

LITIGATION ETHICS: CLAIMS, SETTLEMENTS AND COURTS

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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Frivolous Factual Claims

Hypothetical 1

One of your clients recently purchased an old house, and has had several contractors working on various renovation projects. Your client told you that the contractor working on some roof repairs cut through a water pipe -- causing about \$5,000 worth of damage. That contractor is on shaky ground financially. You know that another unrelated contractor doing plumbing work on the house has substantial assets.

May you file a claim against the plumbing contractor for cutting the pipe?

NO

Analysis

Lawyers clearly cannot file a claim for which there is no conceivable basis. On the other hand, lawyers normally must accept their client's word about the underlying factual context of litigation. Lawyers must investigate the facts before pursuing litigation or advancing a defense, but there are both ethics and cost limitations on that process. Moreover, the adversarial system itself generally uncovers any unsupportable factual allegations and legal arguments. Disciplining lawyers for "pushing the envelope" factually could discourage ultimately meritorious claims.

Both bars (through the ethics rules and the disciplinary process) and courts deal with the issue of frivolous factual claims.

On the ethics front, the old ABA Model Code had essentially a subjective test for determining whether a lawyer was advancing an impermissible frivolous claim.

In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

ABA Model Code of Professional Responsibility, DR 7-102(A)(1) (1980) (emphasis added).

The ABA Model Rules contain a more objective standard.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1. Comment [2] provides some explanation.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 cmt. [2] (emphases added).

The ABA changed these rules as recently as February 2002. In ABA Model Rule 3.1 itself, the change added the phrase "in law and fact" in the first sentence. The Reporter's Explanation Memo indicated that the change did not intend to alter the substance of the rule, but the change certainly made it clear that the standard focuses both on the facts and the law.

Also in February 2002, the ABA added the second sentence in Comment [2], which explains lawyers' prefiling investigation requirement: "What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases

and the applicable law and determine that they can make good faith arguments in support of their clients' positions." The change also deleted part of Comment [2] which prohibited the lawyer from taking steps designed primarily to harass or harm third parties (a topic which is covered in other rules).

The Restatement (Third) of Law Governing Lawyers takes essentially the same approach, but with a more extensive discussion of the standard.

A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

Restatement (Third) of Law Governing Lawyers § 110(1) (2000). Comment b warns against the risk of too readily punishing lawyers for advancing frivolous positions.

Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

Restatement (Third) of Law Governing Lawyers § 110 cmt. b (2000). Thus, the Restatement calls for "tempered" enforcement of the prohibition on filing frivolous claims.

Not surprisingly, bars sometimes sanction lawyers for filing frivolous claims or advancing frivolous defenses. See, e.g., North Carolina LEO 2006-9 (7/21/06) (explaining that a lawyer representing a guardian ad litem may not file a baseless lawsuit, and must either move to withdraw or seek to have the guardian ad litem removed if the guardian ad litem insists on pursuing the matter).

Most situations involving frivolous claims or defenses lead to court sanctions rather than bar discipline. Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 have generated considerable case law about the standards governing lawyers' contentions. See, e.g., Hamilton v. Boise Cascade Express, 519 F.3d 1197 (10th Cir. 2008) (sanctioning a plaintiff's lawyer for mischaracterizing the defendant's position in litigation); Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766 (E.D. Va. 2004) (awarding approximately \$37,000 in fees and sanctions against a plaintiff's lawyer who filed a frivolous employment discrimination claim), aff'd, 124 F. App'x 771 (4th Cir. 2005) (unpublished opinion).

Large law firms are not immune from such punishment.

- United Stars Industries, Inc. v. Plastech Engineered Products, Inc., 525 F.3d 605, 609 (7th Cir. 2008) (upholding \$30,000 in sanctions against Jones Day under Rule 11 and § 1927; noting district court's explanation of defendant's "baseless" counterclaim; "Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an 'in-depth audit' and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an 'internal audit staff' was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.").
- Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH, Civ. A. No. 98-cv-010720-RPM, 2008 U.S. Dist. LEXIS 13483 (D. Colo. Feb. 12, 2008) (criticizing the law firm of McDermott, Will and Emery for taking frivolous positions and finding cost award justified).
- Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 534 F. Supp. 2d 224, 225 (D. Mass. 2008) (awarding \$10,000,000 in attorneys' fees to plaintiffs in a patent infringement case; explaining that the defendants' law firm of Dewey & LeBoeuf acted improperly; "[t]hroughout trial, the defendants demonstrated a failure to accept the claim construction governing this case. In fact, with the exception of their ensnarement argument, their defense to infringement appears to have been wholly based on an attempt to obscure,

evade, or minimize the Federal Circuit's construction of the patent-in-suit (the '678 patent). Even as early as the defendants' opening statements, they essentially urged the jury to adopt an interpretation of the patent claims developed by their experts instead of the construction mandated by the Federal Circuit.").

Thus courts have tried to balance the need to avoid frivolous arguments and the desire to avoid inhibiting meritorious claims.

Courts often explain that lawyers will most often face punishment for continuing to advance arguments once it becomes clear that the arguments have no basis. For instance, in Brunswick v. Statewide Grievance Committee, 931 A.2d 319 (Conn. App. Ct. 2007), the court reprimanded a lawyer for continuing to assert frivolous claims.

It is not that the plaintiff alleged partiality or corruption consistent with § 52-418 in the motion to vacate, but rather that he persisted in that allegation despite having not a scintilla of evidence to support it. For that reason, we agree that the plaintiff lacked a good faith basis to maintain his allegation of evident partiality or corruption on the part of the arbitrators.

Id. at 333 (emphasis added; footnote omitted). The court specifically rejected the lawyer's plea for forgiveness because his client had directed him to keep pursuing the frivolous position.

The plaintiff further testified that his client refused to authorize him to withdraw the allegation. That is no excuse for his continued pursuit of the allegation. The commentary to Rule 1.2(a) of the Rules of Professional Conduct (2002) states in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. When an attorney is aware that a good faith basis is lacking, his duty as a minister of justice every time must trump a client's desire to continue an untenable allegation.

Id. at 334 (emphasis added; footnotes omitted).

Best Answer

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

[M]

Frivolous Legal Claims

Hypothetical 2

You work in a public interest law firm that fights to eliminate the death penalty. You would like to claim that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes. However, the United States Supreme Court recently held that the United States Constitution does not prohibit such executions in all cases.

May you file a lawsuit contending that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes?

YES

Analysis

As difficult as it is for bars and courts to analyze frivolous factual claims, it can be even more complicated to analyze arguably frivolous legal positions. Presumably there is only one unchanging set of facts (although it may take a while to find them), while the law changes.

Restricting legal arguments to those already recognized by courts could have a dramatic effect. The common law expands and contracts gradually, with courts sometimes moving away from precedent or creating new principles as society evolves. If lawyers could be sanctioned for advancing claims that were not already recognized by some judicial decision, lawyers advancing civil rights in the 1950s and 1960s might have lost their licenses.

The ABA Model Rules contain the basic standard.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 (emphases added). Comment [2] specifically mentions the possibility that lawyers might advance legal positions that would actually change existing law.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 cmt. [2] (emphases added).

The Restatement (Third) of Law Governing Lawyers essentially follows the ABA Model Rule approach.

A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

Restatement (Third) of Law Governing Lawyers § 110(1) (2000) (emphasis added).

The Restatement contains a surprisingly frank discussion of the factors lawyers may consider in analyzing whether they can advance a legal position:

A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or

whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d (2000) (emphasis added).

The Restatement's list of factors might surprise some folks, who believe that the law derives from timeless principles rather than from the ebb and flow of political fortunes. The most explicitly practical factor is any "change in the composition of a multi-member court." Lawyers realize that such judicial shifts make a big difference in the law, but nonlawyers might think otherwise.

As it frequently does, the Restatement provides two illustrations to make its point. In the first illustration, the Restatement contrasts an old legal doctrine that has been widely criticized with a recently articulated judicial rule.

The supreme court of a jurisdiction held 10 years ago that only the state legislature could set aside the employment-at-will rule of the state's common law. In a subsequent decision, the same court again referred to the employment-at-will doctrine, stating that "whatever the justice or defects of that rule, we feel presently bound to continue to follow it." In the time since the subsequent decision, the employment-at-will doctrine has been extensively discussed, often critically, in the legal literature, and courts in some jurisdictions have overturned or limited the older decisions. Lawyer now represents an employee at will. Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction. On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous in the absence of reason to believe that there is a substantially possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d, illus. 1 (2000) (emphases added). In this first illustration, the Restatement thus focuses on the amount of criticism leveled at an existing legal doctrine, and the lapse of time since the controlling court dealt with it.

The more extensive the criticism and the older the precedent, the easier it is for a lawyer to ethically challenge legal precedent.

The second illustration describes "well settled" law that has received only minor academic criticism.

Following unsuccessful litigation in a state court, Lawyer, representing the unsuccessful Claimant in the state-court litigation, filed an action in federal court seeking damages under a federal civil-rights statute, 42 U.S.C. § 1983, against the state-court trial judge, alleging that the judge had denied due process to Claimant in rulings made in the state-court action. The complaint was evidently based on the legal position that the doctrine of absolute judicial immunity should not apply to a case in which a judge has made an egregious error. Although some scholars have criticized the rule, the law is and continues to be well settled that absolute judicial immunity under § 1983 extends to such errors and precludes an action such as that asserted by Claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d, illus. 2 (2000) (emphasis added).

Thus, lawyers might be sanctioned for advancing essentially baseless legal claims, but the ethics rules will provide a wide berth if there is any chance that the lawyers can successfully change the law.

This hypothetical comes from the recent debate over states' execution of criminal defendants younger than eighteen.

The United States Supreme Court held as recently as 1989 that states could constitutionally execute minors in certain circumstances. Stanford v. Kentucky, 492 U.S. 361 (1989), overruled in part in Roper v. Simmons, 543 U.S. 551, 574-75 (2005).

In 1993, a minor killed a Missouri woman, and was sentenced to death. The Missouri Supreme Court concluded on its own that "the Supreme Court would today hold such executions [of minors] are prohibited by the Eighth and Fourteenth Amendments." State ex rel. Simmons v. Roper, 112 S.W.3d 397, 400 (Mo. 2003), aff'd, 543 U.S. 551 (2005).

The United States Supreme Court ultimately agreed with the Missouri Supreme Court. Justice Kennedy's majority opinion has received widespread criticism for relying on foreign law in determining that "the evolving standards of decency" now rendered such executions unconstitutional. Roper v. Simmons, 543 U.S. 551 (2005) (5-4 decision).

In a forceful dissent, Justice Scalia criticized the majority opinion.

What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years -- not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," . . . of our national society.

Id. at 608 (Scalia, J., dissenting, joined by Rehnquist, Ch. J. and Thomas, J.).

Justice Scalia specifically criticized the majority for acquiescing in Missouri's cavalier attitude toward the United States Supreme Court's own precedent.

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in Stanford. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." . . . That has been true even where "changes in judicial doctrine' ha[ve] significantly undermined" our prior holding, . . . and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," . . . Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

Id. at 628-29 (emphases added). In the next paragraph, Justice Scalia surmises why the majority did not take the Missouri Supreme Court to task for ignoring its earlier pronouncements.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American

public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years).

Id. at 629 (emphases added).

Thus, at least in the context of federal constitutional law, there may be no legally frivolous claims.

It is not as clear that courts addressing more mundane areas of the law would take the same approach.

Best Answer

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

[M]

Ghostwriting Pleadings

Hypothetical 3

One of your sorority sisters just lost her job, and wants to pursue a wrongful termination claim. Your firm would probably not want you to represent the plaintiff in a case like this, although you do not have any conflicts. You offer to help your sorority sister as much as you can.

Without disclosure to the court and the adversary, may you draft pleadings that your sorority sister can file pro se?

MAYBE

Analysis

Bars' and courts' approach to undisclosed ghostwritten pleadings has evolved over the years. This issue has also reflected divergent approaches by bars applying ethics rules and courts' reaction to pleadings they must address.

ABA Approach

As in other areas, the ABA has reversed course on this issue.

In ABA Informal Op. 1414 (6/6/78), the ABA explained that a pro se litigant who was receiving "active and rather extensive assistance of undisclosed counsel" was engaging in a misrepresentation to the court. The lawyer in that situation helped a pro se litigant "in preparing jury instructions, memoranda of authorities and other documents submitted to the Court." Id. The ABA took a fairly liberal approach to what a lawyer could do in assisting a pro se litigant, but condemned "extensive undisclosed participation."

We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se, or that a lawyer could not, for example, prepare or assist in

the preparation of a pleading for a litigant who is otherwise acting pro se.

Obviously, the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation. Extensive undisclosed participation by a lawyer, however, that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

Id. (emphases added).

In 2007, the ABA totally reversed itself.

In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

ABA LEO 446 (5/5/07).

The ABA rebutted several arguments advanced by those condemning such a practice.

Some ethics committees have raised the concern that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.

Id. (footnote omitted). The ABA even explained that the lawyer involved in such a practice may have a duty to keep it secret.

[W]e do not believe that non-disclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleadings and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

Id. (footnotes omitted).

Bars' Approach

Not surprisingly, state bars' approach to ghostwriting mirrors the ABA reversal -- although some state bars continue to condemn ghostwriting.

Bars traditionally condemned lawyers' undisclosed drafting of pleadings for an unrepresented party to file in court.

- New York City LEO 1987-2 (3/23/87) ("Non-disclosure by a pro se litigant that he is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). Accordingly, we conclude that the inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself beforehand to disclose such assistance to both adverse counsel and the court. Less substantial services, but not including

the drafting of pleadings, would not require disclosure." (emphases added); "Because of the special consideration given pro se litigants by the courts to compensate for their lack of legal representation, the failure of a party who is appearing pro se to reveal that he is in fact receiving advice and help from an attorney may be seriously misleading. He may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected."; "If a lawyer is rendering active and substantial legal assistance, that fact must be disclosed to opposing counsel and to the court. Although what constitutes 'active and substantial legal assistance' will vary with the facts of the case, drafting any pleading falls into that category, except where no more is involved than assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants. Such assistance or the making available of manuals and pleading forms would not ordinarily be deemed "active and substantial legal assistance." (footnote omitted)).

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for pro se clients will be called upon by the court, any disregard by either the attorney or the pro se litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a pro se litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).
- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement. We see nothing ethically improper in the provision of advice

and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a pro se litigant unless it is adequately investigated and can be prepared in good faith." (emphasis added)).

- Kentucky LEO E-343 (1/91) (holding that a lawyer may "limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings"; "On the other hand, the same committees voice concern that the Court and the opponent not be misled as to the extent of the counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Accordingly, the opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by pro se litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleading. It should go without saying that counsel should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the scenes representation. On the 'flip side,' the opponent cannot reasonably demand that counsel providing such limited assistance be compelled to enter an appearance for all purposes. A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.").
- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If *an attorney drafts court papers (other than an*

initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required. In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c). We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined." (emphasis in italics added)).

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").
- Massachusetts LEO 98-1 (1998) (explaining that "significant, ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"; "An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.
- Connecticut Informal Op. 98-5 (1/30/98) ("A lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs. Whether there is misrepresentation in a particular matter is a question of fact. . . . Counsel who prepare and control the content of pleadings, briefs and other documents filed with a court could evade the reach of these Rules by concealing their identities." (emphasis added)).
- Virginia LEO 1803 (3/16/05) (lawyers practicing at a state prison may type up legal documents for inmates without establishing an attorney-client relationship with them, but should make it clear in such situations that the

lawyer is not vouching for the document or otherwise giving legal advice; if the lawyer does anything more than act as a mere typist for an inmate preparing pleadings to be filed in court, the lawyer "must make sure that the inmate does not present himself to the court as having developed the pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

However, a review of state bar opinions shows a steady march toward permitting such undisclosed ghostwritten pleadings as a matter of ethics.

- Illinois LEO 849 (12/83) ("It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding for dissolution of marriage to the preparation of pleadings, without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice to the client's rights.").
- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).
- Alaska LEO 93-1 (5/25/93) ("According to the facts before the Committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance." (emphases added)).
- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client

consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis. Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending. If an attorney, who is not 'of record' in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney. Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim." (emphasis added)).

- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).
- New Jersey LEO 713 (1/28/08) (holding that a lawyer may assist a pro se litigant in "ghostwriting" a pleading if the lawyer is providing "unbundled" legal services as part of a non-profit program "designed to provide legal assistance to people of limited means"; however, such activity would be unethical "where such assistance is a tactic by lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance"; specifically rejecting many other state Bars' opinions that a lawyer providing a certain level of assistance must disclose his role, and instead adopting "an approach which examines all of the circumstances"; "Disclosure is not required if the limited assistance is part of an organized R. 1:21(e) non-profit program designed to provide legal assistance to people of limited means. In contrast,

where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

- Utah LEO 08-01 (4/8/08) ("Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals pro se and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention." (emphasis added)).

Interestingly, one bar seems to have taken the opposite direction.

In Florida LEO 79-7 (1979; revised 6/1/05), the Florida Bar indicated that "[i]t is ethical for an attorney to prepare pleadings without signing as attorney for a party." The Florida Bar explained that

there is no affirmative obligation on any attorney to sign pleadings prepared by him if he is not an attorney of record. It is not uncommon for a lawyer to offer limited services in assisting a party in the drafting of papers while stopping short of representing the party as attorney of record. Under these circumstances, there is no ethical impropriety if the attorney fails to sign the pleadings.

Florida LEO 79-7 (6/1/05). The Florida Bar reconsidered this opinion on February 15, 2000, and again on June 1, 2005, and did not renumber. In the second version of Florida LEO 79-7, the Florida Bar indicated that

[a]ny pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate "Prepared with the Assistance of Counsel." An attorney who drafts pleadings or other filings for a party triggers an

attorney-client relationship with that party even if the attorney does not represent the party as attorney of record.

