LITIGATION ETHICS: COMMUNICATIONS, DISCOVERY AND WITNESSES

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' Public Communications about Cases: Basic Issues

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 l964 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 <u>prohibited</u> 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 in 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.

[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

Courts' Gag Orders

Courts fashioning gag order necessarily balance the same competing interests.

- 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

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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.

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

Lawyers' Public 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 1/3

Lawyers' Public Communications about Cases: Application to Prosecutors

Hypothetical 3

You and your best friend in law school took totally different career paths -- you became a criminal defense lawyer and she became a prosecutor. Over drinks after work one day, you debate whether any limits on lawyers' public communications about their cases should apply equally to you and your friend.

Should prosecutors' public communications about criminal cases be more severely restricted than criminal defense lawyers' statements?

YES

Analysis

The black-letter rule does not distinguish between prosecutors and defense lawyers, but elsewhere the distinction becomes obvious.

ABA Model Rule 3.6's specific list of prejudicial statements (which appears in Comment [5]) could apply to either the prosecution or the defense in criminal matters -- but seems tilted toward prosecutors.

Comment [8] of ABA Model Rule 3.6 points to ABA Model Rule 3.8(f), which contains additional restrictive language.

> The prosecutor in a criminal case shall: . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case

> from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

ABA Model Rule 3.8(f). Comment [5] explains this special rule.

> Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

ABA Model Rule 3.8 cmt. [5].

The Restatement also has its own rule directed to prosecutors.

> A prosecutor must, except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law-enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Restatement (Third) of Law Governing Lawyers § 109(2) (2000). Comment e explains this rule.

> Lawyers who serve as prosecutors or otherwise as government lawyers have significantly diminished free-expression rights to comment publicly on matters in which they are officially involved as advocates. Accordingly, prohibitions against pretrial and trial comment by such lawyers can be more extensive. When the position of the governmental lawyer is filled by popular election, restriction may be particularly necessary to prevent improper extrajudicial comment made for vote-getting purposes. In all

> events, prosecutors must observe the heightened limitations on extrajudicial comment stated in Subsection (2).

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

Most of the case law dealing with lawyers' public communications involves prosecutors' public statements.

- Leigh Jones, Government Misconduct Means Retrial for New Orleans Cops, Nat'l L.J., Sept. 17, 2013 ("Gross prosecutorial misconduct by federal prosecutors will mean a new trial for five former New Orleans police officers convicted for their roles in the Danziger Bridge shootings following Hurricane Katrina."; "United States District Judge Kurt Engelhardt on Tuesday faulted prosecutors for posting online anonymous comments about the defendants, who were convicted of civil-rights violations stemming from the September 4, 2005, fatal shooting of two unarmed people and the wounding of four others on the bridge."; "The government's actions, the judge wrote, were 'like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and basic fairness and common sense basic to every criminal prosecution, wherever it should occur in this country.'").

- Joel Cohen, When Prosecutors Take Liberties With the First Amendment, N.Y. L. J., Feb. 14, 2013 ("Here's a juicy one: Jim Letten, the United States Attorney in New Orleans, was an aggressive prosecutor of corruption for the past 12 years. He had been the longest serving federal prosecutor in a place where his talents were reportedly in need."; "One of his more recent targets was Fred Heebe, a local landfill magnate and one-time candidate for Letten's position. In 2011, Letten indicted Heebe's chief financial officer, Dominick Fazzio, on charges of fraud and money laundering -- presumably to gain his cooperation against Heebe. But in March of the same year, Heebe -- get this -- filed a defamation lawsuit against a commenter on nola.com (a news website affiliated with The Times-Picayune) who identified himself only as 'Henry L. Mencken1951,' and whose posts say things like 'Heebe comes from a long line of corruptors' -- hardly the kind of thing Heebe lawyers, if he is ever indicted, would want the jury pool to have read. Heebe was convinced that 'Mencken' was actually Sal Perricone, a veteran prosecutor in Letten's office who was working on the Fazzio case. He was right. In fact, after he filed suit, Perricone admitted that he was Mencken and promptly 'resigned.'" (footnotes omitted); "After Letten's office began looking into the matter, it was revealed that the attorney in charge of the investigation, Letten's First Assistant, Jan Mann, was also making comments online about the corruption cases that her office was prosecuting ('Don't you ever wonder how they get rich in public office? Not possible unless stealing'). In November 2012, Heebe filed a

second lawsuit, this time against Mann. She was soon demoted and in December announced her retirement. As for Letten? The buck stopped with him -- he understandably resigned a few days later." (footnotes omitted)).

- In re Brizzi, 962 N.E.2d 1240, 1249 (Ind. 2012) (publicly reprimanding a prosecutor for his public comment; "Some of Respondent's statements, however, fall well outside even these parameters, including the statements that Respondent would not trade all the money and drugs in the world for the life of one person, let alone seven, that Turner deserved the ultimate penalty for this crime, that the evidence was overwhelming, and that it would be a travesty not to seek the death penalty. We conclude that when these statements were made, Respondent knew or reasonably should have known that they would have a substantial likelihood of (a) materially prejudicing an adjudicative proceeding in the matter and (b) heightening public condemnation of the accused, and thus violated Professional Conduct Rules 3.6(a) and 3.8(f).").

- Attorney Grievance Comm'n v. Gansler, 835 A.2d 548 (Md. 2003) (reprimanded prosecutor for discussing a defendant's confession in media statements).

- Zimmerman v. Bd. of Prof'l Responsibility, 764 S.W.2d 757, 760 (Tenn. 1989) (prosecutor reprimanded for public statements).

- Harvell v. State, 742 P.2d 1138 (Okla. Crim. App. 1987) (prosecutor's public statement about criminal defendant's alleged admission).

Of course, some bar authorities exonerate prosecutors or reduce the punishment.

- In re Conduct of Lasswell, 673 P.2d 855 (Or. 1983) (finding no ethics violation by prosecutor, who spoke to a newspaper and television reporter about the likelihood of criminal convictions).

- In re McNerthney, 621 P.2d 731 (Wash. 1980) (reducing former prosecutor's punishment to letter of admonition for extra-judicial statements).

Most state bars' discussion of these restrictions also deals with prosecutors.

- Virginia LEO 1768 (11/26/02) (nothing in the general provisions governing lawyer communications or the specific provisions governing prosecutors' statements prohibits a prosecutor from stating in open court before a criminal defendant and the defendant's lawyer that the defendant will face a jury trial

under certain circumstances; in that jurisdiction, it is "commonly known" that juries impose longer sentences than judges).

- Virginia LEO 1594 (6/14/94) (determining if a Commonwealth's Attorney's statements to a newspaper reporter about a pending case constitute a danger of interfering with the fairness of a trial by jury raises a legal question beyond the Bar's jurisdiction; if a "finder of fact" ultimately determines that the statements did constitute such a danger, the "fact that the matter was not ultimately tried by a jury is not dispositive").

- Virginia LEO 1542 (9/2/93) (determining if a prosecutor's public statements about the brutality of a murder violate the Code's prohibition on extrajudicial statements is a legal matter beyond the purview of the Bar).

Two noteworthy incidents highlight the political nature of some of these issues.

First, on July 24, 2007, the North Carolina Bar disbarred Durham District Attorney Michael Nifong. The Bar's first Conclusion of Law pointed to various "statements to representatives of the news media," which the Bar held Nifong "knew or reasonably should have known."

> (a) By making statements to representatives of the news media including but not limited to those set forth in paragraphs 17-35, 37-42, 49-50, 61-62, and 76, Nifong made extrajudicial statements he knew or reasonably should have known would be disseminated by means of public communication and would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, in violation of Rule 3.6(a), and made extrajudicial statements that had a substantial likelihood of heightening public condemnation of the accused, in violation of Rule 3.8(f) of the Revised Rules of Professional Conduct.

Amended Findings of Fact, Conclusions of Law and Order of Discipline, No. 06 DHC 35 (Disciplinary Hearing Comm′n of the N.C. State Bar, July 24, 2007). Several of the Findings of Fact quote Nifong's public statements.

> 23. Between March 27 and March 31, 2006, Nifong made the following statements to a reporter for NBC 17 TV

> News: "The information that I have does lead me to conclude that a rape did occur"; "I'm making a statement to the Durham community and, as a citizen of Durham, I am making a statement for the Durham community. This is not the kind of activity we condone, and it must be dealt with quickly and harshly"; "The circumstances of the rape indicated a deep racial motivation for some of the things that were done. It makes a crime that is by its nature one of the most offensive and invasive even more so"; and "This is not a case of people drinking and it getting out of hand from that. This is something much, much beyond that."
>
> . . . .
>
> 26. Between March 27 and March 31, 2006, Nifong made the following statements to a reporter for MSNBC: "There is evidence of trauma in the victim's vaginal area that was noted when she was examined by a nurse at the hospital"; "her general demeanor was suggested-suggestive of the fact that she had been through a traumatic situation"; "I am convinced there was a rape, yes, sir"; and "The circumstances of the case are not suggestive of the alternate explanation that has been suggested by some of the members of the situation."
>
> 27. Between March 27 and March 31, 2006, Nifong stated to a reporter for the Raleigh News and Observer newspaper, "I am satisfied that she was sexually assaulted at this residence."
>
> . . . .
>
> 33. Between March 27 and March 31, 2006, Nifong stated to a reporter for WRAL TV News, "What happened here was one of the worst things that's happened since I have become district attorney" and "[w]hen I look at what happened, I was appalled. I think that most people in this community are appalled."

Id. (emphases added).

On the other hand, no bar has disciplined (and few if any authorities have even criticized)[1] Northern District of Illinois United States Attorney Patrick Fitzgerald for making the following statements on December 9, 2008.

> This is a sad day for government. It's a very sad day for Illinois government. Governor Blagojevich has taken us to a truly new low. Governor Blagojevich has been arrested in the middle of what we can only describe as a political corruption crime spree. We acted to stop that crime spree.
>
> The most appalling conduct Governor Blagojevich engaged in, according to the complaint filed today or unsealed today, is that he attempted to sell a Senate seat, the Senate seat he had the sole right to under Illinois to appoint to replace President-elect Obama.
>
> . . . .
>
> But the most cynical behavior in all this, the most appalling, is the fact that Governor Blagojevich tried to sell the appointment to the Senate seat vacated by President-elect Obama. The conduct would make Lincoln roll over in his grave.

[1] Abdon M. Pallasch, "Mikva Criticizes United States Attorney's Comments on Ex-Governor Blagojevich," Chicago Sun-Times, July 30, 2009 ("Speaking to 200 lawyers from around the country Thursday, retired appellate Judge Abner Mikva criticized U.S. Attorney Patrick Fitzgerald for showing a bit too much enthusiasm at a news conferences announcing charges against former Governor Rod Blagojevich. 'I certainly don't like the prosecutor coming out and trying his case [in the media] and possibly tainting the jury pool with a big press conference announcing he has indicted so-and-so, or, in Blagojevich's case, has arrested so-and-so -- he hadn't even reached an indictment yet,' Mikva said at the American Bar Association convention. 'The argument is made by some prosecutors that this is a part of a public information factor of a prosecutor's job, and they have to do it. That's nonsense.' Fitzgerald gained a reputation during his first seven years as United States attorney for avoiding colorful language at news conferences and refusing to entertain questions that fell outside 'the four corners of the indictment.' But when he arrested Blagojevich in December, Fitzgerald said Blagojevich 'has taken us to a truly new low.' He said Blagojevich's alleged shaking down of potential appointees to the United States Senate for campaign contributions 'would make Lincoln roll over in his grave.' Mikva said that hyperbole crossed the line. 'I suppose prosecutors have first amendment rights, but . . . somehow there's something wrong and inconsistent with a prosecutor who is supposed to try that case in court and is supposed to be the public persona [of justice] announcing to the world that you've got this guy dead-to-rights and he should go to jail for a long time,' Mikva said.").

Transcript: Justice Department Briefing on Blagojevich Investigation, New York Times, Dec. 9, 2008 (transcript provided by CQ Transcriptions) (emphases added).

Best Answer

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

n 12/11; b 1/13

Lawyers' Public Communications about Judges: Basic Issues

Hypothetical 4

A state bar commission issuing recommendations about lawyers' public communications has now turned to lawyers' criticism of judges. You have been giving some thought to this issue before the commission's next meeting.

(a) Should lawyers be totally prohibited from criticizing judicial opinions?

NO

(b) Should lawyers be totally prohibited from criticizing judges?

NO

(c) Should any limitations on lawyers' criticism of judges apply to nonpublic criticism?

MAYBE

(d) Should any limit on lawyers' public communications about judges be based on the lawyers' subjective belief in the truth of what she says (as opposed to an objective standard)?

NO (PROBABLY)

(e) Should any limit on lawyers' public communications about judges apply only to the wording used (as opposed to the substance of the statement)?

NO

Analysis

Introduction

Nonlawyers' criticism of judges implicates basic First Amendment issues, without the ethics overlay.

- See, e.g., Conservatives, Liberals, Media Advocates Rally Behind Man Jailed For Criticizing Indiana Judge, FoxNews.com, Mar. 3, 2013 ("A group of free-speech advocates is rallying behind an Indiana inmate serving two years for his online rants against a judge who took away his child-custody rights during a divorce case."; "There's no disputing that Daniel Brewington's words were strong and angry -- found in hundreds of emails over the course of the related, two-year divorce case."; "But the group is asking the state's highest court to decide whether they indeed amounted to criminal behavior."; "Brewington was convicted in 2011 of perjury, intimidating a judge and attempting to obstruct justice -- with the attorney general's office successfully arguing that his threat was to expose the judge to 'hatred, contempt, disgrace or ridicule.'"; "However, the group recently filed an amicus brief with the state Supreme Court arguing an appeals court decision in January upholding the felony intimidation charge threatens constitutionally protected speech about public officials."; "The court will decide after the March 11 filing deadline on whether to take up the case."; "The appeals court argued that some of Brewington's claims against Judge James D. Humphrey were false. It also argued their truthfulness were not necessarily relevant to prosecution because the harm, which in this case was striking fear in the victim, occurred 'whether the publicized conduct is true or false,' according to Reason magazine."; "The group is led by University of California Los Angeles law professor Eugene Volokh and includes conservative lawyer James Bopp, a former executive director of the Indiana Civil Liberties Union, the Indiana Association of Scholars, The Indianapolis Star and the James Madison Center for Free Speech."; "Volokh wrote in the brief that the appeals court decision 'endangers the free speech rights of journalists, policy advocates, politicians and ordinary citizens.'"; "In his rants, Brewington called the judge a 'child abuser' and 'corrupt' and accused him of unethical or illegal behavior.").

The ethics rules' limit on lawyers' public criticism of judges includes phrases drawn from another area of the law, but applied very differently.

ABA Model Rule 8.2 limits what lawyers may say about judges.

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

ABA Model Rule 8.2(a) (emphasis added). Interestingly, none of the comments to ABA Model Rule 8.2 actually discuss this black-letter rule. Instead, the first two of the three

comments to this Rule deal with judges running for election, and the third comment encourages lawyers to defend unjustly criticized judges.

The ABA Model Code of Professional Responsibility also addressed this issue, and explained one of the reasons why lawyers should refrain from criticizing judges -- because judges are essentially unable to defend themselves.

> Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

ABA Model Code of Prof'l Responsibility EC 8-6 (1980) (footnotes omitted; emphases added).

The Restatement follows the same basic formulation.

> A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or

> integrity of an incumbent of a judicial office or a candidate for election to such an office.

Restatement (Third) of Law Governing Lawyers § 114 (2000) (emphasis added).

ABA's Reliance on the *New York Times* Standard

For some reason, the ABA looked to the law of defamation when articulating its limit of lawyer criticism of judges.

