepared by, or with the aid of, an attorney or shall identify any attorney

who has prepared, or assisted in preparing, the document."; "Each document filed with the court by a pro se litigant shall bear the following certification: . . . that . . . No attorney has prepared, or assisted in the preparation of this document" or [identifying the lawyer who] "[p]repared, or assisted in the preparation of, this document." (emphasis omitted)).

Thus, Virginia lawyers looking just at ethics opinions might feel free to assist a purportedly pro se litigant in ghostwriting pleadings. But such lawyers could run afoul of courts' continuing (and even increasing) condemnation of the practice.

Best Answer

The best answer is to this hypothetical is **MAYBE**.

Filing Claims Subject to an Affirmative Defense

Hypothetical 15

One of your neighbors became quite ill on a Caribbean cruise several years ago. He never filed a claim against the cruise line, but recently has been telling you over the backyard fence that he "was never really the same" after the illness. You finally convince him to explore a possible lawsuit against the cruise line, but discover that the claim would be time-barred under a stringent federal statute. Although that statute also covers claims against the travel agent which booked the cruise, you think that there is some possibility that the lawyer likely to represent the local travel agent would not discover the federal statute.

May you file an action against the local travel agent after the cut-off date under the federal statute?

YES (PROBABLY)

Analysis

This analysis highlights the tension between: (1) the ethics rules' prohibition on filing frivolous claims; and (2) the ethics rules' general requirement that each lawyer must diligently assert available defenses for her client, rather than rely on the other side to alert the lawyer about those defenses.

Lawyers clearly cannot file baseless claims against an adversary, hoping that the adversary defaults or otherwise fails to assert dispositive defenses (such as failure to state a claim). In other words, a lawyer could not file a claim alleging that her client suffered an injury in an automobile accident that never occurred -- hoping that the defendant would not defend the claim.

On the other hand, claims subject to affirmative defenses greatly complicate the analysis. One article explained the nature of affirmative defenses.

The affirmative defense has its origin in the common law plea of confession and avoidance. At the risk of stating the

obvious, it is a matter not within the elements of plaintiff's prima facie case that defeats plaintiff's claim. It differs from a defense in that it does not controvert plaintiff's prima facie case, rather it raises matters outside of plaintiff's claim that, if proven, defeat plaintiff's established prima facie case.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1040-41 (1996-1997) (footnotes omitted).

Thus, the question becomes whether a plaintiff's lawyer may ethically file a claim for which the defendant has a winning affirmative defense. After all, the plaintiff's claim is not frivolous, because it has some basis in fact and in law. However, the plaintiff will lose if the defendant recognizes the affirmative defense.

Interestingly, bars seem to unanimously find that lawyers may file such claims, while courts have struggled with this issue.

Bar Analysis

For several decades, bars have essentially found that a plaintiff's lawyer may ethically file time-barred claims.

- New York LEO 475 (10/14/77) ("Lawsuits predicated upon causes of action which have been extinguished through the passage of time may not properly be instituted. Since the right no longer exists, the institution of an action purportedly based on the existence of that right would violate DR 7-102 (A)(2) which requires that a lawyer not 'knowingly advance a claim . . . that is unwarranted under existing law' or which cannot 'be supported by good faith argument for an extension, modification, or reversal of existing law.' . . . If, as a matter of law, the passage of time merely gives rise to an affirmative defense may that be waived, however, there would be no impropriety in causing suit to be instituted. This is the usual case and the period of limitations does not destroy the right but merely serves to bar the remedy. Indeed, because this is by far the more usual case, in announcing the ethical rule, the authorities have failed to distinguish cases where the period of limitations extinguishes the client's right and they have uniformly held it proper to advance a claim against which the period has run without further

qualification. . . . The ethical rule can thus be easily stated. What problems occur in applying the rule derive from the uncertain state of the law, for it is not always clear whether the passage of time affects the right or merely the remedy." (emphasis added)).

- Virginia LEO 491 (9/3/82) ("It is not improper for an attorney to file suit on an overdue account after the statute of limitations has run since the limitation of action is an affirmative defense which becomes effective only if so raised.").

The ABA dealt with this issue in 1994. In ABA LEO 387, the ABA addressed the issue of a time-barred claim in both the settlement negotiation context and in the litigation context. The ABA had no trouble with permitting the lawyer to proceed in negotiations.

Applying these general [settlement ethics] principles where the lawyer knows that her client's claim may not be susceptible [to] judicial enforcement because the statute of limitations has run, we conclude that the ethics rules do not preclude a lawyer's nonetheless negotiating over the claim without informing the opposing party of this potentially fatal defect. Indeed, the lawyer may not, consistent with her responsibilities to her client, refuse to negotiate or break off negotiations merely because the claim is or becomes time-barred.

ABA LEO 387 (9/26/94) (emphasis added). The ABA thus took the same attitude toward filing a time-barred claim in court.

We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be

characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentations in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either. . . . The result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit; if it constituted the sort of substantive insufficiency in the claim that would result in its being dismissed without any action on the part of the opposing party; or if the circumstances surrounding the time-barred filing indicated bad faith on the part of the filing party. Short of such additional defects, however, and in the absence of any affirmative misstatements or misleading concealment of facts, we do not believe it is unethical for a lawyer to file suit on a time-barred claim.

Id. (emphases added; footnotes omitted).

Since the ABA issued its analysis in 1994, more state bars have taken the same approach.

- Pennsylvania LEO 96-80 (6/24/96) ("Adopting the reasoning of ABA Formal Opinion 94-387, it would be ethically permissible for you to file a claim on behalf of a client which you know or believe to be barred by the statute of limitations 'unless the rules of the jurisdiction preclude it.' It is not entirely clear what the ABA Committee means by the 'rules of the jurisdiction', although that phrase appears to encompass primarily jurisdictional 'defects' in the action which would be grounds for dismissal without regard to any actions taken by the opposing party.").
- North Carolina LEO 2003-13 (1/16/04) ("The question is whether filing a time-barred claim is 'frivolous' under Rule 3.1 of the Rules of Professional Conduct. . . . Filing suit after the limitations period has expired does not affect the validity of the claim, nor does it divest a court from having jurisdiction to hear the matters raised therein. ABA Formal Opinion 94-387, 1001:235, 237 (1994). Instead, the statute of limitations is merely an affirmative defense to an otherwise enforceable claim. *Id.* The defendant must plead the statute of limitations in his answer or it is waived. *Northampton County Drainage Dist. No. 1 v. Bailey*, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990). In addition, the expiration of the limitations period does not prevent a plaintiff from continuing to negotiate settlement with an opposing

party who is unaware of the limitations period. ABA Formal Opinion 94-387 at 236-237. Because a time-barred claim can be enforced by a court if the defense raises no objection, filing suit under these circumstances would not violate the prohibition against an attorney advancing a frivolous claim under Rule 3.1.").

- Oregon LEO 2005-21 (8/05) (holding that a lawyer may "file a complaint against Defendant not withstanding Lawyer's knowledge of the valid affirmative defense"; "As long as Lawyer has a 'basis in law and fact . . . that is not frivolous,' within the meaning of Oregon RPC 3.1, there is no reason why Lawyer cannot proceed. Frivolous is defined as 'without factual basis or well-grounded legal argument.' . . . Lawyer does not represent Defendant, and it is up to Defendant or Defendant's own counsel to look after Defendant's interests and to discover and assert any available defenses.").

Thus, bars unanimously acknowledge the ethical propriety of lawyers filing time-barred claims, or other claims for which there might be valid affirmative defenses.

Although it might seem unfair for a defendant to suffer some harm because her lawyer overlooks an affirmative defense, one article noted that the very statute of limitations defense itself permits parties to escape liability due to their own or their lawyer's oversight of claims.

An adversarial imbalance occurs because the defendant is allowed to escape adjudication of liability due to the inadvertence of plaintiff in letting the limitations period expire. The defendant gains from an adversarial advantage while the plaintiff is sanctioned if seeking to take advantage of the exact same sort of adversarial "cat and mouse game." If the dispute were truly to be resolved without adversarial gamesmanship, underlying liability and the attendant equities would be the sole focus of the matter. Yet the system remains one of adversaries and removing that nature from one small aspect creates an imbalance.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1051 (1996-1997). The article provides many other examples of seemingly other unfair results based on a lawyer's mistakes.

In most aspects of litigation, opponents profit from an adversary's mistakes and oversights. Averments in pleadings not specifically denied are deemed admitted. Requests to admit not denied within thirty days are deemed admitted. Claims not filed within the applicable limitations period may be dismissed with prejudice.

Id. (footnotes omitted).

This article highlights the basic nature of the adversarial system. Lawyers act as their clients' champions, and in nearly all circumstances may (and should) take advantage of an adversary's oversight or other mistake.

Bars' unanimous approval of lawyers filing time-barred claims reflects their recognition of this basic concept underlying the adversarial system.

Case Law

Interestingly, courts have vigorously debated the propriety (under various rules and statutes -- not ethics principles) of lawyers filing claims that they know are vulnerable to dispositive affirmative defenses.

