

CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS: KEY ISSUES

Hypotheticals and Analyses*

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

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Effect of an Ethics Rules Violation in Nondisciplinary Contexts

Hypothetical 1

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

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

NO

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

MAYBE

Analysis

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

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

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

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

Courts agree with this approach.

- State v. Warren, Crim. A. No. CR-09-9716, 2010 Me. Super. LEXIS 30, at *7 (Me. Super. Ct. Apr. 7, 2010) ("The Rules of Professional Conduct are by their own terms 'not designed to be a basis for civil liability' or 'invoked by opposing parties as procedural weapons.' . . . The Rules of Professional Conduct are only guides for professional behavior. . . . Consequences for their violation are personal to the attorney, and have no bearing on questions of evidence of procedure.").
- Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 628 (8th Cir. 2009) ("We believe the bankruptcy court erred by relying too heavily on the Minnesota Rules of Professional Conduct. Demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached.").
- Bertelsen v. Harris, 537 F.3d 1047, 1058-59 (9th Cir. 2008) ("[U]nder Washington law, the award of disgorgement of fees is not mandatory even where the attorney who got the fees also violated Washington's Rules of Professional Conduct for attorneys; instead, whether to order disgorgement is placed firmly within the discretion of the trial court. . . . Here, the district court made a considered determination that the circumstances did not warrant disgorgement of fees. Whether or not the district court erred in its assessment of the merits of Appellants' breach of fiduciary duty claims -- an issue we do not reach -- it did not abuse its discretion when it declined to award disgorgement on this set of facts. We affirm its judgment on that basis.").
- Carter v. Williams, 246 Va. 53, 60, 431 S.E.2d 297, 301 (Va. 1993) ("[t]he Code of Professional Responsibility does not provide a basis for private causes of action").

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

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

Since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

ABA Model Rule Scope cmt. [20].

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

- CenTra, Inc. v. Estrin, 538 F.3d 402, 410 (6th Cir. 2008) (holding that a client's previous consent did not justify a lawyer's handling of a matter adverse to the client; reversing a lower court's grant of summary judgment to the law firm in a malpractice case, and remanding the case for further proceedings; "Although Rule 1.0(b) makes it clear that a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct, a violation of the rules may be probative in establishing an independent cause of action. For instance, the Michigan Court of Appeals considered the Michigan Rules of Professional Conduct in a civil contract action that determined that a fee agreement was unenforceable.").
- Byers v. Cummings, 87 P.3d 465, 470 (Mont. 2004) ("it is entirely appropriate to use the general language of ethical rules in describing one's ethical duty to a client, however, it is improper to explicitly refer to the specific rule or to instruct the jury by referring to the rule in question").

Similarly, one court has held that a civil judgment entered against the lawyer could act as collateral estoppel in a disciplinary proceeding.

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

Other states take exactly the opposite approach.

- Virginia Rules Scope ("[N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.").
- Star Broad., Inc. v. Reed Smith Ltd. Liab. P'ship, Civ. A. No. 08-0616, 2009 U.S. Dist. LEXIS 14700, at *26, *26-27 (E.D. Va. Feb. 24, 2009) (holding that an expert on the ethical responsibilities of lawyer had nothing to offer in a

malpractice case against a lawyer; "Mr. Rigsby has admitted his lack of qualifications to address the standard of care and breach issues, stating that his only opinion in this case concerns a general standard of care rooted in the Rules of Professional Conduct. He acknowledges that he cannot opine on a specific standard of care or a breach of that standard of care for an attorney practicing in commercial law or government contracts law. In addition, Mr. Rigsby admits that he did not consult with a government contracts lawyer to determine whether the Star/DeCA License Agreement raised issues that needed to be referred to such a specialist. Mr. Rigsby has no experience or training in commercial law or government contracts law and has not consulted with any government contracts lawyer, and cannot provide testimony as expert evidence concerning the standard of care, or the breach of that standard, for a commercial lawyer or a government contracts lawyer in this situation."; "The Rules of Professional Conduct make clear in their Preamble that '[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.' 'They are not designed to be a basis for civil liability . . .' Thus, Mr. Rigsby's opinion that the Rules of Professional Conduct required Mr. Mahone to consult a government contracts lawyer cannot, by itself, establish a claim of legal malpractice.").

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

Best Answer

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

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Applicability of Ethics Rules to Lawyers' Nonlegal Activities

Hypothetical 2

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

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

YES (SOME OF THE RULES)

Analysis

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

The ABA¹ and states have issued general statements indicating that the ethics rules always apply to a lawyer's activities.

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

¹ ABA LEO 336 (6/3/74) ("A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility. . . . In regulating a lawyer's nonprofessional as well as professional conduct, the Code of Professional Responsibility charted no new course. It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, . . . individual or personal activities, . . . and activities as a judicial governmental or public official (emphases added)).

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

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

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

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

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

- See, e.g., Philadelphia LEO 2008-5 (5/2008) (holding that a lawyer acting as an estate's executor may not accept a referral fee from a lawyer that the executor hires to provide legal services for the estate; "The limitations on the conduct of an individual, including an attorney, who is functioning as a fiduciary often exceed the ethical limitations on the conduct of an attorney as provided for in the Rules. The inquirer's most significant question is whether

the lawyer in his capacity as the executor, and, therefore, as a fiduciary, may properly request a referral fee. The issue of the executor's actions are [sic] not strictly governed by the Rules of Professional Conduct but also by the duties of a fiduciary and particularly, his or her duty of loyalty to the beneficiaries of the estate. Unless the executor applies the entire referral fee for the benefit of the estate, either as a reduction of his own compensation as executor or adds it to the estate for distribution to the beneficiaries, the executor can be deemed to have placed himself in an unavoidable conflict of interest having engaged in prohibited self-dealing.").

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

Best Answer

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

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Lawyers' Wrongdoing Unrelated to Clients

Hypothetical 3

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

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

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

Analysis

Most ethics rules acknowledge the difficulty of determining how to address this issue.

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

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

The Restatement takes essentially the same approach.

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

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

Criminal law applies in most respects to acts of lawyers, either in representing clients or in other capacities and activities (see § 8). An act constituting a violation of criminal law is also a disciplinary offense when the act either violates a specific prohibition in an applicable lawyer code or reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Those formulations have replaced in most jurisdictions a formerly employed standard stated in terms of criminal acts constituting "moral turpitude," a phrase that, while meaningful to individuals, is vague and may lead to discriminatory or otherwise inappropriate applications. Whether a criminal act reflects adversely on a lawyer's fitness depends on the nature of the act and the circumstances of its commission. The standard is applicable to criminal acts wherever they may occur, so long as they are also treated as criminal at the place of occurrence.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. g (2000). The Restatement then addresses the difference between criminal context and the disciplinary context, which involves a fairly inexact overlap.

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

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

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

- Disciplinary Counsel v. O'Malley, 935 N.E.2d 5 (Ohio 2010) (suspending a lawyer for two years after a felony conviction for downloading pornography; rejecting a disciplinary board's recommendation for a shorter suspension).
- Fla. Bar v. Behm, 41 So. 3d 136, 144 (Fla. 2010) (disbarring a lawyer who had not paid his taxes, and claimed not to owe them; explaining the lawyer's goofy argument: "Behm's dispute is not with whether he received money from the practice of law but whether the money constituted 'income' for purposes of filing federal income tax returns. According to Behm, he derived

no net gain from the practice of law because his time was his life capital and, in practicing law, he was trading his life capital for an hourly fee, both of equal value. Thus, he realized no profit or net income from these transactions."; "Critically, Behm cites no case or other authoritative source that supports, even tangentially, his primary proposition -- that his earnings did not constitute taxable income because the earnings he received in exchange for billable hours resulted in no gain.").

- Leigh Jones, Barnes & Thornburg Attorney Disciplined for Hiring Prostitute, National Law Journal, Dec. 8, 2010 ("The Indiana Supreme Court has publicly reprimanded a Barnes & Thornburg attorney . . . for patronizing a prostitute in February.").
- Lawyer Censured for Repeatedly Stealing from Blind Concessions Operator, New Jersey Law Journal, Oct. 26, 2010 ("Stealing from clients will get a lawyer disbarred, but the sanction for stealing from a blind refreshment stand operator in an office lobby is only a censure."; "That was the outcome Wednesday in the ethics case against Elwood John Walzer, an attorney and regulatory officer for the Department of Human Services (DHS), who was caught on camera swiping food and beverages at least 14 times between September 19 and October 26, 2007. The vendor operated the stand under a program of the DHS Commission for the Blind and Visually Impaired.").
- Office of Lawyer Regulation v. Hurtgen (In re Hurtgen), 772 N.W.2d 923, 924 (Wis. 2009) (revoking the license of a lawyer who had entered into a plea agreement after being indicted for involvement in a "pay-to-play" scheme in Illinois; "Attorney Hurtgen is a Wisconsin-licensed attorney who engaged in felonious behavior by participating in a pay-to-play scheme. Admittedly, Attorney Hurtgen was not acting as an attorney when he engaged in this scheme, but his participation in this scheme reflects serious misconduct that violates the public trust. The OLR recommends revocation as the appropriate sanction, and Attorney Hurtgen does not oppose this recommendation.").
- Office of Lawyer Regulation v. Brandt (In re Brandt), 766 N.W.2d 194, 196, 202 (Wis. 2009) (issuing a public reprimand against a lawyer for "multiple convictions for operating a motor vehicle while intoxicated"; "Attorney Brandt has been convicted of drunk driving on five separate occasions. Based on that record, we agree with the OLR that Attorney Brandt's multiple OWI convictions demonstrate a pattern of misconduct that evinces a serious lack of respect for the law and as such relate to his 'fitness as a lawyer in other respects.' Attorneys are officers of the court and should be leaders in their communities and should set a good example for others. Driving while intoxicated is a very serious offense with the potential to cause great harm --

- or even death. . . . While it is indeed fortunate that Attorney Brandt did not injure anyone by his intoxicated driving, the fact that he repeatedly drove while intoxicated reflects adversely on his fitness as a lawyer and consequently constitutes a violation of former SCR 20:8.4(b).").
- Santulli v. Texas Bd. of Law Exam'rs, No. 03-06-00392-CV, 2009 Tex. App. LEXIS 2471 (Tex. App. Apr. 10, 2009) (revoking the license of a lawyer who had not repaid his student loans).
 - In re Fahy, No. 05-O-05123, 2009 Calif. Op. LEXIS 1, at *4 (Cal. Bar Ct. Mar. 6, 2009) (disbarring a lawyer for switching his vote during his service as a juror, in order to return to his law practice; "On April 22, respondent concluded that Judge Ballati would not declare a mistrial due to the jury's impasse. He foresaw further lengthy deliberations that his busy law practice could not afford. Accordingly, on that day, he told the other jurors that if the judge would not declare a mistrial, respondent would change his vote for the defense to break the deadlock so he could return his attention to his law practice. On April 26, respondent changed his vote, thus creating a verdict in favor of the defendant.").
 - Iowa Supreme Court Attorney Disciplinary Bd. v. Kress, 747 N.W.2d 530, 533, 533-34, 534, 534-35 (Iowa 2008) (suspending the license of a former University of Iowa Law Professor Kenneth Kress; explaining that Kress was a UC Berkeley Law School graduate who "is particularly well-known as one of the leading scholars nationally in mental health law."; also noting that Kress's "significant other" was a "mental health advocate knowledgeable about psychological disorders"; further explaining that "Kress believed that he had been treated badly at the law school because he deserved to be appointed to a faculty chair, but had not yet received one."; explaining that Kress handed out student evaluation forms to an evening "mental health law seminar," and explained to the ten students in the seminar that his job was "on the line"; emphasizing that "[t]he only student who testified at the hearing indicated that Kress's demeanor was normal, that he spoke at his normal rate, did not exhibit frenzied excitement or seem confused, his speech was not disordered or rambling, and that he seemed logical."; noting that Kress's research assistant was suspicious when Kress violated University procedures by insisting that the evaluation forms be left in Kress's secretary's office that evening; explaining that an investigation of the forms showed that Kress had tampered with them; "The investigation determined that three neutral or unfavorable evaluations were discarded and replaced with favorable versions, two were altered in order to raise the scores, and two evaluations were unchanged. The effect of the changes was to raise Kress's composite teaching effectiveness score on a five point scale from 2.86, a relatively low

score that might attract attention of law school administrators, to 4.86, a very high score that few members of the faculty were able to achieve. When confronted with the results of the investigation, Kress did not claim a medical or mental defense."; noting that "[a]t the hearing, Kress admitted in light of the evidence that he must have tampered with the evaluations. Kress asserted, however, that at the time he suffered from mental and physical illnesses that excused or mitigated his conduct."; reciting Kress's defense: "Kress noted that after going with his research assistant to his secretary's office, he woke up in his office, either from sleep or from a 'delirious loss of consciousness' after hallucinating about two dogs. He told the Commission that he believed that conspirators had succeeded in sending rays into the students' minds changing their neurons, and altering their answers on the evaluations. Kress further testified that in light of the mind-changing rays, he believed that it was only fair for him to change the evaluations back, so they would be correct. Kress believed he was confronted with a matter of life or death. He hallucinated about being in prison, where a medieval jury was laughing at him for failing to save the world from the parade of horrors that was coming. Changing the evaluations thus was transformed from a personal matter to a universal struggle between good and evil."; ultimately suspending Kress's license indefinitely with no possibility of reinstatement for three months, and holding that he could apply for reinstatement only after undergoing a comprehensive mental examination).

- In re Casey, No. 04-O-11237, 2008 WL 5122989 (Cal. Bar Ct. Dec. 4, 2008) (holding that a lawyer who arranged for a client to transfer land to another client in an unfair transaction had engaged in an act of moral turpitude; recommending suspension of the lawyer).
- In re Barrett, 852 N.E.2d 660, 668 (Mass. 2006) (suspending for two years a lawyer who misused company funds while acting as the corporation's CEO and Director; "We agree that the \$130,000 taken by the respondent from NetFax's account did not constitute a misappropriation of client funds while the respondent was engaged in the practice of law. Nonetheless, as chief executive officer and sole director of NetFax, the respondent had a fiduciary obligation to the company, and he breached it. . . . The respondent did not stop being a lawyer merely because he was operating in a corporate capacity and, as such, he was expected to uphold the high moral standards and ethical obligations of the legal profession.").
- State v. Werdell, 136 P.3d 17, 21 (Or. 2006) (reversing the conviction of a lawyer who had disposed of a weapon and alcohol involved in his son's boating accident in which someone had died; examining the literal language of the Oregon statute under which the lawyer had been convicted, finding that

the lawyer had not destroyed "physical evidence which might aid in the discovery or apprehension" of the son, because the son was already in custody).

- Disciplinary Counsel v. Ulinski, 831 N.E.2d 425 (Ohio 2005) (disbarring a lawyer who had pled guilty to federal conspiracy fraud charges).
- Ala. State Bar v. Quinn, 926 So. 2d 1018 (Ala. 2005) (disbarring a lawyer caught smoking marijuana with minors), rehearing denied without opinion, No. 2005 Ala. LEXIS 576 (Ala. Oct. 21, 2005).
- In re Sims, 861 A.2d 1, 4 (D.C. 2004) (disbarring a lawyer for committing what amounts to a misdemeanor -- but which involved the lawyer fixing traffic tickets; explaining that the activity involved a sufficient level of "moral turpitude" to justify disbarment).
- In re Tidwell, 831 A.2d 953, 964 (D.C. 2003) (disbarring an admittedly alcoholic Washington, D.C., lawyer after he was convicted in New York for leaving the scene of a fatal automobile accident; finding that the crime established the kind of "moral turpitude" that justified disbarment).
- In re Bikman, 760 N.Y.S.2d 5, 7 (N.Y. App. Div. 2003) (suspending for 18 months a New York lawyer who defrauded an apartment owner by concealing her sister's death and taking advantage of the lower rent-controlled rent by submitting checks in her deceased sister's name; "A lawyer's unethical conduct, even when it occurs outside the practice of law, is a proper concern of the Disciplinary Committee because it tends to reflect adversely on the legal profession as a whole;" citing earlier New York decisions in which lawyers were punished for making misrepresentations on a resume, issuing worthless checks and engaging in improper business practices).

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

- Leigh Jones, Finally Passing The Bar, "Pretend" Robber Refused Admission to Practice, National Law Journal, Jan. 28, 2011 ("A law graduate who finally passed the bar exam after eight attempts nevertheless will remain without a license to practice, partly because he pretended to be a robber on April Fool's day."; "The Supreme Court of New Hampshire on January 26 ruled that the 1992 law school graduate was ineligible for admission because of his criminal

- record and because he had not repaid nearly \$140,000 in student loans. Especially persuasive to the court was that the applicant had pulled a seven-inch knife on a store clerk in 1993 while, as he explained, he was 'pretending to be a robber.'").
- Iowa Supreme Court Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 771, 764, 767, 767-68, 769 (Iowa 2010) (suspending an Iowa lawyer's license indefinitely "with no possibility of reinstatement for a period of three months," even though he had been on inactive status since 2000; explaining that "[i]n 2000 Templeton took inactive status and began managing a newspaper distribution business. In 2007 he distributed newspapers in four states and personally delivered the newspapers in the Des Moines area."; noting that the lawyer had been arrested for being a "Peeping Tom," and admitted to a psychological disorder; "We have the authority to take disciplinary action against an attorney even though the attorney's license is inactive and the attorney is not actively engaged in the practice of law. . . . This is true even if at the time of the misconduct the attorney was not acting as a lawyer. . . . Thus, even though Templeton's law license was on inactive status and his conduct was unrelated to his representation of clients or any other facet of the practice of law, we still have the authority to sanction him upon a finding that he has engaged in misconduct in violation of the Iowa Rules of Professional Conduct."; finding that the lawyer's conduct violated Iowa Rule 8.4(b), because it reflected adversely on the lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."; "Here, Templeton engaged in a pattern of criminal conduct by repeatedly looking into the victims' windows. In doing so, he violated Doe's, Roe's, and Poe's privacy, and caused them to suffer emotional distress. Although his conduct was compulsive, the record also establishes he intentionally and knowingly invaded the privacy of these women. This conduct also raises serious misgivings about whether Templeton understands the concept of privacy and respects the law protecting individuals' privacy rights. For these reasons, we find Templeton's criminal acts of invading Doe's, Roe's, and Poe's privacy reflects adversely on his fitness to practice law in violation of rule 32:8 4(b)."; finding that the conduct was not "prejudicial to the administration of justice").
 - Barrett v. Va. State Bar, 675 S.E.2d 827, 829 (Va. 2009) ("We hold that a lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules.").
 - In re Brown, 605 S.E.2d 509 (S.C. 2004) (suspending for two years a lawyer who had, among other things, improperly arranged for the notarization of documents, including engaging in such behavior before he became a lawyer).

- In re Hinson-Lyles, 864 So. 2d 108, 117 (La. 2003) (the Louisiana Supreme Court denied admission to the Louisiana Bar of a woman who -- five years earlier while working as a teacher -- was found guilty of having sex with a fourteen-year-old student; the Court had earlier allowed the woman to take the Bar exam and ordered a Commissioner's report on her character and fitness, which the woman passed; a dissenting judge pointed to the woman's successful rehabilitation, excellent performance as a law clerk for a Louisiana judge after graduating from law school, and what he called the "disingenuous" conduct by the Court in allowing the woman to take the Bar exam -- and then denying the woman's application without providing any clear guidelines for when she might be able to re-apply).