Florida LEO 79-7 Reconsidered (2/15/00). The Florida Bar explained why it reconsidered its earlier opinion.

County Court Judges who responded to an inquiry from the Committee about Opinion 79-7 expressed concern about pro se litigants who appear before them having received limited assistance from an attorney and having little or no understanding of the contents of pleadings these litigants have filed. Almost unanimously the judges who responded believed that disclosure of professional legal assistance would prove beneficial, at least where the lawyer's assistance goes beyond helping a party fill out a simple standardized form designed for use by pro se litigants. The Committee concurs.

Id.

Court Approach

Courts have usually taken a far more strict view of lawyers ghostwriting pleadings for pro se litigants.

This is not surprising, because courts might feel misled by reading a pleading they think has been filed by a pro se litigant herself, but which really reflects the careful preparation by a skilled lawyer.

In contrast to the bars' evolving trend toward permitting lawyers' involvement in preparing pleadings for a pro se plaintiff, courts' analysis has shown a steady condemnation of such practice.

- Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231, 1232 (D. Colo. 1994) ("It is elementary that pleadings filed pro se are to be interpreted liberally. . . . Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a

litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party."; "Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P."; "I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.").

- Laremont-Lopez v. Southeastern Tidewater Opportunity Project, 968 F. Supp. 1075, 1077-78, 1078, 1079-80, 1080 (E.D. Va. 1997) ("The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding pro se is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers."; "When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation of the Court."; "The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, there is no specific rule which deals with such ghost-writing. Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted."; "This Opinion and Order sets forth this Court's unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.").

- Ricotta v. State, 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper.'"; In the instant case it appears to the Court that Ms. Kelly was involved in drafting seventy-five to one hundred percent of Plaintiff's legal arguments in his oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).
- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and "interferes with the efficient administration of justice. . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and

as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).

- Ostevoll v. Ostevoll, Case No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug.16, 2000) ("Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. . . . We agree. Thus, this Court agrees with the 1st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. . . . Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. . . . We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.").
- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings, . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and

"this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").

- Washington v. Hampton Roads Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 & n.6 (E.D. Va. May 30, 2002) (explaining that pro se plaintiffs are "given more latitude in arguing the appropriate legal standard to the court"; holding that "[g]host-writing is in violation of Rule 11, and if there were evidence of such activity, it would be dealt with appropriately").
- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghostwriting of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghostwriting."; "[G]hostwriting must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").
- In re West, 338 B.R. 906, 914, 915 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with

universal disfavor in the federal courts."; "This Court has been able to Find no authority which condones the practice of ghostwriting by counsel.").

- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghostwriting Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.' . . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and (improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007.").
- Delso v. Trustees for Ret. Plan for Hourly Employees of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally construe pleadings of pro se litigants liberally. . . . Courts often extend the leniency given to pro se litigants in filing their pleadings to other procedural rules which attorneys are required to follow. . . . Liberal treatment for pro se litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to

[D.N.J. Local R. 56.1], and to the review given to stated claims."; "In many of these situations an attorney would not have been given as much latitude by the court. . . . This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires. . . . Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."; "It is clear to the Court that Shapiro's 'informal assistance' of Delso fits the precise description of ghostwriting. The Court has also determined that undisclosed ghostwriting is not permissible under the current form of the RPC in New Jersey. Although the RPC's are restrictive, in that they assume traditional full service representation, all members of the Bar have an obligation to abide by them. In this matter, Shapiro's ghostwriting was not affirmatively disclosed by himself or Delso. Delso's Cross Motion for Summary Judgment, on which Shapiro assisted, was submitted to the Court without any representation that it was drafted, or at least researched, by an attorney. Thus, for the aforementioned reasons the Court finds that undisclosed ghostwriting of submissions to the Court would result in an undue advantage to the purportedly pro se litigant.").

- Anderson v. Duke Energy Corp., Civ. Case No. 3:06cv399, 2007 U.S. Dist. LEXIS 91801, at *2 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical.").
- Kircher v. Charter Township of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007) ("Although attorney Ward may not have drafted the Complaint, it is evident that he provided the Plaintiff with substantial assistance. All three Complaints are similar, and attorney Ward was able to provide Defendants' counsel with the reasoning that motivated Plaintiff to file the pro se Complaint. . . . This shows that he may have spoken with and assisted Plaintiff with his pro se pleading."; "While the Court declines to issue sanctions or show cause attorney Ward, he is forewarned that the Court may do that in the future if he persists in helping Plaintiff file pro se pleadings and papers.").

Thus, courts have uniformly condemned undisclosed lawyer participation in preparing pleadings, while bars have moved toward a more liberal approach.

Best Answer

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

[M]

Filing Claims Subject to an Affirmative Defense

Hypothetical 4

One of your neighbors became quite ill on a Caribbean cruise several years ago. He never filed a claim against the cruise line, but recently has been telling you over the backyard fence that he "was never really the same" after the illness. You finally convince him to explore a possible lawsuit against the cruise line, but discover that the claim would be time-barred under a stringent federal statute. Although that statute also covers claims against the travel agent which booked the cruise, you think that there is some possibility that the lawyer likely to represent the local travel agent would not discover the federal statute.

May you file an action against the local travel agent after the cut-off date under the federal statute?

YES (PROBABLY)

Analysis

This analysis highlights the tension between: (1) the ethics rules' prohibition on filing frivolous claims; and (2) the ethics rules' general requirement that each lawyer must diligently assert available defenses for her client, rather than rely on the other side to alert the lawyer about those defenses.

Lawyers clearly cannot file baseless claims against an adversary, hoping that the adversary defaults or otherwise fails to assert dispositive defenses (such as failure to state a claim). In other words, a lawyer could not file a claim alleging that her client suffered an injury in an automobile accident that never occurred -- hoping that the defendant would not defend the claim.

On the other hand, claims subject to affirmative defenses greatly complicate the analysis. One article explained the nature of affirmative defenses.

The affirmative defense has its origin in the common law plea of confession and avoidance. At the risk of stating the

obvious, it is a matter not within the elements of plaintiff's prima facie case that defeats plaintiff's claim. It differs from a defense in that it does not controvert plaintiff's prima facie case, rather it raises matters outside of plaintiff's claim that, if proven, defeat plaintiff's established prima facie case.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1040-41 (1996-1997) (footnotes omitted).

Thus, the question becomes whether a plaintiff's lawyer may ethically file a claim for which the defendant has a winning affirmative defense. After all, the plaintiff's claim is not frivolous, because it has some basis in fact and in law. However, the plaintiff will lose if the defendant recognizes the affirmative defense.

Interestingly, bars seem to unanimously find that lawyers may file such claims, while courts have struggled with this issue.

Bar Analysis

For several decades, bars have essentially found that a plaintiff's lawyer may ethically file time-barred claims.

- New York LEO 475 (10/14/77) ("Lawsuits predicated upon causes of action which have been extinguished through the passage of time may not properly be instituted. Since the right no longer exists, the institution of an action purportedly based on the existence of that right would violate DR 7-102 (A)(2) which requires that a lawyer not 'knowingly advance a claim . . . that is unwarranted under existing law' or which cannot 'be supported by good faith argument for an extension, modification, or reversal of existing law.' . . . If, as a matter of law, the passage of time merely gives rise to an affirmative defense may that be waived, however, there would be no impropriety in causing suit to be instituted. This is the usual case and the period of limitations does not destroy the right but merely serves to bar the remedy. Indeed, because this is by far the more usual case, in announcing the ethical rule, the authorities have failed to distinguish cases where the period of limitations extinguishes the client's right and they have uniformly held it proper to advance a claim against which the period has run without further

qualification. . . . The ethical rule can thus be easily stated. What problems occur in applying the rule derive from the uncertain state of the law, for it is not always clear whether the passage of time affects the right or merely the remedy." (emphasis added)).

- Virginia LEO 491 (9/3/82) ("It is not improper for an attorney to file suit on an overdue account after the statute of limitations has run since the limitation of action is an affirmative defense which becomes effective only if so raised.").

The ABA dealt with this issue in 1994. In ABA LEO 387, the ABA addressed the issue of a time-barred claim in both the settlement negotiation context and in the litigation context. The ABA had no trouble with permitting the lawyer to proceed in negotiations.

Applying these general [settlement ethics] principles where the lawyer knows that her client's claim may not be susceptible [to] judicial enforcement because the statute of limitations has run, we conclude that the ethics rules do not preclude a lawyer's nonetheless negotiating over the claim without informing the opposing party of this potentially fatal defect. Indeed, the lawyer may not, consistent with her responsibilities to her client, refuse to negotiate or break off negotiations merely because the claim is or becomes time-barred.

ABA LEO 387 (9/26/94) (emphasis added). The ABA thus took the same attitude toward filing a time-barred claim in court.

We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be

characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentations in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either. . . . The result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit; if it constituted the sort of substantive insufficiency in the claim that would result in its being dismissed without any action on the part of the opposing party; or if the circumstances surrounding the time-barred filing indicated bad faith on the part of the filing party. Short of such additional defects, however, and in the absence of any affirmative misstatements or misleading concealment of facts, we do not believe it is unethical for a lawyer to file suit on a time-barred claim.

Id. (emphases added; footnotes omitted).

Since the ABA issued its analysis in 1994, more state bars have taken the same approach.

- Pennsylvania LEO 96-80 (6/24/96) ("Adopting the reasoning of ABA Formal Opinion 94-387, it would be ethically permissible for you to file a claim on behalf of a client which you know or believe to be barred by the statute of limitations 'unless the rules of the jurisdiction preclude it.' It is not entirely clear what the ABA Committee means by the 'rules of the jurisdiction', although that phrase appears to encompass primarily jurisdictional 'defects' in the action which would be grounds for dismissal without regard to any actions taken by the opposing party.").
- North Carolina LEO 2003-13 (1/16/04) ("The question is whether filing a time-barred claim is 'frivolous' under Rule 3.1 of the Rules of Professional Conduct. . . . Filing suit after the limitations period has expired does not affect the validity of the claim, nor does it divest a court from having jurisdiction to hear the matters raised therein. ABA Formal Opinion 94-387, 1001:235, 237 (1994). Instead, the statute of limitations is merely an affirmative defense to an otherwise enforceable claim. *Id.* The defendant must plead the statute of limitations in his answer or it is waived. *Northampton County Drainage Dist. No. 1 v. Bailey*, 92 N.C. App. 68, 373 S.E.2d 560 (1988), *rev'd in part and aff'd in part*, 326 N.C. 742, 392 S.E.2d 352 (1990). In addition, the expiration of the limitations period does not prevent a plaintiff from continuing to negotiate settlement with an opposing party who is unaware of the limitations period. ABA Formal Opinion 94-387

at 236-237. Because a time-barred claim can be enforced by a court if the defense raises no objection, filing suit under these circumstances would not violate the prohibition against an attorney advancing a frivolous claim under Rule 3.1.").

- Oregon LEO 2005-21 (8/05) (holding that a lawyer may "file a complaint against Defendant notwithstanding Lawyer's knowledge of the valid affirmative defense"; "As long as Lawyer has a 'basis in law and fact . . . that is not frivolous,' within the meaning of Oregon RPC 3.1, there is no reason why Lawyer cannot proceed. Frivolous is defined as 'without factual basis or well-grounded legal argument.' . . . Lawyer does not represent Defendant, and it is up to Defendant or Defendant's own counsel to look after Defendant's interests and to discover and assert any available defenses.").

Thus, bars unanimously acknowledge the ethical propriety of lawyers filing time-barred claims, or other claims for which there might be valid affirmative defenses.

Although it might seem unfair for a defendant to suffer some harm because her lawyer overlooks an affirmative defense, one article noted that the very statute of limitations defense itself permits parties to escape liability due to their own or their lawyer's oversight of claims.

An adversarial imbalance occurs because the defendant is allowed to escape adjudication of liability due to the inadvertence of plaintiff in letting the limitations period expire. The defendant gains from an adversarial advantage while the plaintiff is sanctioned if seeking to take advantage of the exact same sort of adversarial "cat and mouse game." If the dispute were truly to be resolved without adversarial gamesmanship, underlying liability and the attendant equities would be the sole focus of the matter. Yet the system remains one of adversaries and removing that nature from one small aspect creates an imbalance.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1051 (1996-1997). The article provides many other examples of seemingly other unfair results based on a lawyer's mistakes.

In most aspects of litigation, opponents profit from an adversary's mistakes and oversights. Averments in pleadings not specifically denied are deemed admitted. Requests to admit not denied within thirty days are deemed admitted. Claims not filed within the applicable limitations period may be dismissed with prejudice.

Id. (footnotes omitted).

This article highlights the basic nature of the adversarial system. Lawyers act as their clients' champions, and in nearly all circumstances may (and should) take advantage of an adversary's oversight or other mistake.

Bars' unanimous approval of lawyers filing time-barred claims reflects their recognition of this basic concept underlying the adversarial system.

Case Law

Interestingly, courts have vigorously debated the propriety (under various rules and statutes -- not ethics principles) of lawyers filing claims that they know are vulnerable to dispositive affirmative defenses.

Perhaps this debate implicates principles other than the type of balancing inherent in the ethics rules. After all, courts might believe that plaintiffs filing such vulnerable claims not only put defendants at risk of liability that they might not deserve (had they hired a competent lawyer), but also use up valuable judicial time and resources. In other words, courts might be focusing as much on their own dockets as on the purity of the adversarial system.

In 1991, the Fourth Circuit issued an opinion that has come to typify judicial criticism of plaintiffs filing a complaint in the face of an obvious dispositive affirmative defense. In Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991), plaintiffs filed a defamation action after Virginia's one-year limitation period had expired. To be sure,

plaintiffs did not drop their claim after defendants raised the statute of limitations issue.

The court explained that "[i]t was not until the district judge later questioned [plaintiff] specifically about the defamation count that [plaintiff] conceded that the statute of limitations is one year on a defamation count." Id. at 1384.

The court harshly condemned plaintiff.

Even had Brubaker dropped the claim as soon as the limitations argument was raised, we would still conclude that a plaintiff cannot avoid Rule 11 sanctions merely because a defense to the claim is an affirmative one. A pleading requirement for an answer is irrelevant to whether a complaint is well grounded in law. Were we to follow plaintiffs' suggestion, we would be permitting future plaintiffs to engage in the kind of "cat and mouse" game that Brubaker engaged in here: alleging a time-barred claim to see whether the defendants would catch this defense, continuing to pursue the claim after a defendant pointed out that it was time-barred, urging the court not to dismiss the claim, and finally conceding without argument to the contrary that the claim was time-barred. . . . Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions.

Id. at 1384-85 (emphases added; footnote omitted). The Fourth Circuit extensively condemned what it called the "cat and mouse game" inherent in filing a time-barred claim.

We note that we can see no logical reason why the "cat and mouse game" would not be extended beyond situations concerning affirmative defenses. A future plaintiff could raise any claim invalid according to existing precedent, hoping that the defendant would be careless and not find that precedent. In a hearing for Rule 11 sanctions, the plaintiff could then claim that it was up to the defendant to argue that the precedent barred the plaintiff's claim. Were we to accept plaintiffs' theory in our case, that future plaintiff would successfully avoid Rule 11 sanctions. Such a result would effectively abolish Rule 11.

Id. at 1384 n.32. The court ultimately upheld Rule 11 sanctions against the plaintiff.

The Fourth Circuit's opinion has received widespread criticism. For instance, noted authors Geoffrey Hazard and W. William Hodes included the following critique in their widely-quoted The Law of Lawyering.

Theoretically, opposing counsel may fail to assert the statute of limitations defense because of incompetence, for example, or because counsel has successfully urged that the client forego the defense on moral or social grounds. Furthermore, a defendant might waive the defense because he wants to achieve vindication in a public forum, or to reassert the allegedly defamatory remarks. . . .

. . . .

In the Brubaker case, however, the Fourth Circuit rejected this line of reasoning, characterizing L's litigating strategy as "a cat and mouse game" in which she would catch the opposition unawares if she could, but would otherwise quickly dismiss the suit in an attempt to avoid sanctions. This approach seems wrong, for it requires the plaintiff's attorney to anticipate defendant's every move. . . . The whole point of an adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, §3.1:204-2, at 558.2 to 558.4 (1996 Supp.) (emphasis added; footnote omitted).

Since the Fourth Circuit's harsh decision in Brubaker, courts have continued to debate the proper judicial reaction to a claim for which there is an affirmative defense.

Some courts follow the Brubaker approach. See, e.g., Gray Diversified Asset Mgmt. v. Canellis, No. CL 2007-15759, 2008 Va. Cir. LEXIS 147, at *11 (Va. Cir. Ct. Oct. 7, 2008) (Thacher, J.) ("The Court finds that either reviewing the Court's file or reviewing the trial transcript would have placed a reasonable and competent attorney on notice that the claims pressed in the instant action are barred by res judicata."; awarding

sanctions of over \$25,000 against a lawyer from the Venable law firm for filing a claim that the court found was barred by res judicata).

Interestingly, a district court within the Fourth Circuit took exactly the opposite approach. In In re Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008), the Eastern District of Virginia Bankruptcy Court addressed several proofs of claim that an assignee of credit card debt filed five years after the statute of limitations had expired. When the debtors noted that the proofs of claim were time-barred, the assignee creditor sought to withdraw the claims. The debtors resisted the motion to withdraw, and sought sanctions for filing "false" or "fraudulent" claims under a bankruptcy rule. Thus, the court dealt with time-barred claims in the context of a bankruptcy rule rather than under Rule 11, the ethics rules or some other prohibition on filing frivolous claims. Surprisingly, the court did not cite Brubaker, despite its holding in this analogous context.

In Varona, the assignee creditor (PRA) stipulated to the procedure that it often followed in bankruptcy cases.