Perhaps this debate implicates principles other than the type of balancing inherent in the ethics rules. After all, courts might believe that plaintiffs filing such vulnerable claims not only put defendants at risk of liability that they might not deserve (had they hired a competent lawyer), but also use up valuable judicial time and resources. In other words, courts might be focusing as much on their own dockets as on the purity of the adversarial system.

In 1991, the Fourth Circuit issued an opinion that has come to typify judicial criticism of plaintiffs filing a complaint in the face of an obvious dispositive affirmative defense. In Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991), plaintiffs filed

a defamation action after Virginia's one-year limitation period had expired. To be sure, plaintiffs did not drop their claim after defendants raised the statute of limitations issue. The court explained that "[i]t was not until the district judge later questioned [plaintiff] specifically about the defamation count that [plaintiff] conceded that the statute of limitations is one year on a defamation count." Id. at 1384.

The court harshly condemned plaintiff.

Even had Brubaker dropped the claim as soon as the limitations argument was raised, we would still conclude that a plaintiff cannot avoid Rule 11 sanctions merely because a defense to the claim is an affirmative one. A pleading requirement for an answer is irrelevant to whether a complaint is well grounded in law. Were we to follow plaintiffs' suggestion, we would be permitting future plaintiffs to engage in the kind of "cat and mouse" game that Brubaker engaged in here: alleging a time-barred claim to see whether the defendants would catch this defense, continuing to pursue the claim after a defendant pointed out that it was time-barred, urging the court not to dismiss the claim, and finally conceding without argument to the contrary that the claim was time-barred. . . . Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions.

Id. at 1384-85 (emphases added; footnote omitted). The Fourth Circuit extensively condemned what it called the "cat and mouse game" inherent in filing a time-barred claim.

We note that we can see no logical reason why the "cat and mouse game" would not be extended beyond situations concerning affirmative defenses. A future plaintiff could raise any claim invalid according to existing precedent, hoping that the defendant would be careless and not find that precedent. In a hearing for Rule 11 sanctions, the plaintiff could then claim that it was up to the defendant to argue that the precedent barred the plaintiff's claim. Were we to accept plaintiffs' theory in our case, that future plaintiff

would successfully avoid Rule 11 sanctions. Such a result would effectively abolish Rule 11.

Id. at 1384 n.32. The court ultimately upheld Rule 11 sanctions against the plaintiff.

The Fourth Circuit's opinion has received widespread criticism. For instance, noted authors Geoffrey Hazard and W. William Hodes included the following critique in their widely-quoted The Law of Lawyering.

Theoretically, opposing counsel may fail to assert the statute of limitations defense because of incompetence, for example, or because counsel has successfully urged that the client forego the defense on moral or social grounds. Furthermore, a defendant might waive the defense because he wants to achieve vindication in a public forum, or to reassert the allegedly defamatory remarks. . . .

. . . .

In the Brubaker case, however, the Fourth Circuit rejected this line of reasoning, characterizing L's litigating strategy as "a cat and mouse game" in which she would catch the opposition unawares if she could, but would otherwise quickly dismiss the suit in an attempt to avoid sanctions. This approach seems wrong, for it requires the plaintiff's attorney to anticipate defendant's every move. . . . The whole point of an adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, §3.1:204-2, at 558.2 to 558.4 (1996 Supp.) (emphasis added; footnote omitted).

Since the Fourth Circuit's harsh decision in Brubaker, courts have continued to debate the proper judicial reaction to a claim for which there is an affirmative defense.

Some courts follow the Brubaker approach. See, e.g., Gray Diversified Asset Mgmt. v. Canellis, No. CL 2007-15759, 2008 Va. Cir. LEXIS 147, at *11 (Va. Cir. Ct. Oct. 7, 2008) (Thacher, J.) ("The Court finds that either reviewing the Court's file or

reviewing the trial transcript would have placed a reasonable and competent attorney on notice that the claims pressed in the instant action are barred by res judicata."; awarding sanctions of over \$25,000 against a lawyer from the Venable law firm for filing a claim that the court found was barred by res judicata).

Interestingly, a district court within the Fourth Circuit took exactly the opposite approach. In In re Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008), the Eastern District of Virginia Bankruptcy Court addressed several proofs of claim that an assignee of credit card debt filed five years after the statute of limitations had expired. When the debtors noted that the proofs of claim were time-barred, the assignee creditor sought to withdraw the claims. The debtors resisted the motion to withdraw, and sought sanctions for filing "false" or "fraudulent" claims under a bankruptcy rule. Thus, the court dealt with time-barred claims in the context of a bankruptcy rule rather than under Rule 11, the ethics rules or some other prohibition on filing frivolous claims. Surprisingly, the court did not cite Brubaker, despite its holding in this analogous context.

In Varona, the assignee creditor (PRA) stipulated to the procedure that it often followed in bankruptcy cases.

In the ordinary course of business, PRA files proofs of claim in bankruptcy cases across the country. It is not uncommon for PRA to file proofs of claim on accounts that would be beyond the applicable statute of limitations for filing a collection suit. If an objection is filed to such a claim and such objection properly asserts the affirmative defense of the statute of limitations, PRA is willing to withdraw its claim or to allow such objection to be sustained.

Id. at 710 (emphasis added).

The Court first explained that

[i]n Virginia, a debt for which collection action has become barred by the running of a statute of limitations is not extinguished; rather, the bar of the statute operates to prevent enforcement.

Id. at 722. Thus, Virginia recognizes the statute of limitations as an affirmative defense.

Where a party pleads the statute of limitations as a defense, that party has the burden of showing by a preponderance of the evidence that the cause of action arose prior to the statutory period before the action was instituted.

Id. at 723. The Court had no problem with the assignee PRA filing knowingly time-barred proofs of claim.

An examination of Claim Number 1 and Claim Number 9 convinces the Court that these claims are neither false nor fraudulent. The claims facially indicate the circumstances under which they were incurred; there is no attempt to obfuscate the timing of their incurrence so as to mask the potential bar of time. Most importantly, while collection of the claims is arguably time-barred, under Virginia law the debts continue to exist. The bar of the statute of limitations raised by the Varonas in their Claim Objections prevents enforcement of the claims, but the claims are not extinguished. As such, asserting the claims in the bankruptcy of the Varonas does not render the claims either "false" or "fraudulent," and the imposition of sanctions is not appropriate.

Id. at 723-24 (emphases added). The Court likewise seemed untroubled by PRA's admission that it filed time-barred claims in the "ordinary course" of its business, but withdraws the claims (or allows objections to be sustained) whenever a debtor asserts the statute of limitations as an affirmative defense.

Other courts have tried to craft a middle ground position. Even before the Brubaker decision, the Tenth Circuit articulated a standard that analyzed whether the plaintiff could present a "colorable argument" why an obvious affirmative defense did

not apply. If so, they could avoid sanctions for filing a claim subject to a dispositive affirmative defense.

We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. . . . An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable.

White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990) (emphasis added).

Several years later, the Eleventh Circuit took essentially the same approach in

Souran v. Travelers Insurance Co.:

[P]laintiffs need not refrain from filing suit to avoid Rule 11 sanctions simply because they know that defendants will interpose an affirmative defense. Two other circuits have held that the assertion of a claim knowing that it will be barred by an affirmative defense is sanctionable under Rule 11. See Brubaker v. City of Richmond, 943 F.2d 1363, 1383-85 (4th Cir. 1991); White v. General Motors Corp., 908 F.2d 674, 682 (10th Cir. 1990). Here, however, Souran did not know that counts I and II would suffer defeat at the hands of Travelers' fraudulent procurement defense. 'An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable

affirmative defense is inapplicable in a given situation.' White, 908 F.2d at 682. In no way do the facts unequivocally establish that Travelers' affirmative defense of fraudulent procurement would succeed. At most, the facts are inconclusive and present a jury question as to whether Mr. Von Bergen fraudulently procured the policy. In the fact of such uncertainty, Rule 11 sanctions on counts I and II were not proper.

Souran v. Travelers Ins. Co., 982 F.2d 1497, 1510 (11th Cir. 1993).¹

One article also suggested this type of middle ground.