In New York Times Co. v. Sullivan, 376 U.S. 254, 298 (1964), the United States Supreme Court held that a public official could not recover for defamatory statements unless the public official established that the defendant had made a false and defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." In later cases, the United States Supreme Court explained that "reckless disregard" means a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Both standards (knowing falsity and reckless disregard) are purely subjective standards. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974).

Thus, the New York Times constitutional malice standard focuses only on defendants' subjective belief in the truth of their statements. Because opinions can never be objectively proven true or false, they cannot support a defamation action under this standard.

Some courts use defamation principles when interpreting the identical language in Rule. 8.2.

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a

former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Smith v. Pace, 313 S.W.3d 124, 126-27 (Mo. 2010) (reversing a jury's conviction of a lawyer for a criminal contempt resulting from a lawyer's filing of a pleading critical of the presiding judge at the trial court; explaining the factual background; "Smith was prosecuted for criminal contempt of court for strong words he used in petitioning the court of appeals for a writ seeking to quash a subpoena issued for a grand jury in Douglas County. Referring to the prosecuting attorney and the judge overseeing the grand jury, Smith wrote: 'Their participating in the convening, overseeing, and handling the [sic] proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so.'"; holding that "[w]ith respect to lawyers, however, it is not nearly as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide if a lawyer should be disciplined for his or

her speech."; "Since Gentile [Gentile v. State, 501 U.S. 1030 (1991)], numerous state courts have considered the regulation of lawyer speech. Almost all of these cases, however, have involved situations in which a lawyer is disciplined under his or her state's ethics rules."; "In any event, cases involving lawyers' statements require some knowledge of falsity or, at the very least, a reckless disregard for whether the false statement was true or false. The disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or falsity of the lawyer's statements. Monetary sanctions pursuant to Rule 55.03(c) rather than incarceration also may be more suitable." (footnote omitted); finding that the jury was not properly instructed, because the instructions did not require a mental state; "There can be no doubt that the First Amendment protects truthful statements made in judicial proceedings. It is essential, therefore, to prove that the lawyer's statements were false and that he either knew statements were false or that he acted with reckless disregard of whether these statements were true or false. In this case, there was no mental state (mens rea) requirement in the jury instruction. The instruction did not require the jury to find that Smith knew his statements were false or that Smith showed reckless disregard for the truth. The only contested issue the instruction asked the jury to find was whether Smith's written statements to the court of appeals 'degraded and made impotent the authority of the Circuit Court of Douglas County, Associate Circuit Division and impeded and embarrassed the administration of justice.'" (footnote omitted)).

- In re Green, 11 P.3d 1078, 1085 (Colo. 2000) (assessing a lawyer's pleading indicating that a judge was a "racist and bigot"; holding that such statements were pure opinion and therefore incapable of punishment).

- Standing Comm. on Discipline of U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995) (addressing a lawyer's statement that a judge was "ignorant, ill-tempered, buffoon, sub-standard human, right-wing fanatic, a bully, one of the worst judges in the United States" (internal quotations omitted); declining to impose any sanctions, because the lawyer's statements were rhetorical hyperbole and opinion).

Other courts have explicitly rejected application of the defamation law standard -- instead adopting an objective test in analyzing Rule 8.2.

- Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001), cert. denied, 535 U.S. 930 (2002) ("Although the language of rule 4-8.2(a) closely tracks the subjective "actual malice" standard of New York Times, following a review of the significant differences between the interests served by defamation law

and those served by ethical rules governing attorney conduct, we conclude that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions. The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.").

- In re Dixon, 994 N.E.2d 1129, 1133-34, 1134, 1136, 1137, 1138 (Ind. 2013) (holding that a lawyer cannot be disciplined for criticizing a judge in filing required support in a motion to disqualify the judge; "The parties dispute the standard that should be used to determine whether an attorney's statement about a judge violates Rule 8.2(a)."; "One possibility is the 'subjective' standard enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). . . . Although Respondent cities treatises favoring the 'subjective' New York Times test, there appaer to be few, if any, attorney discipline actions that apply the Harte-Hanks [Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989)] test (i.e., serious doubts about the truth of the statement; high degree of awareness of probable falsity)."; "This Court has never decided squarely whether a subjective or objective test applies to the truth or falsity of attorney statements about judges. Our prior cases, though, imply a rejection of the 'subjective' standard applied in defamation cases, and have applied what is in practice an 'objective' test."; "The prohibition against making a statement about a judge that the lawyer knows to be false is fairly straightforward, even though such actual knowledge might be difficult to prove in many cases. Not surprisingly, it is the prohibition against making a statement about a judge with reckless disregard as to its truth or falsity -- as charged in this case -- that is more often disputed. For such cases, we are now persuaded to join the majority view of other jurisdictions and expressly adopt an objective standard for determining when a statement made by an Indiana attorney about a judicial officer violates Rule 8.2(a)."; "Respondent's statements were made not just within, but as material allegations of, a judicial proceeding seeking a change of judge on three grounds, each of which affirmatively requires alleging personal bias or prejudice on the part of the judge."; "But even though Rule 8.2 holds attorneys to a higher disciplinary standard than New York Times does in defamation cases, we also recognize that attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients -- particularly on issues, as here, that require criticism of a judge or a judge's ruling."; "We will therefore interpret Rule 8.2(a)'s limits to be the least restrictive when an attorney is engaged in good faith professional

advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision.").

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1014, 1016 (Wyo. 2009) (explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 80 (Iowa 2008) (explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements.'" (citation omitted).

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] . . . . A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

- Committee on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 285 (W. Va. 1991) ("There is courage, and then there is pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when the respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general."), cert. denied, 502 U.S. 1073 (1992).

Decisions Punishing Lawyers for Criticizing Judges

Numerous courts have sanctioned lawyers[1] for criticizing judges. Some of these decisions rely on the ethics rules, while others rely on statutes, rules or the court's inherent powers.

[1] Most cases, ethics opinions and disciplinary actions involve lawyers' criticism of judges handling cases in which the lawyer is representing a party. However, in some situations courts have had to decide whether a lawyer who was also a party falls under the ethics rules' restrictions. See, e.g., Polk v. State Bar of Texas, 374 F. Supp. 784, 786, 788 (N.D. Tex. 1974) (overturning the Texas Bar reprimand of a lawyer who made the following statement in his capacity as the DUI defendant: This was "'one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial.'"; "This court rejects the contention urged by the defendants that in order to maintain the general esteem of the public in the legal profession both professional and non-professional conduct of an attorney in all matters must be above and beyond that conduct of non-lawyers. While this "elitist" conception may be applicable in non-First Amendment circumstances, the interest of the State in maintaining the public esteem of the legal profession does not rationally justify disciplinary action for speech which is protected and is outside the scope of an attorney's professional and official conduct. Where the protections of the Constitution conflict with the efficiency of a system to ensure professional

- Lawrence Buser, Memphis Lawyer Vows To Fight 60-Day Suspension For Criticizing Judge, Commercial Appeal, Jan. 6, 2013 ("Few colleagues have ever accused veteran Memphis lawyer R. Sadler Bailey of being subtle, including the three-member disciplinary panel that recently recommended he be suspended for 60 days."; "The suspension, which Bailey plans to appeal, stemmed from the 'disrespect and sarcasm' in comments he made to Circuit Court Judge Karen Williams during a medical malpractice trial in 2008 that the panel described as 'contentious, combative and protracted.'"; "Bailey called opposing counsel a liar in court and told Williams she might 'set a world record for error' in her rulings."; "'The primary issue before this panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the judge during open court,' said the opinion of the Tennessee Board of Professional Responsibility panel."; "'We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney's client may be, or how poorly the judge may be performing or how difficult or unethical the adversary counsel may be. . . . Simply abusing or insulting the court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.'").

- Disciplinary Counsel v. Shimko, 983 N.E.2d 1300, 1302, 1303, 1303-04, 1304, 1305, 1306, 1307, 1309 (Ohio 2012) (in a 4-3 decision, suspending a lawyer for one year based on the lawyer's criticism of a judge, but staying the suspension; explaining that the lawyer Shimko made the following derogatory comment about the trial judge in the courtroom; "'Mr. Shimko: Well, Your Honor, I think we have all avoided speaking about the 400-pound gorilla elephant that's in the room. And I still must go on the record to say that the Angelini Defendants have no confidence that they can obtain a fair trial in this case.'"; "'Mr. Shimko: Unless they call them in their direct case-in-chief, and that's what they did. And I'm entitled to cross-examine in his case-in-chief, Your Honor. The Court: I appreciate your position. Mr. Shimko: Don't appreciate yours.'"; also explaining that Shimko made the following statements in briefs: "'When the trial court realized that the Answers to the Interrogatories mandated a judgment in favor of Jeffrey Angelini and against First Federal, the trial court's bias once again surfaced and he contrived a means to find that the jury was now somehow confused, even though they had followed his instructions to the letter. The court's ruling, motivated by its own agenda, was nothing but an abuse of discretion. Throughout the trial, the trial judge was so vindictive in his attitude toward appellant's counsel that he became an advocate for First Federal. In short, the trial judge was trying

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conduct, it is the Constitution that must prevail and the system that must be modified to conform. For the foregoing reasons this court is of the opinion that the reprimand if issued would be violative of Polk's First Amendment rights.").

First Federal's counsel's case for him.'"; "'The absurdity of the trial court's conduct in this instance ought to underscore the whimsical lengths to which it was willing to go to deny Jeffrey Angelini his verdict. In fact, the trial court felt that its contention that the jury was confused was so thin that it had to resort to manufacturing allegations of attorney misconduct to obscure his own abuse of discretion. When the trial court realized that the jury had returned a verdict for Jeffrey Angelini, he arbitrarily disregarded the protocol he had originally adopted, and fabricated allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct.'"; explaining that the lawyer defended himself by arguing that he believed his statements to be true; "Shimko does not deny writing any of the above comments in his briefs or affidavits. He indicates that he believed them to be true. He denies that he intended them to impugn Judge Markus's integrity and claims that to find a violation of Prof. Cond. R. 8.2(a) and 8.4(h) would chill the right of future litigants to file affidavits of bias. Shimko argues that he had a 'firmly held belief that Judge Markus violated his duty as a judge and that Shimko had a right to complain about the conduct of Judge Markus. He refers to Gardner [Disciplinary Counsel v. Gardner, 793 N.E. 2d 425 (Ohio 2003)], which cited with approval the rationale from courts of other states that 'an objective malice standard strikes a constitutionality permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.'" (citation omitted); rejecting a subjective analysis; "The board found such a subjective test unworkable for the test of falsity or reckless disregard of it. We note that the difference between acceptable fervent advocacy and misconduct is not always distinguishable."; ultimately concluding that the lawyer's statements were false, but not dealing with the reckless disregard standard; "The board considered numerous statements concerning Judge Markus, which Shimko admits to writing. The board concluded that these statements were proved by clear and convincing evidence to be unreasonable and objectively false with a mens rea of recklessness."; "There is, admittedly, a fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science."; "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the Disciplinary Counsel."; three judges joined in the dissent, which included the following criticism of the majority opinion: "[T]he majority does damage to the bright-line Gardner rule by waxing poetic about the 'fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science.' . . . I do not agree that the line is so fine.").

- John Caber, Albany District Attorney Censured for Criticism of Judge in a Pending Case, N.Y. L.J., May 25, 2012 ("An upstate appellate panel has censured Albany County District Attorney P. David Soares for his 'reckless and misleading' criticism of a local judge who had removed him from a case and appointed a special prosecutor."; "[T]he district attorney released the following statement: 'Judge Herrick's decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: 'if your District Attorney is being too tough on you, sue him, and you can get a new one.' The Court's decision undermines the criminal justice system and the DAs who represent the interest of the people they serve. We are seeking immediate relief from Judge Herrick's decision and to close this dangerous loophole that he created.'").

- Scialdone v. Commonwealth, 689 S.E.2d 716, 718 (Va. 2010) (reversing and remanding a contempt finding entered by a trial court judge against two lawyers for allegedly tampering with evidence and violating a Virginia statute by using a Yahoo username "westisanazi" during a case presided over by Judge Patricia West; explaining that Judge West found (among other things) that the lawyers violated Virginia Code Section 18.2-456 [which indicates that the "courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following: . . . (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect to any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding"]; ultimately holding that the trial court had not provided sufficient due process before holding the lawyers in contempt).

- Moseley v. Virginia State Bar ex rel. Seventh Dist. Comm., 694 S.E.2d 586, 588, 589 (Va. 2010) (suspending for six months a lawyer for criticizing a judge; "Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was 'an absurd decision from a whacko judge, whom I believe was bribed,' and that he believed that opposing counsel was demonically empowered." (emphasis added); "Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity. Therefore we hold that Moseley's contentions that Rule 8.2 is void for vagueness and that his statements were not a proper predicate for discipline under that Rule are without merit.").

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the

"Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1013, 1014, 1016 (Wyo. 2009) (suspending a lawyer for two months and awarding costs of the proceedings, for a number of acts of wrongdoing, including alleging that the presiding judge must have had an improper ex parte communication with the adversary; rejecting the lawyer's argument that she was merely stating an opinion; finding that the statement accused the judge of actually engaging in ex parte communications; also rejecting a lawyer's argument that "even if the statements were false, she did not know them to be false, and under the applicable objective standard, she did not recklessly disregard the truth"; explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for

judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

- Columbus Bar Ass'n v. Vogel, 881 N.E.2d 1244, 1247 (Ohio 2008) (suspending for two years an Ohio lawyer for interfering with a trial by insisting that he represented the criminal defendant whom he was never appointed to represent; noting that the lawyer told the judge: "'This is an attempt to force this young man [Winbush] to make a plea for ten years to something that he didn't do. And forgive me, but this is a result of collusion between yourself and the prosecutor's office.'").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79, 80, 82, 90 (Iowa 2008) (suspending for three months a lawyer (and former judge) for accusing the judge handling a DUI case against him of "not being honest" in statements to a reporter; also analyzing the lawyer's second drunk driving charge, and finding that the offense "reflected adversely on his fitness to practice law"; explaining that "[w]hether an attorney's criminal behavior reflects adversely on his fitness to practice law is not determined by a mechanical process of classifying conduct as a felony or a misdemeanor"; explaining that in any analysis of the lawyer's criticism of a judge, "'truth is an absolute defense'" (citation omitted); further explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements'" (citation omitted); ultimately concluding that "[w]e are persuaded by the rationale given in support of applying an objective standard in cases involving criticism of judicial officers"; ultimately finding that the lawyer's statements about the judge could result in discipline; "We conclude Weaver did not have an objectively reasonable basis for his statement that Judge Dillard was not honest when he stated his reasons for sentencing Weaver to the Department of Corrections. Therefore, Weaver's conduct reflects a reckless disregard for the truth or falsity of his statement. Accordingly, this statement is not protected speech"; "Weaver did not claim he was expressing an opinion that Judge Dillard was 'intellectually dishonest,' in the sense that Judge Dillard's sentencing decision might have been based upon an unstated premise or hidden bias. . . . Instead, Weaver accused a judge of a specific act of dishonesty which he characterized at the hearing before the Commission as a 'knowing concealment' of the judge's reasons for sentencing him. He was

utterly unable to provide a reasonable basis for this charge at the hearing. Under these facts, we conclude that the First Amendment does not protect Weaver from being sanctioned for professional misconduct.").

- Jordana Mishory, Attorney who pleaded guilty to disparaging remarks about a judge says they fall under protected speech, Daily Business Review, July 16, 2008 ("Fort Lauderdale criminal defense attorney Sean Conway agreed he was in the wrong when he called a controversial Broward judge an 'evil, unfair witch' and 'seemingly mentally ill' two Halloweens ago.").

