# CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS

# PART I

## 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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# Effect of an Ethics Rules Violation in Nondisciplinary Contexts

## Hypothetical 1

In an effort to expand your business, you want to start representing lawyers in defending against disciplinary charges and malpractice claims. As you start considering the issues, a few questions come immediately to mind.

**(a)** Can a lawyer be sued in a malpractice or other civil case for breaching an ethics rule?

**NO**

**(b)** Is breach of an ethics rule admissible in a civil case against the lawyer?

**MAYBE**

## Analysis

Bars and courts have had some difficulty defining the role of ethics rules (and ethics rules violations) in nondisciplinary contexts.

**(a)** The ABA Model Rules and every state's ethics rules indicate that a lawyer's breach of an ethics rule should not create a cause of action against the lawyer.

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

ABA Model Rule Scope note [20] (emphases added).

Courts agree with this approach.

- Rose v. Winters, Yonker & Rousselle, P.S.C., 391 S.W.3d 871, 873, 874, 874-75 (Ky. Ct. App. 2012) (holding that clients could not pursue a private cause of action against their lawyer under the ethics rule requiring lawyers to forfeit any fees they earn in cases they obtained through improper solicitation; "[T]here were no allegations made in the complaint that the Appellees were negligent in handling the Appellants' personal injury claims or in negotiating the settlements. Instead, the Appellants' claims are based on violations of the Kentucky Supreme Court Rules of Professional Conduct. We are unaware of any authority supporting this type of cause of action."; "'If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. **A civil action for recovery of such fees may be brought in a court of competent jurisdiction**. ([e]mphasis added).'" (citation omitted); "As correctly noted by the trial court, the language of SCR 3.130(7.10) appears to presuppose that the appropriate disciplinary agency must first determine whether the lawyer illegally or unethical solicited a potential client in violation of SCR 3.130(7.09). Only after making the determination of unethical or illegal solicitation by the appropriate disciplinary agency does the rule make provision for forfeiture of fees under SCR 3.130(7.10). Therefore, we conclude that, while the rule provides for a cause of action to recover fees, it does not provide a cause of action to determine whether a solicitation in this case was illegal or unethical." (emphasis added)).

- Hullverson v. Hullverson, No. 4:12-CV-00144-JAR, 2012 U.S. Dist. LEXIS 170990, at *6-7, *10, *13-14 (E.D. Mo. Dec. 3, 2012) (addressing a lawyer's lawsuit against several of his family members, alleging that their continued use in advertising of the names of two family members who are now inactive members of the Missouri bar violated the ethics rules and the Lanham Act; dismissing the claims based on the violation of the ethics rules; "Plaintiff's repeated references to the Missouri Rules of Professional Conduct are insufficient to form the basis of a civil cause of action. . . . Moreover, the Court finds such references immaterial to his Lanham Act claims. Accordingly, Plaintiff's allegations concerning purported violations of the Missouri Rules of Professional Conduct will be dismissed. Further, any references to the Missouri Rules of Professional Conduct will be stricken as immaterial from any Lanham Act Claim." (emphasis added); refusing to dismiss the Lanham Act claim based on trademark infringement and unfair competition; "In his Complaint, Plaintiff alleges ownership of the trademark 'Hullverson & Hullverson' and that he has obtained a federal registration for his trademark. . . . Plaintiff further alleges that given the similarity in the names Plaintiff James E. Hullverson, Jr., and Defendants John E. Hullverson, Thomas C. Hullverson, and 'The Hullverson Law Firm,' there is a substantial risk that people will confuse Plaintiff, who practices law in Missouri, with all of the Hullverson defendants."; also refusing to dismiss the Lanham Act claim

based on false and misleading advertising; "In his Complaint, Plaintiff alleges that from 2000 to present, Defendants have represented that John and Thomas Hullverson are attorneys in the Hullverson Law Firm when in fact they are 'inactive' and unauthorized to practice law in Missouri. Plaintiff sets out the evolution of Defendants' advertising with illustrations year-by[-]year showing that John and Thomas Hullverson's names continue to appear prominently on the signage at Defendants' business office, The Hullverson Law Firm, P.C., 1010 Market St., Suite 1480, St. Louis, Missouri, as well as in telephone directories and on the firm's website despite the fact that John and Thomas Hullverson are no longer practicing law in Missouri.").

- State v. Warren, Crim. A. No. CR-09-9716, 2010 Me. Super. LEXIS 30, at *7 (Me. Super. Ct. Apr. 7, 2010) ("The Rules of Professional Conduct are by their own terms 'not designed to be a basis for civil liability' or 'invoked by opposing parties as procedural weapons.'. . . The Rules of Professional Conduct are only guides for professional behavior. . . . Consequences for their violation are personal to the attorney, and have no bearing on questions of evidence or procedure." (emphasis added)).

- Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 628 (8th Cir. 2009) ("We believe the bankruptcy court erred by relying too heavily on the Minnesota Rules of Professional Conduct. Demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached." (emphasis added)).

- Bertelsen v. Harris, 537 F.3d 1047, 1058-59 (9th Cir. 2008) ("[U]nder Washington law, the award of disgorgement of fees is not mandatory even where the attorney who got the fees also violated Washington's Rules of Professional Conduct for attorneys; instead, whether to order disgorgement is placed firmly within the discretion of the trial court. . . . Here, the district court made a considered determination that the circumstances did not warrant disgorgement of fees. Whether or not the district court erred in its assessment of the merits of Appellants' breach of fiduciary duty claims -- an issue we do not reach -- it did not abuse its discretion when it declined to award disgorgement on this set of facts. We affirm its judgment on that basis." (emphasis added)).

- Carter v. Williams, 431 S.E.2d 297, 301 (Va. 1993) ("The Code of Professional Responsibility does not provide a basis for private causes of action").

**(b)** Although all bars agree that an ethics rule violation should not support a civil cause of action against a lawyer, they disagree about the admissibility and relevance of an ethics violation in a civil case.

Some ethics rules (including the ABA Model Rules of Professional Conduct) indicate that a lawyer's breach of an ethics rule can provide evidence of wrongdoing.

> [S]ince the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

ABA Model Rule Scope cmt. [20].

States disagree about this issue. Some states follow the ABA approach, and thus allow the admission of ethics rules as defining a lawyer's standard of care.

- Spence v. Wingate, 716 S.E.2d 920, 927, 928 (S.C. 2011) (finding that a lawyer representing an estate could not act in a manner adverse to one of the estate's beneficiaries, but only because the lawyer had previously represented the beneficiary in a matter relating to the estate; "It is undisputed that attorneys owe fiduciary duties to existing clients. In addition, fiduciary duties created by an attorney-client relationship may be breached even though the formal representation has ended."; "We note that, although the Rules of Professional Conduct do not, in themselves, create a cause of action or establish evidence of negligence per se, they are relevant in assessing the legal duty of an attorney in a malpractice action. . . . A review of the Scope of Rule 407, SCACR clearly indicates that the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation." (emphasis added); "[A]lthough Mrs. Spence is not owed a fiduciary duty based on her status as a beneficiary of the estate, she alleged Wingate's fiduciary duty arose based on their prior attorney-client relationship. Wingate himself concedes in his brief that an attorney owes a fiduciary duty to former clients. Contrary to the circuit court's conclusion, section 62-1-109 is not determinative of whether Mrs. Spence is owed a fiduciary duty as a former client."; "We conclude Wingate owed a fiduciary duty to his former client, Mrs. Spence. This duty included, among other obligations, the obligation not to act in a manner adverse to her interests in matters substantially related to the prior representation. We agree with the Court of Appeals that whether Wingate breached a duty regarding the congressional life insurance policy is a question of fact for a jury to determine.").

- CenTra, Inc. v. Estrin, 538 F.3d 402, 410 (6th Cir. 2008) (holding that a client's previous consent did not justify a lawyer's handling of a matter adverse to the client; reversing a lower court's grant of summary judgment to the law firm in a malpractice case, and remanding the case for further proceedings; "Although Rule 1.0(b) makes it clear that a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct, a violation of the rules may be probative in establishing an independent cause of action. For instance, the Michigan Court of Appeals considered the Michigan Rules of Professional Conduct in a civil contract action that determined that a fee agreement was unenforceable." (emphasis added)).

- Byers v. Cummings, 87 P.3d 465, 470 (Mont. 2004) ("[I]t is entirely appropriate to use the general language of ethical rules in describing one's ethical duty to a client, however, it is improper to explicitly refer to the specific rule or to instruct the jury by referring to the rule in question." (emphasis added)).

In 2013, a Florida court acknowledged that a trial court can admit ethics rules in a malpractice case against a lawyer, but had discretion to decline such use.

- Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A., 118 So. 3d 867 (Fla. Dist. Ct. App. 2013) (although acknowledging that Florida ethics rules allow ethics violations to be admitted in malpractice cases to establish a standard of care, finding that a judge had not abused his discretion by declining to admit such evidence).

Other states take exactly the opposite approach.

- Virginia Rules Scope ("[N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.").

- Smith v. Morrison, 47 A.3d 131, 135, 136 (Pa. Super. Ct. 2012) (affirming judgment for a defendant lawyer in a malpractice case; finding that the trial court had acted properly in refusing to instruct the jury in using phrases from the ethics rules; "Smith [plaintiff] readily admits that the contested Proposed Jury Instructions were taken verbatim from the Pennsylvania Rules of Professional Conduct governing fiduciary duties applied to the attorney-client relationship."; "[W]e find that Smith has failed to clearly establish how the trial court erred when it rejected her proposed jury instructions. As previously noted, the contested jury instructions refer to and quote at length the Pennsylvania Rules of Professional Conduct. When the trial court granted Smith the opportunity to support the points for the contested proposed jury

instructions through the common law, she failed to do so. Smith's belated attempts to now provide case law to support her proposed instructions on appeal cannot save her argument, as these arguments were not raised or considered in the court below." (emphasis added); "More importantly, Smith has not provided precedent binding on this Court to support her argument that the Rules of Professional Conduct constitute valid points for jury instructions independent of common law." (emphasis added)).

- Star Broad., Inc. v. Reed Smith LLP, Civ. A. No. 08-0616, 2009 U.S. Dist. LEXIS 14700, at *26, *26-27 (E.D. Va. Feb. 24, 2009) (holding that an expert on the ethical responsibilities of lawyers had nothing to offer in a malpractice case against a lawyer; "Mr. Rigsby [expert] has admitted his lack of qualifications to address the standard of care and breach issues, stating that his only opinion in this case concerns a general standard of care rooted in the Rules of Professional Conduct. He acknowledges that he cannot opine on a specific standard of care or a breach of that standard of care for an attorney practicing in commercial law or government contracts law. In addition, Mr. Rigsby admits that he did not consult with a government contracts lawyer to determine whether the Star/DeCA License Agreement raised issues that needed to be referred to such a specialist. Mr. Rigsby has no experience or training in commercial law or government contracts law and has not consulted with any government contracts lawyer, and cannot provide testimony as expert evidence concerning the standard of care, or the breach of that standard, for a commercial lawyer or a government contracts lawyer in this situation."; "The Rules of Professional Conduct make clear in their Preamble that '[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.' 'They are not designed to be a basis for civil liability . . .' Thus, Mr. Rigsby's opinion that the Rules of Professional Conduct required Mr. Mahone to consult a government contracts lawyer cannot, by itself, establish a claim of legal malpractice.").

- Allen v. Allison, 155 S.W.3d 682 (Ark. 2004) (holding that the ethics rules are inadmissible in a civil case against a lawyer).

Of course, lawyers' misconduct can violate both ethics rules and criminal statutes or civil law standards. Thus, bars and courts have had to deal with the interplay between these various codes of conduct.

The Restatement recognizes this inevitable overlap.

> Lawyers are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court. The lawyer codes contain both specific regulation of described lawyer conduct as well as general provisions . . . . References in this Restatement to a duty of a lawyer do not necessarily refer to disciplinary offenses, but may instead refer, for example, to standards enforceable through a legal-malpractice recovery by an injured client. In any event, disciplinary offenses are authoritatively specified only in the lawyer code to which the lawyer is subject . . . . However, this Restatement could be consulted with respect to doubtful questions of interpretation of uncertain lawyer-code language and in connection with code drafting or revision. Similarly, opinions of ethics committees in an applicable jurisdiction provide guidance to lawyers and tribunals in disciplinary matters.

Restatement (Third) of Law Governing Lawyers § 5 cmt. b (2000).

> A record of conviction is conclusive evidence that the lawyer committed the offense, but absence of a conviction does not preclude a disciplinary prosecution. Because of the different agencies (prosecutor and lawyer disciplinary counsel) involved in criminal or disciplinary enforcement and the higher standard of proof in criminal cases, an acquittal does not by itself preclude a charge for any disciplinary purpose. In general, nonconstitutional aspects of criminal procedure do not apply to a disciplinary proceeding involving acts that also may constitute a criminal offense. A lawyer may invoke the constitutional privilege against self-incrimination, to the extent it applies, when called upon to testify in a disciplinary proceeding if the lawyer remains at risk of criminal prosecution. Disciplinary charges are usually stayed until completion of a criminal prosecution for the same act, unless doing so threatens a significant objective of the disciplinary process. Interim suspension of a lawyer accused of crime may be warranted and is commonly provided for following conviction of a serious crime regardless of pendency of an appeal.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. g (2000).

Not surprisingly, courts point to the differing burdens of proof in holding that lawyers can be punished professionally despite being acquitted of criminal charges.

- In re Williams, 85 So. 3d 583, 591 (La. 2012) (permanently disbarring a lawyer who had shot and killed someone, although his manslaughter conviction was eventually dismissed; "In a disciplinary proceeding against an attorney who has been convicted of a crime, the attorney is conclusively presumed to be guilty of the crime. See Supreme Court Rule XIX, § 19(E). In such cases, the ODC bears no additional burden to prove the attorney's criminal conduct; the sole issue to be determined is whether the crime warrants discipline and, if so, the extent thereof. Id."; "The fact that an attorney has not been convicted of a crime does not preclude the ODC from proving the attorney committed a criminal act in violation of Rule 8.4(b) of the Rules of Professional Conduct." (emphasis added)).

Some jurisdictions automatically discipline lawyers convicted of a sufficiently egregious criminal act. For instance, in most states a lawyer's felony conviction will result in disbarment.

However, even in those jurisdictions it can sometimes be difficult to assess the applicability of such a rule.

- In re Wilde, 68 A.3d 749, 751 (D.D.C. 2013) ("This case of first impression raises the question whether a criminal conviction entered in a foreign country [South Korea] is a 'conviction of [a] crime' within the meaning of D.C. Bar R. XI, § 10, and can be the basis for imposing the mandatory disbarment provisions of D.C. Code § 11-2503(a) (2001) for conviction of a crime of moral turpitude. We agree with the unanimous recommendation of the Board on Professional Responsibility ('the Board') that the conviction of a member of the District of Columbia Bar in a court of a foreign country is not a conviction of a crime within the meaning of the aforementioned rule and statute. Accordingly, a conviction in a court of a foreign country, unlike a conviction in a court of this country, is not automatically given conclusive effect for purposes of suspension or disbarment pursuant to D.C. Code § 11-2503(a) and D.C. Bar R. XI, § 10.").

On the civil side, courts have dealt with the preclusive effect of a civil judgment against a lawyer in a disciplinary proceeding.

- Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47 (Pa. 2005) (holding that a civil judgment entered against a lawyer could act as collateral estoppel in a disciplinary proceeding).

Courts have also addressed the reverse situation -- whether lawyers' professional discipline should have preclusive effect in civil claims against the lawyers.

- Donahoe v. Arpaio, Nos. CV-10-02756- & 11-00902-PHX-NVW, 2013 U.S. Dist. LEXIS 155640, at *8-9 (D. Ariz. Oct. 24, 2013) ("[W]eighty policy considerations militate against such an aggressive expansion of collateral estoppel. Attorney discipline proceedings are intended to protect the public. Giving those proceedings preclusive effect in subsequent litigation would significantly burden the bar disciplinary process. The state must be free to protect the community unencumbered by collateral monetary windfalls for third parties.").

## Best Answer

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

n 1/12; b 10/14

# Applicability of Ethics Rules to Lawyers' Nonlegal Activities

## Hypothetical 2

You tell one of your partners that you plan to begin representing lawyers in defending against disciplinary charges and civil actions. She asks you a simple question that you find yourself unable to answer.

Do the ethics rules apply to a lawyer's personal, nonprofessional activity?

## YES (SOME OF THE RULES)

## Analysis

In addition to debating the general role of ethics rules in assessing lawyer conduct (and misconduct), courts and bars have also discussed the extent to which ethics rules apply to specific lawyer conduct -- especially conduct that does not relate to a lawyer's traditional role as legal advisor to a client.

The ABA and states have issued general statements indicating that the ethics rules always apply to a lawyer's activities.

- ABA LEO 336 (6/3/74) ("A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility. . . . In regulating a lawyer's nonprofessional as well as professional conduct, the Code of Professional Responsibility charted no new course. It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, . . . individual or personal activities, . . . and activities as a judicial governmental or public official (emphases added)).

However, such blanket statements cannot possibly mean what they say. A lawyer supplementing her income by selling cosmetics cannot possibly have to place all "client" prepayments in a trust account. A lawyer buying vegetables at a grocery store that his law firm represents is "doing business" with a client, but certainly does not have

to make written disclosures of possible conflicts and obtain a written consent from the client before paying for a rutabaga.

Determining the precise applicability of ethics rules to a lawyer's non-legal activities requires a more sophisticated analysis.

The analysis focuses on individual lawyers, not on law firms. The Restatement notes that approach.

> For the most part, lawyer codes prohibit stated offenses by individual lawyers. Law firms as such are not subject to professional discipline, although at least two states now impose the obligations of their lawyer codes on law firms as well as on individual lawyers.

Restatement (Third) of Law Governing Lawyers § 5 cmt. b (2000). The reporter's note provides more detail.

> Thus far, most jurisdictions have resisted suggestions that more effective disciplinary enforcement over lawyers in firms could be achieved if law firms themselves were directly subject to vicarious disciplinary liability for violations of firm lawyers. . . . Recent and notable exceptions are New Jersey and New York.

Restatement (Third) of Law Governing Lawyers § 5 cmt. b, reporter's note (2000).

Some ethics rules start with the phrase "in representing a client" -- and thus apply only when a lawyer acts in his or her legal capacity. For instance, the prohibition on a lawyer's ex parte communication with a represented person starts with the phrase "[i]n representing a client." ABA Model Rule 4.2. Thus, that rule obviously applies only when a lawyer acts in a representational capacity. Similarly, the rule prohibiting lawyers from undertaking an action primarily designed to embarrass or burden a third person begins with the same phrase. ABA Model Rule 4.4(a).

On the other hand, some ethics rules do not start with that phrase. For instance, the ABA Model Rule listing a series of improper actions begins with the phrase: "[i]t is professional misconduct for a lawyer to." ABA Model Rule 8.4. Therefore, a lawyer may be punished for violating those prohibitions regardless of whether the lawyer is acting in a representational capacity or not.

Not surprisingly, the ethics rules are more likely to apply if a lawyer acts in a fiduciary or other role that parallels a professional role.

- See, e.g., Philadelphia LEO 2008-5 (5/2008) (holding that a lawyer acting as an estate's executor may not accept a referral fee from a lawyer that the executor hires to provide legal services for the estate; "The limitations on the conduct of an individual, including an attorney, who is functioning as a fiduciary often exceed the ethical limitations on the conduct of an attorney as provided for in the Rules. The inquirer's most significant question is whether the lawyer in his capacity as the executor, and, therefore, as a fiduciary, may properly request a referral fee. The issue of the executor's actions are [sic] not strictly governed by the Rules of Professional Conduct but also by the duties of a fiduciary and particularly, his or her duty of loyalty to the beneficiaries of the estate. Unless the executor applies the entire referral fee for the benefit of the estate, either as a reduction of his own compensation as executor or adds it to the estate for distribution to the beneficiaries, the executor can be deemed to have placed himself in an unavoidable conflict of interest having engaged in prohibited self-dealing.").

As lawyers move away from the traditional role as legal advisor, bars and courts are likely to find that the lawyers continue to be bound by some of the "core" ethical duties (honesty, confidentiality, etc.) but not the more tangential ethical duties (avoiding conflicts, trust account procedures, etc.).

Some of the most sweeping prohibitions apply to lawyers acting in any capacity, not just in a representational capacity. For instance, under ABA Model Rule 8.4,

> [i]t 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;
>
> (d) engage in conduct that is prejudicial to the administration of justice;

ABA Model Rule 8.4(b)-(d).

Despite the possible applicability of these general standards, the history of ethics rules and bar discipline reflect a trend away from such inherently ambiguous standards toward a more specific list of conduct that deserves punishment.

The Restatement discusses this evolution.

> In all jurisdictions, the process of professional regulation has generally been closely connected to courts, the bodies that traditionally, and now, also control admission to practice . . . . The traditional standard for measuring the propriety of the lawyer's conduct was that of "conduct unbecoming a lawyer" as elaborated in decisions ruling on such disciplinary proceedings. In the decades after adoption by the ABA of its 1908 Canons of Ethics, some jurisdictions began to rely on provisions of the Canons as stating grounds for discipline. In 1969 and 1983, the ABA adopted explicitly regulatory approaches to stating the grounds for lawyer discipline . . . . Today, every state has adopted a lawyer code defining sanctionable offenses, and in general discipline is administered only for a violation so defined. States also maintain relatively formal codes of procedure for adjudicating a charge of a disciplinary violation, most of which are modeled on the ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1996) and similar predecessor compilations. Those procedures are subject to constitutional and statutory constraints under both federal and state law. In selecting among available disciplinary sanctions, many states are also guided by the ABA Standards for Imposing Lawyer Sanctions (adopted 1986, as amended 1992).

Restatement (Third) of Law Governing Lawyers § 5 cmt. b (2000). Thus, the ethics rules and the disciplinary authorities try to focus on specific rules rather than on general standards.

> No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule. Further, a specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated ground for a violation. For example, a lawyer whose office books and accounts are in conformity with lawyer-code provisions specifying requirements for them should not be found in violation of a general provision proscribing "dishonesty" for failure to have even more detailed or complete records.

Restatement (Third) of Law Governing Lawyers § 5 cmt. c (2000).

Perhaps the most noteworthy example of this trend involves the ABA Model Rules' 1983 abandonment of an "appearance of impropriety" standard for disciplining lawyers. Although courts continue to rely on that standard in disqualification disputes, the ethics rules no longer rely on what some have called a "junk standard."

## Best Answer

The best answer to this hypothetical is **YES (SOME OF THE RULES)**.

n 1/12; b 10/14

# Lawyers' Wrongdoing Unrelated to Clients

## Hypothetical 3

You have been asked to participate in a panel dealing with the recent wave of corporate scandals. You expect to be asked about the extent to which lawyers may be punished by their bars for conduct that does not directly relate to the lawyers' dealings with their clients. Of course, you want to be prepared with an answer.

What types of lawyer wrongdoing should be punishable by the bar even though the wrongdoing does not involve any clients?

## CRIMES INVOLVING MORAL TURPITUDE OR WHICH EXHIBIT THE ABSENCE OF CHARACTERISTICS RELEVANT TO PRACTICING LAW; A PATTERN OF EVEN INSIGNIFICANT WRONGDOING

## Analysis

Given the complicated overlap between ethics rules, criminal statutes, and civil standards, bars have tried to draw a line between sufficiently egregious misconduct justifying professional discipline and the type of minor criminal act or civil wrong that would not justify such discipline.

An ABA Model Rules comment tries to define that line.

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the

> administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

ABA Model Rule 8.4 cmt. [2] (emphasis added).

The Restatement takes essentially the same approach.

> Professional duties defined in lawyer codes are mainly concerned with lawyer functions performed by a lawyer in the course of representing a client and causing harm to the client, to a legal institution such as a court, or to a third person. Those duties extend further, however, and include some lawyer acts that, even if not directly involving the practice of law, draw into question the ability or willingness of the lawyer to abide by professional responsibilities. Every jurisdiction, for example, reserves the power to subject a lawyer to professional discipline following conviction of a serious crime . . . regardless of whether the underlying acts occurred in the course of law practice. Such acts are a proper basis for discipline regardless of where they occur.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. b (2000). The Restatement also discusses the impact of a lawyer's criminal violation on the lawyer's professional standing.

> Criminal law applies in most respects to acts of lawyers, either in representing clients or in other capacities and activities . . . . An act constituting a violation of criminal law is also a disciplinary offense when the act either violates a specific prohibition in an applicable lawyer code or reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Those formulations have replaced in most jurisdictions a formerly employed standard stated in terms of criminal acts constituting "moral turpitude," a phrase that, while meaningful to individuals, is vague and may lead to discriminatory or otherwise inappropriate applications. Whether a criminal act reflects adversely on a lawyer's fitness depends on the nature of the act and the circumstances of its commission. The standard is applicable

> to criminal acts wherever they may occur, so long as they are also treated as criminal at the place of occurrence.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. g (2000).

Not surprisingly, the "moral turpitude" standard is not dispositive or fixed.

- In re Rigas, 9 A.3d 494, 496, 498 (D.C. 2010) (suspending a lawyer for one year; explaining that Rigas pled guilty to a violation of a federal statute "which prohibits willfully making any false entry in the books, accounts, records, or memoranda of any carrier" subject to the FCC; finding that the criminal statute did not involve crimes of moral turpitude; "The case presents an issue of first impression, to wit, whether a criminal conviction referred to the Board by this court for an inquiry regarding moral turpitude may be the subject of negotiated discipline. Having considered the careful, thorough guidelines put forth by the Board to ensure that the process is not abused, as well as the efficiency likely to be gained by foregoing a contested hearing when neither Bar Counsel nor the respondent believes one is necessary, we hold that it may."; "On August 3, 2006, this court suspended [Rigas] from the practice of law pursuant to D.C. Bar R. XI, § 10 (c), and directed the Board to institute a formal proceeding for the purpose of determining what final discipline should be imposed, and to review Rigas's offense to decide whether it involved moral turpitude within the meaning of D.C. Code § 11-2503 (a) (2001)."; "The matter presently before us is one such case where a formal, contested hearing would be of little benefit, because there is no evidence of moral turpitude on Rigas's part.").

Many courts have punished lawyers for sufficiently egregious misconduct unrelated to their representation of clients.

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735, 737, 738 (Conn. App. Ct. 2001) (suspending for five years a lawyer who provided his tax returns to the counterparty in a real estate transaction, but did not disclose that the lawyer actually had not paid those taxes; "As a condition to receiving the loans, the defendant provided Sanborn and the Picards with copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of $ 93,603 and a tax liability of $ 26,210. His 1993 federal income tax return stated that the adjusted gross income was $ 116,950, with a tax owing of $ 31,389. . . . As of the date of the closing, however, the defendant had in fact not paid, nor even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax

obligations." (emphasis added); "[T]he defendant argues that rule 8.4 (3) prohibits only active, intentional misrepresentation and, because he did not explicitly say that he paid his income taxes, he engaged in, at most, passive misrepresentation."; "The court found that there was clear and convincing evidence demonstrating that the defendant misrepresented relevant facts to Sanborn and to the Picards by submitting his federal income tax returns without disclosing that he did not pay his income taxes, stated a falsehood on the URLA [Uniform Residential Loan Application] when he denied having any outstanding federal obligations, and was 'less than forthright [to the court] in his testimony concerning his taxes.' Further, the court concluded that the defendant failed to disclose information 'under circumstances where there is a duty to speak,' all in violation of rule 8.4 (3).").