In the ordinary course of business, PRA files proofs of claim in bankruptcy cases across the country. It is not uncommon for PRA to file proofs of claim on accounts that would be beyond the applicable statute of limitations for filing a collection suit. If an objection is filed to such a claim and such objection properly asserts the affirmative defense of the statute of limitations, PRA is willing to withdraw its claim or to allow such objection to be sustained.

Id. at 710 (emphasis added).

The Court first explained that

[i]n Virginia, a debt for which collection action has become barred by the running of a statute of limitations is not extinguished; rather, the bar of the statute operates to prevent enforcement.

Id. at 722. Thus, Virginia recognizes the statute of limitations as an affirmative defense.

Where a party pleads the statute of limitations as a defense, that party has the burden of showing by a preponderance of the evidence that the cause of action arose prior to the statutory period before the action was instituted.

Id. at 723. The Court had no problem with the assignee PRA filing knowingly time-barred proofs of claim.

An examination of Claim Number 1 and Claim Number 9 convinces the Court that these claims are neither false nor fraudulent. The claims facially indicate the circumstances under which they were incurred; there is no attempt to obfuscate the timing of their incurrence so as to mask the potential bar of time. Most importantly, while collection of the claims is arguably time-barred, under Virginia law the debts continue to exist. The bar of the statute of limitations raised by the Varonas in their Claim Objections prevents enforcement of the claims, but the claims are not extinguished. As such, asserting the claims in the bankruptcy of the Varonas does not render the claims either "false" or "fraudulent," and the imposition of sanctions is not appropriate.

Id. at 723-24 (emphases added). The Court likewise seemed untroubled by PRA's admission that it filed time-barred claims in the "ordinary course" of its business, but withdraws the claims (or allows objections to be sustained) whenever a debtor asserts the statute of limitations as an affirmative defense.

Other courts have tried to craft a middle ground position. Even before the Brubaker decision, the Tenth Circuit articulated a standard that analyzed whether the plaintiff could present a "colorable argument" why an obvious affirmative defense did not apply. If so, they could avoid sanctions for filing a claim subject to a dispositive affirmative defense.

We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their

claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. . . . An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable.

White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990) (emphasis added).

Several years later, the Eleventh Circuit took essentially the same approach in

Souran v. Travelers Insurance Co.:

[P]laintiffs need not refrain from filing suit to avoid Rule 11 sanctions simply because they know that defendants will interpose an affirmative defense. Two other circuits have held that the assertion of a claim knowing that it will be barred by an affirmative defense is sanctionable under Rule 11. See Brubaker v. City of Richmond, 943 F.2d 1363, 1383-85 (4th Cir. 1991); White v. General Motors Corp., 908 F.2d 674, 682 (10th Cir. 1990). Here, however, Souran did not know that counts I and II would suffer defeat at the hands of Travelers' fraudulent procurement defense. 'An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation.' White, 908 F.2d at 682. In no way do the facts unequivocally establish that Travelers' affirmative defense of fraudulent procurement would succeed. At most, the facts are inconclusive and present a jury question as to whether Mr. Von Bergen fraudulently procured the policy. In the fact

of such uncertainty, Rule 11 sanctions on counts I and II were not proper.

Souran v. Travelers Ins. Co., 982 F.2d 1497, 1510 (11th Cir. 1993).¹

One article also suggested this type of middle ground.

While laudable as an effort to deter hopeless filings and preserve court and party resources, treating a claim as legally or factually deficient and subject to Rule 11 sanctions because of an affirmative defense that a defendant may or may not assert constitutes a reordering of the burdens of pleading as defined by the underlying substantive law. The goal of deterrence can be better accomplished by judicially imposed sanctions, not for factual or legal deficiency, but rather as a pleading asserted for an improper purpose. When a defense is obvious, that is, when plaintiff has access to all information necessary to assess the merits of the defense that plaintiff knows defendant will assert, there can be no proper reason for filing a claim which has no chance of succeeding and court initiated Rule 11 sanctions should be imposed. Where plaintiff does not know whether the defense will be raised and files the action, sanctions should follow if the plaintiff refuses to immediately dismiss the action once a dispositive affirmative defense is asserted. With this approach, deterrence is accomplished and no one's time is wasted by a plaintiff who refuses to accept the obvious. Most importantly, a rule of procedure is not used to add to the elements of plaintiff's prima facie case, and traditional burdens of pleading are preserved.

¹ Accord Leeds Bldg. Prods., Inc. v. Moore-Handley, Inc. (In re Leeds Bldg. Prods., Inc.), 181 B.R. 1006, 1010, 1011 (Bankr. N.D. Ga. May 10, 1995) ("Affirmative defenses normally are raised after an action is commenced, and the evidence needed to establish the merits of such a defense is sought through the discovery process. To accept the argument Moore-Handley current is asserting, however, would, in effect, require a plaintiff to conduct discovery prior to filing a complaint. Such a requirement contravenes the purpose of notice pleading embodied in the Federal Rules of Civil and Bankruptcy Procedure. Therefore, this Court declines to find a general requirement in Rule 9011 that a plaintiff has to make a prefiling investigation into possible affirmative defenses. Instead, the Court concludes that Rule 9011, and likewise Rule 11, places no prefiling duty upon a plaintiff to conduct an inquiry into possible affirmative defenses, except in those unusual or extreme circumstances where such a defense is obvious and needs no discovery to establish." (emphasis added); "In fact, the Court finds it hard to imagine any preference action in which the ordinary course of business defense would be so obvious as to make a preference complaint a bad faith filing. It was proper in this proceeding for Leeds to first file its complaint and then utilize the discovery process to determine the validity of Moore-Handley's defense. . . . [T]he fact that Moore-Handley notified Leeds that it would assert such a common defense did not make the defense an obvious one."; denying sanctions).

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1063-64 (1996-1997).

The Hazard and Hodes text which criticized Brubaker's extreme position also criticizes the courts taking the other extreme (which allows a responding party to assert essentially any conceivable affirmative defense, regardless of its merits).

However, this objection to the result in Brubaker is itself troublesome, for it has no limiting point and would completely swallow Rule 11: it could justify filing the most bizarre court papers, so long as it remained theoretically possible that the opposition would bungle or waive any objections. The Fourth Circuit may have drawn the line at the wrong place in Brubaker, but its recognition that a line must be drawn is correct.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §3.1:204-2, at 558.4 (1996 Supp.) (emphases added).

These courts' efforts to draw such a fine line create a standard nearly impossible to define with any certainty. In essence, it creates two levels of analysis. First, the litigant asserting a claim would have to establish that the claim was not frivolous under some vaguely defined standard. Second, the party responding to the claim with some affirmative defense would have to establish that the affirmative defense is not frivolous -- under some equally vague standard.

Best Answer

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

[M]

Collaborative Lawyering

Hypothetical 5

One of your business clients just called to ask if you are willing to participate in what seems like an unusual arrangement. Your client is trying to resolve a contractual dispute with one of her customers. Under your client's proposed arrangement, both clients and both lawyers would agree to negotiate a possible resolution of the dispute. If the negotiations fail, both lawyers would agree to withdraw from representing their clients -- and the clients would have to retain new lawyers to litigate. This concept sounds intriguing to you, but you worry that your contractual agreement to withdraw in case of litigation would create an insoluble conflict with your duty of loyalty and diligence -- because you and the other lawyer would have an incentive to recommend settlement even if clients would be better served by litigating.

May you enter into the arrangement your client has proposed?

YES (PROBABLY)

Analysis

This arrangement involves the increasingly common practice of lawyers limiting the scope of their representations.

Traditionally, clients retained lawyers to handle matters to their conclusion. As the legal profession became more specialized, clients tended to hire transactional lawyers to handle business negotiations, and turn to litigators if disputes arose. In some situations, clients hired certain lawyers to seek resolution of a dispute, with the plan to retain other lawyers if litigation ensued. However, all of these selections normally reflected the client's decision. The adversary might well take the same approach, but neither the client nor the lawyer generally agreed with the adversary to limit the lawyer's role in any way.

As part of the increasing menu of options that imaginative lawyers have created, clients and lawyers several years ago began to develop what are called "cooperative law" and "collaborative law" arrangements.

The former arrangement essentially amounts to an agreement among clients to mediate or arbitrate disputes.

However, a collaborative law arrangement takes a dramatically different view than the traditional approach. As described by the Colorado Bar in Colorado LEO 115,

[t]he Collaborative Law model of practice is generally regarded as constituting a fundamental shift in the lawyer's role from an advocate in an adversarial system to an advocate in a collaborative environment where the commitment is to the settlement of a dispute outside the traditional litigation model. Collaborative Law involves the advance agreement entered into by the clients and the lawyers. Importantly, the lawyers execute this Four-Way Agreement as independent parties. The Four-Way Agreement limits the lawyers' participation to the negotiation and facilitation of a settlement without the threat of litigation. If the parties decide to use the court system, they must hire lawyers other than the lawyers who participated in the Collaborative Law process. The lawyers agree to discontinue representing their client if the parties choose to litigate the dispute, which creates a practical incentive to resolve the dispute without the need for litigation. While Collaborative Law has not been universally defined, "[v]irtually all collaborative law leaders and practitioners believe that the disqualification agreement is the irreducible minimum condition for calling a practice collaborative law.

Colorado LEO 115 (2/24/07) (footnotes omitted). Thus, a collaborative law arrangement necessarily depends on the lawyers' agreement to withdraw if negotiations fail. This creates an enormous incentive to settle rather than litigate cases.

States disagree about the ethical permissibility of collaborative law arrangements.

As lawyers began to develop the collaborative lawyering model several years ago, some bars quickly concluded that the ethics rules permitted such limited representations.

For instance, in North Carolina LEO 2002-1, the North Carolina Bar dealt with the following question:

Several lawyers from different law firms would like to start a non-profit organization (the "CFL Organization") to promote the use of a process called "collaborative family law" to facilitate the resolution of domestic through non-adversarial negotiation. The goal of the collaborative family law process is to avoid the negative economic, social, and emotional consequences of protracted litigation by using cooperative negotiation and problem solving. In the "four-way meetings" to negotiate a settlement, each spouse is represented by a lawyer of his or her choice provided the lawyer is trained in and dedicated to the process of collaborative family law. A spouse who wants the CFL Organization to facilitate a collaborative family law process may be represented by a lawyer who is not a member of the organization provided the lawyer is committed to the process. However, it is anticipated that in the majority of cases, both the husband and the wife will be represented by lawyers who are members of the CFL Organization. Each spouse agrees to pay his or her own legal fees. A lawyer participating in the process, including a member of CFL Organization, receives all compensation for legal representation from his or her client.

May a lawyer who is a member of the CFL Organization represent a spouse in a collaborative family law process if another member of the organization represents the other spouse?

North Carolina LEO 2002-1 (4/19/02). The North Carolina Bar answered "yes."

Significantly, the North Carolina Bar also explicitly answered "yes" to the following question:

To further the goal of avoiding litigation, the lawyers must agree to limit their representation of their respective clients

to representation in the collaborative family law process and to withdraw from representation prior to court proceedings. May a lawyer ask a client to agree, in advance, to this limitation on the lawyer's legal services?

Id. (emphasis added).

Several years later, the Kentucky Bar noted the dramatic spread of collaborative law arrangements.

Collaborative law is a relatively new form of alternative dispute resolution, which encourages parties to cooperate in order to reach an agreement, rather than to engage in acrimonious litigation. The collaborative law process has become increasingly popular and the topic has been widely discussed in family law seminars across the country. There are well over a hundred collaborative law groups in more than 25 states from California to New York and Texas has a statute specifically authorizing parties and their lawyers to use collaborative law procedures in divorce proceedings.

Kentucky LEO E-425 (6/05) (footnotes omitted). The Kentucky Bar recognized that collaborative law arrangements are "used primarily in family law cases." The Kentucky Bar ultimately concluded that Kentucky lawyers may enter into such collaborative law arrangements, but provided several warnings.

[L]awyers who engage in the collaborative-type resolution process are reminded that they are still bound by the Rules of Professional Conduct and cannot circumvent those rules through the collaborative agreement. More specifically, the lawyer has a duty of competence and independence, including the duty to evaluate whether the collaborative process will serve the client's best interests. In addition, the lawyer has a duty to adequately inform the client about the process, including the advantages, disadvantages and alternatives, and to obtain the client's informed consent to its use. Where it is contemplated that the lawyer will be prohibited from continued representation, either because the client does make disclosures required by the substantive provisions of the collaborative law agreement or because the parties are unable to reach a settlement, the lawyer must fully advise the client of the limitations on continued

representation and of the consequences of withdrawal. The lawyer also must be prepared to comply with the applicable rules on mandatory withdrawal and confidentiality.

Id.

Later that year, the New Jersey Supreme Court's Advisory Committee on Professional Ethics reached essentially the same conclusion -- allowing New Jersey lawyers to enter into collaborative law arrangements if they reasonably believe that the process will succeed, and if they "disclose the potential risks and consequences of failure of the collaborative law process to the client." New Jersey LEO 699 (12/12/05).

However, the Colorado Bar then reached the opposite conclusion. In Colorado LEO 115, the Colorado Bar concluded that

[i]t is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Committee further concludes that pursuant to Colo. RPC 1.7(c) the client's consent to waive this conflict cannot be validly obtained.

Colorado LEO 115 (2/24/07) (footnote omitted). In essence, the Colorado Bar explained that collaborative law agreements represent a promise by the lawyer to benefit the adversary by agreeing "to impair his or her ability to represent the client." Id.

Furthermore, the Colorado Bar held that the client could not consent to the arrangement because of the inherent conflicts.¹

¹ Colorado LEO 115 (2/24/07) (finding that the practice of what the Bar calls "collaborative law" violates Colorado ethics rules). "The Committee concludes that a client may not consent to this conflict for several reasons. First, in the Collaborative Law context, the possibility that a conflict will materialize is significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict

First, in the Collaborative Law context, the possibility that a conflict will materialize is significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way.

Colorado LEO 115 (2/24/07).

Interestingly, the Colorado Bar held that clients may enter into the same arrangement as long as the lawyers do not participate.

While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any legal purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract.

Id. Not surprisingly, the Colorado Bar permitted Colorado lawyers to enter into "cooperative law" arrangements, which do not include the draconian disqualification provisions.

As it often does, the ABA spoke on the issue shortly after Colorado created a conflict with other states.

inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that 'reasonably should be pursued on behalf of the client,' or at least considered, is foreclosed to the lawyer."; explaining that clients may enter into essentially the same arrangement as long as the lawyers do not participate; "Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.")

In ABA LEO 447, the ABA flatly rejected the Colorado approach, and endorsed the concept of collaborative lawyering. Among other things, the ABA noted that Colorado was the only jurisdiction to have rejected the concept of collaborative lawyering since the concept arose in 1990 (in Minnesota). The ABA could not have been any clearer.

[W]e agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

ABA LEO 447 (8/9/07). The ABA indicated that lawyers may limit the scope of their representations, and that agreeing in advance to withdrawal rather than to litigate was not "per se unreasonable."

Of course, a lawyer contemplating such an arrangement must obtain the client's informed consent.

Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.

Id. (footnote omitted). As the ABA explained it,

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the

collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.

Id. The ABA's endorsement of a collaborative lawyer presumably ends the debate about the ethical propriety of such an arrangement.

Best Answer

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

[M]

Multiple Representations -- Special Rules for Aggregate Settlements

Hypothetical 6

You have built a lucrative practice representing homeowners in lawsuits against pest control companies for negligent termite treatment of new homes. In some cases, you represent incorporated neighborhood associations, and in other situations you represent groups of homeowners who have jointly hired you to pursue their claims. In recent years, you have found that defendants generally like to "wrap up" litigation by paying one lump sum to settle an entire lawsuit. To ease your administrative burden, your standard retainer agreement calls for your clients to agree in advance to decide whether or not to take such a "lump sum" settlement offer by majority vote of the homeowners involved.

- (a) Is such an approach ethical in cases where you represent an incorporated neighborhood association?

YES

- (b) Is such an approach ethical in cases where you represent a group of individual homeowners?

NO

Analysis

(a) If a lawyer represents a corporate entity, the lawyer must follow the directions of the corporation's duly represented board and management. If your corporate client has set up a procedure for deciding whether to accept an offer, you may follow the results of that process.

(b) Most states' ethics rules contain a specific provision covering what are called "aggregate settlements." These are settlements that are contingent on all of the clients accepting the settlement -- each of the lawyer's clients may essentially "veto" the settlement by refusing to accept it.

ABA Rule 1.8(g) prohibits lawyers from entering into such aggregate settlements unless each client approves the settlement, after full disclosure of what all of the other clients are receiving in the settlement.

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

ABA Rule 1.8(g).

The ABA recently provided some explanation of how the aggregate settlement rule works. In ABA LEO 438 (2/10/06), the ABA noted that such settlements are not defined in the Model Rules, but do not include certified class actions or derivative actions.

The ABA's description of the type of arrangements subject to the aggregate settlement rule highlights the vagueness of the concepts and the possible breadth of the rule. For example, aggregate settlements occur "when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas," even if all of the lawyer's clients do not face criminal charges, have the same claims or defenses, or "participate in the matter's resolution." ABA LEO 438 (2/10/06).

Aggregate settlements may arise in connection with a joint representation in the same matter, but "[t]hey also may arise in separate cases" -- as with "claims for breach of warranties against a home builder brought by several home purchasers represented by the same lawyer, even though each claim is filed as a separate law suit and arises with respect to a different home, a different breach, and even a different subdivision." Id.

Similarly, the ABA explained how settlement offers can trigger the aggregate settlement rule. For instance, "a settlement offer may consist of a sum of money offered to or demanded by multiple clients with or without specifying the amount to be paid to or by each client." Id. The aggregate settlement rule can also become an issue when "a claimant makes an offer to settle a claim for damages with two or more defendants," or when "a prosecutor accepts pleas from two or more criminal defendants as part of one agreement." Thus, a lawyer's adversary has the perverse power to trigger the aggregate settlement rule in the way that the adversary frames a settlement offer.