- Williams & Connolly, LLP v. People for Ethical Treatment of Animals, Inc., 643 S.E.2d 136, 138-39, 142, 144, 145, 146 (2007) (affirming the entry of sanctions against several lawyers from Williams & Connolly for having filed a pleading accusing Fairfax County Circuit Court Judge David T. Stitt of allegedly improper ex parte communications with PETA, Williams & Connolly's client's adversary; noting that pleadings filed by Williams & Connolly lawyers accused Judge Stitt of "inexcusable" consideration of PETA's ex parte communication and of "ignoring the basic tenets of contempt law"; "Initially, we are compelled to observe that the Feld Attorneys' [Williams & Connolly and a Virginia firm] brief filed with this Court contains a striking omission. The Feld Attorneys do not mention the fact that in the motions, they used language that directly accused Judge Stitt of unethical conduct. These allegations of unethical conduct were stark and sweeping, stating that Judge Stitt '[v]iolated [h]is [e]thical [o]bligations,' 'ignored his ethical responsibilities,' and 'acted directly counter to [those ethical responsibilities].' We therefore must consider the Feld Attorneys' arguments in the additional context of those written statements contained in the motions."; "Although the Canons of Judicial Conduct are not a source of law, we nevertheless consider the cited provision from the Canons because they are 'instructive' on a central issue before us, namely, whether the Feld Attorneys had an objectively reasonable basis in law for contending that Judge Stitt violated his ethical duties in considering the ex parte petition and in issuing the rule to show cause."; "Reasonable inquiry by the Feld Attorneys would have shown that the routine practice of the Circuit Court of Fairfax County is to consider ex parte petitions for a rule to show cause and to issue rules to show cause upon the filing of a sufficient affidavit by the petitioning party. At the time the Feld Attorneys made the motions, there was a long-standing published order entered in the Circuit Court of Fairfax County stating: 'It is the practice of this Court to issue summons on a rule to show cause upon affidavit or ex parte evidence without notice. . . .' The published order in Alward, available upon simple legal research, would have informed the Feld attorneys that Judge Stitt merely followed the routine practice of the Circuit Court of Fairfax County when he considered the petition and issued the rule to show cause. In addition, the record shows that counsel for PETA

obtained this same information concerning this routine practice of the Circuit Court of Fairfax County by placing a telephone call to a deputy clerk of the circuit court."; "The fact that the Feld Attorneys were seeking the recusal of the trial judge did not permit them to use language that was derisive in character. Yet they liberally employed such language. As stated above, the Feld Attorneys alleged in the motion to recuse that Judge Stitt 'ignore[ed] the basic tenets of contempt law,' 'create[d] an appearance, at the very least, that [he] will ignore the law in order to give a strategic advantage to PETA,' and 'ignored his ethical responsibilities [and] acted directly counter to them.'"; "We hold that the record before us demonstrates that the Feld Attorneys' motions were filed for an improper purpose and, thus, violated clause (iii) of the second paragraph of Code § 8.01-271.1. Contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for [an] improper purpose,' within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1. Such language and representations are wholly gratuitous and serve only to deride the court in an apparent effort to provoke a desired response."; upholding that Judge Stitt's imposition of $40,000 sanctions against the lawyers, and revoking pro hac vice admission of a Williams & Connolly lawyer).

- Brandon Glenn, Lawyer's 'Happy Meal' comment eats at judge, Crain's Chicago Business, May 29, 2007 ("A Chicago lawyer's comment to a bankruptcy judge in court has gotten him in some hot water, or perhaps more appropriately, hot oil. 'I suggest with respect, Your Honor, that you're a few french-fries short of a Happy Meal in terms of what's likely to take place,' William Smith, a partner with Chicago-based McDermott Will & Emery LLP, said during a hearing May 7 in Miami in front of Judge Laurel Myerson Isicoff, according to court documents. Mr. Smith's comment represents 'conduct that appears to be inconsistent with the requirements of professional conduct,' Judge Isicoff wrote in an order for Mr. Smith to appear before her June 25 'to show cause why he should not be suspended from practice before this court.' Though he's not licensed to practice in Florida, Mr. Smith has been granted permission to appear in this particular case. Judge Isicoff could revoke that permission at the June 25 hearing. Mr. Smith, a clerk for the court, both parties in the case and a lawyer from the opposing firm did not return calls seeking comment. In a statement, McDermott Will & Emery said: 'We expect our lawyers to observe established rules and protocols of professional conduct in the courtroom. Any departure from that standard is of concern to us and we look forward to a resolution of this matter.'" ((emphasis added)).

- Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1284-86 (Pa. 2006) (disbarring a Pennsylvania lawyer for an escalating series of criticisms of a

judge; noting that the criticisms began in 1997, and included such statements as allegations that the judge "'has a personal bias or prejudice,'" "'has knowledge of criminal misconduct in this matter,'" "'engages in criminal misconduct,'" engages in conduct that "'was similar to that of priests who molested young boys,'" is a "'despicable person'" who was "'perpetrating more harm to America than the Al Quida [sic] bombers did on September 11, 2001.'" (internal citations omitted)), cert. denied, 549 U.S. 1181 (2007).

- Taboada v. Daly Seven, Inc., 636 S.E.2d 889, 890 (Va. 2006) (suspending a well-known Roanoke, Virginia, lawyer's right to practice before the Virginia Supreme Court for one year and fining him $1,000; explaining that the Virginia Supreme Court held that a well-known Virginia lawyer had violated the Virginia equivalent of Rule 11 by including intemperate language in a petition for rehearing in the Virginia Supreme Court; as the Virginia Supreme Court explained, "Barnhill made numerous assertions in the petition for rehearing regarding this Court's opinion. Barnhill described this Court's opinion as 'irrational and discriminatory' and 'irrational at its core.' He wrote that the Court's opinion makes 'an incredible assertion' and 'mischaracterizes its prior case law.' Barnhill states: 'George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result.' Barnhill argued in the petition that this Court's opinion 'demonstrates so graphically the absence of logic and common sense.' Barnhill wrote in boldface type that 'Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence.' Barnhill also included the following statement in the petition: '[I]f you attack the King, kill the King; otherwise, the King will kill you.'").

- Notopoulous v. Statewide Grievance Comm., 890 A.2d 509, 512 n.4, 514 n.7 (Conn.) (assessing a lawyer's letter to the court staff accusing the judge of "abuses" and "extortion," and calling the judge "not merely an embarrassment to this community but a demonstrated financial predator of its incapacitated and often dying elderly whose interests he is charged with the protection" (internal quotations omitted); holding that the disciplinary authorities bear the "initial burden of evidence to prove the ethics violation by clear and convincing evidence," after which the lawyer must "provide[] evidence that he had an objective, reasonable belief that his statements were true"; finding that the lawyer had failed to defend his statements, and could be punished despite acting pro se as a conservator of his mother's estate; rejecting the lawyer's First Amendment argument; affirming a public reprimand), cert. denied, 549 U.S. 823 (2006).

- Anthony v. Virginia State Bar ex rel. Ninth Dist. Comm., 621 S.E.2d 121, 123 (Va. 2005) (affirming a public reprimand of Virginia lawyer Joseph Anthony,

who had written several letters directly to the Virginia Supreme Court, accusing its justices of "'an extreme desire/need to protect some group and/or person'" because the court had declined to disclose what Anthony alleged to have been improper ex parte communications between the Supreme Court justices and parties in a case that he was handling; rejecting Anthony's First Amendment claims), cert. denied, 547 U.S. 1193 (2006).

- Pilli v. Virginia State Bar, 611 S.E.2d 389, 392, 397 (Va.) (suspending for 90 days a lawyer who filed a pleading in which he accused a state court judge of "negligently and carelessly" failing to consider matters, "'skewing . . . the facts,'" and "'failing to tell the truth'"; noting that the lawyer wrote that "I cannot tolerate a Judge lying . . . . He is flat out inaccurate, and wrong." (internal quotations omitted); upholding a 90-day suspension; noting that the pleading attacked the judge's "qualifications and integrity" in "the most vitriolic of terms" -- even though Rule 8.2 goes only to the substance of the criticism and not the style; finding that the lawyer's statements were fact rather than opinion, and therefore concluded that "we need not address the issue whether statements of pure opinion, in the absence of any factual allegations, are subject to disciplinary review under Rule 8.2"; not addressing the lawyer's First Amendment argument, because the lawyer had not raised it before the disciplinary authorities), cert. denied, 546 U.S. 977 (2005).

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] . . . . A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- In re Disciplinary Action Ag. Nathan, 671 N.W.2d 578, 581-82, 583 (Minn. 2003) (indefinitely suspending a lawyer who wrote that one judge was "'a bad judge'" who "'substituted his personal view for the law'" and "'won election to the office of judge by appealing to racism'"; also noting that "[t]wo days later Nathan sent the judge a letter stating that if the judge did not schedule a hearing and provide 10 items of relief he was requesting, he would publish an article in area newspapers. Enclosed was an article entitled The Young

Sex Perverts with the judge's name prominently displayed below the title. Nathan published the article in the St. Paul Pioneer Press as a paid advertisement on November 3, 2000, shortly before election day.").

- In re Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (addressing the following footnote from the brief filed by an experienced appellate lawyer from the large Indianapolis, Indiana, law firm of Ice Miller who was signing as local counsel; "'Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).'"; initially suspending Wilkins for thirty days, although later reducing the punishment to a public reprimand. In re Wilkins, 782 N.E.2d 985 (Ind.), cert. denied, 540 U.S. 813 (2003)).

- Hanson v. Superior Court, 109 Cal. Rptr. 2d 782 (Cal. Ct. App. 2001) (upholding contempt finding against a lawyer who told the jury that his criminal defense client had not received a fair trial).

- In re Delio, 731 N.Y.S.2d 171 (N.Y. App. Div. 2001) (lawyer censured for calling judge irrational, pompous and arrogant).

- In re McClellan, 754 N.E.2d 500 (Ind. 2001) (publicly reprimanding lawyer for filing a pleading in which the lawyer criticized a decision as being like a bad lawyer joke).

- In re Dinhofer, 690 N.Y.S.2d 245 (N.Y. App. Div. 1999) (suspending lawyer for 90 days for telling a judge she was "corrupt" in a phone conference).

- Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996) (public reprimand of lawyer for statements to the media that the judge was motivated by political concern), cert. denied, 520 U.S. 1155 (1997).

- Kentucky Bar Ass'n v. Waller, 929 S.W.2d 181, 181, 182 (Ky. 1996) (noting that a lawyer had included the following language in his memorandum entitled "Legal Authorities Supporting the Motion to Dismiss": "'Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . . .'"; noting that the lawyer had included the following statement in another pleading: "'Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined -- first lost -- then won.'"; noting that the

lawyer had responded to a motion to show cause why he should not be held in contempt in a pleading entitled: "Memorandum In Defense of the Use of the Term 'As-Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office"; noting that the lawyer had added the following "P.S." in another pleading: "'And so I place this message in a bottle and set it adrift on a sea of papers -- hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form . . . [o]r is it too formitable (sic) a task and will you yourself have to forego a place at the trough? There is a better and happier way and -- with due temerity I claim to have found it -- it requires one to identify an ass hole when he sees one.'" (alterations in original), cert. denied, 519 U.S. 1111 (1997).

- In re Palmisano, 70 F.3d 483, 485-86, 486, 487 (7th Cir. 1995) (affirming disbarment of a lawyer who included the following statements in correspondence with judges, court administrators and prosecutors: "'Judge Siracusa is called "Frank the Fixer" or "Frank the Crook".'"; "'Like [Judge Robert] Byrne, Frank the Crook is too busy filling the pockets of his buddies to act judicially.'"; "'Judge Lewis, another crook, started in about me . . .'."; "The crooks calling themselves judges and court employees . . .'."; "'I believe and state that most of the cases in Illinois in my experience are fixed, not with the passing of money, but on personal relations, social status and judicial preference.'"; "Chief Justice Peccarelli [sic], your response is illustrative of the corruption in the 18th Judicial District.'"; "'When I stand outside the Court stating that Judge Peccarelli is a crooked judge who fills the pockets of his buddies, I trust Judge Peccarelli will understand this his conduct creates the improper appearance, not my publication of his improper conduct.'"; "'I believe [Justices Unverzagt, Inglis, and Dunn] are dishonest. . . . If the case has been assigned to any of these three, I would then petition the court for a change of venue. Everyone should be assured that the court is honest and not filing [sic] the pockets of those favored by the court.'"; explaining that "[f]ederal courts, no less than state courts, forbid ex parte contacts and false accusations that bring the judicial system into disrepute. . . . Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning -- for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct."; holding that "[e]ven a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that

implied factual assertion may be a proper basis for a penalty."; explaining that the court would have had to deal with the criticism if the lawyer had "furnished some factual basis for his assertions," but noting that he had not; "Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction.").

- In re Atanga, 636 N.E.2d 1253, 1256, 1257 (Ind. 1994) (addressing statements made by lawyer Jacob Atanga, a self-made immigrant from Ghana, who graduated from law school when he was 36 and became president-elect of his local bar association; explaining that Atanga told a local court that he could not attend a hearing in a criminal matter because he had a previously scheduled a hearing in another city; noting that the judge had changed the hearing date, but later reset the hearing for the original date after the prosecutor's ex parte application to reschedule; noting further that the day before the hearing, Atanga sought a continuance because of the conflicting hearing that had been scheduled in the other city; explaining that the local judge refused, and warned Atanga that he would be held in contempt if he did not attend the hearing; noting that Atanga did not attend, and was arrested, fingerprinted, photographed and even given a prisoner's uniform -- which Atanga wore even though the judge eventually accepted Atanga's apology and removed the contempt; noting that Atanga later told the local newspaper that he thought the judge was """ignorant, insecure, and a racist. He is motivated by political ambition."""; eventually upholding a thirty-day suspension, although acknowledging that the local court's procedures were "unusual"; "Ex parte communication between the prosecution and the court, without notice to opposing counsel of record, should not be done as matter or course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality.").

- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six-month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is

inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

- Kunstler v. Galligan, 571 N.Y.S.2d 930, 931 (N.Y. App. Div.) (holding in criminal contempt the well-known civil rights lawyer William Kunstler who made the following statement to a judge in court: "'You have exhibited what you partisanship is. You shouldn't be sitting in court. You are a disgrace to the bench. . . . You are violating every stand of fair play.'"), aff'd, 79 N.Y.2d 775 (N.Y. 1991).

Some lawyers' criticism of judges goes unsanctioned. For instance, lawyers representing alleged terrorists imprisoned at Guantanamo Bay apparently faced no sanctions for harsh language they included in a Supreme Court pleading.

- Reply Brief of Appellant-Petitioner at 3-4, 3 n.5, 6, Al-Adahi v. Obama, No. 10-487, 2010 U.S. Briefs 487 (U.S. Dec. 29, 2010) (in a pleading filed by lawyers from King & Spalding and Sutherland Asbill & Brennan, criticizing a District of Columbia circuit court decision; "To avoid [purported precedent], the Court of Appeals created a new 'conditional probability' rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error are discussed in Al-Adahi's petition. The circuit created a standard, contrary to [the precedent], permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony." (footnotes omitted); "'Conditional probability' is rightly described by the dissent as 'a bizarre theory' and 'gobbledy-gook' -- strong words -- in the probable cause decision that gave rise to it. Prandy-Binett, 995 F.2d at 1074, 1077 (dissenting opinion)."; "The author of Al-Adahi in the Court of Appeals also wrote [other decisions]. . . . As a senior judge, the author of Al-Adahi is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled 'The Guantanamo Mess', he stated publicly that this Court erred in Boumediene. Judge A. Raymond Randolph, The Guantanamo Mess, The Center for Legal and Judicial Studies -- Joseph Story Distinguished Lecture (Oct. 10, 2010), http://www.heritage.org/Events/2010/10/Guantanamos-Mess. No prevailing petitioner has survived a trip to that court, and multiple petitions for certiorari now pending -- and more are coming -- in Guantánamo cases seeking this Court's attention. The court of appeals radically departed from this Court's dispositive precedent in [the earlier case], creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in Boumediene, but to announce a

> wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions." (footnote omitted)).