- In re Tidwell, 831 A.2d 953, 964 (D.C. 2003) (disbarring an admittedly alcoholic Washington, D.C., lawyer after he was convicted in New York for leaving the scene of a fatal automobile accident; finding that the crime established the kind of "moral turpitude" that justified disbarment).

- In re Bikman, 760 N.Y.S.2d 5, 7 (N.Y. App. Div. 2003) (suspending for 18 months a New York lawyer who defrauded an apartment owner by concealing her sister's death and taking advantage of the lower rent-controlled rent by submitting checks in her deceased sister's name; "A lawyer's unethical conduct, even when it occurs outside the practice of law, is a proper concern of the Disciplinary Committee because it tends to reflect adversely on the legal profession as a whole;" citing earlier New York decisions in which lawyers were punished for making misrepresentations on a resume, issuing worthless checks and engaging in improper business practices).

- In re Sims, 861 A.2d 1, 4 (D.C. 2004) (disbarring a lawyer for committing what amounts to a misdemeanor -- but which involved the lawyer fixing traffic tickets; explaining that the activity involved a sufficient level of "moral turpitude" to justify disbarment).

- Disciplinary Counsel v. Ulinski, 831 N.E.2d 425 (Ohio 2005) (disbarring a lawyer who had pled guilty to federal conspiracy fraud charges).

- Ala. State Bar v. Quinn, 926 So. 2d 1018 (Ala. 2005) (disbarring a lawyer caught smoking marijuana with minors), rehearing denied without opinion, No. 2005 Ala. LEXIS 576 (Ala. Oct. 21, 2005).

- In re Barrett, 852 N.E.2d 660, 668 (Mass. 2006) (suspending for two years a lawyer who misused company funds while acting as the corporation's CEO and Director; "We agree that the $130,000 taken by the respondent from NetFax's account did not constitute a misappropriation of client funds while

the respondent was engaged in the practice of law. Nonetheless, as chief executive officer and sole director of NetFax, the respondent had a fiduciary obligation to the company, and he breached it. . . . The respondent did not stop being a lawyer merely because he was operating in a corporate capacity and, as such, he was expected to uphold the high moral standards and ethical obligations of the legal profession.").

- State v. Werdell, 136 P.3d 17, 21 (Or. 2006) (reversing the conviction of a lawyer who had disposed of a weapon and alcohol involved in his son's boating accident in which someone had died; examining the literal language of the Oregon statute under which the lawyer had been convicted, finding that the lawyer had not destroyed "physical evidence which might aid in the discovery or apprehension" of the son, because the son was already in custody).

- Iowa Supreme Court Attorney Disciplinary Bd. v. Kress, 747 N.W.2d 530, 533, 533-34, 534, 534-35 (Iowa 2008) (suspending the license of a former University of Iowa Law Professor Kenneth Kress; explaining that Kress was a UC Berkeley Law School graduate who "is particularly well-known as one of the leading scholars nationally in mental health law."; also noting that Kress's "significant other" was a "mental health advocate knowledgeable about psychological disorders"; further explaining that "Kress believed that he had been treated badly at the law school because he deserved to be appointed to a faculty chair, but had not yet received one."; explaining that Kress handed out student evaluation forms to an evening "mental health law seminar," and explained to the ten students in the seminar that his job was "on the line"; emphasizing that "[t]he only student who testified at the hearing indicated that Kress's demeanor was normal, that he spoke at his normal rate, did not exhibit frenzied excitement or seem confused, his speech was not disordered or rambling, and that he seemed logical."; noting that Kress's research assistant was suspicious when Kress violated University procedures by insisting that the evaluation forms be left in Kress's secretary's office that evening; explaining that an investigation of the forms showed that Kress had tampered with them; "The investigation determined that three neutral or unfavorable evaluations were discarded and replaced with favorable versions, two were altered in order to raise the scores, and two evaluations were unchanged. The effect of the changes was to raise Kress's composite teaching effectiveness score on a five point scale from 2.86, a relatively low score that might attract attention of law school administrators, to 4.86, a very high score that few members of the faculty were able to achieve. When confronted with the results of the investigation, Kress did not claim a medical or mental defense."; noting that "[a]t the hearing, Kress admitted in light of the evidence that he must have tampered with the evaluations. Kress asserted, however, that at the time he suffered from mental and physical illnesses that

excused or mitigated his conduct."; reciting Kress's defense: "Kress noted that after going with his research assistant to his secretary's office, he woke up in his office, either from sleep or from a 'delirious loss of consciousness' after hallucinating about two dogs. He told the Commission that he believed that conspirators had succeeded in sending rays into the students' minds changing their neurons, and altering their answers on the evaluations. Kress further testified that in light of the mind-changing rays, he believed that it was only fair for him to change the evaluations back, so they would be correct. Kress believed he was confronted with a matter of life or death. He hallucinated about being in prison, where a medieval jury was laughing at him for failing to save the world from the parade of horribles that was coming. Changing the evaluations thus was transformed from a personal matter to a universal struggle between good and evil."; ultimately suspending Kress's license indefinitely with no possibility of reinstatement for three months, and holding that he could apply for reinstatement only after undergoing a comprehensive mental examination).

- In re Casey, No. 04-O-11237, 2008 WL 5122989 (Cal. Bar Ct. Dec. 4, 2008) (holding that a lawyer who arranged for a client to transfer land to another client in an unfair transaction had engaged in an act of moral turpitude; recommending suspension of the lawyer).

- Office of Lawyer Regulation v. Hurtgen (In re Hurtgen), 772 N.W.2d 923, 924 (Wis. 2009) (revoking the license of a lawyer who had entered into a plea agreement after being indicted for involvement in a "pay-to-play" scheme in Illinois; "Attorney Hurtgen is a Wisconsin-licensed attorney who engaged in felonious behavior by participating in a pay-to-play scheme. Admittedly, Attorney Hurtgen was not acting as an attorney when he engaged in this scheme, but his participation in this scheme reflects serious misconduct that violates the public trust. The OLR recommends revocation as the appropriate sanction, and Attorney Hurtgen does not oppose this recommendation.").

- Office of Lawyer Regulation v. Brandt (In re Brandt), 766 N.W.2d 194, 196, 202 (Wis. 2009) (issuing a public reprimand against a lawyer for "multiple convictions for operating a motor vehicle while intoxicated"; "Attorney Brandt has been convicted of drunk driving on five separate occasions. Based on that record, we agree with the OLR that Attorney Brandt's multiple OWI convictions demonstrate a pattern of misconduct that evinces a serious lack of respect for the law and as such relate to his 'fitness as a lawyer in other respects.' Attorneys are officers of the court and should be leaders in their communities and should set a good example for others. Driving while intoxicated is a very serious offense with the potential to cause great harm -- or even death. . . . While it is indeed fortunate that Attorney Brandt did not injure anyone by his intoxicated driving, the fact that he repeatedly drove

while intoxicated reflects adversely on his fitness as a lawyer and consequently constitutes a violation of former SCR 20:8.4(b).").

- In re Fahy, No. 05-O-05123, 2009 Calif. Op. LEXIS 1, at *4 (Cal. Bar Ct. Mar. 6, 2009) (disbarring a lawyer for switching his vote during his service as a juror, in order to return to his law practice; "On April 22, respondent concluded that Judge Ballati would not declare a mistrial due to the jury's impasse. He foresaw further lengthy deliberations that his busy law practice could not afford. Accordingly, on that day, he told the other jurors that if the judge would not declare a mistrial, respondent would change his vote for the defense to break the deadlock so he could return his attention to his law practice. On April 26, respondent changed his vote, thus creating a verdict in favor of the defendant.").

- Santulli v. Texas Bd. of Law Exam'rs, No. 03-06-00392-CV, 2009 Tex. App. LEXIS 2471 (Tex. App. Apr. 10, 2009) (revoking the license of a lawyer who had not repaid his student loans).

- Disciplinary Counsel v. O'Malley, 935 N.E.2d 5 (Ohio 2010) (suspending a lawyer for two years after a felony conviction for downloading pornography; rejecting a disciplinary board's recommendation for a shorter suspension).

- Fla. Bar v. Behm, 41 So. 3d 136, 144 (Fla. 2010) (disbarring a lawyer who had not paid his taxes, and claimed not to owe them; explaining the lawyer's unique argument: "Behm's dispute is not with whether he received money from the practice of law but whether the money constituted 'income' for purposes of filing federal income tax returns. According to Behm, he derived no net gain from the practice of law because his time was his life capital and, in practicing law, he was trading his life capital for an hourly fee, both of equal value. Thus, he realized no profit or net income from these transactions." (emphasis added); "Critically, Behm cites no case or other authoritative source that supports, even tangentially, his primary proposition -- that his earnings did not constitute taxable income because the earnings he received in exchange for billable hours resulted in no gain.").

- Lawyer Censured for Repeatedly Stealing from Blind Concessions Operator, N.J. L.J., Oct. 26, 2010 ("Stealing from clients will get a lawyer disbarred, but the sanction for stealing from a blind refreshment stand operator in an office lobby is only a censure." (emphasis added); "That was the outcome Wednesday in the ethics case against Elwood John Walzer, an attorney and regulatory officer for the Department of Human Services (DHS), who was caught on camera swiping food and beverages at least 14 times between September 19 and October 26, 2007. The vendor operated the stand under a program of the DHS Commission for the Blind and Visually Impaired.").

- Leigh Jones, Barnes & Thornburg Attorney Disciplined for Hiring Prostitute, Nat'l L.J., Dec. 8, 2010 ("The Indiana Supreme Court has publicly reprimanded a Barnes & Thornburg attorney . . . for patronizing a prostitute in February.").

- In re Roisman, 931 N.Y.S.2d 571 (N.Y. App. Div. 2011) (suspending a lawyer for one year for a failure to pay his income taxes).

- Utah LEO 11-03 (11/15/11) (addressing the following issue: "Is it a violation of the Utah Rules of Professional Conduct for an attorney to ask a law student to undertake research using the law student's free account and in breach of the student's contract with Lexis and/or Westlaw?"; answering as follows: "A lawyer who encourages or participates in a law student's violation of the student's contractual obligation to the electronic research service violates the Rules of Professional Conduct." (emphasis added)).

- In re Zulandt, 939 N.Y.S.2d 338, 339 (N.Y. App. Div. 2012) (suspending for three years a former Cravath lawyer who had assaulted his girlfriend; "On December 24, 2008, respondent pleaded guilty to a charge of assault in the third degree (Penal Law § 120.00), a class A misdemeanor. In accordance with his plea agreement, the court sentenced respondent to ten months of incarceration, ordered restitution in the amount of $8,272.55, and entered a final order of protection against him. On June 23, 2009, respondent was released from custody after serving approximately six months in jail."; "Respondent's criminal conviction stems from an argument that he had with the complainant, his former girlfriend, in her apartment on October 4, 2007. During the encounter, respondent repeatedly threw the complainant to the floor and slapped her about the face, causing physical injuries that required medical attention. During the assault, respondent called the complainant such derogatory names as 'slut' and 'whore.' Respondent also destroyed or damaged various items of the complainant's personal property, including a Cartier watch that he smashed with a hammer, a purse that he filled with water, a painting that he punctured, and a couch that he damaged with water and oil." (emphases added)).

- In re Vanderslice, 55 A.3d 322, 327 n.24 (Del. 2012) (suspending for one year a lawyer who stole funds from his law firm; "'Although a majority of our cases involving Rule 8.4(d) violations have revolved around violations of a legal duty (such as a failure to pay taxes), we have also found Rule 8.4(d) violations for attorneys who have committed crimes involving violence, dishonesty, or a breach of trust. See, e.g., In re Nixon, 49 A.3d 1193, 2012 WL 3030517 (Del. July 25, 2012) (holding attorney who had been convicted of possessing drugs violated Rule 8.4(d).'").

- Leigh Jones, Board Calls For Disbarment of Cigar-Smuggling Lawyer, Nat'l L.J., Aug. 13, 2012 ("The Illinois attorney ethics board has recommended the disbarment of an attorney convicted of smuggling trunkloads of Cuban cigars into the country during the 1990s." (emphasis added); "The hearing board of the Illinois Attorney Registration and Disciplinary Commission on August 9 recommended stripping the law license from Richard Steven Connors, convicted 2002 of violating the Trading with the Enemy Act, falsifying information on his passport and conspiracy. Connors, sentenced to 37 months in prison and ordered to pay a $60,000 fine, denied the allegations. The United States Court of Appeals for the Seventh Circuit affirmed his conviction in 2006."; "The ethics board found that Connors had engaged in criminal acts that reflected adversely on his honesty, trustworthiness or fitness as a lawyer. It also found that his conduct 'tended to bring the legal profession into disrepute.' The recommendation was first reported by the Legal Profession Blog.").

- Zoe Tillman, Court Approves Suspension for Lawyer Who Stole Neckties, Nat'l L.J., Sept. 28, 2012 ("The District of Columbia Court of Appeals today approved the 90-day suspension of a former United States Department of Treasury lawyer who pleaded guilty to stealing neckties from a high-end Virginia department store." (emphasis added); "Albert Zarate, a member of the District of Columbia Bar since 1995, pleaded guilty in Fairfax County Circuit Court to attempting to steal 'seven or eight' neckties from a Nordstrom department store in December 2009, according to court filings. The District's attorney disciplinary body found that Zarate's actions didn't involve moral turpitude, and negotiated the 90-day suspension with him."; "In an order published this morning, a three-judge appellate panel agreed that Zarate's case didn't involve moral turpitude and approved the 90-day suspension. The suspension was effective from December 2010, meaning he's already served the time.").

- Bruce Vielmetti, Lawyer Who Padded Hours For Bonus Seeks Break From High Court, Milwaukee J. Sentinel, Oct. 8, 2012 ("A lawyer accused of ripping off his own partners by inflating his billings to win bonuses could become a barometer of the Wisconsin Supreme Court's feelings about lawyers' duties to each other." (emphasis added); "A referee has recommended the court suspend Matthew Siderits' license for 18 months, a term his attorney said would amount to a career killer. Siderits disputes the finding that he knowingly engaged in fraud or deceit. Even if the court agrees he did, he argues that a reprimand or much shorter suspension is the proper sanction because he cooperated with the ethics investigation, has no prior discipline and has paid back his former partners." (emphasis added); "But the Office of Lawyer Regulation (OLR) argues even lawyers who defraud their own partners deserve significant punishment to deter others, and that Sideritis'

claim that he had insufficient notice of his fiduciary duty should be ignored."; "Siderits (Marquette, 1996) was a shareholder and the treasurer of Otjen, Van Ert & Weir. Another partner noticed that year after year, Siderits seemed to just meet the threshold of 1,800 billable hours that would qualify him for a bonus."; "After a little digging, they found out that in at least a couple years, Siderits -- though he billed more than 1,800 hours -- had gone back and modified the actual bill sent to clients and that the adjusted totals were under 1,800. He was fired in June 2009."; "Though he ultimately paid back about $60,000 to settle with the firm, he also became the subject of investigation by the OLR, and after an extensive hearing last year, a referee found Siderits had violated rules of professional conduct.").

- Martha Neil, Ex BigLaw Partner Who Lied on Child's School Financial Aid Application is Disbarred, ABA J., Nov. 27, 2012 ("An Illinois lawyer has been disbarred by the state supreme court for misrepresenting his income on his child's private school financial aid applications, in order to qualify for $22,830 in assistance over an approximately four-year period." (emphasis added); "In addition to providing falsified copies of his tax returns to the Francis W. Parker School in Chicago, Bruce Paul Golden also 'understandably offended' most members of the hearing panel, it noted in an earlier report, by refusing to provide requested information and 'antagonistic, sometimes rude' conduct, recounts Forest Leaves, a suburban news publication. Golden worked for more than 20 years at McDermott Will & Emery." (emphasis added); "The Illinois Supreme Court disbarred him in a brief November 19 order."; "A securities lawyer, Golden had worked at McDermott Will & Emery for 21 years and been a capital partner for 10 when he was expelled in 1991. Golden graduated from Harvard Law School in 1969." (emphasis added)).

- Iowa Supreme Court Attorney Disciplinary Bd. v. Rhinehart, 827 N.W.2d 169, 177 (Iowa 2013) (suspending a lawyer for sixty days for misconduct, but finding that some of the ethics rules did not apply to the lawyer's conduct in his own divorce action; "We reach the same conclusion as to rule 32:3.4(c), which the Board alleges Rhinehart violated when he failed to disclose A.G. and J.G.'s cases in his own divorce proceedings. Rule 32:3.4(c) prohibits an attorney from 'knowingly disobey[ing] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.' Iowa R. Prof'l Conduct 32:3.4(c). This rule, like rule 32:3.3, is located in the section of the rules entitled 'Advocate,' which helps show the rule applies only when an attorney is representing a client. The Board cites no authority, and we found none applying rule 32:3.4 to a lawyer for conduct in his own case while not representing a client. Accordingly, because Rhinehart was not serving as an advocate representing a client, we hold rule 32:3.4(c) did not apply to him when he committed extrinsic fraud as a party in his own dissolution proceeding.").

- State ex rel. Counsel for Discipline v. Cording, 825 N.W. 2d 792, 795-96, 797, 798 (Neb. 2013) (imposing a public reprimand on a lawyer after his misdemeanor conviction for public indecency; "Respondent's illegal conduct took place in a heavily wooded area of the park. There is nothing in the record to indicate that members of the public were present or that anyone viewed respondent's conduct. Respondent was charged in Lancaster County Court with third degree sexual assault and public indecency. He was found guilty of both counts. . . . The [county] district court reversed the conviction for third degree sexual assault, but affirmed the conviction for public indecency, which was a Class II misdemeanor."; "[R]espondent argues that his conduct did not adversely reflect on his fitness as a lawyer because his actions were not undertaken when he was acting in that capacity. Respondent claims that the offense of public indecency was not an offense relevant to the practice of law because it does not involve violence, dishonesty, breach of trust, or serious interference with the administration of justice. He asserts that his actions, at best, would support nothing more than a finding that he touched someone where the touching could be observed by the public. At the time of the incident, there were no other people present and no one was in a position to observe the touching. Under these circumstances, respondent argues there was no connection between the alleged behavior and his honesty, trustworthiness, and fitness as an attorney."; "We agree with the referee's determination that the record shows by clear and convincing evidence that respondent's conduct violated his oath of office and § 3-508.4(b). Respondent's conviction of public indecency adversely reflects on his fitness as a lawyer." (emphasis added); "The referee found that the actions of respondent in a public park were far below the conduct that the Nebraska Supreme Court and the public should expect from an attorney licensed to practice law in the State of Nebraska. We agree.").

- In re Weisel, 965 N.YS.2d 28, 29 (N.Y. App. Div. 2013) (suspending for nine months a lawyer who admitted that he was addicted to lying; "The other attorney eventually learned that respondent had forged his name on the fraudulent stipulation. Once his dishonesty was discovered, respondent wrote letters to his client and the attorney. In the letter to his client, respondent claimed that he suffered from an 'addiction [to] lying' that he analogized to an addiction to drugs or alcohol. In the letter to the attorney, he apologized for his actions, offering the explanation that he 'did not know how to properly file an action on behalf of [his] client, and felt this would buy [him] time to properly file same.' He also stated he had come to the conclusion that he had trouble telling the truth, 'be it either personal or business.'" (emphasis added)).

- Hal R. Lieberman, Discipline for "Private Conduct," N.Y. L.J., Feb. 19, 2013 ("[A]ttorneys cannot engage in illegal conduct or be dishonest in their

business or personal dealings even if there are no criminal consequences. For example, New York lawyers have recently been disciplined, in some cases severely, for the following kinds of misconduct having nothing to do with their law practices: falsely accusing a state trooper of having uttered anti-Semitic slurs against him, and reaffirming those accusations on more than one occasion, in an attempt to get out of speeding ticket; willfully refusing, in violation of court orders, to timely pay child support; pursuing frivolous and vexatious litigation as a 'party-litigant, not as an attorney'; telling the co-executor under a will executed by the lawyer's uncle that the lawyer needed a power of attorney from the uncle to reinstate dormant bank accounts, but instead used the power of attorney to restructure, and to attempt to restructure, his uncle's accounts for the lawyer's personal benefit; and, fraudulently occupying a rent-regulated apartment for two years after the death of the tenant of record." (footnotes omitted) (emphasis added)).

- In re Rosenzweig, 960 N.Y.S.2d 376, 377, 379 (N.Y. App. Div. 2013) (suspending for six months a lawyer who lied in order to enter into a bigamous marriage; "The underlying facts are undisputed. Respondent married Theresa Wong in 1985. In or about 1995 he entered into an amorous relationship with Radiah Givens. Although married to Wong, respondent traveled with Givens to Jamaica, falsely informed a Jamaican government official that he was a 'bachelor,' executed marriage documents indicating that he was then a bachelor, and participated in a ceremony by which he and Givens were 'officially married' under Jamaican law. According to respondent, Givens understood that their purported marriage was not a legal union, and they had no plans to cohabit after the Jamaican ceremony."; "That respondent's misconduct involves his personal life only, does not necessarily warrant a sanction less severe than suspension." (emphasis added)).

- Karen Sloan, Suspension for Spurned Attorney Who Waged Vendetta, Nat'l L.J., May 20, 2013 ("This is not how to mentor a fledgling lawyer. An Indiana attorney has been suspended from practice for three years for pursuing a romantic relationship with a summer law clerk and attempting to destroy her legal career when she rejected his advances. The Supreme Court of Indiana on May 17 ruled that Arthur Usher violated eight of the Indiana Rules of Professional Conduct -- including committing a criminal act, knowingly making a false statement to the state's Disciplinary Commission and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The court blocked Usher from the practice for at least three years, without automatic reinstatement. One judge, Stephen David, dissented because he believed disbarment was warranted, the opinion said. According to the ruling, the episode began in the summer of 2006, when a female law student at the Indiana University Robert H. McKinney School of Law became a summer associate at Indianapolis law firm Bose McKinney & Evans, where Usher was

a partner. Usher and the associate, dubbed Jane Doe in court papers, developed a social relationship when she returned to law school for her 3L year. Usher departed for a position at the law firm Krieg DeVault and pursued a romantic relationship with the former intern, according to the opinion, but Doe rebuffed his advances and the social relationship soured in 2008. 'Respondent then began attempting to humiliate Jane Doe and to interfere with her employment prospects,' the court found. According to the court, Usher obtained a clip of a horror movie in which Doe had appeared -- apparently topless, although she would testify that a body double was used -- and he sent the clip to an attorney at Bose, which had offered her a job. Usher suggested that the recipient show the clip to the firm's executive committee, but the recipient declined. Next, Usher created a fictitious thread of emails purportedly from female attorneys outraged that Bose would hire a new associate who had appeared in such a film and concerned that her employment would tarnish the firm and its relationship with clients. He instructed his paralegal to send the email and film clip from an untraceable computer to more than 50 attorneys at prominent local firms, including Bose." (emphases added)).

- Marlise Silver Sweeney, Ex-Bryan Cave Lawyer Charged with Making Death Threat, AmLaw Daily, July 3, 2013 ("A federal grand jury in Missouri has indicted onetime Bryan Cave associate Ryan Walsh, who was laid off six months after joining the firm's New York office in 2008, with threatening to kill a Bryan Cave employee in a message left on the person's office voicemail."; "According to the indictment handed up Thursday in federal court in the Eastern District of Missouri, Walsh - who faces the formal charge of transmitting a communication containing a threat to injure the person of another - left the message in question for the unidentified Bryan Cave worker on his or her office line at 9:27 p.m. on June 15." (emphasis added); "In an affidavit filed with the court separately, Federal Bureau of Investigation special agent David Herr states that in his alleged message, Walsh said, among other things: 'I show up to murder pieces of shit like you. . . . Let's record this as a threat and turn it over to the Office of Chief Disciplinary Counsel. This is like an arbitration or something. But, more importantly, I'm going to kill you.'" (emphases added)).

- In re Mintz, 317 P.3d 756, 761, 762, 763, 764 (Kan. 2014) (indefinitely suspending (but not disbarring) a lawyer who lied to the police about the circumstances in which his lover died of a drug overdose; "The Disciplinary Administrator highlights that Mintz made deceptive statements to law enforcement officers who investigated J.A.'s unattended death. Further, he admittedly delayed calling law enforcement -- waiting over 2 and 1/2 hours -- after discovering J.A.'s body. During the lapsed time period, Mintz took J.A.'s car keys and cell phone and walked back to the bar where J.A.'s car had

> been parked the previous night. He drove J.A.'s car back to her apartment complex and parked it. Then, Mintz drove home in his own vehicle and changed clothes. Significantly, Mintz deleted all text messages between himself and J.A. from both her cell phone and his own cell phone. He admitted that all of these actions were done in order 'to cover my ass.'"; "Mintz responds that his dishonesty should not be characterized as a pattern of misconduct. Instead, this was an isolated incident that comprised an emotionally charged reaction to a tragic and debilitating event in his life."; "[T]he cases reflect that trauma and stress do not excuse a lack of honesty when dealing with law enforcement officials."; "Clear and convincing evidence supports the conclusion that Mintz engaged in deceptive practices and made untruthful statements during a law enforcement investigation. The panel's emphasis on the isolated nature of the conduct, the nature of the harm, Mintz' general reputation as an attorney, and the fact that the deposition occurred under stress do not change the conclusion that a violation of KRPC 8.4(c) occurred. If anything, some or all of these factors are circumstances to be considered in determining the appropriate discipline to be imposed for violating KRPC 8.4(c).").

Courts have punished lawyers (or refused their admission or readmission to the bar) for egregious misconduct before the lawyers were members of the bar, or while they were on inactive status.

- In re Pilie, 98 So. 3d 802, 804 (La. 2012) (denying bar admission to a lawyer who had been charged with but never convicted of soliciting a minor; "[T]he lack of a criminal conviction does not prevent this court from considering the effect to be given to the conduct for purposes of our constitutional responsibility to regulate the practice of law.").

- In re Petition for Readmission of Madden, 423 S.W.3d 39, 44-45, 45, 45-46, 47 (Ark. 2012) (refusing the readmission of a lawyer who had pleaded guilty 12 years before to misprision of a felony; "By its plain language, [Ark. Supreme Court Procedures Regulating Prof'l Conduct] section 2(J) includes in the definition of 'Serious Crime' any felony and 'any lesser crime will constitute a 'serious crime' only if it reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.'. . . Madden's conviction for misprision of a felony, a class E felony under federal law, clearly falls within the definition of a 'Serious Crime.'"; "The Federal Criminal Code defines misprision of a felony as: 'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or

imprisoned not more than three years, or both.' 18 U.S.C. § 4 (1996)."; "[T]he majority of federal appellate courts, including the United States Court of Appeals for the Eighth Circuit, that have considered the offense of misprision of a felony have described the elements of that offense as (1) the principal committed and completed the felony alleged; (2) the defendant has knowledge of the fact; (3) the defendant failed to notify the authorities; and (4) the defendant took affirmative steps to conceal the crime. . . . These cases underscore that mere silence or failure to report a crime is not sufficient to sustain a conviction for misprision of a felony, since there must be some positive act designed to conceal from the authorities the fact that a crime has been committed. . . . Hence, it is clear that the modern interpretation of misprision of a felony, recognized by a majority of federal jurisdictions, . . . requires some affirmative or willful act of concealment as an element of the crime. It is equally clear that this affirmative-act-of-concealment element requires a mental state of something more than negligence or recklessness."; "Madden's request that this court consider the fact that he did not take affirmative steps to conceal this crime as evidence that his behavior involved the mental state of negligence or recklessness is a request that this court consider evidence that is inconsistent with the elements of the crime for which he pled guilty and was convicted. This is plainly prohibited by section 15(C)(4) of the Procedures Regulating Professional Conduct in disbarment proceedings, and this court concludes that this rule is equally applicable to proceedings for reinstatement or readmission to the bar."; "Because an affirmative act of concealment is an element of the offense of misprision of a felony, it cannot be said that the offense of misprision of a felony requires a culpable mental state of negligence or recklessness. As a consequence, Madden's conviction for misprision of a felony falls within the definition of 'Serious Crime' and does not qualify under the exception set forth in [Ark. Supreme Court Procedures Regulating Prof'l Conduct] section 24(B)(2).").