As the ABA explained it, Model Rule 1.8(g) "deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement." Id.

The ABA cited several decisions confirming that lawyers may not enter into agreements "that allow for a settlement based upon a 'majority vote' of the clients" the lawyer represents. The ABA explained that "[b]est practices would include the details of the necessary disclosures in . . . writings signed by the clients." Information required to be disclosed under ABA Model Rule 1.8(g) might be protected by Model Rule 1.6, which requires the clients' consent for disclosure to the other clients. The ABA also explained that

[t]he best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement.

Id. ABA LEO 438 (2/10/06). Lawyers should also advise their clients "of the risk that if the offer or demand requires the consent of all commonly-represented litigants, the

failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand." Id.

State bars generally follow this approach. See, e.g., Virginia LEO 616 (11/13/84) (a lawyer representing several insureds may not arrange an aggregate settlement to which one of the clients objects).

Courts agree that because each client must accept the settlement after full disclosure, this rule prohibits lawyers from having their clients agree in advance to be bound by a "majority vote" of all of the clients at the time they receive a settlement offer. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975) (a lawyer cannot settle a case for multiple plaintiffs by majority vote).

In some situations, there might be some debate about whether a settlement for multiple clients amounts to an "aggregate settlement" governed by the rule. For instance, in Arthurlee v. Tuboscope Vetco International, Inc., 274 S.W. 3d 111 (Tex. App. 2008), petition for review filed, No. 08-0990 (Tex. Nov. 25, 2008), a plaintiff's lawyer represented 176 plaintiffs alleging injury caused by exposure to silica while working for one of the defendants. The lawyer notified all of his clients of an upcoming mediation, and urged all of them to attend the mediation. Eventually the settlement discussion settled on a total figure for all of the plaintiffs.

After several days of fruitless mediation about which factors should be used to value the plaintiffs' claims, they switched gears and decided to talk about a total amount of money needed to resolve all the claims at one time. Appellees' [defendants] attorney agreed that so long as the individual demands did not exceed \$45 million, he would recommend to his clients and their many insurance carriers to settle the claims, but only if 95% of Smith's clients agreed. They signed a Rule 11 agreement memorializing their understanding, although the Rule 11 agreement did not

include the \$45 million figure -- or any sum of money -- for settling Smith's inventory of claims.

274 S.W.3d at 116 (footnote omitted). The plaintiffs' lawyer then sent each of his clients a letter with a calculated amount of that client's settlement using a matrix that the lawyer had devised.

The letters were substantially the same, except for the settlement amounts, which, for the appellants, ranged from \$209,000 to \$662,000, and which were characterized as a "final offer" made by defendants. All but one or two plaintiffs of the 178 or 179 pending claims agreed to settle.

Id. (footnote omitted).

Approximately three years after signing their settlement agreements, several of the plaintiffs later fired their lawyer and hired another lawyer. Among other things, they claimed that their first lawyer had "fraudulently induced them to enter into an impermissible aggregate settlement." Id. at 117. The plaintiffs sought to void their original settlements as improper under Texas's aggregate settlement rule.

In denying plaintiffs' claims, the court held that

[a]n aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.

Id. at 120. The court found that plaintiffs had not been involved in an aggregate settlement governed by the Texas rule.

We find no authority -- and they do not direct us to any -- that proscribes the manner in which negotiations must occur or that requires haggling or horse-trading between the parties. After the mediation, appellants made settlement demands on appellees, based on factors specific to each of their claims, and appellees accepted their demands and paid them. This is the essence of negotiation.

Thus, there were individual negotiations on behalf of appellants. The Rule 11 agreement did not actually settle any case, let alone all of the cases as an aggregate settlement. No amount of money was stated in the Rule 11 agreement, and, indeed, the Rule 11 agreement did not bind the defendants to a lump sum to be paid to the plaintiffs' lawyers and divided among his clients.

Id. at 121. The court also noted that "each appellant's case was settled individually, after a lengthy negotiation process involving individual offers and acceptances. Shank [counsel for defendants] explained that each settlement had to be negotiated individually in order to determine issues of insurance coverage and allocation." Id.

Interestingly, a dissenting judge vehemently disagreed with the majority, and contended that the plaintiff's first lawyer had violated the aggregate settlement rule.

It is undisputed that, in this case, appellants' counsel violated Rule 1.08(f). The plaintiffs' attorneys not only failed to disclose to their clients, including appellants, "the existence and nature of all the claims or pleas" involved in the settlement and "the nature and extent of the participation of each person in the settlement," they also actively misrepresented that the settlement was not an aggregate settlement when it was, that their claims had been individually negotiated when they had not been, and that the number of claimants was smaller than in fact it was. . . . Therefore, appellants' counsel *not only violated Rule 1.08(f) and breached their fiduciary duties to their clients, they also committed fraud.*

Id. at 126-27 (Keyes, J. dissenting) (emphasis in italics added). The dissenter contended that all the settlements were part of a single \$45,000,000 amount discussed during the mediation.

The majority's factual finding that the plaintiffs' claims were individually negotiated is belied by the record, which plainly shows that all claims were negotiated as part of a single global settlement of the claims of all plaintiffs represented by Smith for a fixed sum of money and apportioned according to a matrix agreed upon by counsel for both plaintiffs and

defendants. Its conclusion that a single global settlement of the claims of multiple individual plaintiffs that satisfies these criteria is not an aggregate settlement is contradictory to the definition of an aggregate settlement

Id. at 129. The dissenter also thought that the defendants had participated in the fraud.

[T]he settling defendants withheld the information that each plaintiff's settlement was part of a \$45 million aggregate settlement, and they falsely represented to each plaintiff in documents they drafted that "Defendant's payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits"; that "Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims"; and that "Defendants have not made any aggregate offer and this settlement is not part of any aggregate settlement."

Id. at 130.

Best Answer

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

[M]

Affirmative Statements of Value or Intent

Hypothetical 7

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES (MAYBE)

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

MAYBE

Analysis

Under ABA Model Rule 4.1 and its state counterparts,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

.....

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

ABA Model Rule 4.1 & cmt. [1].

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.¹

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law Whether a

¹ ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

A recent ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$ 200, when, in reality, it is willing to accept as little as \$ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion

as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think \$90,000 will settle this case. Will your client give \$90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

Best Answer

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

[M]

Silence about the Law

Hypothetical 8

You are preparing to begin serious settlement negotiations with a plaintiff's lawyer, and you have several questions about whether you can stay silent in certain circumstances that you expect might arise.

May you remain silent if the plaintiff's lawyer tells you that he realizes that the plaintiff's available damages are capped at \$250,000 by a state statute -- which you know the legislature to have raised just last week to \$500,000?

MAYBE

Analysis

Several authorities have dealt with this issue.

For instance, the Rhode Island Bar has indicated that a lawyer does not have to disclose such changes in the law.

The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law.

. . . [a] lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated.

Rhode Island LEO 94-40 (7/27/94) (emphasis added).

Courts have also dealt with a litigant's silence about the law. To be sure, the courts examining such conduct review a much broader set of considerations than a

bar's more narrow analysis of whether silence in this setting falls short of a lawyer's ethical duty.

The West Virginia Supreme Court invalidated a settlement agreement in a similar situation -- in which plaintiff's lawyer accepted a \$100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide's possible liability.

While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons' attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons' counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal.

Hamilton v. Harper, 404 S.E.2d 540, 542 n.3 (W. Va. 1991). The court found that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct. Id. at 544.

Best Answer

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

[M]

Silence about Facts

Hypothetical 9

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients' cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

- (a) May you remain silent if an adversary demands the full amount of what it understands to be your client's insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

NO

- (b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

MAYBE

- (c) May you remain silent when an adversary makes a \$100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a \$1,000,000 umbrella liability policy?

MAYBE

Analysis

As in other settlement contexts, the analysis begins with ABA Model Rule 4.1.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1.

Comment [1] provides some explanation.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

This hypothetical deals with silence rather than affirmative statements. Not surprisingly, bars and courts often have a very difficult time determining whether a lawyer may ethically remain silent during settlement negotiations.

(a) The issue here is whether a lawyer must correct a client's misrepresentation to an adversary.

A lawyer must correct such misstatements. For instance, an ABA Section of Litigation article explained that a lawyer learning that her client had lied to the other side must correct the client's lie before consummating a settlement. Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, Litigation Ethics (ABA Section of Litig., Ethics & Professionalism Comm.), Summer 2005, 1.

(b) In this scenario, the adversary has investigated your client's insurance coverage on its own, and failed to discover an insurance policy. Neither you nor your client has misstated anything.

Bars and courts have taken differing positions about a lawyer's duty in this setting.

For instance, the New York County Bar has indicated that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure.

The New York County Bar provided its review of lawyers' duties during negotiations.

A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead.

If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction.

N.Y. County Law. Ass'n LEO 731 (9/1/03) (emphases added).

On the other hand, in Pennsylvania LEO 97-107, a settlement agreement was premised on a client's inability to convey a time share by deed. After negotiating the settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the time share by deed. The bar held that the lawyer must disclose the fact that the parties' mutual premise was incorrect.

Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false.

Pennsylvania LEO 97-107 (8/21/97) (emphasis added).

Courts also disagree about what a lawyer must do in this setting.

In Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit reversed a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement). The court first noted that "counsel for Brown [plaintiff] could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct." Id. at 175. The circuit court then criticized the lower court's analysis.

[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. "An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court

does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)."

Id. (emphasis added).

The Sixth Circuit decision noted that the county's lawyer was not certain that the claimant misunderstood the facts.

The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.

Id. at 173. It is unclear whether the court would have reached a different conclusion if the county was certain rather than simply suspicious of the other side's misunderstanding.

On the other hand, at least one court had punished a lawyer who did not disclose the existence of an additional insurance policy when learning that the other side was not aware of its existence.

- State ex rel. Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who "became aware" at a meeting with a hospital that the hospital was unaware of a third liability insurance policy from which it might seek reimbursement for medical expenses that it paid to the lawyer's client; noting that "[r]ather than disclose the third policy, [the lawyer] negotiated for a release of the hospital's lien based upon [the hospital executive's] limited knowledge"; agreeing that the lawyer "had a duty to disclose . . . the material fact of the [insurance] policy").
- Slotkin v. Citizens Cas. Co. of New York, 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a \$1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller

amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

(c) In this scenario, the lawyer reasonably believes that the other side misunderstands the extent of insurance coverage (based on the size of its demand), but does not know for sure that the other side is unaware of the insurance coverage.

One would think that the lawyer's duty in this setting would be somewhat lower than the scenario in which the lawyer knows for sure that the other side is relying on inaccurate factual information.

The New York County Legal Ethics Opinion discussed above apparently would apply the general rule (not requiring disclosure) to a situation in which the adversary's settlement demand was so low that the adversary must not be aware of a large insurance policy.

It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.

N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03).

As explained above, in Brown v. County of Genessee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit noted that the county's lawyer assumed (but did not know for sure) that a claimant's lawyer misunderstood an important fact. The Sixth Circuit did not indicate whether it would have reached a different conclusion in the case had the

county's lawyer known for certain that the claimant's lawyer misunderstood the important fact.

Best Answer

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

[M]

Enforcing Settlement Agreements: General Rule

Hypothetical 10

You recently spent two years litigating a hotly contested case in Washington, D.C. Last week, you attended a private mediation session. After you and the plaintiff's lawyer reached a tentative settlement, the plaintiff's lawyer said that she needed a ten-minute break, and left the meeting for a short time. When the plaintiff's lawyer returned to the meeting, you and she shook hands on what she said was an acceptable settlement. However, you just received a call from the plaintiff's lawyer. She tells you that her client claims not to have given her authority to settle, and therefore refuses to honor the settlement.

May you assure your client that you will be able to enforce the settlement that you reached with the plaintiff's lawyer?

NO

Analysis

This hypothetical comes from a recent Washington, D.C. case (discussed below), and highlights the states' various approaches to lawyers' authority to settle litigation. The issue involves a mix of statutory law, common law agency principles, and ethics rules.¹

In most agency situations, an agent can bind a principal under several circumstances. First, the agent might have actual authority to act on the principal's behalf in entering into a contract. The actual authority can be express (explicitly given by the principal to the agent) or implied (based on dealings between the principal and the agent). Second, the agent might have "apparent" authority to act on the principal's behalf. This "apparent" authority comes from statements or conduct creating a

¹ Several law review articles have outlined the dramatic differences among states' approaches. Jeffrey A. Parness & Austin W. Bartlett, Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority, 78 Or. L. Rev. 1061 (1999); Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543 (1998-1999).

reasonable belief in the other side that the agent can act for and therefore bind the principal.

Judicial and bar analyses represent a spectrum -- from essentially automatically enforcing agreed settlements to essentially ignoring such settlements if the client balks. **First**, some courts follow traditional agency principles in finding that a lawyer can bind her client to a settlement if the lawyer acts with apparent authority. See, e.g., Motley v. Williams, 647 S.E.2d 244, 247 (S.C. Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." Shelton at 184, 439 S.E.2d at 834 (quoting Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct. App. 1984)). This court has held: '[E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.' Arnold at 572, 316 S.E. at 417 (quoting Ex parte Jones, 47 S.C. 393, 397, 25 S.E. 285, 286 (1896))." (emphasis added); (enforcing the settlement).

Second, some courts recognize a presumption in favor of the lawyer's authority, and thus in favor of a settlement's enforceability.

For instance, the Second Circuit has acknowledged that "the decision to settle a case rests with the client," and that "a client does not automatically bestow the authority to settle a case on retained counsel." Pereira v. Sonia Holdings, Ltd. (In re Artha

Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir.1996). The Second Circuit nevertheless recognized a presumption that a lawyer has a client's authority to settle a case.

Nevertheless, because of the unique nature of the attorney-client relationship, and consistent with the public policy favoring settlements, we presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so. In accordance with that presumption, any party challenging an attorney's authority to settle the case under such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority.

Id. (emphasis added). In that case, the Second Circuit held that a Rogers & Wells client had not overcome the presumption that its lawyer possessed authority to settle a case. The court affirmed a bankruptcy court's denial of the client's motion to set aside the settlement.

Many other courts have taken this approach.

- Messer v. Huntington Anesthesia Group, Inc., 664 S.E.2d 751, 759, 760 (W. Va. 2008) ("When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed."; finding that the party challenging the settlement had not overcome the "strong presumption" that the settlement should be enforced).
- Collick v. United States, 552 F. Supp. 2d 349, 353 (E.D.N.Y. 2008) ("[A] party challenging an attorney's settlement authority bears the burden of showing that the attorney lacked authority to settle."; refusing to enforce the settlement agreement).
- Joseph v. Worldwide Flight Services, Inc., No. 03 CV 2470 (NG) (RML), 2007 U.S. Dist. LEXIS 23786, at *21 (E.D.N.Y. Feb. 28, 2007) ("A client who seeks to set aside a settlement entered into by his attorney 'bears the burden of proving by affirmative evidence that the attorney lacked authority.' . . . Thus, in order to set aside the settlement agreement and stipulation of discontinuance, Joseph must show with 'clear evidence,' . . . that Ronai entered into the settlement and stipulation without his consent or approval. This burden of proof is 'not insubstantial.'" (citation omitted); recommending that the court enforce a settlement agreement).

- American Prairie Construction Co. v. Tri-State Financial, LLC, 529 F. Supp. 2d 1061, 1076-77 (D.S.D. 2007) ("While an attorney's authority to settle must be expressly conferred, the existence of the attorney of record's authority to settle in open court is presumed unless rebutted by affirmative evidence that authority is lacking." . . . Clients are held accountable for acts and omissions of their attorneys. . . . The rules for determining whether settlement authority has been given by the client to the attorney are the same as those which govern other principal-agent relationships. . . . The party who denies that the attorney was authorized to enter into the settlement has a heavy burden to prove that authorization was not given. . . . Also, a client's failure to object timely to his or her attorney's action taken without the client's consent may be deemed to be acquiesced by the client."; remanding to the bankruptcy court for an analysis of the settlement agreement's enforceability).
- Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 610 (E.D. Tex. 1998) ("An attorney retained for litigation is presumed to possess express authority to enter into a settlement agreement on behalf of the client. . . . The client bears the burden of rebutting this presumption with clear evidence that the attorney lacked settlement authority."; finding that the client had not overcome that presumption; granting defendants' motion to enforce a settlement agreement).
- Sorensen v. Consolidated Rail Corp., 992 F. Supp. 146, 149 (N.D.N.Y. 1998) (acknowledging that "[o]nly the principal can act to bestow apparent authority upon an agent," and thus an "agent cannot unilaterally obtain this authority"; nevertheless recognizing that "[w]hen the attorney of record enters into a settlement agreement, there is a presumption that the attorney had authority to do so. . . . The party seeking to prove a lack of settlement authority 'bears the burden of proving by affirmative evidence that the attorney lacked authority.'" (citations omitted); finding that the client had not carried its burden of overcoming the presumption granting defendant's motion to enforce an oral settlement agreement).
- HNV Central Riverfront Corp. v. United States, 32 Fed. Cl. 547, 549-50 (Fed. Cl. 1995) ("It is well established that 'an attorney retained for litigation purposes is presumed to possess express authority to enter into a settlement agreement on behalf of the client, and the client bears the burden of rebutting this presumption with affirmative proof that the attorney lacked settlement authority.'" Amin v. Merit Systems Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991) (emphasis added). Thus unless HNV rebuts this presumption with affirmative proof, HNV's attorney is presumed to have had the express authority to settle this case by dismissing it with prejudice. HNV, however, has provided no such proof. In fact, HNV has failed to respond to this motion."; granting defendant's motion to enforce a settlement agreement).