While laudable as an effort to deter hopeless filings and preserve court and party resources, treating a claim as legally or factually deficient and subject to Rule 11 sanctions because of an affirmative defense that a defendant may or may not assert constitutes a reordering of the burdens of pleading as defined by the underlying substantive law. The goal of deterrence can be better accomplished by judicially imposed sanctions, not for factual or legal deficiency, but rather as a pleading asserted for an improper purpose. When a defense is obvious, that is, when plaintiff has access to all information necessary to assess the merits of the defense that plaintiff knows defendant will assert, there can be no proper reason for filing a claim which has no chance of succeeding and court initiated Rule 11 sanctions should be imposed. Where plaintiff does not know whether the defense will be raised and files the action, sanctions should follow if the plaintiff refuses to immediately dismiss the action once a dispositive affirmative defense is asserted. With this

¹ Accord Leeds Bldg. Prods., Inc. v. Moore-Handley, Inc. (In re Leeds Bldg. Prods., Inc.), 181 B.R. 1006, 1010, 1011 (Bankr. N.D. Ga. May 10, 1995) ("Affirmative defenses normally are raised after an action is commenced, and the evidence needed to establish the merits of such a defense is sought through the discovery process. To accept the argument Moore-Handley current is asserting, however, would, in effect, require a plaintiff to conduct discovery prior to filing a complaint. Such a requirement contravenes the purpose of notice pleading embodied in the Federal Rules of Civil and Bankruptcy Procedure. Therefore, this Court declines to find a general requirement in Rule 9011 that a plaintiff has to make a prefiling investigation into possible affirmative defenses. Instead, the Court concludes that Rule 9011, and likewise Rule 11, places no prefiling duty upon a plaintiff to conduct an inquiry into possible affirmative defenses, except in those unusual or extreme circumstances where such a defense is obvious and needs no discovery to establish." (emphasis added); "In fact, the Court finds it hard to imagine any preference action in which the ordinary course of business defense would be so obvious as to make a preference complaint a bad faith filing. It was proper in this proceeding for Leeds to first file its complaint and then utilize the discovery process to determine the validity of Moore-Handley's defense. . . . [T]he fact that Moore-Handley notified Leeds that it would assert such a common defense did not make the defense an obvious one."; denying sanctions).

approach, deterrence is accomplished and no one's time is wasted by a plaintiff who refuses to accept the obvious. Most importantly, a rule of procedure is not used to add to the elements of plaintiff's prima facie case, and traditional burdens of pleading are preserved.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1063-64 (1996-1997).

The Hazard and Hodes text which criticized Brubaker's extreme position also criticizes the courts taking the other extreme (which allows a responding party to assert essentially any conceivable affirmative defense, regardless of its merits).

However, this objection to the result in Brubaker is itself troublesome, for it has no limiting point and would completely swallow Rule 11: it could justify filing the most bizarre court papers, so long as it remained theoretically possible that the opposition would bungle or waive any objections. The Fourth Circuit may have drawn the line at the wrong place in Brubaker, but its recognition that a line must be drawn is correct.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §3.1:204-2, at 558.4 (1996 Supp.) (emphases added).

These courts' efforts to draw such a fine line create a standard nearly impossible to define with any certainty. In essence, it creates two levels of analysis. First, the litigant asserting a claim would have to establish that the claim was not frivolous under some vaguely defined standard. Second, the party responding to the claim with some affirmative defense would have to establish that the affirmative defense is not frivolous -- under some equally vague standard.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

Multiple Representations -- Special Rules for Aggregate Settlements

Hypothetical 16

You have built a lucrative practice representing homeowners in lawsuits against pest control companies for negligent termite treatment of new homes. In some cases, you represent incorporated neighborhood associations, and in other situations you represent groups of homeowners who have jointly hired you to pursue their claims. In recent years, you have found that defendants generally like to "wrap up" litigation by paying one lump sum to settle an entire lawsuit. To ease your administrative burden, your standard retainer agreement calls for your clients to agree in advance to decide whether or not to take such a "lump sum" settlement offer by majority vote of the homeowners involved.

- (a) Is such an approach ethical in cases where you represent an incorporated neighborhood association?

YES

- (b) Is such an approach ethical in cases where you represent a group of individual homeowners?

NO

Analysis

(a) If a lawyer represents a corporate entity, the lawyer must follow the directions of the corporation's duly represented board and management. If your corporate client has set up a procedure for deciding whether to accept an offer, you may follow the results of that process.

(b) Most states' ethics rules contain a specific provision covering what are called "aggregate settlements." These are settlements that are contingent on all of the clients accepting the settlement -- each of the lawyer's clients may essentially "veto" the settlement by refusing to accept it.

ABA Rule 1.8(g) prohibits lawyers from entering into such aggregate settlements unless each client approves the settlement, after full disclosure of what all of the other clients are receiving in the settlement.

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

ABA Rule 1.8(g).

The ABA recently provided some explanation of how the aggregate settlement rule works. In ABA LEO 438 (2/10/06), the ABA noted that such settlements are not defined in the Model Rules, but do not include certified class actions or derivative actions.

The ABA's description of the type of arrangements subject to the aggregate settlement rule highlights the vagueness of the concepts and the possible breadth of the rule. For example, aggregate settlements occur "when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas," even if all of the lawyer's clients do not face criminal charges, have the same claims or defenses, or "participate in the matter's resolution." ABA LEO 438 (2/10/06).

Aggregate settlements may arise in connection with a joint representation in the same matter, but "[t]hey also may arise in separate cases" -- as with "claims for breach of warranties against a home builder brought by several home purchasers represented by the same lawyer, even though each claim is filed as a separate law suit and arises with respect to a different home, a different breach, and even a different subdivision." Id.

Similarly, the ABA explained how settlement offers can trigger the aggregate settlement rule. For instance, "a settlement offer may consist of a sum of money offered to or demanded by multiple clients with or without specifying the amount to be paid to or by each client." Id. The aggregate settlement rule can also become an issue when "a claimant makes an offer to settle a claim for damages with two or more defendants," or when "a prosecutor accepts pleas from two or more criminal defendants as part of one agreement." Thus, a lawyer's adversary has the perverse power to trigger the aggregate settlement rule in the way that the adversary frames a settlement offer.

As the ABA explained it, Model Rule 1.8(g) "deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement." Id.

The ABA cited several decisions confirming that lawyers may not enter into agreements "that allow for a settlement based upon a 'majority vote' of the clients" the lawyer represents. The ABA explained that "[b]est practices would include the details of the necessary disclosures in . . . writings signed by the clients." Information required to be disclosed under ABA Model Rule 1.8(g) might be protected by Model Rule 1.6, which requires the clients' consent for disclosure to the other clients. The ABA also explained that

[t]he best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement.

Id. ABA LEO 438 (2/10/06). Lawyers should also advise their clients "of the risk that if the offer or demand requires the consent of all commonly-represented litigants, the

failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand." Id.

State bars generally follow this approach. See, e.g., Virginia LEO 616 (11/13/84) (a lawyer representing several insureds may not arrange an aggregate settlement to which one of the clients objects).

Courts agree that because each client must accept the settlement after full disclosure, this rule prohibits lawyers from having their clients agree in advance to be bound by a "majority vote" of all of the clients at the time they receive a settlement offer. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975) (a lawyer cannot settle a case for multiple plaintiffs by majority vote).

In some situations, there might be some debate about whether a settlement for multiple clients amounts to an "aggregate settlement" governed by the rule. For instance, in Arthorlee v. Tuboscope Vetco International, Inc., 274 S.W. 3d 111 (Tex. App. 2008), petition for review filed, No. 08-0990 (Tex. Nov. 25, 2008), a plaintiff's lawyer represented 176 plaintiffs alleging injury caused by exposure to silica while working for one of the defendants. The lawyer notified all of his clients of an upcoming mediation, and urged all of them to attend the mediation. Eventually the settlement discussion settled on a total figure for all of the plaintiffs.

After several days of fruitless mediation about which factors should be used to value the plaintiffs' claims, they switched gears and decided to talk about a total amount of money needed to resolve all the claims at one time. Appellees' [defendants] attorney agreed that so long as the individual demands did not exceed \$45 million, he would recommend to his clients and their many insurance carriers to settle the claims, but only if 95% of Smith's clients agreed. They signed a Rule 11 agreement memorializing their

understanding, although the Rule 11 agreement did not include the \$45 million figure -- or any sum of money -- for settling Smith's inventory of claims.

274 S.W.3d at 116 (footnote omitted). The plaintiffs' lawyer then sent each of his clients a letter with a calculated amount of that client's settlement using a matrix that the lawyer had devised.

The letters were substantially the same, except for the settlement amounts, which, for the appellants, ranged from \$209,000 to \$662,000, and which were characterized as a "final offer" made by defendants. All but one or two plaintiffs of the 178 or 179 pending claims agreed to settle.

Id. (footnote omitted).

Approximately three years after signing their settlement agreements, several of the plaintiffs later fired their lawyer and hired another lawyer. Among other things, they claimed that their first lawyer had "fraudulently induced them to enter into an impermissible aggregate settlement." Id. at 117. The plaintiffs sought to void their original settlements as improper under Texas's aggregate settlement rule.

In denying plaintiffs' claims, the court held that

[a]n aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.

Id. at 120. The court found that plaintiffs had not been involved in an aggregate settlement governed by the Texas rule.

We find no authority -- and they do not direct us to any -- that proscribes the manner in which negotiations must occur or that requires haggling or horse-trading between the parties. After the mediation, appellants made settlement demands on appellees, based on factors specific to each of their claims, and appellees accepted their demands and paid them. This is the essence of negotiation.

Thus, there were individual negotiations on behalf of appellants. The Rule 11 agreement did not actually settle any case, let alone all of the cases as an aggregate settlement. No amount of money was stated in the Rule 11 agreement, and, indeed, the Rule 11 agreement did not bind the defendants to a lump sum to be paid to the plaintiffs' lawyers and divided among his clients.

Id. at 121. The court also noted that "each appellant's case was settled individually, after a lengthy negotiation process involving individual offers and acceptances. Shank [counsel for defendants] explained that each settlement had to be negotiated individually in order to determine issues of insurance coverage and allocation." Id.