- Leigh Jones, Finally Passing The Bar, "Pretend" Robber Refused Admission to Practice, Nat'l L.J., Jan. 28, 2011 ("A law graduate who finally passed the bar exam after eight attempts nevertheless will remain without a license to practice, partly because he pretended to be a robber on April Fool's day."; "The Supreme Court of New Hampshire on January 26 ruled that the 1992 law school graduate was ineligible for admission because of his criminal record and because he had not repaid nearly $140,000 in student loans. Especially persuasive to the court was that the applicant had pulled a seven-inch knife on a store clerk in 1993 while, as he explained, he was 'pretending to be a robber.'").

- Iowa Supreme Court Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 771, 764, 767, 767-68, 769 (Iowa 2010) (suspending an Iowa lawyer's license indefinitely "with no possibility of reinstatement for a period of three months,"

even though he had been on inactive status since 2000; explaining that "[i]n 2000 Templeton took inactive status and began managing a newspaper distribution business. In 2007 he distributed newspapers in four states and personally delivered the newspapers in the Des Moines area."; noting that the lawyer had been arrested for being a "Peeping Tom," and admitted to a psychological disorder; "We have the authority to take disciplinary action against an attorney even though the attorney's license is inactive and the attorney is not actively engaged in the practice of law. . . . This is true even if at the time of the misconduct the attorney was not acting as a lawyer. . . . Thus, even though Templeton's law license was on inactive status and his conduct was unrelated to his representation of clients or any other facet of the practice of law, we still have the authority to sanction him upon a finding that he has engaged in misconduct in violation of the Iowa Rules of Professional Conduct."; finding that the lawyer's conduct violated Iowa Rule 8.4(b), because it reflected adversely on the lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."; "Here, Templeton engaged in a pattern of criminal conduct by repeatedly looking into the victims' windows. In doing so, he violated Doe's, Roe's, and Poe's privacy, and caused them to suffer emotional distress. Although his conduct was compulsive, the record also establishes he intentionally and knowingly invaded the privacy of these women. This conduct also raises serious misgivings about whether Templeton understands the concept of privacy and respects the law protecting individuals' privacy rights. For these reasons, we find Templeton's criminal acts of invading Doe's, Roe's, and Poe's privacy reflects adversely on his fitness to practice law in violation of rule 32:8 4(b)."; finding that the conduct was not "prejudicial to the administration of justice").

- Barrett v. Va. State Bar, 675 S.E.2d 827, 829 (Va. 2009) ("We hold that a lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules.").

- In re Brown, 605 S.E.2d 509 (S.C. 2004) (suspending for two years a lawyer who had, among other things, improperly arranged for the notarization of documents, including engaging in such behavior before he became a lawyer).

- In re Hinson-Lyles, 864 So. 2d 108, 117 (La. 2003) (the Louisiana Supreme Court denied admission to the Louisiana Bar of a woman who -- five years earlier while working as a teacher -- was found guilty of having sex with a fourteen-year-old student; the Court had earlier allowed the woman to take the Bar exam and ordered a Commissioner's report on her character and fitness, which the woman passed; a dissenting judge pointed to the woman's successful rehabilitation, excellent performance as a law clerk for a Louisiana judge after graduating from law school, and what he called the "disingenuous" conduct by the Court in allowing the woman to take the Bar exam -- and then

denying the woman's application without providing any clear guidelines for when she might be able to re-apply).

Although the line is difficult to draw, it would seem that bars would almost certainly punish lawyers for most non-client-related crimes involving moral turpitude. They are also likely to punish significant crimes that go to the type of behavior lawyers must exhibit when dealing with clients, and even to a pattern of minor crimes (which might tend to reflect an indifference to the rule of law).

Some courts take a fairly forgiving view of lawyers' wrongdoing, if there are extenuating circumstances.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Keele, 795 N.W.2d 507, 509, 515 (Iowa 2011) (dismissing the bar's complaint against a lawyer for improper possession of a firearm; explaining that "[i]n 2006 or 2007, a court finalized Keele's dissolution of marriage. After the dissolution, Keele lived alone in his West Liberty home and became lonely and depressed. He began to frequent bars and nightclubs, associate with new people, and use illegal drugs. Keele rented an apartment in Davenport where he partied with other drug addicts, who supplied him with drugs. Eventually, he became addicted to crack cocaine. From January 2007 through July, he was using crack cocaine on a regular basis. During this period, Keele continued to represent clients without complaint. However, he spent less time at the office and quit going to work on a regular basis."; "Thus, the board has failed to establish a convincing preponderance of the evidence that a sufficient nexus exists between Keele's illegal possession of the firearm and his ability to function as a lawyer. Accordingly, while we do not condone or excuse Keele's conduct, we find Keele's illegal possession of the firearm does not adversely reflect on his fitness to practice law in violation of rule 32:8.4(b).").

Bars have had the most trouble dealing with lawyers' substance abuse and mental illness.

A 2009 ABA Model Rule addressed this issue.

- Am. Bar Ass'n, Model Rule on Conditional Admission to Practice Law (adopted by the ABA House of Delegates (Aug. 2009) ("An applicant who currently satisfies eligibility requirements for admission to practice law,

> including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent successful rehabilitation from chemical dependency or successful treatment for mental or other illness, or from any other condition this Court deems appropriate, that has caused conduct that would otherwise have rendered the applicant currently unfit to practice law. The [Admissions Authority] shall recommend appropriate conditions that the applicant to the bar must comply with during the period of conditional admission.").

A 2010 article describes states' varied approach to substance-abusing lawyers.

- Leigh Jones, Discipline Varies Widely for Addicted Attorneys, Nat'l L.J., Sept. 20, 2010 ("An Indiana lawyer shows up at the courthouse drunk and gets into a car accident. His license is suspended, but stayed, for 180 days. A New Hampshire attorney and admitted alcoholic takes on what turns out to be a meritless case and conceals the defeat from clients. He is disbarred."; "An Iowa attorney and a self-described alcohol abuser involved in a series of disciplinary actions, including taking a client's money and abandoning a divorce case, gets a license suspension. He can apply to renew it in six months. Meanwhile, a Florida attorney who's been sober and in a 12-step program since his arrest on drug charges in 2004 is disbarred for the six-year-old offense."; "Each of the four cases involved substance abuse -- and each had a very different outcome. The decisions, all from the past two years, show how broad the inconsistencies are in the way courts dole out punishment for substance-abusing attorneys. Whether because of uneven precedent, murky ethics issues or a hard-line stance against recognizing addiction as a mitigating factor in misconduct, courts can give attorneys little more than a slap on the wrist in some cases. In others, careers are finished.").

In the same year, the Nebraska Supreme Court described how it handled depression as a mitigating factor in lawyer misconduct.

> State ex rel. Counsel for Discipline v. Switzer, 790 N.W.2d 433, 440, 440-41 (Neb. 2010) ("We put forward a test to establish depression as a mitigating factor. To satisfy the test, 'the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.' We noted that these elements were questions of fact. And we

> have applied this test in other cases." (footnotes omitted); "Here, the referee considered the Thompson [State ex rel. Counsel for Discipline v. Thompson, 652 N.W.2d 593 (Neb. 2002)] test. The referee found that Switzer met the first two elements of the test. Regarding the third element, the referee stated that he could not conclude with any degree of confidence whether treatment would substantially reduce the likelihood of future misconduct. Switzer takes exception to this finding by the referee."; "We do not believe it is necessary to parse the testimony to determine the likelihood of further misconduct. Even if Switzer can satisfy the Thompson test, his depression is just one mitigating factor. We balance it with other mitigating factors as well as aggravating factors. In short, when the Thompson test is satisfied, it does not automatically result in a less severe punishment.").

## Best Answer

The best answer to this hypothetical is **CRIMES INVOLVING MORAL TURPITUDE OR WHICH EXHIBIT THE ABSENCE OF CHARACTERISTICS RELEVANT TO PRACTICING LAW; A PATTERN OF EVEN INSIGNIFICANT WRONGDOING**.

n 1/12; b 10/14

# Doing Business with Clients: General Rule

## Hypothetical 4

You represent the owner of a small suburban office building in her labor and employment matters (mostly relating to the small clerical staff she employs). You do not perform any real estate work for the owner. Your firm wants to open up a "satellite office" in the suburbs, and you just told your managing partner that the firm should consider leasing space from your client.

**(a)** May you lease office space from your client?

**YES**

**(b)** Must your client be separately represented in the lease negotiations?

**NO**

**(c)** Must you make any disclosures to your client or receive any consents from your client before entering into the lease?

**YES**

## Analysis

Lawyers doing business with their clients confront both fiduciary duty and ethics challenges.

### Fiduciary Duty

As a matter of common law fiduciary duty, lawyers entering into business transactions with their clients normally are presumed to have defrauded them -- and must overcome that presumption with clear and convincing evidence.

- Liggett v. Young, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's home; reversing the trial court's award of summary judgment to the lawyer in

a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).

- Tower Investors, LLC v. 111 E. Chestnut Consultants, Inc., 864 N.E.2d 927, 943 (Ill. App. Ct.) (holding that a partner of the Chicago law firm of Sonnenschein, Nath & Rosenthal (who had invested in a law firm client through an entity separate from the law firm) could enforce a promissory note; explaining that "attorney-client transactions are not void, but rather, presumptively fraudulent"; explaining that the sophisticated client had not been defrauded, because the law firm had fully explained the conflict), appeal denied, 875 N.E.2d 1125 (Ill. 2007).

- In re Corporate Dissolution of Ocean Shores Park, Inc., 134 P.3d 1188 (Wash. Ct. App. 2006) (holding that a lawyer entering into a business transaction with a client must show that the transaction was fair).

- Thomas v. Turner's Adm'r, 12 S.E. 149, 153 (Va. 1890) ("According to that rule all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence."; "All transactions between the parties, to be upheld in a court of equity must be uberrima fides, and the onus is on the attorney to show, not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client freely; and (3) that it was entered into with such a full understanding of the nature and extent of his rights, as to enable the client to thoroughly

> comprehend the scope and effect of it."; ultimately holding that the lawyer had not carried his burden of showing that the transaction was fair, although the client had signed the agreement after reading it, and also affirmed that she understood it).

## ABA Model Rules

Building on this common law fiduciary duty principle, the ABA Model Rules contain a remarkably stringent standard for business transactions between lawyers and their clients.

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

ABA Model Rule 1.8(a) (emphases added).

Not surprisingly, this rule does not apply

> to standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has not advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

ABA Model Rule 1.8 cmt. [1].

- Liggett v. Young, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's home; reversing the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).

- Pennsylvania LEO 2001-100 (3/2001) (holding that Rule 1.8(a) does not apply to "standard commercial transactions" between lawyers and clients, such as those involving banking, brokerage and medical services, or a lawyer's purchase of products from clients; explaining that the ethics rules are inapplicable to those transactions because they take place on a "level playing field" in which the "lawyer's legal training and experience do not put her at an advantage over the client"; explaining that Pennsylvania's version of Rule 1.8(a) does not contain a provision requiring that the business transaction be "fair and reasonable to the client," but does require the lawyer to "expressly advise the client that she has, and should pursue, the right to an independent evaluation of the transaction by another lawyer.").

## Restatement

The Restatement takes the same basic approach as the ABA Model Rules, but without the mandatory written disclosures and consents.

> A lawyer may not participate in a business or financial transaction with a client, except a standard commercial

> transaction in which the lawyer does not render legal services, unless:
>
> (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
>
> (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
>
> (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Restatement (Third) of Law Governing Lawyers § 126 (2000).

## State Case Law

Every state has a rule dealing with lawyers doing business with their clients.

These usually fall somewhere between the ABA Model Rules and the Restatement.

States have severely punished lawyers who violate the applicable rules.

- In re Conduct of Hostetter, 238 P.3d 13, 15, 18, 20, 24 (Or. 2010) (suspending for 150 days a lawyer who "represented the borrower in the underlying loan transaction" and then "subsequently represented the lender in collecting the loans from the borrower's estate"; "This case presents a matter of first impression in Oregon -- that is, whether a former client, now deceased, is protected by the former-client conflict-of-interest rules. Oregon is not alone, as no jurisdiction appears to have directly addressed the issue. At best, a few jurisdictions have addressed the related issue of whether dissolved corporations are 'clients' for purposes of the former-client conflict-of-interest rules. Those jurisdictions are split on the issue. Some jurisdictions hold that, upon a corporation's dissolution, a conflict of interest cannot exist, because the entity is 'dead,' no longer exists, and, accordingly, cannot have interests adverse to the current client. . . . Conversely, other jurisdictions hold that a bankruptcy trustee 'stands in the shoes' of the corporation as former client, and the accused in later litigation may not represent an interest adverse to the successors in interests of the failed corporation."; "[W]e conclude that, pursuant to DR 5-105(C) and RPC 1.9(a), an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and

are adverse to the current client during the subsequent representation."; "The debt collection and loan transactions certainly involved the same transaction -- the underlying loan documents that the accused drafted on behalf of Ingle [deceased client]. The accused's representation of Hohn {lender to deceased client] involved his own work that he had completed on behalf of Ingle and, in that regard, the matters are substantially related. We therefore determine that the accused engaged in a matter-specific conflict in violation of RPC 1.9(a).").

- Office of Lawyer Regulation v. Trewin, 684 N.W.2d 121 (Wis. 2004) (suspending for five months a lawyer who engaged in a business transaction with a client without following the Wisconsin rule requiring lawyers to advise their clients in writing of the possible adverse effects of the relationship).

- In re Timpone, No. 93178, 2004 Ill. LEXIS 7, at *4 (Ill. Jan. 23, 2004) (suspending an Illinois lawyer for 42 months because he borrowed money from a client for whom the lawyer had just completed some work; explaining that the lawyer had "violated his fiduciary duty to his client by, among other things: (1) failing to advise [client] that there were limits on the types of transactions an attorney could enter into with a client; (2) failing to advise him to consult independent counsel before making the loan; and (3) providing no collateral for the loan and giving [client] no promissory note evidencing the loan or the interest rate until five years after the transaction").

Not surprisingly, courts generally refuse to enforce agreements between a lawyer and a client, based on these standards.

- Fair v. Bakhtiari, 125 Cal. Rptr. 3d 765 (Cal. Ct. App. 2011) (addressing a situation in which a lawyer and client entered into a successful real estate business venture; explaining that the lawyer could not recover under a quantum meruit theory when the client rescinded the business venture, because the lawyer had not complied with the ethics rules governing business with clients).

- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782 (10th Cir. 2009) (holding that a lawyer who had declared bankruptcy could not discharge a debt to a client from whom the lawyer had borrowed money, because the lawyer had not complied with Rule 1.8).

- Valley/50th Avenue, L.L.C. v. Stewart, 153 P.3d 186, 190, 190-91 (Wash. 2007) (reversing summary judgment for a law firm seeking to foreclose on a mortgage note agreed to by a client to secure payment of the lawyer's bills; noting that Washington Rule 1.8(a)(2) requires that "the client is given a

reasonable opportunity to seek the advice of independent counsel in the transaction"; "The parties dispute whether Rose had adequate opportunity to seek the advice of independent counsel. The opportunity to seek independent advice must be real and meaningful. It is not enough that at some moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been. . . . The disclosures and notices required by RPC 1.8 are meaningless unless the client is given a reasonable amount of time to act upon the information disclosed and seek independent counsel. The definition of a 'reasonable opportunity' may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney. . . . The burden is upon the lawyer to demonstrate that a real and meaningful opportunity to seek independent counsel was afforded to the client.").

- McLaughlin v. Amirsaleh, 844 N.E.2d 1105 (Mass. App. Ct. 2006) (finding that public policy prohibited enforcement of a mortgage that a lawyer had obtained in a client's real property to secure loans that the lawyer had made to the client).

Some courts give the client even a better deal -- finding the arrangement voidable by the client.

- BGJ Assocs. LLC v. Wilson, 7 Cal. Rptr. 3d 140 (Cal. Ct. App. 2003) (holding that a lawyer's transaction with a former client was voidable because the lawyer had not made the necessary disclosures in writing, and had not obtained the client's consent in writing).

- Petit-Clair v. Nelson, 782 A.2d 960 (N.J. 2001) (holding that clients could void a mortgage on their personal residence that they had given their lawyer to secure payment of legal fees; explaining that the lawyer had not advised the client of the advisability of seeking independent counsel in the transaction).

This approach allows clients to enforce favorable arrangements, while voiding unfavorable deals.

## Other Possibly Applicable Principles

In addition to the overarching rule governing lawyer-client business transactions, lawyers may find themselves confronting other rules.

First, if the business transaction results in a lawyer obtaining a security interest related to fees, the lawyer must satisfy the "reasonableness" standard and comply with trust account procedures when acquiring possession of client property.

- ABA LEO 427 (5/31/02) (lawyers acquiring security interests in client property to secure the payment of fees must comply with the rules governing business transactions with clients (although fee agreements themselves generally do not require such compliance); lawyers executing on the security may only obtain a reasonable fee; lawyers taking possession of property under such an arrangement must comply with trust account procedures; lawyers may not retain collateral "exceeding the reasonable fee plus the reasonable costs of preserving and realizing on the security," despite any state law allowing the exercise of greater rights).

Second, if a business transaction gives a lawyer a proprietary interest in litigation, the lawyer might run afoul of the separate prohibition on such an arrangement. ABA Model Rule 1.8(a).

- See, e.g., Virginia LEO 1390 (3/12/91) (a divorce client grants a deed of trust on the marital home to a lawyer to secure the payment of attorneys' fees; because the divorce has not been concluded and the spouses are quarreling over their interests in the house, this arrangement impermissibly gives the lawyer a proprietary interest in the divorce action and may not be cured by consent.

Third, some courts take a very harsh view of lawyers competing with their clients in a business.

- See, e.g., Fla. Bar v. Herman, 8 So. 3d 1100 (Fla. 2009) (suspending for eighteen months a lawyer who created a company that competed with client's business).

**Imputed Disqualification**

Under ABA Model Rule 1.8(k), the prohibition involving a lawyer doing business with a client applies to all lawyers in the same firm.

* * *

**(a)-(c)** This type of transaction would not automatically violate the ethics rules. Although the client would not be required to hire another lawyer to represent her in the transaction, you would have to comply with all of the stringent requirements in the applicable ethics rule -- including the universal requirement of a written disclosure and a written consent.

## Best Answer

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

n 1/12

# Lawyers' Ownership of Their Corporate Client's Stock

## Hypothetical 5

Your former college roommate was always trying to invent something that would make him a millionaire, but until recently he had failed time after time. He just called to tell you about his latest invention, and to ask whether you would be willing to represent him in all of the necessary legal work. Your client offers to give your firm a percentage of his proposed new company's stock in lieu of fees.

May your law firm accept stock in your client's company in lieu of fees?

## YES

## Analysis

Lawyers acquiring their client's stock in place of legal fees have not only entered into a business transaction with the client, they also now find themselves part owners of the client that they represent. For obvious reasons, this type of business transaction raises additional ethics complications.

The ABA analyzed this issue just as the tech bubble reached its peak in the late 1990's -- and issued the resulting legal ethics opinion just after the bubble had burst.

In ABA LEO 418 (7/7/00), the ABA indicated that lawyers may accept stock in lieu of or in addition to a client's cash payment for services, but indicated that the arrangement must satisfy the ethics standards for "business transactions" with clients.

In addition, the lawyer must fully explain the possible conflicts that might arise -- such as diminution in client control of the corporation, and ways in which the lawyer's personal interests in the stock value might affect the lawyer's professional judgment.

The ABA explained that the lawyer should describe the services to be rendered, and whether the stock acquisition is in the nature of an investment, a direct payment for services, or a true "retainer" paid for the lawyer's availability. The lawyer should recommend that the client seek independent advice in connection with the transaction.

The ABA addressed in detail the conflicts that might arise in connection with such a transaction. A lawyer's ownership of a client's stock does not create an inherent conflict of interests, because both share an interest in the corporation's success. In the case of conflicts (as when a lawyer's ethical duty requires disclosure of adverse facts that will affect the stock price), the lawyer must subordinate any economic self-interest in favor of the ethics duty, and obtain the client's consent to be involved in rendering advice if there might be a material conflict. In the case of a severe conflict (as when the stock is the lawyer's major asset), the lawyer might be incapable of rendering legal advice.

As with other business transactions, a lawyer's acquisition of a client's stock implicates other ethics rules too.

For instance, the ABA explained that the fee (paid in corporate stock) must meet the "reasonableness" standard. Interestingly, the ABA indicated that determining the "reasonableness" of the fee focuses "only [on] the circumstances reasonably ascertainable at the time of the transaction." This means that a lawyer will not run afoul of the "reasonableness" standard if the stock skyrockets in value after the transaction.

The ABA also explained that a lawyer might violate the prohibition on acquiring a proprietary interest in litigation if the corporation's main asset consists of a litigation

claim. Finally, the ABA noted the general ethics rule allowing clients to fire their lawyers at any time and for any reason -- which would prevent a lawyer/shareholder from trying to stop the corporate client from firing the lawyer.

The ABA also mentioned some steps that law firms had chosen to take in connection with owning their clients' stock. For instance, the ABA pointed out that some law firms had adopted policies about stock ownership in firm clients, such as: assuring that the percentage of stock ownership in a client was a non-material amount; requiring that a firm lawyer other than the main client contact decide any issues involving conflicts; and transferring billing and supervisory responsibility to a lawyer with no stock ownership in the client. ABA LEO 418 (7/7/00).

State bars have taken essentially the same position.

- Pennsylvania LEO 2001-100 (3/2001) (finding that the ethics rules do not per se prohibit lawyers from owning their client's stock as long as the transaction complies with Rule 1.8; explaining that determining whether a lawyer's fee taken in a company's stock is "clearly excessive" should be made "based on the information available at the time of the transaction and not with the benefit of hindsight" -- meaning that an enormous increase in the value of the stock would not automatically doom the transaction).

- N. Y. City LEO 2000-3 (2000) (finding no per se prohibition on a lawyer accepting a client's stock as payment for services, but requiring that the transaction satisfy applicable ethics rules; requiring disclosure of the risks inherent in the transaction, the possibility of a conflict of interest, and "any potential impact on the attorney/client privilege and confidentiality rules, particularly in communications between the client and the attorney in his role as investor rather than as counsel").

- District of Columbia LEO 300 (7/25/00) (finding no per se prohibition on a lawyer accepting stock in a corporate client as compensation for legal services, as long as the lawyer has complied with Rule 1.8).

- Utah LEO 98-13 (12/4/98) (finding no per se prohibition on a lawyer accepting a corporate client's stock as payment for legal fees).

- Virginia LEO 1593 (4/11/94) (a lawyer may accept compensation in the form of corporate stock for legal services, as long as "he feels his independent professional judgment will not be affected by his status as a stockholder"; the client consents after a full disclosure; and the transaction is "not unconscionable, unfair or inequitable when made").

- Virginia LEO 1131 (9/1988) (a law firm may invest in a realty corporation and continue to represent clients of the corporation if the clients consent after full disclosure).

Although lawyers' interest in owning their clients' stock surely has waned since the late 1990s, lawyers should remember that such transactions must meet all of the stringent requirements for all lawyer-client business transactions, as well as the special rules that apply when a lawyer becomes part owner of a client.

## Best Answer

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

n 1/12

# Clients' Gifts to Lawyers: General Rule

## Hypothetical 6

You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients. However, this very trait has led you to pose some questions to your firm's "ethics guru."

**(a)** May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?

**NO (PROBABLY)**

**(b)** May you accept your client's offer to name you as a beneficiary in her estate (the bequest is $250,000)?

**MAYBE**

**(c)** May you prepare a will for a client who has asked you to include a provision under which your daughter (for whom your client has been a "second mother" for her whole life) will receive enough money for a college education?

**NO (PROBABLY)**

## Analysis

Because of the obvious possibility of a lawyer's exercise of undue influence in such situations, as well as the inherent conflict between the lawyer's and the client's interests in connection with client gifts to lawyers or their families, bars have always imposed limitations on such arrangements.

The limitations vary from rule to rule and from bar to bar.

## ABA Model Rules

The ABA Model Rules impose two specific but related prohibitions.

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ABA Model Rule 1.8(c) (emphasis added).

The Comment to this Model Rule explains that these prohibitions relate to solicitation and document preparation, not acceptance.

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

ABA Model Rule 1.8 cmt. [6].

Thus, lawyers may not solicit substantial gifts from clients (and may not prepare documents consummating those gifts), but lawyers may accept such gifts -- subject to general rules under which fiduciaries are presumed to have defrauded their clients in such circumstances.

As a practical matter, this latter principle might deter lawyers from ever accepting such gifts absent independent representation of the client in the arrangement, but the Rule does not require such separate representation.

## Restatement

Unlike the ABA Model Rules, the Restatement articulates the obvious rationale for the rule.

> A client's valuable gift to a lawyer invites suspicion that the lawyer overreached or used undue influence. It would be difficult to reach any other conclusion when a lawyer has solicited the gifts. Testamentary gifts are a subject of particular concern, both because the client is often of advanced age at the time the will is written and because it will often be difficult to establish the client's true intentions after the client's death. At the same time, the client-lawyer relationship in which a gift is made is often extended and personal. A genuine feeling of gratitude and admiration can motivate a client to confer a gift on the lawyer. The rule of this Section respects such genuine wishes while guarding against overreaching by lawyers.

Restatement (Third) of Law Governing Lawyers § 127 cmt. b (2000).

In contrast to the ABA Model Rules, the Restatement does not prohibit solicitation (although a comment mentions it) -- but rather deals only with document preparation and acceptance.

Unlike the ABA Model Rules, the Restatement discusses the proportionality of gifts.

> A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly

> related to the donor. . . . A lawyer may not accept a gift from a client, including a testamentary gift, unless: (a) the lawyer is a relative or other natural object of the client's generosity; (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Restatement (Third) of Law Governing Lawyers § 127 (2000) (emphasis added).

A Restatement illustration explains how this proportionality principle works in a family setting.

> Lawyer is one of Mother's five children. At Mother's instruction, Lawyer prepares her will leaving one-fifth of the estate to each of the children, including Lawyer. Lawyer's preparation of such an instrument is within the exceptions in § 127(2). However, if Lawyer received one-third of the estate, and the other four children each received one-sixth, in the event of a challenge, Lawyer would be required to persuade the tribunal that Lawyer did not overreach Mother.

Restatement (Third) of Law Governing Lawyers § 127 cmt. e, illus. 1 (2000).

The Restatement also provides an explanation of the "substantial gift" element, as well as an illustration.

> In determining whether a gift to a lawyer is substantial within the meaning of Subsection (2)(b), the means of both the lawyer and the client must be considered. To a poor client, a gift of $100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer's overreaching. To a wealthy client, a gift of $1,000 might seem insubstantial in relation to the client's assets, but if substantial in relation to the lawyer's assets, it suggests a motivation on the part of the lawyer to overreach the client-donor, or at least not to have fully advised the client of the client's rights and interests. Under either set of circumstances, the lawyer violates the client's rights by accepting such a gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f (2000). The illustration provides an obviously permissible situation.