- Shields v. Keystone Cogeneration Systems, Inc., 620 A.2d 1331, 1333-35 (Del. Super. Ct. 1992) ("The applicable principle is that authority given by a client to his attorney to settle a case when exercised by the attorney in accordance with the terms of the authority culminating in settlement of litigation is binding upon the client. . . . This principle applies even though the client attempts to repudiate that authority after settlement has been reached by the attorney. . . . An agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement. . . . The burden is upon the party who challenges the authority of the attorney to overcome the presumption of authority."; approving a stipulation of settlement over clients' objection).

Third, some states apply just the opposite presumption -- requiring the party seeking to enforce the settlement to prove the lawyer's authority (rather than requiring the challenger to establish lack of authority). These courts rely on the ethics rules' allocation of authority.

Under ABA Model Rule 1.2(a), lawyers "shall abide by a client's decision whether to settle a matter." Comment [1] explains that clients and lawyers can allocate the decision-making process between them, but that major decisions "such as whether to settle a civil matter, must . . . be made by the client." ABA Model Rule 1.2 cmt. [1] (emphases added).

Similarly, Restatement (Third) of Law Governing Lawyers § 22 cmt. c (2000) explains that "[t]his Section forbids a lawyer to make a settlement without the client's authorization." That comment warns that "[a] lawyer who does so may be liable to the client or the opposing party . . . and is subject to discipline." Id. The comment then explains that:

The Section allows a client to confer settlement authority on a lawyer, provided that the authorization is revocable before settlement is reached. A client authorization must be expressed by the client or fairly implied from the dealings of lawyer and client. Thus, a client may authorize a lawyer to enter a settlement within a given

range. A client is bound by a settlement reached by such a lawyer before revocation.

Id.

Thus, several states have refused to enforce settlement agreements entered into by a lawyer absent some evidence that the lawyer possessed actual authority to resolve the case.

For instance, in Brewer v. National Railroad Passenger Corp., 649 N.E.2d 1331 (Ill. 1995), the Illinois Supreme Court reversed a lower court's enforcement of a personal injury settlement. The court explained the general Illinois principles.

Turning to the merits, the controlling legal principles are quite settled. The authority of an attorney to represent a client in litigation is separate from and does not involve the authority to compromise or settle the lawsuit. An attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so. . . .

Where a settlement is made out of court and is not made a part of the judgment, the client will not be bound by the agreement without proof of express authority. This authority will not be presumed and the burden of proof rests on the party alleging authority to show that fact. . . . Further, in such a case, opposing counsel is put on notice to ascertain the attorney's authority. If opposing counsel fails to make inquiry or to demand proof of the attorney's authority, opposing counsel deals with the attorney at his or her peril.

Id. at 1333-34 (emphases added). The Illinois Supreme Court noted that the record "contains affirmative uncontradicted evidence that plaintiff did not expressly authorize his attorney to agree that plaintiff would quit his job," and therefore reversed the lower court's enforcement of the settlement. Id. at 1334.

Similarly, in New England Educational Training Service, Inc. v. Silver Street Partnership, 528 A.2d 1117 (Vt. 1987), the court reversed a trial court's decision to enforce a settlement agreement. The court characterized the plaintiff's argument in favor of enforcing the settlement.

Plaintiff's argument is that retention of an attorney with express authority to negotiate a settlement, which defendant's attorney had in this case, combined with an extensive history of negotiations, implies the power to reach a binding agreement. While this Court has never addressed this precise question, other courts have concluded that an attorney does not have implied authority to reach a binding agreement under these circumstances.

Id. at 1119-20. The court rejected plaintiff's argument.

We think that these decisions are specialized applications of the general rule, supported by the weight of the authority, that an attorney has no authority to compromise or settle his client's claim without his client's permission . . . [A]n important distinction must be drawn between an attorney's authority to conduct negotiations and his authority to bind his client to a settlement agreement without express permission. The latter is within the ambit of the subject matter of litigation, which remains at all times within the control of the client, and cannot be implied from authority to conduct negotiations. Accordingly, we hold that retention of an attorney to represent one's interest in a dispute, with instructions to conduct settlement negotiations, without more, does not confer implied authority to reach an agreement binding on a client.

Plaintiff's argument that our holding will undercut the policy in favor of settlement agreements is unpersuasive. First, the incentives for all parties to settle litigation are not affected by our holding today. While our holding will restrict the enforceability of unauthorized agreements against clients, it does not follow that settlement will be discouraged. Rather, the primary effect of this decision will be to "encourage attorneys negotiating settlements to confirm their, or their opponent's, actual extent of authority to bind their respective clients." . . . More importantly, the client's control over settlement decisions is preserved.

Id. at 1120 (emphases added).

Several states take this approach.

- Magallanes v. Illinois Bell Telephone Co., 535 F.3d 582, 584, 585 (7th Cir. 2008) ("Under Illinois law, an attorney has no authority to settle a claim of the client absent the client's express authorization to do so. . . . An attorney's authority to agree to an out-of-court settlement will not be presumed, and the burden of proof rests on the party alleging authority to show that fact."; finding for the second time that a trial court had abused its discretion in enforcing a settlement, and remanding for reinstatement of the case; explaining that "lest there be any lingering doubt as to our intent, this case must proceed to decision on the merits").
- Price v. Bowen, 945 A.2d 367, 368 (Vt. 2008) ("[The Vermont Supreme Court] ha[s] long recognized 'the general rule, supported by the weight of the authority, that an attorney has no authority to . . . settle his client's claim without his client's permission.' . . . A 'settlement is valid only if defendant was found to have granted express authority to . . . settle on those terms.'" (citation omitted); remanding for a hearing "as to the authority of defendant's attorney to enter the disputed settlement").
- Kulchawik v. Durabla Manufacturing Co., 864 N.E.2d 744, 749 (Ill. App. Ct. 2007) ("An attorney who represents a client in litigation has no authority to settle a claim of the client absent the client's express authorization to do so. . . . Where a settlement is made out of court and not made part of the judgment, the client will not be bound by the agreement without proof of express authority. . . . The party alleging authority has the burden of proving that fact. . . . The plaintiffs point to no evidence that Moser expressly authorized Meyer to settle the lawsuits on behalf of Durabla. Meyer had been retained by Durabla's insurance company."; enforcing a settlement agreement).
- BP Products North America, Inc. v. Oakridge at Winegard, Inc., 469 F. Supp. 2d 1128, 1134-35 (M.D. Fla. 2007) ("In Florida, the party seeking to enforce the settlement agreement must establish that counsel for the opposing party was given the clear and unequivocal authority to settle the case by his or her client. See, e.g., Spiegel, 834 So. 2d at 297 (citing Jorgensen v. Grand Union Co., 490 So.2d 214 (Fla. 4th DCA 1986)). 'An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.' Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So. 2d 796 (Fla. 1st DCA 1985). In Murchison v. Grand Cypress Hotel Corporation, [13 F.3d 1483 (11th Cir. 1994)], the Circuit Court considered the following facts in deciding whether a client had given his attorney clear authority to settle the case: 1) whether the client knew his lawyer was in the

process of negotiating a settlement; 2) whether and how many times the client met or spoke with his attorney while settlement negotiations were ongoing; 3) whether the client was present in the courtroom when the settlement was announced in open court; 4) whether the client immediately objected to the settlement; and 5) whether the client was an educated man who could understand the terms of the settlement agreement. See Murchison, 13 F.3d at 1485-86."; enforcing the settlement).

Some states have even adopted statutes specifically indicating that only clients have the power to settle cases, and declining to honor settlements entered into by lawyers without "special authority in writing" from the client. Cook v. Surety Life Ins. Co., 903 P.2d 708, 714 & 717, 715 (Haw. Ct. App. 1995) ("Thus, we hold, that ordinarily, an attorney must have the written authority of the client to settle in order to settle a matter on behalf of a client."; vacating the trial court's enforcement of a settlement).

This approach has faced considerable academic criticism. For instance, a Georgetown Journal of Legal Ethics article has bluntly condemned this approach.

In an attempt to protect the client in the context of the attorney-client relationship, some courts have trod inappropriately upon the rights and expectations of the other party to the contract. The third party's rights and expectations of sanctity of contract deserve no less protection than that afforded by traditional agency law to third parties in general contexts.

Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543, 545 (1998-1999). Later in the article, the author elaborates.

Although the client may not have actually authorized the attorney to enter into a settlement agreement, the third party must be allowed to enforce the agreement against the client if the third party reasonably interprets the client's manifestations as bestowing the authority to settle on the attorney. The wariness expressed by some courts is based

on the desire to protect a client within the attorney-client relationship but the result ignores fairness to the third party. There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs. The third party who has reasonably interpreted the client's manifestations as an indication that the attorney has authority to settle is indeed the innocent, and deserves the protection of the apparent authority doctrine.

Any desire by courts to protect the client from the wrongdoing attorney cannot be furthered at the expense of the third party. The client has other, more appropriate protections. Not only can a wronged client sue his attorney for malpractice, but the client can pursue professional discipline for the attorney, an avenue of recourse unavailable in most other agency settings.

Id. at 586 (emphases added; footnotes omitted). Despite this criticism, many jurisdictions continue to follow this client-centric approach.

Fourth, some courts do not recognize any presumptions, but instead look to such issues as the speed with which a client attempts to repudiate a settlement agreement the client's lawyer entered into without authority.

For instance, a Colorado appellate court explained that

[a]n attorney does not have the authority to compromise and settle the claim of a client without his or her knowledge and consent. . . . Thus, generally, a client is not bound by a settlement agreement made by an attorney when the lawyer has not been granted either express or implied authority. . . .

However, because there is at least one other party involved in a settlement (who, in the absence of further action or proceedings on the claim against it, is entitled to rely on the fact that the case has been resolved), when a client discovers that an attorney has "settled" his claim

without authority, the client must either timely repudiate the settlement and proceed with the lawsuit or ratify the settlement as an acceptable bargain.

Siener v. Zeff, 194 P.3d 467, 471 (Colo. Ct. App. 2008) (refusing to enforce a settlement).

Fifth, some courts follow a different approach if the settlement occurred in a court proceeding or in a court-supervised mediation.

For instance, in Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind. 1998), the court answered a certified question from the United States District Court for the Northern District of Indiana. In explaining a lawyer's authority to settle a case, the court first explained

[a]s a general proposition an attorney's implied authority does not extend to settling the very business that is committed to the attorney's care without the client's consent. The vast majority of United States jurisdictions hold that the retention of an attorney to pursue a claim does not, without more, give the attorney the implied authority to settle or compromise the claim. The rationale for this rule is that an attorney's role as agent by definition does not entitle the attorney to relinquish the client's rights to the subject matter that the attorney was employed to pursue to the client's satisfaction. In Indiana, the rule that retention does not ipso facto enable an attorney to settle a claim has a solid if distant foundation.

Id. at 1302-03 (footnote omitted). The court then recognized the different rule that applied in court.

Although the theoretical underpinnings of this rule are not always fully explained, and on occasion are set forth in terms slightly at variance with standard agency doctrines, these cases uniformly bind the client to an in court agreement by the attorney and remit the client to any recovery that may be available from the attorney.

Id. at 1305 (emphasis added; footnote omitted). Although acknowledging that several states disagree with this approach (including New Hampshire, Kentucky and Mississippi), the court explained that

[t]he cases in Indiana and elsewhere recite the content of this rule, but frequently do not explain the reason for it. Indeed one rarely encounters a rule that is so commonly cited and yet so infrequently explained. When the rationale is stated, it emerges as one of necessity.

Id. at 1306 (emphasis added). The court then explained the reasoning for this rule.

The reason behind this rule stems from the setting of an in court proceeding and the unique role of an attorney-agent in that setting. Proceedings in court transpire before a neutral arbiter in a formal and regulated atmosphere, where those present expect legally sanctioned action or resolution of some kind. A rule that did not enable an attorney to bind a client to in court action would impede the efficiency and finality of courtroom proceedings and permit stop and go disruption of the court's calendar. Of course the attorney is free, and obligated, to disclaim authority if it does not exist. But in the absence of such a disclaimer, an attorney's actions in court are binding on the client. In contrast to court proceedings, when an attorney represents a client out of court, custom does not create an expectation of settlement or compromise without the client's signing off.

Id. The court then expanded the reach of this general rule to ADR proceedings under court rules.

We conclude that a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client's claim. However, retention does confer the inherent power on the attorney to bind the client to an in court proceeding. For purposes of an attorney's inherent power, proceedings that are regulated by the ADR rules in which the parties are directed or agree to appear by settlement authorized representatives are in court proceedings.

Id. at 1309-10.

. . .

This hypothetical comes from a recent District of Columbia Court of Appeals decision.

In Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004), the court addressed a question certified by the District of Columbia Circuit:

"Under District of Columbia law, is a client bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms."

Id. at 592. The court explained the factual background of the settlement, and specifically noted that the plaintiff did not attend the settlement conference. The court also explained that after plaintiff's lawyer reached a deal with the defendant's lawyer, he "left the hearing room with cell phone in hand, apparently to call [the plaintiff]. When he returned, the attorneys 'shook hands' on the deal and later reduced it to writing." Id.

The court answered the certified question in the negative.

These ethical principles are key to the issue before us, because they not only govern the attorney-client relationship, they inform the reasonable beliefs of any opposing party involved in litigation in the District of Columbia, as well as the reasonable beliefs of the opposing party's counsel, whose practice is itself subject to those ethical constraints. It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties -- especially when represented by counsel, as here -- must bear the risk of unreasonable

expectations about an attorney's ability to settle a case on the client's behalf. . . .

Applying these principles, we conclude that the two client manifestations contained in the certified question -- sending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf -- were insufficient to permit a reasonable belief by the District that Harrison [plaintiff's lawyer] had been delegated authority to conclude the settlement. Some additional manifestation by Makins [plaintiff] was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have.

Id. at 595-96.

Best Answer

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

[M]

Retainer Agreements Giving Lawyers Authority to Settle

Hypothetical 11

Having been "burned" once by a client who reneged on a settlement agreement that you thought the client had authorized, you recently insisted that a client sign a retainer agreement with the following provision:

"The undersigned client further agrees that the said attorney shall have full power and authority to settle, compromise, or take such action as he might deem proper for the best interest of the client, and the client does hereby appoint the said attorney as attorney-in-fact, with full power to execute any and all instruments and documents in behalf or in the name of said client, which are necessary to settle or make other disposition of said matter, including endorsement of checks or drafts received as proceeds of recovery."

Relying on this provision, you recently settled a personal injury case for your client. However, the client repudiated the settlement.

Will your client be bound by the settlement?

NO (PROBABLY)

Analysis

Several courts have dealt with retainer agreements which purport to give a lawyer full authority to settle cases.

Some courts honor such provisions. For instance, in Beverly v. Chandler, 564 So. 2d 922 (Ala. 1990), the Alabama Supreme Court affirmed a trial court's enforcement of a settlement agreement entered into by a lawyer pursuant to such a provision. The court first pointed to an Alabama statute emphasizing lawyers' power to settle cases.

"Section 34-3-21, Code of Alabama 1975, as amended, vests in an attorney authority to bind his or her client in all matters that relate to the cause, including the right to settle all questions involved in the case. Such agreements are not

only authorized, but encouraged, to promote justice and fair dealing and to terminate properly or prevent litigation."

Id. at 923 (citation omitted). The court specifically rejected the client's argument that the retainer agreement was "void as an illegal contract against public policy." Id. at 924.

In this case, the contract entered into between Mary Beverly and her attorneys expressly authorized them to settle or resolve her case. The authority given them was clear and unequivocal, with no limitations or restrictions expressly placed upon the power to compromise or settle. Furthermore, the record is devoid of any evidence to indicate that Mary Beverly ever revoked this express grant of authority to her attorneys.

Id.

However, some authorities take a dramatically different approach. For instance, the Restatement (Third) of Law Governing Lawyers

[p]rohibits an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid.

Restatement (Third) of Law Governing Lawyers § 22 cmt. c (2000) (emphasis added).

This hypothetical comes from In re Lewis, 463 S.E.2d 862 (Ga. 1995). The Supreme Court pointed to a Georgia Disciplinary Standard stating that lawyers shall not "settle a legal proceeding or claim without obtaining proper authorization from his client." Id. at 863.

As part of this court's duty to regulate the practice of law in the public's interest, we interpret Standard 45 as precluding Lewis [lawyer] from settling Uselton's [client's] claim without consulting her about the \$22,500 settlement offer and obtaining her consent to accept it. A client who enters into a contingent fee contract with an attorney cannot relinquish the right to decide whether to accept a settlement offer. To allow a client to waive that right by general contract creates a conflict of interest that violates an attorney's fiduciary obligations to a client.

Id. The court upheld the state disciplinary board's 18-month suspension of the lawyer.

Best Answer

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

[M]

Disclosing Unfavorable Facts

Hypothetical 12

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

- (a) Must your partner disclose her client's criminal conviction for fraud and perjury?

NO (PROBABLY)

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

- (b) Must your partner disclose the earlier judgment entered against your client?

YES

Analysis

Lawyers' duties to disclose unfavorable facts vary depending on the type of proceeding -- in a dichotomy that highlights the essential nature of the adversarial system.

- (a) In a typical adversarial proceeding, the ethics rules prohibit a lawyer's false statement of fact, or silence in the face of someone else's false statement of material fact.

A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of

material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February 2002), the prohibition only precluded lawyers' false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [o]r engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Other rules involving arguably deceptive trial conduct tend to focus on lawyers' presentations of evidence rather than lawyers' own statements to the court. See, e.g., ABA Model Rule 3.3(a)(3) (prohibiting lawyers from knowingly offering evidence that the lawyer "knows to be false").