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

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

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

we find Keele's illegal possession of the firearm does not adversely reflect on his fitness to practice law in violation of rule 32:8.4(b).").

Bars have had the most trouble dealing with lawyers' substance abuse and mental illness. A 2010 article describes states' varied approach to substance-abusing lawyers.

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

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

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

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

Best Answer

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

n 1/12

Doing Business with Clients: General Rule

Hypothetical 4

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

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

YES

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

NO

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

YES

Analysis

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

Fiduciary Duty

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

- Liggett v. Young, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's

- home; reversing the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).
- Tower Investors, LLC v. 111 E. Chestnut Consultants, Inc., 864 N.E.2d 927, 943 (Ill. App. Ct.) (holding that a partner of the Chicago law firm of Sonnenschein, Nath & Rosenthal (who had invested in a law firm client through an entity separate from the law firm) could enforce a promissory note; explaining that "attorney-client transactions are not void, but rather, presumptively fraudulent"; explaining that the sophisticated client had not been defrauded, because the law firm had fully explained the conflict), appeal denied, 875 N.E.2d 1125 (Ill. 2007).
 - In re Corporate Dissolution of Ocean Shores Park, Inc., 134 P.3d 1188 (Wash. Ct. App. 2006) (holding that a lawyer entering into a business transaction with a client must show that the transaction was fair).
 - Thomas v. Turner's Adm'r, 12 S.E. 149, 153 (Va. 1890) ("According to that rule all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence."; "All transactions between the parties, to be upheld in a court of equity must be uberrima fides, and the onus is on the attorney to show, not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client

freely; and (3) that it was entered into with such a full understanding of the nature and extent of his rights, as to enable the client to thoroughly comprehend the scope and effect of it."; ultimately holding that the lawyer had not carried his burden of showing that the transaction was fair, although the client had signed the agreement after reading it, and also affirmed that she understood it).

ABA Model Rules

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

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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

Not surprisingly, this rule does not apply

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

the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

ABA Model Rule 1.8 cmt. [1].

- Liggett v. Young, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's home; reversing the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).
- Pennsylvania LEO 2001-100 (3/2001) (holding that Rule 1.8(a) does not apply to "standard commercial transactions" between lawyers and clients, such as those involving banking, brokerage and medical services, or a lawyer's purchase of products from clients; explaining that the ethics rules are inapplicable to those transactions because they take place on a "level playing field" in which the "lawyer's legal training and experience do not put her at an advantage over the client"; explaining that Pennsylvania's version of Rule 1.8(a) does not contain a provision requiring that the business transaction be "fair and reasonable to the client," but does require the lawyer to "expressly advise the client that she has, and should pursue, the right to an independent evaluation of the transaction by another lawyer.").

Restatement

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

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

(1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;

(2) the terms and circumstances of the transaction are fair and reasonable to the client; and

(3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

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

State Case Law

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

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

States have severely punished lawyers who violate the applicable rules.

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

pursuant to DR 5-105(C) and RPC 1.9(a), an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation."; "The debt collection and loan transactions certainly involved the same transaction -- the underlying loan documents that the accused drafted on behalf of Ingle [deceased client]. The accused's representation of Hohn {lender to deceased client} involved his own work that he had completed on behalf of Ingle and, in that regard, the matters are substantially related. We therefore determine that the accused engaged in a matter-specific conflict in violation of RPC 1.9(a).").

- Office of Lawyer Regulation v. Trewin, 684 N.W.2d 121 (Wis. 2004) (suspending for five months a lawyer who engaged in a business transaction with a client without following the Wisconsin rule requiring lawyers to advise their clients in writing of the possible adverse effects of the relationship).
- In re Timpone, No. 93178, 2004 Ill. LEXIS 7, at *4 (Ill. Jan. 23, 2004) (suspending an Illinois lawyer for 42 months because he borrowed money from a client for whom the lawyer had just completed some work; explaining that the lawyer had "violated his fiduciary duty to his client by, among other things: (1) failing to advise [client] that there were limits on the types of transactions an attorney could enter into with a client; (2) failing to advise him to consult independent counsel before making the loan; and (3) providing no collateral for the loan and giving [client] no promissory note evidencing the loan or the interest rate until five years after the transaction").

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

- Fair v. Bakhtiari, 125 Cal. Rptr. 3d 765 (Cal. Ct. App. 2011) (addressing a situation in which a lawyer and client entered into a successful real estate business venture; explaining that the lawyer could not recover under a quantum meruit theory when the client rescinded the business venture, because the lawyer had not complied with the ethics rules governing business with clients).
- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782 (10th Cir. 2009) (holding that a lawyer who had declared bankruptcy could not discharge a debt to a client from whom the lawyer had borrowed money, because the lawyer had not complied with Rule 1.8).

- Valley/50th Avenue, L.L.C. v. Stewart, 153 P.3d 186, 190, 190-91 (Wash. 2007) (reversing summary judgment for a law firm seeking to foreclose on a mortgage note agreed to by a client to secure payment of the lawyer's bills; noting that Washington Rule 1.8(a)(2) requires that "the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction"; "The parties dispute whether Rose had adequate opportunity to seek the advice of independent counsel. The opportunity to seek independent advice must be real and meaningful. It is not enough that at some moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been. . . . The disclosures and notices required by RPC 1.8 are meaningless unless the client is given a reasonable amount of time to act upon the information disclosed and seek independent counsel. The definition of a 'reasonable opportunity' may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney. . . . The burden is upon the lawyer to demonstrate that a real and meaningful opportunity to seek independent counsel was afforded to the client.").
- McLaughlin v. Amirsaleh, 844 N.E.2d 1105 (Mass. App. Ct. 2006) (finding that public policy prohibited enforcement of a mortgage that a lawyer had obtained in a client's real property to secure loans that the lawyer had made to the client).

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

- BGJ Assocs. LLC v. Wilson, 7 Cal. Rptr. 3d 140 (Cal. Ct. App. 2003) (holding that a lawyer's transaction with a former client was voidable because the lawyer had not made the necessary disclosures in writing, and had not obtained the client's consent in writing).
- Petit-Clair v. Nelson, 782 A.2d 960 (N.J. 2001) (holding that clients could void a mortgage on their personal residence that they had given their lawyer to secure payment of legal fees; explaining that the lawyer had not advised the client of the advisability of seeking independent counsel in the transaction).

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

Other Possibly Applicable Principles

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

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

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

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

ABA Model Rule 1.8(a).

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

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

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

Imputed Disqualification

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

* * *

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

Best Answer

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

n 1/12

Clients' Gifts to Lawyers: General Rule

Hypothetical 5

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

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

NO (PROBABLY)

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

MAYBE

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

NO (PROBABLY)

Analysis

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

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

ABA Model Rules

The ABA Model Rules impose two specific but related prohibitions.

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

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

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

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

ABA Model Rule 1.8 cmt. [6].

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

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

Restatement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Restatement provides several other useful illustrations.

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

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

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

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

ACTEC Commentaries

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

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

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

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

State Case Law

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

Several cases highlight this unforgiving approach.

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).
- Attorney Grievance Comm'n v. Stein, 819 A.2d 372, 375, 374, 376, 379 (Md. 2003) (suspending indefinitely a lawyer who had prepared a will under which he received a bequeath; explaining that the lawyer (Stein) (a) had practiced as a lawyer since 1961, and had never been sanctioned as a lawyer or received any warnings about any alleged misconduct during his entire practice, (b) represented a couple who had been clients and friends of Stein's father since the 1950s, and (c) prepared a will under which he was to receive a substantial gift; noting that Stein acknowledged that the gift was his suggestion; explaining that the lower court found that the testator was competent and that "there was no indication that any improper influence or duress was brought to bear upon the client" by Stein; noting that Stein suggested to the testator that she speak with one of Stein's partners, but did not explain to the testator "the necessity of seeing an independent attorney outside of the firm."; also noting that Stein claimed that he was unaware of Maryland Rule 1.8(c)(2), which requires that the client be separately represented by independent counsel in connection with a gift to a lawyer who is not a relative; explaining that the requirement of independent counsel was "express and mandatory," and that "the independent counsel required by the Rule must be truly independent -- the requirement of the Rule may not be satisfied by consultation with an attorney who is a partner of, shares space with, or is a close associate of the attorney-drafter"; acknowledging that Stein was 69 years old and semi-retired, and had never violated any other ethical rule since 1961, but harshly warning that "we consider a violation of Rule 1.8(c) to be most serious. Respondent's conduct undermines the public confidence in the legal profession in a particularly egregious manner.").

- In re Grevemberg, 838 So. 2d 1283, 1285, 1286 (La. 2003) (suspending for one year a lawyer who drafted a will under which the lawyer and his wife received most of the client's property; acknowledging that the testator was mentally competent when preparing the will, and that the lawyer "had not exercised any undue influence on her"; also recognizing that the lawyer had a "well-respected reputation and good character in the community," had exhibited a "cooperative attitude toward the proceedings" and had enjoyed an "unblemished record in the practice of law for over 56 years"; nevertheless noting that Louisiana's Rule 1.8 prohibits a lawyer from preparing any instrument of this sort).
- Toledo Bar Ass'n v. Cook, 778 N.E.2d 40 (Ohio 2002) (suspending for one year a lawyer who followed a client's suggestion that his will provide a benefit to a nursing home owned by the lawyer; noting that the lawyer resigned from her positions at the nursing home -- although her siblings continued to control the nursing home -- and prepared the will that the client suggested; explaining that when the testator died and his children questioned the bequest, the nursing home disclaimed any interest in the client's estate, and the lawyer apologized; citing Ohio's Rule that completely prohibits a lawyer from preparing any instrument under which the lawyer receives a benefit from a non-relative client; suspending the lawyer for one year (although reducing the suspension to six months if the lawyer took ethics CLE courses)).

Some bars seem to be more forgiving.

- Cooner v. Alabama State Bar, 59 So. 3d 29, 40 (Ala. 2010) (reversing a disbarment of a lawyer who prepared a trust for his aunt's husband, which named himself as a beneficiary; concluding that the lawyer's aunt's husband was a "relative" under Rule 1.8; "A 'relative' is '[a] person connected with another by blood or affinity; a person who is kin with another.' Black's Law Dictionary 1315 (8th ed. 2004). Thus, a person is 'related' to another person, when the person is connected with another person by blood or affinity. . . . Therefore, we conclude that 'related' as that term is used in Rule 1.8(c), Ala. R. Prof. Cond., includes relationships by blood and by marriage and that an affinity relationship between an uncle and his nephew is within the meaning of the term 'related.'"; "Moreover, we decline to hold, as the State Bar urges us to do, that, for purposes of Rule 1.8(c), Ala. R. Prof. Cond., an affinity relationship arising from the marriage between a husband and blood relatives of the wife terminates with the death of the wife.").
- Attorney Grievance Comm'n v. Saridakis, 936 A.2d 886, 894 (Md. 2007) (providing a warning but not otherwise sanctioning a Maryland lawyer who arranged for a client insisting on naming the lawyer as one of her

beneficiaries to have the arrangement reviewed by another lawyer with whom the lawyer shared offices; noting that the hearing judge concluded that the second lawyer "acted as independent counsel" to the testator; finding that the second lawyer was not sufficiently independent to comply with Maryland's Rule 1.8(c), but that the respondent lawyer had attempted in good faith to comply with that Rule).

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

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

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

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

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

Best Answer

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

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

Hypothetical 6

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

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

YES

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

YES (PROBABLY)

Analysis

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

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

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

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

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

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

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

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

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of

Professional Conduct, Commentary on MRPC 1.2, at 36-37 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

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

- New Hampshire LEO 2008-09/1 (5/13/09) ("When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b) and that the attorney may continue to exercise independent professional judgment in recommending to the client the best choices for fiduciaries under Rule 2.1. In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the 'informed consent' of the client to the selection of the drafting attorney as the named fiduciary.").
- Virginia LEO 1515 (approved by the Supreme Court 2/1/94) (outlining the principle governing a lawyer acting as executor or trustee, explaining that: a pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection; the lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services"; a lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent); a lawyer acting as a fiduciary is governed by the Code; a lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud).
- Georgia LEO 91-1 (9/13/91) ("It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, so long as he or she obtains the client's written

consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee should be in accord with Georgia law.").

- Virginia LEO 1358 (10/1/90) (explaining that lawyers drafting a will or trust agreement must be very careful in naming themselves as executors or trustees; concluding that it is likely to be improper if the lawyer has not previously represented the client; noting that at a minimum, the lawyer has a duty to advise the client of fees that would be charged by other executors or trustees; explaining that if the instrument requires that the estate or trust hire the lawyer's firm for legal services, the client must consent after full disclosure).

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

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

The ACTEC Commentaries reach the same conclusion.

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

that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

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

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

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

Best Answer

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

n 1/12

Law Firm Non-Compete Arrangements

Hypothetical 7

You are starting your own law firm, and want to avoid some of the troubles that you have seen at larger law firms for whom you have worked. Among other things, you would like to have every lawyer joining the firm agree not to work for another law firm in the same city for two years after leaving your firm.

May you include such a provision in your partnership or employment agreements?

NO

Analysis

The ABA Model Rules indicate that

[a] lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except in an agreement concerning benefits upon retirement.

ABA Model Rule 5.6(a).

The Restatement has essentially the same prohibition.

A lawyer may not offer or enter into a law-firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer's retirement from the practice of law.

Restatement (Third) of Law Governing Lawyers § 13(1) (2000). A comment explains this provision.

[A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to

prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).

Every state has adopted such a restriction -- usually using the identical language.

The many court and bar analyses of this provision emphasize the clients' right to hire lawyers of their choice -- which the non-competition provision would inhibit.

ABA/BNA Lawyers' Manual on Professional Conduct § 51:1201 ("[t]he restrictions hinder the ability of clients to choose which lawyers they want to represent them, and impermissibly constrain the ability of lawyers to practice law").

Only one state seemed to have taken an opposite approach (at least until the late 1990's). Maine LEO 126 (9/25/92) (explaining that a law firm could require that an associate sign a non-compete as a condition of employment; "[i]t is not a violation of the Bar Rules for a law firm to require or utilize non-competition agreements"; explaining that most states specifically forbid non-competes, but that "no such provision in any form appears in the Maine Bar Rules"). Maine superseded this opinion in a February 1997 rules change.

The prohibition on law firm non-competition provisions is another example of how lawyers are treated differently from other professionals, most or all of whom may freely enter into non-competes.

Best Answer

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

n 2/12

Other Law Firm Restrictions

Hypothetical 8

As your firm's managing partner, you have asked for recommendations from a partnership committee about how to protect the firm and its clients from harm caused by lawyers suddenly leaving the firm (either individually or in groups).

May you include the following provisions in your partnership agreement:

- (a) Partners must provide a sixty-day written notice of their departure, and forfeit all of their capital in the firm if they leave before the end of the sixty days?

YES (PROBABLY)

- (b) Partners who leave the firm and take clients with them must pay the firm a percentage of those clients' receipts for a one-year period after their departure?

NO (PROBABLY)

- (c) Partners who leave the firm will be responsible for their pro rata share of any lease payments for the law firm's offices (unless the firm is able to replace the departed lawyers with others to occupy the space)?

MAYBE

Analysis

Imaginative law firms have tried numerous tactics to discourage lawyers from leaving their firms and taking business with them. In some cases, the motivation is purely pecuniary, but in other situations the firms act out of concern for the smooth transition of their clients' business.

Courts or bars nullify nearly every one of these creative techniques. These courts and bars apply the basic principle that law firms may not create a "financial

disincentive" for lawyers who leave the firm and compete with it that is materially different from whatever disincentive applies to lawyers who leave the firm for other reasons.

The Restatement explains how the general prohibition on noncompetes affects this analysis.

[A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.

Beyond professional discipline, such rules preclude enforcement of a provision of a firm agreement under which a departing lawyer is denied otherwise-accrued financial benefits on entering into competitive law practice, unless the denial applies to all departing firm lawyers, whether entering into competitive practice or not (including, for example, lawyers who become judges, government counsel, or inside legal counsel for a firm client or who change careers, such as by entering teaching).

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).¹

¹ Not surprisingly, the Restatement recognizes that law firms can restrict what their partners can do while in the firm.

Also distinguishable are law-firm requirements restricting a lawyer's right to practice law prior to termination, such as the common restriction that the lawyer must devote his or her entire practice to clients of the firm. Similarly, an organization employing a lawyer does not violate the rule of this Section in requiring that the lawyer's practice is limited to the affairs of the organization. For example, governmental practice is often so limited.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).

(a) Bars and courts generally uphold provisions that apply the same way to lawyers who leave the firm and compete with the firm and lawyers who do not later compete with the firm.

- Pierce v. Morrison Mahoney LLP, 897 N.E.2d 562, 565 (Mass. 2008) ("In this case, we must decide whether that firm's amended partnership agreement, which imposes identical financial consequences on all partners who voluntarily withdraw from the firm, regardless of whether they compete with the firm after withdrawing, also violates [Supreme Judicial Court] rule 5.6. We conclude that it does not.").
- Hoffman v. Levstik, 860 N.E.2d 551 (Ill. Ct. App. 2006) (upholding a trial court's enforcement of a law firm's partnership agreement allowing the law firm to reduce repayment of the withdrawing partner's capital by up to \$50,000 if the partner voluntarily withdrew; also upholding a partnership agreement provision allowing some discretion by the law firm in determining the date of a withdrawing partner's termination for calculating the withdrawing partner's share of the firm's profits; finding that under the partnership agreement's provisions a large contingent fee award should have been considered in calculating the withdrawing partner's share).

However, this basic principle creates an awkward restriction for law firms. A law firm might have difficulty attracting lawyers who would fear enormous financial penalties if they ever leave the firm. In addition, law firms may want to avoid disappointing or angering those lawyers who leave for purposes other than to compete with the firm -- such as joining a client's law department, becoming judges, or even being gently squeezed out of the firm.

Thus, most courts or bars allow notice provisions such as this, but an uneven application of a notice provision might create ethics issues.

For instance, if a law firm routinely waived this penalty for lawyers that left the firm to enter public service, teach at a law school, etc. -- but enforced it against lawyers

who joined competing law firms -- a court or bar might conclude that the notice requirement was intended to punish competitors rather than to protect clients.

More and more law firms are adding lengthier and lengthier notice provisions to their partnership and employment agreements. Few bars or courts seem to have dealt with these, although some recent articles have described law firms' attempts to enforce them.