> Client, who has a longstanding professional relationship with Lawyer, presents Lawyer with an antique locket, with a market value of under $50, that had belonged to Client's deceased sister. 'My sister always wanted to be a lawyer,' Client says to Lawyer, 'but that was difficult in her generation. I like to think she would have been as good a lawyer as you now are, and I think she would like you to have this.' Lawyer may accept the Client's gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f, illus. 2 (2000).

The Restatement provides several other useful illustrations.

> Client has come to Lawyer for preparation of Client's will. 'I do not have living relatives and you have been my trusted friend and adviser for most of my adult life,' Client tells Lawyer. 'I want you to have a bequest of $50,000 from my estate.' Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying 'I do not want anyone else to know my business.' Lawyer may not draft Client's will containing the proposed gift to Lawyer.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 3 (2000).

> The same fact as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a $50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. Lawyer may accept the inter vivos gift of $50,000 from Client, so long as Lawyer did not solicit the gift or prepare an instrument effecting the gift from Client.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 4 (2000).

## ACTEC Commentaries

The ACTEC Commentaries essentially follow the ABA Model Rules and the Restatement approach.

> MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8 (c) and may include a person who is not related by blood or marriage but has a close familial relationship. However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. . . . For purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

Thus, the ACTEC Commentaries contain the same concept of "proportionality" that appears in the Restatement. This is a subtlety that does not appear in the ABA Model Rules, but which assures that lawyers cannot take advantage of other family members.

## State Case Law

Throughout the country, courts often take a harsh approach toward lawyers who have arranged for gifts from their clients.

Several cases highlight this unforgiving approach.

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).

- Attorney Grievance Comm'n v. Stein, 819 A.2d 372, 375, 374, 376, 379 (Md. 2003) (suspending indefinitely a lawyer who had prepared a will under which he received a bequeath; explaining that the lawyer (Stein) (a) had practiced as a lawyer since 1961, and had never been sanctioned as a lawyer or received any warnings about any alleged misconduct during his entire practice, (b) represented a couple who had been clients and friends of Stein's father since the 1950s, and (c) prepared a will under which he was to receive a substantial gift; noting that Stein acknowledged that the gift was his suggestion; explaining that the lower court found that the testator was competent and that "there was no indication that any improper influence or duress was brought to bear upon the client" by Stein; noting that Stein suggested to the testator that she speak with one of Stein's partners, but did not explain to the testator "the necessity of seeing an independent attorney outside of the firm."; also noting that Stein claimed that he was unaware of Maryland Rule 1.8(c)(2), which requires that the client be separately represented by independent counsel in connection with a gift to a lawyer who is not a relative; explaining that the requirement of independent counsel was "express and mandatory," and that "the independent counsel required by the Rule must be truly independent -- the requirement of the Rule may not be satisfied by consultation with an attorney who is a partner of, shares space with, or is a close associate of the attorney-drafter"; acknowledging that Stein was 69 years old and semi-retired, and had never violated any other ethical rule since 1961, but harshly warning that "we consider a violation of Rule 1.8(c) to be most serious. Respondent's conduct undermines the public confidence in the legal profession in a particularly egregious manner.").

- In re Grevemberg, 838 So. 2d 1283, 1285, 1286 (La. 2003) (suspending for one year a lawyer who drafted a will under which the lawyer and his wife

received most of the client's property; acknowledging that the testator was mentally competent when preparing the will, and that the lawyer "had not exercised any undue influence on her"; also recognizing that the lawyer had a "well-respected reputation and good character in the community," had exhibited a "cooperative attitude toward the proceedings" and had enjoyed an "unblemished record in the practice of law for over 56 years"; nevertheless noting that Louisiana's Rule 1.8 prohibits a lawyer from preparing any instrument of this sort).

- Toledo Bar Ass'n v. Cook, 778 N.E.2d 40 (Ohio 2002) (suspending for one year a lawyer who followed a client's suggestion that his will provide a benefit to a nursing home owned by the lawyer; noting that the lawyer resigned from her positions at the nursing home -- although her siblings continued to control the nursing home -- and prepared the will that the client suggested; explaining that when the testator died and his children questioned the bequest, the nursing home disclaimed any interest in the client's estate, and the lawyer apologized; citing Ohio's Rule that completely prohibits a lawyer from preparing any instrument under which the lawyer receives a benefit from a non-relative client; suspending the lawyer for one year (although reducing the suspension to six months if the lawyer took ethics CLE courses)).

Some bars seem to be more forgiving.

- Cooner v. Alabama State Bar, 59 So. 3d 29, 40 (Ala. 2010) (reversing a disbarment of a lawyer who prepared a trust for his aunt's husband, which named himself as a beneficiary; concluding that the lawyer's aunt's husband was a "relative" under Rule 1.8; "A 'relative' is '[a] person connected with another by blood or affinity; a person who is kin with another.' Black's Law Dictionary 1315 (8th ed. 2004). Thus, a person is 'related' to another person, when the person is connected with another person by blood or affinity. . . . Therefore, we conclude that 'related' as that term is used in Rule 1.8(c), Ala. R. Prof. Cond., includes relationships by blood and by marriage and that an affinity relationship between an uncle and his nephew is within the meaning of the term 'related.'"; "Moreover, we decline to hold, as the State Bar urges us to do, that, for purposes of Rule 1.8(c), Ala. R. Prof. Cond., an affinity relationship arising from the marriage between a husband and blood relatives of the wife terminates with the death of the wife.").

- Attorney Grievance Comm'n v. Saridakis, 936 A.2d 886, 894 (Md. 2007) (providing a warning but not otherwise sanctioning a Maryland lawyer who arranged for a client insisting on naming the lawyer as one of her beneficiaries to have the arrangement reviewed by another lawyer with whom the lawyer shared offices; noting that the hearing judge concluded that the second lawyer "acted as independent counsel" to the testator; finding that the

> second lawyer was not sufficiently independent to comply with Maryland's Rule 1.8(c), but that the respondent lawyer had attempted in good faith to comply with that Rule).

Interestingly, there seems to be no case law on the enforceability of estate planning documents that clearly violate the lawyer's ethics rules -- but for which the lawyer would happily forfeit a law license (or accept a punishment) in order to keep the money.

Such a scenario would arise where ethics rules and fiduciary duty principles intersect. The former generally only governs the bar's discipline of lawyers, and does not provide the governing principles in situations arising outside the disciplinary context. Thus, the enforceability of an unethical testamentary or other document probably would involve common law fiduciary duty principles rather than ethics rules provisions.

**(a)** Under most approaches, you could not solicit such a gift, because it would be seen as benefiting you.

**(b)** The ABA Model Rules would normally permit accepting such a gift, but the Restatement would permit such acceptance only under certain circumstances.

**(c)** Most bar rules would prohibit a lawyer from preparing this instrument.

**Best Answer**

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

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# Clients' Gifts to Lawyers: Imputation of Disqualification

## Hypothetical 7

You recently attended an ethics seminar, and learned that lawyers cannot prepare documents under which they receive some benefit from a non-family member client. You were startled by the harshness of the new rule, but recall that lawyers might be able to accept the money if someone else advises the client on the wisdom of making the bequest or gift. Now you wonder how such an arrangement would work.

**(a)** May you accept money from a non-family member client if one of your partners prepares the documents under which you receive that money?

**NO**

**(b)** May you accept money from a non-family member client if the client is being advised by a financial advisor?

**MAYBE**

## Analysis

Although lawyers may theoretically accept money from a client who is not a family member, the ethics rules match the harshness of the prohibition with the narrowness of the circumstances in which they may do so.

**(a)** ABA Model Rule 1.8(c)'s ban on a lawyer's solicitation of a substantial gift or a preparation of documents applies on its face to any other lawyers who are "associated in the firm" with the lawyer subject to the prohibition. ABA Model Rule 1.8(k).

The Restatement takes essentially the same approach, but with an explanation of how the involvement of an independent lawyer avoids the problems.

> When a competent and independent person other than the lawyer-donee acts as the client's adviser with respect to a particular gift, there is less reason to be concerned with overreaching by the lawyer. A lawyer's encouragement to a client to seek independent advice also evidences concern for fairness on the lawyer's part. Whether the lawyer may prepare an instrument effecting the gift from the client to the lawyer is determined by Subsection (1), under which independent advice is irrelevant. If the lawyer does not prepare such an instrument, the lawyer is not precluded from receiving a gift subject to the limitations of Subsection (2)(c), including that of independent advice. Such a gift also remains subject to invalidation if the circumstances warrant under the law of fraud, duress, undue influence, or mistake.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g (2000).

The Restatement provides several useful illustrations explaining the imputation principle.

> Client has come to Lawyer for preparation of Client's will. 'I do not have living relatives and you have been my trusted friend and adviser for most of my adult life,' Client tells Lawyer. 'I want you to have a bequest of $50,000 from my estate.' Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying 'I do not want anyone else to know my business.' Lawyer may not draft Client's will containing the proposed gift to Lawyer.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 3 (2000).

> The same fact as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a $50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. Lawyer may accept the inter vivos gift of $50,000 from Client, so long as Lawyer did not solicit the gift or prepare an instrument effecting the gift from Client.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 4 (2000).

> On behalf of Client, a corporation assisted in the matter by Inside Legal Counsel, Lawyer has obtained satisfaction of a judgment in an amount significantly surpassing what Client and Inside Legal Counsel thought possible. Lawyer receives payment of Lawyer's final statement with a covering letter from Inside Legal Counsel stating that Client, on the recommendation of Inside Legal Counsel, was also enclosing an additional check in the substantial amount in gratitude for the outstanding result obtained by Lawyer. Lawyer may accept the gift of the additional check, reasonably assuming that Client has been appropriately advised in the matter by Inside Legal Counsel.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 5 (2000).

**(b)** Unlike the ABA Model Rules, the Restatement provides guidance on what type of independent advice will immunize a lawyer's acceptance of money from a non-family member client -- and also explains that the independent advice does not have to come from a lawyer.

> The recommendation of independent advice must be more than perfunctory. The independent adviser may not be affiliated with the lawyer-donee. It is not necessary that the person consulted as adviser be a lawyer. Any person qualifies who is mature and appropriately experienced in personal financial matters, trusted by the client, not a beneficiary of the gift, and not selected by or affiliated with the lawyer. A lawyer-donee bears the burden of showing that reasonable effort was made to persuade the client to obtain independent advice and that the lawyer did not otherwise unduly influence or overreach the client. If the lawyer-donee has tried but failed to persuade the client to seek such help, or if the client reflects the independent adviser's counsel, the presumption of overreaching can be overcome and the gift upheld.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g (2000) (emphasis added).

Any lawyer finding himself or herself in this situation would be wise to check on the applicable state bar's attitude toward this issue.

## Best Answer

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

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# Lawyers Preparing Documents in which They Are Named as Executor or Trustee

## Hypothetical 8

You have represented a local dentist for several years, and consider yourself to be her close friend as well as her lawyer. The dentist called you this morning to discuss her estate planning.

**(a)** If the dentist suggests it, may you act as executor under a will that you draft for the dentist?

**YES**

**(b)** May you raise the issue first, and suggest that you draft a will that names you as executor?

**YES (PROBABLY)**

## Analysis

At first blush, this scenario sounds like it should be governed by the rules applicable to lawyers accepting bequests or gifts from a client. However, this scenario instead involves a lawyer accepting employment, rather than a gift. Still, the same basic considerations apply, because the employment represents a financial opportunity for the lawyer to earn money.

**(a)** Perhaps because the normal context in which the client chooses an executor (as part of the estate planning process) is susceptible to lawyer overreaching, most bars have added a special level of requirements when lawyers agree to provide this particular type of law-related services to their clients.

In ABA LEO 426 (5/31/02),[1] the ABA explained that lawyers may act as personal representatives or trustees under documents the lawyer prepares, but must: (1) obtain a written consent if the lawyer's judgment would be significantly affected and (2) advise the client about how the lawyer's compensation will be calculated and whether it is subject to some limits or court approval.

The ACTEC Commentaries recognize that a lawyer's service as a fiduciary does not amount to a "gift" to the lawyer, but rather as a role in which the lawyer will receive payment.

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[1] ABA LEO 426 (5/31/02) ("When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self-interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries. When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing." (footnotes omitted; emphasis added); "When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision." (footnote omitted; emphasis added); "[T]he Model Rules do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest. The obligations of the lawyer or his firm as counsel to the fiduciary do not differ materially from the obligations of the lawyer as fiduciary. The principal responsibility of the lawyer for a fiduciary is to give advice to assist the fiduciary in properly performing his fiduciary duties. The lawyer for a personal representative or trustee may owe a limited duty of care to the legatees and creditors of the estate or to the beneficiaries of the trust the fiduciary serves. This duty, however, is no greater than the duty that the personal representative or trustee himself owes beneficiaries of the estate or trust." (footnote omitted); "When a lawyer serves as a fiduciary and concurrently represents a beneficiary or creditor of the estate or trust, he must, in accordance with Rule 1.7, resolve any conflicts of interest that may arise. For example, were a lawyer serving as a fiduciary to recognize, while also attempting to represent a beneficiary or creditor in a claim against the estate, that he would be obligated as fiduciary to oppose the beneficiary or creditor's claim, his representation thereby would be materially limited under Rule 1.7(a). Moreover, the representation of the beneficiary or creditor would not be permissible even with the consent of the client, because it would be unreasonable for the lawyer to conclude that he could provide competent and diligent representation when opposing the interests of an estate or trust for which he is a fiduciary." (footnote omitted); finding that a lawyer's representation of a beneficiary or creditor in an unrelated matter would be less likely to cause conflicts).

> As noted in ABA Formal Opinion 02-426 (2002), the client's appointment of the lawyer as a fiduciary is not a gift to the lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

The ACTEC Commentaries take the same basic approach as the ABA Model Rules.

> Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36-37 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

States follow the same basic approach, but some have imposed additional specific requirements.

- New Hampshire LEO 2008-09/1 (5/13/09) ("When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b) and that the attorney may continue to exercise independent professional judgment in recommending to the client the best choices for fiduciaries under Rule 2.1. In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the 'informed consent' of the client to the selection of the drafting attorney as the named fiduciary.").

- Virginia LEO 1515 (approved by the Supreme Court 2/1/94) (outlining the principle governing a lawyer acting as executor or trustee, explaining that: a pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection; the lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services"; a lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent); a lawyer acting as a fiduciary is governed by the Code; a lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud).

- Georgia LEO 91-1 (9/13/91) ("It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, so long as he or she obtains the client's written consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee should be in accord with Georgia law.").

- Virginia LEO 1358 (10/1/90) (explaining that lawyers drafting a will or trust agreement must be very careful in naming themselves as executors or

> trustees; concluding that it is likely to be improper if the lawyer has not previously represented the client; noting that at a minimum, the lawyer has a duty to advise the client of fees that would be charged by other executors or trustees; explaining that if the instrument requires that the estate or trust hire the lawyer's firm for legal services, the client must consent after full disclosure).

This issue becomes even more complicated if a lawyer acting as executor wants to hire the lawyer's own law firm to represent the estate.

As explained above, in ABA LEO 426 (5/31/02), the ABA acknowledged that lawyers may hire their own law firms to perform legal work in the administration of the trust or estate. The ABA explained that in such circumstances the lawyers generally represent themselves -- and not the beneficiaries, or the trust or estate as an entity.

The ACTEC Commentaries reach the same conclusion.

> Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36-37 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphases added).

**(b)** As long as lawyers comply with the specific requirements adopted by the pertinent bar, they may solicit designation as a fiduciary.

## Best Answer

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

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# Lawyers as Testifying Expert Witnesses

## Hypothetical 9

As a favor to a law school classmate, you provided expert testimony on behalf of an ERISA consulting firm which had been sued. Your firm's largest client has now asked one of your partners to sue that consulting firm. The issue being litigated is closely related to the area on which you provided expert testimony for the consulting firm. For your career's sake, you hope that your expert testimony does not bar your law firm from being adverse to the consulting firm.

May one of your partners represent a client adverse to a company for whom you had acted as an expert witness on a related matter?

## NO (PROBABLY)

## Analysis

The issue here is whether the consulting company will be deemed a "former client" for conflicts purposes. If so, your entire firm is barred from being adverse to it. If not, your partner might be free to take the case adverse to the consulting firm.

The ABA has discussed this issue. In ABA LEO 407 (5/13/97), the ABA indicated that a lawyer serving as an expert witness does not establish an attorney-client relationship with the party for whom the lawyer will testify, although the lawyer may be bound by other law to keep confidential any information acquired from the party. Interestingly, a lawyer who acts as a consultant rather than a witness may well be bound by the ethics rules. Because of this dichotomy, the ABA recommends that lawyers acting either as witnesses or consultants define the relationship very carefully before beginning their work.

Although you may have no ethical duty as a lawyer to avoid taking a position adverse to a company for which you acted as an expert, other law (such as the law of agency) probably prevents you (and therefore your firm) from suing the company without its consent.

At least one bar has taken a more liberal approach than the ABA.

- See, e.g., District of Columbia LEO 337 (2/2007) ("A lawyer serving as an expert witness to testify on behalf of a party does not thereby establish an attorney-client relationship with that party. Therefore, D.C. Rule 1.9 governing conflicts of interest with former clients would not apply to prohibit a lawyer from subsequently taking an adverse position to the party for whom the lawyer testified as an expert witness, even where the matter for which the lawyer testified and the matter involved in the subsequent representation are substantially related to one another. However, any firm that hires a lawyer as an expert witness should assure that the lawyer's role as expert witness is made clear and should obtain the client's informed consent if the expert's role changes to that of co-counsel.").

Not surprisingly, the Federal Circuit held that King & Spalding must be disqualified from representing a party in a matter that would require it to challenge the expert opinion of one of its own partners -- relying on the conflicts of interest provision of Rule 1.7 rather than focusing on whether testifying as an expert created an attorney-client relationship.

- Outside the Box Innovations, LLC v. Travel Caddy, Inc., 369 F. App'x 116, 117, 118 (Fed. Cir. 2010) (unpublished opinion) ("The parties present the issue as whether, under the Georgia Rules of Professional Conduct (GRPC), a law firm is disqualified from accepting representation of a client on appeal because one of the firm's attorneys was an expert witness in the same matter on behalf of another party with adverse interests. The parties devote most of their arguments to whether or not Askew [partner at King & Spalding] created an attorney-client relationship with Union Rich [plaintiff]. Although we doubt that there was an attorney-client relationship between Union Rich and Askew, merely because he served as an expert witness regarding the amount of fees, we focus our attention on a matter raised by Union Rich which requires that King & Spalding be disqualified."; "The question whether King & Spalding

> should challenge the expert opinion of one of King & Spalding's partners in our view would materially and adversely affect the firm's representation of Travel Caddy on appeal. We determine that Rule 1.7(a) is applicable.").

Lawyers acting as testifying experts should also bear in mind the rules governing the attorney-client privilege and -- especially -- the work product doctrine in connection with communication or documents shared with a testifying expert.

Before 1993, federal courts disagreed about whether materials shared with a testifying expert lost the work product qualified immunity, and were therefore fair game for discovery by an adversary. North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283, 286 (M.D.N.C. 1985)(finding opinion work product shared with a testifying expert absolutely protected from discovery); William Penn Life Assurance Co. of Am. v. Brown Transfer & Storage Co., 141 F.R.D. 142, 143 (W.D. Mo. 1990) (allowing discovery of opinion work product shared with a testifying expert).

In 1993, the Federal Rules changed, so that testifying experts must now reveal all materials that they "considered" -- not just those that the expert "relied upon."

The vast majority of federal courts now hold that materials shared with a testifying expert may no longer be withheld on work product grounds. Karn v. Ingersoll Rand, 168 F.R.D. 633, 635-36 (N.D. Ind. 1996). A small number of federal courts take the opposite approach. Estate of Chopper v. R.J. Reynolds Tobacco Co., 195 F.R.D. 648, 651-52 (N.D. Iowa 2000).

In the vast majority of federal courts, the only remaining issue is whether the testifying expert actually "considered" the materials. As might be expected, courts entertaining such an argument generally require that the testifying expert establish that

the expert did not review the materials -- a mere lack of recollection does not suffice. Aniero Concrete Co. v. New York City School Constr. Auth., No. 94 Civ. 9111 (CSH)(FM), 2002 U.S. Dist. LEXIS 2892 (S.D.N.Y. Feb. 21, 2002).

The law on the state level provides more confusion. Not every state changed its rules in 1993. For instance, courts in Virginia (which did not change its rules) disagree about whether opinion work product shared with a testifying expert may be withheld from discovery. Wilson v. Rogers, 53 Va. Cir. 280, 282 (Va. Cir. Ct. 2000) (following the Federal Rule, and ordering production of correspondence between the defendants lawyer and the testifying expert); Moyers v. Steinmetz, 37 Va. Cir. 25, 26, 29 (Va. Cir. Ct. 1995) (ordering production of a lawyer's letter to a testifying expert, but allowing redaction of the lawyer's opinions).

Even the Skadden law firm learned to its regret that these general principles can apply when a lawyer acts as an expert witness.[1]

[1] Herrick Co. v. Vetta Sports, Inc., No. 94 Civ. 0905(RPP), 1998 U.S. Dist. LEXIS 14544, at *9-10, *11 (S.D.N.Y. Sept. 14, 1998) ("[I]t is well established that a party waives the attorney-client and work product privileges whenever it puts an attorney's opinion into issue, by calling the attorney as an expert witness or otherwise. . . . By choosing to use Wolfram's [Professor Charles W. Wolfram, a legal ethics expert called by Skadden to testify about the nature of the attorney-client relationship between Skadden and the plaintiffs and to opine that Skadden did not breach any ethical obligations to plaintiffs] expertise to bolster its case, Skadden has turned the prior advice it received from Wolfram into 'matter, not privileged, which is relevant to the subject matter involved in the pending action,' and which is discoverable under Rule 26(b)(1). The fact that an attorney-client relationship existed between Skadden and Wolfram at the time some of these documents were created is not a bar to the production of these documents. Skadden need not have designated Wolfram as its expert witness in this case, and its decision to do so waives attorney-client and work product protections that might otherwise exist. Skadden shall therefore provide to plaintiffs the withheld documents relating to advice given to Skadden by Wolfram on the general subject matter of Wolfram's report filed in this action." (citations omitted); also holding that "the notes of a Skadden attorney to Wolfram on an opposing expert's opinion in another litigation should also be produced so that counsel for plaintiffs may properly assess the relevance of Wolfram's response to that opinion"; ordering production of documents claimed to be privileged).

**Federal Rule 26 Changes.** Changes in the federal rules effective as of December 2010 dramatically affect the work product analysis.

Under revisions to Federal Rule 26, the work product doctrine protects:

- drafts of "any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded"; and
- "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)" -- except communications relating to the testifying expert's compensation, any "facts or data" provided by the party's lawyer and "considered in forming the [testifying expert's] opinions to be expressed," and any "assumptions" provided by the party's lawyer and "relied on" by the testifying expert in forming "the opinions to be expressed."

The rules changes apparently do not relieve a party of any obligation to preserve or log such protected work product.

## Best Answer

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

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# Lawyers Serving on Client Boards of Directors

## Hypothetical 10

As your client's Associate General Counsel, you are honored by the client's recent request that you serve on its board of directors. However, now you are wondering whether you can or should accept the offer.

**(a)** May you serve on a client's board of directors?

**YES**

**(b)** If so, what special considerations should you keep in mind?

**CONSIDER THE AVAILABILITY OF THE ATTORNEY-CLIENT PRIVILEGE, AND ADVISE DIRECTORS ABOUT ITS AVAILABILITY**

## Analysis

**(a)** Although the frequency of lawyers serving on client boards of directors seems to be declining, lawyers continue to serve on their clients' boards of directors.

A comment to ABA Model Rule 1.7 provides specific guidance on this issue.

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is

> present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

ABA Model Rule 1.7 cmt. [35].

In 1998, the ABA issued a legal ethics opinion providing more detail. In ABA LEO 410 (2/27/98), the ABA indicated that lawyers serving on a corporation's board of directors should warn the corporation that their discussions with the board might not be protected by the attorney-client privilege (because they involve business advice rather than legal advice). The lawyer should also warn the other directors about the dangers of waiving the attorney-client privilege. The ABA also indicated that lawyers serving on their client's boards should consider declining to represent the clients in lawsuits involving actions that they opposed as directors. If the board might require an "advice of counsel" defense, the lawyer-director might suggest that the company should hire another lawyer to give that advice.

Although the ABA did not completely prohibit outside lawyer-directors from voting on any actions involving retaining, paying or discharging the lawyer-director's law firm,[1] the ABA suggested that outside lawyer-directors consider abstaining from such decisions.

The Restatement takes the same basic approach.

> A lawyer's duties as counsel can conflict with the lawyer's duties arising from the lawyer's service as a director or officer of a corporate client. Simultaneous service as

[1] New York LEO 589 (3/18/88) (imposing a flat prohibition on such activity).

> corporate lawyer and corporate director or officer is not forbidden by this Section. The requirement that a lawyer for an organization serve the interests of the entity . . . is generally consistent with the duties of a director or officer. However, when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue to serve as corporate counsel without the informed consent of the corporate client. The lawyer may not participate as director or officer in the decision to grant consent.

Restatement (Third) of Law Governing Lawyers § 135 cmt. d (2000).

In discussing the unique tension facing an in-house lawyer who serves on the client's board of directors, the Restatement explains that such a lawyer cannot provide an opinion to the corporation about the legality of bonus payments for which the lawyer would also be entitled. The disqualification is to the lawyer's partners as well, but corporations can consent through another agent.

- Restatement (Third) of Law Governing Lawyers § 135 cmt. d, illus. 3 (2000) ("Lawyer serves on the board of directors of Company and is also employed by Company as corporate secretary and inside legal counsel. Company proposes to give bonuses to its five highest-paid officers, including Lawyer. Authority to pay such bonuses presents a close legal question. The directors have requested Lawyer to render in opinion as counsel concerning the legality of the payments. Lawyer's status as recipient of the bonus and role as a director to whom the opinion will be addressed create a substantial risk that Lawyer's opinion for Company will be materially and adversely affected. The conflict would not be cured by having the opinion prepared by a partner of Lawyer, because conflicts under this Section are imputed to affiliated lawyers. Both Lawyer's personal conflict and the imputed conflict are subject to effective consent by agents of Company authorized to do so.").

**(b)** Lawyers serving on a client's board of directors should keep a number of special considerations in mind.

First, they must determine whether they are acting in a director's or a lawyer's role each time they act -- which will frequently govern the availability of the attorney-

client privilege. Perhaps more importantly, the lawyer must advise fellow board members that conversations with the lawyer's director might not be privileged (lay directors naturally would assume that any conversations with a lawyer-director would deserve privilege protection).

Second, lawyers serving as directors must remember that they are not acting as advocates for management, but rather as fiduciaries for all of the shareholders.

Third, directors who are lawyers at outside law firms which represent the company must avoid favoring the law firm at the expense of the company or its shareholders. The ABA has explained that these lawyers should not participate in the board's deliberations about hiring, paying or firing the company's law firms, and a New York City LEO completely prohibits such participation (explained above). To be even more careful, the lawyer should not serve as the law firm's main liaison with the client.

Fourth, lawyers should not assume that all possible conflicts problems can be cured by the lawyers recusing themselves in voting as directors on matters involving the lawyer or the lawyer's firm. This is because directors have a fiduciary duty to their shareholders, and at some point violate that fiduciary duty if they must avoid participating in important corporate decisions.