Although some situations involve the courtroom setting, many cases discussing lawyers' false statements arise in the deposition setting. Not surprisingly, courts consider statements at a deposition to be "to a tribunal" for purposes of the ethics rules -- both because every state's rules of civil procedure essentially analogize the deposition setting to a trial setting, and because deposition testimony frequently will be read in court at a later trial.

The more difficult situations involve a lawyer's silence rather than affirmative misstatements.

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other side to facts that might assist its case.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that

the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).
- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving courts sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

(b) Interestingly, the ethics rules are quite different in ex parte proceedings.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d). A comment to ABA Model Rule 3.3 explains the basis for this important difference.

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.

To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully

advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

[a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

[A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Best Answer

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

[N]

Disclosing Directly Adverse Law: General Rules

Hypothetical 13

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

- (a) A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES

- (b) A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES (PROBABLY)

- (c) Unfavorable dicta in a decision from your state's supreme court?

NO (PROBABLY)

- (d) A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

NO (PROBABLY)

Analysis

Introduction

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes,

weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.¹

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

¹ Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's County, 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. County of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

. . . .

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.

Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the

constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)² (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal

² ABA Model Code of Professional Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

[D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

[T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."

....

While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

In representing a client in a matter before a tribunal, a lawyer may not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

"Legal authority" includes case-law precedents as well as statutes, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to

draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. cmt. c, illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach. However, at least one state (Virginia) applies a wildly different standard.

A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, No. 2:99-cv-01707-RJC, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in

April, 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." . . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.

. . . .

In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.

. . . This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the

decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

(a) Both the ABA Model Rules and the case law require disclosure of directly controlling adverse authority.

(b) Some lawyers confuse the meaning of the term "controlling" in ABA Model Rule 3.3(a)(2).

A lawyer's disclosure duty includes more than "controlling" decisional or other law. ABA Model Rule 3.3(a)(2) requires disclosure of "legal authority in the controlling jurisdiction" (emphasis added). Thus, the term "controlling" applies to the jurisdiction, not to the decisional or other law. This means that any directly adverse law issued by a court or adopted by the legislature, promulgated by an agency, etc. must be disclosed -- if it comes from the controlling jurisdiction. Tyler v. State, 47 P.3d 1095, 1111 (Alaska Ct. App. 2001) ("'Directly adverse' authority encompass[es] more than 'controlling' authority.").

Presumably, the "controlling jurisdiction" could be another state, if the forum's choice of law principles would look to that other state for the controlling law.

(c) Although ABA Model Rule 3.3(a)(2) does not define the term "legal authority," the Restatement indicates that

[i]n most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers §111 cmt. c (2000) (emphasis added).

However, as with other issues involving the duty of disclosure, some courts require far more than the ethics rules require.

For instance, the Federal Circuit affirmed the United States Court of International Trade's reprimand of a Department of Justice lawyer for "misquoting and failing to quote fully from two judicial opinions." Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1347 (Fed. Cir. 2003). In that case, the DOJ lawyer had omitted several sentences from decisions she quoted. The Federal Circuit found that the lawyer's omission provided a misleading view of the decisions. In addition,

she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face portions of the quotation from McAllister in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

Id. at 1349. Thus, the DOJ lawyer had included "emphasis added" following her quotation from one case, but had not done so following her quotation from a dissent by Supreme Court Justice Clarence Thomas.

The Federal Circuit also rejected the DOJ lawyer's argument that an early United States Supreme Court statement was dictum and therefore not covered by her disclosure obligation -- noting that a 1960 Second Circuit case and Justice Thomas's dissent "believed that the statement was sufficiently important to quote it . . . and to cite it." Id. at 1356.

(d) On its face, ABA Model Rule 3.3(a)(2) does not require disclosure of directly adverse law from another state -- unless that state supplies the controlling law in the case.

However, as explained in the Introduction, some courts ignore the ABA Model Rules and the Restatement, and instead essentially revert to the 1949 ABA legal ethics opinion that required lawyers to disclose law "which would reasonably be considered important by the judge sitting on the case." ABA LEO 280 (6/18/49).

Best Answer

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

[N]

Disclosing Unpublished Case Law

Hypothetical 14

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

- (a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES (PROBABLY)

- (b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

NO (PROBABLY)

Analysis

(a)-(b) The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a

requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Restatement (Third) of Law Governing Lawyers §111 Reporter's Note cmt. d (2000)

(emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions, the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 189-90 (2006/2007)

(emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.

In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 39 (2005).

One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

Into the early 1980s, federal courts of appeals were publishing nearly 90% of their opinions. However, by the mid-1980s, the publication rates for federal court of appeals decisions changed dramatically. By 1985, almost 60% of all federal court of appeals decisions were unpublished. Today [2007], more than 80% of all federal court of appeals decisions are unpublished.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 192-93 (2006/2007) (emphases added; footnotes omitted).

As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

[i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not

surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

[T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such an opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

Kirt Shulberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after Anastasoff. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

- (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
- (2) Permit citation to relevant unpublished opinions.

See Letter from Robert D. Evans, Director, ABA Govtl. Affairs Office, to Howard Coble, Chairman, Subcomm. on Courts, Internet & Intellectual Prop., U.S. House of Representatives (July 12, 2002).

The Anastasoff opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course,

this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).
- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).
- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).
- States (25 as of that time) prohibiting citation of any unpublished opinion.
- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach.

As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).

This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.

Dione C. Greene, The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule", 81 Ind. L.J. 1503, 1503-04 (Fall 2005) (footnotes omitted).

New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions

(92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. *Id.* . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

Aaron S. Bayer, [Unpublished Appellate Decisions Are Still Commonplace](#), The National Law Journal, Aug. 24, 2009.

State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court

need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it

will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?

Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to

disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.

Brundage v. Estate of Carambio, 951 A.2d 947, 956-57 (N.J. 2008) (emphasis added).

In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

[I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.

- Lifschitz v. George, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 28, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts." (internal citation omitted); upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

Best Answer

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

Judges' Disqualification Based on Personal Relationships with Litigants

Hypothetical 15

Over the years, you have found that one of the most enjoyable aspects of practicing law is the wide circle of friends with whom you enjoy spending leisure time. You have just been offered a judgeship, and you wonder to what extent judges can continue to socialize with litigants.

If you become a judge, may you:

- (a) Attend a church picnic with the defendant in a car accident case you are hearing?

YES

- (b) Play golf with the plaintiff in a commercial litigation matter, whom you have known for twenty-five years?

YES

- (c) Go hunting with a government official (such as the country's Vice President) who has been sued in his official (rather than personal) capacity in a case that will come before your court?

YES

Analysis

(a)-(b) Courts and bars by definition cannot establish per se rules governing situations in which a judge's friend appears as a litigant.

Every judicial code tries to balance: (1) the desirability of judges' involvement in their communities; and (2) the need to assure both the reality and perception of judges' evenhandedness and independence. Judges cannot lead a monastic life, but must

never appear to favor their friends, engage in discriminatory behavior or use their prestige to gain some improper benefit.

Like its predecessor, the ABA Model Judicial Code explains the benefits of judicial involvement in community affairs.

Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

ABA Model Code of Judicial Conduct, Rule 3.1 cmt. [2] (2007). For this reason, the ABA Model Judicial Code does not just allow judges to participate in community matters -- it encourages such involvement.

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in education, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

ABA Model Code of Judicial Conduct, Rule 3.1 cmt. [1] (2007). Accord Code of Conduct for United States Judges, Canon 4 (2009).¹

¹ Code of Conduct for United States Judges, Canon 4 Commentary (2009) ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.").

Given the official encouragement of involvement in community matters, judges obviously will develop personal relationships with members of the community. Of course, judges also bring with them to the bench any previous personal relationships.

Therefore, judges' ability to hear cases involving friends who are litigants must be judged under the most general principle.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). The judicial code governing federal judges takes the same basic approach.

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

Code of Conduct for United States Judges, Canon 3C(1) (2009).

Every judicial ethics code has essentially the same provision. Judges themselves must determine if they can hear a case in which one of their friends is involved. Most judges would decline to hear a case in which their best, life-long friend has been accused of murder, but undoubtedly would hear a case in which a casual acquaintance from an earlier bar association involvement appears as a defendant before the judge in a minor matter.

Most attempts to disqualify judges based on such relationships fail.

(c) This question is based on an incident involving Justice Scalia -- who faced criticism for having traveled with Vice President Cheney on a hunting trip to Texas despite the pendency before the Supreme Court of a case in which Vice President Cheney was being sued in his official capacity.

Although the judicial codes do not apply to Supreme Court justices, Justice Scalia issued a lengthy explanation of why he was not prohibited from participating in a decision about whether to grant certiorari in that case. In denying the Sierra Club's motion to recuse, Justice Scalia handled the issue with his typical bluntness.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which he is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

Cheney v. United States Dist. Court, 541 U.S. 913, 928-29 (2004).

Best Answer

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

[N]

Judges' Disqualification Based on Personal Relationships with Lawyers

Hypothetical 16

Having just been appointed as a local judge, you need to make some decisions about cases which have been assigned to you.

- (a) May you hear a case in which one of the litigant's lawyers is your best friend?

MAYBE

- (b) May you hear a case in which one of the litigant's lawyers is your son-in-law?

NO (WITHOUT CONSENT)

- (c) May you hear a case in which one of the litigant's lawyers is your brother-in-law?

MAYBE

- (d) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is a partner?

NO (PROBABLY) (WITHOUT CONSENT)

- (e) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is an associate?

MAYBE

Analysis

Because in nearly every situation judges are drawn from the legal community in which they have practiced, they frequently handle matters in which current or former professional colleagues and friends represent litigants.

As with a judge's personal relationships with litigants, the bottom-line rule requires a judge to recuse himself or herself "in any proceeding in which the judge's

impartiality[] might reasonably be questioned." ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). Accord Code of Conduct for United States Judges, Canon 3(C)(1) (2009).

(a) Depending on the length and intensity of the friendship (and the nature of the case), a judge's personal friendship with a lawyer might require the judge's recusal. In most situations, such a personal friendship would not require the judge's recusal.¹

Another option is for the judge to disclose the friendship, and essentially give any litigant a "veto power" over the judge's participation. The ABA Model Judicial Code provision describing this process does not find it effective if the judge's "bias or prejudice" rises to the level actually requiring recusal. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007). Accord Code of Conduct for United States Judges, Canon 3D (2009). However, a judge struggling with determining if he or she must recuse himself could trigger this process to be extra careful.

(b) A specific federal statute governs a judge's disqualification if a close family member acts as a lawyer in a matter before the judge.

He shall also disqualify himself in the following circumstances: . . . He or his spouse, or a person within the

¹ See, e.g., People v. Chavous, No. 240340, 2004 Mich. App. LEXIS 1149, at *2-3 (Mich. Ct. App. May 6, 2004) (unpublished opinion) (refusing to overturn a verdict against a criminal defendant, who had been unsuccessful in seeking to disqualify the judge -- a childhood friend of the prosecutor; "In the present case, the trial judge disclosed that he knew the prosecutor as a child because they lived in the same neighborhood. However, the last communication between the two had occurred in 1996. Prior to 1996, they had not seen each other since college. The trial judge stated that he was comfortable handling the case, and there was no need to recuse. Although the prosecutor apprised defense counsel of the prior relationship months earlier, defendant sought disqualification just before the commencement of trial. At the request of his client, defense counsel moved to disqualify the trial judge. Both the trial court and the chief judge denied the motion. Following de novo review of the record, we cannot conclude that the trial court's decision was an abuse of discretion. Wells, supra. [People v. Wells, 605 N.W.2d 374, 379 (Mich. Ct. App. 1999)] Defendant failed to meet her burden of establishing bias or prejudice with blanket assertions unsupported by citations to the record. Id. Defendant's only argument is that the rulings against her objections may show bias, but this Court has specifically stated that repeated rulings against a litigant do not require disqualification of a judge.").

third degree of relationship to either of them, or the spouse of such a person: . . . Is acting as a lawyer in the proceeding.

28 U.S.C. § 455(b)(5)(ii).

Similarly, the ABA Model Judicial Code provides that judges should disqualify themselves if a "lawyer in the proceeding" has a certain defined relationship with the judge.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned, including but not limited to the following circumstances: . . . The judge knows[] that the judge, the judge's spouse or domestic partner,[] or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . a person who has more than a de minimis interest that could be substantially affected by the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b), (c) (2007) (emphasis added).

The Code of Conduct for United States Judges contains a similar rule.

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii), (iii) (2009) (emphasis added).

If the judge's relationship to a lawyer appearing before the judge does not rise to the level of actual "bias or prejudice," a judge disqualifying herself under these

provisions may initiate a procedure under which the parties can agree to let her continue as the judge.

A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007). The judicial code governing federal judges has a similar provision.

Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

Code of Conduct for United States Judges, Canon 3D (2009).

Thus, judges must disqualify themselves if a close relative appears as a lawyer before the judge, but absent actual "bias or prejudice" the judge may remain in the case if all of the parties consent to that arrangement (using the prescribed procedure).

(c) The issue here is whether a brother-in-law is a "person within the third degree of relationship" to the judge or the judge's spouse. The ABA Model Judicial Code defines that relationship.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

ABA Model Code of Judicial Conduct, Terminology (2007).

Of course, judges may choose to disqualify themselves in either situation, or may disclose the relationship on the record and follow the process for seeking all of the parties' and their lawyers' consent to the judge hearing the matter.

(d) A comment to the ABA Model Judicial Code explains that judges need not automatically disqualify themselves just because a litigant appearing before the judge is represented by a lawyer who practices in the same firm as one of the judge's close relatives.

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [4] (2007) (emphasis added).

The Code of Conduct for United States Judges contains a similar comment.

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) Commentary (2009)

(emphasis added).

Thus, judicial codes take a much more subtle approach to judges handling matters in which one of the litigant's lawyers practices law with the judge's close relative.

A federal statute requires a judge to

disqualify himself in the following circumstances: . . . He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(5)(iii) (emphasis added).

The ABA Model Judicial Code provides that

[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned, including but not limited to the following circumstances: . . . The judge knows[] that the judge, the judge's spouse or domestic partner,[] or a person within the third degree of relationship[] to either of them, or the spouse or domestic partner of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . a person who has more than a de minimis interest that could be substantially affected by the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b) & (c) (2007) (emphasis added). Thus, the ABA Model Judicial Code applies the standard only if the person has "more than a de minimis[] interest" -- which contrasts with the federal statute's application of the standard if the judge's relative has any interest.

The Code of Conduct for United States judges contains a similar rule.

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is: . . . acting as a lawyer in the proceeding;

[or] . . . known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009) (emphasis added).

These prohibitions apply if the judge's relative has a financial interest (of the specified level -- either any interest or a de minimis interest) that could be "substantially affected by the proceeding." Thus, none of the judicial codes require the judge's relative to have a "substantial" financial interest. Rather, the rules apply if the relative has a financial interest that could be "substantially" affected by the matter before the judge.

If the lawyer's close relative is a partner in a firm representing a litigant before the judge, there is at least a strong chance that the judge's relative has "an interest that could be substantially affected by the outcome of the proceeding" (the statutory standard) or "has more than a de minimis interest that could be substantially affected by the proceeding" (the ABA Model Judicial Code standard).

Thus, some courts take a per se approach.

A federal judge must disqualify himself from consideration of a case if a person within the third degree of relationship "[i]s acting as a lawyer in the proceeding(.)" . . . Further, a judge must recuse if such a family member "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." . . . That a relative within the proscribed proximity stands to benefit financially as a partner in a participating firm - even if the relative is not himself involved - is sufficient to require recusal. . . . In this case, petitioner Price is the nephew of Chief Judge U.W. Clemon of the Northern District of Alabama, and is a full partner in LMPP. There is thus no dispute that, under Sections 455(b)(5)(ii) and 455(b)(5)(iii), Judge Clemon may not hear

cases in which Price or LMPP is acting as a lawyer or a firm
in which he is a full partner is a participant.

In re BellSouth Corp., 334 F.3d 941, 943-44 (11th Cir. 2003) (emphasis added). This per se approach does not appear in the judicial ethics rules -- which reject such an absolute rule.

States' judicial ethics advisory committees take varying positions. Those adopting an unforgiving attitude have indicated that judges must disqualify themselves if:

- A lawyer from a law firm employing the judge's daughter appears before the judge.²
- A lawyer from a law firm employing the judge's relative appears before the judge.³
- A lawyer from a law firm employing the judge's wife appears before the judge.⁴

² Fla. Judicial Ethics Advisory Comm. Op. 2006-26 (10/31/06) ("JEAC Opinion 98-20 is dispositive of this inquiry. In that opinion, this Committee held that even though the judge's daughter would not personally be the attorney of record in the case before the judge, the judge should recuse himself from presiding over cases in which the law firm where his daughter is employed is the law firm of record, unless all parties agree to a remittal of disqualification pursuant to Canon 3F. . . . The Committee pointed out that Canon 3E(1)(d)(ii), . . . Florida Code of Judicial Conduct, requires a judge's disqualification if the judge's child is the attorney of record. Canon 3E(1)(d)(iii) also requires a judge's disqualification if a person within the third degree of relationship to the judge 'is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.' The Committee held in JEAC Opinion 98-20 that a judge's child has more than a de minimis economic interest that could be substantially affected by the proceeding when the judge's child is associated with the law firm appearing before the judge.").

³ Id.; Fla. Judicial Ethics Advisory Comm. Op. 2003-18 (10/31/03) (analyzing the following situation: "Whether a judge is obligated to disclose and disqualify himself or herself when the law firm employing the judge's niece as a legal intern appears before the judge."; responding as follows: "Whether a judge is obligated to disclose and disqualify himself or herself when a law firm appears before the judge that has employed the judge's brother as an expert witness in a different matter not pending before the judge."; pointing to an earlier opinion which "stated that a judge should not sit on any case involving the law firm in which one of the judge's nephews was a partner, and another nephew was an associate").