- Amaris Elliott-Engel, Kline & Specter Injunction Bars Ex-Associate From Practicing Elsewhere for 60 Days, Legal Intelligencer, July 21, 2011 (issuing a preliminary injunction barring the former lawyer from practicing for sixty days after he left a law firm, because he had not provided the required sixty days notice mandated in the employment agreement; "At the start of the hearing in Kline & Specter v. Englert, Kline & Specter's counsel, Richard A. Sprague, said that Englert, who joined the firm after his graduation from the University of Pennsylvania Law School, had violated his employment contract. Under that contract, Sprague said, Englert is required to give 60 days' notice before leaving the firm. Sprague, of Sprague & Sprague, argued that [Judge] Sheppard should uphold the employment contract by issuing a preliminary injunction that would bar Englert from practicing law anywhere else but at Kline & Specter for 60 days."; "While Sheppard initially stated that the firm's request sounded like a restrictive covenant for lawyers, Sprague said that a preliminary injunction would be valid because Englert was free to leave to work somewhere else eventually but he needed and had failed to give 60 days' notice."; "Frank D'Amore of Attorney Career Catalysts said that the norm in the legal industry is for notice provisions in legal employment contracts to go unenforced. Once client notification has been arranged to be carried out in an orderly fashion, in the 'vast majority of cases, even if there is some saber rattling, almost all firms back down,' said D'Amore, who said he does not have knowledge of this specific case."; "The reasons to not enforce notice provisions include helping the firm's morale by not requiring an attorney who wants to exit the firm to remain; helping the firm's recruiting of new legal talent by not gaining a reputation for making it hard to leave; and abiding by the principle that the client's best interest must be served above all else. D'Amore said.").
- Brian Baxter, Waiting Game for Barnes & Thornburg Lateral Hires, American Law Daily, Oct. 13, 2010 ("So just how long will a group of litigators who gave

notice at Wildman, Harrold, Allen & Dixon on October 1 have to wait before heading to their new home at Barnes & Thornburg? Maybe not as long as they claim they were initially told. On Tuesday, the Chicago Tribune reported that Wildman executive committee member H. Roderic Heard and five of his partners from the firm's Windy City office would be forced to wait out a 90-day-notice period after the attorneys tendered their resignations. The story quickly made its way around the legal blogosphere, with some poking fun at Wildman for delaying the move by insisting on enforcing a clause that's commonly found in partnership agreements but rarely raised. Wildman general counsel Stephen Landes, who chairs his firm's professional standards committee, claims that the furor over the six departures is much ado about nothing. 'We started this [process] on a Friday, it's moving right along, and I expect that by sometime next week we'll have this thing done,' Landes says. 'It's not an event that's going to have an adverse effect on us.' However out of the ordinary it seems to be for the firm to enforce the notice period, Wildman maintains it's merely conducting due diligence and protecting its clients. As Landes explains it, the firm wants to go to its clients not only with news of the departures, but also with a plan of action for how client matters will be handled once the six lawyers depart. 'The rules require us to take care of the clients, and they're our clients until they decide they're not our clients,' he says. 'We have to make sure they have all the information and instructions they need to make a decision, so down the line we haven't created a problem by rushing the process.'").

While law firms generally justify such notices as protecting clients, the dampening effect of such provisions on lawyer departures renders them vulnerable to attack. Challengers might also try to determine if law firms have applied such notice requirements evenhandedly. For instance, a law firm which enforces a lengthy notice period against lawyers moving to a competitor but not to lawyers moving to an academic setting or to a client's law department might well lose a fight over such provisions.

(b) This type of restriction has been routinely nullified. See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct § 51:1205 (noting that courts have routinely

condemned an agreement that "requires the lawyer to pay his former firm a percentage of the fees he is paid by clients who leave with him").

The reporter's note for the Restatement recognizes this.

In the clear majority of jurisdictions a covenant in a partnership agreement that restricts the right of a former law-firm lawyer to practice by reason of a substantial financial penalty for competing with the former firm will be denied effect, on the ground that the covenant is unreasonable in that it violates the lawyer-code prohibition. In the majority of those decisions, the prohibition is applied only to income or other benefits accrued prior to departure from the firm.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b, reporter's note (2000).

Courts and bars generally take this approach.

- Cincinnati Bar Ass'n v. Hackett, 950 N.E.2d 969, 971-72 (Ohio 2011) (issuing a public reprimand against a partner who hired an associate only after the associate signed an agreement that the associate would pay back part of any money earned from case that the associate took with him if he left the firm; "[R]espondent sought to restrain his former associates from taking clients with them when they left his firm. His employment contract required a departing associate who continued to represent the firm's former clients to remit 95% of the fees generated in the clients' cases to respondent regardless of the proportion of the work that each attorney performed. If enforced, this clearly excessive fee would create an economic deterrent for the departing attorney that would adversely affect the clients' right to retain an attorney of their own choosing. Therefore, we agree that respondent has violated both Prof. Cond. R. 1.5 and 5.6.").
- Texas LEO 590 (12/2009) ("Under the Texas Disciplinary Rules of Professional Conduct, a law firm may not seek to enter into an agreement with a member of the firm that would require, if the lawyer later left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm.").
- Arizona LEO 09-01 (5/2009) ("A law firm may not employ associate lawyers using a contract that requires a departing associate to pay \$3,500 to the law

- firm for each instance in which the departing associate continued to represent a law firm client. This requirement would violate the policy underlying ER 5.6 that puts the commercial interests of law firms secondary to the need to preserve client choice."; "[T]he fee 'acts as a disincentive to representing the client' and, thereby, 'limits the client's ability to retain counsel of choice.' Phil. Bar Assn. Op. 89-3. [2] Cf. Stevens v. Rooks Pitts & Poust, 682 N.E. 2d 1125, 1132 (Ill. App. 1997) (holding that 'no law partnership agreement should restrict a departing partner's ability to practice law.'). 'Financial disincentives may involve either forfeiting compensation that is due to the departing lawyer or requiring that the departing lawyer remit to the firm a part of profits earned from representing former clients of the firm.' Legal Ethics, Law. Deskbk. Prof. Resp. § 5.6-1 (2008-09 ed.) See ABA/BNA Lawyer's Manual on Professional Conduct 51:1205 (2004) (examining financial disincentives involved in Rule 5.6). The fee here surely has such an effect because it must be paid each time that the departing associate continues the representation of a Firm client.").
- Law Offices of Ronald J. Palagi, P.C. v. Howard, 747 N.W.2d 1, 13 (Neb. 2008) (holding that the ethics rules prohibit the enforcement of a law firm employment agreement requiring a lawyer withdrawing from the firm to pay back to the firm any fees earned by cases that the withdrawing lawyer takes with him; "Based upon similar ethics rules in effect throughout the country, '[c]ourts do not enforce any agreement involving the employment of lawyers that appears to have restrictive and thus anticompetitive tendencies.' This is so whether the restriction on competition is direct or indirect. The prohibition against restrictive covenants in agreements between lawyers is generally reasoned to be necessary to ensure the freedom of clients to select counsel of their choice. Courts and commentators note a distinction between the business principles which govern commercial enterprises and the ethical principles that govern the practice of law and find that because 'clients are not merchandise' and '[l]awyers are not tradesmen,' restrictive covenants may not 'barter in clients.' Because the client's freedom of choice is the paramount interest the ethics rules attempt to serve, courts reason that any disincentive to competition is as detrimental to the public interest as an outright prohibition on competition. Thus, cases almost uniformly hold that financial disincentive provisions in Attorney Agreements are unenforceable as against public policy." (citation & footnotes omitted).
 - North Carolina LEO 2001-10 (1/18/02) (condemning a provision in which a law firm ties deferred compensation to a withdrawing lawyer's competition with the firm; "The provision reduces the amount of deferred compensation payable to a shareholder if the shareholder decides to leave the firm.

Deferred compensation is reduced by 75% if the departing shareholder engages in 'competitive activity' within a 50-mile radius of Law Firm's offices.").

On the other hand, at least one bar has upheld an agreement in which a law firm's employment agreement includes a financial disincentive for lawyers to leave the firm -- requiring them to pay back to the firm fees that they earn on cases the lawyers take with them.

- North Carolina LEO 2008-8 (10/24/08) (analyzing several law firm employment agreements under which a withdrawing lawyer would have to pay certain amounts back to the law firm; noting generally that "a lawyer may participate in the offering or making of an employment or other similar agreement that includes a provision for dividing fees following a lawyer's departure from a firm provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice"; explaining that some states (such as Ohio) find such arrangements unethical, but disagreeing with those states; "Although the opinion prohibits financial disincentives on the continued representation of the clients, it does not prohibit an agreement for repurchasing the shares of a withdrawing lawyer if the agreement 'represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him.' . . . [S]uch agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm. Any financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of Rule 5.6(a); 2007 FEO 6. Each employment agreement must be analyzed individually to determine whether it violates Rule 5.6(a); however, some general principles can be articulated. The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation. . . . The

formula may take into account the work performed on the representation prior to the lawyer's departure, non-lawyer resources that the firm allocated to the representation not including costs advanced for the client, firm overhead that can be fairly allocated to the client's representation prior to departure, and the legal work, non-lawyer resources, and overhead that will be required of the withdrawing lawyer to complete the representation."; finding that an agreement calling for the withdrawing lawyer to pay 70 percent of any fee recovery back to the firm is unethical because the amount is too large; also concluding that such an agreement may require the withdrawing lawyer to compensate the law firm for goodwill "that initially induced the client to seek the legal services of the law firm" (as long as the "goodwill is valued fairly and reasonably and is not such a significant proportion of the fee that it creates a financial disincentive for the departing lawyer to continue the representation of clients who desire her services"); also concluding that such an agreement may not require the withdrawing lawyer to reimburse the firm for the costs advanced on behalf of the client, because such advance costs are the client's responsibility -- and that such a provision "would have a chilling effect on the departing lawyer's willingness to continue the representation of a client"; finding that such arrangements do not violate the general prohibition on fee-splitting between lawyers who are not in the same firm, because the agreements are reached when the lawyers practice in the same firm; also concluding that such employment agreements may include a mandatory arbitration clause if there is a disagreement about how to calculate the payments; "Lawyers are urged to include such provisions in employment agreements to foster early resolution of disputes without litigation and without drawing clients into the disputes.").

(c) Courts and bars sometimes recognize that a lawyer's departure from a firm affects the firm's value -- and theoretically allows the law firm to take that diminution of value into account when determining what the law firm should pay the lawyer upon his or her withdrawal.

- North Carolina LEO 2007-6 (4/20/07) (analyzing the following provision in a law firm partnership or shareholder agreement describing a formula under which the law firm's repurchase of the withdrawing lawyer's interest shall be reduced as follows: "The purchase price shall be reduced . . . by an amount equal to one hundred twenty-five Percent (125%) of the work in process generated by employees of the corporation during the twelve (12) months preceding the event requiring or permitting the stock purchase on behalf of

clients of the corporation for whom the shareholder or law firm with whom the shareholder is or becomes associated, performs legal services during the twelve (12) month period following the event requiring or permitting the stock purchase."; explaining that "Rule 5.6 protects two important ethical principles: the right of clients to legal counsel of their choice and lawyer mobility. Although this provision is not like a typical covenant not to compete in that it does not have geographical or temporal restrictions, it does tie the decrease in share value to the fact that the departed lawyer represents former clients of the firm. By so doing, the provision provides a disincentive for the departing lawyer to represent clients with whom the lawyer has a prior relationship, penalizes the departing lawyer for representing former clients of the firm, and restricts the lawyer's right to practice. Moreover, the provision does not appear to measure the devaluation of the lawyer's shares in the firm due to the lawyer's departure. If a provision in a firm agreement penalizes a lawyer for taking clients, will dissuade a lawyer from continuing to represent firm clients after his departure, or does not otherwise fairly represent the devaluation of ownership interest in the firm engendered by the lawyer's departure, it violates Rule 5.6(a)."; "Nevertheless, Rule 5.6(a) does not prohibit a repurchase provision in a firm agreement that takes into account the financial effect of a lawyer's departure from a firm. However, the provision must include a more refined approach for evaluating the loss of value due to the lawyer's departure. For example, a provision that takes into account various economic factors that affect the value of the firm's shares, such as long-term financial commitments to staff and for space and equipment leases originally made by the firm in reliance upon the departing lawyer's continued contribution to the firm, may be acceptable under the rule. To the extent that a contractual provision represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him, the provision might not violate Rule 5.6(a).").

- Shuttleworth, Ruloff and Giordano, P.C. v. Nutter, 493 S.E.2d 364 (Va. 1997) (upholding an employment provision that required each lawyer to pay his or her "proportionate share" of lease payments for an eleven-year term of a lease; explaining that the agreement provided that the withdrawing lawyers would not have any obligations to share in the lease payments if they left the firm because of death or disability, if they were voluntarily terminated by the firm, or if they became a judge; explaining that this lease obligation would extend beyond the first five years of the lease only if the withdrawing lawyer was engaged in the private practice of law; reversed the lower court conclusion that the provision violated the ethics rules, and finding that the

provision "was to ensure that Shuttleworth had the financial means with which to make the lease payments.").

A provision like this does not appear to run afoul of the ethics rules on its face -- because it simply requires lawyers leaving the firm to help cover the firm's out-of-pocket expenses incurred because the lawyers were practicing there.

Best Answer

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

n 2/12

Law Firms' Remedies Against Withdrawing Lawyers

Hypothetical 9

You just became your firm's managing partner, and now face one of the biggest crises that your small firm has ever confronted. Three of your firm's ten lawyers just left, and took all of your firm's paralegals and two of your best secretaries with them. It has become obvious from the way events have unfolded that the withdrawing group had planned all of this many months in advance. The remaining lawyers in your firm are urging you to file a lawsuit against those who left.

Is there any cause of action you can pursue against the lawyers and staff who left your firm?

YES

Analysis

Although law firms may not prohibit or even discourage their lawyers from leaving the firm and competing against it for clients, lawyers contemplating such withdrawal may not ignore their fiduciary duties to the firm.

Law Firms' Actions Against Withdrawing Lawyers

Given the increasing mobility of lawyers and the recent demise of large law firms apparently triggered in part by lawyer defections, it should come as no surprise that some law firms consider and even pursue claims against lawyers who withdraw from the firm and against their new employers. Legal publications carry a number of stories about such threats or actions every year.

- Zach Lowe, Sonnenschein Hit with \$30 Million Poaching Suit, American Law Daily, June 9, 2009 ("Sonnenschein Nath & Rosenthal was hit with a lawsuit Friday accusing the firm of illegally recruiting several lawyers from a Chicago-based consulting firm where a Sonnenschein partner used to work, court

- records show. The suit, which seeks injunctive relief and \$30 million, accuses Lisa Murtha, a partner in Sonnenschein's health care practice, of orchestrating the recruitment of three employees at her former company, Huron Consulting Group. In court records, Huron describes Sonnenschein as its 'direct competitor' in the health care consulting business.").
- Henry Gottlieb, Suit Over Firm's Collapse Tests Limits of Poaching Lawyers, New Jersey Law Journal, Feb. 3, 2009 ("Nine years after a 14-lawyer exodus led to the death of a prominent New Jersey bankruptcy firm, the partners left behind are nearing a climax of their efforts to exact revenge on the firm that wooed the defectors, Lowenstein Sandler. An Essex County judge has scheduled an April trial in a suit charging that Lowenstein Sandler violated fair business practice rules and thieved financial secrets, knowing the recruitment would kill off Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen in Roseland, New Jersey. Within a month of the February 2000 defections by lawyers who had \$5 million in revenues the previous year, the remaining 50 or so attorneys and support staff scattered, leaving behind a shell firm that has been seeking damages. Lowenstein Sandler has denied it violated any legal or business ethics guidelines on the hiring of laterals and has evidence to support a defense that Ravin Sarasohn collapsed because of longstanding financial woes, not the recruitments. But barring a settlement or dismissal on summary judgment, the 260-lawyer firm -- New Jersey's second-largest -- will soon be in the uncomfortable position of having to defend its business practices to a jury with millions of dollars in damages at risk in the case, Ravin, Sarasohn v. Lowenstein Sandler, Esx-L-6327-00. The litigation also puts the spotlight on an issue all large firms face: What is permissible conduct for wooing practice groups, particularly when confidential financial data is exchanged and the recruitment is implicated in the collapse of the target firm? The case has lasted nine years because the claim against Lowenstein Sandler was put on hold, except for discovery, while Ravin Sarasohn pursued the three defecting equity partners on charges similar to the ones against Lowenstein Sandler in an arbitration that proceeded at glacial speed.").
 - Brian Baxter, Perkins Coie Sues Ex-Intellectual Property Associate Who Left Firm for Rival, American Law Daily, Feb. 11, 2009 ("While law firm layoffs have certainly been known to lead to lawsuits, it's not every day when a firm turns around and goes after a former employee -- especially when that individual is a former associate. That's the case with Perkins Coie. The firm filed a breach of contract suit against former IP associate David Xue in Alameda County Superior Court in Oakland on January 29. According to court documents, Xue left the firm for Goodwin Procter in September 2008.

- Now Perkins Coie wants to recoup \$36,334.25 it claims Xue owes the firm for advanced payments towards his law school tuition and related expenses.").
- Jeremy Hodges, Cadwalader Threatens Legal Action Over Partner Walkout, LegalWeek, Jan. 27, 2009 ("Cadwalader, Wickersham & Taft has threatened seven departing London partners with legal action for breaching their partnership agreement. The group -- which includes former London office head Michelle Duncan -- handed in their notice at Cadwalader earlier this month to join rival United States firm Paul, Hastings, Janofsky & Walker. Cadwalader has issued the team with letters before action alleging that they have breached the confidence terms of their partnership deed. London firm Lewis Silkin sent the letters before action on behalf of Cadwalader. Under United Kingdom employment law, Paul Hastings may also be obliged to take on more of the Cadwalader associates than originally anticipated, as Cadwalader on Monday confirmed that it believes all of the associates connected to the departing partners are covered by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). There are currently 23 associates in Cadwalader's London office and it is thought that more than half will follow the team of partners.").
 - Bud Newman, Fla. Law Firm Accuses Ex-Associate of Stealing Clients, Daily Business Review, Jan. 3, 2008 (noting that a West Palm Beach law firm filed a lawsuit against a former associate and his new law firm for unilaterally contacting the plaintiff law firm's clients before and after the associate left the firm, in violation of the Florida Rule prohibiting such unilateral contact absent efforts to arrange for a joint communication with the law firm).

Interestingly, few if any of these threatened lawsuits or lawsuits has resulted in published decisions. It seems that law firms either do not carry through on their threats, or resolve any lawsuits that they file.

ABA Model Rules

Interestingly, the ABA Model Rules do not address this issue -- apparently leaving it mostly up to the common law.

Restatement

The Restatement recognizes that a lawyer's withdrawal from a firm can raise a number of issues.

A lawyer's departure from a law firm with firm clients, lawyers, or employees, unless done pursuant to agreement, can raise difficult legal issues. Departing a firm or planning to do so consistently with valid provisions of the firm agreement is not itself a breach of duty to remaining firm members. Thus, a lawyer planning a departure to set up a competing law practice may make such predeparture arrangements as leasing space, printing a new letterhead, and obtaining financing. It is also not a breach of duty to a former firm for a lawyer who has departed the firm to continue to represent former firm clients who choose such representation, so long as the lawyer has complied with the rules of Subsection (3). Delineating what other steps may permissibly be taken consistent with such duties requires consideration of the nature of the duties of the departing lawyer to the firm, the duty of the firm to the departing lawyer such as under the firm agreement, as well as the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from both the departing lawyer and the firm on which to base such a choice. . . . As a matter of the law of advertising and solicitation, under most lawyer codes in-person or telephonic contact with persons whom the lawyer has been or was formerly actively representing is not impermissible. Under decisions of the United States Supreme Court, direct-mail solicitation is constitutionally protected against an attempt by the state generally to outlaw it.

However, as a matter of departing lawyer's duties to the law firm, the client is considered to be a client of the firm. . . . The departing lawyer generally may not employ firm resources to solicit the client, may not employ nonpublic confidential information of the firm against the interests of the firm in seeking to be retained by a firm client (when not privileged to do so, for example to protect the interests of the client), must provide accurate and reasonably complete

information to the client, and must provide the client with a choice of counsel. As stated in Subsection (3), a departing lawyer accordingly may not solicit clients with whom the lawyer actually worked until the lawyer has either left the firm . . . or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients. In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms. If a lawyer and firm agree that the lawyer is free to solicit existing firm clients more extensively than as provided in Subsection (3), their relationship is controlled by such agreement. For example, it might be agreed that a departing lawyer may seek to represent some clients as an individual practitioner or as a member of another firm.

Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000). The Restatement also emphasizes that the problem becomes even more complex if lawyers leave in groups.

With respect to other firm lawyers and employees, a lawyer may plan mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure.

Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000).

Permissible and Impermissible Actions by Withdrawing Lawyers

A law firm's possible claims against a withdrawing lawyer obviously depends on the permissibility of the lawyer's steps before and after leaving the firm.

First, most states permit lawyers planning to leave a law firm to make logistical arrangements for competition (such as renting office space, opening bank accounts, etc.). Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (permitting lawyers' "logistical arrangements" made before they left their firm, but condemning the lawyers' secret arrangement among themselves to lure away law firm associates and clients). See Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1 (1988).

Not surprisingly, courts condemn lawyers whose "logistical" arrangements go beyond the appropriate steps. For example in Joseph D. Shein, P.C. v. Myers, 576 A.2d 985, 986 (Pa. Super. Ct. 1990), three withdrawing associates arrived at their firm at 6:00 a.m. with a rental truck, "entered the offices and removed approximately 400 case files." The breakaway lawyers then wrote their clients, announced the opening of their new firm and enclosed the documents necessary for their clients to transfer the representation to their new firm.

The trial court awarded \$10,000 in punitive damages against each of the three breakaway associates for the wrongful removal of the files, but declined to award any compensatory damages. Id. at 986-87. The appellate court reversed, noting that the three withdrawing associates had violated their fiduciary duties by the

surreptitious removal of four hundred files from Shein's offices, scurrilous statements about the Shein firm and misleading letters to clients accompanied by forms to be used by clients to discharge the Shein firm.

Id. at 989. The appellate court remanded for a determination of damages, noting that the firm

must be awarded a money judgment reasonably equivalent to the anticipated revenue protected from outside interference [] that [it] would have received pursuant to the contracts had the cases remained in [the] firm.

Id. This case obviously involved conduct at the "bad" end of the spectrum, but it highlights the fiduciary duty all lawyers have to their colleagues.

In a similar case, In re Smith, 843 P.2d 449 (Or. 1992), an associate in an Oregon firm determined to leave his firm. In the next two and a half months, he met with thirty-one clients in his office and arranged for them to sign individual retainer agreements. He did not open files for these clients at his old firm. When the associate left, he took his secretary, the files pertaining to the thirty-one new clients who had retained him and files relating to fifty to seventy-five other cases. He then sent letters to other firm clients announcing that "we have changed the name and address of our law firm." Id. at 451. The Oregon Supreme Court found this conduct egregious enough to suspend the associate for four months.

Other courts are somewhat more generous.

- Winters v. Mulholland, 33 So. 3d 54, 55 (Fla. Ct. App. 2010) (holding that a lawyer's former associate was not liable under a "civil theft" statute because the law firm did not prove causation -- that the clients left the law firm and moved to the former associate's new firm because of the wrongful conduct).

Second, most bars traditionally prohibited lawyers from advising clients of their departure before the lawyers advised their own law firms.

The Restatement takes this strict approach.

Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients: (a) prior to leaving the firm: (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and (ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and (b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Restatement (Third) of Law Governing Lawyers § 9(3) (2000) (emphasis added).

However, in 1999, the ABA explained that in some situations departing lawyers may not only be permitted to provide such advance notice to the lawyers -- but also the lawyers may be required to do so.

- ABA LEO 414 (9/8/99) (a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working," and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that the notices to current clients and discussions as a matter of ethics must await departure from the firm"; the departing lawyer "must ensure that her new law firm would have no disqualifying conflict of interest" preventing the new firm from representing the client; although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; legal rules govern a departing lawyer's actions before the firm receives notice of the departure; "the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's

fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; a withdrawing lawyer generally may retain documents the lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; "When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services"; a lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation." After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them." (emphasis added).

Cases and opinions decided since the 1999 ABA legal ethics opinion have continued the trend of permitting such advance word to clients.

- Arizona LEO 10-02 (3/2010) ("Termination of a lawyer's employment or partnership with a firm, for whatever reason, requires the lawyer and firm involved to (1) provide timely notice to affected clients to permit those clients to make informed decisions regarding their continued representation, (2) work to ensure the continued competent and diligent representation of the client, (3) avoid charging excessive fees in connection with any work done as a result of the departure and related transitions, and (4) share information as necessary to permit the firm, the lawyer, and his or her future law firm to comply with their duties to avoid conflicts. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties to a client or the court."; "This duty to inform the client of a lawyer's departure arises because the client, not the lawyer or law firm, chooses which lawyer will continue to represent the client."; "This analysis assumes that the departing lawyer had a significant enough role in the representation of the client that informing the client would be reasonable and necessary. The departing lawyer may have been only one of a many-member team of lawyers handling a matter or may have done only a very small amount of work on a matter (such a few hours of legal research). Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose

counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer.").

- Joint Pennsylvania & Philadelphia LEO 2007-300 (6/2007) (providing a comprehensive analysis of law firm's and lawyer's obligation when the lawyer withdraws from the law firm; holding that "[b]oth the departing lawyer and the old firm have independent ethical obligations to inform the client that its lawyer is leaving the old firm"; "[t]he clients entitled to notice are those for whom the departing lawyer is currently handling active matters or plays a principal role in the current delivery of legal services"; "[t]he law firm should preferably be notified before the clients are notified"; "[j]oint notification of clients is preferable"; explaining that "[a]ny suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after that departing lawyer has left the old firm must be rejected"; "there is no ethical prohibition against the departing lawyer's giving notice to current clients (i.e., clients for whose active matters the departing lawyer currently is responsible or for whom the lawyer plays a principal role in the current delivery of legal services) in person or by telephone"; noting that the law firm's and the departing lawyer's initial notice to the client should not disparage the other; also explaining the law firm's duty when receiving calls for the withdrawing lawyer after the lawyer departs; "In our prior opinion we also concluded, relying upon Opinion 94-30 of the Philadelphia Professional Guidance Committee, that where, following a partner's departure a client for whom the partner had worked, telephoned the law firm asking for the former partner, the firm was obligated to provide the contact information for that former partner prior to engaging in any other discussion with the client. . . . That advice was based on the need to allow the client to make prompt contact with the former attorney in order to facilitate the client's freedom of choice in the selection of counsel. . . We also concluded that after providing the contact information, the firm's representative was permitted to inquire whether the call was related to a legal matter, and if so, the firm's representative could properly propose the firm's assistance in the matter. . . . This conclusion was based upon the analysis that a client represented by one lawyer in a firm is a client of the firm. . . . Under Rule 7.3(a), we acknowledged the firm's right to communicate with a prospective client with whom the firm had a prior professional relationship. . . . We noted, however, that if the caller resisted the invitation or indicated a desire to talk only to the former partner, continued persistence or heavy-handedness by the firm would run the risk of violating Rule 7.3(b) which prohibits direct solicitation of persons who display a disinclination to deal with the firm. . . . We believe this guidance remains appropriate today."; also analyzing the timing of the withdrawing lawyer's duty

to advise the firm of her departure; explaining that the issue is fact-intensive; providing examples of situations that might trigger the withdrawing lawyer's duty to advise the firm of her departure; "if the lawyer were, for example, working on a client matter at the old firm and the new firm were on the other side, any personal interest conflict arising in that circumstance would be one that the old firm would have an interest and an obligation to address"; "Similarly, a duty to disclose a possible departure in advance of any binding commitment or agreement to join a new firm could arise under the law of fiduciary duty. For example, if a partner with a substantial practice were aware that the old firm was making significant investments or undertaking significant commitments in terms of personnel, space, equipment, financing or other resources, to support that partner's practice, a fiduciary duty of disclosure may arise if the partner were to engage in substantive discussion that reasonably could result in that partner and the practice being taken elsewhere after the investments and commitments were entered. Similarly, if a partner or an associate engaged in substantive discussions with another firm about joining that firm, the partner or associate could not ethically deny the existence of such discussion if asked by his current firm."; ultimately explaining that in the absence of some partnership agreement or other contractual arrangement requiring notice as of a certain time, "the departing lawyer should give such notice as is fair and reasonable under all the circumstances. In determining what is fair and reasonable in this context, the guiding principles should be to ensure that client freedom of choice is maintained and to allow the old firm in a responsible and orderly way to discharge its ethical obligations to clients, although other factors may also be relevant." (emphases added)).

- District of Columbia LEO 273 (9/17/97) (explaining the duties of a lawyer considering withdrawing from a law firm; explaining that the lawyer had the duty to advise the clients whose matters the lawyer was handling; "Under the Rules of Professional conduct, a lawyer responsible for a client's matter would be obligated to inform that lawyer's clients of his/her planned departure and of the lawyer's prospective new affiliation, and to advise the client whether the lawyer will be able to continue to represent it. . . . In most situations, a lawyer's change of affiliation during the course of a representation will be material to a client, as it could affect such client concerns as billing arrangements, the adequacy of resources to support the lawyer's work for the client, and conflicts of interest." (emphasis added); "Thus, not only does Rule 1.4 require the lawyer to communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue the representation by the departing lawyer and, if not, to make

other representation arrangements." (emphasis added); warning the lawyer that the notice to the clients should not include attempts to convince the client to move business to the new lawyer; "The lawyer's communication to the client should include the fact and date of the change in affiliation, and whether the lawyer wishes to continue the representation. The lawyer should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm. The client would also need to be informed of any conflict of interest matters affecting its representation at the new firm. Any communication which exceeds that required by ethical rules -- for example, an active solicitation of the client to leave the lawyer's current firm and join the lawyer at the new firm -- could run afoul of the lawyer's obligations under partnership law (for departing partners), corporate law (for shareholders of a professional corporation) and the common law of obligations of employees (for lawyers who are employees of a firm). For example, solicitation of clients by a departing partner (i.e., activity going beyond neutrally informing a client of the lawyer's planned departure and new affiliation) may be a breach of a partner's fiduciary obligations to other partners and may constitute tortious interference with the law firm's business relations."; indicating that the lawyer's possible duty to advise the law firm of the withdrawal before advising the clients is of "no ethical significance"; "Under partnership or other law, a departing lawyer may also be obliged to inform the lawyer's firm, at or around the time the lawyer so notifies clients, of his/her planned departure from the firm. (There appears to be no ethical significance to whether the client or the law firm is first informed of the lawyer's planned departure)." (emphasis added); also explaining that lawyer must be careful in asserting a retaining lien over files; "Where the lawyer or law firm whose relationship with the client is being terminated in this process is owed money for legal services provided, a retaining lien against client files is available only to a very limited extent in the District of Columbia."; pointing to other law as governing the withdrawing lawyer's recruitment of law firm lawyers or employees to leave with the withdrawing lawyer; "Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations."; also dealing with the lawyer's use of a law firm name; "Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").

- Kentucky Bar Ass'n v. Unnamed Attorney, 205 S.W.3d 204, 209 (Ky. 2006) ("[W]e adopt the ABA view that such a duty of notification arises when the departing attorney 'is responsible for the client's representation or . . . plays a principal role in the law firm's delivery of legal services currently in a matter[.]' . . . Clearly, the facts of this case show that the respondent was the only attorney responsible for the man's case and that he played a 'principal' role in delivering legal services to the respondent since no other attorneys from the firm were involved with the man's case until after the respondent left the firm.").
- Alaska LEO 2005-2 (9/8/05) (addressing a lawyer's ethical obligations when changing firms; essentially adopting ABA LEO 414).

However, some courts are not so generous. In Dowd & Dowd, Ltd. v. Gleason, 352 Ill. App. 3d 365, 816 N.E.2d 754 (Ill App. Ct.), appeal denied, 211 Ill. 2d 573, 823 N.E.2d 964 (Ill. 2004), for instance, the court upheld a law firm's judgment against two former partners of the firm, who had solicited Allstate as a client before they left the firm. Interestingly, the head of Allstate's Claims Department and a manager in that Claims Department testified under oath that "they had not been solicited by [the withdrawing partner] to move their business to the new firm" (id. at 764), but the trial court instead believed a former paralegal, who testified that one of the withdrawing partners told her that they had lined up Allstate before they left the firm (id. at 763). The court pointed to various other breaches of fiduciary duty by the withdrawing partners, including the update and download of Allstate's service lists that the withdrawing partners took with them (id. at 767). The court upheld damages of nearly \$2.5 million, including all of the law firm's payments to the partners during the time when they were breaching their fiduciary duties. The damages also included profits the law firm would have earned had Allstate stayed with the firm (id. at 773).

Third, states have also condemned withdrawing lawyers' advance efforts to lure other lawyers or employees away from the firm.¹ There are many common law fiduciary duty cases finding such conduct actionable.

However, some courts and bars have taken a far more liberal approach -- undoubtedly balancing the normal fiduciary duty issues against the ethics rules' emphasis on lawyer mobility.

- District of Columbia LEO 273 (9/17/97) (analyzing the ethics rules governing lawyers' withdraw from one firm and joining another firm; "Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations.").
- Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1071-72 (Ind. Ct. App. 2007) (analyzing a situation in which one of six associates working at a law firm left the firm, and was immediately followed by all of the other associates and support staff; noting that the lawyer owed fiduciary duties to the law firm whether he was a partner or an associate; acknowledging that the lawyer discussed with the other associates the possibility that they would join him at his new firm; "Even when we construe this evidence in KLP's [law firm from which the lawyer withdrew] favor, we do not find that it establishes that Hansen [lawyer who left the firm] was actively and directly competing with KLP while still employed there. He was certainly preparing to compete by questioning KLP employees about their desire, if any, to leave KLP and work for SHCD [new law firm] in the future. He was gathering information about Uptegraft's [other associate who eventually left the firm] salary requirement and Aspy's [other associate who eventually left the firm] willingness to quit his job. He expressed a desire to find positions for all of the KLP employees at SHCD. There is no evidence, however, that Hansen made formal offers of employment with SHCD to KLP employees or that he took actions that constituted anything more than mere preparation to compete with KLP. Consequently, we find that the trial court properly entered summary judgment in Hansen's favor on this count of KLP's complaint.").

¹ Reeves v. Hanlon, 95 P.3d 513 (Cal. 2004) (permitting a law firm to sue its former lawyers who improperly sought to hire away at-will law firm employees).

Fourth, lawyers leaving their firms may not take with them client lists, trade secrets, etc.

Again, these rules mirror the general law in non-lawyer cases. As one ABA LEO explained,

the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.

ABA LEO 414 (9/8/99).

Fifth, lawyers generally may solicit any firm client after the lawyer leaves the firm -- as long as the lawyer complies with applicable ethics rules about such marketing efforts.

Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients. . . after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Restatement (Third) of Law Governing Lawyers § 9(3)(b) (2000).

Sixth, law firms considering merging with other firms generally may not engage in the type of "stand-still" agreements to which corporations often agree.

- See, e.g., Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes, No. 2008/10374, 2008 NY Slip Op 51885U, at *2, *8 (N.Y. Sup. Ct. Sept. 16, 2008) (analyzing an agreement between the Nixon Peabody law firm and a French law firm that the firms entered into while discussing a possible law firm merger; explaining that under the agreement neither firm would "for two years from the date of its agreement . . . employ or offer partnership directly or indirectly" to any lawyer at the other firm (citation omitted); holding that the French law firm could not enforce the provision after Nixon Peabody hired several of the French law firm's partners when the law

firm merger negotiations broke down; finding that the "non-solicitation clause upon which [the French law firm] relies is unenforceable as it violates this state's public policy"; granting summary judgment to Nixon Peabody; also granting summary judgment on the French law firm's claim that Nixon Peabody aided and abetted several French partners' breach of fiduciary duty to their firm; granting summary judgment to Nixon Peabody on the French law firm's claim that it tortuously interfered with contractual relations among the French lawyers in the firm).

Practical Do's and Don'ts for Departing Lawyers and Their Firms

Although some courts and bars take a different position, most of them have reached a general consensus on the acceptable and unacceptable behavior by departing lawyers and their firms.

It is useful to consider the obligations and prohibitions at different times during this process.

Before the Departing Lawyer Advises the Firm

Before the departing lawyer advises the firm, the departing lawyer should recognize the following do's and don'ts.

Do

- Comply with all partnership or employment agreement provisions (unless they are trumped by the ethics requirements).
- Continue spending full time working for the firm (it would be best to engage in the permissible type of pre-departure activities before or after regular working hours, and through personal computers, telephones, etc. -- although there appears to be no per se prohibition on acting otherwise).
- Be careful when making plans to later compete with the firm (permissible activities include renting space, ordering stationery, opening a bank account, etc.).
- Accumulate the information that might be requested by a potential new employer. Although generally even the identity of a lawyer's clients deserve

confidentiality protection, every bar recognizes what amounts to an unstated principle allowing lawyers to disclose to potential new employers the type of information the employers might need when checking conflicts (this unstated principle allows disclosure of only the minimum amount of information required, and applies only when employment discussions become very serious).

Don't

- Advise clients of the departure (although this may be permissible if it is in the client's best interests, and has become less unacceptable as the ethics rules have evolved in this area). If it is necessary to advise the client, be sure to emphasize that the client may choose whichever option is in the client's best interest.
- Seek to solicit others to leave the firm. Traditionally, the ethics rules frowned upon if not prohibited even advising colleagues of the departure, but the case law and bars' approach has become somewhat more liberal (for instance, the D.C. Bar indicates that this issue has little if any ethics ramifications). It would be best not to advise anyone else at the firm (either lawyers or staff) that you intend to leave. If you find it necessary to advise others of your intent, do not offer them a job at your new firm, or even hold out the promise of a job. At most, you should advise them that you cannot talk about that topic until you are at the new firm.
- Begin to compete with the firm (by advising clients not to open matters at the firm, but instead hold off -- either explicitly or implicitly encouraging the clients to retain the new firm).
- Take actions inconsistent with a fiduciary duty to the firm (for instance, a departing lawyer who is in a management position should not make hiring decisions, forecast profits, etc.; partners should not vote on expansion plans, office leases, etc.).
- Provide a false response if someone at the firm asks about future plans, including a possible departure.
- Disclose any information requested by a potential new employer if the disclosure would substantially harm a client (as with embarrassing information, future business plans, etc.). In some situations vague information might suffice, but in other situations the inability to disclose client information might scuttle a possible job offer.

- Transfer any files or other documents to personal computers, or otherwise use client or firm documents in preparing to compete (without notifying the firm and attempting to reach an amicable resolution of issues relating to the use and retention of client files and more generic documents prepared while at the firm). The off-limits firm information includes client lists, billing rates, client revenues, realization rates, etc.

After the Departing Lawyer Advises the Firm (but Before He Leaves)

After the departing lawyer advises the firm (but before he leaves), the departing lawyer should recognize the following do's and don'ts.

Do

- Comply with partnership or employment agreement provisions such as notice provisions, etc.
- Offer to send a joint communication (with the firm) to the clients for whose matters you currently have a large degree of responsibility. The recipients of this communication should be determined on a matter-by-matter rather than a client-by-client basis. The communication should announce the departure and the date of departure, and emphasize the client's right to (1) stay with the firm; (2) move with the departing lawyer; or (3) choose another law firm.
- Consider sending a unilateral communication if the law firm balks at sending a joint communication (the unilateral communication must contain the same provisions as the preferable but not required joint communication).
- Respond in a neutral way to inquiries from clients who receive either a joint or unilateral communication about the departure.