Interestingly, a dissenting judge vehemently disagreed with the majority, and contended that the plaintiff's first lawyer had violated the aggregate settlement rule.

It is undisputed that, in this case, appellants' counsel violated Rule 1.08(f). The plaintiffs' attorneys not only failed to disclose to their clients, including appellants, "the existence and nature of all the claims or pleas" involved in the settlement and "the nature and extent of the participation of each person in the settlement," they also actively misrepresented that the settlement was not an aggregate settlement when it was, that their claims had been individually negotiated when they had not been, and that the number of claimants was smaller than in fact it was. . . . Therefore, appellants' counsel *not only violated Rule 1.08(f) and breached their fiduciary duties to their clients, they also committed fraud.*

Id. at 126-27 (Keyes, J. dissenting) (emphasis in italics added). The dissenter contended that all the settlements were part of a single \$45,000,000 amount discussed during the mediation.

The majority's factual finding that the plaintiffs' claims were individually negotiated is belied by the record, which plainly shows that all claims were negotiated as part of a single global settlement of the claims of all plaintiffs represented by Smith for a fixed sum of money and apportioned according to a matrix agreed upon by counsel for both plaintiffs and

defendants. Its conclusion that a single global settlement of the claims of multiple individual plaintiffs that satisfies these criteria is not an aggregate settlement is contradictory to the definition of an aggregate settlement

Id. at 129. The dissenter also thought that the defendants had participated in the fraud.

[T]he settling defendants withheld the information that each plaintiff's settlement was part of a \$45 million aggregate settlement, and they falsely represented to each plaintiff in documents they drafted that "Defendant's payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits"; that "Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims"; and that "Defendants have not made any aggregate offer and this settlement is not part of any aggregate settlement."

Id. at 130.

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **NO**.

Affirmative Statements of Value or Intent

Hypothetical 17

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES (MAYBE)

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

MAYBE

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless statements of intent and wrongful statements of fact. Most authorities label the former

"puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an

undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.¹

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be

¹ ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

A proposed 2014 California legal ethics opinion distinguished between statements that amount to harmless "puffery" and those that cross the line into knowing misrepresentations. Some statements clearly fall into the former category.

- Proposed California LEO 12-0007 (1/24/14) (finding as permissible "puffing" the following example: "Attorney's inaccurate representation regarding Plaintiff's 'bottom line' settlement number." (emphasis added); "As explained in ABA Formal Opn. No. 06-439, statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere 'puffery,' are not false statements of material fact and thus, do not constitute an ethical violation and are not fraudulent or deceitful. In fact, a party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise."; "Here, Attorney's inaccurate representation regarding the Plaintiff's 'bottom line,' settlement number is allowable 'puffery' rather than a misrepresentation of a material fact. Attorney has not committed an ethical violation by overstating Plaintiff's 'bottom line' settlement number. Moreover, Attorney revealing actual 'bottom line' could be a violation of Business and Professions code section 6068(e).").

Some statements fall at the other end of the spectrum, and constitute improper misrepresentations.

- Proposed California LEO 12-0007 (1/24/14) (finding the following to be examples of impermissible statements of representation of fact: "Attorney's misrepresentation about the existence of a favorable eyewitness." (emphasis added); "Attorney's inaccurate representations to the settlement officer (which Attorney intended be conveyed to Defendant and Defendant's lawyer) regarding Plaintiff's wage-loss claim." (emphasis added); "Defendant's lawyer's representation that Defendant's insurance policy is for \$50,000 although it is really \$500,000." (emphasis added)).

The proposed California legal ethics opinion also analyzed a statement that could fall into either category, depending on the facts.

- Proposed California LEO 12-0007 (1/24/14) (examining the following scenario: "Defendant's lawyer also states that Defendant is prepared to litigate the matter and might simply file for bankruptcy if Defendant does not get a defense verdict. In fact, Defendant has a \$500,000 insurance policy. Further, Defendant has no plans to file for bankruptcy and has never discussed doing so with his lawyer." (emphasis added); analyzing the following example based on that scenario: "Defendant's lawyer's representation that Defendant will litigate the matter and file for bankruptcy if there is not a defense verdict."; "Whether Defendant's lawyer's representation regarding Defendant's plans to file for bankruptcy constitutes a permissible negotiating tactic will depend on the specific facts at hand. For example, if Defendant's lawyer knows that Defendant does not qualify for bankruptcy protection, threatening protection, threatening that Defendant intends to file in order to gain a negotiating advantage would constitute an impermissible intentional misrepresentation of a material fact intended to mislead Plaintiff and Attorney regarding Defendant's financial ability to pay. However, if Defendant's lawyer believes in good faith that bankruptcy is an available option for Defendant, even if unlikely, a statement by Defendant's lawyer that Defendant could or might consider filing for bankruptcy protection would likely be a permissible negotiating tactic, rather than a false statement of material fact." (emphasis added)).

(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

An ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$ 200, when, in reality, it is willing to accept as little as \$ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion

as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think \$90,000 will settle this case. Will your client give \$90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

Best Answer

The best answer to (a) is **(A) YES**; the best answer to (b) is **(A) MAYBE YES**; the best answer to (c) is **MAYBE**.

1/15

Silence about Facts

Hypothetical 18

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients' cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

- (a) May you remain silent if an adversary demands the full amount of what it understands to be your client's insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

NO

- (b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

MAYBE

- (c) May you remain silent when an adversary makes a \$100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a \$1,000,000 umbrella liability policy?

MAYBE

Analysis

As in other settlement contexts, the analysis begins with ABA Model Rule 4.1.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1.

Comment [1] provides some explanation.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

This hypothetical deals with silence rather than affirmative statements. Not surprisingly, bars and courts often have a very difficult time determining whether a lawyer may ethically remain silent during settlement negotiations.

(a) The issue here is whether a lawyer must correct a client's misrepresentation to an adversary.

A lawyer must correct such misstatements. For instance, an ABA Section of Litigation article explained that a lawyer learning that her client had lied to the other side must correct the client's lie before consummating a settlement. Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, Litigation Ethics (ABA Section of Litig., Ethics & Professionalism Comm.), Summer 2005, 1.

(b) In this scenario, the adversary has investigated your client's insurance coverage on its own, and failed to discover an insurance policy. Neither you nor your client has misstated anything.

Bars and courts have taken differing positions about a lawyer's duty in this setting.

For instance, the New York County Bar has indicated that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure.

The New York County Bar provided its review of lawyers' duties during negotiations.

A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead.

If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction.

N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (emphases added).

On the other hand, in Pennsylvania LEO 97-107, a settlement agreement was premised on a client's inability to convey a time share by deed. After negotiating the settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the time share by deed. The bar held that the lawyer must disclose the fact that the parties' mutual premise was incorrect.

Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false.

Pennsylvania LEO 97-107 (8/21/97) (emphasis added).

Courts also disagree about what a lawyer must do in this setting.

In Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit reversed a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement). The court first noted that "counsel for Brown could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct." Id. at 175. The circuit court then criticized the lower court's analysis.

[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. "An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court

does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)."

Id. (emphasis added) (citation omitted).

The Sixth Circuit decision noted that the county's lawyer was not certain that the claimant misunderstood the facts.

The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.

Id. at 173. It is unclear whether the court would have reached a different conclusion if the county was certain rather than simply suspicious of the other side's misunderstanding.

More recently, a North Carolina court dealt with a plaintiff's effort to rescind his settlement with a boat manufacturer in an action for breach of warranty and other claims. After settling all of his claims against the boat manufacturer except for post-settlement work on the boat, the plaintiff discovered that while being shipped from the manufacturer's factory to North Carolina, the boat "had been involved in a collision with a tree." Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731 (N.C. Ct. App. 2009).¹ Plaintiff sought to overturn his settlement, but the court rejected his effort.

¹ Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers'

Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement.

Id. at 734. The court also explained that:

Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.

Id. at 736.

manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").

On the other hand, at least one court had punished a lawyer who did not disclose the existence of an additional insurance policy when learning that the other side was not aware of its existence.

- State ex rel. Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who "became aware" at a meeting with a hospital that the hospital was unaware of a third liability insurance policy from which it might seek reimbursement for medical expenses that it paid to the lawyer's client; noting that "[r]ather than disclose the third policy, [the lawyer] negotiated for a release of the hospital's lien based upon [the hospital executive's] limited knowledge"; agreeing that the lawyer "had a duty to disclose . . . the material fact of the [insurance] policy").
- Slotkin v. Citizens Cas. Co. of New York, 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a \$1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

(c) In this scenario, the lawyer reasonably believes that the other side misunderstands the extent of insurance coverage (based on the size of its demand), but does not know for sure that the other side is unaware of the insurance coverage.

One would think that the lawyer's duty in this setting would be somewhat lower than the scenario in which the lawyer knows for sure that the other side is relying on inaccurate factual information.

The New York County Legal Ethics Opinion discussed above apparently would apply the general rule (not requiring disclosure) to a situation in which the adversary's settlement demand was so low that the adversary must not be aware of a large insurance policy.

It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets

to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.

N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03).