⁴ North Carolina LEO 1 (10/21/05) (analyzing the following situation: "Assume that Attorney A has no involvement in a matter coming before Judge B, her husband. The matter involves fees for Law Firm either because it is a collection case on behalf of Law Firm or because there is a claim for attorney's fees associated with the underlying claim (e.g., custody or child support in district court; Rule 11 in Superior Court). May members of Law Firm appear before Judge B without disclosing Attorney A's relationship?";

Committees taking a more liberal approach have required disclosure to the parties (but not automatic disqualification) if:

- A lawyer from a law firm employing the judge's relative appears before the judge.⁵

answering in the negative: "If Attorney A stands to benefit directly from a favorable outcome, then Judge B, Attorney A's husband, would also benefit financially. Under these circumstances, Law Firm may seek first to have the matter heard by someone other than Judge B if possible. If it is not possible, disclosure should be made to opposing counsel so that he has the opportunity to move for recusal. Law Firm should disclose Attorney A's relationship, even where Attorney A would not directly benefit financially from the outcome. See Opinion #2, above. In addition, Judge B may independently determine that he must recuse himself under the Code of Judicial Conduct because his impartiality may be reasonably questioned under the circumstances."; finding that the lawyer in question could appear before other judges in the same judicial district).

⁵ Fla. Judicial Ethics Advisory Comm. Op. 2007-16 (10/8/07) (holding that a judge has to disclose to litigants that the judge's son-in-law was employed by a litigant's law firm as a law clerk, but would not be automatically disqualified from handling the case; "Issues of disqualification, arising out of the employment of a judge's relative by a law firm, have been the subject of numerous opinions by this Committee. In the distant past, this Committee opined that disqualification was not required when the judge's son was employed by a law firm as summer help in a non-legal capacity or when the judge's son-in-law was a law clerk."; "The more recent trend of opinions has required disqualification in almost all cases in which a relative of the [judge's] spouse is employed by a law firm. The recent opinions are a clear departure from the above referenced opinions. For example, this Committee's most recent opinion recommended disqualification when the judge's spouse is employed by a law firm as a paralegal. Fla. JEAC Op. 07-14. Other examples are JEAC Opinion 82-17 that required disqualification when the judge's son, who was not yet a member of the Florida Bar, was working with a law firm; JEAC Opinion 92-8 that required disqualification in cases involving a law firm in which the wife works (without specifying the nature of the employment); and Florida JEAC Opinion 03-18 that required disqualification in cases involving a law firm employing the judge's niece, a second year law student, as a summer intern. The facts of JEAC Opinion 03-18 are very similar to the current inquiry, and if this Committee followed the rationale of that opinion, disqualification would be required."; "This Committee is now of the opinion that the trend toward bright line requiring disqualification in all cases involving the employment of a judge's relative by a law firm may be misplaced."; "Even though disqualification is not required under the facts of this inquiry, the Judge should disclose to the parties the relationship that the son-in-law has with the law firm."); North Carolina LEO 1 (10/21/05) (assessing the following situation: "Law Firm hires Attorney A, who is married to District Court Judge B. Attorney A is also the daughter of Senior Resident Superior Court Judge C. Judges B and C are in the same judicial district and the lawyers in Law Firm regularly appear before judges in this district, including Judges B and C."; holding as follows: "While Attorney A may not personally appear before Judges B and C without consent from all parties involved in the matter, a member of Attorney A's firm is not disqualified. See CPR 225 (lawyer permitted to appear before judge who is his brother with consent from all parties to the matter). A previous ethics opinion held that the personal disqualification of a lawyer from practicing before a family member ordinarily is not imputed to the other members of the lawyer's firm. CPRs 226 and 367. Nonetheless, a judge may determine independently that he must recuse himself if his impartiality may be reasonably questioned by reason of financial interests or some other special circumstances. Canon III D of the Code of Judicial Conduct; see also 97 Formal Ethics Opinion 1."); Comm. on Codes of Conduct [for United States Judges] Advisory Op. 58 (7/10/98) (analyzing to what extent a judge's relative has an "interest" that could be substantially affected by a proceedings outcome; "The Committee concludes that an equity partner in a law firm generally has 'an interest that could be substantially affected by the outcome of the proceeding' in all cases where the law firm represents a party before the court.").

- A lawyer from a law firm employing the judge's cousins appears before the judge.⁶
- A lawyer appears before the judge from a United States Attorney's office that employs the judge's child.⁷

As explained above, a judge considering that she is not required to disqualify herself under the "bias and prejudice" standard can handle the issue by disclosing the relationship and letting the litigants and their lawyers decide whether to insist that the judge step aside. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

(e) If the judge's close relative is an associate in a law firm representing a litigant before the judge, it seems less likely that the relative would have an interest that meets the disqualifying standards mentioned above.

Best Answer

The best answer to (a) is **MAYBE**; the best answer to (b) is **NO (WITHOUT CONSENT)**; the best answer to (c) is **MAYBE**; the best answer to (d) is **PROBABLY NO (WITHOUT CONSENT)**; the best answer to (e) is **MAYBE**.

[N]

⁶ Fla. Judicial Ethics Advisory Comm. Op. 2004-06 (2/6/04) (responding affirmatively to the question "[w]hether a judge is required to announce or otherwise notify the parties when a lawyer from law firms employing the judge's two first cousins appears before the judge."; "Two years is a reasonable period of time for a judge to disqualify himself or herself from hearing any cases handled by the judge's former law firm, so long as at the end of two years there are no financial ties between the judge and former law firm including, but not limited to, outstanding fees, buyout, or ownership of real estate.").

⁷ Comm. on Codes of Conduct [for United States Judges], Advisory Op. 38 (7/10/98) ("The last question is raised here, specifically, 'Can the judge's impartiality reasonably be questioned because the judge's child is an assistant United States attorney?' It does not seem reasonable to do so in view of the unique nature and obligations of the United States attorney's office, which does not represent clients, as do private law firms, but rather, the public interest."; "In view of this basic distinction, it would seem unreasonable to question the judge's impartiality merely because the judge's child happened to be an assistant United States attorney.").

Manipulating the Choice of Judges: Docket Assignment

Hypothetical 17

You practice in a state judicial district served by three judges -- two of whom are very conservative and one of whom is very liberal. Over the years, you and every other local lawyer has recognized the advantage that employment and personal injury plaintiffs have when drawing the liberal judge. Not surprisingly, you have considered various steps to increase the odds that your plaintiff's cases are assigned to the liberal judge. Your local court's docket control clerk assigns cases on a rotating basis.

May you take the following steps in an effort to increase the chances of drawing the liberal judge:

- (a) Wait until you know that both conservative judges are out of town before filing a motion (such as a motion seeking a TRO) that requires immediate judicial attention?

YES (PROBABLY)

- (b) Have one of your associates wait at the clerk's office until it looks as if the next case filed will be assigned to the liberal judge, at which time your associate will file your client's case?

MAYBE

- (c) File three essentially identical cases for your client, and then dismiss the two cases assigned to the conservative judges?

NO

Analysis

Every court follows its own practice of assigning cases. Lawyers attempting to diligently represent their clients naturally look for a way to increase the odds of drawing a judge who is more inclined to favor the client's arguments.

As with all other ethics issues, the question here is how aggressively a lawyer can seek such a "good" draw -- without "gaming" the docket-assignment system in a way that the ethics rules prohibit or (especially) the court thinks inappropriate.

(a) It does not appear as if any lawyer has been punished for timing the filing of an action to maximize the chances of drawing a judge that the lawyer believes might be more favorable to his or her client's position.

(b) There seems to be no reported decisions in which a lawyer has faced punishment for a tactic such as this. However, courts might think that this crosses the line into impermissible judge-shopping. Of course, the more judges to which the case might be assigned, the less likely this type of tactic is to succeed.

(c) This hypothetical comes from the case of In re Fieger, No. 97-1359, 1999 U.S. App. LEXIS 22435 (6th Cir. Sept. 10, 1999) (not for publication).

In that case, the well-known Michigan lawyer Geoffrey Fieger (representing Dr. Jack Kevorkian)

signed and caused to be filed thirteen complaints for declaratory and injunctive relief in federal district court, all challenging the constitutionality of the same provisions of Michigan common law. Dr. Jack Kevorkian was the plaintiff on all thirteen complaints, nine of which were brought against the Oakland County prosecutor, three against Wayne County prosecutor, and one against the Macomb County prosecutor.

Id. at *2. Significantly, Fieger did not accurately complete the civil docket cover sheet, which required him to advise the court if the cases were related to any other cases (an affirmative answer to which would have resulted in all of the cases going to the same judge).

After the cases were assigned to judges, Fieger voluntarily dismissed twelve of the lawsuits, leaving only one of the cases pending. The Sixth Circuit opinion indicates that "[i]n press interviews, Fieger stated that he dismissed the cases so he could select the judge." Id. at *3.

The Eastern District of Michigan chief judge appointed a three-judge panel to examine Fieger's conduct. The panel eventually accepted a proposal under which Fieger apologized to the court and agreed to pay over \$8,000 in costs. The panel also referred the matter to the Michigan Bar for possible discipline. Fieger later filed motions complaining about the panel's use of the term "reprimands" in its order -- arguing that the term incorrectly implied that he had been adjudicated and found guilty of misconduct.

The Sixth Circuit rejected Fieger's challenge. Among other things, the court found Fieger's conduct improper.

[W]e note that Fieger's actions fully warranted the imposition of sanctions. He circumvented the random assignment rule, specifically tried to control the assignment of judges to his cases, and boasted publicly that he had done so. These actions violated the rules, as well as his duties as an officer of the court.

Id. at *7.

Most courts would probably take the same approach to such a tactic, although Fieger's public boasting of his manipulation certainly made it easier for the court in that case to find an improper motive.

Best Answer

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

[N]

Manipulating the Choice of Judges: Triggering Recusal

Hypothetical 18

One of your largest clients just hired you to defend a series of employment discrimination cases filed by several plaintiffs in Northern District of Alabama federal court. Your client also wants you to defend cases that your client expects other plaintiffs will file in the coming years. In previous employment cases, your client has been extremely unlucky before one Northern District of Alabama judge, and has asked you about possible ways to avoid that judge.

May you take the following actions -- if you are motivated by the desire to avoid having the unsympathetic Northern District of Alabama judge hear cases against your client:

- (a) Move for a change of venue to the Southern District of Alabama (if there are legal grounds for doing so)?

YES

- (b) Retain as additional local counsel the judge's son?

NO (PROBABLY)

- (c) In preparing for a case that you plan to file against an employee in six months, retain as local counsel the judge's son to appear as counsel of record when you file the complaint?

MAYBE

- (d) Retain as additional local counsel a law firm in which the judge's eldest daughter works?

MAYBE

- (e) Retain as additional local counsel the law firm at which the judge previously worked?

MAYBE

Analysis

Lawyers' attempts to manipulate the selection of judges can implicate both lawyers' and judges' ethics rules, as well as courts' power to police their own dockets and avoid unfair litigation tactics.

To a certain degree, lawyers may freely attempt to "forum shop." For instance, plaintiffs who could file a case in one of several courts undoubtedly will assess what judge they might draw in different jurisdictions. There is nothing wrong with a plaintiff filing a lawsuit in a jurisdiction where a sympathetic judge might handle the case.

Lawyers may also retain co-counsel or local counsel in an effort to influence judges. There is certainly nothing wrong with retaining as co-counsel a lawyer who has had great success before a certain judge, who seems to have the judge's respect, who clerked several years ago for the judge, etc. In fact, it could be argued that lawyers diligently representing their clients have a duty to search out lawyers as co-counsel or local counsel who are likely to have a positive influence with the judge.

On the other hand, courts have been extremely harsh on lawyers who have attempted to "knock out" judges by taking advantage of the judicial ethics rules requiring judges to disqualify themselves (often called "recusal") in certain circumstances.

(a) No lawyer seems to have been punished for seeking a change in venue in an effort to arrange for a more sympathetic judge.

Perhaps the issue never comes up, because most lawyers are smart enough not to reveal their true motive. However, even a lawyer acknowledging that intent probably would not face any punishment for filing an arguably meritorious venue motion.

In Wolters Kluwer Financial Services, Inc. v. Scivantage, 564 F.3d 110 (2d Cir.), cert. denied, 130 S. Ct. 625 (2009), the Second Circuit dealt with an analogous situation -- in which a litigant voluntarily dismissed a case to pursue litigation in another court. The Second Circuit upheld sanctions against a former Dorsey & Whitney lawyer for several inappropriate actions. However, the court then dealt with another action taken by the Dorsey lawyer, which the district court had sanctioned.

The district court found that Dorsey's main purpose in filing a Rule 41 voluntary dismissal of the Wolters litigation was to judge-shop in order to conceal from its client "deficiencies in counsel's advocacy" that had been noted by the district judge in New York. The district court reasoned that this sort of judge-shopping was an improper purpose and was accordingly sanctionable.

Id. at 114. The Second Circuit reversed this sanction -- explaining that a plaintiff may freely dismiss an action under Rule 41.

It follows that Dorsey was entitled to file a valid Rule 41 notice of voluntary dismissal for any reason, and the fact that it did so to flee the jurisdiction or the judge does not make the filing sanctionable. Accordingly, because the district court made no finding that Dorsey acted in bad faith in voluntarily dismissing the case under Rule 41, and because Dorsey was entitled by law to dismiss the case, the district court's sanction against Dorsey for filing the voluntary dismissal must be reversed.

Id. at 115.

(b) A federal statute,¹ the ABA Model Code of Judicial Conduct,² the Code of Conduct for United States Judges³ and every state counterpart requires disqualification if a judge's close family member appears as a lawyer before the judge. In some

¹ 28 U.S.C. § 455(b)(5)(ii).

² ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b), (c) (2007).

³ Code of Conduct for United States Judges, Canon 3C(1)(d)(ii), (iii) (2009).

situations, the judge can remain on the case after disclosure to and consent by the litigants and their lawyers.⁴

Given this strict standard, it should come as no surprise that clever lawyers have tried to "knock off" judges by hiring the judge's close relative as co-counsel.

A number of courts have dealt with lawyers' efforts to trigger a judge's recusal.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the court dealt with similar cases before the Monroe Circuit Court, in which three judges served. Two of the judges "had a reputation within the local legal community of being tough sentencing judges, while [the third judge] had the reputation of being somewhat more lenient." Id. at 263. One of the tough sentencing judges had a first cousin who practiced in the area, and the other tough sentencing judge had a brother-in-law who practiced in the area. The Michigan Bar alleged that these two lawyers improperly accepted retainers specifically for the purpose of disqualifying the judges who were relatives. In some cases, they received \$1,000 retainer payments when appearing.

The Michigan grievance commission somehow obtained statements from clients indicating that the lawyers freely admitted that this was their practice. In one criminal case, one of the tough-sentencing judges was assigned to handle the matter. His relative entered an appearance, which caused his recusal. When the case was re-assigned to the other tough sentencing judge, his relative entered an appearance -- causing the case to be assigned to the more lenient judge.

⁴ ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

The Michigan Supreme Court agreed with the lawyer disciplinary board that lawyers may freely undertake some action in an effort to "forum shop," but that these lawyers' actions crossed the line.

The ADB correctly observes that there are a variety of permissible steps that have a degree of similarity to the charged conduct. For instance, a lawyer may file a motion for change of venue that recites legal grounds, but is motivated by a desire to move the case to a jurisdiction where the lawyer believes success is more likely. A lawyer may accept employment and be brought into a case because the client (or an attorney already involved in the case) believes the lawyer has a record of success in appearances against an opposing lawyer, or before a particular judge. . . . In the instant case, the Grievance Administrator charges that the respondents were selling, not their professional services, but their familial relationships.

Id. at 267. The Michigan Supreme Court found that the lawyers' conduct was "prejudicial to the administration of justice." Id.

The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong. . . .

. . . .

It is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications, selling the lawyer's family relationship rather than professional services. A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to the discipline.

On the other hand, the rules do not prohibit a lawyer from taking a case that might lead to a recusal. Mr. Golden and Mr. Rostash are not precluded from practicing law in the Monroe Circuit Court. The Grievance Administrator alleges that there are sixty-six cases in which the respondents acted improperly to gain recusals. To the extent that these are cases in which Mr. Golden or Mr. Rostash appeared as lawyers and were substantially involved in the representation of the client, then the recusal was an unavoidable result of the rules established to avoid conflicts of interest.

An appearance filed principally to obtain the recusal (or de minimis activity as co-counsel to a lawyer who is handling the case, with the co-counsel designation serving with principally to obtain the recusal) is a ground for discipline. . . .

Id. at 267-68. The Michigan Supreme Court remanded to the disciplinary authorities.

Interestingly, one circuit court (the Eleventh Circuit) has twice dealt with such efforts involving Northern District of Alabama Judge U.W. Clemon. These incidents involved the rule involving a judge's relative appearing as a lawyer in the proceeding himself or herself, as well as the rule involving the relative's firm appearing in the proceeding (discussed more fully below).

Issues involving Judge Clemon arose as early as 1995. At that time, Judge Clemon's nephew was working at the Constangy, Brooks law firm.

As explained in the later case of Robinson v. Boeing Co., 79 F.3d 1053, 1056 (11th Cir. 1996), Judge Acker of the Northern District of Alabama was handling a case that a plaintiff had brought against BellSouth. Judge Acker ordered the clerk to provide a list of all cases filed in the Northern District of Alabama between January 1, 1993 and June 2, 1995, in which the case was originally assigned to Judge Clemon, but thereafter any lawyer from Costangy, Brooks appeared for the defendant -- thus triggering Judge Clemon's recusal.