Geoffrey Fieger's Dispute with the Michigan Judicial System

The long-running battle between well-known Michigan lawyer Geoffrey Fieger and Michigan state court judges (as well as the federal government) provides a case study in lawyers' public communications about judges.

Fieger had been very critical of Judge Clifford Taylor, then serving on the Michigan Court of Appeals. A dissenting Michigan Supreme Court judge (in the case discussed below) recounted some of Fieger's statements about Judge Taylor.

> In 1994, complaining about two then-recent Court of Appeals cases, Mr. Fieger publicly insulted Chief Justice (then-Court of Appeals Judge) Clifford Taylor, calling him "amazingly stupid" and saying:
>
> > Cliff Taylor and [Court of Appeals Judge E. Thomas] Fitzgerald, you know, I don't think they ever practiced law, I really don't. I think they got a law degree and said it will be easy to get a - they get paid $ 120,000 a year, you know, and people vote on them, you know, when they come up for election and the only reason they keep getting elected [is] because they're the only elected officials in the state who get to have an incumbent designation, so when you go into the voting booth and it says "Cliff Taylor", it doesn't say failed Republican nominee for Attorney General who never had a job in his life, whose wife is Governor Engler's lawyer, who got appointed when he lost, it says "Cliff Taylor incumbent judge of the Court of Appeals," and they vote for him even though they don't know him. The guy could be Adolf Hitler and it says "incumbent judge" and he gets elected.

> Mr. Fieger said more about Chief Justice (then Court of Appeals Judge) Taylor:
>
> > [T]his guy has a political agenda . . . . I knew in advance what he was going to do . . . . We know his wife is Governor Engler's Chief Counsel. We know his wife advises him on the law. We know-we knew-what he was going to do in advance, and guess what, he went right ahead and did it. Now you can know somebody's political agenda affects their judicial thinking so much that you can predict in advance exactly what he's going to do[,] . . . his political agenda translating into his judicial decisions.

Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007) (emphases added).

Unfortunately for Fieger, Judge Taylor was later elected Michigan's Chief Justice. Judge Taylor was later defeated in a reelection effort, and replaced with a Democrat-supported judge. That judge later resigned days before being indicted for felony fraud charges -- to which she later plead guilty.

- Jacob Gersham, Michigan Ex-Justice Admits Guilt in Fraud, Associated Press, Jan. 29, 2013 ("Former Michigan Supreme Court Justice Diane Hathaway pleaded guilty Tuesday to a felony fraud charge in connection with a real-estate scheme that allegedly helped her avoid a debt payment of up to $90,000. The case is the latest setback for Michigan Democrats, who waged a bruising, high-profile election battle last fall for three of the court's seven seats, but failed to tip the balance of power in the court, occupied by four Republicans. Governor Rick Snyder is expected to fill Ms. Hathaway's seat with a member of his party, widening the slim Republican majority. On Tuesday, Ms. Hathaway admitted to making fraudulent claims in a debt-forgiveness application to ING Direct, now a subsidiary of Capital One Financial Corporation. She pleaded guilty to a single felony charge of bank fraud in federal court in Ann Arbor. Ms. Hathaway couldn't be reached for comment. Federal prosecutors on January 18 accused Ms. Hathaway of lying about a Florida home she owned in order to dodge a payment of as much as $90,000 as she sought ING's approval for a short sale on a Michigan property. In a short sale, a home is sold for less than the mortgage owed. Ms. Hathaway, 58 years old, had abruptly announced her retirement from the

> court days before the prosecutors filed criminal charges. Earlier, the state's judicial watchdog had called for her suspension, describing the allegations as 'unprecedented in Michigan judicial disciplinary history.' . . . . Ms. Hathaway was on a trial court for 16 years before she was elected to an eight-year term on Michigan's high court in 2008.").

Perhaps the most notorious Fieger issue that reached the Michigan Supreme Court involved Fieger's criticism of several Michigan appellate court judges during his daily radio program -- condemning those judges for reversing a trial court verdict for one of his clients.

The Michigan Supreme Court recited Fieger's statements.

> Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses." Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Appeals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

Fieger, 719 N.Y.2d at 129 (emphasis added).

According to newspaper accounts, Fieger's lawyer said "the comments were made in [Fieger's] role as a radio show host, not as a lawyer, and enjoyed absolute

protection under the First Amendment." Dawson Bell, Fieger's case at center of free speech debate, Detroit Free Press, Mar. 9, 2006.

The Michigan Supreme Court ultimately found that the ethics rules applied to Fieger. The Court's opinion is remarkable for several reasons, including the majority's accusation that a dissenting justice was pursuing a "personal agenda" driven by "personal resentment," and had "gratuitously" and "falsely" impugned other Supreme Court justices.[2]

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[2] Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution."; in dissenting from the majority, Justice Weaver argues that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

The saga then continued in federal court. Fieger sued the Michigan Supreme Court in federal court, challenging the constitutionality of the ethics rules under which the Supreme Court sanctioned him. The Eastern District of Michigan agreed with Fieger, and overturned Michigan Rule 3.5(c) (which prohibits "undignified or discourteous conduct toward the tribunal") and Rule 6.5(a) (which requires lawyers to treat all persons involved in the legal process with "courtesy" and "respect"; and which includes a comment explaining that "[a] lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality" (emphasis added)).[3]

However, the Sixth Circuit reversed -- finding that the district court had abused its discretion in granting Fieger the declaratory relief he sought.[4]

Perhaps not coincidently, Fieger played a prominent role in a later case involving limits on lawyers' advertisements that might be seen as tainting a jury pool. The federal

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[3] Fieger v. Michigan Supreme Court, Civ. A. No. 06-11684, 2007 U.S. Dist. LEXIS 64973 (E.D. Mich. Sept. 4, 2007), vacated and remanded, 553 F.3d 955 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010).

[4] Fieger v. Michigan Supreme Court, 553 F.3d 955, 960, 957 (6th Cir. 2009) (holding that well-known lawyer Geoffrey Fieger did not have standing to challenge the constitutionality of the Michigan ethics rules prohibiting critical statements about judges; noting that "plaintiffs [Fieger and another lawyer] neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments of the United States Constitution . . . ."; noting that the district court had held certain provisions of the Michigan ethics rules unconstitutionally vague, but reversing that decision, and remanding for dismissal; "We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction. We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief."), cert. denied, 130 S. Ct. 1048 (2010).

government prosecuted Fieger for campaign contribution violations involving his support for Democratic primary candidate John Edwards (the jury ultimately acquitted Fieger). Just before his trial, Fieger ran several advertisements implying that the Bush Administration was attempting to silence him. The district court handling the criminal prosecution prohibited Fieger from running the advertisements.

> 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.

United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist. LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008).

Judges' Criticism of Other Judges

Interestingly, judges can be extremely critical of their colleagues, usually without any consequence.

Some majority opinions severely criticize dissenting judges.

- Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael

> Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution." (emphasis added); "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

In some situations, one judge's criticism of a colleague paralleled a lawyer's statement that drew sanctions. As explained above, an experienced appellate lawyer from a large Indianapolis, Indiana, law firm was punished for signing (as local counsel) a brief that contained the following footnote:

> "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was

> determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."

In re Wilkins, 777 N.E.2d 714, 715 n.2 (Ind. 2002) (emphasis added). In the same year, the West Virginia Chief Justice and one of his colleagues included the following criticism of a majority opinion in a vigorous dissent.

> In the final analysis, it is clear that the majority opinion was merely seeking a specific result which can be supported neither by the record nor by the applicable law. Therefore, to achieve the desired outcome, the majority opinion completely avoids any discussion of the evidence or the law. With this irreverent approach to judicial scholarship, I strongly disagree.

State ex rel. Ogden Newspapers v. Wilkes, 566 S.E.2d 560, 569 (W. Va. 2002) (emphasis added).

Appellate courts have also criticized lower courts in surprisingly strident language.

- HSBC Bank USA, N.A. v. Taher, 962 N.Y.S.2d 301, 304 (N.Y. App. Div. 2013) (using harsh language and criticizing a trial judge; "[W]e take this opportunity to remind the Justice of his obligation to remain abreast of and be guided by binding precedent. We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity to be heard by any party . . . , was improper and should not be repeated." (emphasis added)).

- Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1220 (Del. 2012) (criticizing Delaware Court of Chancery Chief Judge Leo Strine; "[T]he court's excursus on this issue strayed beyond the proper purview and function of a judicial opinion. 'Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it.' We remind Delaware judges that the obligation to write judicial opinions on the issues presented is not a license to use those opinions as a platform from

> which to propagate their individual world views on issues not presented. A judge's duty is to resolve the issues that the parties present in a clear and concise manner. To the extent Delaware judges wish to stray beyond those issues and, without making any definitive pronouncements, ruminate on what the proper direction of Delaware law should be, there are appropriate platforms, such as law review articles, the classroom, continuing legal education presentations, and keynote speeches." (footnotes omitted) (emphasis added)).

Judges have also criticized their colleagues in other contexts. In one newsworthy situation, a judge received widespread publicity for criticizing another judge with whom he serves. That judge had sent an email containing the following language to colleagues on the bench, criticizing the judge who was then handling the murder case of Brian Nichols, a criminal defendant who gained national notoriety by murdering a judge and then escaping from the courthouse:

> 'Is there any way to replace the debacle and embarrassment Judge Fuller is. He is a disgrace and pulling all of us down. He is single handedly destroying the bench and indigent defense and eroding the public trust in the judiciary. See his latest order. He can not [sic] tell the legislature what to do. ENOUGH IS ENOUGH. Surely he can be replaced. He is a Fool. How is it done. Seek mandamus for a trial? We should investigate if it can be done.'

Greg Land, Ga. Judge Blasts Judge in Courthouse Murder Case as a "Fool" and "Embarrassment", Fulton County Daily Report, Nov. 1, 2007. The judge handling the Nichols case later recused himself from handling the case.

(a)-(b) No ethics rules totally prohibit lawyers' criticism of opinions or judges.

(c) On their face, the ABA Model Rules (and parallel state rules) apply to public and nonpublic statements.

This contrasts with the ABA Model Rules' limitations on lawyers' statements about an investigation or litigated matter, which applies only to statements "that the lawyer knows or reasonably should know will be disseminated by means of public communication." ABA Model Rule 3.6(a) (emphasis added). The latter rule obviously focuses on the possibility of affecting a proceeding. However, one might have thought that the public interest in favor of respecting the judicial system's integrity and public reputation would have supported a similarly expansive view of the rule limiting lawyers' criticism of judges.

Not many courts or bars have dealt with this issue. One decision essentially forgave a lawyer for an ugly but private statement about a judge.

- In re Isaac, 903 N.Y.S.2d 349, 349, 351 (N.Y. App. Div. 2010) (holding that the bar would not discipline a lawyer for calling a judge a "prick" in a private conversation; "[W]e agree with the Panel that respondent's comments about this Court and his ability to influence the Court, made in a private conversation, are not subject to professional discipline as they were uttered 'outside the precincts of a court.'" (citation omitted)).

Of course, the lack of bar analysis or case law might simply reflect the difficulty of discovering lawyers' private comments about judges.

(d) As explained above, most bars judge a lawyer's conduct under an objective standard, despite the use of the defamation standard in the rule -- which in the world of defamation is a completely subjective standard.

(e) The current limit on lawyers' criticism of judges goes to the substance rather than the style of what lawyers say.

Interestingly, at least one state's former ethics code limited how a lawyer criticized the judge, rather than the criticism itself. See former Va. Code of Prof'l

Responsibility EC 8-6 ("While a lawyer as a citizen has a right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.").

Best Answer

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

n 12/11; b 1/3

Lawyers' Public Communications about Judges: Defining the Limits

Hypothetical 5

One judge in your local state court has received national notoriety for issuing controversial and unpopular decisions. As your local bar's ethics "guru," you have received several calls from lawyers anxious to know what they can say about this judge's recent decisions.

May a lawyer say the following about a judge's decision:

(a) "We respectfully disagree with the judge's recent decision"?

YES

(b) "We think the judge got it wrong"?

YES

(c) "We think the judge totally missed both the facts and the law presented at the trial"?

MAYBE

(d) "We were astounded at the judge's lack of understanding of basic legal principles"?

NO (PROBABLY)

(e) "We obviously disagree with the judge's stupid decision"?

NO

Analysis

(a)-(e) This hypothetical highlights the inevitable focus on the language of a lawyer's criticism rather than the substance -- despite the ethics rules' articulation of a standard based only on substance rather than style.

Best Answer

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

n 12/11; b 1/13

Surveillance Videotapes

Hypothetical 6

As a defense lawyer, you frequently defend automobile accident cases brought by plaintiffs claiming serious debilitating injuries. In some cases, you suspect that plaintiffs are lying about the extent of their injuries.

May you arrange for an investigator to drive by a plaintiff's house, and videotape the plaintiff engaged in such outdoor activities as mowing the lawn, climbing a ladder to clean gutters, playing touch football, etc.?

YES

Analysis

Surveillance videotapes of this sort are a traditionally accepted way for defendants and their lawyers to challenge plaintiffs' claims of permanent injuries.

There are many cases involving this practice, none of which even mention the practice's ethical propriety -- thus implicitly acknowledging the legitimacy of such discovery tactics.

Courts dealing with surveillance videotapes most frequently wrestle with one of four issues.

First, courts debate whether such surveillance videotapes constitute protected work product. Most courts hold that they do. Bradley v. Wal-Mart Stores, Inc., 196 F.R.D. 557, 557 (E.D. Mo. 2000). This seems like the proper conclusion under the work product doctrine. The surveillance videotapes are "tangible things" prepared at a time when the defendant is in or reasonably anticipates litigation, and motivated by that litigation.

The fact that the surveillance videotapes show non-confidential events does not change that analysis. The work product doctrine is not based on confidentiality, and can protect such "tangible things" as a court reporter's transcript (McGarrah v. Bayfront Med. Ctr., Inc., 889 So. 2d 923, 926 & n.2 (Fla. Dist. Ct. App. 2004)), a videotape of an accident scene (Falco v. N. Shore Labs. Corp., 866 So. 2d 1255 (Fla. Dist. Ct. App. 2004)) or the translation of a document from one language to another (In re Papst Licensing GmbH Patent Litig., Civ. A. No. 99-MD-1298 Section "G" (2), 2001 U.S. Dist. LEXIS 10012, at *69-70 (E.D. La. July 12, 2001)).

Interestingly, no court seems to have dealt with the possibility that a surveillance videotape might deserve opinion work product protection. This seems like a long shot, but the higher protection of opinion work product might apply to the surveillance videotape that somehow reflects the lawyer's specific instructions about how to tape the plaintiff. Because the opinion work product doctrine protection applies to opinions of any client representative (not just lawyers), the doctrine might even protect a surveillance videotape that reflects the videographer's opinion about what is important.

Second, courts must determine if the plaintiff can overcome the work product protection. The work product doctrine provides only a conditional or qualified immunity from discovery, and the adversary can obtain a litigant's work product by showing "substantial need" for the work product, and the inability to obtain the "substantial equivalent" without "undue hardship."