Don't

- Begin to compete with the firm (in the ways described above). You can answer inquiries from clients, but should not actively solicit new business from them.
- Disparage the law firm.
- Violate any common law duties governing solicitation of colleagues to leave the firm. If you advise others of your intent to leave, or if anyone asks you

about it, you should not offer a job at your new firm, or even hold out the hope of a job at your new firm.

During this time, the law firm should recognize the following do's and don'ts.

Do

- Try to agree on a joint communication to the clients (described above). It seems unlikely that the departing lawyer would balk at sending a joint communication, but if so the law firm may send a unilateral communication (which contains all of the provisions discussed above).
- Communicate with clients after the client receives the initial joint or unilateral communication offering the client the three choices discussed above (subject to the limitations discussed below).
- Try to amicably agree with the departing lawyer about the documents that he will take with him. Although files generally belong to clients and not law firms or lawyers, the ABA has indicated that departing lawyers generally may take "copies of documents that she herself has created for general use in her practice," and generally may "retain copies of client documents relating to her representation of former clients."

Don't

- Disparage the departing lawyer.
- Communicate with clients before the clients receive either a joint or unilateral communication providing the three choices discussed above. Even after such communication, don't simply advise the client that the firm will continue to represent the client.
- Try to prohibit contact between the departing lawyer and the clients on whose matters the departing lawyer has been primarily responsible.
- Deny contact information about clients (identified on a matter-by-matter basis) with whom the departing lawyer might need to communicate about the departure.
- Insist that the departing lawyer advise the firm of the identity of clients with whom the departing lawyer has communicated about her departure.

- Deny the departing lawyer access to any documents, firm resources, etc., that the departing lawyer needs to adequately provide legal services to any clients.

After the Departing Lawyer Leaves the Firm

After the departing lawyer leaves the firm, the departing lawyer should recognize the following do's and don'ts.

Do

- Follow the ethics rules on solicitation, direct mail and other marketing when contacting any of the firm's clients (acceptable post-departure targets of ethical marketing including those clients to whom you never provided any legal services).

Don't

- Disparage the law firm.

At this time, the law firm should recognize the following do's and don'ts.

Do

- Advise clients seeking to communicate with the departing lawyer of her new contact information. It is generally permissible to offer as a first choice to put the client in touch with someone at the firm who can help the client, but the law firm must always provide contact information for the departing lawyer upon request.
- Try to arrange a protocol with the departing lawyer about handling mail directed to the lawyer. For instance, it generally would be appropriate for the law firm to (1) put junk mail aside until the lawyer can pick it up; (2) open mail directed to the lawyer which comes from clients that the firm will continue to represent or which the firm and the lawyer are both representing on separate matters; and (3) make mail available for pickup by the lawyer if it comes from clients that the law firm will no longer be representing.
- Comply with the ethics rules governing files requested by clients who have chosen to retain the departing lawyer. There is no single national rule on this, so it is important to follow the pertinent state's ethics rules.

Don't

- Open mail directed to the departing lawyer if it relates to clients that the firm no longer represents.
- Disparage the departing lawyer.
- Try to condition release of a client's file or any other event on obtaining the client's release of liability.

Best Answer

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

n 2/12

Litigation Settlements: General Rule

Hypothetical 10

You have successfully represented plaintiffs in several franchise lawsuits against an out-of-state franchisor. The franchisor's lawyer just called to offer an attractive settlement in the latest case that you brought. When you read the "fine print," you see that the franchisor wants you to agree not to bring similar cases against the franchisor on behalf of any other plaintiffs.

May you enter into a settlement agreement that contains such a provision?

NO

Analysis

Emphasizing the importance of clients' ability to hire lawyers of their choice, the ABA Model Rules and most states' ethics rules prohibit such restrictions as part of settlement agreements.

A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

ABA Model Rule 5.6(b).

The ABA has flatly indicated that this type of restriction violates the ethics rules. ABA LEO 371 (4/16/93) (the Model Rules prohibit the demand for or acceptance of a lawyer's agreement not to represent future claimants against a settling defendant as part of a global settlement of mass tort litigation).

The Restatement takes the same basic position.

In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice

law, including the right to represent or take particular action on behalf of other clients.

Restatement (Third) of Law Governing Lawyers § 13(2) (2000). A comment provides some explanation.

Subsection (2) states the prohibition against restrictive agreements made in settling a client's claim. For example, a defendant as a condition of settlement may insist that the lawyer representing the plaintiff agree not to take action on behalf of other clients, such as filing similar claims, against the defendant. Proposing such an agreement would tend to create conflicts of interest between the lawyer, who would normally be expected to oppose such a limitation, and the lawyer's present client, who may wish to achieve a favorable settlement at the terms offered. The agreement would also obviously restrict the freedom of future clients to choose counsel skilled in a particular area of practice. To prevent such effects, such agreements are void and unenforceable.

Restatement (Third) of Law Governing Lawyers § 13 cmt. c (2000).

Bars routinely take the same approach.¹

Despite the near-unanimity among the states, one of the leading ethics academicians in the country has severely criticized the prohibition. In Stephen Gillers, A Rule Without a Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice, 79 A.B.A.J. 118 (Oct. 1993), Professor Stephen Gillers of New York University School of Law rejected the main arguments in favor of the prohibition. As Professor Gillers points out,

it cannot be true that the profession's duty to help make counsel available requires individual lawyers to keep

¹ N.Y. City LEO 1999-03 (3/1999) ("A lawyer may not enter into a settlement agreement that restricts her own or another lawyer's ability to represent one or more clients, even if such an agreement may be enforceable as a matter of law.").

themselves free to serve clients. Absent court order, lawyers may reject clients outright and without a reason. Less directly, every time lawyers accept a case they reduce their availability, if only by virtue of the conflict rules.

Id. Professor Gillers also discounts the argument that the prohibition "prevents moneyed defendants from 'buying off' plaintiff's lawyers . . . thereby denying future claimants any effective counsel."

This argument fails for two reasons. First, defendants are allowed to try this gambit -- they can use the same funds to try to retain the best opposing lawyers. Second, and more important, the argument assumes that the plan can work, that enough good lawyers will agree to forego lucrative work and that the defendant will be willing and able to make it financially worthwhile. These untested assumptions are dubious. They ignore the market. If a claim has merit and elimination of one lawyer creates a vacancy, the market will produce a replacement. Undoubtedly, some lawyers will accept a restriction, but surely not enough to deprive worthy claimants of all counsel. The prohibition on restrictive covenants was adopted before the era of mass torts. Today, it can impede useful settlements and foster needless litigation. Willing participants should be able to agree as they wish.

Id. Despite this common-sense analysis, every state prohibits such restrictions.

- See, e.g., North Carolina LEO 2003-9 (1/16/04) (holding that a lawyer may not agree to a settlement arrangement in which the lawyer agrees not to represent a client against the same defendant; also holding that "a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants."; explaining that "[t]he confidentiality provision above does not specifically prohibit Attorney's use of confidential information learned during the representation or representation of other claimants with similar claims against Employer. Instead, it restricts only the disclosure of certain information gained in the representation. The provision is not proscribed by Rule 5.6(b) which is silent on participation in a settlement agreement that prohibits a lawyer from revealing information about the matter or the terms of

the settlement. In fact, such a provision is consistent with the lawyer's continuing duty to not reveal the confidential information of a client or a former client without the informed consent of the client or the former client."; "Attorney's use of Plaintiff's confidential information to represent the other employees, even without overt disclosure of the information, would violate Rule 1.9(c) if it exposed Plaintiff to liability under the confidentiality provision of the settlement agreement. In this event, Attorney would be prohibited from representing other employees because Attorney's failure to use Plaintiff's confidential information would materially limit his representation of the other employees. Rule 1.7(a)(2). But see, ABA Formal Opinion 00-417.").

Interestingly, one massive aggregate settlement proceeded despite obvious issues involving such ethics restrictions. The settlement offered by Merck in the Vioxx cases required that plaintiff's lawyers handling any cases against Merck who recommended the settlement to one client must recommend it to every client -- and also required those lawyers to seek to withdraw from representing any of their clients who rejected the settlement. Although roundly rejected by academics, the settlement succeeded. Somewhat surprisingly, at least one court refused to address the ethical propriety of Merck's settlement offer in advance.²

² Stratton Faxon v. Merck & Co., Civ. A. No. 3:07cv1776 (SRU), 2007 U.S. Dist. LEXIS 93413, at *7-8 (D. Conn. Dec. 21, 2007) (declining to rule ahead of time on the ethical propriety of a settlement agreement between Merck as manufacturer of Vioxx and a Connecticut law firm representing approximately 85 plaintiffs; explaining that the proposed settlement required the law firm to recommend a settlement to all of its clients or to none of its clients, although it also contained a "safe harbor" provision indicating that the "all or none" requirement does not bind any plaintiff if the ethics rules of their state prohibit it; "Instead, Stratton Faxon merely has a difficult decision to make about an ethical rule. It must either recommend that all of its client[s] accept the private and consensual settlement, none of its clients accept the settlement, or trust its interpretation of the Connecticut ethical rules that would place it, and its clients, in the safe harbor. There indeed may be adverse future consequences to any potential decision Stratton Faxon makes. But lawyers make difficult decisions about ethical rules on a daily basis. Not every difficult decision constitutes a 'case of actual controversy.' Because Stratton Faxon seeks a prospective ruling advising it about a [sic] how a Connecticut ethical rule will operate under [a] given hypothetical state of facts, and because the defendants are not adverse to the plaintiffs in this case, no case or controversy exists. As such, Stratton Faxon's complaint is dismissed for lack of jurisdiction.").

Best Answer

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

n 2/12

Litigation Settlements: Other Possible Provisions

Hypothetical 11

You defended your client in a number of product liability cases against the same plaintiff's lawyer, and you are looking for a way to prevent that lawyer from filing new cases against your client.

May you settle the next case only if the plaintiff's lawyer agrees:

- (a) Not to solicit any new clients to bring similar cases against your client?

MAYBE

- (b) Not to assist or cooperate with any other parties or their lawyers in pursuing cases against your client?

MAYBE

- (c) To maintain in strict confidence the amount of the settlement and all pertinent documents?

MAYBE

- (d) To either represent your client or act as a "consultant" for your client, which would prevent the plaintiff's lawyer from pursuing other cases against your client without its consent?

MAYBE

Analysis

A fairly simple (but largely undefined) restriction has generated enormous case law and ethics decisional analysis.

A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

ABA Model Rule 5.6(b).

Imaginative lawyers have tried to craft settlement agreement provisions that might restrict an adversary from taking similar cases in the future, without running afoul of the prohibition on practice restrictions.

One Colorado Legal Ethics Opinion¹ criticized settlement agreement provisions:

- Prohibiting a plaintiff's lawyer from subpoenaing certain documents or persons representing other clients.
- Prohibiting a plaintiff's lawyer from using certain expert witnesses in future cases.
- Imposing forum or venue limitations in future cases brought by a plaintiff's lawyer.
- Prohibiting a plaintiff's lawyer from referring potential clients to other lawyers.
- Requiring a plaintiff's lawyer to turn over work product that the lawyer would need in future cases.

¹ Colorado LEO 92 (6/19/93) ("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation. See, e.g., New Mexico Ethics Comm. Op. 1985-5 (unethical as a condition of settlement for plaintiff's counsel in wrongful death action to be required to turn over attorney work product without which the lawyer's ability to practice law would be restricted); District of Columbia Bar Op. No. 35 (1977) (unethical for an attorney as part of a settlement to agree not to refer a potential client to another attorney if that potential client has a claim against the defendant involved in the settlement); Arizona Op. No. 90-6 (7/18/90) (lawyer who represents several franchisees against a franchisor may not enter into a settlement agreement that provides that the lawyer will disclose the names of all franchisees who have contacted the lawyer regarding potential representation against the defendant).").

- Requiring a plaintiff's lawyer to reveal the names of all potential clients who have approached the lawyer for possible representation.

A Pennsylvania legal ethics opinion² nullified a settlement agreement provision in which a plaintiff's lawyer agreed to return an amount of money (described as "reimbursement of fees and costs") if the plaintiff's lawyer handled similar cases against the defendant.

Defense lawyers might be tempted to think of this only as a plaintiff's lawyer problem -- essentially taking a "there's no harm in asking" approach. However, ABA Model Rule 5.6(b) and the various state rules adopting the same approach generally prohibit both the "making" and the "offering" of impermissible restrictions. Thus, courts and bars criticize the lawyer offering such a restriction as much as the lawyer considering or accepting it. See, e.g., In re Hager, 812 A.2d 904, 919 n.18 (D.C. 2002) ("We note that several bar opinions have stated that a defense attorney who proposes a restriction on practice provision as part of a settlement also engages in unethical conduct, even if the offer is rejected"); Philadelphia LEO 95-13 (8/1995) (reminding a plaintiff's lawyer who had received a settlement offer with such a restrictive provision that "you must consider whether you have an obligation to report defense counsel [to the Pennsylvania Bar] for their conduct in making the offer").

² Philadelphia LEO 95-13 (8/1995) (advising a plaintiff's lawyer that he could not agree to a settlement provision in which he agreed to return \$50,000 (allocated to "reimbursement of fees and costs") if the plaintiff "directly or indirectly" represented another plaintiff in similar cases against the defendant, and reminding the plaintiff's lawyer that "you must consider whether you have an obligation to report defense counsel [to the Pennsylvania Bar] for their conduct in making the offer" (emphases omitted)).

Most of these bar condemnations of such techniques resulted from plaintiffs' lawyers' inquiries before entering into such arrangements. Interestingly, there is still a debate about the enforceability of restrictions that violate applicable ethics rules.

At least one bar has held that "[a]n agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule." New York LEO 730 (7/27/00) (citing Feldman v. Minars, 658 N.Y.S.2d 614 (N.Y. App. Div. 1997) as "holding that agreement not to solicit clients is enforceable even assuming it violates the rule").

(a) A New York court has indicated that such a provision does not violate public policy. Feldman v. Minars, 658 N.Y.S.2d 614 (N.Y. App. Div. 1997). However, an earlier Arizona ethics opinion found such an agreement improper.

- Arizona LEO 90-06 (7/18/90) (analyzing a settlement agreement in which a lawyer representing franchisees should include the following limitations; "[T]he franchisees and the attorneys representing the franchisees agree to supply to the attorneys for Corporation A a full complete list of all Corporation A's franchisees who have been contacted by any of the foregoing, whether by mail or telephone, or by any other means, or who have communicated in any way with any of the foregoing concerning any legal action or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. . . . The franchisees and the attorneys representing the franchisees hereby agree not to solicit or contact any franchisee of Corporation A concerning any legal action or potential legal action brought or to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. The franchisees and their attorneys also hereby agree not to participate voluntarily in any way in any legal action brought or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement."; finding that the provisions were improper; "[T]he Committee concludes that the inquiring attorney may not disclose the names of any franchisees who have consulted with him in any matters regarding

Corporation A, unless they consent to have their name revealed after consultation. Otherwise, to do so would violate ER 1.6(a)."; "Of course, to the extent that the inquiring attorney has contacted any franchisees as third parties, outside of any attorney/client relationship and unrelated to the representation of any client, he may disclose these contacts to opposing counsel."; also finding that the lawyer could not agree to the second provision).

(b) The New York state court decision mentioned above upheld a settlement provision with this restriction. Feldman v. Minars, 658 N.Y.S.2d 614 (N.Y. App. Div. 1997). The same opinion upheld a settlement provision with this restriction. Id.

(c) Confidentiality provisions obviously do not directly restrict a lawyer's right to practice, but courts and bars sometimes examine the effect of such provisions.

The North Carolina Bar upheld such a confidentiality provision, "even though the provision will effectively limit the lawyer's ability to represent future claimants." North Carolina LEO 2003-9 (1/16/04).

The ABA found such a strict confidentiality agreement unethical.

ABA LEO 417 (4/7/00) (addressing the following question: "The Committee has been asked whether, under the ABA Model Rules of Professional Conduct, a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party. The proposed settlement would be favorable to the lawyer's client. The Committee notes that, while this particular situation is most likely to arise in litigation, it could also arise in transactional matters."; explaining that the proposed limitation would amount to a restriction on the lawyer's practice; "In this case, the proposed settlement provision would not be a direct ban on any future representation. Rather, it would forbid the lawyer from using information

learned during the representation of the current client in any future representations against this defendant. As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation."; explaining the difference between a permissible restriction on the lawyer's disclosure of client confidences and an impermissible restriction on the lawyer's use of client confidences; "A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the matter accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision."; "Although the Model Rules also place a restraint on the 'use' of information relating to the former client's representation, it applied only to use of the information to the disadvantage of the former client. Even in this circumstance, the prohibition does not apply when the information has become generally known or when the limited exceptions of Rule 1.6 or 3.3 (Candor Towards the Tribunal) apply. This prohibition has been interpreted to mean that a lawyer may not use confidential information against a former client to advance the lawyer's own interests, or advance the interests of another client adverse to the interests of the former client. If these circumstances are not applicable, using information acquired in a former representation in a later representation is not a violation of Rule 1.9(c). Thus, from a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information." (footnotes omitted); concluding that "[a]lthough a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related

party, except to the limited extent described above. An agreement not to use information learned during the representation would effectively restrict the lawyer's right to practice and hence would violate Rule 5.6(b).").

Some states have taken the ABA approach, condemning confidentiality agreements that take too restrictive an approach.

- South Carolina LEO 10-04 (9/8/10) (holding that a plaintiff's lawyer cannot agree as part of a settlement not to mention the defendant's name in seeking future clients; explaining the context: "A lawsuit is filed in a SC Court. A settlement is reached whereby the defendant agrees to pay the plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for 'commercial or commercially-related publicity purposes.' Lawyer A may identify generally 'a settlement was achieved against an industry' -- ie: trucking or retail store. The fact that Lawyer A has sued the defendant is a matter of public record and nothing filed in the case was under seal."; explaining that "Rule 5.6 was not intended to merely protect against specific practice-of-law prohibitions but is aimed more broadly at lawyers' access to legal markets and, more importantly, clients' access to lawyers of their choosing. Thus advertising and solicitation need not themselves be regarded as the practice of law in order for them to be protected by Rule 5.6).")
- New York LEO 730 (7/27/00) (finding that a confidentiality provision could violate the prohibition on practice restrictions if its "practical effect" is the same as a practice restriction; noting that the confidentiality provision applied "to some information that, ordinarily, the plaintiff's lawyer would have no duty to keep confidential"; "These provisions would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret under DR 4-101 but was nevertheless covered by the settlement terms. A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients -- precisely the problem at which DR 2-108(B) is aimed.")
- Alaska LEO 2000-2 (3/10/00) (finding that a confidentiality agreement "might" violate the prohibition on practice restrictions if it precludes the representation of future similar clients).

(d) Given the breadth and depth of the ethics duty of loyalty to existing clients, clever defense lawyers undoubtedly thought early on of simply having their clients hire the plaintiff's lawyer to represent the client or act as a "consultant" -- which blocks the plaintiff's lawyer from handling any matters adverse to the client without its consent.

One state has explicitly approved such an arrangement, after finding that the defendants in that situation were not trying to "buy off" or "conflict out" plaintiff's lawyer.