As explained above, the ethics rules do not require judges to recuse themselves merely because a litigant had hired a law firm which employs the judge's close relative. The court nevertheless assumed that a defendant's retention of Costangy, Brooks would automatically cause Judge Clemon's recusal.

Judge Acker explained in his order that the BellSouth case was the first such case assigned to him in those circumstances, but that the clerk reported that lawsuits filed against the following corporate defendants faced exactly the same fate (original assignment to Judge Clemon, later appearance of Constangy, Brooks, recusal of Judge Clemon, and reassignment to another judge): AmSouth Bank, University of Alabama, Wal-Mart Inc., Parker Hannafin Corp., Southern Company Services, Inc., Southern Natural Gas, ALFA Mutual Insurance Co., Blue Cross and Blue Shield, Baptist Medical Center, Jim Walter Resources, Inc., Liberty National Life Insurance Co., Krystal Co., Compass Bancshares, Inc., etc.

Judge Acker reached the following conclusion:

The court has no way of knowing what the incidence of Constangy, Brook and Smith's being retained by defendants would have been if the above-named cases had been originally assigned to judges other than Judge Clemon, but an intelligent guess is that the incidence would have been less. What, if anything, this court should do about the matter will be for the entire court and not for one judge. Meanwhile, the defendant in this case is represented by competent counsel and shall file its answer (which may include a motion to dismiss)

Id. at 1056-57. Unfortunately, it is unclear what step Judge Acker took after conducting this analysis. The order does not explicitly exclude Costangy, Brooks from representing BellSouth.

The issue of Judge Clemon came up again just a few years later. An employment plaintiff sued Boeing and the case was assigned to Judge Clemon. About fifteen months later, Boeing sought to associate lawyers from Constangy, Brooks as "additional trial counsel cognizant of the fact that Judge Clemon's nephew was

associated with the firm and granting defendant's motion would most certainly lead to Judge Clemon's recusal." Id. at 1054.

Not surprisingly, Boeing argued that it wanted to hire Constangy Brooks because of "the additional attorneys' knowledge of employment-related matters and the vast resources of the firm." Id. Another district judge heard Boeing's motion, and denied Boeing's effort to add Constangy Brooks. That judge did not find that Boeing was attempting to manipulate the system, but noted the possibility of abuse.

"If the issue is truly not one of 'judge shopping' the denial of the motion will not adversely affect the defendant. There is no shortage of law firms available to replace the Lanier-Ford law firm. The fact that a case has been pending a considerable period of time lends itself to potential abuse after there has been an opportunity for considering rulings, discussions, etc. of a trial judge. No matter how extensive the discovery may be, the true motive will be elusive, non-objective and not likely truly ascertainable. The discovery issues, especially those involving attorney-client privilege, are complex, and further discovery would not likely result in a confession or 'smoking gun.' When there has been a passage of fifteen months, the problem is exacerbated. When there has been such a passage of time, the burden to establish the right to join a disqualifying firm is greater. The court concludes that the motion should be denied."

Id. at 1055 (emphasis added). The Eleventh Circuit affirmed that denial of Boeing's motion to retain Judge Clemon's nephew's firm.

The Eleventh Circuit concluded that "[t]his potential for manipulation or impropriety may be considered, without making specific findings, a difficulty the deciding judge reflected upon in his opinion." Id. at 1056.

The Eleventh Circuit addressed matters involving Judge Clemon again seven years later. In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit denied a petition for writ of mandamus filed by BellSouth, which was attempting to

overturn a district court's order disqualifying Judge Clemon's nephew and the law firm in which he was then a partner (Lehr Middlebrooks Price & Proctor) from representing BellSouth.

The Eleventh Circuit first provided the background of the judicial ethics rules that applied.

A federal judge must disqualify himself from consideration of a case if a person within the third degree of relationship "[i]s acting as a lawyer in the proceeding(.)" . . . Further, a judge must recuse if such a family member "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." . . . That a relative within the proscribed proximity stands to benefit financially as a partner in a participating firm - even if the relative is not himself involved - is sufficient to require recusal. . . . In this case, petitioner Price is the nephew of Chief Judge U.W. Clemon of the Northern District of Alabama, and is a full partner in LMPP. There is thus no dispute that, under Sections 455(b)(5)(ii) and 455(b)(5)(iii), Judge Clemon may not hear cases in which Price or LMPP is acting as a lawyer or a firm in which he is a full partner is a participant.

Id. at 943-44 (emphasis added). This per se approach does not appear in the judicial ethics rules -- which reject such an absolute rule.

The Eleventh Circuit acknowledged that "[i]t has long been a matter of concern that parties in the Northern District of Alabama might be taking strategic advantage of the recusal statute to, in effect, 'judge-shop.'" Id. at 944. The court explained that after the early decisions, the Northern District of Alabama adopted a "Standing Order" essentially creating a presumption that any party adding a lawyer in a case before Judge Clemon was acting improperly, if the addition of that lawyer would result in Judge Clemon's recusal.

". . . There shall be a strong, but rebuttable, presumption that the reason for such a proposed addition or substitution of counsel is to cause recusal or disqualification of the assigned judge"

Id. at 945 (quoting from Standing Order).

In the case before the court this time, the Eleventh Circuit noted that Judge Clemon's nephew filed a stand-alone appearance as counsel of record eleven days after the plaintiff filed a class-action employment discrimination case against BellSouth. The case had been assigned to Judge Clemon, but another judge heard the disqualification motion. That judge disqualified the Judge Clemon's nephew and his law firm.

The Eleventh Circuit acknowledged that the Standing Order did not technically apply to the case before it, because BellSouth did not add Judge Clemon's nephew as additional counsel, but rather retained the nephew from the beginning. However, the Eleventh Circuit noted that the district court had been "suspicious" about BellSouth's retention of Judge Clemon's nephew, and had conducted some research.

The court then discussed BellSouth's history of retaining Price [Judge Clemon's nephew] as counsel. Based on a computer analysis by court staff, Price was retained in only four of the 204 cases in which BellSouth was sued in the Northern District of Alabama since 1991. Although the 204 cases were divided among 19 different judges, three of the four Price cases were initially referred to Judge Clemon, forcing his recusal. The court found the fourth case to be of dubious value, since the appearance was entered only after the Jenkins controversy developed, suggesting it may have been contrived. Applying the presumption in light of the foregoing evidence, the district court found that the reason for the selection of Price as counsel was to cause the recusal of the assigned judge.

Id. at 947. The Eleventh Circuit ultimately agreed that the Standing Order did not apply, but nevertheless denied BellSouth's petition for writ of mandamus. Ironically, BellSouth had already been represented for over a year by the Constangy firm -- the law firm where Judge Clemon's nephew previously worked.

Well-respected Judge Tjoflat filed a lengthy dissent (even though he had been one of three judges who issued the per curiam decision in the earlier Robinson v. Boeing Co. case (discussed above)). He thought that Judge Clemon should automatically have disqualified himself as soon as his nephew filed his notice of appearance. Judge Tjoflat noted that Judge Clemon's nephew had appeared from the beginning of the case, so the situation did not involve BellSouth later choosing the nephew "as counsel to force the district court and the respondents to start from scratch with a new judge after expending significant resources." Id. at 976 (Tjoflat, J., dissenting). Judge Tjoflat worried about the process that the majority would require.

If the majority is correct that the recusal statute authorizes the disqualification of counsel hired to force recusal of the first judge, this will require an evidentiary hearing before a second judge every time the first judge's third-degree relative is retained as counsel and the opposing party would like the proceedings to remain before the first judge. Under the majority's scheme, a party who wants the first judge to stay on the case because of a type of bias not covered by the recusal statute - e.g., ideological bias - will always move to disqualify the relative once he appears as counsel in the case, even if the relative is retained for legitimate reasons long before the complaint is ever filed. In every such case, the motion to disqualify will force an evidentiary hearing before a second judge to determine the party's motivation for hiring the judge's relative, this hearing will be necessary even if the motion to disqualify the relative is baseless because the first judge is conflicted and thus cannot rule that the motion is baseless.

Id. at 977 (Tjoflat, J., dissenting). Judge Tjoflat predicted that this would result in a lengthy and inappropriate evidentiary process.

Following an evidentiary hearing in which the moving party demonstrates that the first judge is likely to be biased in his favor and the relative was hired to avoid this bias, and it appears that the moving party only wants the case returned to the first judge so that he can capitalize on the judge's bias in favor of his position, there would be, at the very least, a reasonable basis to question the first judge's impartiality under Section 455(a), if the case were reassigned to him.

Id. at 978 (Tjoflat, J., dissenting). Judge Tjoflat concluded that "[a]voiding this ugly scenario is why Congress opted to eliminate a hearing on a party's motive for hiring the judge's relative in the first place." Id. at 978 (Tjoflat, J., dissenting).

Interestingly, about as many pages of judicial analysis have been devoted to Judge Clemon's situation as to all other judges combined.

Still, a few other courts have dealt with similar recusal issues.

- Valley v. Phillips County Election Comm'n, 183 S.W.3d 557, 560 (Ark. 2004) (addressing a situation in which three days after learning that his case had been assigned to a particular judge, the plaintiff hired the partner of the judge's political opponent; concluding that "Valley retained [the lawyer] to force recusal" -- and disqualifying the lawyer).
- United States v. Jones, 102 F. Supp. 2d 1083, 1086 (E.D. Ark. 2000) (addressing a situation in which lawyer Luther Sutter filed an entry of appearance for criminal defendant Jones, thus triggering recusal of the judge handling the criminal matter; noting that "[b]y order filed on June 1st in the case of Harris v. Lester, 4:99cv00320 GH, the Court filed an order of recusal due to family members of the Court and family members of the plaintiff's attorney, Sutter, having recently participated in religious and church activities. By memo dated June 2nd, Sutter was added to the Court's recusal list. On June 7th, Sutter personally visited with several of this Court's staff members and received clarification that the recusal would be in all the cases where he was attorney of record and would apply to him personally and not other members of the firm. The attachments to the June 19th motion for accommodation clearly show that Sutter was aware when he entered his appearance here that the undersigned was the judge assigned to this case."; refusing to allow Sutter's appearance on behalf of Jones).

At least one bar has taken the same approach.

- Michigan LEO JI-44 (11/1/91) ("A lawyer may not associate as co-counsel with a lawyer in another firm, or offer or accept a referral from a lawyer, when one of the reasons for associating with or referring to the particular lawyer is to instigate a judicial recusal.").

(c) Courts obviously have an easier time analyzing (and possibly finding an improper motive in) a litigant's retention of a lawyer whose hiring triggers a judge's recusal after the judge has begun to handle the case. In some of the situations discussed above, the cases have been pending for some time.

For instance, in In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit noted that

[c]ourts in the district have been asked to apply the Standing Order several times in cases assigned to Judge Clemon in which Price (Judge Clemon's nephew) appeared. In two cases brought to our attention, courts declined to invoke the presumption of wrongful intent, because Price and LMPP [Price's law firm] had appeared from the outset rather than as substitute or additional counsel.

Id. at 945. In the case before the court, Judge Clemon's nephew entered an appearance just eleven days after the plaintiff filed the complaint against BellSouth -- although the case apparently had been assigned to Judge Clemon before that time.

One of the interesting questions is how (or even whether) the court can assess a client's motives in retaining lawyers.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the Michigan disciplinary authority somehow obtained access to privileged communication between the clients and the lawyers -- and thus could point to several admissions that the lawyers were purely motivated by their desire to recuse their relatives from acting as judges.

In one of the Eleventh Circuit cases (In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003)) and in the Eastern District of Arkansas case discussed above, the courts had entered orders dealing with the situation. The order involving Judge Clemon created a rebuttable presumption that retaining the judge's nephew or the nephew's law firm was improper. The Eastern District of Arkansas order memorialized the judge's intent to recuse himself if any litigant hired a family/church friend.

In the matters involving Judge Clemon, the district court examined statistics to demonstrate some improper motive by corporate defendants obviously anxious to avoid their cases being heard by Judge Clemon.

Absent some evidence that a lawyer has retained co-counsel primarily to disqualify a judge sometime in the future, it is difficult to see how the lawyer could be punished for his or her selection of co-counsel.

(d) A comment to the ABA Model Judicial Code,⁵ the Code of Conduct for United States Judges,⁶ and state counterparts explains that a judge does not have to disqualify himself or herself just because a litigant appearing before the judge is represented by a lawyer who practices in the firm with one of the judge's relatives.

Instead, the issue is whether the relative has any interest or any "de minimis[] interest"⁷ that could be "substantially affected by the outcome of the proceeding."⁸ Courts and bars take different positions on this issue, but it is more likely that a judge

⁵ ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [4] (2007).

⁶ Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009).

⁷ ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b) & (c) (2007).

⁸ 28 U.S.C. § 455(b)(5)(ii); Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009).

would be disqualified if one of the judge's close relatives was a partner (rather than an associate) in the law firm representing one of the litigants before the judge.

As explained elsewhere, judges wondering whether they must disqualify themselves in a setting like that might choose to disclose the relationship, and follow the process for seeking litigants' and lawyers' consent to stay in the case.⁹

Many courts and bars have condemned efforts to seek a judge's disqualification by hiring a law firm that employs one of the judge's relatives. Several cases dealing with Northern District of Alabama Judge U.W. Clemon (discussed above) seemed not to differentiate much between situations in which Judge Clemon's nephew appeared personally, and situations in which colleagues from his law firm appeared. It would be easy to understand this reaction if the judge had already announced that the judge would recuse himself or herself if any colleague of the judge's relative appeared as a lawyer before the judge (or if there was a track record of the judge doing so). In that situation, the judge would essentially have turned the fairly subtle analysis of the relative's "interest" in the firm into a per se rule -- which other litigants and their lawyers would be tempted to use in manipulating the judge selection.

(e) Nothing in the ABA Model Judicial Code or in any of its state equivalents requires judges to recuse themselves if a litigant before the judge has hired the law firm in which the judge previously served as a partner or as an associate. Instead, judges use their own judgment about that situation, either: (1) automatically disqualifying themselves (for at least a certain period of time); (2) making the required disclosure and

⁹ ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

seeking the litigants' and lawyers' consent to continue handling the case under the prescribed process; or (3) not disclosing the affiliation at all (often after a lapse of time following the judge's departure from the firm).

Given the lack of any certain rules about the effect of this situation, it is somewhat surprising that several courts in high-profile cases found that litigants had acted improperly in hiring law firms at which the judges hearing the case had previously worked.

- Order at 2, 2-3, 3, 4, 4-5, Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., No. 00-1218 (Fed. Cir. Nov. 28, 2001) (not citable as precedent pursuant to Fed. Cir. R. 47.6) (addressing a situation in which ex-solicitor general Seth Waxman and his new firm of Wilmer Cutler appeared as counsel for appellant DeKalb Genetics after that company had summary judgment entered against it; holding that Wilmer Cutler "surely knew that upon the filing of its entry of appearance, two members of the [federal circuit] panel would be called upon to determine" whether Wilmer Cutler's appearance "counsels their disqualification from further proceedings in this case" (emphasis added); explaining that one member of the panel departed from Wilmer Cutler in 1990 and at that time severed all financial connections with Wilmer Cutler, while another member of the panel "more recently retained a financial interest in the firm"; noting that the Second Circuit was "similarly disrupted" in an early case involving similar facts; concluding that "[w]e see no reason not to follow the rule that in these circumstances, the judges stay and the new lawyers go"; acknowledging that "[t]his court, of course, cannot know precisely why Mr. Waxman's skills have been sought by Appellant"; "If he is desired only for strategic advice, no entry of appearance would have been required, and we would have been saved the need to examine our duties under the Canons. Mr. Waxman's entry however leaves open substantive participation by Wilmer, Cutler & Pickering in the remainder of the appeal here, and it is that situation which compels our invocation of the rule that protects the integrity of our appellate process."; sua sponte ordering Mr. Waxman and Wilmer Cutler to withdraw their entry of appearance).
- In re Federal Communications Comm'n, 208 F.3d 137, 139, 139-40, 139 n.1 (2d Cir. 2000) (addressing a situation in which Gibson, Dunn entered an appearance for its client NextWave in preparation for a petition for rehearing, thereby triggering the recusal of one of the judges who signed the order that NextWave sought to overturn; noting that "[i]t cannot have escaped the notice of the Gibson, Dunn firm and its several partners that one of the members of this Court's panel, Judge Robert Sack, was a member of that

firm from 1986 until 1998. It was therefore obvious that Gibson, Dunn's appearance, if accepted by this Court, would draw into question Judge Sack's ability or willingness to remain on the panel, regardless of whether counsel focused on the relevant texts." (emphasis added); ultimately rejecting the appearance of Gibson, Dunn; "Once the members of a panel assigned to hear an appeal become known or knowable, counsel thereafter retained to appear in that matter should consider whether appearing might cause the recusal of a member of the panel. We make no finding as to good faith or intent by the estimable lawyers of Gibson, Dunn. It is clear, however, that tactical abuse becomes possible if a lawyer's appearance can influence the recusal of a judge known to be on a panel. Litigants might retain new counsel for rehearing for the very purpose of disqualifying a judge who ruled against them. As between a judge already assigned to a panel, and a lawyer who thereafter appears in circumstances where the appearance might cause an assigned judge to be recused, the lawyer will go and the judge will stay. . . . So the failure of counsel to consider in advance the known or knowable risk of a judge's recusal may result in the rejection of the appearance by that lawyer or firm."; ironically, noting that "On March 2, 2000, a motion was made by Global Crossing Ltd. and Liberty Media Corporation for leave to file a brief amicus curiae in support of NextWave's position. The motion, which has yet to be adjudicated, was filed by Simpson Thacher & Bartlett. A second member of the panel is a former partner of that firm; and a current partner of that firm is the son of the third member of this panel.").

The judicial codes certainly do not require such a harsh approach, but courts perceiving some attempt to manipulate the system understandably resist such efforts.

Best Answer

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

[N]