In some ways, it is almost humorous to consider how a plaintiff could ever meet this standard. After all, the plaintiff presumably knows whether she can mow the lawn,

climb a ladder, play touch football, etc. Some courts recognize this common sense principle. Ex parte Doster Constr. Co., 772 So. 2d 447 (Ala. 2000). Other courts use shaky logic to come to a different conclusion -- holding that surveillance videotape might somehow be misleading. These courts conclude that a plaintiff can overcome defendant's work product doctrine protection covering the surveillance videotapes. Southern Scrap Material Co. v. Fleming, No. 01-2554 SECTION "M" (3), 2003 U.S. Dist. LEXIS 10815, at *56 n.45 (E.D. La. June 18, 2003) (holding that surveillance videotapes and photographs were protected by the work product doctrine, but must be produced because they are "available only from the ones who obtained it, fixes information available at a particular time and place under particular circumstances, and therefore, cannot be duplicated").

Third, courts debate whether a defendant has to produce such surveillance videotapes that it has taken of plaintiff. This analysis also involves the "substantial need" test for overcoming an adversary's work product doctrine protection. Unlike other forms of work product, almost by definition a plaintiff does not have "substantial need" for a surveillance videotape unless the defendant intends to use the videotape at trial. Thus, most courts take the logical approach that defendant must produce such surveillance videotapes only if it intends to use the videotapes at trial. Fletcher v. Union Pac. R.R., 194 F.R.D. 666 (S.D. Cal. 2000) (finding that the defendant's secret surveillance videotape of plaintiff in daily activities amounted to factual work product, but refusing to order its production because defendant indicated that it would not use the surveillance tape at trial). Samples v. Mitchell, 495 S.E.2d 213 (S.C. Ct. App. 1997)

(finding that a defendant had improperly failed to disclose the existence of a surveillance videotape showing a plaintiff engaged in activity casting doubt on her injury; noting that defendant is obligated to at least disclose the existence of the videotape, even if it claimed work product protection; granting plaintiff a new trial after the trial judge allowed the defendant to use the videotape despite not having disclosed it). Of course, any litigant must produce documents or other exhibits that they intend to introduce at trial.

Fourth, courts must decide when the defendant should produce a surveillance videotape that it intends to use at trial. This analysis highlights the interesting intersection of privilege/work product doctrine and discovery/trial logistics. A majority of courts take a very clever approach -- requiring the defendant to produce surveillance videotapes but only after it deposes the plaintiff. Runions v. Norfolk & W. Ry., 51 Va. Cir. 341, 344 (Roanoke 2000) ("The court will therefore order that (1) the contents of surveillance movies, tape, and photographs must be disclosed if the materials will be used as evidence either substantively or for impeachment; and (2) the plaintiff and his attorneys must be afforded a reasonable opportunity, consistent with the needs expressed by the court in Dodson, to observe these movies or photographs before their presentation as evidence. Within its discretion, however, the court will further order that the defendant has the right to depose the plaintiff before producing the contents of the surveillance information for inspection. Counsel will forthwith arrange for the plaintiff's deposition to be taken. As soon as Mr. Runions has signed the deposition transcript, or, if he waives signature, as soon as his deposition is concluded, NW's lawyers will

produce the surveillance materials."). The in terrorem effect of a secret surveillance videotape presumably drives the plaintiffs to truthfully answer deposition questions about the extent of their injuries.

Best Answer

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

Intrusive Surveillance Videotapes

Hypothetical 7

As a defense lawyer, you receive numerous proposals from private investigators about how to catch plaintiffs exaggerating or even lying about the extent of their personal injuries.

May you direct a private investigator to engage in the following activities from a van parked on a public street outside a plaintiff's home:

(a) Use a telephoto lens to videotape plaintiff's activities?

YES (PROBABLY)

(b) Use a camera mounted on top of the van to look over a hedge on the plaintiff's property line?

MAYBE

(c) Use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

NO (PROBABLY)

(d) Use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim.

NO

Analysis

(a)–(d) While every court seems to explicitly allow litigants to conduct secret surveillance videotape of an adversary conducting activities in plain view, more intrusive types of surveillance eventually implicate other common law and even statutory limitations.

None of these surveillance techniques intercepts communications, and therefore do not trigger what generally are more specific and narrow regulations. Still, state law at some point restricts intrusive surveillance.

Many states recognize an "invasion of privacy" tort. Although the contours of this tort vary from state to state, especially intrusive surveillance techniques presumably would run afoul of these common law torts. For example, Illinois apparently follows the Prosser and Restatement (Second) of Torts invasion of privacy approach -- which includes "unreasonable intrusion upon the seclusion of another." Huskey v. National Broadcasting Co., 632 F. Supp. 1282, 1286 (N.D. Ill. 1986); Midwest Glass Co. v. Stanford Dev. Co., 339 N.E.2d 274, 277 (Ill. App. Ct. 1975).

However, not every state recognizes such a tort. For instance, Virginia has repeatedly rejected the concept of an "invasion of privacy" tort. Instead, Virginia law simply prohibits one from using a person's "name, portrait, or picture" for commercial purposes. Va. Code § 8.01-40.

At least one state has enacted a specific law restricting certain types of intrusive surveillance. California Civil Code § 1708.8(b) limits the type of activity that "paparazzi" commonly use.

> A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical

> impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Cal. [Civ.] Code § 1708.8(b). The law also makes a violator subject to disgorgement to the plaintiff of any proceeds gained as a result of such improper surveillance. Cal. [Civ.] Code § 1708.8(d).

Interestingly, the California law has a specific exemption for (1) law enforcement personnel; and (2) private entities with a reasonable suspicion that the subject of the surveillance has engaged in "suspected fraudulent conduct." Cal. [Civ.] Code §1708.8(g).

> This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, or other misconduct,, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.

Id.

Best Answer

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

Eavesdropping in a Public Place

Hypothetical 8

You are preparing for a large commercial litigation trial against Acme Company. You have been calling various hotels in a nearby city looking for a suitable spot to conduct a mock jury trial. The hotel event planner with whom you just spoke assured you that her hotel can handle such an event -- telling you that "we have a mock jury trial just like yours lined up this Saturday afternoon for Acme Company."

May you arrange for several of your law firm's secretaries and paralegals to "hang out" in that hotel's public lobby and hallways this Saturday afternoon (hoping to overhear conversations that might prove useful)?

YES (PROBABLY)

Analysis

This situation does not involve intrusive surveillance or any explicit deception. Instead, it involves eavesdropping in a semipublic place.

Courts seem not to have dealt with situations like this, meaning that they probably are acceptable.

One often-told incident involves a similar practice. Although perhaps apocryphal, the story relates that two large New York City law firms were battling each other in a high-stakes hostile takeover case. One law firm reportedly sent a number of its secretaries, staff and paralegals to ride up and down the elevators of the other law firm's building -- and later report back on any stray conversations they heard on the elevator.

Although a judge might find such tactics somehow "sleazy," no ethics rule seems to prohibit it.

Best Answer

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

Use of a Body Wire

Hypothetical 9

You represent a wife in a bitter custody battle. The client has tearfully told you how verbally abusive her ex-husband has been to her and the children when they meet every other Saturday morning at a McDonald's parking lot where he picks up the children.

May you suggest that your client wear a "body wire" during one of the Saturday morning exchanges to capture her ex-husband's abusive language?

MAYBE

Analysis

This type of evidence-gathering does not involve (1) deception (as long as the person wearing the "body wire" does not affirmatively lie about anything); or (2) trespass or other arguable invasion of someone's privacy.

Still, many states' laws would consider this an electronic "interception" of someone else's communication. See, e.g., Va. Code §§ 19.2-61 et seq. If so, the legality of such "body wire" use would depend on whether the law permits such interception if only one of the participants consented.

A state's approach to the ethics of such a practice might be difficult to predict. It seems likely that a state would approach such "body wire" usage as it does the tape recording of telephone calls. However, it would be easy to envision a state taking a more liberal attitude toward the use of body wires, at least in a public space like a parking lot. It would seem that someone verbally abusing an ex-wife or children in a fast food parking lot would not have the same "expectation of confidentiality" as a

participant in a telephone call. On the other hand, bars which would prohibit lawyers from lawfully recording telephone calls might well take the same approach to this type of recording.

Best Answer

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

Electronic Surveillance Involving Trespass

Hypothetical 10

You represent the wife in a bitter custody battle. Her children have reported dangerous unsanitary conditions at her ex-husband's apartment. The children have also described having trouble sleeping at night when they stay with their father, because he refuses to lock the apartment door. Your client said that last Sunday she went to her ex-husband's apartment to pick up the children, but no one was there. She peeked in the window and noticed the dangerous unsanitary conditions inside. She has asked whether she can enter her ex-husband's apartment next time she finds herself in that position, and take pictures of the unsanitary conditions.

(a) May your client enter her ex-husband's apartment and photograph dangerous unsanitary conditions?

NO (PROBABLY)

(b) May your client ask one of her children to photograph the dangerous unsanitary conditions?

YES (PROBABLY)

(c) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, may you use the photographs in the custody dispute?

MAYBE

(d) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, is the court likely to use and rely on the photographs in making custody decisions?

YES

Analysis

Introduction

The ethics rules prohibit lawyers from engaging in any activity (including discovery) that violates the "legal rights" of others.

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a).

ABA Model Rule 4.4 Comment [1] indicates that "[i]t is impractical to catalogue" all of the "rights of third persons" that lawyers must respect. The comment indicates that those rights "include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

In this hypothetical, the client had asked ahead of time whether she can engage in such conduct herself. This situation therefore implicates the general "lawyers cannot do indirectly what they cannot do directly" principle found in every state's ethics rules.

> It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

ABA Model Rules 8.4(a). Comment [1] to ABA Model Rule 8.4 provides a further explanation.

> Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an

> agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

ABA Model Rule 8.4 cmt. [1].

This scenario sometimes arises when journalists use aggressive investigation techniques, and the subjects of the investigation claim a news gathering tort.

For instance, Food Lion sued ABC after ABC's "Prime Time Live" program aired a report showing Food Lion employees mishandling food. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999). Two ABC employees had obtained jobs at Food Lion (using false identities, fictitious local addresses, etc.), and relied upon "lipstick cameras" and hidden body microphones to secretly record what they saw at Food Lion. Food Lion did not sue ABC for defamation, but instead "focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." Id. at 510.

The jury awarded Food Lion $1,400 in compensatory fraud damages, $1 each on its duty of loyalty and trespass claims and $1,500 on a state statutory claim. The jury then awarded punitive damages of $5,545,750 -- which the district court remitted to $315,000. The trial court reversed the fraud verdict, upheld the breach of duty of loyalty verdict, upheld the trespass verdict, and reversed the statutory verdict. After reversing the punitive damages verdict, the Fourth Circuit left Food Lion with compensatory damages of $2.

Several other courts have dealt with news gathering torts. For instance, in KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr. 2d 431 (Cal. Ct. App. 1995), a television

reporter knocked on the door of a home where three minor children (ages five, seven and eleven) were by themselves. While the camera was rolling, the television reporter asked the children if they knew the Weber children who lived nearby. The children being interviewed told the reporter that the Weber children were "nice" and that they play together "all the time." The reporter then said: "Well, the mom has killed the two little kids and herself." The seven-year-old girl is videotaped saying, "Oh my God!" The children sued for intentional infliction of emotional distress; and the court denied the television station's motion for summary judgment.

On the other hand, the Seventh Circuit in Desnick v. American Broadcasting Cos., Inc., 44 F.3d 1345 (7th Cir. 1995), endorsed "ambush journalism" conducted by Sam Donaldson and other reporters for the ABC program "Prime Time Live." ABC had sent persons with concealed cameras into an eye surgery center to show that the eye center's doctors recommended needless cataract surgery for elderly patients with Medicare coverage for such surgery. The eye center sued ABC for defamation, trespass, invasion of the right of privacy, fraud and violations of federal and state laws regulating electronic surveillance. Judge Posner pointed to law that permits entry into an establishment even if the consent to enter is procured by fraud.

> Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote

> competition. Others might be thought justified by some kind of implied consent -- the restaurant critic for example might point by way of analogy to the use of the "fair use" defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.

Id. at 1351.

Judge Posner contrasted those situations with a curious busybody who obtains entry to someone's home by claiming to be a meter reader, or a competitor entering a business by posing as a customer, but hoping to obtain trade secrets.

> How to distinguish the two classes of case -- the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright -- they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

Id. at 1352.

Judge Posner also pointed to housing discrimination testers, who do not violate trespass laws by entering into houses they are pretending to be interested in buying or renting. Judge Posner dismissed all of the claims but the defamation claim.

(a) Because your client's entry into her ex-husband's apartment would almost surely be trespass, you cannot advise her to enter the apartment and take photographs.

(b) It is unclear whether the children (who would not be trespassing) can take photographs of dangerous unsanitary conditions. It seems likely that a lawyer could advise the mother to arrange for the children's recording of the unsanitary conditions.

(c) Courts disagree about whether a lawyer can use the fruits of the investigation that the lawyer himself or herself could not engage in. In the case of an investigator acting as the lawyer's agent, such use normally would be improper. On the other hand, a court might permit the use of photographs in a situation where a less sophisticated client has gathered evidence in this fashion. If the evidence gathering involved a crime, courts might take a less forgiving approach.

(d) Given the courts' necessary focus on the best interest of the child, it seems likely that the court would use even wrongfully obtained evidence.

Very few cases deal with situations like this. This hypothetical comes from the case of Rogers v. Williams, 633 A.2d 747 (Del. Fam. Ct. 1993). In that case, a father sought custody of his two sons. The father's new wife went to the mother's home to make a child support payment. Finding the door unlocked, she entered the mother's house. She then brought a camcorder back to the house and videotaped what the father claimed to be the "unhealthiness" of the mother's residence. The mother sought

to exclude the videotape from admission in the custody hearing. The court acknowledged that the videotape was "wrongfully obtained" because the father's wife "did not have respondent's permission to enter and videotape her home." Id. at 748. The court nevertheless admitted the videotape. As the court explained it, "[t]he state has an overwhelming interest in promoting and protecting the best interests of its children," so the "public policy" required the court to "consider as much relevant evidence as possible when deciding child custody." Id. at 749.

Best Answer

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

Tape Recording Telephone Calls

Hypothetical 11

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 party's consent, in a state where both parties' consent is required?

NO

(b) When the client (a young woman) wants to record her step-father's gloating admission that the step-father sexually abused her when she was a young girl?

MAYBE

(c) When a lawyer wants to record an abusive ex-boyfriend's threat to kill her?

YES

(d) When a lawyer wants to record blatant lies by opposing counsel?

MAYBE

(e) When a lawyer wants to record a client's threat to withhold payment of the lawyer's bill?

NO (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. In states where one participant in a telephone call can tape-record the call (approximately 38 states as of 2009), 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 tape 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]

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[1] ABA Model Rule 4.1(a) ("[i]n 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) ("[i]t 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 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

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 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

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circumstances. We make no comment today on the merits of the questions that we will charge the committee to consider.").

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 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).

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[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).

- 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. at 1117. 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.

Similarly, one Florida court condemned a wife's use of spyware to catch her husband's on-line communications with another woman. O'Brien v. O'Brien, 899 So. 2d 1133 (Fla. Dist. Ct. App. 2005).

Other bars clearly disagree.

- 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.").

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 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.

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[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).

[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 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.

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

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

Hypothetical 12

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

Other Use of Modern Techniques

Hypothetical 13

The outcome of a large commercial case might hinge on a neutral witness's credibility. You are considering ways to confidentially test his credibility.

May you:

(a) Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

YES

(b) Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

NO (PROBABLY)

(c) Use the new speech pattern software to analyze the neutral witness's statements on the subject matter during a press conference that was broadcast on the local news station?

YES (PROBABLY)

Analysis

This hypothetical comes from Philadelphia LEO 2000-1 (2/2000).