- Virginia LEO 1715 (2/24/98) (defendants in an employment discrimination case may arrange a settlement under which the plaintiff's lawyers will represent the defendants (thereby implicitly prohibiting the lawyers from representing other plaintiffs against the same defendants without their consent); although such an arrangement could be seen as "merely a ruse" to circumvent the Code's ban on settlements that "broadly restrict" a lawyer's right to practice law, the lawyers here "have not represented any other clients adverse to defendants and do not have a present expectation of such representation in the future," and could "provide valuable advice to defendants" on employment discrimination law; furthermore, the facts did not suggest that the defendants were trying to "buy off" plaintiff's counsel or "conflict out" plaintiff's counsel by hiring him or her; determining if such a settlement agreement "broadly restricts" the lawyers' practice requires a factual determination, but a settlement agreement like this entered into by a large firm with many practice areas might survive, while the Code might prohibit a similar arrangement entered into by a small "boutique" firm giving up a substantial portion of its practice; here, the settlement agreement did not completely restrict the lawyers' right to practice, since they could take cases against the defendants with consent).

Other courts have expressed remarkable hostility to such arrangements.

- Johnson v. v. Nextel Commc'ns, Inc., 660 F.3d 131, 139, 141, 142 (2d Cir. 2011) (finding that former clients of a law firm could pursue an action against the law firm and against Nextel, the defendant in the case that law firm had pursued on behalf of its then-clients and current plaintiffs; noting that the law firm of Leeds, Morelli & Brown ("LMB") had settled with Nextel in an arrangement in which the law firm had a financial incentive to arrange for all five hundred eighty-seven individual clients to resolve their dispute against Nextel under a specified dispute resolution process, after which the law firm

would begin to represent Nextel; "The overriding nature of the conflict is underscored by the fact that, when fourteen of the 587 clients failed to agree, Nextel's final, but pre-consultancy, payment to LMB was reduced from \$2 million to \$1,720,000, or \$20,000 per non-agreeing client. Under the DRSA [dispute resolution process], after obtaining the waivers, LMB would be paid \$1.5 million when half of the claimants' claims were resolved through the DRP, regardless of the individual outcomes. Another \$2 million (\$1,720,000 after Amendment 2) would be paid to LMB when the remaining claims were resolved, again without regard to individual outcomes. However, the \$2 million would be reduced on a sliding scale if less than all the claims were resolved within forty-five weeks from the effective date. To become entitled to the \$2 million, LMB would have to process over thirteen claims per week starting on the effective date, or over two claims per work day."; "Once all the claims were processed, LMB would formally go to work for Nextel as a consultant for two years at \$1 million per year. LMB also promised in the DRSA not to accept new clients with claims against Nextel, not to refer any such client to another lawyer or firm, and not to accept compensation for any prior referral."; finding that the arrangement was improper; "[W]e express our candid opinion that the DRSA was an employment contract between Nextel and LMB designed to achieve an en masse processing and resolution of claims that LMB was obligated to pursue individually on behalf of each of its clients."; "To be sure, the claimants were allowed to consult with another attorney, but an initial attorney hired to bring a discrimination action does not fulfill his or her representational obligations by presenting a client with a proposal that can be considered in an informed manner only by hiring a second attorney."; finding that the plaintiffs could also sue Nextel for aiding and abetting the law firm's misconduct; "Viewed in the light most favorable to appellants, therefore, they have sufficiently alleged that Nextel negotiated and signed the DRSA with the knowledge, and intent, that it would undermine LMB's ability to fairly represent appellants. We therefore vacate the district court's dismissal of appellants' claim against Nextel for aiding and abetting LMB's breach of fiduciary duty.").

- Cardillo v. Bloomfield 206 Corp., 988 A.2d 136, 139-40, 140 (N.J. Super. Ct. App. Div. 2010) (analyzing a situation in which a lawyer representing a plaintiff entered into a settlement agreement with the defendant at about the same time that the lawyer entered into an agreement in which she agreed not to take any more cases against the same defendant; explaining that about five months later a lawyer brought an action seeking a court determination that the second agreement was void because it violated the New Jersey ethics rule prohibiting such restrictions; explaining that "[t]he parties cannot circumvent the import of RPC 5.6(b), and the reality of their transaction by

expressly claiming during the negotiations that they are negotiating the two agreements separately and then by executing two separate agreements. Nor may they defeat application of the RPC by the device of arranging to execute the agreements on different days or with minor negotiations in the interim."; rejecting defendants' argument that the lawyer was prohibited by "principles of equitable estoppel" to challenge the agreement; "[E]nforcement of RPC 5.6(b) will cause no injustice here. RPC 5.6(b) is designed in part to benefit the public; that purpose would be thwarted if equitable estoppel principles allowed the Cardillo Agreement to stand."; affirming the lower court's finding that the second agreement was void).

A few examples suffice to show the great risks that lawyers take by offering or agreeing to such restrictions.

Adams v. BellSouth Telecommunications, Inc., Case No. 96-2473-CIV.-

MIDDLEBROOKS, 2001 U.S. Dist. LEXIS 24821 (S.D. Fla. Jan. 29, 2001). A plaintiff's firm represented a group of 56 plaintiffs in litigation against BellSouth. The plaintiffs' firm dealt with two in-house BellSouth lawyers, Francis Semmes and Keith Kochler.

Francis Semmes graduated summa cum laude from the University of Alabama, and received his J.D. degree from Duke in 1979. He is now BellSouth's General Counsel, Regulatory Alabama. Keith Kochler graduated cum laude from Franklin & Marshall College, where he was Phi Beta Kappa -- and earned his J.D. degree from George Washington University in 1979. He practiced at Smith, Currie & Hancock until joining BellSouth in 1983. He left BellSouth to start King & Spalding's labor and employment practice, and returned to BellSouth in 1986. He eventually rose to become BellSouth's Chief Labor and Employment Counsel. He left BellSouth in 2002 to join Kilpatrick Stockton in its Atlanta office.

The plaintiffs' law firm suggested to Semmes and Kochler that they would enter into a "global settlement" for \$1.5 million, which could include their agreement not to take any other cases against BellSouth for one year. Someone at the plaintiffs' firm suggested that such a provision would be unethical, so the lawyers eventually agreed that BellSouth would hire the plaintiffs' firm as "consultants."

When this arrangement came to the court's attention, the court considered sanctions both against the plaintiffs' law firm and against BellSouth's lawyers, Semmes and Kochler. The court first found that it was as ethically impermissible to offer an improper restriction as part of a settlement agreement as it was to accept it. The court found "the most disturbing facet" of BellSouth's lawyers' conduct to be pitting the plaintiffs' law firm against its own clients -- by insisting that the consulting fees come from the already-agreed-upon \$1.5 million settlement. Id. at *36.

The court (1) prohibited Semmes and Kochler from appearing in the Southern District of Florida until they had provided "certified proof" that they had taken five hours of Florida ethics MCLE, and (2) ordered the lawyers to provide a copy of the court's order "to the regulating authority of any state bar to which they are admitted." Id. at *45.

In re Conduct of Brandt, 10 P.3d 906 (Or. 2000). Brandt and Griffin practiced in Oregon, and successfully represented distributors of tools manufactured by a subsidiary of Stanley. Stanley's vice president discussed a global settlement of all of the claims being pursued by Brandt and Griffin, but said that he wanted to avoid future litigation against Stanley, and "that the only way that he could be assured of that would

be to retain the plaintiffs' lawyers to represent Mac Tools [the subsidiary] and Stanley in the future." Id. at 911.

The plaintiffs' lawyers were careful not to make their possible employment by Stanley a condition of the settlement. A mediator suggested that he hold retainer agreements between the plaintiffs' lawyers and Stanley "in escrow" until all of the settlement proceeds had been disbursed and the case was dismissed. Id. at 913.

Griffin called the Oregon Bar's General Counsel, because he was still worried about such a provision. The Bar's General Counsel told Griffin that the proposed arrangement was "hypothetically possible." Id. at 914.

Brandt and Griffin then entered into the settlement agreement, which explicitly disclaimed any connection to their being hired by Stanley. Brandt and Griffin later advised their clients of their retention by Stanley, noting that "we are disclosing this information to you because we feel that we have an obligation to do so." Id. at 915.

One of the plaintiffs balked at the settlement, and filed complaints with the Bar against Brandt and Griffin.

Brandt and Griffin first argued that they could not be disciplined because they had consulted with the Oregon Bar's General Counsel, and had relied on the General Counsel's "advice that putting the retainer agreements into escrow with the mediator was a way to avoid the prohibition" of practice restrictions in settlements. Id. at 918. The court rejected that argument, holding that "favorable advice by the Bar's general counsel does not provide a defense to disciplinary violations. Id.

The Oregon Supreme Court held that Brandt and Griffin had violated the prohibition on practice restrictions as part of settlements. The court also found that the lawyers' disclosure to their client was inadequate, because they did not advise their clients that their retention by Stanley was a condition of the settlement, and that they had signed retainer agreements before their clients had signed the settlement agreement.

The Supreme Court suspended Griffin from practicing law for 12 months, and suspended Brandt for 13 months.

In re Hager, 812 A.2d 904 (D.C. 2002). Mark Hager was a plaintiff's lawyer who was representing plaintiffs in litigation against Warner-Lambert regarding its head-lice shampoo. As part of a settlement agreement, Hager agreed to be retained by Warner-Lambert (for which he was paid \$225,000). Noting that Hager had not advised his clients of this retention, the D.C. Bar suspended Hager from practice for one year.

Best Answer

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

Forms of Practicing Law

Hypothetical 12

You remember from law school that lawyers may not limit their liability to clients in advance of their work for those clients. Now you are wondering how that rule applies to the form in which you choose to practice.

May you and your colleagues enter into partnership or corporate arrangements that limit your liability (such as LLPs, LLCs, etc.)?

YES

Analysis

ABA Model Rules

Under the ABA Model Rules,

[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless that client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1).

Despite this general prohibition on lawyers limiting their liability to their clients in advance, every state has long recognized the permissibility of lawyers practicing in some type of partnership or corporate form that limits their liability in some way.

Although many lawyers do not seem to realize it, each individual lawyer even in a limited liability partnership or corporation must be individually responsible for his or her own malpractice. Such lawyers apparently must have their personal assets at risk.

The ABA Model Rules explain this principle. ABA Model Rule 1.8 cmt. [14] (explaining that the provision prohibiting lawyers from limiting their liability to their clients

in advance does not "limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct." (emphasis added)).

Restatement

The Restatement contains several sections that explain these concepts.

The Restatement first recognizes the general rule that an entire law firm can be liable for an individual lawyer's misconduct negligence.

A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

Restatement (Third) of Law Governing Lawyers § 58(1) (2000).

The Restatement also explains the liability of each individual lawyer in the firm.

Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

. . . A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Restatement (Third) of Law Governing Lawyers § 58(2), (3) (2000).

A comment provides an additional explanation.

Vicarious liability of law firms and principals of traditional general partnerships results from the principles of respondeat superior and enterprise liability. . . . Vicarious liability also helps to maintain the quality of legal services, by requiring not only a firm but also its principals to stand

behind the performance of other firm personnel. Because many law firms are thinly capitalized, the vicarious liability of principals helps to assure compensation to those who may have claims against principles of a firm.

On the other hand, limited liability is a principle generally accepted for those engaged in gainful occupations, and it may be difficult for a lawyer to monitor effectively the behavior of other lawyers in a firm. For those and other reasons, legislatures have adopted statutes making it possible for lawyers to practice in modified partnerships or other entities in which the principals are not subject to the traditional vicarious liability of general partners. Such entities themselves continue to be vicariously liable for acts of their principals and employees, and their lawyers continue to be liable for their own acts.

Restatement (Third) of Law Governing Lawyers § 58 cmt. b (2000). The next comment addresses individual lawyers' financial responsibility.

In a law firm organized as a traditional general partnership without limitation of liability, the partners are "principals" within the meaning of this Section, and associates, paraprofessionals, and other employees (including part-time employees while so acting) are "employees." The firm and its principals are ordinarily liable for wrongful acts and omissions of lawyers who have an of-counsel relationship with the firm . . . , while they are doing firm work. However, the scope of liability for acts of an of-counsel lawyer may be affected by the terms of the of-counsel relationship and the extent of the lawyer's affiliation to the firm apparent to the lawyer's clients. The scope of the of-counsel lawyer's vicarious liability for acts of firm lawyers is determined by general partnership law. . . .

Even though no traditional partnership exists, a person might be able to assert vicarious liability under the doctrine of partnership by estoppel, or purported partnership, against lawyers who represented themselves to be partners or consented to another's so representing them when the person relied on that representation.

Restatement (Third) of Law Governing Lawyers § 58 cmt. c (2000).

The Restatement explains numerous ways in which lawyers can avoid this harsh general rule rendering all partners liable for one partner's misconduct or negligence.

First, the Restatement distinguishes individual lawyers' responsibility for misconduct or negligence from responsibility for normal operating expenses.

Whether the principals of a professional corporation or other entity, as well as the entity, are liable for other liabilities, such as the corporation's obligation to pay rent for its office, depends on the law of the jurisdiction. The firm may enter into contracts excluding or limiting vicarious liability in commercial transactions such as renting office space, but may not enter into agreements prospectively limiting the firm's liability to a client for malpractice.

Restatement (Third) of Law Governing Lawyers § 58 cmt. c (2000).

Second, a comment addresses states' legislation allowing some limitation on such liability.

Legislation allows lawyers to practice in professional corporations and, in many states, in limited-liability general partnerships or limited-liability companies. Such legislation generally contains language excluding liability of principals of the entity for negligence or misconduct in which they did not participate directly or as supervisors. The effect of such statutory language on lawyers may be limited by the state supreme court's rules and by statutory provisions concerning professional regulation. Thus, rules in some states require lawyers in professional corporations or other entities to accept specified vicarious liability, to maintain specified liability insurance, or to give notice to clients of the nature of the firm.

Restatement (Third) of Law Governing Lawyers § 58 cmt. c (2000).

Third, the Restatement acknowledges lawyers' freedom to organize their law practice in a way that reduces or eliminates the liability of partners who are not personally responsible for some negligence or wrongdoing.

A law firm established as a partnership is generally subject to partnership law with respect to questions concerning creation, operation, management, and dissolution of the firm. Originally in order to achieve certain tax savings, law firms were permitted in most states to constitute themselves as professional corporations. Most such laws permitted that form to be elected even by solo practitioners or by one or more lawyers who, through their professional corporation, became partners in a law partnership. Pursuant to amendments to the partnership law in many states in the early 1990s, associated lawyers may elect to constitute the organization as a limited-liability partnership, with significant limitations on the personal liability of firm partners for liability for acts for which they are not personally responsible Correspondingly, some states permit lawyers to form limited-liability companies. Lawyers who are members of professional corporations or limited-liability companies are subject to statutory and court rules applicable to such organizations set up to practice law.

Among the questions determined by law generally applicable to the particular legal form in which the firm is constituted or attempted be to be constituted are those specifying such matters as the following: the means by which the firm is to be constituted; who within the organization is authorized to govern the firm and to enter into contracts or otherwise incur liability on its behalf; the consequences of acts of any owner or nonowner employee of the firm causing injury to persons outside the organization (see § 58); the responsibility of the firm under laws governing employee rights; who within the firm is authorized to participate in managing the firm; what powers and rights exist in owners of the firm in the absence of controlling provisions in the firm agreement; the means by which an interest in the firm may be transferred and similar questions of succession to an interest in the firm; what events cause dissolution and what consequences follow

from dissolution; and by what means the affairs of the firm are to be wound up on dissolution. With respect to any such issue, a provision of an applicable lawyer code bearing on the issue should control absent clear indication that valid different regulations governing structures of the kind involved are to control.

Restatement (Third) of Law Governing Lawyers § 9 cmt. b (2000) (emphasis added).

Fourth, the Restatement explains that the normal rules do not apply to in-house lawyers.

The lawyers of a corporate law department are not vicariously subject to each other's liabilities under this Section. Such departments usually have no outside clients, and their client-employer does not need vicarious liability to enforce responsibility on the part of its lawyer employees. Any outside nonclient injured by a law department lawyer can look to the corporation as responsible for its lawyer employees; such outsiders normally are adequately protected by the corporation's liability under general principles of enterprise liability. A department lawyer who participated in the acts giving rise to liability is directly, but not vicariously, liable

For similar reasons, the lawyers of the legal office of a governmental agency are not vicariously subject to each other's liabilities under this Section. In addition, the damage liability of the agency or of the government of which it is part is often affected by rules and statutes regulating governmental liability or immunity for torts and other wrongs.

Restatement (Third) of Law Governing Lawyers § 58 cmt. c (2000).

Fifth, the Restatement explains that law firms and their lawyers normally are not responsible for the acts of co-counsel.

A firm is not ordinarily liable under this Section for the acts or omissions of a lawyer outside the firm who is working with firm lawyers as co-counsel or in a similar arrangement. Such a lawyer is usually an independent agent of the client

over whom the firm has no control, not a servant or independent contractor. This is especially likely to be the case when the second lawyer represents the client in another jurisdiction, in which that lawyer, but not the firm's lawyers, is a member of the bar. The firm may, however, be liable in some circumstances. Thus a firm may be liable to the client for the acts and omissions of the outside lawyer if the firm assumes responsibility to a client for a matter, for example pursuant to obligations in fee-sharing arrangements . . . or by assigning work to a temporary lawyer who has no direct relationship with the client. Such arrangements make the outside lawyer the firm's subagent In such circumstances, the outside lawyer may be liable to the firm for contribution or indemnity. A firm is liable to its client for acts and omissions of its own principals and employees relating to the outside lawyer, for example when it undertakes to recommend or supervise the outside lawyer and does so negligently or when its lawyers advise or participate in the outside lawyer's actionable conduct A firm may also be liable to a nonclient for the acts and omissions of an outside lawyer, for example when principals or employees of the firm direct or help perform those acts or omissions.

Restatement (Third) of Law Governing Lawyers § 58 cmt. e (2000).

State Cases and Legal Ethics Opinions

States generally take the same approach.¹

¹ Some states include this principle in their statutes. For instance, Virginia's Professional Limited Liability Company Act explicitly indicates that the Act shall not be construed to alter or affect the professional relationship between a person furnishing professional services and a person receiving that service either with respect to liability arising out of that professional service or the confidential relationship between the person rendering the professional service and the person receiving that professional service.

Va. Code § 13.1-1109 (emphasis added). Perhaps to make it even clearer, Va. Code § 54.1-3906 indicates that "[e]very attorney shall be liable to his client for any damage sustained by the client through the neglect of his duty as such attorney."

- Nat'l Union Fire Ins. Co. v. Wuerth, 913 N.E.2d 939, 945 (Ohio 2009) ("[W]e hold that a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.").
- New Mexico LEO 2009-01 (1/20/09) ("From an analysis solely limited to the provisions of the Rules of Professional Conduct, it would appear that the practice of law within any limited entity would be permitted so long as three conditions are met: (1) the lawyers acting within such a framework continue to meet all of their obligations under the Rules, (2) the lawyer's liability to the client as provided by the Rules of Professional Conduct is unchanged by the form of limited liability entity, and (3) the lawyer may lawfully practice in such an entity.").
- Michigan LEO R-17 (1/14/94) ("[a] lawyer's selection of a limited liability company does not affect the liability of a lawyer rendering services to a client, a lawyer charged with supervisory responsibilities in reference to the rendition of services, or the firm").
- Connecticut LEO 94-2 (1/3/94) (permitting lawyers to practice in limited liability partnerships or corporations, noting "what is of paramount importance is the lawyer's direct personal responsibility to the client for the lawyer's own actions and the actions of those directly supervised").

The limited liability form essentially permits lawyers to avoid losing their personal assets because a partner has committed malpractice.

Of course, malpractice liability insurance has largely eliminated the relevance of this issue.