As explained above, in Brown v. County of Genessee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit noted that the county's lawyer assumed (but did not know for sure) that a claimant's lawyer misunderstood an important fact. The Sixth Circuit did not indicate whether it would have reached a different conclusion in the case had the county's lawyer known for certain that the claimant's lawyer misunderstood the important fact.

Best Answer

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**; the best answer to (c) is **MAYBE**.

b 8/11

Enforcing Settlement Agreements: General Rule

Hypothetical 19

You recently spent two years litigating a hotly contested case in Washington, D.C. Last week, you attended a private mediation session. After you and the plaintiff's lawyer reached a tentative settlement, the plaintiff's lawyer said that she needed a ten-minute break, and left the meeting for a short time. When the plaintiff's lawyer returned to the meeting, you and she shook hands on what she said was an acceptable settlement. However, you just received a call from the plaintiff's lawyer. She tells you that her client claims not to have given her authority to settle, and therefore refuses to honor the settlement.

May you assure your client that you will be able to enforce the settlement that you reached with the plaintiff's lawyer?

NO

Analysis

This hypothetical comes from a Washington, D.C., case (discussed below), and highlights the states' various approaches to lawyers' authority to settle litigation. The issue involves a mix of statutory law, common law agency principles, and ethics rules.¹

In most agency situations, an agent can bind a principal under several circumstances. First, the agent might have actual authority to act on the principal's behalf in entering into a contract. The actual authority can be express (explicitly given by the principal to the agent) or implied (based on dealings between the principal and the agent). Second, the agent might have "apparent" authority to act on the principal's behalf. This "apparent" authority comes from statements or conduct creating a

¹ Several law review articles have outlined the dramatic differences among states' approaches. Jeffrey A. Parness & Austin W. Bartlett, Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority, 78 Or. L. Rev. 1061 (1999); Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543 (1999).

reasonable belief in the other side that the agent can act for and therefore bind the principal.

Judicial and bar analyses represent a spectrum -- from essentially automatically enforcing agreed settlements to essentially ignoring such settlements if the client balks.

First, some courts follow traditional agency principles in finding that a lawyer can bind her client to a settlement if the lawyer acts with apparent authority. See, e.g., Motley v. Williams, 647 S.E.2d 244, 247 (S.C. Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." Shelton [Shelton v. Bressant, 439 S.E.2d 833 (S.C. 1993)] at 184, 439 S.E.2d at 834 (quoting Arnold v. Yarborough, 281 S.C. 570, 572. 316 S.E.2d 416, 417 (Ct. App. 1984))). This court has held: "[E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud." Arnold at 572, 316 S.E. at 417 (quoting Ex parte Jones, 47 S.C. 393, 397, 25 S.E. 285, 286 (1896))." (emphasis added); enforcing the settlement).

Second, some courts recognize a presumption in favor of the lawyer's authority, and thus in favor of a settlement's enforceability.

For instance, the Second Circuit has acknowledged that "the decision to settle a case rests with the client," and that "a client does not automatically bestow the authority to settle a case on retained counsel." Pereira v. Sonia Holdings, Ltd. (In re Artha

Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir.1996). The Second Circuit nevertheless recognized a presumption that a lawyer has a client's authority to settle a case.

Nevertheless, because of the unique nature of the attorney-client relationship, and consistent with the public policy favoring settlements, we presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so. In accordance with that presumption, any party challenging an attorney's authority to settle the case under such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority.

Id. (emphasis added). In that case, the Second Circuit held that a Rogers & Wells client had not overcome the presumption that its lawyer possessed authority to settle a case. The court affirmed a bankruptcy court's denial of the client's motion to set aside the settlement.

Many other courts have taken this approach.

- XL Ins. Am., Inc. v. BJ's Wholesale Club, Inc., 86 Vir. Cir. 476, 481, 482 (Va. Cir. Ct. 2013) (finding that a lawyer had "apparent authority" to bind a client to a settlement; "Viewing the record in light of the relevant case law, it is the Court's ruling that Mr. Nyce possessed apparent authority to bind BJ's as to both the settlement agreement and the SIR [Self-Insured Retention]. Nothing at the mediation took place to put XL on notice that Mr. Nyce lacked authority to settle the matter or bind BJ's as to the SIR. BJ's sent two attorneys, Messrs. Nyce and Kelly, to attend mediation in their representative capacities. Both attorneys participated actively in the mediation. Like in Singer [Singer Sewing Machine Co. v. Ferrell, 144 Va. 395 (1926)], Mr. Nyce left the negotiating table to confer with his client via telephone. Both attorneys for BJ's advised Mr. Cortese that \$3,000,000 was a good settlement amount. Upon conclusion of the mediation, Mr. Nyce drafted and signed the documents memorializing the settlement agreement, then prepared the final documents ultimately removing this case from Norfolk Circuit docket."; "Mr. Nyce testified at deposition that he 'made it clear to Judge Shadrick, Cortese, everybody else, that [he] was [attending the mediation], but [he] did not have the authority to [. . .] agree to fund [the] BJ's SIR . . . ' Mr. Nyce's testimony to this effect was not corroborated. Importantly, co-counsel for BJ's, Mr. Kelly, did not testify to hearing such a disclaimer. Rather, the record indicates that counsel for BJ's acted in such a

way as to create the reasonable belief that they possessed authority to bind BJ's as to the settlement agreement and \$500,000 SIR."; "The facts here are closer to Singer than they are to Walson. In Walson, the attorney in question ended negotiations with an explicit disclaimer of authority with respect to a particular issue. Notwithstanding this disclaimer, he appeared the following day and executed a settlement agreement against his client's wishes. Moreover, the attorney in that case repeatedly sent to his client for endorsement draft settlement agreements, indicating that his client's signature, rather than his own, would be required to bind the parties to settlement. Neither of these facts are presented by the record."; "Here, Mr. Nyce consulted with his client during the mediation on several occasions, returning each time to continue the process. At no point did he indicate that BJ's was unwilling to settle, nor did negotiations break down following one of these consultations. Rather, each time he returned to the table, negotiations continued, ultimately resulting in an agreement signed by Mr. Nyce. All of his actions created the reasonable belief that he possessed the authority to bind BJ's to the agreement and SIR.").

- Messer v. Huntington Anesthesia Grp., Inc., 664 S.E.2d 751, 759, 760 (W. Va. 2008) ("When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed."; finding that the party challenging the settlement had not overcome the "strong presumption" that the settlement should be enforced).
- Collick v. United States, 552 F. Supp. 2d 349, 353 (E.D.N.Y. 2008) ("[A] party challenging an attorney's settlement authority bears the burden of showing that the attorney lacked authority to settle."; refusing to enforce the settlement agreement).
- Joseph v. Worldwide Flight Servs., Inc., 480 F. Supp. 2d 646, 653 (E.D.N.Y. 2007) ("A client who seeks to set aside a settlement entered into by his attorney 'bears the burden of proving by affirmative evidence that the attorney lacked authority.' . . . Thus, in order to set aside the settlement agreement and stipulation of discontinuance, Joseph must show with 'clear evidence,' . . . that Ronai entered into the settlement and stipulation without his consent or approval. This burden of proof is 'not insubstantial.'" (citation omitted); recommending that the court enforce a settlement agreement).
- Am. Prairie Constr. Co. v. Tri-State Fin., LLC, 529 F. Supp. 2d 1061, 1076-77 (D.S.D. 2007) ("While an attorney's authority to settle must be expressly conferred, the existence of the attorney of record's authority to settle in open court is presumed unless rebutted by affirmative evidence that authority is lacking." . . . Clients are held accountable for acts and omissions of their attorneys. . . . The rules for determining whether settlement authority has been given by the client to the attorney are the same as those which govern other principal-agent relationships. . . . The party who denies that the

attorney was authorized to enter into the settlement has a heavy burden to prove that authorization was not given. . . . Also, a client's failure to object timely to his or her attorney's action taken without the client's consent may be deemed to be acquiesced by the client."; remanding to the bankruptcy court for an analysis of the settlement agreement's enforceability).

- Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 610 (E.D. Tex. 1998) ("An attorney retained for litigation is presumed to possess express authority to enter into a settlement agreement on behalf of the client. . . . The client bears the burden of rebutting this presumption with clear evidence that the attorney lacked settlement authority."; finding that the client had not overcome that presumption; granting defendants' motion to enforce a settlement agreement).
- Sorensen v. Consol. Rail Corp., 992 F. Supp. 146, 149 (N.D.N.Y. 1998) (acknowledging that "[o]nly the principal can act to bestow apparent authority upon an agent," and thus an "agent cannot unilaterally obtain this authority"; nevertheless recognizing that "[w]hen the attorney of record enters into a settlement agreement, there is a presumption that the attorney had authority to do so. . . . The party seeking to prove a lack of settlement authority 'bears the burden of proving by affirmative evidence that the attorney lacked authority.'" (citations omitted); finding that the client had not carried its burden of overcoming the presumption granting defendant's motion to enforce an oral settlement agreement).
- HNV Cent. Riverfront Corp. v. United States, 32 Fed. Cl. 547, 549-50 (Fed. Cl. 1995) ("It is well established that 'an attorney retained for litigation purposes is presumed to possess express authority to enter into a settlement agreement on behalf of the client, and the client bears the burden of rebutting this presumption with affirmative proof that the attorney lacked settlement authority.'" Amin v. Merit Systems Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991) (emphasis added). Thus unless HNV rebuts this presumption with affirmative proof, HNV's attorney is presumed to have had the express authority to settle this case by dismissing it with prejudice. HNV, however, has provided no such proof. In fact, HNV has failed to respond to this motion."; granting defendant's motion to enforce a settlement agreement).
- Shields v. Keystone Cogeneration Sys., Inc., 620 A.2d 1331, 1333-35 (Del. Super. Ct. 1992) ("The applicable principle is that authority given by a client to his attorney to settle a case when exercised by the attorney in accordance with the terms of the authority culminating in settlement of litigation is binding upon the client. . . . This principle applies even though the client attempts to repudiate that authority after settlement has been reached by the attorney. . . . An agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement. . . . The burden is upon the party who challenges the authority

of the attorney to overcome the presumption of authority."; approving a stipulation of settlement over clients' objection).