> The inquirer has asked this Committee to analyze the ethical implications for an attorney utilizing a recently-developed software program which purports to instantaneously analyze speech patterns to determine the veracity of the speaker. The technology firm that developed the software has asked the inquirer to use it in the inquirer's law practice "to determine its validity in real life situations."

(a) No one could object to using such methods unless there was some active deception involved.

(b) The Philadelphia Bar held that using the software during a deposition violated several rules.

> A person testifying at a deposition expects that testimony offered on the record will be transcribed and may be used thereafter at trial or in some other context. However, neither the deponent nor an attorney attending the deposition has reason to anticipate that the deponent's speech patterns will be calibrated and analyzed on a basis such as propounded for the described software. Using the software surreptitiously at the deposition, without the consent of the deponent and counsel present at the deposition, therefore may be deemed to violate Rule 4.1 (Truthfulness in Statements to Others), Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

(c) The Philadelphia Bar took a different approach to audiotapes obtained through lawful means and analyzed using the software.

> In contrast, we see no ethical violation in using the software to analyze a lawfully-obtained, lawfully-created tape recording or videotape originally prepared for some other purpose, as long as: (1) it does not violate any restriction placed on the recording or videotape by law or otherwise, (2) the creation of the recording or videotape involved no deception. In other words, if the inquirer comes into possession of a lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape. We distinguish that scenario, however, from a situation in which the inquirer knows before making a tape that the inquirer intends to use the software to analyze it, yet fails to disclose that intention to the speaker.

Many lawyers would probably think that this activity would pass muster under the ethics rules, but the Philadelphia bar's hostile reaction should prompt lawyers to check

the applicable rules and how the bars have interpreted them. This is especially important in any pre-litigation informal discovery -- because under the ABA Model Rule 8.5 approach, the applicable ethics rules might be supplied by the state where the conduct occurred rather than by the state where the litigation ultimately will ensue.

Best Answer

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

Deception: Worthwhile Causes

Hypothetical 14

You have chosen as your favorite pro bono project a local private group that fights housing discrimination. Over the years, you have learned that the only effective way to find and eliminate housing discrimination is to use "testers." These "testers" are prospective homebuyers with false backgrounds that are identical in every way but one -- their race or national origin.

(a) May you participate as a "tester" in an effort to find and eliminate housing discrimination?

MAYBE

(b) May you supervise your group's use of such "testers" without engaging in the practice yourself?

YES (PROBABLY)

Analysis

Bars everywhere have wrestled with a lawyer's use of deception (either herself or through a non-lawyer) in the pursuit of some socially worthwhile goal.

A lawyer's deception implicates a number of ethics rules.

First, lawyers themselves must avoid deception when representing a client.

> 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.

ABA Model Rule 4.1(a). A comment describes this rule.

> 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].

State ethics rules show a remarkable diversity in their approach to this basic principle. For instance, ABA Model Rule 4.1 prohibits only a lawyer's knowing false statement of material fact. The ABA Model Rules explain that this term

> denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). The last sentence brings a touch of objectivity to the meaning. Commentators have explained that a lawyer cannot avoid violation of a rule requiring "knowing" conduct by willful blindness or other unreasonable behavior.

Virginia takes the ABA Model Rule approach to the level of required knowledge, but drops the materiality element.

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law.

Virginia Model Rule 4.1(a). Thus, on its face the Virginia ethics rules would prohibit a lawyer's insignificant (but knowing) lie. Ironically, this is exactly the opposite of the approach Virginia has taken to Rule 8.4. As explained below, Virginia added a phrase to ABA Model Rule 8.4(c) to avoid an absolute prohibition on all deceptive conduct, however insignificant.

Not surprisingly, courts punish such direct deception.[1]

Second, lawyers may not assist or counsel a client in committing fraud.

> 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). A comment explains this rule.

> 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.

ABA Model Rule 4.2 cmt. [9].

Not surprisingly, this obligation applies in litigation. "The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation." ABA Model Rule 3.3 cmt. [3].

Although such misconduct might be hard to detect, courts naturally punish lawyers who advise their clients to engage in deceptive conduct.

- See, e.g., Attorney Grievance Comm'n v. Elmendorf, 946 A.2d 542, 544 (Md. 2008) (reprimanding a lawyer who has sent an e-mail to an acquaintance to whom the lawyer had sent the following e-mail about the possibility of the

[1] See, e.g., Attorney Grievance Comm'n v. Smith, 950 A.2d 101 (Md. 2008) (suspending a lawyer for pretending to be a police officer in a voicemail message left with a witness before a trial).

> acquaintance falsely claiming a one-year separation in order to obtain a no-fault divorce; "'You can file whatever you want so long as the parties say that it has been a year, the court won't question it so long as the parties agree to that.'" (citation omitted); noting that the lawyer claimed to have later advised the acquaintance that the lawyer did not imply that the acquaintance should lie to the court; reject the bar's effort to have the lawyer suspended).

Third, lawyers must assure at least some level of similar conduct from non-lawyers that they supervise.

> With respect to a nonlawyer employed or retained by or associated with a lawyer: . . . (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(b), (c).

Fourth, the ABA Model Rules contain a catch-all provision that has vexed commentators for many years.

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(b), (c). As explained below, commentators have tried to interpret Model Rule 8.4(c) in a way that softens somewhat the absolute prohibition on any deceptive conduct.

Ironically, ABA Model Rule 8.4(b) prohibits a lawyer from committing a "criminal act" -- but only if that criminal act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." One would have expected that the "reflects adversely" proviso would also be added to ABA Model Rule 8.4(c). In fact, the proviso makes much more sense in ABA Model Rule 8.4(c) than (b). As it now stands, lawyers in a state following the ABA Model Rules might not automatically be punished for a criminal act -- the bar must determine if that criminal act "reflects adversely" on the lawyer's honesty, trustworthiness, etc. However, a lawyer in that state can be punished for any other type of deceptive act (even if it does not "reflect adversely" on his honesty, etc.) -- presumably including making such knowingly false statements as "No, I really like the tie you gave me for Father's Day" or "I really loved your meatloaf."

As with ABA Model Rule 4.1, states have taken differing approaches to this rule. For instance, Virginia has taken what seems like a much more logical approach.

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; (c) engage in conduct involving dishonesty fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

Virginia Rule 8.4(b), (c). Thus, Virginia includes the "reflects adversely" proviso in both the section dealing with criminal acts and the section dealing with other deceptive acts.

Vermont has not changed its rule, but a 2009 Vermont case articulated a limited reach of the seemingly unlimited prohibition on any deceptive conduct.

> [W]e are not prepared to believe that any dishonesty, such as giving a false reason 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.'

In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 12, 14, 15 (Vt. 2009).

Fifth, The ABA Model Rules contain another general provision that commentators have criticized for being essentially meaningless.

> It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(d). Much like the phrase "appearance of impropriety," the term "prejudicial to the administration of justice" provides no real guidance to lawyers or bar disciplinary committees.

The Restatement deals with tape recording and ex parte contacts, but not with the basic issue of deception.

> A lawyer may conduct an investigation of a witness to gather information from or about the witness. Such an investigation may legitimately address potentially relevant aspects of the finances, associations, and personal life of the witness. In conducting such investigations personally or through others, however, a lawyer must observe legal constraints on intrusion on privacy. The law of some jurisdictions, for example, prohibits recording conversations with another person without the latter's consent. When 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. Such a need may exist more readily in a criminal-defense representation. In conducting such an investigation, a lawyer must comply with the limitations of § 99 prohibiting contact with [sic] represented person, of § 102 restricting communication with persons who owe certain duties of confidentiality to others, and of § 103 prohibiting misleading an unrepresented person.

Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (emphasis added).

Given these flat prohibitions on any deceptive conduct, there simply is no way to reconcile the ethics rules and commonly used deception -- even for a socially worthwhile goal.

Commentators have appeared to agree on a few basic principles. For instance, most authorities agree that the complete prohibition on any conduct "involving dishonesty, fraud, deceit or misrepresentation" in ABA Model Rule 8.4(c) cannot

possibly mean what it says. Otherwise, a lawyer could lose his license by dishonestly answering questions from his wife such as "Does this dress make me look fat?"[2] The authorities tend therefore tend to argue that ABA that Model Rule 8.4(c) must involve serious misconduct, or else it would render ABA Model Rule 4.1(a) superfluous.

But of course then they have to deal with Model Rule 4.1(a). At least that rule is limited to a lawyer's conduct "[i]n the course of representing a client." It also limits its reach to statements of "material" fact or law. Still, a lawyer participating in a housing discrimination "test" presumably is "representing a client" and is clearly engaged in material deception. Whether the lawyer can ask a non-lawyer colleague to engage in such deception implicates ABA Model Rule 5.3. The answer is clearly "no" if the non-lawyer's conduct must match the lawyer's conduct.

Given this intractable discrepancy between the ethics rules and these common activities, commentators have proposed various rules changes that would allow socially worthwhile deception without totally abandoning the anti-deception principle.

An often-cited law review article by well-respected national bar leaders proposed the following standard for lawyer deception.

> (1) A lawyer employing an undercover investigator or discrimination tester must have reasonable grounds to believe that either: (a) the target person, entity, or group is engaged in criminal, corrupt, or otherwise unlawful activity, or (b) the deception is necessary to avoid physical bodily harm or death; and

[2] Some states have wisely amended their version of Rule 8.4(c) to add the type of "reflects adversely on a lawyer's fitness" concept that appears in the mandatory reporting requirements. See Virginia Rule 8.4(c).

> (2) The undercover investigator or discrimination tester can engage in misrepresentation only to the extent necessary for the limited purpose of detecting and/or proving the criminal or unlawful acts. The investigator or tester cannot engage or assist in any crime, even if for the purpose of investigating the target person or entity; and
>
> (3) With special regard to civil cases, a lawyer cannot authorize deception or misrepresentation for any other reason than those listed in (1) above. An undercover investigator or tester must not be used to circumvent the responsibilities of a lawyer under the Model Rules, and must be used only in connection with activities that would not violate the Model Rules if engaged in by a lawyer not acting as such (i.e. in a nonlawyer capacity). Any necessary deception must be used only in the public interest and with the intent of furthering justice.

David B. Isbell & Lucantonio N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the *Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 808 n.58 (1995) (emphases added).

A 1989 article in the Notre Dame Law Review proposed the following standard:

> The ABA should recognize that it may not be unethical for an attorney to use deception when 1) the deception is coupled with a compelling reason to perpetrate the deception, 2) the deception is not intended for the benefit of the deceiver, 3) the deception is revealed within a reasonable time after the deception is perpetrated, 4) the deception is perpetrated with the intent of furthering justice, and 5) no reasonable alternative is available.

Christopher J. Shine, Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception, 64 Notre Dame L. Rev. 722, 749-50 (1989).

The ABA Intellectual Property Section recommended a similar standard for deceptive conduct.

> [3] This Rule pertains to statements of material facts that lawyers make in their professional capacity representing clients, not to statements made by persons acting in the capacity of an investigator in the course of gathering information, even though such person may be acting under the direction of a lawyer or may be him- or herself a lawyer. This Rule therefore does not apply to statements made by investigators to disguise their identity or purpose in order to facilitate gathering information. Communications made by an investigator may nonetheless present issues under other prohibitions of these Rules, such as those related to fraud, perjury or misrepresentations that reflect adversely on fitness to practice law or to communications with a person known to be represented by a lawyer.

Proposed Model Rule 4.1 cmt. [3] from the ABA IP Law Section (May 13, 1998).

None of these or similar proposals have made it very far at the ABA. In the meantime, several states have changed their rules.

For instance, Oregon allows all lawyers (not just government lawyers) to advise clients and supervise non-lawyers in some deceptive conduct, but not engage in it themselves.

> Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful

> activity has taken place, is taking place or will take place in the foreseeable future.

Oregon Rule 8.4(b).[3]

More recently, several other states have adopted changes that are limited to government lawyers.

> [2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

South Carolina Rule 4.1 cmt. [2]. This South Carolina rule allows government lawyers themselves to engage in deceptive conduct.

> (2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:
>
> (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through order, directions, advice and encouragement may cause other agencies and offices of government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not

[3] An Oregon legal ethics opinion applies this general rule to several examples. Oregon LEO 2005-173 (8/05) (addressing several scenarios under Oregon Rule 8.4(b), which indicates that "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."; interpreting three situations, holding that (1) a lawyer cannot befriend or approach a witness pretending to be from witness's employer's personnel office and question the witness about an accident, because the lawyer's adversary is an injured worker and is not engaging in "violations of civil law, criminal law, or constitutional rights"; (2) a lawyer may not herself use a fictitious name when interviewing a doctor, in an effort to convince the doctor that she is severely injured, as part of an investigation into suspected fraud by the doctor in another accident case, noting that Rule 8.4(b) does not allow a lawyer to participate directly in covert activity; (3) a deputy district attorney may hire someone to pose as a drug customer in a sting operation, if he in good faith believes that unlawful drug dealings are taking place).

> prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and
>
> (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Alabama Rule 3.8(2). In contrast to the South Carolina rule, this Alabama rule only allows government lawyers to supervise non-lawyers in the deceptive conduct.

Florida has also adopted a new rule.

> A lawyer shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

Florida Rule 4-8.4(c). Florida's approach is different from Oregon's, South Carolina's and Alabama's. It allows government lawyers acting as lawyers only to supervise others in the deceptive conduct. On the other hand, "government lawyers employed in a capacity other than as a lawyer" may engage in deceptive practices themselves.

Virginia added a sentence to the end of its Rule 5.3 Comment [1] -- which deals with non-lawyers.

> At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test."

Virginia Rule 5.3 cmt. [1]. This comment essentially allows lawyers to supervise non-lawyers in traditionally accepted socially worthwhile deceptive conduct.

While the ABA has debated[4] and a handful of states acted, lawyers have continued to engage in knowingly deceptive conduct in furtherance of socially worthwhile goals.

For instance, an Arizona LEO clearly allowed lawyers to direct non-lawyers in such activities. Arizona LEO 99-11 (9/99) (indicating that "[a] private practice lawyer ethically may direct a private investigator or tester to misrepresent their identity or purpose in contacting someone who is the subject of investigation, only if the misrepresentations are for the purpose of gathering facts before filing suit"; the hypothetical involved a "tester" whose goal was to investigate a school's possible discrimination; the Arizona Bar cited a number of cases approving the use of such "testers" in racial discrimination cases, including Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983)).

[4] ABA LEO 396 (7/28/95) ("There is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents. . . . to conduct investigations, but for lawyers to supervise the acts of those agents. And the investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not 'representing a client.' However, when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigators' conduct."; "Although there appears to be no decisional authority on the point, it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules -- the overwhelming majority of the provisions of the Model Rules -- that apply only to a lawyer 'representing a client.' Such an investigator would nonetheless be subject to those few provisions of the Model Rules, such as portions of Rule 8.4 (Misconduct) that apply to lawyers even when they are not acting as such. See, e.g., Rule 8.4(b): 'It 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.'")

Courts have clearly approved such conduct. See Mena v. Key Food Stores Co-Operative, Inc., 758 N.Y.S.2d 246, 250 (N.Y. Sup. Ct. 2003) (finding the plaintiffs in a racial bias lawsuit had not acted improperly in being trained by the lawyer how to tape-record in-person and telephone conversations in which defendant's employees made racially offensive statements; "Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures as long as the law of the jurisdiction permits such conduct."; explaining that "[h]ere, too, we have activity that might otherwise evade discovery or proof and a circumstance which has policy interests as compelling as those we find in housing discrimination matters. The interests at stake here transcend the immediate concerns of the parties and attorneys involved in this racial bias action. The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin."); Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000) (holding that employment "testers" have standing to sue for employment discrimination); Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983) (approving use of a professional tester's testimony in the case alleging racial discrimination in the leasing of apartments).