**Best Answer**

The best answer to **(a)** is **YES**; the best answer to **(b)** is **CONSIDER THE AVAILABILITY OF THE ATTORNEY-CLIENT PRIVILEGE, AND ADVISE DIRECTORS ABOUT ITS AVAILABILITY**.

n 1/12

# Lawyers Representing or Taking Positions Adverse to Corporations on Whose Board the Lawyer or Her Partner Sits

## Hypothetical 11

The chairman of a locally-based publically traded company just invited you to join its board. You are flattered by the offer, but you want to explore how your presence on the board would affect your law firm's business opportunities.

**(a)** May your firm represent a company on whose board you serve?

**YES**

**(b)** May your firm represent a party litigating against a company on whose board you serve, as long as you recuse yourself from participating in the matter both at the board and at your law firm.

**MAYBE**

## Analysis

Lawyers serving on a corporate board of directors must remember that their fiduciary duty to the corporation might conflict with their representation of the corporation or another client in a legal capacity.

Under Rule 1.7,

> [e]xcept as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2). A comment specifically mentions a lawyer's capacity as a board member.

> In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

ABA Model Rule 1.7 cmt. [9] (emphases added).

**(a)** The ABA Model Rules implicitly acknowledge that a lawyer or the lawyer's firm can represent a corporation on whose board the lawyer serves -- although warning that conflicts of interest "might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter." ABA Model Rule 1.7 cmt. [35].

The ABA also explained in a 1998 legal ethics opinion that the lawyer might have to decline a representation of the company in a matter involving actions that the lawyer/board member opposed as a director. ABA LEO 410 (2/27/98).

Not surprisingly, states also permit lawyers to represent corporations on whose board they serve.

- North Carolina RPC 130 (10/23/92) (holding that a law firm can represent a governing board on which one of its lawyers sits).

**(b)** Adversity to the corporation by the lawyer's firm (or obviously the lawyer herself) clearly implicates possible conflicts with the lawyer/board member's fiduciary duties to the corporation.

The ABA Model Rules do not explicitly deal with this issue, but the Restatement indicates that such adversity requires consents -- presumably by the corporation and the corporation's adversary.

> A second type of conflict that can be occasioned by a lawyer's service as director or officer of an organization

> occurs when a client asks the lawyer for representation in a matter adverse to the organization. Because of the lawyer's duties to the organization, a conflict of interest is present, requiring the consent of the clients under the limitations and conditions provided [elsewhere in the Restatement].

Restatement (Third) of Law Governing Lawyers § 135 cmt. d (2000).

The Restatement also provides an illustration.

> Lawyer has been asked to file a medical-malpractice action against Doctor and Hospital on behalf of Client. Hospital is operated by University, on whose Board of Trustees Lawyer serves. While Lawyer would not personally be liable for the judgment if Client prevails . . . , the close relationship between Lawyer and University requires that Lawyer not undertake the representation unless Client's consent is obtained pursuant to [other Restatement provision].

Restatement (Third) of Law Governing Lawyers § 135 cmt. d, illus. 4 (2000).

State bars disagree about this issue. Several states have prohibited law firms from representing clients suing corporations on whose board a firm lawyer serves -- finding an irreconcilable conflict that cannot be cured with consent.

- Ohio LEO 2008-2 (6/6/08) (holding that a law firm cannot represent a client adverse to a corporation on whose board one of the law firm's lawyers sits; explaining the ethics issues implicated by a lawyer serving on a corporate board; "Serving in a dual role as a corporate director and corporate counsel is cautioned because of the ethical challenges: conflicts of interest calling into question the lawyer's professional independence; confusion among other directors and management as to whether a lawyer's views are legal advice or business suggestions; and concerns regarding protection of the confidentiality of client information, especially the attorney-client privilege. See ABA Formal Opinion 98-410 (1998). A common example of a conflict of interest calling into question a lawyer's independent judgment would be if a lawyer director is called upon to advise the corporation in matters involving the actions of the directors."; holding that the lawyer sitting on the board could not personally represent a client adverse to the corporation; "The lawyer's duties as a corporate director would materially limit the lawyer's ability to represent the client against the corporation."; "The corporation is not technically a client of a lawyer director who is not corporate counsel, but a lawyer director cannot

isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer."; disagreeing with other authorities, and imputing the individual lawyer's disqualification to the entire law firm; "The material limitation conflict of interest of a lawyer who serves as a corporate director and whose client is suing the corporation arises from both the lawyer's fiduciary duties to the corporation and the lawyer's personal interest in serving on the board. Both of these material limitation conflicts of interest, the personal interest and the fiduciary duties owed, pose a significant risk of materially limiting the lawyer's loyalty and independence in representing a client against the corporation."; "Thus, the Board's view is that the conflict of interest of the lawyer who serves as corporate director and not as corporate counsel and whose client is suing the corporation is imputed to other lawyers in the firm under Rule 1.10(a). Because the prohibited lawyer's conflict is based upon a fiduciary duty to the corporation as well as a personal interest of the prohibited lawyer and presents a significant risk of materially limiting the representation of the client[,] the conflict is imputed to the law firm pursuant to Rule 1.10(a)."; finding that the law firm may not represent the other client adverse to the corporation even if the corporation consents; "Rule 1.10(e) does provide for waiver of the law firm's disqualification upon consent of the affected client under conditions stated in Rule 1.7. But, pursuant to Rule 1.7(c)(2), the conditions for waiving a conflict under Rule 1.7(b) cannot be met, because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not a client of the law firm but a lawyer director's fiduciary duties to the corporation cannot be isolated from the lawyer's professional duties.").

- North Carolina RPC 160 (7/21/94) (holding that a lawyer cannot file a lawsuit against a board on which one of the law firm's associates sits; "Under Rule 5.1(b) [now Rule 1.7], an irreconcilable conflict would exist if a lawyer who is a member of the board of trustees of a nonprofit hospital were to represent a client who is suing the board or the hospital which is managed and controlled by that board. Rule 5.1(b). While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct. Rule 5.11(a) and CPR 66.").

At least one state took a more liberal approach -- permitting such adversity if the adverse party consented (thus apparently not requiring the corporation's consent as well).

- Virginia LEO 1821 (1/11/06) (explaining that a lawyer may file a lawsuit against a trust company on whose board the lawyer's partner sits (but who

> does not represent the trust department) if (1) the "affected client" (the plaintiff suing the trust company) consents; and (2) the lawyer "reasonably believes" that he can "provide competent and diligent representation" to his clients; noting that although the board member's recusal is not mentioned as a cure in the rules, it is a factor in analyzing the second requirement, which could be met if the board (in consultation with its lawyer) allows such recusal, after considering "such matters as whether the litigation is 'routine' or 'non-routine' in the course of the board's business; whether the claim goes to matters that had been determined by the board, or lower level administrative staff; and whether the claim involves matters on which [the partner who is a member of the board] has voted or has been involved in."; acknowledging that the board member's resignation might cure the conflict, unless there is some contractual undertaking that would affect his post-withdrawal activities; warning that under Rule 4.2, the plaintiff's lawyer should not have dealt with the company through his partner who serves on the board, but rather through the lawyer representing the trust company).

As in other areas, lawyers must check the approach taken by the applicable bar before deciding whether they can become adverse to the corporation on whose board they or one of their partners serves. Given the high stakes involved, they probably should also check the pertinent bar's attitude before agreeing to serve on a corporate board.

## Best Answer

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

n 1/12

# Lawyers as Guardians ad Litem

## Hypothetical 12

Both to supplement your income and -- especially -- to satisfy your urge to help the less fortunate, you have agreed to begin serving as a guardian ad litem for disadvantaged children. You think that you will receive the first call shortly, and a few questions have come to mind as you have considered your role in more detail.

**(a)** May you simultaneously act as a guardian ad litem for a child in dealing with the Department of Social Services and also represent the Department in unrelated matters?

**YES (WITH CONSENT)**

**(b)** Given the prohibition in the witness-advocate rule on a lawyer both testifying and acting as an advocate, may you act as a guardian ad litem for a child in a court proceeding in which you might be called to testify in some way about the child or the child's situation?

**YES**

## Analysis

The role of a guardian ad litem for a child does not exactly equate to that of a lawyer for the child.

Bars have struggled with reconciling the general requirement that lawyers acting as a fiduciary comply with all ethics duties, and the particular duties of a guardian ad litem.

For instance, the North Carolina Bar has tried to reconcile a lawyer's duties as guardian ad litem and lawyer in the same case.

- North Carolina LEO 2004-11 (1/21/05) ("The GAL [guardian ad litem] does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to

clients. See RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer."; "[a] lawyer serving as both lawyer and GAL for a parent in a TPR [Termination of Parental Rights] action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.").

**(a)** In one Legal Ethics Opinion, the Virginia Bar acknowledged that lawyers acting as guardians ad litem generally must comply with their ethical duties as lawyers, and therefore must obtain consent in this circumstance -- which would require the court's consent because a child cannot provide an adequate consent.[1]

**(b)** In another Legal Ethics Opinion decided at about the same time, the Virginia Bar emphasized the differences between the role of a lawyer and that of a guardian ad litem. The Bar specifically held that the latter trumps the former if there is some inconsistency.

Because a guardian ad litem has a statutory duty to "advise the court" in the best interests of the child, that obligation outweighs the witness-advocate rule.[2]

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[1] Virginia LEO 1725 (4/20/99) (lawyers who serve as guardians ad litem must follow the ethics rules "whether or not an attorney-client relationship exists" with the children, and therefore must obtain consent if they will simultaneously be representing the Department for Social Services on some matters and acting as guardians ad litem on other unrelated matters; the lawyers need consent because "even where the legal matters are dissimilar, the simultaneous representation of adverse clients is improper unless the clients consent and waive the conflict"; because the children are incapable of giving consent, a court must grant the consent).

[2] Virginia LEO 1729 (3/26/99) (although lawyers acting as guardians ad litem generally must comply with the ethics rules, "the relationship of the GAL and child is different from the relationship of attorney and client," and the "specific duty of the guardian ad litem should prevail" if there is any conflict with a lawyer's standard ethics responsibility; a guardian ad litem who must testify on a disputed issue of material fact may continue to represent the child despite the witness-advocate rule, because the lawyer's statutory duty to "advise the court" about the child's interest and welfare trumps the witness-advocate rule (which would otherwise prohibit the guardian's representation of the child in the hearing)).

More recently, the Virginia Bar again explained that a lawyer's duty of confidentiality is much weaker when the lawyer is acting as a guardian ad litem compared to the situation in which the lawyer is acting as legal advisor.

- Virginia LEO 1844 (12/18/08) (explaining that a lawyer acting as a guardian ad litem for a 7-year-old girl (who has asked the lawyer not to disclose her father's abusive behavior -- which the father denies) must balance the duty of confidentiality with his role as a GAL under Virginia Supreme Court Rule 8:6. "[L]awyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules," and must generally protect the child's confidences; noting that the GAL's compliance with Supreme Court Rule 8:6 and the Standards governing GALs "may justify the disclosure of confidential information "pursuant to Rule 1.6(b)(1) -- which allows the disclosure of confidences "to comply with law or a court order."; providing an example, "the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian."; explaining that because "the GAL not only serves as the child's advocate but is obliged to identify and recommend the outcome that best serves the child's interests," the GAL "needs to investigate information obtained from and about the child in order to ascertain certain facts," after which the GAL can assess "the risk of probable harm to the child" and then determine "whether the GAL has a duty, as an advocate for the child's best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child; holding that such a disclosure would be permitted in light of the Committee's analysis earlier in this opinion of Rule 1.6(b)(1), where a lawyer can reveal protected information to the extent reasonably necessary to comply with law").

## Best Answer

The best answer to **(a)** is **YES (WITH CONSENT)**; the best answer to **(b)** is **YES**.

n 1/12

# Lawyers as Escrow Agents

## Hypothetical 13

One of your best clients just asked you to be an escrow agent, holding funds that the client must pay in connection with a transaction.

**(a)** May you act as an escrow agent in a transaction you negotiated for a client?

**MAYBE**

**(b)** If you have acted as an escrow agent in a matter where you have not also represented a client, may you represent the client in a later dispute over the escrowed funds?

**MAYBE**

## Analysis

**(a)-(b)** Lawyers may clearly act as escrow agents in matters in which they have not also acted as legal advisors for one of the parties to a transaction.

However, the analysis becomes much more difficult if the lawyer has acted as a legal advisor and then wants to act as an escrow agent. A different conflict issue arises if a lawyer has acted as an escrow agent (in a matter where the lawyer was not involved as a legal advisor) and then wants to represent one of the parties as an advocate in a dispute over the escrowed funds.

Surprisingly, at least one state has indicated that a lawyer who has acted as a legal advisor cannot act as an escrow agent in the transaction -- but can act as an advocate for one of the parties in a dispute over escrowed funds if the lawyer has not previously been a legal advisor in that matter.

- North Carolina LEO 98-11 (7/16/98) (explaining that a lawyer who acts as an escrow agent must play a neutral role, but may represent one or the other party after ending the role as escrow agent, unless there is some other basis for disqualification; "The fiduciary relationship demands that the escrow agent be impartial to both the obligor and the obligee under the escrow agreement. Therefore, the lawyer/escrow agent may not act as an advocate for either party against the other in any dispute regarding the release of the escrowed funds. The lawyer must carry out the terms of the escrow agreement with regard to the release the escrowed funds upon the happening of the agreed contingency or the performance of the agreed condition. If the lawyer/escrow agent cannot determine whether the contingency has occurred or there has been performance -- either because the terms of the escrow agreement are too vague or the parties have a factual dispute -- he may not release the funds until both parties consent or there is a court order directing that the funds be released. RPC 66."; "In the present situation, Attorney A must be impartial in carrying out the terms of the escrow agreement. If he is unable to determine that the condition for release of the funds has been met, he may not release the funds to either Buyer or Seller until they have reached an agreement between themselves or until there is a court order instructing Attorney A to release the funds to one party or the other. As long as he serves as escrow agent, Attorney A must be impartial and he may not be an advocate for Buyer even though Buyer was formerly his client."; "Former service as an escrow agent does not disqualify a lawyer from assuming the role of advocate for one party in a dispute over escrowed funds. Cf. RPC 82 (former service as trustee under deed of trust does not disqualify a lawyer from assuming partisan role in foreclosure proceeding). Of course, in the present inquiry, because of his prior representation of Buyer at closing, Attorney A may only assume the role of advocate for Buyer.").

Many lawyers choose not to act as escrow agents. There usually is not much compensation involved, and it also falls outside of what lawyers normally do. It might even fall outside the typical lawyer malpractice policy.

If lawyers choose to play such a role, they must carefully check all of the ethics implications.

## Best Answer

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

n 1/12

# Dealing with Clients Who Have Diminished Capacity

## Hypothetical 14

For several years, you have represented a local farmer and his wife. They have become quite wealthy by selling parcels of land, and have become a good source of business for you. Two years ago, you also began to represent their daughter. Last year, the farmer died, leaving his widow as executrix and the main beneficiary of his estate. You have noticed that his widow (whom you still represent) is "slipping," and now you have become very concerned that she might not be able to care for herself. Her condition has grown worse recently (although she denies any problems, and insists on living independently), and you are considering what steps you should (or must) take. Not coincidentally, you received a call this morning from the daughter (your other client) about her mother's condition.

May you undertake the following steps (without the widow's consent)?

**(a)** Reveal confidential information about the widow's behavior to her regular physician (in an effort to see whether you are overreacting to what appears to be a worsening problem)?

**YES**

**(b)** Reveal confidential information about the widow's behavior to an independent physician?

**YES**

**(c)** Represent the daughter in seeking a guardian for the widow (her mother) if the doctors confirm your suspicion about her prognosis?

**NO**

**(d)** Seek the appointment of a guardian for the widow on your own?

**YES**

## Analysis

The dilemma facing lawyers representing clients whose decision-making has become impaired highlights the need to balance the lawyer's: (1) duty of loyalty to the client (which might cause the lawyer to follow the client's direction regardless of its wisdom) and (2) the duty to act in what the lawyer sees as the client's true best interests.

### ABA Model Rules

The ABA Model Rules attempt to strike a good balance, but ultimately allow the lawyer to act in what the lawyer believes is the client's best interests -- even over the client's objection.

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ABA Model Rule 1.14(b).

In 1996, the ABA issued a legal ethics opinion providing additional guidance to lawyers struggling through this issue. ABA LEO 404 (8/2/96).[1]

[1] ABA LEO 404 (8/2/96) (a lawyer whose client has become incompetent may take protective action, including petitioning for the appointment of a guardian (although the lawyer may not represent a third party in seeking a guardian); the appointment of a guardian should be a last resort, and the lawyer may withdraw only if it will not prejudice the client).

Together, ABA Model Rule 1.14 and the LEO provide much more guidance than earlier ethics rules for lawyers whose clients are suffering from such a diminished capacity.

First, ABA Model Rule 1.14 recognizes that clients might face a diminished capacity to "make adequately considered decisions" for a variety of reasons, including "mental impairment" or minority status. ABA Model Rule 1.14(a). This recognizes a spectrum of capacity (which is one reason the ABA changed the Rule's name in 2002 from "Client Under a Disability").

Even if the client's capacity is diminished, the lawyer must maintain a normal attorney-client relationship "as far as reasonably possible." Id. ABA LEO 404 (8/2/96) explained that this provision essentially trumps principles of agency law that might "operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent."

Interestingly, ABA LEO 404 recognized that a lawyer might want to withdraw from representing such a client (because lawyers are "uncomfortable" with the prospect of having to act under ABA Model Rule 1.14), but may do so under ABA Model Rule 1.16(b) only if he can withdraw "without material adverse effect on the interests of the client." This limitation might essentially force a lawyer to act under ABA Model Rule 1.14 -- rather than withdraw.

Second, lawyers are free to take "reasonably necessary protective action" when the lawyer reasonably believes that a client with diminished capacity (who "cannot

adequately act in [her] own interest") "is at risk of substantial, physical, financial or other harm" unless some action is taken. ABA Model Rule 1.14(b).

ABA LEO 404 noted that this provision allows a lawyer to act "whether or not immediately necessary to the lawyer's effective representation of the client." As that LEO explained, "a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies."

Significantly, the lawyer may take such action only if the client faces the risk of "substantial" harm. For example, comment [1] explains that "it is recognized that persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions." ABA Model Rule 1.14 cmt. [1].

ABA LEO 404 noted that a lawyer may act only when the client cannot adequately act in the client's "own" interest. That LEO explained that a client "who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest," so that a lawyer "should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."

Third, a lawyer facing this scenario may consult with "individuals or entities that have the ability to take action to protect the client." ABA Model Rule 1.14(b). The Rule's next section reminds lawyers that they must comply with their ABA Model Rule 1.6 confidentiality duty, but also notes that a lawyer taking appropriate protective action is "impliedly authorized" under ABA Model Rule 1.6 to reveal client confidences --

"to the extent reasonably necessary to protect the client's interests." ABA Model Rule 1.14(c).

Comment [3] explains that lawyers might consult with family members, but must always "look to the client" rather than the family member in making decisions. ABA Model Rule 1.14 cmt. [3]. Comment [6] further explains that lawyers may "seek guidance from an appropriate diagnostician" in "determining the extent of the client's diminished capacity." ABA Model Rule 1.14 cmt. [6].

Fourth, ABA Model Rule 1.14(b) indicates that the lawyer's responsive action can even include "seeking the appointment of a guardian ad litem, conservator or guardian." ABA Model Rule 1.14(b).

Comment [7] states the obvious axiom that lawyers must "advocate the least restrictive action on behalf of the client." ABA Model Rule 1.14 cmt. [7]. Thus, the Rule reminds lawyers that "appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require." Id. On the other hand, the next comment clearly states that a lawyer properly taking protective action is impliedly authorized to make necessary disclosures, "even when the client directs the lawyer to the contrary." ABA Model Rule 1.14 cmt. [8]. Presumably the same is true of a lawyer's request for a guardian.

Interestingly, ABA LEO 404 concluded that a lawyer in this circumstance (1) "should not attempt to represent a third party petitioning for a guardianship over the lawyer's client", and (2) "should not act or seek to have himself appointed guardian" (except in those extraordinary circumstances where "immediate and irreparable harm

will result from the slightest delay"). In essence, a lawyer may seek the appointment of a guardian on the client's behalf, but not on some other client's behalf or on the lawyer's own behalf.[2]

Fifth, Comment [9] deals with emergency situations in which a client is "threatened with imminent and irreparable harm" if the lawyer does not take some legal action on the client's behalf -- even though the client cannot make "considered judgments about the matter." ABA Model Rule 1.14 cmt. [9].

The comment explains that taking such an extraordinary action would normally be limited to maintaining the status quo. ABA LEO 404 provided an example -- a lawyer whose client is about to be evicted could "take action on behalf of the client to forestall or prevent the eviction." Comment [10] indicates that lawyers acting in such extreme situations normally "would not seek compensation" for their work. ABA Model Rule 1.14 cmt. [10].

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[2] In one interesting case, the Washington State Supreme Court found that a lawyer had acted improperly in seeking the appointment of guardian for a client who had just fired the lawyer. In re Eugster, 209 P.3d 435, 441 (Wash. 2009) (suspending for eighteen months a lawyer who filed a petition for appointment of a guardian for one of his clients after the client fired him; "Eugster [lawyer] filed the petition based upon his personal judgment without conducting any formal investigation into Mrs. Stead's [client] medical or psychological state. There is no evidence Eugster consulted Mrs. Stead's healthcare providers or talked with people in the Parkview community. Eugster testified that Mrs. Stead had told him she had seen a doctor in the last six months for a 'sanity test' and was aware that she had been examined by Dr. Green before his representation began. Three months before he filed the petition for appointment of a guardian for Mrs. Stead, Eugster had Mrs. Stead sign a new trust, powers of attorney, and a will he had prepared, indicating he had no concerns about her testamentary capacity at that point. The last date that either Eugster or Roger personally talked to Mrs. Stead was on August 3, 2004, nearly two months before filing the petition." (footnote omitted)), modified, No. 200,568-3, 2009 Wash. LEXIS (Sept. 23, 2009).

## Restatement

The Restatement generally takes the same approach as the ABA Model Rules. Restatement (Third) of Law Governing Lawyers § 24 (2000).

In one comment, the Restatement warns lawyers not to act too quickly.

> Disabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times; and they may be caused by childhood, old age, physical illness, retardation, chemical dependency, mental illness, or other factors. Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. Lawyers, moreover, should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views.

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (2000) (emphasis added).

Similarly, the Restatement warns lawyers not to substitute their own judgment for the client's best interests.

> A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so. The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law. The lawyer should, for example, help the client oppose confinement as a juvenile delinquent even though the lawyer believes that confinement would be in the long-term interests of the client and has unsuccessfully urged the client to accept confinement. Advancing the latter position should be left to opposing counsel.

Restatement (Third) of Law Governing Lawyers § 24 cmt. c (2000). The Restatement also explains that "a lawyer may properly withhold from a disabled client information that would harm the client, for example, when showing a psychiatric report to a mentally-ill

client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully." Id.

## ACTEC Commentaries

The ACTEC Commentaries also address the duties of lawyers representing clients with diminished capacity.

Among other things, the ACTEC Commentaries allow lawyers to disclose confidential information when necessary to assess their clients' capacity.

> [T]he lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

## States' Approach

State bars generally follow the consensus approach of the ABA Model Rules, the Restatement, and the ACTEC Commentaries.

- District of Columbia LEO 353 (2/2010) (analyzing D.C. Rule 1.14; "A lawyer representing an incapacitated person with a surrogate decision-maker should ordinarily look to the client's chosen surrogate decision-maker for decisions on behalf on the client and accord the surrogate decision-maker's choices the same weight as those of a client when the client is unable to express, or does not express, a contrary view. A lawyer may not substitute her judgment for the judgment of the surrogate decision-maker when the surrogate decision-maker is acting within the scope of the power afforded to her by law,

was selected by the incapacitated person before becoming incapacitated, and is not engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner. If the surprise decision-maker is engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner, then the lawyer may take protective action including seeking a substitute decision-maker. The lawyer may not withdraw because a withdrawal will substantially harm the client and no grounds for a prejudicial withdrawal under Rule 1.16(b) exist.").

- South Carolina LEO 93-04 (1993) (holding that a lawyer who represented an elderly female client had to maintain the confidentiality of the client if she was competent, and had to follow the direction of a legal representative if she was incompetent).

Some states take different approaches.

- See, e.g., Pennsylvania LEO 98-97 (9/16/98) (analyzing the confidentiality duties of a lawyer who prepared a will and power of attorney for a client, and then represented two other people in filing a guardianship action; inexplicably failing to deal with the general rule that a lawyer cannot represent a third party in seeking a guardianship for the lawyer's client; ultimately concluding that the lawyer owed duties of confidentiality to both of the clients, and therefore could not disclose the protected confidential communication absent a court order).

**(a)-(b)** The ABA Model Rules, the Restatement, and the ACTEC Commentaries explicitly permit disclosure such as this if it is in the client's best interests. ABA Model Rule 1.14 cmt. [7]; Restatement (Third) of Law Governing Lawyers § 24(4) (2000); American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

**(c)-(d)** The ABA Model Rules, the Restatement, and the ACTEC Commentaries allow a lawyer representing an impaired client to seek the appointment of a guardian if the step would be in the client's best interests.

Interestingly, the ABA has explained that lawyers may seek the appointment of a guardian only when acting on their own, and not in representing another client.[3]

## Best Answer

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

n 1/12

[3] ABA LEO 404 (8/2/96) (a lawyer whose client has become incompetent may take protective action, including petitioning for the appointment of a guardian (although the lawyer may not represent a third party in seeking a guardian); the appointment of a guardian should be a last resort, and the lawyer may withdraw only if it will not prejudice the client).

# Lawyers as Public Officials

## Hypothetical 15

One of your partners just called to tell you that she is interested in seeking appointment to the board responsible for zoning decisions in your county. She knows that you and some of your colleagues appear before that board on behalf of clients, and she wants to make sure that you are "comfortable" with her serving on the board.

**(a)** May your partner serve on the zoning board?

**YES**

**(b)** May your law firm represent a plaintiff suing the county based on a zoning board decision -- despite your partner's presence as a member of the board?

**MAYBE**

**(c)** May you continue to appear before the board, as long as your partner recuses herself from decisions in which you are acting as an advocate?

**NO (IN SOME STATES)**

## Analysis

Of course, lawyers frequently serve in public positions. In fact, lawyers are often uniquely qualified to do so -- and encouraged to do so by the profession's highest aspirations.

Because lawyers serving as public officials have fiduciary duties to the public, they have to comply with the general conflicts principles of Rule 1.7.

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

> responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

Interestingly, it is not clear whether a lawyer serving as a public official has responsibilities to a "third person" (the board on which the lawyer sits, the citizens of the governmental unit involved, etc.) or instead has a "personal interest" (by virtue of the lawyer's fiduciary or other duties to the government entity or the people). Either way, a lawyer playing some public role clearly has some responsibilities as part of that role. It is also clear that those responsibilities might have a material impact on the lawyer's or one of the lawyer's partners' responsibilities to other clients involved in the public process.

The ABA Model Rule dealing with the general prohibition on misconduct recognizes that lawyers acting as public officials face a higher ethics burden.

> Lawyers holding public office assume legal responsibilities going beyond those of other citizens.

ABA Model Rule 8.4 cmt. [5].

Surprisingly, the Restatement recognizes that lawyers acting as public officials have fiduciary duties to the public.