Best Answer

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

n 2/12

"Unbundled" Legal Services

Hypothetical 13

After a decade of working at a large law firm, you decided to change career paths and begin serving the urban poor in your area. Several potential clients have expressed the worry that they cannot afford to pay you for handling an entire case -- but would like to hire you for certain parts of cases that they want to file against their landlords. In particular, two clients have asked whether they could hire you to take the deposition of their landlords, but not handle any other part of their case.

May you agree to limit your representation of a client to taking one deposition?

YES

Analysis

Many states are now engaged in a vigorous debate over what are called "unbundled" legal services (sometimes called "limited representation," "discrete task representation" or "a la carte" lawyering). Starting with lawyers dedicated to increasing legal representation for indigents and other clients of limited means, lawyer groups have tried in many states to permit lawyers to provide certain defined services for clients without assuming responsibility for an entire representation. Requiring lawyers to assume full responsibility for a representation might deter lawyers from assisting in discrete matters that clients of limited means might find useful.

The Florida Supreme Court adopted an "unbundled legal services" rule on November 13, 2003. As of that time, five other states had adopted similar rules: Colorado; Wyoming; Maine; Washington; New Mexico. Amendments to the Rules

Regulating the Fla. Bar & the Fla. Family Law Rules of Proc. (Unbundled Legal Servs.),

860 So. 2d 394, 399 (Fla. 2003).

States continue to move in this direction.

- Mass. Supreme Judicial Court Order, In re Limited Assistance Representation, (Apr. 10, 2009) (eff. May 1, 2009), available at http://www.mass.gov/courts/sjc/docs/Rules/Limited_Assistance_Representation_order1_04-09.pdf (holding that lawyers can engage in "Limited Assistance Representation," as long as they qualify to do so and obtain the client's informed written consent to such a limited representation; explaining that such a limited representation can include the preparation of pleadings, but only with notification to the court; "A pleading, motion or other document filed by an attorney making a limited appearance shall comply with Rule 11(a), Mass. R.Civ.P., and/or cognate Departmental Rules, and shall state in bold type on the signature page of the document: 'Attorney of [party] for the limited purpose of [court event].' An attorney filing a pleading, motion or other document outside the scope of the limited appearance shall be deemed to have entered a general appearance, unless the attorney files a new Notice of Limited Appearance with the pleading, motion or other document.").
- Arizona LEO 06-03 (7/2006) (assessing a family law practitioner providing limited-scope representations; "An attorney who provides limited-scope representation to a client does not have an affirmative duty to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In an appropriate case and under appropriate circumstances, an attorney may limit services to 'coaching' a client. Because coaching may occur at a mediation, at a settlement conference or in litigation, the attorney should be guided by ER 4.1 and ER 3.3 when deciding whether the judge, mediator, or opposing counsel should be informed of the limited-scope representation. Finally, an attorney may limit services and only represent the client in a deposition, but should be aware of whether doing so constitutes an appearance in the case.").
- North Carolina LEO 2005-10 (1/20/06) (explaining the ethics rules governing lawyers providing "unbundled" legal services over the Internet; holding that the lawyer must follow the ethics rules requiring communication with the client and diligent representation; also noting that "a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of

email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis."; also addressing the lawyer's desire to provide "unbundled" legal services; "VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.").

The issue of "unbundled services" presents more difficulties than many lawyers realize. For instance, the thorough Florida Supreme Court rule amendments provide such guidance as: "in fairness to the opposing party the attorney and the pro se litigant should not both be allowed to argue on the same legal issue" (*id.* at 399); "we do not envision that the rule would permit an attorney to appear solely for the purpose of making evidentiary objections on behalf of the family law litigant who is representing himself or herself on all matters" (*id.* at 399-400); "both the attorney and the litigant should be served with all pleadings that are filed during the duration of the limited representation" (*id.* 400); "the attorney who appears of record in a limited proceeding or

matter does not require the permission of the court to end the representation when the limited representation is over. The rule requires only that the attorney file a notice of completion" (*id.* at 401).

In addition to the required full disclosure and client consent, the rules permitting "unbundled" services generally envision lawyers handling particular matters for a particular period of time -- rather than avoiding such basic duties as the obligation to communicate to the client or conduct a careful legal analysis in the area that the lawyer has agreed to handle.

Best Answer

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

n 2/12

Limiting Liability: General Rule

Hypothetical 14

You have been asked to represent a contentious and litigious local businessman, and want to assure certainty to your possible exposure ahead of time.

May you enter into a retainer agreement that limits your liability to return of the fees that your client has paid?

MAYBE

Analysis

The ABA and many state bars have retreated from what was once a strict prohibition on limiting liability to clients in advance of the work.

Under the current ABA Model Rules,

A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1) (emphasis added).

A comment to this Model Rule provides an explanation.

Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and the effect of the agreement. Nor does this

paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

ABA Model Rule 1.8 cmt. [14].

Interestingly, the Restatement still takes a very strict approach prohibiting such prospective limitations of liability.

For purposes of professional discipline, a lawyer may not:
(a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Restatement (Third) of Law Governing Lawyers § 54(4) (2000).

To emphasize the point, the Restatement elsewhere indicates that

An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Id. § 54(2). A comment explains the Restatement's approach.

An agreement prospectively limiting a lawyer's liability to a client . . . is unenforceable and renders the lawyer subject to professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.

Id. § 54 cmt. b.

Given this stark contrast between the ABA Model Rules and the Restatement, it should come as no surprise that not every state follows the liberal ABA Model Rule approach. For instance, Virginia follows a more traditional approach, which prohibits all outside lawyers from limiting their liability in any fashion. See, e.g., Virginia Rule 1.8(h) ("[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement").

The Texas Bar dealt with a related issue.

- Texas LEO 581 (4/2008) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer in the event of a joinder of the lawyer as a defendant in the client's litigation provided that (1) the agreement does not prospectively limit in any way the lawyer's liability to the client for malpractice and (2) the obligation for payment of the lawyer's legal defense fees and the obligation to pay the fees billed by the lawyer for his work do not taken together constitute a compensation arrangement that would be unconscionable within the meaning of Rule 1.04(a).").

A Texas state court also dealt with a number of interesting issues involving claims against the former law firm of Keck, Mahin & Cate. In National Union Fire Insurance Co. v. Keck, Mahin & Cate, No. 14-03-00747-CV, 2004 Tex. App. LEXIS 11163 (Tex. App. Dec.14, 2004), the court analyzed a release of Keck's liability. Among other things, the court analyzed a prospective limitation on liability while covering only past conduct.

While it is true the release covers past conduct, the disciplinary rule does not speak in terms of conduct. Rather, it speaks in terms of liability. We find the release between KMC [the law firm] and Grenada is an agreement to prospectively limit KMC's malpractice liability because it seeks to limit liability that had not yet accrued.

Id. at *19.

Because the client was not independently represented, the prospective limitation violated the Texas Ethics Rules. The court then addressed whether the ethics violation invalidated the release -- finding that it did not.

However, a violation of Rule 1.08(g) does not automatically render the release invalid . . . because violating Rule 1.08(g) does not invalidate the release as a matter of law, we overrule National Union's first issue.

Id. at *21-22. Thus, the court enforced the release despite the ethics violation.

Best Answer

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

n 2/12

Limiting Liability: In-House Lawyers

Hypothetical 15

You joined your client's law department about six weeks ago. At one recent conference of all corporate officers, it dawned on you for the first time that you are not covered by your client-employer's standard indemnification provision that covers all other officers.

May you arrange for an indemnification provision in your client-employer's bylaws that covers all in-house lawyers?

MAYBE

Analysis

Indemnification provisions represent a limitation on liability, and therefore must comply with the applicable jurisdiction's particular approach.

The ABA Model Rules and most state ethics rules allow all lawyers to limit their liability in advance, as long as the client is separately represented. ABA Model Rule 1.8(h)(1).

Under the ABA Model Rules,

[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1) (emphasis added).

Interestingly, the Restatement still takes a very strict approach prohibiting such prospective limitations of liability.

An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Restatement (Third) of Law Governing Lawyers § 54(2) (2000). To emphasize the point, the Restatement also explains that

[f]or purposes of professional discipline, a lawyer may not:
(a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Id. § 54(4). A comment explains the Restatement's approach.

An agreement prospectively limiting a lawyer's liability to a client . . . is unenforceable and renders the lawyer subject to professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.

Id. § 54 cmt. b.

Not many states have dealt with these issues in the context of in-house lawyers.

The Virginia Bar has repeatedly indicated that in-house lawyers may not ask for or accept an indemnity commitment from their client-employers. Virginia LEO 1364 (6/28/90) (corporate counsel may not accept an indemnity commitment from their employer); Virginia LEO 1211 (4/19/89) (in-house lawyers do have attorney-client relationships with employers, and therefore may not ask for an indemnity agreement); Virginia LEO 877 (4/1/87) (an in-house lawyer may not obtain an indemnification agreement).

When Virginia revised its ethics rules as of January 1, 2000, in-house lawyers were singled out for special favorable treatment. Under Virginia Rule 1.8(h), only

in-house lawyers are permitted to limit their liability to their clients in advance -- if the clients are separately represented.

Best Answer

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

n 2/12

Duty to Disclose Possible Malpractice

Hypothetical 16

You have been supervising a new associate in her handling of a relatively small case for a new client. You just realized that the associate forgot to include a potential cause of action in her complaint, and it is now too late to add a claim under your state's pleading rules. The forfeited claim would not have justified a large additional damage figure, and you wonder what obligations you have.

Must you advise the client of your firm's malpractice?

YES

Analysis

Legal malpractice claims raise special issues arising from the unique attorney-client relationship, which sometimes generate fascinating debates among the states.

Introduction

Malpractice claims can arise at nearly any time in the attorney-client relationship, and involve work performed years before.

- Shu v. Butensky, No. A-2396-07, 2009 WL 417265 (N.J. Super. Ct. App. Div. Feb. 23, 2009) (unpublished opinion) (holding that a lawyer could be sued for malpractice by a client for a mistake that the lawyer made in 1986 during a real estate transaction).
- Steele v. Allen, 226 P.3d 1120, 1124 (Colo. Ct. App. 2009) (holding that a lawyer may be liable for malpractice for providing advice during even a preliminary discussion with a prospective client; "[W]hether statements are made during an initial consultation for legal services or in a casual manner in a social setting may ultimately be determinative of whether a lawyer is liable for negligent misrepresentation.").

Furthermore, malpractice claims can be based on a nearly endless variety of lawyer mistakes.

- Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629-30 (8th Cir. 2009) ("We predict that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client. . . . Thus, the lawyer must know that there is a non-frivolous malpractice claim against him such that 'there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by' his own interest in avoiding malpractice liability. . . . It follows that a lawyer's duty to disclose his own errors must somehow be connected to a possibility that that client might be harmed by the error. For a fiduciary duty to be implicated, the lawyer's own interests in avoiding liability must conflict with those of the client. A lawyer may act in the client's interests to prevent the error from harming the client without breaching a fiduciary duty.").
- CenTra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008) (holding that a former client could file a malpractice action based on its lawyer's simultaneous representation of an adversary).
- Vaxion Therapeutics, Inc. v. Foley & Lardner LLP, Case No. 07cv280-IEG(RBB), 2008 U.S. Dist. LEXIS 98612, at *19 (S.D. Cal. Dec. 4, 2008) ("California courts have not imposed any requirement that a plaintiff alleging breach of fiduciary duty under similar circumstances prove actual disclosure of confidential information. To the contrary, California courts have explicitly held that in an action for breach of fiduciary duty, the plaintiff is not required to show confidences were actually disclosed.").
- Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773 (S.D. Miss. 2006) (holding that a client could sue a law firm for negligence and breach of fiduciary duty for failure to disclose a conflict).
- Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300 (Idaho 2005) (allowing a client to sue its lawyer for malpractice based on a law firm's disclosure of client information to firm lawyer who was supposed to be screened from the matter).
- Virginia LEO 966 (9/30/87) (a law firm hired to advise on a real estate matter must disclose to the client that the law firm mistakenly failed to obtain an extension of time to file a tax return, even though the law firm was not hired to file the return).

Restatement Malpractice Analysis

The Restatement deals with several other issues relating to malpractice claims.

First, the Restatement explains that a continuing fiduciary relationship between a lawyer and a client generally delays commencement of the statute of limitations period for malpractice claims.

Claims against a lawyer may give rise to issues concerning statutes of limitations, for example, which statute (contract, tort, or other) applies to a legal-malpractice action, what the limitations period is, when it starts to run, and whether various circumstances suspend its running. Such issues are resolved by construing the applicable statute of limitations. Three special principles apply in legal-malpractice actions, although their acceptance and application may vary in light of the particular wording, policies, and construction of applicable statutes.

First, the statute of limitations ordinarily does not run while the lawyer continuously represents the client in the matter in question or a substantially related matter. Until the representation terminates, the client may assume that the lawyer, as a competent and loyal fiduciary, will deflect or repair whatever harm may be threatened. . . . That principle does not apply if the client knows or reasonably should know that the lawyer will not be able to repair the harm, or if the client and lawyer validly agree (see Subsection (3) hereto) that the lawyer's continuing the representation will not affect the running of the limitations period.

Second, even when the statute of limitations is generally construed to start to run when the harm occurs, the statute does not start to run against a fiduciary such as a lawyer until the fiduciary discloses the arguable malpractice to the client or until facts that the client knows or reasonably should know clearly indicate that malpractice may have occurred. Until then, the client is not obliged to look out for possible defects (see Comment d hereto) and may assume that the lawyer is providing competent and loyal service and will notify the client of any substantial claim

Third, the statute of limitations does not start to run until the lawyer's alleged malpractice has inflicted significant injury. For example, if a lawyer negligently drafts a contract so as to render it arguably unenforceable, the statute of limitations does not start to run until the other contracting party declines to perform or the client suffers comparable injury. Until then, it is unclear whether the lawyer's malpractice will cause harm. Moreover, to require the client to file suit before then might injure both client and lawyer by attracting the attention of the other contracting party to the problem. Whether significant injury has been inflicted by a lawyer's errors at trial when appeal or other possible remedies remain available is debated in judicial decisions. Compliance with decisions holding that injury occurs prior to affirmance on appeal (or similar unsuccessful outcome) may require that a protective malpractice action be filed pending the outcome of the appeal or other remedy.

Restatement (Third) of Law Governing Lawyers § 54 cmt. g (2000).

Second, a Restatement comment addresses comparative and contributory negligence in malpractice cases.

In jurisdictions in which comparative negligence is a defense in negligence and fiduciary-breach actions generally, it is generally a defense in legal-malpractice and fiduciary-breach actions based on negligence to the same extent and subject to the same rules. The same is true of contributory negligence and comparative or contributory fault generally. . . . In appraising, those defenses, regard must be had to the special circumstances of client-lawyer relationships. Under fiduciary principles, clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty . . . and to fulfill a lawyer's duty to notify a client of substantial malpractice claims The difficulty many clients face in monitoring a lawyer's performance is one of the main grounds for imposing a fiduciary duty on lawyers. Except in unusual circumstances, therefore, it is not negligent for a client to fail to investigate, detect, or cure a lawyer's malpractice until the client is aware or should reasonably be aware of facts clearly indicating the basis for

the client's claim Whether a client should reasonably be so aware may depend, among other factors, on the client's sophistication in relevant legal or factual matters.

Those considerations are weaker when a nonclient asserts a claim based on a duty of care under § 51. In those circumstances, no fiduciary relationship ordinarily exists. Accordingly, it is often more appropriate to conclude that, under general legal principles, a nonclient has been comparatively or contributorily negligent, for example in unreasonably accepting without investigation a lawyer's representation about facts that are also readily available to the nonclient.

Restatement (Third) of Law Governing Lawyers § 54 cmt. d (2000).

Third, another comment addresses the in pari delicto defense.

The defense of in pari delicto bars a plaintiff from recovering from a defendant for a wrong in which the plaintiff's conduct was also seriously culpable. To the extent recognized by the jurisdiction for other actions, the defense is available in legal-malpractice actions, subject to consideration of lawyer fiduciary duties and the characteristics of client-lawyer relationships The defense is thus available only in circumstances in which a client may reasonably be expected to know that the activity is a wrong despite the lawyer's implicit endorsement of it, for example when a client claims to have followed the advice of a lawyer to commit perjury.

Restatement (Third) of Law Governing Lawyers § 54 cmt. f (2000).

Fourth, the Restatement also makes it clear that a lawyer cannot be held liable in malpractice for complying with an ethics rule requirement, even if that harms the client.

When, for example, a jurisdiction's professional rule requires a lawyer to disclose a client's proposed crime when necessary to prevent death or serious bodily harm (compare § 66), a lawyer who reasonably believes that disclosure is required is not liable to a client for disclosing. Similarly, if the rule forbids disclosure of a client's proposed unlawful act not constituting a crime or fraud, a lawyer who reasonably

believes that disclosure is forbidden is not liable to a
nonclient

Restatement (Third) of Law Governing Lawyers § 54 cmt. h (2000).

Duty to Disclose Possible Malpractice

Authorities agree that a lawyer's duty of communication and diligence requires
lawyers to report their possible malpractice to clients.

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan." (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").
- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with

respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

- California 12009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvice the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.');
 - Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.');
 - Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.');
 - N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.');
 - N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.');
- also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").
- New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition.

Best Answer

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

n 2/12

Malpractice Claims: Indemnity/Contribution Claims Against Successor Lawyers

Hypothetical 17

A client recently fired your firm in the middle of a litigation matter, and hired replacement counsel to finish the discovery and try the case. You naturally followed the litigation out of curiosity, and you believe that your replacement counsel seriously mishandled the case. When your former client recently filed a malpractice action against your firm, you inevitably considered the possibility of seeking indemnity or contribution from your replacement counsel.

Can lawyers sued for malpractice seek indemnity or contribution from the lawyers that replaced them?

MAYBE

Analysis

Lawyers sued for malpractice nearly always face the temptation to seek contribution or indemnity from their successors -- if only to complicate and confound their client's claims.

The ABA Model Rules do not deal with this issue, which involves legal principles as much as (if not more than) ethics principles.

The Restatement (1) bars a lawyer sued for malpractice from seeking contribution or indemnity from the successor lawyer in the same action, but (2) permits the defendant lawyer to argue in that action that part of the alleged damages resulted from the successor lawyer's negligence.

When the damage caused by the negligence or fiduciary breach of a lawyer is increased by the negligence or fiduciary breach of successor counsel retained by the client,

the first lawyer is liable to the client for the whole damage if the conditions set forth in Restatement Second, Torts § 447 are satisfied. The successor lawyer is also directly liable to the client for damage caused by that lawyer's negligence or fiduciary breach. The first lawyer, however, may not seek contribution or indemnity from the successor lawyer in the same action in which the successor lawyer represents the client, for that would allow the first lawyer to create or exacerbate a conflict of interest for the second lawyer and force withdrawal of the second lawyer from the action. The first lawyer may, however, dispute liability in the negligence or fiduciary breach action for the portion of the damages caused by the second lawyer on the ground that the conditions of Restatement Second, Torts § 447 are not satisfied. The client may then choose whether to accept the possibility of such a reduction in damages or to assert a second claim against successor counsel, with the resultant necessity of retaining a third lawyer to proceed against the first two. Regardless of whether the client asserts a second claim, such three-sided disputes may raise problems involving client confidences . . . , conflicts of interest . . . , lawyer duties of disclosure . . . , and lawyer witnesses . . . that require lawyers and judges to act carefully to protect the rights of clients and lawyers.

The Restatement (Third) of Law Governing Lawyers § 53 cmt. i (2000) (emphases added).