(a) The ABA Model Rules contain a general prohibition on lawyers engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." ABA Model Rule 8.4(c). ABA Model Rule 5.1(a) requires that law firms adopt "measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional

Conduct." Therefore, lawyers should avoid participation in such "tests" because they would require deceitful conduct by the lawyer.

(b) A law firm's responsibility for non-lawyer staff members is slightly different from the responsibility the law firm has for assuring that lawyers comply with the ethics rules. ABA Model Rule 5.3(a). This difference means that in certain limited circumstances law firm staff may engage in conduct that would be a violation of the rules if performed by a lawyer.

Best Answer

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

Deception: Commercial and Other Causes

Hypothetical 15

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 Brothers, 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.

[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").

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)).

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 "dissemblance."[2] It will be interesting to see if other bars follow New York's lead.

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[2] New York County Lawyers' Association LEO 737 (5/23/07) (addressing a non-government lawyer's use of an investigator who employs "dissemblance"; 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 "dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of this opinion, dissemblance 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

Best Answer

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

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negotiating or engaging in a transaction that is not by itself unlawful. Dissemblance 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 dissemblance, but permitting a lawyer-directed investigator's dissemblance 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 dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance 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 dissemblance 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 '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.").

Deception by Government Investigators

Hypothetical 16

You have been placed in charge of a special prosecution unit focusing on illegal drug sales.

May you participate in setting up drug "sting" operations?

YES

Analysis

Even without explicit permission under the ethics rules or the official imprimatur of bar approval, government lawyers traditionally have engaged in certain types of deception.

By definition, lawyers who advise spy agencies such as the CIA advise their clients to engage in deception. The same is true of criminal "sting" operations.

Not surprisingly, bars everywhere have approved such conduct, often through a strained reading of the ethics rules that they choose not to apply in the same way to private lawyers.

- Virginia LEO 1845 (6/19/09) (explaining that Virginia State Bar staff lawyers may direct and supervise nonlawyer bar investigators, outside investigators, or volunteers who "engage in covert investigative techniques in the investigation of the unauthorized practice of law in any case in which no other reasonable alternative is available to obtain information against the person engaging in the unauthorized practice of law."; noting specifically, that they may undertake a covert investigation of a paralegal's reported preparation of wills and powers of attorney without a lawyer's direct supervision (which would amount to a criminal act); explaining that the Bar worried that "because of the absence of witnesses who can testify or produce substantive evidence," the Bar might not be able to undertake enforcement actions against the paralegal; noting that the Bar proposed to direct a nonlawyer to contact the paralegal "under the pretext of wanting a will and/or POA

prepared, collect and pay for these services, and report back the results."; holding that lawyers directing and supervising such a covert operation would not violate Virginia Rule 8.4(c), because such behavior would not reflect adversely on "the lawyer's fitness to practice law."; noting that Virginia's unique Comment [1] to its Rule 5.3 specifically approves "traditionally permissible activity" such as law enforcement investigations and housing discrimination tests; citing earlier LEO opinions, which have recognized a "law enforcement" exception to Rule 8.4(c)'s general prohibition on deception).

- Michael E. Ruane, FBI's Sham Candidate Crawled Under W. Va.'s Political Rock, Washington Post, Dec. 2, 2005, at A1 (explaining that the FBI had arranged for an accused criminal to engage in a sting operation in Logan County, West Virginia -- which involved the man pretending to run for the West Virginia House of Delegates; explaining that "[t]he current case began in 2003, when Esposito, a lawyer who had been mayor of the City of Logan for 16 years, entered a plea agreement with the government in a corruption case, according to court papers. He had been accused of paying the $6,500 bar tab of a local magistrate for reasons not specified and then paying the magistrate to keep quiet about the arrangement. The magistrate was later indicted on an extortion charge. Under the plea agreement, Esposito began helping the Justice Department in its investigation of county political corruption, which the department described as 'commonplace and widespread.'"; "The small-town lawyer and former mayor [Thomas Esposito] was just bait. And when the FBI lowered him into the murky waters of southern West Virginia politics last year, it dangled him like a shiny lure. The whole affair landed yesterday in a Charlestown courtroom, where a defense attorney cried foul, accusing the government of 'outrageous' conduct and of violating the sanctity of the election process. He said the charade robbed 2,175 citizens who voted for Esposito -- unaware he wasn't for real -- of a constitutional right. But a federal judge sided with the government, ruling after a 30-minutes hearing that corruption in Logan County had been endemic 'for longer than living memory' and that the bogus election campaign might have been the only way to root it out."; interestingly, noting that "[t]he FBI withdrew Esposito from the race two days after the meeting with Harvey and Mangus, and the Justice Department has said it took great pains to alert the public by way of the media [starting on April 14, approximately one month before the election]. But his name remained on the ballot, and on primary day -- May 11, 2004 -- he got more than 2,000 votes, placing last in the field."; rejecting the criminal defense lawyer's argument that the government had corrupted the political process in West Virginia by essentially encouraging voters to waste their vote on a sham candidate rather than on a real candidate).

- District of Columbia LEO 323 (3/29/04) ("Rule 8.4(c) of the Rules of Professional Responsibility makes it professional misconduct for a lawyer to 'engage in conduct involving fraud, deceit, or misrepresentation.' This prohibition applies to attorneys in whatever capacity they are acting -- it is not limited to conduct occurring during the representation of a client and is, therefore, facially applicable to the conduct of attorneys in a non-representational context. See ABA Formal Op. No. 336 (1974) (lawyer must comply with applicable disciplinary rules at all times). The prohibition on misrepresentation would, therefore, facially apply to attorneys conducting certain activities that are part of their official duties as officers or employees of the United States when the attorneys are employed in an intelligence or national security capacity." (footnote omitted); "But, clearly, it 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."; "[W]e are convinced that the anti-deceit provisions of Rule 8.4 do not prohibit attorneys from misrepresenting their identity, employment or even allegiance to the United States if such misrepresentations are made in support of covert activity on behalf of the United States and are duly authorized by law." (footnote omitted); "Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.").

- 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).

- Utah LEO 02-05 (3/18/02) ("Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or 'covert' operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c)

based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation." (footnote omitted)).

- United States v. Parker, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (adopting magistrate's order, which noted: "First, undercover 'sting' investigations initiated without probable cause have been held not to constitute a due process violation.").

- North Carolina LEO 97-10 (1/16/98) ("Opinion rules that a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.").

Criminal defendants (and foreign spies) routinely lose challenges to this type of government behavior.

The common law has created one defense -- the "entrapment" defense -- which allows criminal defendants to argue that they would not have engaged in the wrongful conduct but for the government's invitation to do so.

As the Ninth Circuit recently explained,

> [e]ntrapment has two elements: "government inducement of the crime and the absence of predisposition on the part of the defendant." Inducement is "any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense."

United States v. Sandoval-Mendoza, 472 F.3d 645, 648 (9th Cir. 2006) (footnotes omitted). Of course, the criminal defendant often can prove the first element -- but the defendant's entrapment defense usually founders on the second element.

For instance, in the Sandoval-Mendoza case, the court rejected the defendant's attempt to prove "absence of predisposition."

> The government presented evidence Sandoval-Mendoza was predisposed to sell drugs, including wiretap recordings of him talking as though he were an experienced drug

> dealer. Offering to buy drugs from a drug dealer is not entrapment, even if the government "sets the dealer up" by providing an informant pretending to be a customer, because the dealer is already predisposed to sell.

Id. at 649. Accord United States v. Al-Shahin, 474 F.3d 941, 948 (7th Cir. 2007) (rejecting criminal defendants' entrapment defense, and describing the following factors that the court can consider in analyzing a criminal defendant's predisposition: "(1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government," quoting United States v. Blassingame, 197 F.3d 271, 281 (7th Cir. 1999) (citations omitted).

In one recent (and rare) victory for a criminal defendant on the entrapment issue, a Florida court found that the government had entrapped the defendant -- with perhaps the oldest temptation known to man.

> The defendant was 37 years old with absolutely no criminal history, unknown to law enforcement officers, and gainfully employed in lawful activity at the time the confidential informant first approached him. The defendant became romantically interested in the CI and she led him to believe that she was similarly interested in him. She first brought up the topic of illegal drug use and continually asked the defendant if he knew where to buy drugs or if he could obtain drugs for her. The defendant repeatedly told her that he did not use or sell illegal drugs, and that, being new to the area, he did not know anyone who used or sold drugs.
>
> The CI made promises of an intimate relationship, to include sexual relations, if the defendant would assist her in obtaining drugs. She discussed her personal medical

> problems with the defendant and played on his sympathy, indicating that she needed the drugs to cope with the pain and the stress of cancer. The CI was herself a convicted drug trafficker who had recently received a below guidelines suspended sentence and probation. Unbeknownst to the defendant at the time, the CI was involved in similar transactions with several other individuals, who she also pretended to befriend.

Madera v. State, 943 So. 2d 960, 962 (Fla. Dist. Ct. App. 2006) (emphasis in original).

Courts have taken a somewhat more balanced attitude toward deception by government lawyers that is not part of a classic "sting" operation. Two cases provide interesting examples -- one of which is somewhat surprising.

In In re Friedman, 392 N.E.2d 1333 (Ill. 1979), the chief of the criminal division of the Cook County State's Attorney's office suspected a local lawyer of attempting to bribe police officers in connection with DUI matters. The government lawyer arranged for police officers to lie in court in favor of the suspected lawyer's client, and then accept $50 from the lawyer in a "washroom adjacent to the courtroom." The Illinois Supreme Court succinctly described its dilemma in determining whether to sanction the government lawyer.

> This case presents the questions whether disciplinary action is merited and, if so, the nature of the sanction to be imposed when a prosecutor admittedly engages in conduct violative of the Code of Professional Responsibility for the purpose of developing evidence to be used in a subsequent prosecution. The parties have not cited nor has our research disclosed any analogous cases previously considered by either a court or disciplinary committee.

Id. at 1334. The Illinois Supreme Court ultimately declined to sanction the lawyer, but criticized the lawyer for needlessly engaging in deceptive conduct.

The Colorado Supreme Court dealt with a gruesome situation in In re Pautler, 47 P.3d 1175 (Colo. 2002).

The story began on June 8, 1998, when Chief Deputy District Attorney Mark Pautler arrived at the scene of several murders -- three women had "died from blows to the head with a wood splitting maul." Id. at 1176. Pautler learned that there might be witnesses at another location, and quickly traveled there. One of the witnesses described what she had been through at the scene of the murders.

> One of the witnesses at the Belleview apartment, J.D.Y., was the third woman abducted. Neal [William Neal, the killer] also took her to the Chenango apartment where he tied her to a bed using eyebolts he had screwed into the floor specifically for that purpose. While J.D.Y. lay spread-eagled on the bed, Neal brought a fourth woman to the Chenango apartment. He taped her mouth shut and tied her to a chair within J.D.Y.'s view. Then, as J.D.Y. watched in horror, Neal split the fourth victim's skull with the maul. That night he raped J.D.Y. at gunpoint.

Id. at 1177.

By the time Pautler had arrived at the second apartment, Neal was gone, but police there had already established contact with him (he was using his cell phone). Neal at one point indicated that he would surrender to the police, but only if he could speak to a lawyer first. Pautler tried to contact Neal's former lawyer, but the former lawyer's number was no longer in service. Neal also mentioned the possibility of being represented by a public defender, but Pautler did not try to find a public defender.

Pautler worried that a public defender might tell Neal to stop talking with the law enforcement officials -- all of whom were trying to continue the dialogue until the police could identify Neal's cell phone location.

Pautler decided to impersonate a public defender and speak with Neal. After Pautler and Neal spoke for some time, Neal eventually surrendered without incident. When a real public defender began to represent Neal, Pautler did not explain the deception to the public defender. The public defender learned of the deception several weeks later while listening to the tape of his client Neal speaking with Pautler (the public defender recognized Pautler's voice).

Neal eventually dismissed the public defender's office, represented himself at the trial and was sentenced to death for the murders.

The Colorado Bar then charged Pautler with violations of the Colorado ethics rules. In defending against the ethics charges,

> Pautler testified that given the same circumstance, he would not act differently, apart from informing Neal's defense counsel of the ruse earlier.

Id. at 1178. Pautler also put on a witness that described a similarly acute situation.

> Pautler requests this court to craft an exception to the Rules for situations constituting a threat of "imminent public harm." In his defense, Pautler elicited the testimony of an elected district attorney from a metropolitan jurisdiction. The attorney testified that during one particularly difficult circumstance, a kidnapper had a gun to the head of a hostage. The DA allowed the kidnapper to hear over the telephone that the DA would not prosecute if the kidnapper released the hostage. The DA, along with everyone else involved, knew the DA's representation was false and that the DA fully intended to prosecute the kidnapper. Pautler analogizes his deceptive conduct to that of the DA in the hostage case and suggests that both cases give cause for an exception to Rule 8.4(c).

Id. at 1180. The Colorado Supreme Court found the analogy unconvincing, noting that despite Neal's earlier murders "nothing indicated that any specific person's safety was in

imminent danger." Id. The Colorado Supreme Court also noted that Pautler could have called a public defender. The Colorado Supreme Court explained that

> Pautler also had the option of exploring with Neal the possibility that no attorney would be called until after he surrendered.

Id.

After all of this, the Colorado Supreme Court took an unforgiving view.

> In sum, we agree with the hearing board that deceitful conduct done knowingly or intentionally typically warrants suspension, or even disbarment. . . . We further agree that the mitigating factors present in Pautler's case outweigh the aggravating factors, and affirm the imposition of a three-month suspension, which shall be stayed during twelve months of probation. This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished. At the same time, it acknowledges Pautler's character and motive.

Id. at 1184. In an en banc decision, the Colorado Supreme Court affirmed a disciplinary hearing board's punishment.[1] The Colorado Supreme Court suspended Pautler's license for 3 months. The court also stayed the suspension and placed Pautler on probation 12 months.[2] The court also ordered Pautler to pay the costs of the proceeding.

Despite this somewhat surprising case, it seems clear beyond a doubt that government lawyers may freely participate in blatant deception as part of their governmental responsibilities.

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[1] Only one disciplinary hearing board member dissented when the hearing board punished Pautler.

[2] Although the opinion is somewhat ambiguous, presumably Pautler could continue practicing law during the probation period, and the three-month suspension would be imposed only if he engaged in some wrongdoing during the 12 months of probation.

Best Answer

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

Paying Fact Witnesses

Hypothetical 17

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.[20]

[20] 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

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

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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 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.").

> 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).

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.[21]

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

[21] 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."

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).

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).[22]

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

[22] 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).

Ethics Opinion from the previous year.[23] Other courts express even more hostility. In 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

[23] 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 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.").

policy" a consulting agreement between Exxon and one of its former employees who was a fact witness; specifically rejecting the ABA approach).[24]

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 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.

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[24] 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.").

(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**.

Paying Fact Witnesses a Contingent Fee

Hypothetical 18

One of your company's retired executives initially wanted $5,000 to "tell the truth" as a fact witness. When you balked at his request, he dropped his demand to $2,500 -- and tells you that he won't insist on being paid unless you are successful in the trial.

May you pay a fact witness an amount contingent on the case's outcome?

NO

Analysis

Authorities universally prohibit paying fact witnesses any amount that is contingent on a case's outcome.

> [T]he offer or payment of allowable expenses may not be contingent on the content of the witness's testimony or the outcome of the litigation or otherwise prohibited by law.