> Service by a lawyer as an official in local, state, or federal government carries fiduciary duties within the meaning of this Section. In many jurisdictions, private practice is permitted on the part of public officials in smaller communities and in certain offices, such as part-time judge and as legislator. Public duties can impair the lawyer's effective representation of private clients, requiring that the lawyer-official not represent the affected client, withdraw from the representation, or obtain effective consent . . .

> (limits in minority of states on power of public agencies to consent to conflicted representation).
>
> A lawyer-official's obligations as public official are defined by public law outside the law governing lawyers. For example, a lawyer might be required to abstain on any matter in which a client of the lawyer was interested even if an unaffiliated lawyer represented the client in the particular matter. In general, an official's responsibilities as such require that the lawyer seek to serve the public interest and not the interests of private-practice clients.

Restatement (Third) of Law Governing Lawyers § 135 cmt. f(i) (2000) (emphasis added).

The Restatement provides an illustration of a situation in which a lawyer would have to decline a private representation.

> Lawyer is a member of the city council of a town. The council is considering the mayor's proposal to raise the property tax rate by five percent. Some of Lawyer's private clients favor the proposal and some oppose it. Whether Lawyer may vote on the proposal is determined by public law. However, Company, one of Lawyer's private clients, seeks to retain Lawyer to persuade the city council to exempt Company's large and valuable tract of land from the tax increase. Lawyer may not accept the representation. Lawyer's responsibility as public official to vote on the merits of Company's planned exemption creates a risk that Lawyer's representation of Company would be materially and adversely affected. Public law would also likely prohibit Lawyer from participating in the matter of Client's exemption.

Restatement (Third) of Law Governing Lawyers § 135 cmt. f(i), illus. 6 (2000).

The Restatement also deals with a common scenario -- a lawyer acting as a part-time public official.

> A lawyer serving as a public official may perform the role of lawyer in that office. Such exercise of official duties is subject to the law governing lawyers when not overridden by

> other law. For example, a part-time prosecutor exercises wide discretion over the decision whether to prosecute, what charges to file, and what criminal sanctions to seek (see § 97). Where proper exercise of the prosecutor's discretion creates the risk of material and adverse effect on the lawyer-prosecutor's representation of a private client, it is improper for the prosecutor to represent the client without effective consents. Similarly, where there is a substantial risk that proper functioning as a prosecuting official will be materially and adversely affected by the interests of private clients, a conflict of interest requires that the prosecutor not function in the public office unless effective consent of all affected clients is obtained. The informed consent of affected nonclients may be necessary, and such consent may be required to comply with standards different from those stated in § 122, such as those of due process.

Restatement (Third) of Law Governing Lawyers § 135 cmt. f(ii) (2000). An illustration provides some guidance.

> Prosecutor, who has a part-time private law practice, represents Client in a divorce case. Client alleges that she was the victim of an assault by her Husband. Prosecutor may neither prosecute Husband nor take part in such decisions as whether to prosecute or what charge to file. Another prosecutor must decide whether to charge Husband. Consent to the conflict by Client and an appropriate official of the state would be unavailing without the effective consent of Husband.

Restatement (Third) of Law Governing Lawyers § 135 cmt. f(ii), illus. 7 (2000).

Some states seem to have carried this concept to an extreme (discussed below).

**(a)** Lawyers may clearly serve on such public bodies.

**(b)** Although not all states would be this liberal, the North Carolina Bar has indicated that a law firm may represent a plaintiff suing a "public body" although one of the law firm's partners serves on that body.

- North Carolina LEO 2002-2 (7/19/02) ("[A] lawyer may represent a party suing a public body or non-profit organization, although the lawyer's partner or associate serves on the board, subject to certain conditions."; "Lawyers should be encouraged to serve on public bodies, whether by election or appointment, because, by education and experience, lawyers are uniquely qualified for such service. Any barriers to public service by lawyers should be removed if procedures can be established that preserve the ethical values of the profession. To avoid the appearance of impropriety or undue influence, a lawyer who is elected or appointed to a public body must be screened in his law firm from participation in an action brought by another lawyer in the firm against the public body or any subsidiary of that public body. See Rule 6.5 and RPC 53. This means that the law firm must adopt reasonably adequate procedures, under the circumstances, to isolate the lawyer from participation in the discussion of the matter with the other members of the firm and from exposure to any confidential information relative to the matter. Sharing of the legal fee generated by the representation, while not specifically prohibited, is discouraged. Although receipt of the fee by the board member/lawyer may not materially affect his judgment or neutrality, screening from participation in the profit earned from the representation increases the isolation of the lawyer and thereby enhances the public's perception that the lawyer is not exercising undue influence on the other members of the board. Therefore, if practical, a law firm should adopt reasonable procedures for withholding the lawyer's share in the profit (after overhead) from the legal fee earned from the representation. The lawyer serving on the public body must also make full disclosure to the body on which he serves and be screened from participation in the public body's deliberations on the matter. The lawyer must do the following: (1) Disclose in writing or in open meeting to the governing body his relationship to the matter involved; (2) Refrain from any expression of opinion, public or private, or any formal or informal consideration of the matter, including any communication with other members or the staff of the governing body; (3) Absent himself from any discussion of the matter by the governing body; and (4) Withdraw from voting on all issues relating to the matter.").

**(c)** States ethics rules governing lawyers acting on such boards reflect the difficulty of applying these heightened ethics duties to lawyers who also want to maintain a private practice.

Virginia has addressed this issue, with somewhat surprising results.

In one Legal Ethics Opinion, the Virginia Bar indicated that a lawyer may not serve as a "lobbyist" before the Virginia General Assembly if one of the lawyer's partners serves in the General Assembly.[1]

In a later Legal Ethics Opinion, the Virginia Bar held that a lawyer may not appear before a "governing body" if one of the lawyer's partners sits on the "governing body" -- even if that lawyer does not participate in the decision.[2]

A lawyer later approached the Virginia Bar to seek a clarification of this broad ruling -- which undeniably would discourage lawyers in large law firms from serving on such public bodies.

Surprisingly, the Virginia Bar's reconsideration of this issue resulted in a more draconian rule. The Bar expanded the prohibition from "governing bodies" (which is a term of art in Virginia, and includes only such ultimate decision-making bodies as boards of supervisors) to all "public bodies" (which is not a defined term in Virginia law). The Bar also made it clear that the prohibition on a lawyer "appearing" before such public bodies went beyond in-person appearances, and includes even an appearance by way of pleading.[3] The Bar reiterated its earlier position that the member/lawyer's

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[1] Virginia LEO 1502 (12/14/92) (a lawyer may continue to appear before the Virginia General Assembly (not on behalf of any particular client, but rather on behalf of certain positions) even though one of the lawyer's employees now serves in the Virginia General Assembly; the Bar apparently made this approval contingent on the lawyer not acting as a "lobbyist" as that term is statutorily defined; the lawyer may also serve as a part-time litigation assistant to an employee who is serving in the Virginia General Assembly, because the lawyer will not receive any fee or cost reimbursement from the state).

[2] Virginia LEO 1718 (12/2/98) ("[I]t is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter.").

[3] Virginia LEO 1763 (1/6/02) (a lawyer cannot appear (either in person, by submission, letter, etc.) before any public board, or "other public body," upon which another lawyer in the firm sits; the disqualification cannot be cured by the lawyer's recusal from pertinent decisions on the board or other

recusal from pertinent decisions would not cure the conflict -- meaning that no colleague of the member/lawyer can appear before the public body in person or in a written submission.

This extension has troubling implications. Most importantly, it discourages involvement in important civic affairs by lawyers in firms which are also involved in those civic affairs. It would be easy to see how this rule would deprive public bodies of the valuable services that lawyers could bring them.

This approach also seems contrary to the Virginia State and Local Government Conflict of Interests Act. In its very first section, the Act indicates that its purpose includes "establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, . . . so that the standards of conduct of such officers and employees may be uniform throughout the Commonwealth." Va. Code § 2.2-3100.

Of course, the Virginia Bar has repeatedly indicated in other circumstances that lawyers can be (and often should be) governed by a higher standard than that required by non-lawyers. Still, the Bar's harsh approach seems to fly in the face of this legislative intent to set a uniform standard.

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public body (expanding the reach of earlier LEO 1718 beyond "governing bodies" and beyond in-person "appearance" before public bodies)).

## Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **MAYBE**; the best answer to **(c)** is **NO (IN SOME STATES)**.

n 1/12

# Lawyer Working with an Adversary's Lawyer on an Unrelated Matter

## Hypothetical 16

You practice in a 20-lawyer firm in a medium-sized city. An out-of-state company just hired you to defend it in a commercial litigation lawsuit. The plaintiff is represented by a lawyer with whom you are working in a co-counsel relationship on a large case that takes up approximately 30 percent of your time each day.

Does this working relationship with the plaintiff's lawyer create a conflict of interest that requires disclosure and consent?

## MAYBE

## Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[1]

Depending on the frequency and scope of co-counsel relationships, working with an adversary's lawyer as allies in unrelated matters might create a conflict that requires disclosure and consent.

It is not difficult to envision situations in which such a working relationship could create conflicts. For instance, a young lawyer receiving 95% of his or her income from cases referred by another lawyer might have a conflict (requiring disclosure and

[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

consent) if asked by a client to oppose that lawyer in some other matter. The client might justifiably worry that a young lawyer so dependent on the other lawyer's goodwill would not risk such a high percentage of his or her income by antagonizing the other lawyer.

## Best Answer

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

n 1/12

# Lawyers' Personal Friendship with the Adversary's Lawyer or Staff

## Hypothetical 17

After several years as an associate in a large New York firm, you have decided to move back to the small town where you were born and raised. A number of your high school classmates stayed in that town, and now you wonder whether your personal relationships that you expect to blossom upon your return will create any conflicts issues.

**(a)** Does a personal friendship with an adversary's lawyer create a conflict that requires disclosure and consent?

**MAYBE**

**(b)** May you begin to date an attractive high school classmate, who is now the office manager at a firm you expect to oppose in litigation and transactional matters?

**YES (PROBABLY)**

## Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[1]

[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

**(a)** A personal friendship with the opposing lawyer normally does not create a conflict that requires disclosure and consent. In fact, general standards of professionalism and civility would encourage such friendships.

However, it is conceivable that such a close relationship that could trigger the general conflicts rule that applies whenever a lawyer's personal interests might interfere with the lawyer's duty of loyalty to clients. ABA Model Rule 1.7(a)(2).

For instance, a lawyer litigating against his or her closest childhood friend might be reluctant to take advantage of arguments or positions that would embarrass the opposing lawyer in front of the adversary, etc.

The Virginia Bar has addressed an analogous situation -- in which the lawyer has a personal friendship with the adversary rather than the adversary's lawyer. In Virginia LEO 1523 (5/11/93), the plaintiff in a dog bite case hired a lawyer who was a "casual acquaintance" of the defendant. The Virginia Bar explained that the lawyer's casual relationship with the defendant is a "personal interest" that may create a conflict. As the Virginia Bar explained it, the "impact of such personal interests may be measured along a continuum, with the least significant interests representing only a de minimis conflict which does not require disclosure to or consent from the client." In that particular situation, the Virginia Bar noted that any conflict was cured by the client's consent. Id.

**(b)** Relationships with non-lawyer employees of opposing law firms create possible conflicts, as well as concerns over confidentiality.

The Virginia Bar has dealt with this issue on a number of occasions. In Virginia LEO 793 (5/27/86), the Virginia Bar held that a lawyer may represent a client when the

lawyer's adversary is represented by a law firm employing the lawyer's fiancé as a secretary. The Virginia Bar explained that if the lawyer felt that the relationship with his secretary might affect his judgment about the matter, the lawyer must make disclosure and obtain the client's consent.

## Best Answer

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

n 1/12

# Lawyers' Family Relationships

## Hypothetical 18

You and your husband graduated from law school together, and ended up practicing at the two largest law firms in your city. This did not create a problem at first, because your husband began his career as a transactional lawyer. However, he has just switched to the litigation section in the other law firm, and some obvious questions have now come to your mind.

**(a)** Must you obtain the clients' consent if you and your husband are on opposite sides of a litigated case?

**YES**

**(b)** Must you obtain the clients' consent if your husband's law firm is on the other side of the case (even if your husband is not working on the case)?

**NO (PROBABLY)**

## Analysis

**(a)** Not surprisingly, this issue has become more important as women have increasingly joined the Bar.

The ABA Model Rules formerly dealt with this issue in a rule (ABA Model Rule 1.8(i)). In 2002, the ABA moved the discussion to a mere comment.

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that

> lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

ABA Model Rule 1.7 cmt. [11].

Most states continue to address the issue in a Rule (even those states following the ABA Model Rule approach generally take several years to move toward the ABA Model Rule standards).

The Restatement deals with this issue as a matter of imputed disqualification.

> The fact that lawyers are related by blood or marriage does not, in itself, require imputation under the rule described in this Section. Like lawyers in the same firm, however, the degree of financial interdependence, sharing of information, and loyalty between spouses, for example, is ordinarily high. Yet, if the rule were that a spouse and the spouse's firm are disqualified from any case in which the other spouse was disqualified, law firms would be reluctant to hire either spouse. Thus, in general, the law does not impute conflicts between firms of lawyers by virtue of family relationship alone. However, in the absence of informed consent by all affected clients . . . , lawyers who are married to each other -- or lawyers similarly related such as parent-lawyers and their lawyer children -- may not personally represent clients adverse to the interests of clients of the other spouse or relative. Each must also observe prohibitions against misuse of confidential client information. . . . Conflicts arising out of relationships in which financial resources are pooled and living quarters shared in circumstances closely approximating marriage should be treated in the same way as spousal conflicts.

Restatement (Third) of Law Governing Lawyers § 123 cmt. g.

This abstract rule leaves open a number of questions.

First, what type of relationship triggers the disclosure and consent requirement? Interestingly, ABA Model Rule 1.7 cmt. [11] gives as examples: "parent, child, sibling or spouse." This contrasts markedly with the more precise (and broader) explanation in the ABA Model Rule dealing with lawyers preparing documents under which they receive gifts.

> For purposes of this paragraph [dealing with client gifts to lawyers who are not related to the client], related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ABA Model Rule 1.8(c).

Most states include the same definition in their rules dealing with gifts. It would have been very easy for the ABA to include the same or similar definition in the comment dealing with a lawyer's adversity to a family member. Presumably the ABA's failure to do so means that the definition may be less precise.

Unfortunately, it might become important to know exactly where to draw the line. For instance, it would be understandable for the ethics rules to require disclosure and consent if a father were on one side of the case and his daughter (who just graduated last year from law school) was on the other side of the case. It would be a far different situation if a father and daughter were both experienced, or had been estranged from each other for decades.

Second, the ABA Model Rule comment does not deal with relationships involving emotion rather than blood. For instance, if the ethics rules require disclosure and informed consent if lawyers who are married become directly adverse to one another,

why wouldn't the same rules apply if the opposing lawyers are living together rather than officially married? What if they were involved in a long-term sexual relationship, but not living together? What if it was a long-term adulterous relationship?

These and other obvious questions present themselves whenever two lawyers with some family, emotional, or other relationship become direct adversaries.

**(b)** No state's rule or bar opinion goes so far as to automatically require disclosure and consent when a lawyer represents a client adverse to someone represented by another law firm in which the lawyer's relative works -- if the lawyer is not involved in the matter at the other law firm.

However, it seems possible that such a situation could create a problem if the stakes were high and the law firms were small. If a reasonable person would believe that a client should be aware of such relationships, it would always be best to make a full disclosure and obtain both clients' informed consent.

## Best Answer

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

n 1/12

# Lawyers Representing an Adversary's Lawyer in an Unrelated Matter

## Hypothetical 19

You just received a call from your firm's largest client -- which has been sued by a plaintiff represented by another firm in town that is approximately the same size as your firm. Coincidently, last week your managing partner retained that other law firm to represent your firm in a malpractice case that arose from your alleged mistakes.

Must you disclose to your largest client that the plaintiff's law firm in that case is also representing your law firm in an unrelated matter?

## MAYBE

## Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[1]

In most situations, this situation probably would not create a conflict requiring disclosure and consent.

However, at least two scenarios come to mind that might create a conflict.

First, the attorney-client relationship with the adversary's lawyer might be so material to you or the other lawyer that it could conceivably affect your loyalty to the client, and thus trigger the conflicts rules. For instance, if the other law firm was

[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

defending you in a case involving the bulk of your assets and your license, the client might worry that you would not be aggressive enough on its behalf when dealing with the other lawyer.

The ABA addressed this situation in one legal ethics opinion. In ABA LEO 406 (4/19/97), the ABA explained that a lawyer representing another lawyer may also represent a client adverse to the other lawyer's client unless the representation of the client may be "materially limited" by the relationship between the lawyers. The ABA explained that determining whether such a material limit exists depends on such factors as: the importance and sensitivity of the matters; the size of the fee; any similarity between the representations; whether the representations will "cause either or both of [the lawyers] to temper advocacy on behalf of their opposing third-party clients." If the representation meets this standard, the lawyer may proceed (if at all) only with consent, although even curative consent would be unavailable if the lawyer could not make full disclosure because of other client confidences. The ABA explained that even if not required, it might be prudent to disclose the lawyers' relationship.

In discussing the imputation of such a disqualification, the ABA indicated that any non-curable conflict would disqualify the representing lawyer's entire firm, but that the representation of a lawyer in a purely personal matter would not result in disqualification of the represented lawyer's entire firm.

Second, the attorney-client relationship might generate confidentiality problems. For instance, if a plaintiff's lawyer hires one of your partners to prepare her estate plan,

your partner might learn what the plaintiff's lawyer expects to receive in certain cases that the lawyer is handling against your clients.

Under the approach of ABA LEO 406 (4/19/97), your partner's individual disqualification would apparently not be imputed to your entire law firm. However, it might still be wise to make disclosure and obtain consent.

Several states' courts and bars have dealt with this issue. Most either require or recommend disclosure and consent.

- Pennsylvania LEO 2007-027 (1/2/08) (assessing the following situation: "Inquirer asks if X may represent inquirer's child when Inquirer and X represent opposing parties (the 'Pending Case') in an unrelated matter."; holding that the "best practice here" would be to obtain informed consent).

- N.Y. City LEO 1996-3 (4/2/96) ("Whether a lawyer may undertake the representation of, or whether a lawyer may retain, an adversary attorney, with or without the consent of the clients being represented by the respective attorneys, depends upon an analysis of the particular facts and circumstances, including: (a) the intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries' relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms.").

- New Jersey LEO 678 (11/21/94) ("This Committee has not previously addressed the inquirer's question, i.e., whether an attorney may represent an opposing attorney in a matter unrelated to the matter in which the attorneys are adversaries."; "[W]e find that the inquirer's proposed representation of his adversary in an unrelated matter would create an appearance of impropriety. In so holding, we recognize that the only other ethics tribunal to have considered this question under the appearance of impropriety doctrine reached a different result from ours. See Illinois Opinion 822 (April 4, 1983), ABA/BNA Lawyers' Manual on Professional Conduct: Ethics Opinions 1980-1985 at 801:3015. Nevertheless, we find the proposed conduct to be impermissible.").

- Iowa LEO 92-28 (2/18/93) ("You state that in your community of 8000 you and lawyer A frequently are adversaries in litigation. A personal injury action has been brought against him in his personal, non-lawyer, part-ownership of an apartment building. His insurance carrier has requested you to defend him."; "In actual practice lawyers are entitled to be defended by counsel even as non-professionals are. The mere fact that the lawyers involved have been adversaries in other, non-related litigation should not affect their professional responsibilities or conduct.").

- New York LEO 579 (3/20/87) (explaining that "[t]his Committee has not previously addressed the question whether Attorney A, who is engaged in litigation as opposing counsel to Attorney B, may represent Attorney B in a personal and unrelated matter"; "It is the view of this Committee that the Code does not mandate a per se disqualification. In the first instance, both Attorney A and Attorney B must satisfy themselves that the creation of an attorney-client relationship between them will not compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties. If there is doubt in the mind of either attorney that the dual representation by Attorney A might affect any settlement recommendation, litigation strategy or other professional judgments either attorney might be called upon to make on behalf of those existing clients, then Attorney A should decline the proffered employment. If, on the other hand, both attorneys are confident that representation of their existing clients will not be compromised in any manner by Attorney A's acceptance of Attorney B as a client in an unrelated matter and if the existing clients in the pending litigation both give their informed consent to the dual representation following full disclosure, then Attorney A may properly accept employment by Attorney B. In addition, it must be apparent that representation of Attorney B will not call upon either attorney to reveal or use any confidences or secrets of the existing clients under circumstances proscribed by DR 4-101. Should either client decline to give consent, then the multiple representation is, of course, impermissible." (footnote omitted); ultimately concluding that "provided both clients consent and the other standards set forth in this opinion are met, an attorney for a client in a pending lawsuit may simultaneously represent counsel for the adverse party in a personal and unrelated litigation.").

- Illinois LEO 822 (4/1983) ("It is not improper for Lawyer B to represent Lawyer A when each frequently represent [sic] clients adverse to each other provided Lawyer B makes full disclosure to such clients and obtains consents therefrom.").

- Maryland LEO 82-4 (12/3/81) ("You state that a partner in your law firm is defending Attorney X in a legal malpractice action. Attorney X represents a client in an unrelated personal injury claim against a party who is being

defended by a member of your firm."; "You ask whether there is a conflict or other ethical consideration which precludes your law firm from defending one or both of the above matters. You further ask whether there is a conflict or other ethical consideration which applies to Attorney X."; "A majority of the Committee believes that, at the very least, full disclosure should be made to the personal injury clients of Attorney X and your law firm and that the consent of Attorney X, his client and your client are necessary before you undertake the defense of the claim. A majority of the Committee believes that the full disclosure requirement of DR 5-105(C) is met by informing the respective clients that the representation involves a separate, independent personal matter, without specifying the nature of the representation.").

- Michigan LEO CI-649 (6/15/81) ("Where a lawyer represents a second lawyer in said second lawyer's divorce action the second lawyer's views as to appropriate litigation tactics, negotiating techniques, property division, support levels, and other aspects of divorce practice, are secrets of the lawyer-client and may not thereafter be used by the first lawyer to the disadvantage of the lawyer-client, whether in the latter's personal or professional capacity."; "Where a lawyer represents a second lawyer in said second lawyer's divorce action, the first lawyer may not then or thereafter represent a party to another divorce action in which the opposing party is represented by said second lawyer, as such representation must necessarily involve use of the second lawyer's secrets to his or her disadvantage, or representation less zealous than is ethically required, or both, and creates the appearance of impropriety."; "Where a lawyer represents a second lawyer in said second lawyers divorce action, the first lawyer may not during such representation represent a party to another divorce action in which the opposing party is represented by said second lawyer, as the first lawyer's independent professional judgment with respect to each client must necessarily be adversely affected, the consent of all persons involved, if given, is of no consequence as it is not obvious that the first lawyer can adequately represent the interest of each, and the dual representation would create the clear appearance of impropriety."; "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.").

In 1996, the Rhode Island Bar took the same basic approach in a reciprocal situation -- in which a lawyer handling a divorce found that the lawyer representing the other side in that divorce case was simultaneously representing the lawyer's wife in his own divorce case.

- Rhode Island LEO 96-23 (9/12/96) ("The inquiring attorney is a party in a divorce action. The attorney was recently retained by a client to prosecute the client's divorce. Upon receiving a copy of the entry of appearance of opposing counsel, the inquiring attorney learned that the opposing counsel in the client's divorce is the same attorney who represents the inquiring attorney's spouse in the attorney's own divorce action."; "As long as the inquiring attorney reasonably believes that his/her representation of the client will not be adversely affected by the circumstances presented, communicates that belief to the client after full disclosure and obtains the consent of his/her client, he/she may continue to represent the client in the divorce action.").

## Best Answer

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

n 1/12

# Lawyers and Their Relatives Suing Clients

## Hypothetical 20

Your job as a large law firm's managing partner brings new challenges everyday, and yesterday was no exception. One of your young partners called to tell you that both he and his wife were injured when a load of lumber fell on them as they were shopping at a local home improvement store -- which is one of your firm's largest clients.

**(a)** May your young partner's wife (represented by another law firm) file a lawsuit against the home improvement store?

**YES**

**(b)** May your young partner (representing himself) file a lawsuit against the home improvement store?

**NO**

## Analysis

**(a)** Although the young partner clearly has a personal stake in his wife recovering from your firm's client, as a matter of ethics nothing would seem to prevent her from pursuing a legitimate case against your firm's client. As a business matter, she might choose not to pursue the case, but she did not give up her right to compensation for personal injury when she married one of your lawyers.

**(b)** Under standard conflicts analysis, your young partner could pursue a case against the home improvement store as a plaintiff, but would almost surely be unable to represent a client (even himself) in a lawsuit against a firm client -- without its consent after a full disclosure.

It would be interesting to analyze this incident if the young partner possessed confidential information about the home improvement store because he personally represented it (or otherwise had acquired confidences about it). Although no court or bar seems to have addressed it, it would be easy to envision a situation in which the young partner could not reveal confidences about the home improvement store to his own personal injury lawyer, and would have to try his best to resist using any confidential information to the home improvement store's disadvantage.

## Best Answer

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

n 1/12

# Lawyers' Personal Financial Stake in a Client's Adversary

## Hypothetical 21

One of your partners just walked into your office, closed the door behind her (always a bad sign) and asked for your advice on what she called an "awkward" situation. Your partner tells you that one of her best clients asked her to represent him in suing a restaurant where the client and his wife obviously received tainted food, as a result of which they both suffered severe food poisoning. The client wants to file a large lawsuit that undoubtedly would exceed the restaurant's insurance coverage. Your partner tells you that the situation is "awkward" because she is a 25 percent owner of the restaurant.

As long as the restaurant and the client consent, may your partner represent the client against the restaurant in a lawsuit alleging food poisoning?

## NO (PROBABLY)

## Analysis

A lawyer's involvement with a client's adversary (personal, financial or otherwise) may create a conflict of interest that must be disclosed and cured before the lawyer can proceed. In some situations, even consent would not permit the representation.

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).[1]

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[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

The Restatement deals with this issue in more detail than the ABA Model Rules. Under the Restatement,

> [u]nless the affected client consents to the representation under the limitations and conditions provided [elsewhere in the Restatement], a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.

Restatement (Third) of Law Governing Lawyers § 125 (2000). A comment provides more explanation.

> Client interests include all those that a reasonable lawyer, unaffected by a conflicting personal interest, would protect or advance. Perhaps the clearest case of a conflict is where the lawyer has a significant adverse financial interest in the object of the representation. Such a financial interest, other than one so insignificant that a person of normal sensibility would be unaffected by it, ordinarily constitutes a conflict of interest. A lawyer having such an interest is prohibited from accepting or continuing the representation unless the affected client gives informed consent.
>
> A conflict under this Section need not be created by a financial interest. Included are interests that might be altruistic, such as an interest in furthering a charity favored by the lawyer, and matters of personal relationship, for example where the opposing party is the lawyer's spouse or a long-time friend or an institution with which the lawyer has a special relationship of loyalty. Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs. . . . A conflict exists if such an interest would materially impair the lawyer's ability to consider alternative courses of action that otherwise might be available to a client, to discuss all relevant aspects of the subject matter of the representation with the client, or otherwise to provide effective representation to the client. In some cases, a conflict between the personal or financial interests of a lawyer and those of a client will be so substantial that client consent will not suffice to remove the disability . . . .

Restatement (Third) of Law Governing Lawyers § 125 cmt. c (2000) (emphasis added).

This hypothetical comes from Restatement (Third) of Law Governing Lawyers § 125 cmt. c, illus. 1.