Third, some states apply just the opposite presumption -- requiring the party seeking to enforce the settlement to prove the lawyer's authority (rather than requiring the challenger to establish lack of authority). These courts rely on the ethics rules' allocation of authority.

Under ABA Model Rule 1.2(a), lawyers "shall abide by a client's decision whether to settle a matter." Comment [1] explains that clients and lawyers can allocate the decision-making process between them, but that major decisions "such as whether to settle a civil matter, must . . . be made by the client." ABA Model Rule 1.2 cmt. [1] (emphasis added).

Similarly, Restatement (Third) of Law Governing Lawyers § 22 cmt. c (2000) explains that "[t]his Section forbids a lawyer to make a settlement without the client's authorization." That comment warns that "[a] lawyer who does so may be liable to the client or the opposing party . . . and is subject to discipline." Id. The comment then explains that:

The Section allows a client to confer settlement authority on a lawyer, provided that the authorization is revocable before settlement is reached. A client authorization must be expressed by the client or fairly implied from the dealings of lawyer and client. Thus, a client may authorize a lawyer to enter a settlement within a given range. A client is bound by a settlement reached by such a lawyer before revocation.

Id.

Thus, several states have refused to enforce settlement agreements entered into by a lawyer absent some evidence that the lawyer possessed actual authority to resolve the case.

For instance, in Brewer v. National Railroad Passenger Corp., 649 N.E.2d 1331 (Ill. 1995), the Illinois Supreme Court reversed a lower court's enforcement of a personal injury settlement. The court explained the general Illinois principles.

Turning to the merits, the controlling legal principles are quite settled. The authority of an attorney to represent a client in litigation is separate from and does not involve the authority to compromise or settle the lawsuit. An attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so. . . .

Where a settlement is made out of court and is not made a part of the judgment, the client will not be bound by the agreement without proof of express authority. This authority will not be presumed and the burden of proof rests on the party alleging authority to show that fact. . . . Further, in such a case, opposing counsel is put on notice to ascertain the attorney's authority. If opposing counsel fails to make inquiry or to demand proof of the attorney's authority, opposing counsel deals with the attorney at his or her peril.

Id. at 1333-34 (emphases added). The Illinois Supreme Court noted that the record "contains affirmative uncontradicted evidence that plaintiff did not expressly authorize his attorney to agree that plaintiff would quit his job," and therefore reversed the lower court's enforcement of the settlement. Id. at 1334.

Similarly, in New England Educational Training Service, Inc. v. Silver Street Partnership, 528 A.2d 1117 (Vt. 1987), the court reversed a trial court's decision to

enforce a settlement agreement. The court characterized the plaintiff's argument in favor of enforcing the settlement.

Plaintiff's argument is that retention of an attorney with express authority to negotiate a settlement, which defendant's attorney had in this case, combined with an extensive history of negotiations, implies the power to reach a binding agreement. While this Court has never addressed this precise question, other courts have concluded that an attorney does not have implied authority to reach a binding agreement under these circumstances.

Id. at 1119-20. The court rejected plaintiff's argument.

We think that these decisions are specialized applications of the general rule, supported by the weight of the authority, that an attorney has no authority to compromise or settle his client's claim without his client's permission . . . [A]n important distinction must be drawn between an attorney's authority to conduct negotiations and his authority to bind his client to a settlement agreement without express permission. The latter is within the ambit of the subject matter of litigation, which remains at all times within the control of the client, and cannot be implied from authority to conduct negotiations. Accordingly, we hold that retention of an attorney to represent one's interest in a dispute, with instructions to conduct settlement negotiations, without more, does not confer implied authority to reach an agreement binding on a client.

Plaintiff's argument that our holding will undercut the policy in favor of settlement agreements is unpersuasive. First, the incentives for all parties to settle litigation are not affected by our holding today. While our holding will restrict the enforceability of unauthorized agreements against clients, it does not follow that settlement will be discouraged. Rather, the primary effect of this decision will be to "encourage attorneys negotiating settlements to confirm their, or their opponent's, actual extent of authority to bind their respective clients." . . . More importantly, the client's control over settlement decisions is preserved.

Id. at 1120 (emphases added).

Several states take this approach.

- Wells Fargo Bank, N.A. v. Green, Civ. A. No. 3:10-CV-67, 2011 U.S. Dist. LEXIS 23113, at *2, *4 (W.D. Va. Mar. 7, 2011) ("Under Virginia law, 'it is well settled that a compromise made by an attorney without authority . . . will not be enforced to the client's injury' Walson v. Walson, 37 Va. App. 208, 556 S.E.2d 53, 56 (Va. Ct. App. 2001) (quoting Singer Sewing Machine Co. v. Ferrell, 144 Va. 395, 132 S.E. 312, 315 (Va. 1926). The attorney's authority to settle a case may be actual or apparent. See Dawson v. Hotchkiss, 160 Va. 577, 169 S.E. 564, 566 (Va. 1933). As Plaintiff's counsel has represented that he lacked actual authority to enter the alleged agreement, and there is no evidence to the contrary, the court will only consider whether counsel had apparent authority."; "[T]here is no evidence before the court that Plaintiff made any verbal or nonverbal representation that Plaintiff's counsel had authority to enter a settlement agreement. Under Virginia law, it is not sufficient that Plaintiff's counsel was an attorney, retained by Plaintiff, and authorized to negotiate."; declining to enforce the settlement).
- Alper v. Wiley, 81 Va. Cir. 212, 213 (Va. Cir. Ct. 2010) ("Long standing precedent in Virginia makes clear that an attorney, simply by reason of his or her employment, does not have the authority to compromise his or her client's claim. . . . Generally, the scope of the agent's authority in dealings with third parties is that authority which the principal has held the agent out as possessing or which the principal is estopped to deny. . . . Evidence of apparent authority of an attorney to bind the client to a settlement agreement must find support in the record."; "The authority of the attorney to bind his client cannot be proved by his or her declarations, acts, or conduct alone."; declining to enforce the settlement).
- Andrews v. Andrews, 80 Va. Cir. 279, 282 (Va. Cir. Ct. 2010) ("An attorney may not bind his client[] to a settlement absent the client's express authority. . . . This has long been a proposition of settled law with which sophisticated commercial parties such as Insurance companies should be well familiar[.] It is clear from the evidence here that the plaintiff did not authorize Conrad to enter into the settlements claimed, was unaware that he had taken the actions he took, and received none of the funds tendered by the defendants to him. In short the evidence is wholly devoid of any showing that Conrad [lawyer] acted within the terms of his actual authority or any implied authority."; "A client may, as principal, imbue his attorney with apparent authority to settle a claim."; "It is essential, in determining the scope of any apparent authority, to look at the actions of the client, however, for it is clear that the attorney can never [b]e the architect of his own mandate. . . . The apparent authority must be the product of a belief that is 'traceable to the principal's manifestations.' Restatement (Third) of Agency §2.03 (2006). Manifestation by the principal is the *sine qua non* to any creation of apparent authority."; "A decision to settle a claim is the client's alone. . . . And while

rationing a lawyer may vest [him] with apparent authority to do all acts reasonably calculated to advance the client's interests, it may never be the sole source for a finding of apparent authority to compromise them."; declining to enforce the settlement).