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

Not surprisingly, bars are quick to discipline lawyers who arrange such contingent payments to fact witnesses. See, e.g., Florida Bar v. Wohl, 842 So. 2d 811, 813 (Fla. 2003) (suspending for ninety days a lawyer who entered into an agreement involving testimony by a former employee of the Winston family diamond business, who was prepared to testify in the estate litigation involving Harry Winston's widow; noting that the agreement called for a "bonus" of up to $1,000,000 depending on the "usefulness of the information provided"); Committee on Legal Ethics of the State Bar v. Sheatsley, 452 S.E.2d 75, 77 (W. Va. 1994) (issuing a public reprimand critical of a lawyer who had agreed to pay his client's former employee $3,250 to prevent the former

employee "from changing his story," and an additional $3,250 "upon a favorable completion of the case").

Best Answer

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

Government Prosecutors Paying Fact Witnesses

Hypothetical 19

After practicing as a commercial litigator for several years, you began to represent white collar criminal defendants. You are considering filing several motions challenging the government prosecutor's actions.

(a) May you object to the government's payment to a fact witness of $5,000 to "tell the truth"?

NO (PROBABLY)

(b) May you object to the government's offer to reduce the criminal charges against an important witness if he testifies favorably against your client?

NO (PROBABLY)

Analysis

Given the harsh judicial language about the effect of paying fact witnesses in civil cases, one might expect courts to take the same approach when analyzing the government's payments to fact witnesses.

In fact, just the opposite is true. Courts almost seem offended that anyone would challenge the government's use of fact witnesses who have either received cash payments or the government's promise of a reduced sentence in return for testimony.

> No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify as long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility. A

> witness such as Kelly who is paid a fee for his services has less of an inducement to lie than witnesses who testify with promises of reduced sentences. It makes no sense to exclude the testimony of witnesses such as Kelly yet allow the testimony of informants such as those in Hoffa and Kimble who are testifying with the expectation of receiving reduced sentences. We therefore join our sister circuits, discussed above, who have faced this problem and conclude that the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness.

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

Famous criminal defendants who have unsuccessfully sought to challenge the government's offering of such inducements to fact witnesses include Jimmy Hoffa[1] and Jeffery Skilling.[2]

One article described the great variety of incentives the government can freely offer prosecution witnesses in return for favorable testimony.

> An enormous range of benefits have traditionally been granted to informers. Some lucky Chicago gang members turned informers brought shame upon the local United States Attorney's Office when defense lawyers discovered that the informers received heroin, morphine, phone sex with a government paralegal, clothes, gifts, electronics, access to phones, and conjugal visits in government offices in exchange for their "cooperation" in bringing down the

[1] Hoffa v. United States, 385 U.S. 293 (1966) (upholding the conviction on jury tampering of Jimmy Hoffa, despite the government's payment to a fact witness's wife of four monthly installments of $300 each, along with dropping federal and state charges against the fact witness).

[2] United States v. Skilling, Crim. No. H-04-025, 2006 U.S. Dist. LEXIS 42664 (S.D. Tex. June 23, 2006) (rejecting defendants' efforts to have their defense witnesses immunized because the government had immunized prosecution witnesses).

> notorious El Rukn gang. . . . In San Diego, one violent criminal facing a twenty-five year sentence for robbery also received conjugal visits in the prosecutor's office, as well as numerous day trips outside jail facilities and a special cell in county jail with a color TV, a private shower and a telephone. He even had nude pictures of himself and his wife taken in the DA's office. . . . While these benefits must be disclosed to the defense and while some of the inducements extend far beyond the bounds of propriety, they do not constitute bribery under the current state of the law.

Barry Tarlow, Can Prosecutors Buy Testimony?, The National Association of Criminal Defense Lawyers Champion Magazine, RICO Report, May 2005, at 55.

Thus, courts take dramatically different approaches to a private litigant's payments to a fact witness and the government's payments to a fact witness. The few courts that even bother trying to explain the distinction sometimes feebly note that the payments are coming from the sovereign government itself rather than from the government's lawyer.

Best Answer

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

Preparing Fact Witnesses for Testimony

Hypothetical 20

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 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).

[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.").

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 l 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**.

Talking with Witnesses during Deposition Breaks

Hypothetical 21

You are preparing your executive vice president to be deposed. She asks whether you will be able to discuss her testimony during deposition breaks.

May you discuss a witness's testimony during a deposition break?

MAYBE

Analysis

A number of courts have severely restricted lawyers' ability to communicate with their witnesses during deposition breaks.

As in so many other areas, new forms of communication create interesting scenarios. In July 2009, the District of New Jersey dealt with a situation involving a video deposition in which the deponent, the deponent's lawyer, and the questioning lawyer were all in different cities -- with the participants visible to each other only from the "chest up." The questioning lawyer received a text message from the defense lawyer that was obviously meant for the deponent, and correctly suspected that the deponent and his lawyer were communicating by text message during the deposition. The court condemned this practice, and stripped privilege protection from the communications. Ngai v. Old Navy, Civ. A. No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *2-3, *14 (D.N.J. July 31, 2009).[1]

[1] Ngai v. Old Navy, Civ. A. No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *2-3, *14 (D.N.J. July 31, 2009) (analyzing a defense lawyer's text messaging of a defense witness during a video taped deposition in which the plaintiff, the witness and the defense lawyer were at different locations; "The distance between deponent and PHV counsel, however, did not impede counsel's communications with his client [noting that the deponent and the defense lawyer 'were only visible from the 'chest up' and

Most notably, in Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), the court directly analogized depositions to trials (during which courts specifically prohibit lawyers from speaking with witnesses).

> Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.

Id. at 529. To assure that any such conferences were not misused, the court specifically held that "these conferences are not covered by the attorney-client privilege, at least as to what is said by the lawyer to the witness" -- and that therefore "any such

---

that she was unable to observe defense counsel's hands during the deposition'] Counsel Letter at 2. PHV counsel and the deponent exchanged numerous text messages both before and during the deposition. Transcript of PHV Counsel's Text Messages ('Messages Transcript'). Before the deposition, PHV counsel and the deponent exchanged eleven text messages . . . Messages Transcript. During the deposition, which commenced at 2:36 p.m. and ended at 3:48 p.m., PHV counsel and the deponent exchanged five messages . . . See Deposition Transcript; Messages Transcript. In addition, PHV counsel accidentally sent a message to plaintiffs' counsel stating '[you] [are] doing fine,' which was intended for the deponent. Id.; Counsel Letter at 2. Plaintiffs' counsel responded by asking '[you] talking to me or [F]iona?' Message Transcript. PHV counsel, realizing his mistake, falsely responded '[m]y son who is coming home from school today[.]' . . . Id. Suspecting something might be amiss, . . . plaintiffs' counsel requested that PHV counsel preserve his text messages exchanged during the deposition."; finding that the pre-deposition text messages deserve privilege protection, but that text messages during the deposition did not deserve privilege protection because the court thought "the text messages exchanged between the deponent and PHV counsel were private conversations during a deposition but they are not protected by the attorney-client privilege."; citing Hall v. Clifton Precision, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993)).

conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what." Id. at 529 n.7.

A number of federal district courts have essentially incorporated the Hall standard into their local rules. For instance, the District of South Carolina Local Civil Rules contain the following provisions.

> Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

D.S.C. Loc. Civ. R. 30.04(E).

Maryland takes essentially the same position.

> While the interrogation of the deponent is in progress, neither an attorney nor the deponent should initiate a private conversation except for the purpose of determining whether a privilege should be asserted. To do so otherwise is presumptively improper.
>
> During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness's prior testimony.

D. Md. Loc. R., Guideline 5(f), (g).

Various state rules follow the same approach.

> Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a

> right to confidentiality or a limitation pursuant to a previously entered court order.

N.J. Ct. R. 4:14-3(f).

> (1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph (d) (3).

Del. Ch. Ct. R. 30(d)(1); Del. Super. Ct. R. Civ. P. 30(d)(1).

Some courts reject the Hall approach, and allow communications between witnesses and their lawyers during deposition breaks. Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 92 (N.D.N.Y. 2003) (rejecting the holding of Hall, and denying a motion to direct litigants to reveal what they had discussed with their lawyer during a deposition break; noting that the Hall rule "seems to be highly criticized elsewhere" and has "not been followed by the Second Circuit or by any other district court within the circuit"), vacated and remanded on other grounds, 445 F.3d 619 (2d Cir. 2006); In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 622 (D. Nev. 1998) ("[T]his Court disagrees with the contention that any conference counsel may have with the deponent during a deposition waives the claim of privilege as to the communications between client and counsel during any conference or other break in the deposition. Accordingly, the Court will not give the interrogating counsel carte blanche to invade the privileged

communications between counsel and his client." (citation omitted); establishing "deposition protocol" including provisions apparently appropriate in Nevada such as "[n]o firearms shall be permitted at depositions").

Interestingly, in criminal litigation such restrictions might actually implicate constitutional principles. For instance, in United States v. Sandoval-Mendoza, 472 F.3d 645 (9th Cir. 2006), the Ninth Circuit addressed a court's prohibition on overnight discussions between a criminal defendant and his lawyer (at least about a client's testimony). On appeal, the defendant argued that the prohibition violated his constitutional rights. The defendant pointed to two United States Supreme Court cases dealing with this issue.

> Sandoval-Mendoza argues that the district court's order prohibiting him from discussing his testimony with his lawyer during the recesses amounted to a structural error under Geders v. United States [Genders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)] and Perry v. Leeke [Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). See also United States v. Santos, 201 F.3d 953 (7th Cir.2000); Mudd v. United States, 798 F.2d 1509 (D.C.Cir. 1986)]. Perry and Geders reach opposite conclusions based on different facts. In Geders, the trial court prohibited all communication between the defendant and his lawyer during an overnight recess between direct and cross examination. The Supreme Court held that this prohibition required reversal because it deprived the defendant of his Sixth Amendment right to counsel. [Geders v. United States, 425 U.S. 80, 91-92, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)]. In Perry, the trial court prohibited all communication between the defendant and his lawyer during a fifteen minute recess between direct and cross examination. The Supreme Court held that this prohibition did not violate the Sixth Amendment. [Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)]. Perry distinguished Geders, on the ground that "the normal consultation between attorney and client that occurs during

> an overnight recess would encompass matters that go beyond the content of the defendant's own testimony-matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. [Perry v. Leeke, 488 U.S. 272, 284, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).]

Id. at 650 & nn.14, 15, 16, 17, 18.

Not surprisingly, the court found that "the facts of this case fall in the middle." Id.

> The district court instructed Sandoval-Mendoza's lawyer, "You can communicate. Just not concerning cross, his testimony, now that he's on cross-examination, unless that's concluded. That doesn't mean you can't talk with your client at all, just not concerning his testimony."

Id.

The Ninth Circuit cited two other circuits (including the District of Columbia Circuit) that prohibit such restrictions. The Ninth Circuit acknowledged that "this is a difficult question. Cross examination best exposes the truth when a witness must answer questions unaided. Coaching may vitiate its value. But it is hard to see how a defendant and his lawyer can communicate without implicit coaching." Id. at 651. The Ninth Circuit ultimately concluded that the district court's restriction violated the criminal defendant's Sixth Amendment rights.

> [W]e conclude that trial courts may prohibit all communication between a defendant and his lawyer during a brief recess before or during cross-examination, but may not restrict communications during an overnight recess.

Id. The court did not have to decide whether the district court's prohibition independently required a new trial, because it found that another error justified a new trial.

Best Answer

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

Representing Deposition Witnesses

Hypothetical 22

Your adversary has scheduled the depositions of your client's four most senior executives. Your client's in-house lawyer suggests that you represent the executives at their depositions.

Should you represent your client's executives at their depositions?

NO (PROBABLY)

Analysis

Although many lawyers reflexively choose to represent their corporate clients' employees in depositions, they should not do so without assessing the benefits and the risks.

A corporation's lawyer presumably wants to represent an executive during his deposition so that the lawyer can (1) engage in privileged communications to prepare for the deposition, and during breaks in the deposition (where permitted); and (2) instruct the witness not to answer questions that would intrude into the corporation's attorney-client privilege.

However, in the vast majority of courts, a corporation's lawyer can take advantage of these benefits without representing the deposition witness. Peralta v. Cendant Corp., 190 F.R.D. 38, 39 (D. Conn. 1999); United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554, 556 (E.D. Pa. 2004); Surles v. Air France, No. 00 Civ. 5004 (RMB)(FM), 2001 WL 815522, at *5-6 (S.D.N.Y. July 19, 2001). Under the standard formulation of Upjohn, the corporation's lawyer may engage

in privileged communications with any corporate employee, as long as the lawyer is obtaining facts that she needs to give legal advice to the company. The privilege normally applies even to communications with former corporate employees.[29] And because the privilege belongs to the corporation and not to the individual employee, the corporation's lawyer presumably can instruct the employee not to destroy the privilege that she does not own. Thus, there seems to be no added benefit to a company's lawyer also representing the deposition or trial witness.

In contrast, there are some possible risks in doing so. Establishing a full attorney-client relationship with a corporate employee creates a joint representation on the same matter -- the deposition (or even the litigation). Absent some agreement to the contrary, a lawyer jointly representing multiple clients in the same matter (1) cannot keep secrets from either client (meaning that the lawyer would have to share with the employee everything the lawyer has learned from the company about the litigation or the deposition), and (2) must be totally loyal to both clients (meaning that the development of adversity between them probably would trigger the lawyer's withdrawal from representing both of them). Restatement (Third) of Law Governing Lawyers § 75

[29] Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (holding that the attorney client privilege and the work product doctrine protect the deposition preparation discussions between a company's lawyer and a former company employee; "Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment. . . . It is true, as APP contends, that the privilege guarding such discussions will not protect pre-deposition conversations that are held to refresh a deponent's memory. . . . However, this is a very narrow exception. Pre-deposition conversations may also be work product; to the extent Ex-Im's attorneys communicated their legal opinions and theories of the case, their conversations are immune from discovery. . . . APP has had its opportunity to obtain from Ms. Mostofi the non privileged information to which it is entitled. The benefit that might be obtained from asking Ms. Mostofi about communications with Ex-Im lawyers that neither concerned information she learned while she was an Ex-Im employee nor was work product is outweighed by the burden a new deposition would impose on Ex-Im.").

cmt. d (2000); Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997); ABA Model Rule 1.7 cmts. [29] - [32].

A New York state court found that lawyers from Morgan Lewis committed an ethics violation by representing several current and former employees of a hospital client. The court criticized the representations as an attempt to prevent ex parte communications from the plaintiff's lawyer to the current and former employees, but specifically pointed to Morgan Lewis's improper solicitation of the client as grounds for reporting the law firm to the bar. Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008).[30]

Somewhat surprisingly, two high-profile cases involved a corporation's lawyer also representing a corporate executive in depositions -- which the courts held did not

[30] Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008) (in an opinion by Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

prevent the lawyers from later representing the corporation adverse to those executives.[31]

Thus, this common practice apparently has not caused any lawyer to be "burned" severely enough to generate a decision, but lawyers should be wary nevertheless.

Best Answer

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

[31] United States v. Stein, 463 F. Supp. 2d 459, 466 (S.D.N.Y. 2006) (in an opinion by District Judge Lewis Kaplan, assessing an effort by a KPMG partner to prevent KPMG from waiving the attorney-client privilege otherwise covering communications between KPMG's lawyers and a partner; finding that the partner could not prevent KPMG from waiving the privilege because the partner was not a joint client of KPMG's lawyers; rejecting the partner's argument that KPMG's lawyer had previously represented a partner on two occasions; "To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee's role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship."); Under Seal v. United States (In re Grand Jury Subpoena Under Seal), 415 F.3d 333, 336-37 (4th Cir. 2005) (addressing a corporate employee's claim that he subjectively believed that the company's in-house and outside lawyers jointly represented him and the company; ultimately rejecting his claim; noting but not working into the analysis the fact that company's in-house and outside lawyers represented the executive during an interview before the SEC; explaining that both lawyers "stated that they represented [the executive] 'for purposes of [the] deposition.'").