The Restatement explains that the lawyer's interest as a part owner of the restaurant "might materially and adversely affect Lawyer's representation of Client." Moreover, "because Client's recovery could significantly affect the value of Lawyer's investment interest, Lawyer may not represent Client even if the Client were to give informed consent."

> Lawyer owns a 25 percent interest in a restaurant. Client was a customer at the restaurant and suffered severe food poisoning. Client has asked Lawyer to file suit against the restaurant for damages substantially in excess of insurance coverage. Lawyer's interest as investor in the restaurant might materially and adversely affect Lawyer's representation of Client. Because Client's recovery could significantly affect the value of Lawyer's investment interest, Lawyer may not represent Client even if Client were to give informed consent (see § 122 (2)).

Restatement (Third) of Law Governing Lawyers § 125 cmt. c, illus. 1 (2000).

The Restatement contrasted this situation with that in Illustration 2, in which the lawyer's child owned a five percent interest in the restaurant. In that situation, the Restatement explained that the lawyer may proceed if the lawyer believes that he or she can effectively represent the client despite the smaller financial interest, as long as the client provides informed consent after disclosure.

> Same facts as in Illustration 1, except that Lawyer's child owns a five percent interest in the restaurant. Even though Lawyer owns no interest personally, concern about injuring the financial position or reputation of Lawyer's child might materially and adversely affect Lawyer's representation of

> Client. If Lawyer concludes that Lawyer can overcome the personal concerns involved and represent Client effectively, the representation may proceed if Client gives informed consent to the representation (see § 122).

Restatement (Third) of Law Governing Lawyers § 125 cmt. c, illus. 2 (2000).

The Restatement also deals with an even more remote possible conflict in Illustration 3 -- in which the lawyer owned stock in a mutual fund that itself owns one percent of the stock of the company that supplied the tainted food (the lawyer's indirect interest in the food supplier was less than $25.00). The Restatement indicates that the lawyer need not raise the possible conflict with the client, given the de minimis interest.

> Lawyer owns stock in a publicly held mutual fund that, in turn, carries in its diversified portfolio an interest of less than one percent in the common stock of Ajax Corporation, a publicly held corporation that produces frozen foods. The value of Lawyer's indirect interest in Ajax Corporation is less than $25.00. Client developed food poisoning after eating frozen peas that had been processed by Ajax Corporation and has asked Lawyer to file suit for damages against it. The described interest is so small, and the possibility of an effect on Lawyer's representation is so remote, that Lawyer need not raise the possibility of a conflict of interest with Client.

Restatement (Third) of Law Governing Lawyers § 125 cmt. c, illus. 3 (2000).

The Restatement's illustrations help frame the issue, and provide useful guidance for lawyers analyzing this issue.

## Best Answer

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

n 1/12

# In-House Lawyers' Wrongful Termination Claims

## Hypothetical 22

As your client's in-house general counsel, you have learned that one of the lawyers on your staff has become increasingly belligerent with clients, and beginning to act in a way that would justify firing her. Before you take that step, you want to determine if the lawyer could file a wrongful termination claim if you fire her.

May in-house lawyers file wrongful termination claims against their clients/employers?

## MAYBE

## Analysis

Courts have debated whether in-house lawyers may file wrongful termination claims.

It is difficult to imagine that an in-house lawyer would be left without a remedy if the lawyer were treated in an illegal or otherwise unjustified way. On the other hand, the importance of preserving client confidences might "trump" the in-house lawyers' rights, and prevent the assertion of a wrongful termination claim that would necessarily reveal client confidences.

The ABA dealt with this issue in ABA LEO 424 (9/22/01). The ABA explained that former in-house lawyers may sue their former employer/clients, even if the lawyer claims retaliatory discharge based on adherence to ethics obligations. However, the lawyer/plaintiffs suing their former client/employers may only disclose information "to the extent necessary to establish her claim against her employer," and must affirmatively seek to avoid unnecessary disclosure by using such procedures as in-camera review,

sealing of the record, proceeding without disclosing the parties' names, etc. ABA LEO 424 (9/22/01).

A well-known older case indicated that in-house lawyers may not file a "retaliatory discharge" claim because it would necessarily involve disclosure of client confidences.

- Balla v. Gambro, Inc., 584 N.E.2d 104, 107, 108, 108-109 (Ill. 1991) (concluding that an in-house lawyer may not pursue a claim against a client/employer for retaliatory discharge; "We agree with the trial court that appellee does not have a cause of action against Gambro for retaliatory discharge under the facts of the case at bar."; "We agree with the conclusion reached in Herbster [Herbster v. N. Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986)] that, generally, in-house counsel do not have a claim under the tort of retaliatory discharge. However, we base our decision as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have."; "In this case, the public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel. Appellee was required under the Rules of Professional Conduct to report Gambro's intention to sell the 'misbranded and/or adulterated' dialyzers. . . . Appellee alleges, and the FDA's seizure of the dialyzers indicates, that the use of the dialyzers would cause death or serious bodily injury. Thus, under the above-cited rule, appellee was under the mandate of this court to report the sale of these dialyzers.").

A number of more recent cases also take this approach -- prohibiting or otherwise restricting in-house lawyers from pursuing wrongful termination claims because of the inevitable disclosure of client confidential information.

- Kidwell v. Sybaritic, Inc., 749 N.W.2d 855, 863-64 (Minn. Ct. App. 2008) (holding that a company's former general counsel can file a wrongful termination claim, but cannot pursue a claim under Minnesota's whistle-blower protection statute; noting that "[t]he majority view . . . appears to reject the attorney-client defense and to permit such claims, though sometimes with the proviso that in-house attorneys may pursue such claims so long as they do not run afoul of the duty of confidentiality (a proviso that potentially could be applied as a bar).").

- Ausman v. Arthur Anderson, LLP, 810 N.E.2d 566 (Ill. App. Ct. 2004) (prohibiting an in-house lawyer from suing her former client/employer for wrongful discharge), appeal denied, 823 N.E.2d 962 (Ill. 2004).

- Meadows v. Kindercare Learning Ctrs., Inc., No. CV-03-1647-HU, 2004 U.S. Dist. LEXIS 8770, at *15-16 (D. Or. May 11, 2004) (noting the debate among states about whether in-house lawyers can assert wrongful termination claims if the claims would necessarily disclose privileged communications; concluding that the in-house lawyer "has not cited persuasive authority to support her assertion that a claim for wrongful discharge, not based on the attorney's adherence to ethical requirements, can go forward when it involves disclosure of privileged information. . . . Despite being cast in terms of opposition to discriminatory practices, Meadows' wrongful discharge claim unavoidably seeks to protect her private employment rights at the expense of the public interest in maintaining attorney-client privilege. This is not the purpose for which the tort of wrongful discharge was created, and her claim cannot stand.").

In contrast, the trend clearly favors in-house lawyers' ability to file wrongful termination claims, although sometimes with limits on what evidence they can present, etc.

- Sands v. Menard, Inc., 787 N.W.2d 384, 387, 388, 389, 390, 300, 400, 400-01 (Wis. 2010) (in a 4-3 vote, holding that an arbitration panel could award a former in-house lawyer money damages but could not order her reinstatement, because the attorney-client relationship had been hopelessly tainted; explaining how the company had treated Dawn Sands, whose title was "Executive General Counsel"; "On her first day at Menard, Sands learned that she was required to punch a clock and would be paid by the hour at a rate of $26.92 ($ 55,993.60 annually, plus overtime). With this hourly rate, Sands could earn up to $ 40.38 per hour for overtime (at time-and-a-half) and an additional $ 2.50 per hour for weekend hours worked." (emphasis added); noting the company's reaction after Sands complained of her treatment after working at the company for about six years; "Sands responded, 'I've been sitting here working my butt off and I get nothing. I just get all these promises . . . . [W]hat is that, just a big lie to make me keep working?' Charlie Menard shrugged and said, 'Worked, didn't it?' Sands replied that as a 43-year old woman with no one else to rely on, she needed to be concerned about her retirement. Charlie Menard responded, '[W]hy don't you get married like every other girl?'"; explaining that "John Menard returned and declared, '[Y]ou know what, you're all done right now. Pick your shit up; I want your ass out of here. You've got five minutes." (emphasis added); "At

some point during this encounter, Sands turned to her computer in an attempt to log off. John Menard saw this, approached her from the other side of her desk with his hand in a fist, and ordered her to get away from the computer."; "When she entered her former office, she found papers and books strewn everywhere, and furniture upturned." (emphasis added); ultimately concluding that "[i]n this case, it is clear that Sands cannot in good faith represent Menard without violating her ethical obligations as an attorney."; "Leading up to and throughout the arbitration process, all parties agreed that the relationship was irretrievably broken. Sands understood this and unequivocally testified against reinstatement before the arbitration panel, even going so far as to state that 'no reasonable person would entertain reinstatement as a possibility.' She further made clear her view of the prospective employment conditions at Menard, stating, '[I]t would be impossible to return to such a hostile environment.'"; "Let there be no mistake -- the mutual animosity and distrust between Sands and the executive leadership of Menard, the very people to whom her absolute loyalty would be owed, continued throughout the arbitration hearing and shows no signs of abating today. Sands was right. No reasonable person would consider reinstatement a possibility in this situation. No one could have assessed this situation and determined that reinstatement could lead to a productive setting where both Sands and Menard would benefit. Trust has been completely broken; nothing good could possibly come from reinstatement. In view of this especially bitter litigation marked by personal and professional animosity, we see no way Sands could now return to Menard and serve the company in conformity with her ethical obligations."; "Though the panel's decision was otherwise thorough, nowhere did the panel consider the applicability of Sands' ethical obligations as an attorney. It never examined whether Sands could ethically perform her role if it awarded reinstatement. If it had, it would have reached the same conclusion Sands had: no reasonable person would entertain reinstatement as a possibility." (footnote omitted); "We do not conclude that reinstatement is always inappropriate for in-house lawyers or general counsels, or that reinstatement is always inappropriate when the relationship is acrimonious or the employee served in a high-level role. The specific circumstances of each case must be considered. Here, it is our judgment that the panel's reinstatement order would have the practical effect of forcing Sands to violate her ethical obligations. Such a result violates the strong public policy of the State of Wisconsin." (footnote omitted)).

- Keller v. Loews Corp., 894 N.Y.S.2d 376, 377 (N.Y. Sup. Ct. 2010) (reversing summary judgment for a former in-house lawyer in a counterclaim by her employer Loews, which alleged improper disclosure of client confidences in the former in-house lawyer's claim against Loews; "Plaintiff alleges religious discrimination in the termination of his employment as in-house attorney with

defendant Loews Corporation. Defendant's counterclaim alleges that plaintiff breached his fiduciary duty to Loews by disclosing confidential information in his complaint. The motion court dismissed the counterclaim on the ground that there is no fiduciary relationship between an employer and an at-will employee. That was error."; "[T]he duty to preserve client confidences and secrets continues even after representation ends. . . . [W]e conclude that an in-house attorney, his status as an at-will employee notwithstanding, owes his employer-client a fiduciary duty. We note that plaintiff also had a contractual duty pursuant to his employment agreement to maintain the confidentiality of confidential materials. Plaintiff failed to establish prima facie that he did not disclose confidential information or communications with Loews. The complaint alleges that plaintiff gave tax advice that was relied on by Loews in deciding not to spin off a subsidiary. However, plaintiff's testimony creates an issue of fact as to whether the information contained in the complaint was based on plaintiff's legal advice to Loews.").

- Jordan v. Sprint Nextel Corp., ARB Case No. 06-105, ALJ Case No. 2006-SOX-041, 2009 DOL Ad. Rev. Bd. LEXIS 100, at *38 (U.S. Dep't of Labor ARB Sept. 30, 2009) (holding that an in-house lawyer may use privileged and confidential communication in pursuing a Sarbanes-Oxley claim; "[W]e affirm the ALJ's holding that Jordan is not precluded from relying on statements or documents covered by the attorney client privilege in pursuit of his SOX whistleblower complaint.").

- San Diego LEO 2008-1 (2008) (holding that in-house lawyers may sue their former employers, but must be careful when disclosing information they acquired while working at their client/employer; creating a matrix of such information, and describing what disclosures the plaintiff in-house lawyers may ethically make; explaining that such in-house lawyers may disclose "employment information" (such as the terms of the employment, salary, etc.) publicly as part of their lawsuit, but may disclose "Legal Services Information" (subject to the attorney-client privilege or the duty of confidentiality) only to their own lawyer, and not publicly; explaining the difference between the attorney-client privilege and the ethics duty of confidentiality; "Important differences between the two bodies of law support this general rule."; "The duty of confidentiality defines obligations the lawyer owes to the client. It prohibits the lawyer from using or disclosing, without client consent, information the lawyer acquires in the course of her work for the client. The privilege is a rule of evidence providing a defense against disclosure that otherwise would be compelled by the rules of some tribunal. It therefore defines the circumstances in which the demands of adjudication trump confidentiality." (footnote omitted); "The duty is broader than the privilege in two ways. The duty applies to more things than the privilege, and it applies in more circumstances than the privilege. The duty applies to information the

lawyer acquires in the course of working for the client. Such information includes but is not limited to confidential client communications for the purpose of securing legal services, which is the scope of the privilege. The duty also applies regardless [of] whether there is a matter pending before some tribunal, which is the only circumstance in which the privilege may be asserted." (footnotes omitted); holding that an in-house lawyer suing a former employer may disclose confidences to her own lawyer, but may reveal privileged information to others only if such disclosure is permitted by law or an exception to the confidentiality rules; "Former in-house attorneys and their employment counsel should approach the question of disclosure with great care. Because Section 6068(e) [confidentiality provision] allows for no disclosures in this context, counsel should presume they are subject to discipline for making such disclosure unless the case law creates an unambiguous exception to the statutory duty. At present, the case law creates qualified exceptions for disclosure to employment counsel of both Employment Information and Legal Services Information. Case law also creates exceptions for public disclosure of Employment Information. Public disclosure of Legal Services Information presumptively subjects the former in-house attorney to discipline unless disclosure is allowed by: (i) an exception to Section 6068(e); (ii) an exception to the attorney-client privilege; or (iii) a trial court order protecting client information from public view.").

- Delaware LEO 2008-3 (9/30/08) (explaining that a city attorney who had sued the City in an employment case may still represent the City, as long as the lawyer is not handling cases similar to his or her lawsuit against the City; "[I]f Attorney's duties include representing the City in age discrimination cases or other areas of labor law that raises issues that significantly overlap with the issues raised in his lawsuit, then there may be a 'significant risk that the representation of [the City] will be materially limited by . . . a personal interest of the lawyer.' The Committee, however, has not been informed that such circumstances exist here. Moreover, the City can and should take steps to ensure that such a set of circumstances does not develop in the future. Attorney is subordinate to more senior City lawyers. Those senior lawyers have the authority to delegate assignments to Attorney and should implement appropriate safeguards to avoid implicating Rule 1.7(a)(2). . . . Also, Attorney and the defendants in the Superior Court action are represented by outside counsel, which should help to ensure that both Attorney's and the defendant's confidences and strategy in the lawsuit are protected."; "[T]he Committee assumes that, as suggested, the City will take appropriate measures to minimize the risk of a conflict, such as avoiding the assignment to Attorney of cases and projects involving the same or similar factual or legal issues raised in his lawsuit.").

- Nesselrotte v. Allegheny Energy, Inc., Civ. A No. 06-01390, 2008 U.S. Dist. LEXIS 55730, at *37-38, *41, *45-46, *47 (W.D. Pa. July 22, 2008) (analyzing a situation in which a former in-house lawyer sued Allegheny Energy after leaving her job with protected documents; criticizing plaintiff for taking protected documents when she left Allegheny Energy; "[T]o the extent Plaintiff asserts that Rule 1.6(c)(4) allows an in-house attorney to copy and remove privileged and/or confidential documents before his or her last day of employment in order to use the same in future litigation against her former employer, the Court finds that such a reading ignores a well-settled aspect of the attorney-client privilege: the privilege belongs to the client, not the attorney. . . . On the contrary, as this Court has stated on numerous occasions, the proper avenue for a former employee (even an attorney) to obtain privileged and/or confidential documents in support of his or her claims is through the discovery process as set forth in the Federal Rules of Civil Procedure, not by self-help."; rejecting the applicability of the self-defense exception; "[T]he Court finds that Kachmar [Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173 (3d 1997)] does not stand for the proposition espoused by Plaintiff, i.e., Rule 1.6(c)(4) trumps the attorney client privilege in causes of action by a former in-house counsel against his or her former employer. "; "In summary, the Court does not foreclose the notion of a former in-house counsel revealing information relating to the representation of a client in a proceeding against a client (and former employer). As noted above, courts in California, Tennessee and Montana have held as much. In support of their respective arguments, Plaintiff only focuses on her right to bring suit under Title VII and related statutes and Defendants only focus on their right of protection from disclosure under the attorney client privilege; however, the Court must weigh both considerations."; "[T]he Court declines to hold that Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct trumps the attorney client privilege in the context of this case, where an attorney employed self help by removing without authorization privileged and confidential documents seemingly in breach of her former employer's Ethics Code and Confidentiality Agreement."; ordering the documents returned to defendant Allegheny Energy).

- Grieco v. Fresenius Med. Care Holdings, Inc., Dkt. No. 2006-00854 BLS2, 2008 Mass. Super. LEXIS 63, at *3, *6-7 (Mass. Super. Ct. Feb. 19, 2008) (addressing privilege issues in connection with a lawsuit by in-house lawyers against their former employer; "One preliminary issue in this case is whether FMC [former employer] may withhold, as privileged, documents which plaintiffs themselves either authored or received while in FMC's employ. That is a different question from whether plaintiffs may use those or other privileged documents at trial, or otherwise disclose them, or the information they contain, in support of their claims against their former employer and client."; pointing to an earlier Massachusetts case that distinguished between

the discovery of privileged documents by a former in-house lawyers and the in-house lawyers' use of those documents; "GTE [GTE Prods. Corp. v. Stewart, 610 N.E.2d 892 (Mass. 1993)] apparently made no claim that its former counsel's possession of GTE's privileged documents was somehow prohibited by the attorney-client privilege. Nevertheless, the court's discussion highlights the distinction between (1) disclosure to a former attorney (through discovery or otherwise) of privileged documents which that attorney had previously authored or received, enabling the attorney to 'identify witnesses to depose and to learn additional facts about the case,' . . . and (2) the attorney's use of those or other privileged documents to prove his or her claims in the case, or any other use which would require disclosure of the documents or privileged information therein."; ultimately concluding that an in-house lawyer suing a former employer can show his or her personal lawyer protected documents).

- Schaefer v. Gen. Elec. Co., Case No. 3:07-CV-0858 (PCD), 2008 U.S. Dist. LEXIS 5552, at *51, *25, *28, *26, *44-45, *50-51 (D. Conn. Jan. 22, 2008) (holding that a former GE in-house lawyer can sue for wrongful termination, and actually act as a class representative; "There is no question that an in-house counsel may reveal client confidences to the extent necessary to bring a wrongful discharge or other employment discrimination claim on her own behalf."; "Nothing in the Model Rules, the Connecticut Rules, or the comments to either set of rules states that the balance struck by Rule 1.6 has anything to do with class actions."; noting that some of the information the former in-house lawyer wanted to disclose might not deserve protection under Rule 1.6; "[G]iven the facts presented in the case thus far, the Court cannot conclude that information obtained either through Ms. Schaefer's participation in the GE Women's Network or through publicly available statistical information falls within Rule 1.6. Information obtained by Ms. Schaefer at the GE Women's Network meetings was not confidential client information obtained in the course of her representation of GE."; "[T]he Court cannot conclude at this time that Ms. Schaefer's serving as class representative for a gender discrimination class action violates any of her ethical duties to GE under the Model Rules. While it is not necessary for the Court to conclude definitively whether Title VII trumps any attorney's ethical obligations under the Rules, there is no question, and it bears repeating, that Ms. Schaefer has the full range of rights of an employee under Title VII. Congress did not exclude in-house attorneys from its definition of an employee under Title VII."; also allowing the former in-house lawyer to retain copies of GE documents; "Schaefer avers that she has retained copies only of documents which reflect her personal performance at GE, and not which reveal confidential client information. . . . Schaefer's right to retain copies of such documents is implicit in her right to make defensive disclosures of protected information in dispute with her client under Model Rule 1.6. See ANN. MODEL R. OF PROF'L

CONDUCT at 107 (6th ed. 2007) (citing Conn. Ethics Op. 05-04 (2005) (lawyer may keep copies of client files after termination of representation even if client asks for all copies)). Accordingly, GE's request that the Court order the return of GE property is denied.").

- Willy v. Administrative Review Bd., 423 F.3d 483, 501 (5th Cir. 2005) (assessing former in-house lawyer's claim against his former employer, alleging that he was subjected to retaliation for trying to stop the company's wrongdoing; rejecting the company's and the Department of Labor's argument "that no rule or case law imposes a per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ").

- Alexander v. Tamdem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. Dist. Ct. App. 2004) (holding that a former company general counsel suing her former employer under whistleblower claim could properly reveal privileged communications to her personal lawyer without causing the personal lawyer's disqualification).

- Meadows v. Kindercare Learning Ctrs., Civ. No. 03-1647-HU, 2004 U.S. Dist. LEXIS 20450 (D. Or. Sept. 29, 2004) (allowing an in-house lawyer to sue her former employer for wrongful discharge because it can proceed without disclosing attorney client privilege).

- O'Brien v. Stolt-Nielson Transp. Group, Ltd., 838 A.2d 1076, 1083-84 (Conn. Super. Ct. 2003) (allowing an in-house lawyer to file a wrongful termination or constructive discharge claim after reviewing the history of such claims; finding "that there is no persuasive rationale for per se barring suits by in-house attorneys for wrongful termination or constructive discharge").

- Spratley v. State Farm Mutual Auto. Ins. Co., 2003 UT 31, ¶ 32 (Utah 2003) (finding that in-house lawyers may file wrongful termination claims, and may disclose the client's confidences "as reasonably necessary to make a claim" against the former client).

- Lewis v. Nationwide Mut. Ins. Co., No. 3:02CV512(RNC), 2003 U.S. Dist. LEXIS 5126 (D. Conn. Mar. 18, 2003) (finding that an insurance company's in-house lawyer whose job was to defend the company's insureds may file a wrongful termination suit claiming that he was improperly fired because he refused to allow the insurance company to interfere with his independent judgment; distinguishing cases involving regular in-house lawyers, because in this situation the insureds rather than the insurance company was the in-house lawyer's client).

- Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 859 (Tenn. 2002) (finding that the trend was in favor of allowing lawsuits by in-house counsel for wrongful discharge "under limited circumstances, to pursue a claim of retaliatory discharge based upon termination in violation of public policy").

- Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 919-20 (Cal. Ct. App. 2001) (holding that under California law, an in-house counsel may sue for wrongful termination, even though the lawyer would have to reveal to his or her lawyer client confidences; "We conclude in-house counsel may disclose ostensible employer-client confidences to her own attorneys to the extent they may be relevant to the preparation and prosecution of her wrongful termination action against her former client-employer."; noting that "[c]ourts in some jurisdictions have concluded it is impossible to meet this challenge and therefore have refused to permit such suits on the ground they pose too great a threat to the attorney-client relationship").

## Best Answer

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

n 1/12

# Public Policy Disagreements Between Lawyers and Their Clients

## Hypothetical 23

You majored in Civil War history in college, and you have maintained your interest in Civil War preservation work. Two months ago, you received an e-mail "alert" from a group dedicated to preserving Civil War battle sites, announcing the creation of an ad hoc group to resist development plans near a historically significant spot. You would like to help the group, but soon discover that your firm is representing the developer. Now you want to carefully assess what steps would be ethically permissible.

May you do the following in connection with the ad hoc group's efforts to stop the development?

**(a)** Represent the ad hoc group in litigation?

**NO**

**(b)** Provide "behind the scenes" advice to the ad hoc group about possible steps it could take to derail the development?

**NO**

**(c)** Lobby on behalf of the ad hoc group with your Congresswoman?

**MAYBE**

**(d)** Take a leadership role in the "ad hoc" group (without acting as its legal advisor)?

**MAYBE**

**(e)** Join the "ad hoc" group and pay a $20 membership fee?

**YES**

**(f)** Sign a petition supporting the "ad hoc" group's efforts?

**YES**

**(g)** Attend a rally supporting the "ad hoc" group?

**YES**

**(h)** If you do not believe that you could represent the developer because of your strong personal beliefs, is your individual disqualification imputed to the whole firm?

**NO**

## Analysis

Lawyers historically have taken on intensely unpopular causes of clients. In fact, some of American history's best-known representations have involved unpopular clients (such as John Adams's representation of the British officers and soldiers in the case arising from the Boston Massacre).

Although public policy disagreements between lawyers and their clients obviously can implicate client relations and business concerns, bars have struggled with determining when such disagreements cross the line into conflicts of interest raising ethical concerns.

In several places, the ABA Model Rules explain what some folk do not seem to understand -- that a lawyer's representation of a client does not mean that the lawyer endorses the client's views. This concept appears in ABA Model Rule 1.2, dealing with the scope of a lawyer's representation.

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

ABA Model Rule 1.2(b). A comment provides a slightly more helpful explanation.

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

ABA Model Rule 1.2 cmt. [5].

The ethics rules deal with this issue in at least one other area. Lawyers are not supposed to turn down court appointments unless (among other things) "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." ABA Model Rule 6.2(c).

The Restatement also acknowledges the issue:

> A conflict under this Section need not be created by a financial interest. Included are interests that might be altruistic, such as an interest in furthering a charity favored by the lawyer, and matters of personal relationship, for example where the opposing party is the lawyer's spouse or a long-time friend or an institution with which the lawyer has a special relationship of loyalty. Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs. . . . A conflict exists if such an interest would materially impair the lawyer's ability to consider alternative courses of action that otherwise might be available to a client, to discuss all relevant aspects of the subject matter of the representation with the client, or otherwise to provide effective representation to the client. In some cases, a conflict between the personal or financial interests of a lawyer and those of a client will be so substantial that client consent will not suffice to remove the disability.

Restatement (Third) of Law Governing Lawyers § 125 cmt. c (2000) (emphasis added).

The Restatement applied this basic principle to a lawyer's public statement about a policy issue.

> The standard of this Section allows consideration in a given situation of the social value of the lawyer's behavior alleged to constitute the conflict. For example, a lawyer's statement about a matter of public importance might conflict with a client's objectives, but the public importance of free expression is a factor to be considered in limiting the possible reach of the relevant conflicts rule . . . .

Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iv) (2000).

The Restatement deals with a less extreme example.

> In general, a lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required. Lawyers usually represent many clients, and professional detachment is one of the qualities a lawyer brings to each client. Moreover, it is a tradition that a lawyer's advocacy for a client should not be construed as an expression of the lawyer's personal views. Resolution of many public questions is benefited when independent legal minds are brought to bear on them. For example, if tax lawyers advocating positions about tax reform were obliged to advocate only positions that would serve the positions of their present clients, the public would lose the objective contributions to policy making of some persons most able to help.

Restatement (Third) of Law Governing Lawyers § 125 cmt. e.

The Restatement then turns to limitations on this general rule. For instance,

> a lawyer may not publicly take a policy position that is adverse to the position of a client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer's representation of the client in the matter.

Id.

In Illustration 5, the Restatement explains that a lawyer representing a large mining company in lobbying relating to strip-mine restoration may not -- absent the client's informed consent -- take a public position supporting strip-mining legislation that the lawyer will be called upon to oppose in representing the client.