- Walson v. Walson, 556 S.E.2d 53, 55, 57 (Va. Ct. App. 2001) (rejecting a trial court's finding that a wife had given her lawyer apparent authority to settle a case, despite the undisputed fact that the lawyer repeatedly spoke by telephone to his client (the wife) during the settlement negotiation, and told the husband's lawyer "that wife had agreed" to the proposed settlement; "Through her conduct, wife plainly held Byrd [lawyer] out as possessing the authority to conduct settlement negotiations on her behalf. She permitted him to attend the two negotiation meetings and to relay her offers and counteroffers to husband and Schell [opposing lawyer], as well as her rejections and acceptance of husband's offers and counteroffers. However, nothing in the record indicates that wife held out Byrd as possessing the authority to execute the final property settlement agreement on her behalf."; declining to enforce the settlement).
- Magallanes v. Ill. Bell Tel. Co., 535 F.3d 582, 584, 585 (7th Cir. 2008) ("Under Illinois law, an attorney has no authority to settle a claim of the client absent the client's express authorization to do so. . . . An attorney's authority to agree to an out-of-court settlement will not be presumed, and the burden of proof rests on the party alleging authority to show that fact."; finding for the second time that a trial court had abused its discretion in enforcing a settlement, and remanding for reinstatement of the case; explaining that "lest there be any lingering doubt as to our intent, this case must proceed to decision on the merits").
- Price v. Bowen, 945 A.2d 367, 368 (Vt. 2008) ("[The Vermont Supreme Court] ha[s] long recognized 'the general rule, supported by the weight of the authority, that an attorney has no authority to . . . settle his client's claim without his client's permission.' . . . A 'settlement is valid only if defendant was found to have granted express authority to settle on those terms.'" (citation omitted); remanding for a hearing "as to the authority of defendant's attorney to enter the disputed settlement").
- Kulchawik v. Durabla Mfg. Co., 864 N.E.2d 744, 749 (Ill. App. Ct. 2007) ("An attorney who represents a client in litigation has no authority to settle a claim of the client absent the client's express authorization to do so. . . . Where a settlement is made out of court and not made part of the judgment, the client will not be bound by the agreement without proof of express authority. . . . The party alleging authority has the burden of proving that fact. . . . The plaintiffs point to no evidence that Moser [defendant's president] expressly authorized Meyer to settle the lawsuits on behalf of Durabla. Meyer had

been retained by Durabla's insurance company."; enforcing a settlement agreement).

- BP Prods. N. Am., Inc. v. Oakridge at Winegard, Inc., 469 F. Supp. 2d 1128, 1134-35 (M.D. Fla. 2007) ("In Florida, the party seeking to enforce the settlement agreement must establish that counsel for the opposing party was given the clear and unequivocal authority to settle the case by his or her client. See, e.g., Spiegel [Spiegel v. Holmes, 834 So. 2d 295 (Fla. Ct. app. 2002)], 834 So. 2d at 297 (citing Jorgensen v. Grand Union Co., 490 So.2d 214 (Fla. 4th DCA 1986)). 'An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.' Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So. 2d 796 (Fla. 1st DCA 1985). In Murchison v. Grand Cypress Hotel Corporation, [13 F.3d 1483 (11th Cir. 1994)], the Circuit Court considered the following facts in deciding whether a client had given his attorney clear authority to settle the case: 1) whether the client knew his lawyer was in the process of negotiating a settlement; 2) whether and how many times the client met or spoke with his attorney while settlement negotiations were ongoing; 3) whether the client was present in the courtroom when the settlement was announced in open court; 4) whether the client immediately objected to the settlement; and 5) whether the client was an educated man who could understand the terms of the settlement agreement. See Murchison, 13 F.3d at 1485-86." (footnote omitted); enforcing the settlement).

Some states have even adopted statutes specifically indicating that only clients have the power to settle cases, and declining to honor settlements entered into by lawyers without "special authority in writing" from the client. Cook v. Surety Life Ins. Co., 903 P.2d 708, 714 & 717, 715 (Haw. Ct. App. 1995) ("Thus, we hold, that ordinarily, an attorney must have the written authority of the client to settle in order to settle a matter on behalf of a client."; vacating the trial court's enforcement of a settlement).

This approach has faced considerable academic criticism. For instance, a Georgetown Journal of Legal Ethics article has bluntly condemned this approach.

In an attempt to protect the client in the context of the attorney-client relationship, some courts have trod inappropriately upon the rights and expectations of the other

party to the contract. The third party's rights and expectations of sanctity of contract deserve no less protection than that afforded by traditional agency law to third parties in general contexts.

Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543, 545 (1999). Later in the article, the author elaborates.

Although the client may not have actually authorized the attorney to enter into a settlement agreement, the third party must be allowed to enforce the agreement against the client if the third party reasonably interprets the client's manifestations as bestowing the authority to settle on the attorney. The wariness expressed by some courts is based on the desire to protect a client within the attorney-client relationship but the result ignores fairness to the third party. There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs. The third party who has reasonably interpreted the client's manifestations as an indication that the attorney has authority to settle is indeed the innocent, and deserves the protection of the apparent authority doctrine.

Any desire by courts to protect the client from the wrongdoing attorney cannot be furthered at the expense of the third party. The client has other, more appropriate protections. Not only can a wronged client sue his attorney for malpractice, but the client can pursue professional discipline for the attorney, an avenue of recourse unavailable in most other agency settings.

Id. at 586 (emphases added; footnotes omitted). Despite this criticism, many jurisdictions continue to follow this client-centric approach.

Fourth, some courts do not recognize any presumptions, but instead look to such issues as the speed with which a client attempts to repudiate a settlement agreement the client's lawyer entered into without authority.

For instance, a Colorado appellate court explained that

[a]n attorney does not have the authority to compromise and settle the claim of a client without his or her knowledge and consent. . . . Thus, generally, a client is not bound by a settlement agreement made by an attorney when the lawyer has not been granted either express or implied authority. . . .

However, because there is at least one other party involved in a settlement (who, in the absence of further action or proceedings on the claim against it, is entitled to rely on the fact that the case has been resolved), when a client discovers that an attorney has "settled" his claim without authority, the client must either timely repudiate the settlement and proceed with the lawsuit or ratify the settlement as an acceptable bargain.

Siener v. Zeff, 194 P.3d 467, 471 (Colo. Ct. App. 2008) (refusing to enforce a settlement).

Fifth, some courts follow a different approach if the settlement occurred in a court proceeding or in a court-supervised mediation.

For instance, in Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind. 1998), the court answered a certified question from the United States District Court for the Northern District of Indiana. In explaining a lawyer's authority to settle a case, the court first explained

[a]s a general proposition an attorney's implied authority does not extend to settling the very business that is committed to the attorney's care without the client's consent. The vast majority of United States jurisdictions hold that the retention of an attorney to pursue a claim does not, without more, give the attorney the implied authority to settle or

compromise the claim. The rationale for this rule is that an attorney's role as agent by definition does not entitle the attorney to relinquish the client's rights to the subject matter that the attorney was employed to pursue to the client's satisfaction. In Indiana, the rule that retention does not ipso facto enable an attorney to settle a claim has a solid if distant foundation.

Id. at 1302-03 (footnote omitted). The court then recognized the different rule that applied in court.

Although the theoretical underpinnings of this rule are not always fully explained, and on occasion are set forth in terms slightly at variance with standard agency doctrines, these cases uniformly bind the client to an in court agreement by the attorney and remit the client to any recovery that may be available from the attorney.

Id. at 1305 (emphasis added; footnote omitted). Although acknowledging that several states disagree with this approach (including New Hampshire, Kentucky and Mississippi), the court explained that

[t]he cases in Indiana and elsewhere recite the content of this rule, but frequently do not explain the reason for it. Indeed one rarely encounters a rule that is so commonly cited and yet so infrequently explained. When the rationale is stated, it emerges as one of necessity.

Id. at 1306 (emphasis added). The court then explained the reasoning for this rule.

The reason behind this rule stems from the setting of an in court proceeding and the unique role of an attorney-agent in that setting. Proceedings in court transpire before a neutral arbiter in a formal and regulated atmosphere, where those present expect legally sanctioned action or resolution of some kind. A rule that did not enable an attorney to bind a client to in court action would impede the efficiency and finality of courtroom proceedings and permit stop and go disruption of the court's calendar. Of course the attorney is free, and obligated, to disclaim authority if it does not exist. But in the absence of such a disclaimer, an attorney's actions in court are binding on the client. In contrast to court proceedings, when an attorney represents a client out of

court, custom does not create an expectation of settlement or compromise without the client's signing off.

Id. The court then expanded the reach of this general rule to ADR proceedings under court rules.

We conclude that a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client's claim. However, retention does confer the inherent power on the attorney to bind the client to an in court proceeding. For purposes of an attorney's inherent power, proceedings that are regulated by the ADR rules in which the parties are directed or agree to appear by settlement authorized representatives are in court proceedings.

Id. at 1309-10.

. . . .

This hypothetical comes from a District of Columbia Court of Appeals decision.

In Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004), the court addressed a question certified by the U.S. Court of Appeals for the District of Columbia Circuit:

"Under District of Columbia law, is a client bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms."

Id. at 592. The court explained the factual background of the settlement, and specifically noted that the plaintiff did not attend the settlement conference. The court also explained that after plaintiff's lawyer reached a deal with the defendant's lawyer, he "left the hearing room with cell phone in hand, apparently to call [the plaintiff]. When he returned, the attorneys 'shook hands' on the deal and later reduced it to writing." Id.

The court answered the certified question in the negative.

These ethical principles are key to the issue before us, because they not only govern the attorney-client relationship, they inform the reasonable beliefs of any opposing party involved in litigation in the District of Columbia, as well as the reasonable beliefs of the opposing party's counsel, whose practice is itself subject to those ethical constraints. It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties -- especially when represented by counsel, as here -- must bear the risk of unreasonable expectations about an attorney's ability to settle a case on the client's behalf. . . .