> Lawyer currently represents Client, a large mining company with mining operations in Lawyer's state. Lawyer's work for Client includes lobbying before government agencies concerning restoration of strip-mined land. Lawyer has also been a long-time member of Seed, an organization with an interest in preserving the environment. Seed has proposed legislation that would require mining companies to restore strip-mined land to a fertile condition, legislation that Lawyer's work for Client will require Lawyer to oppose. Unless Lawyer obtains Client's informed consent . . ., Lawyer may not personally take a public position supporting the legislation.

Restatement (Third) of Law Governing Lawyers § 125 cmt. e, illus. 5 (2000).

In Illustration 6, the Restatement explains that a lawyer may work with a bar group in seeking to change tax laws on a going-forward basis, even if the lawyer is currently representing a corporation that is taking advantage of the existing tax laws in negotiating with the IRS over prior years.

> Lawyer represents Corporation in negotiating with the Internal Revenue Service to permit Corporation to employ accelerated depreciation methods for machinery purchased in a prior tax year. At the same time, Lawyer believes that the accelerated depreciation laws for manufacturing equipment reflect unwise public policy. Lawyer has been working with a bar-association committee to develop a policy statement against the allowance, and the committee chair has requested Lawyer to testify in favor of the report and its proposal to repeal all such depreciation allowances. Any new legislation, as is true generally of such tax enactments, would apply only for current and future tax years, thus not directly affecting Corporation's matter before the IRS.

> Although the proposed legislation would be against Corporation's economic interests, Lawyer may, without Corporation's consent, continue the representation of Corporation while working to repeal the allowance.

Restatement (Third) of Law Governing Lawyers § 125 cmt. e, illus. 6 (2000).

Bars have also dealt with this issue.

- N.Y. County Laws. Ass'n LEO 744 (10/19/11) ("Rule 6.4 does not require a lawyer to obtain client consent to speak publicly at a law reform forum, notwithstanding that the reform may affect the interests of a client of the lawyer. It is permissible for a lawyer to participate in law reform activities even if the client objects, provided the attorney does not divulge any confidential information. The lawyer must, however, take into consideration and be mindful that conflicts of interest may, in certain circumstances, require the lawyer to cease the client representation, or cease the law reform activity, under Rule 1.7. Rule 6.4 also requires that the lawyer disclose to the law reform organization when a lawyer knows that the client's interests may be materially benefitted by a decision in which the lawyer participates.").

- N.Y. City LEO 1997-3 (1997) ("A lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised."; "[I]t is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy. Of course, the question of whether zealous advocacy may be compromised can arise in numerous situations. A lawyer must exercise sound judgment in determining whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a particular client. In certain cases, while client consent may not be required, it may nevertheless be desirable to give the client an opportunity to terminate the representation before the lawyer openly takes an opposing personal position on the same subject." (footnote omitted); "The rule of imputed disqualification that applies with respect to legal services rendered by different lawyers within the same law firm, see DR 5-105(D), should not automatically extend to a case involving personal views espoused as such by a lawyer in the firm not working on the relevant matter. In any case where there may be a question, it is recommended that the lawyer begin his or her

remarks with a disclaimer to the effect that the views expressed are his or her own. In the Committee's view, the interests of the legal system are best served by encouraging lawyers to speak out about their personal convictions, even if they are not always in harmony with the interest of a client." (footnote omitted)).

There is not much case law dealing with this issue, presumably because business considerations normally deter lawyers from taking public positions that would anger the lawyers' clients.

Predictably, a California case most recently addressed this issue in depth. The trial court entered a judgment against a Reed Smith lawyer who publicly opposed a Beverly Hills real estate development that he had earlier represented in gaining regulatory approval. The appellate court reversed.

- Oasis West Realty, LLC v. Goldman, 106 Cal. Rptr. 3d 539, 544, 548, 549, 550, 551 (Cal. Ct. App. 2010) (reversing a judgment against a former Reed Smith lawyer who represented a real estate developer in connection with a Beverly Hills project, and then publicly opposed the project two years after the representation ended; explaining that "[o]n May 6, 2008 he [Reed Smith partner Kenneth Goldman] addressed the city council, opposing a rule which required individuals seeking signatures on the referendum petition to carry with them the entire EIR and other documents, totaling about 15 pounds. Goldman's statement was that the requirement was unnecessary and unfair 'whether you're for the Hilton or for the Referendum.'"; "On May 12, 2008, he and his wife spent about 90 minutes soliciting signatures on the referendum petition from their neighbors. At 4 or 5 houses, they left a 'dear neighbor' note which they both signed, expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition, and urging the neighbor to do the same."; "But Goldman never undertook a second employment, or developed any other relationship which could create conflicting fiduciary duties. He was not placed in the position of choosing between clients, because there was no second client."; "If, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Professions Code section 6068."; "However, there is no evidence that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he

was basing his opposition on that information. He did not trade on his former representation of Oasis to lend credence to his opposition. Such conduct would imply that he had confidential information and was basing his actions on that information, and would be tantamount to revealing confidential information."; "Our analysis does not end with the rules and the Business and Professions Code. An attorney's duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations."; "[W]e turn again to the facts, and conclude that a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions."; "However, when Goldman asked his neighbors to sign the petition (indeed, when he signed it himself) he unquestionably acted against the interest of his former client, on the issue on which he was retained. Did this breach the duty of loyalty?"; "This is a sweeping statement, and read literally would bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against Measure H. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf."; "Oasis seeks to impose something like a rule against the appearance of impropriety, but California has not adopted such a rule."; explaining that Professor Hazard [reporter for original ABA Model Rules] has called the "appearance of impropriety" standard a "'garbage" standard'" (citation omitted); "We thus see no authority for a rule which would bar an attorney from doing that Goldman did here: signing a petition in opposition to the Hilton project, and asking his neighbors to sign such a petition, when he had once represented the developer concerning the project. To the extent that Oasis asks us to create such a rule, we decline the invitation. We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest."), reversed and superseded by 250 P.3d 1115 (Cal. 2011).

However, the California Supreme Court reversed the appellate court -- thus reinstating the former client's claim against the Reed Smith lawyer.

- Oasis West Realty, LLC v. Goldman, 250 P.3d 1115, 1124 (Cal. 2011) (allowing a former developer client to sue a Reed Smith lawyer who had earlier represented the developer in seeking approval to develop a project in Beverly Hills, and who later solicited signatures opposing the development; noting that the lawyer was prohibited from either disclosing or using the former client's confidential information; "A claim that Goldman [Reed Smith lawyer] used confidential information acquired during his representation of Oasis [former developer client] in active and overt support of a referendum to overturn the city council's approval of the Hilton project, where the council's

> approval of the project was the explicit objective of the prior representation, meets that low standard."; noting that the client hired a lawyer to demand that the Reed Smith lawyer cease his activities, which amounted to recognizable damages).

Significantly, the court focused on the former client's claim that the lawyer had misused confidential information -- rather than on the positional adversity issue.

**(a)-(g)** The activities described in this hypothetical obviously reflect a continuum of adversity, starting with clearly impermissible legal adversity to a current client without its consent, and ending with a fairly minor and unobtrusive involvement in a matter adverse to a client. It is very difficult to draw lines, but the answer at the two extremes seems clear.

**(h)** Under ABA Model Rule 1.10(a), individual lawyer's disqualification is imputed to the whole law firm

> unless . . . the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

ABA Model Rule 1.10(a)(1) (emphasis added).

A comment provides a further explanation.

> The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the

> personal disqualification of the lawyer would be imputed to all others in the firm.

ABA Model Rule 1.10 cmt. [3].[1]

## 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 **MAYBE**; the best answer to **(e)** is **YES**; the best answer to **(f)** is **YES**; the best answer to **(g)** is **YES**; the best answer to **(h)** is **NO**.

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[1] Inexplicably, at least one state has not added this exception to its imputed disqualification rule. Virginia Rule 1.10(a).

# Lawyers' Romantic Relationships with Their Clients

## Hypothetical 24

As a classic type A "workaholic," you have never really set aside enough time for a social life. However, you are attracted to a number of women with whom you deal on a nearly daily basis, and you want to know if there are any ethical impediments to asking them out on dates.

**(a)** May you date a divorced woman you represent on various estate matters?

**YES (PROBABLY)**

**(b)** May you date the in-house lawyer at a company for whom you do a substantial amount of work (she is the source of all of the work)?

**YES (PROBABLY)**

**(c)** May you date a word processor who works at your firm's largest client?

**YES (PROBABLY)**

## Analysis

**(a)-(c)** Personal relationships with clients and client employees are not per se unethical, but create both the possibility of a conflict based on a lawyer's personal interests, and can also be awkward from a client relation standpoint.

For instance, it may be difficult to comply with your duties to favor a corporate client's interests at the expense of a corporate employee with whom you have a romantic relationship. Managers of the corporate clients might also worry that you would reveal confidential information to a corporate employee not otherwise entitled to receive it.

## Best Answer

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

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# Sexual Relationships Between Lawyers and Their Clients

## Hypothetical 25

You are serving on a state bar committee which will recommend changes to your state's ethics rules. Your committee has vigorously debated what rule should apply to sexual relationships between lawyers and their clients.

What rule should govern sexual relationships between lawyers and their clients?

**SEXUAL RELATIONSHIPS ARE PROHIBITED UNLESS THEY PRE-DATE THE ATTORNEY-CLIENT RELATIONSHIP (PROBABLY)**

## Analysis

Bars in many states have discussed this issue, which involves potential conflicts between the lawyers' personal interests and the clients' interests, as well as the strong possibility of lawyers abusing emotionally vulnerable clients (especially in domestic relations matters).

The ABA has addressed this issue on a number of occasions.

In 1992, the ABA took a fairly harsh approach in discussing such relationships, but without adopting a bright line rule.[1]

The current ABA Model Rules adopt a bright line test.

> A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

ABA Model Rule 1.8(j).

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[1] ABA LEO 364 (7/6/92)(sexual relations with clients may violate the Model Rules and lawyers "would be well advised to refrain from such a relationship;" the client's consent to such a relationship "will rarely be sufficient" to eliminate the ethical dangers, and a lawyer whose conduct has been challenged will be called upon to establish that the client consented after full disclosure and was not harmed by the relationship.

In the accompanying comment, the ABA Model Rules describe the inherent risks in such a relationship, and conclude that

> [b]ecause of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client would give adequate informed consent, this Rule prohibits the lawyers from having sexual relations with a client [which begins during the attorney-client relationship] regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

ABA Model Rule 1.8 cmt. [17]. In contrast,

> [s]exual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.

Id. at cmt. [18].

In discussing the role of in-house lawyers, ABA Model Rule another comment explains that

> [w]hen the client is an organization, . . . this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

ABA Model Rule 1.8 cmt. [19].

The prohibition remains as a personal matter only. The provision dealing with sexual relationships between lawyers and clients represents the only part of Rule 1.8 that is not imputed to other lawyers in the firm. ABA Rule 1.8(k).

Interestingly, the Restatement takes a more nuanced approach.

> A lawyer may not . . . enter a sexual relationship with a client when that would undermine the client's case, abuse the client's dependence on the lawyer, or create risk to the lawyer's independent judgment, for example when the lawyer represents the client in divorce proceedings.

Restatement (Third) of Law Governing Lawyers § 16 cmt. e (2000).

State ethics rules take differing positions on this issue.

Those states addressing this issue by rule tend to follow the basic ABA approach -- prohibiting sexual relations between lawyers and their clients unless the relationship pre-dates the attorney-client relationship, and would not prejudice the client. See, e.g., California Rule 3-120; Michigan Rule 1.8(j); Washington State Rule 1.8(k). Some states following the basic ABA Model Rule approach have fine-tuned the limitations.

- Cleveland Metro. Bar Ass'n Ethics & Professionlism Comm. Advisory Op. 2011-1 (2011) ("A lawyer may not commence soliciting or engaging in sexual activity with a lawyer's client during the course of representation without violating Rule 1.8(j) of the Ohio Rules of Professional Conduct. Client consent, even if the client initiated the sexual activity, does not constitute a defense. A lawyer may, if the Rules of Professional Conduct permit, withdraw from the representation **before** soliciting or engaging in sexual activity. Other lawyers in the lawyer's firm may, if they can do so without violating the Rules of Professional Conduct, continue to represent the client."; noting that Ohio prohibits solicitation of sexual activity, unlike the ABA Model Rules).

Some states have experienced an interesting history dealing with this issue. For instance, the Oklahoma Bar adopted a per se prohibition on sexual relationships ("except in a situation involving a spouse") in Oklahoma LEO 308 (12/9/94). A little over three months later, the Oklahoma Bar withdrew that opinion. Several years later, Oklahoma adopted Oklahoma LEO 311 (10/16/98), which indicated that lawyers

initiating a sexual relationship with a client during the attorney-client relationship "will more likely than not" violate the ethics rules.

Not surprisingly, impermissible sexual relationships can involve a nearly endless series of possible scenarios.

- Lawyer Disciplinary Bd. v. Stanton, 695 S.E.2d 901 (W. Va. 2010) (revoking a license of a West Virginia lawyer who had sexual relationships with a former client -- but who had lied to prison authorities by claiming that he represented the former client in a successful effort to meet her in prison for sex).

- Commonwealth v. Stote, 922 N.E.2d 768, 771 n.1, 772-73, 778 (Mass. 2010) (affirming a criminal defendant's motion for a new trial based on his lawyer's failure to advise him that his lawyer was engaged in an "intimate relationship" with the prosecutor; "The affidavits of Walsh [lawyer for criminal defendant Stote] and the ADA [prosecutor] reveal the following facts about the nature of their relationship. The ADA attests in her affidavit that she and Walsh did not live together at any time during their relationship. Walsh similarly attests that they lived separately. The ADA also states that she does not know whether the relationship was 'monogamous.' Although neither affidavit states whether the relationship was sexual, we can safely assume that it was, given that the relationship lasted more than one year, the participants were mature adults, neither of them has denied it, and the ADA's reference to a 'monogamous' relationship implies as much. The ADA further states that Walsh did not bring legal work to her home, did not to her knowledge receive telephone calls at her home regarding legal matters, and did not discuss Stote's case with her or disclose confidential information to her. She states that, while she and Walsh were seeing each other, they did not 'substantively' discuss their 'respective legal concerns' and that their work did not 'overlap in any respect'. Although she was aware that Walsh was working on 'an appellate brief,' she did not know of its contents, and 'even if' she knew the defendant's name 'at that time,' she did not know anything about Stote's case until she read our 2000 opinion, which was issued after the relationship ended. Walsh similarly attests that he did not discuss Stote's case or appeal with the ADA and that he did not disclose any confidential information to her. Shortly after the relationship ended, according to the ADA's affidavit, Walsh began living with another woman who he later married." (footnote omitted); "We conclude that in the circumstances of this case, there was neither an actual conflict of interest nor a potential conflict that resulted in material prejudice in Stote's appeal. We remind members of the bar of their professional obligation under rule 1.7(b) to disclose to their clients any intimate personal relationship that might impair their ability to provide untrammeled and unimpaired assistance

of counsel. See Croken [Commonwealth v. Croken, 717 N.E.2d 272 (Mass. 1999)], supra at 273. Even if an attorney reasonably believes that he or she can continue to represent the client vigorously, the attorney should err on the side of caution by disclosing the relevant facts, which need not include the name of the third person, and asking whether the client consents to the representation. This dispute could well have been avoided if Walsh had simply informed Stote of his relationship with a colleague of the prosecutor who sought affirmance of the conviction. Stote would then have had the opportunity either to give informed consent to the continued representation or to retain different appellate counsel, as Stote attests he would have done. The order denying Stote's second motion for a new trial is affirmed." (footnote omitted)).

- Cincinnati Bar Ass'n v. Schmalz, 914 N.E.2d 1024, 1025 (Ohio 2009) (publicly reprimanding lawyer Anna Schmalz for engaging in improper sexual conduct with an incarcerated individual; "[A]n attorney investigating the defendant's allegations for the trial judge supplied a CD that contained recordings of over 50 hours of telephone calls between the defendant and respondent. The calls had been monitored by the Hamilton County Sheriff's Department with the knowledge of the participants. Among the approximately 110 half-hour recorded conversations between the respondent and her client were explicit descriptions of sexual acts and professions of love between the two. In at least three calls, respondent requested and/or engaged in telephonic sexual activities with her client.").

Some high-powered lawyers have run afoul of these provisions. For instance, in 2000, the Washington Supreme Court suspended for one year the former Washington State Bar president -- who had carried on sexual relationships with six clients while representing them in matrimony matters.[2] More recently, the Oklahoma Bar issued a public reprimand of the Oklahoma Bar Association's General Counsel.[3]

State bars generally deal harshly with lawyers violating these ethics rules.

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[2] In re Halverson, 998 P.2d 833 (Wash. 2000).

[3] State ex rel. Okla. Bar Ass'n v. Murdock, 236 P.3d 107 (Okla. 2010) (issuing a public reprimand of the General Counsel of the Oklahoma Bar Association for sexual misconduct, which involved biting a woman's breast and grabbing her clothing).

- In re Hammond, 56 So. 3d 199, 201-02 (La. 2011) (permanently disbarring a lawyer who arranged for a sixteen year old girl (whom "he identified as his 'assistant'") to perform oral sex on two clients while videotaping the encounter, after explaining that the lawyer "believed he could obtain a reversal of their convictions, resulting in an immediate release from jail, but that he would need samples of their semen in order to do so").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Bowles, 794 N.W.2d 1 (Iowa 2011) (suspending for eighteen months a lawyer who had engaged in sexual misconduct with a client in a courthouse library).

- Iowa Supreme Court Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 765, 766, 766-67 (Iowa 2010) (suspending a lawyer who might have engaged in a sexual relationship with a client; finding evidence of that relationship inadequate to demonstrate an improper relationship, but finding that the lawyer had improperly disclosed information about his client -- even though the information was publicly available at the time; "Factually, there is no doubt that Marzen publicly disclosed Doe's [client] prior history with and litigation involving her former probation officer. Further, there is no factual question that Marzen learned this information through a confidential conversation with his client. Doe also testified that she never consented to Marzen's disclosure. The question thus presented is whether an attorney violates the rules of confidentiality by disclosing information learned through client confidences when that information is also available in the public forum." (footnote omitted); "[T]he rule of confidentiality must apply to all communication between the lawyer and client, even if the information is otherwise available."; "[I]t is not clear from Marzen's statements to the media that he was attempting to mount a defense; rather, it would appear that he was attempting to defame Doe. The ability to defend, moreover, is not absolute. A lawyer can reveal confidential client information only in the appropriate forum and only to the extent necessary to offer protection. While certainly the revelation of Doe's confidential information to the local media was necessary to defend Marzen's bid for county attorney, it was not necessary to defend him against the allegations of this disciplinary proceeding. We have considered all of Marzen's claims and find his conduct violated rule 32:1.6(a).").

- Lawyer Disciplinary Bd. v. Chittum, 689 S.E.2d 811, 815, 816, 817 (W. Va. 2010) (holding that a lawyer who had engaged in "flirtatious" communications with a client that he never met had not violated the prohibition on sexual relations with that client, but finding that the lawyer had engaged in other misconduct; "He was appointed pursuant to a pro bono program and received no fee or reimbursement of expenses. After receiving this appointment, Mr. Chittum initiated a flirtatious long distance telephone and letter writing relationship with Ms. Stevenson. However, Mr. Chittum and Ms. Stevenson

never met each other in person."; "While there was no physical contact between the parties, the Board found that Mr. Chittum attempted to develop a sexual relationship with Ms. Stevenson which constituted a violation of Rules 8.4(a), 8.4(d) and 8.4(g) of the Rules of Professional Conduct."; "Mr. Chittum and Ms. Stevenson never physically met each other. Their relationship existed solely through telephone calls and letters. Mr. Chittum never attempted to physically have sexual intercourse with Ms. Stevenson or touch her in any manner. Mr. Chittum's telephone calls and letters implied the possibility of having a romantic relationship with Ms. Stevenson at some future date. This conduct does not rise to the level of 'sexual relations' as defined by Rule 8.4(g)."; "However, Mr. Chittum's flirtatious remarks were misconduct under Rule 8.4(a), because they were an attempt to establish a sexual relationship with his client. We condemn this conduct and find that Mr. Chittum's behavior was inappropriate and prejudicial to the administration of justice because his client was incarcerated and in a vulnerable position. Under the circumstances, Ms. Stevenson might have felt obligated to respond to Mr. Chittum's flirtatious overtures to ensure that he would fully pursue her interests in the divorce proceeding. We therefore agree with the Board's finding that Mr. Chittum's behavior was also a violation of Rule 8.4(d) of the Rules of Professional Conduct.").

- In re Anonymous Member of S.C. Bar, 699 So. 2d 693, 695 (S.C. 2010) (admonishing a lawyer for engaging in an affair with a client's wife; "The practice of law is a laudable profession that should be held to the highest of standards; practicing law is a privilege. Respondent admits to a serious lapse in judgment in these circumstances, and rightly so. Sexual involvement with the spouse of a current client, while not expressly proscribed by the language of our Rules of Professional Conduct, unquestionably has the propensity to compromise the most sacred of professional relationships: that between an attorney and his or her client. Attorneys who engage in a sexual relationship with their client's spouse do so at their professional peril. Consequently, this Court alerts the bar, in addition to admonishing Respondent, that a sexual relationship with the spouse of a current client is a per se violation of Rule 1.7, as it creates a significant risk that the representation of the client will be limited by the personal interests of the attorney.").

- Attorney Grievance Comm'n of Md. v. Hall, 969 A.2d 953 (Md. 2009) (suspending a lawyer for engaging in a sexual relationship with a client).

- In re Hoffmeyer, 656 S.E.2d 376 (S.C. 2008) (suspending for nine months a lawyer who admitted to having a sexual relationship with a client).

- Disciplinary Counsel v. Sturgeon, 855 N.E.2d 1221, 1223 (Ohio 2006) (disbarring a lawyer for improperly seeking sexual relations with his clients;

noting among other things that the lawyer said to one client: "'[y]ou have great breasts, can I see your tits? If I win your case, can I get a peek at them?'").

- Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath, 713 N.W.2d 682 (Iowa 2006) (suspending for three years a lawyer who had engaged in sexual relationships with clients).

- State ex. rel. Counsel for Discipline v. Hogan, 717 N.W.2d 470 (Neb. 2006) (suspending for 18 months a lawyer who engaged in sexual misconduct, despite the lawyer's claim that he suffered from a "sexual compulsive disorder," and the lawyer's enrollment in "Sexaholics Anonymous" and "Sex Addicts Anonymous" groups).

- Cleveland Bar Ass'n v. Kodish, 852 N.E.2d 160, 169 (Ohio 2006) (indefinitely suspending a lawyer for a number of ethics violations, including a consensual sexual relationship with a corporate client's representative, despite no evidence that the affair "compromised client interest").

- Guiles v. Simser, 804 N.Y.S.2d 904 (N.Y. Sup. Ct. 2005) (finding that a lawyer who had engaged in a consensual sexual relationship could not be sued by the client for malpractice or breach of fiduciary duty).

- In re Disciplinary Proceedings Against Gamino, 707 N.W.2d 132 (Wis. 2005) (suspending for six months a lawyer who had engaged in sexual relationships with two clients).

- State ex rel. Okla. Bar Ass'n v. Downes, 121 P.3d 1058 (Okla. 2005) (suspending for one year a divorce lawyer for engaging in a consensual sexual relationship with a client).

- Bezold v. Kentucky Bar Ass'n, 134 S.W.3d 556 (Ky. 2004) (publicly reprimanding a lawyer who had engaged in a sexual relationship with a client).

- Attorney Grievance Comm'n v. Culver, 849 A.2d 423 (Md. 2004) (disbarring a divorce lawyer for engaging in an adulterous sexual relationship with a client).

- In re Berg, 955 P.2d 1240, 1246, 1247 (Kan. 1998) (disbarring a lawyer for improper sexual relationships with various clients, including a client who suffered from psychological abusive behavior by her husband, alcoholism, drug addiction, and suicidal tendencies; among other things, explaining that Berg had trouble finding one client with whom he had sexual relations; "In March 1996, A.C. lived in a mobile home. Respondent went to her home

early in the morning on March 12, 1996. He went to A.C.'s former employer and inquired about where A.C. lived or worked. He later discovered A.C. lived in a mobile home. He could not find the home, so he went to the elementary school and asked for information about her children." rejecting lawyer's mitigation arguments; "In mitigation, respondent presented a large volume of testimony regarding his reform. He testified that he attends weekly Bible study and accountability groups (Promise Keepers). He attends a Sexaholics Anonymous meeting at least once a week.").

Some states take a less stringent approach.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Monroe, 784 N.W.2d 784, 785 (Iowa 2010) (suspending for thirty days a lawyer who had engaged in a sexual relationship with a client, but finding that the relationship was not prejudicial to the administration of justice; "[W]e reject the board's position that a sexual relationship between attorney and client automatically prejudices the administration of justice, requiring instead that there be proof the relationship actually hampered the proper functioning of the court system.").

- Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 2d 474, 478, 487, 489 (Miss. 2010) (dismissing a claim of a former client against his former lawyer [then president and chief operating officer of the Baker Donelson law firm], who admittedly had an affair with the client's wife; explaining that the affair began with what the lawyer described as "alcohol-related kissing"; concluding that "[n]o material facts have been presented to support that the subject affair was in any way 'related to the representation or arising therefrom.'. . . As no genuine issue of material fact exists on the issue of whether an adulterous affair between Reed and Rebecca constituted a breach of fiduciary duty Reed owed to Sam, this Court concludes that the circuit court erred in denying partial summary judgment to Reed as to Sam's claim of breach of fiduciary duty."; also finding that the lawyer's firm of Baker Donelson was not liable for its lawyer's misconduct, because it was a "frolic").

- Virginia LEO 1853 (12/29/09) (although warning lawyers that initiating a sexual relationship with a client during the course of a representation will almost always be unethical for various reasons, declining to adopt a per se ban on such relationships; "It is apparent that entering into a sexual relationship with a client during the course of representation can seriously harm the client's interests. The numerous ethical obligations of a lawyer to a client are so fundamental to the attorney-client relationship that obtaining the client's purported consent to entering into a sexual relationship with the lawyer will rarely be sufficient to eliminate any potential ethical violation.

> Therefore, it is the opinion of this Committee that a lawyer should refrain from entering into a sexual relationship with a client. In most situations, the client's ability to give the informed consent required by Rule 1.7(b) is overwhelmed by the lawyer's position of power and influence in the relationship and the client's emotional vulnerability.").

As always, some states take a slightly different approach. Interestingly, South Carolina Rule 1.8(m) contains a typographical error.

> A lawyer shall not have sexual relations with a client when the client is in a vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect upon the interests of the client, or when sexual relations might adversely effect [sic] the lawyer's representation of the client.

South Carolina Rule 1.8(m).

The Alaska Bar has held

> that sexual relationships with clients commenced during the course of the representation by either an attorney or the attorney's law firm are unethical [if they adversely affect the lawyer's ability to represent the client or would otherwise hurt the client, create a possibility of a lawyer being a witness, began during an "emotionally charged" matter or are the result of coercion or in exchange for legal services].

Alaska LEO 92-6 (10/30/92). Thus, if one lawyer in the firm involved in such a sexual relationship with any firm client, "no member of the attorney's firm may continue to represent the client . . . . Accordingly, the firm must withdraw."[4]

[4] The Alaska Bar indicated that a sexual relationship pre-dating the commencement of the representation does not violate this rule.

## Best Answer

The best answer to this hypothetical is **SEXUAL RELATIONSHIPS ARE PROHIBITED UNLESS THEY PRE-DATE THE ATTORNEY-CLIENT RELATIONSHIP (PROBABLY)**.

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