Applying these principles, we conclude that the two client manifestations contained in the certified question -- sending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf -- were insufficient to permit a reasonable belief by the District that Harrison [plaintiff's lawyer] had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have.

Id. at 595-96.

Best Answer

The best answer to this hypothetical is **NO**.

b 8/11; n 2/15

Disclosing Unfavorable Facts

Hypothetical 20

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

(a) Must your partner disclose her client's criminal conviction for fraud and perjury?

NO (PROBABLY)

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

(b) Must your partner disclose the earlier judgment entered against your client?

YES

Analysis

Lawyers' duties to disclose unfavorable facts vary depending on the type of proceeding -- in a dichotomy that highlights the essential nature of the adversarial system.

(a) In a typical adversarial proceeding, the ethics rules prohibit a lawyer's false statement of fact, or silence in the face of someone else's false statement of material fact.

A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of

material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February 2002), the prohibition only precluded lawyers' false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [o]r engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Other rules involving arguably deceptive trial conduct tend to focus on lawyers' presentations of evidence rather than lawyers' own statements to the court. See, e.g., ABA Model Rule 3.3(a)(3) (prohibiting lawyers from knowingly offering evidence that the lawyer "knows to be false").

Although some situations involve the courtroom setting, many cases discussing lawyers' false statements arise in the deposition setting. Not surprisingly, courts consider statements at a deposition to be "to a tribunal" for purposes of the ethics rules -- both because every state's rules of civil procedure essentially analogize the deposition setting to a trial setting, and because deposition testimony frequently will be read in court at a later trial.

The more difficult situations involve a lawyer's silence rather than affirmative misstatements.

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other side to facts that might assist its case.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary

judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).
- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention,

which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving courts sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

(b) Interestingly, the ethics rules are quite different in ex parte proceedings.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d). A comment to ABA Model Rule 3.3 explains the basis for this important difference.

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.

To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully

advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

[a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it

should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

[A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Best Answer

The best answer to **(a)** is **PROBABLY NO**; the best answer to **(b)** is **YES**.

Disclosing Directly Adverse Law

Hypothetical 21

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

- (a) A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES

- (b) A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES (PROBABLY)

- (c) Unfavorable dicta in a decision from your state's supreme court?

NO (PROBABLY)

- (d) A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

NO (PROBABLY)

Analysis

Introduction

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes,

weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.¹

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

¹ Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's County, 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. County of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

. . . .

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.

Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the

constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)² (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal

² ABA Model Code of Professional Responsibility DR 7-106(B)(1) (1980) ("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." (footnote omitted)).

argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

[D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

[T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."

. . . .

While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

In representing a client in a matter before a tribunal, a lawyer may not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

"Legal authority" includes case-law precedents as well as statutes, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to

draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. cmt. c, illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach.

Only one state appears to have explicitly indicated what the ABA Model Rules and most states presume -- that legal research does not fall within lawyers' confidentiality duty.

"Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

New York Rule 1.6(a) (emphasis added).

Although most states follow the ABA Model Rules approach, some take a different approach. For instance, New York does not require disclosure of "legal authority in the controlling jurisdiction" that is adverse to the client, but instead requires disclosure of an apparently narrower range of adverse authority.

A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

New York Rule 3.3(a)(2) (emphasis added). Although New York's Comments do not explain the distinction between this approach and the ABA Model Rules' approach, it seems to be different. For instance, law from another state circuit or district might fall within the ABA Model Rules' definition of "legal authority in the controlling jurisdiction" (the state) -- but not the "controlling legal authority." In some states, various circuit courts at the trial or the appellate level take differing approaches to issues such as the required imminence of litigation required to claim work product protection. So in that setting, the ABA Model Rules would require lawyers to disclose a sister court's adverse authority, while the New York formulation would not.

Another state uses a different formulation that seems to fall somewhere between the New York approach and the ABA Model Rules approach.

A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Yet another jurisdiction takes a unique approach which is not obvious on its face.

A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.

D.C. Rule 3.3(a)(3) (emphasis added). The reference to "legal authority in the controlling jurisdiction" follows the ABA Model Rules formulation, and presumably includes law that does not control in the case -- as does the language of other jurisdictions mentioned above. However, the unique phrase "known to the lawyer to be dispositive of a question at issue" would seem to exclude from lawyers' disclosure duty adverse authority that does not control in the case. In other words, legal authority that does not control in the case but is instead from a sister court (for example) would not be "dispositive of a question at issue" in the case.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, No. 2:99-cv-01707-RJC, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April, 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.". . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as *Hittle* under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.

. . . .

In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the

"floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.

. . . This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition

for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

(a) Both the ABA Model Rules and the case law require disclosure of directly controlling adverse authority.

(b) Some lawyers confuse the meaning of the term "controlling" in ABA Model Rule 3.3(a)(2).

A lawyer's disclosure duty includes more than "controlling" decisional or other law. ABA Model Rule 3.3(a)(2) requires disclosure of "legal authority in the controlling jurisdiction" (emphasis added). Thus, the term "controlling" applies to the jurisdiction, not to the decisional or other law. This means that any directly adverse law issued by a court or adopted by the legislature, promulgated by an agency, etc. must be disclosed -- if it comes from the controlling jurisdiction. Tyler v. State, 47 P.3d 1095, 1111 (Alaska Ct. App. 2001) ("'Directly adverse' authority encompass[es] more than 'controlling' authority.").

Presumably, the "controlling jurisdiction" could be another state, if the forum's choice of law principles would look to that other state for the controlling law.

(c) Although ABA Model Rule 3.3(a)(2) does not define the term "legal authority," the Restatement indicates that

[i]n most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers §111 cmt. c (2000) (emphasis added).

However, as with other issues involving the duty of disclosure, some courts require far more than the ethics rules require.

For instance, the Federal Circuit affirmed the United States Court of International Trade's reprimand of a Department of Justice lawyer for "misquoting and failing to quote fully from two judicial opinions." Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1347 (Fed. Cir. 2003). In that case, the DOJ lawyer had omitted several sentences from decisions she quoted. The Federal Circuit found that the lawyer's omission provided a misleading view of the decisions. In addition,

she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face portions of the quotation from McAllister in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

Id. at 1349. Thus, the DOJ lawyer had included "emphasis added" following her quotation from one case, but had not done so following her quotation from a dissent by Supreme Court Justice Clarence Thomas.

The Federal Circuit also rejected the DOJ lawyer's argument that an early United States Supreme Court statement was dictum and therefore not covered by her disclosure obligation -- noting that a 1960 Second Circuit case and Justice Thomas's dissent "believed that the statement was sufficiently important to quote it . . . and to cite it." Id. at 1356.

(d) On its face, ABA Model Rule 3.3(a)(2) does not require disclosure of directly adverse law from another state -- unless that state supplies the controlling law in the case.

However, as explained in the Introduction, some courts ignore the ABA Model Rules and the Restatement, and instead essentially revert to the 1949 ABA legal ethics opinion that required lawyers to disclose law "which would reasonably be considered important by the judge sitting on the case." ABA LEO 280 (6/18/49).

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **PROBABLY YES**; the best answer to **(c)** is **PROBABLY NO**; the best answer to **(d)** is **PROBABLY NO**.

Disclosing Unpublished Case Law

Hypothetical 22

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

- (a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES (PROBABLY)

- (b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

NO (PROBABLY)

Analysis

(a)-(b) The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a

requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Restatement (Third) of Law Governing Lawyers §111 Reporter's Note cmt. d (2000)

(emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions, the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 189-90 (2006/2007)

(emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.

In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 39 (2005).

One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

Into the early 1980s, federal courts of appeals were publishing nearly 90% of their opinions. However, by the mid-1980s, the publication rates for federal court of appeals decisions changed dramatically. By 1985, almost 60% of all federal court of appeals decisions were unpublished. Today [2007], more than 80% of all federal court of appeals decisions are unpublished.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 192-93 (2006/2007) (emphases added; footnotes omitted).

As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

[i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not

surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

[T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such an opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

Kirt Shuldborg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after Anastasoff. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

- (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
- (2) Permit citation to relevant unpublished opinions.

See Letter from Robert D. Evans, Director, ABA Govtl. Affairs Office, to Howard Coble, Chairman, Subcomm. on Courts, Internet & Intellectual Prop., U.S. House of Representatives (July 12, 2002).

The Anastasoff opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course,

this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).
- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).
- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).
- States (25 as of that time) prohibiting citation of any unpublished opinion.
- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach.

As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).

This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.

Dione C. Greene, The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule", 81 Ind. L.J. 1503, 1503-04 (Fall 2005) (footnotes omitted).

New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions

(92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

Aaron S. Bayer, Unpublished Appellate Decisions Are Still Commonplace, The National Law Journal, Aug. 24, 2009.

State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court

need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it

will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?

Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to

disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.

Brundage v. Estate of Carambio, 951 A.2d 947, 956-57 (N.J. 2008) (emphasis added).

In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

[I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.

- Lifschitz v. George, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 28, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "'only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts.'" (internal citation omitted); upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

Best Answer

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **PROBABLY NO**.