The Nevada federal district court described the nationwide debate about this issue. In Mirch v. Frank, 295 F. Supp. 2d 1180, 1183 (D. Nev. 2003), the court stated the basic issue:

whether an attorney defending a malpractice suit should be permitted to implead his former client's current counsel in order to seek indemnity or contribution for the current counsel's alleged malpractice.

The court discussed the policy issues involved in this debate. The court explained the arguments in favor of permitting such claims.

First, a successor counsel could escape liability if a former attorney was prohibited from using impleader to hold the successor attorney accountable for malpractice
Second, it would be unfair to allow the client to sue former counsel for malpractice and yet, at the same time, claim attorney-client privilege with the successor counsel, thereby limiting former counsel's access to relevant evidence. . . .
Third, the successor counsel's "position of trust with and influence over the client . . . could create a situation ripe for mischief and manipulation" if the successor counsel fails to disclose his own negligence to the client. . . . Finally, disallowing the use of impleader could dull the successor counsel's incentives to act as carefully and diligently for the client since the successor counsel would be less likely to face malpractice liability after replacing former counsel.

Id. at 1185.

The court also articulated the arguments against permitting such claims.

First, the attorney accused of malpractice can use impleader as a nefarious litigation tactic by spreading chaos in the opposing camp and creating a conflict of interest that would force the client's current counsel to withdraw or be disqualified. . . . Second, such an action would interfere with the attorney-client confidences of the client. . . . Third, the use of impleader in this circumstance could interfere with the ability of the client to pursue such a malpractice claim as a successor attorney, wary of a potential impleader claim for malpractice brought by the former attorney, might not act in the best interests of the client in pursuing the claim. . . . This might have a chilling effect on malpractice claims. . . .
Fourth, the attorney's duty runs to the client, and not the former attorney, and to subject the successor attorney to a suit by the former attorney would force the successor attorney to confront "potential conflicts of interest in trying to serve two masters. . . ."

Id. at 1184.

The court noted states' different approaches:

- States prohibiting such claims include Colorado, California, District of Columbia, Utah, Illinois, Minnesota, New Jersey.
- States permitting such claims include Maryland and New York.

The court finally settled on the middle ground, articulated in the Restatement.

The Restatement (Third) of Law Governing Lawyers § 53(i) (2000) strikes a balance between the competing policy interests by stating that the former attorney may not seek contribution from the successor attorney in the same action, but may seek to reduce the damages by the portion of the liability attributable to the successor lawyer.

Id. at 1185.

More recently, a North Carolina federal court reached the same conclusion.

Shealy v. Lunsford, No. 1:03CV1000, 2005 U.S. Dist. LEXIS 2043 (M.D.N.C. Jan. 31, 2005). That decision explained that the states permitting such claims include West Virginia, Illinois, Washington and New York (id. at *23 n.3).

Best Answer

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

n 2/12

Malpractice Claims: Assignability

Hypothetical 18

As your law firm's managing partner, you realize that all large firms face malpractice actions -- but that does not stop you from becoming upset when a plaintiff sues your firm. The latest lawsuit raises a twist you have never faced before, because the plaintiff pursuing the malpractice action alleges that it is an assignee of your firm's former client.

May legal malpractice plaintiffs assign their malpractice claims?

MAYBE

Analysis

The unique nature of malpractice claims has resulted in a debate among the states about the assignability of such claims.

Most states forbid such assignments. An Indiana court explained the reason for this approach in Rosby Corp. v. Townsend, Yosha, Cline & Price, 800 N.E.2d 661 (Ind. Ct. App. 2003).

First, the attorney's loyalty to a client would be weakened if a client could sell off a malpractice claim, making such assignments important bargaining chips in the negotiation of settlements. "A legal system that discourages loyalty to the client, disserves that client." [Picadilly Inc. v. Raikos, 582 N.E.2d 338, 342 (Ind. 1991).] Second, the duty to maintain the confidences of the client would be threatened by the assignment of legal malpractice claims. Id. at 343. Whenever a client sues an attorney for malpractice, the attorney may utilize confidential information revealed by the client to defend against the claim, see Ind. Professional Conduct Rule 1.6(b)(2); however, because the client may cease the litigation at any point, the client ultimately controls the release of confidential information. This is not the case, though, when the client has assigned the claim to another

party, who may reveal information the client wished to remain confidential.

Id. at 666.

The Indiana court noted that the states finding that "such assignments were void as against public policy" include West Virginia, California, Kentucky, Tennessee and Texas. Id. at 666-67.

Many states continue to line up on this side of the issue.

- Davis v. Scott, 320 S.W.3d 87, 90, 91, 92 (Ky. 2010) (holding that malpractice claims were not assignable; "The primary issue in this matter is the purported assignment contained in the settlement agreement. Both parties acknowledge that Kentucky law prohibits the assignment of a legal malpractice claim. . . . This rule is predicated upon the unique and highly personal nature of the attorney-client relationship."; "Both Davis and Global [company that financed the lawsuit] contend that it was their intention to assign merely the proceeds of the malpractice claim against Scott. The surrounding circumstances, however, belie this assertion. By the terms of the settlement agreement, Global selected and retained Davis's counsel in the malpractice action and bore the financial responsibility for the cost of suing Scott. Because Davis is obligated to bring the action, he may not withdraw the suit. Davis is not permitted to settle the malpractice claim without Global's express written consent. Davis agreed to share privileged, attorney-client information with Global. Global retained control over the initiation, continuation and/or dismissal of the malpractice claim."; "The allocation of the proceeds of the malpractice suit is also troublesome. Because Global receives the lion's share of any judgment -- 80% -- its interest far outweighs Davis's and renders Davis merely a nominal plaintiff. Also, under the assignment, Global receives a percentage of the damages awarded as opposed to a specified dollar amount. Therefore, its interest is not only in a successful claim, but a claim with the largest judgment possible. This is further indication of Global's ownership of the lawsuit."; "Though Global and Davis assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against Scott, but of the entire claim itself. Kentucky law does not permit an assignment of a legal malpractice claim."; "We believe the most appropriate solution under these circumstances is to remand the matter to the circuit court with directions to dismiss Davis's complaint without prejudice. As stated above, though Davis has not forfeited his malpractice

- claim, the current suit, born of the improper assignment, cannot be permitted to continue. Should Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest.").
- Johnson v. Hart, 692 S.E.2d 239, 243 n.2, 243, 244 (Va. 2010) (holding that Virginia law did not allow assignment of malpractice claims; quoting Virginia Code: "Code § 8.01-26 provides in pertinent part: 'Only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action ex contractu are assignable.'"; explaining that "Virginia has adopted the strict privity doctrine in legal malpractice cases; as a threshold requirement, a plaintiff must demonstrate the existence of an attorney-client relationship. 'It is settled in the Commonwealth that no cause of action exists in cases [involving a claim solely for economic losses] absent privity of contract.' Copenhaver v. Rogers, 238 Va. 361, 366, 384 S.E. 2d 593, 595, 6 Va. Law Rep. 499 (1989)."; ultimately concluding that "[t]his same policy precludes a testamentary beneficiary from maintaining, in her own name, a legal malpractice action against an attorney with whom an attorney-client relationship never existed. To hold otherwise would implicate the same concerns that counsel against the assignment of legal malpractice claims."; upholding summary judgment for a lawyer sued by an executor whom the lawyer had represented; holding that no attorney-client relationship existed between the executor and the lawyer; "In this case, no such relationship existed between Johnson [executor] and Hart [lawyer]. As the stipulation indicated, Hart was retained to represent the Estate, not Johnson."; not explaining whether the court agreed with the stipulation).
 - Taylor v. Babin, 13 So. 3d 633, 641 (La. Ct. App. 2009) ("Having thoroughly reviewed the cases from other jurisdictions, we are persuaded by the reasoning of the federal courts and the majority of our sister states and hold that legal malpractice claims may not be assigned. The mere threat of a malpractice claim being assigned would be detrimental to an attorney's duty of loyalty and confidentiality to his client, would promote collusion, and would increase a lawyer's reluctance to represent an underinsured or insolvent client. Therefore, also as a matter of public policy, we conclude it is not prudent to permit enforcement of a legal malpractice claim that has been transferred by assignment, but never pursued by the original client.").
 - Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC, 675 F. Supp. 2d 75, 77, 79, 80-81, 81 (D.D.C. 2009) (holding that D.C. law prohibits assignment of a malpractice action against a law firm; "The malpractice action against KGRM [law firm], although filed with Edens named as the plaintiff, is

to be prosecuted by counsel selected by Golf Tech, and Edens must cooperate with the suit. . . . Further, all decisions relating to this malpractice action are 'controlled' by Golf Tech [plaintiff's former litigation adversary in the underlying suit], with Golf Tech paying all litigation costs and attorneys' fees."; "[T]he majority of courts have found that the costs to society outweigh the benefits and that overriding public policy concerns render these types of assignments invalid."; "Because the 'losing' party in the consent judgment will never have to pay, nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action."; "In the underlying infringement action, Golf Tech, represented by Pierce Atwood, argued that Edens' golf simulation technology infringed its valid patent and that it should prevail on the merits. Now, however, Golf Tech, as assignee, is alleging (through the same Pierce Atwood attorneys) that it would not have prevailed in the patent infringement action but for the negligence of KGRM in representing Edens. This is the very type of disreputable and illogical role reversal that has understandably troubled many courts."; "One concern is that the prospect of assignment would make it too risky for lawyers to represent under-insured or judgment-proof defendants because the only way for the client to satisfy a losing judgment would be to assign his or her claim for malpractice.").

- Law Office of David J. Stern v. Security Nat'l Servicing Corp., 969 So. 2d 962, 970 (Fla. 2007) (holding that "the assignment of legal malpractice claims that arise in mortgage foreclosures violates the two policy concerns underlying the general prohibition against such assignment"; holding that allowing such assignments would create a market for legal malpractice claims; "Permitting such a market to arise would create an 'undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.'" (citation omitted)).
- Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 958 n.19 (E.D. Va. 2005) (relying on MNC Credit Corp. v. Sickels, 497 S.E.2d 331 (Va. 1998); identifying other states "holding legal malpractice claims unassignable" as Arizona; California; Colorado; Florida; Illinois; Indiana; and Kentucky).

Other states take exactly the opposite position. In Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057 (R.I. 1999), the Rhode Island Supreme Court

permitted assignment of a legal malpractice claim, and noted that as of that time five other jurisdictions permitted assignment: Washington, D.C.; Maine; New York; Oregon; Pennsylvania.

Some cases have continued to take this minority approach.

- Gurski v. Rosenblum & Filan, LLC, 885 A.2d 163 (Conn. 2005) (holding that a client cannot assign a legal malpractice case to its litigation adversary; declining to adopt a per se prohibition on such assignments, but finding that the assignment was inappropriate in this setting).
- Cowan Liebowitz & Latman, P.C. v. Kaplan, 902 So. 2d 755 (Fla. 2005) (holding that an insolvent corporation could assign a malpractice claim against its lawyer to the corporation's creditors).
- Security Nat'l Servicing Corp. v. Law Office of David J. Stern, P.A., 916 So. 2d 934 (Fla. Dist. Ct. App. 2005) (allowing assignment of a legal malpractice case along with a note and mortgage).
- Silver v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, Civ. A. No. 03-4393, 2004 U.S. Dist. LEXIS 14651, at *10 (E.D. Pa. July 28, 2004) (explaining that "the Supreme Court of Pennsylvania determined that assignments of legal malpractice claims were permissible and do not require privity because 'where the attorney has caused harm to his or her client, there is no relationship that remains to be protected'" (citation omitted)).

Best Answer

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

n 2/12

Lawyers' Liability to Third Parties for Negligence

Hypothetical 19

Your law firm has for many years represented a dysfunctional wealthy family. You prepared the family patriarch's estate documents. He died several months ago, and you just heard this morning that two family members have filed lawsuits against your law firm based on the patriarch's estate documents.

- (a) Is a named beneficiary likely to succeed in a malpractice case based on your failure to include a certain tax-saving provision, which cost the beneficiary \$250,000?

YES

- (b) Is a distant relative likely to succeed in a malpractice case based on your failure to include her in the estate planning documents (she claims that you should have known that the patriarch intended to leave her at least some amount of money)?

NO

Analysis

Lawyers' liability to non-clients for negligence normally plays out in malpractice cases rather than in ethics analyses. Such liability has evolved over the years, and continues to differ from state to state.

The ABA Model Rules do not deal with this issue, but the Restatement and case law have extensively analyzed lawyers' possible liability to non-clients for negligence.

Restatement

The Restatement deals extensively with a lawyer's possible liability to third parties for negligence.

A Restatement comment explains the law's reluctance to impose such liability.

Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

Restatement (Third) of Law Governing Lawyers § 51 cmt. b (2000) (emphases added).

Not surprisingly, state law defines the duties.

When a lawyer owes a duty to a nonclient under this Section, whether the nonclient's cause of action may be asserted in contract or in tort should be determined by reference to the applicable law of professional liability generally. The cause of action ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance Whether the representations are actionable may be affected by the duties of disclosure, if any, that the client owes the nonclient In the absence of such duties of disclosure, the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000).

The Restatement articulates three situations in which a lawyer might be liable to a non-client for negligence.

Third Parties Invited to Rely on the Lawyer's Services. First, the lawyer "owes a duty to use care"

to a nonclient when and to the extent that: (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.

Restatement (Third) of Law Governing Lawyers § 51(2) (2000) (emphasis added).

A comment explains this concept.

When a lawyer or that lawyer's client (with the lawyer's acquiescence) invites a nonclient to rely on the lawyer's opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care . . ., unless the jurisdiction's general tort law excludes liability on the ground of remoteness. Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient The lawyer's client typically benefits from the nonclient's reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving nonclients reason to rely on similar invitations. . . . If a client is injured by a lawyer's negligence in providing opinions or services to a nonclient, for example because that renders the client liable to the nonclient as the lawyer's principal, the lawyer may have corresponding liability to the client

Clients or lawyers may invite nonclients to rely on a lawyer's legal opinion or services in various circumstances For example, a sales contract for personal property may provide that as a condition to closing the seller's lawyer will provide the buyer with an opinion letter regarding the absence of liens on the property being sold A nonclient may require such an opinion letter as a condition for engaging in a transaction with a lawyer's client. A lawyer's opinion may state the results of a lawyer's investigation and analysis of facts as well as the lawyer's legal conclusions On when a lawyer may properly decline to provide an opinion and on a

lawyer's duty when a client insists on nondisclosure, see § 95, comment 3. A lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or after the lawyer renders it.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphases added).

The same comment also explains how lawyers can avoid such possibly unintended liability to non-clients.

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through a limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent.

When a nonclient is invited to rely on a lawyer's legal services, other than the lawyer's opinion, the analysis is similar. For example, if the seller's lawyer at a real-estate closing offers to record the deed for the buyer, the lawyer is subject to liability to the buyer for negligence in doing so, even if the buyer did not thereby become a client of the lawyer. When a nonclient is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphases added).

Another comment deals with a much more specific situation -- a liability insurance company's claim of negligence by a lawyer it hires to represent its insured.

Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must pay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss. In such circumstances, the insured and insurer, under the insurance contract, both have a reasonable expectation that the lawyer's services will benefit both insured and insurer. Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

Restatement (Third) of Law Governing Lawyers § 51 cmt. g (2000) (emphasis added).¹

Intended Third-Party Beneficiaries of the Lawyer's Services. Second, a lawyer owes a similar duty.

¹ Accord General Security Ins. v. Jordan, Coyne & Savits, LLP, Case No. 1:04cv1436, 2005 U.S. Dist. LEXIS 2937 (E.D. Va. Feb. 23, 2005) (holding that an insurance company can sue the insured's lawyer for malpractice).

to a nonclient when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely

Restatement (Third) of Law Governing Lawyers § 51(3) (2000) (emphasis added).

Several comments provide an explanation.

In some circumstances, reliance by unspecified persons may be expected, as when a lawyer for a borrower writes an opinion letter to the original lender in a bank credit transaction knowing that the letter will be used to solicit other lenders to become participants in syndication of the loan. Whether a subsequent syndication participant can recover for the lawyer's negligence in providing such an opinion letter depends on what, if anything, the letter says about reliance and whether the jurisdiction in question, as a matter of general tort law, adheres to the limitations on duty of Restatement Second, Torts § 552(2) or those of *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.1931), or has rejected such limitations. To account for such differences in general tort law, Subsection (2) refers to applicable law excluding liability to persons too remote from the lawyer.

Restatement (Third) of Law Governing Lawyers § 51 cmt. e (2000) (emphasis added).

When a lawyer knows . . . that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the

circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third party must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f (2000) (emphasis added).

The Restatement provides three illustrations that address this scenario.

Client retains Lawyer to prepare and help in the drafting and execution of a will leaving Client's estate to Nonclient. Lawyer prepares the will naming Nonclient as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Nonclient thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Nonclient is thereby harmed. Lawyer is subject to liability to Nonclient for negligence in drafting and supervising execution of the will.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 2 (2000).

Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit Nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations

such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 3 (2000).

Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent and then sues Lawyer for expenses imposed on Heir by the will, alleging that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir for negligence. Recognizing a duty by lawyer to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyers' duty to assist clients even when the clients' competence might later be challenged. Whether Lawyer is liable to Client's estate or personal representative (due to privity with the lawyer) is beyond the scope of this Restatement. On the lawyer's obligations to a client with diminished capacity, see § 24.

Restatement (Third) of Law Governing Lawyers § 51 cmt. f, illus. 4 (2000).

Clients as Fiduciaries Relying on the Lawyer's Services. Third, lawyers owe a similar duty

to a nonclient when and to the extent that: (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient; (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach; (c) the nonclient is not reasonably able to protect its rights; and (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Restatement (Third) of Law Governing Lawyers § 51(4) (2000).

A comment explains this concept.

A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). That comment explains the limitation on this general principle.

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries -- trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when a client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

For obvious reasons, the lawyer's liability varies directly with the client's fiduciary duties.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement Even when a relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). The comment also deals with a situation in which the lawyer represents a client in both his or her fiduciary role, as well as the beneficiary of that duty.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client . . . and may incur obligations concerning conflict of interests A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

The lawyer's liability in this setting arises only when the lawyer knows of the client's breach of fiduciary duty.

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3) . . . , "know" is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology P [5] (1983) (" . . . 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The concept is functionally the same as

the terminology "has reason to know" as defined in Restatement Second, Torts § 12(1) (actor has reason to know when actor "has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists."). The "know" terminology should not be confused with "should know" (see id. § 12(2)). As used in Subsection (3) and (4) "knows" neither assumes nor requires a duty of inquiry.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). In essence, the lawyer may give the client/fiduciary the benefit of the doubt when following his or her instructions.

Generally, a lawyer must follow instruction of the client-fiduciary . . . and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law . . . or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary's wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000). The liability in this scenario arises only if the beneficiary cannot protect his or her own rights.

Liability under Subsection (4) exists only when the beneficiary of the client's fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary

unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee's lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

Finally, a lawyer faces liability in this setting only if it would not conflict with some other duty that the lawyer owes.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through means that do not entail disclosure. In any event, a lawyer's duty under this Section requires only the care set forth in § 52.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h (2000).

Several illustrations show how these principles work.

Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

. . . Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

. . . Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

Restatement (Third) of Law Governing Lawyers § 51 cmt. h, illus. 5, 6, 7 (2000).

Situations in which Lawyers will not be Held Liable. The Restatement also provides examples of situations in which lawyers will not be held liable for negligence to third parties.

One comment deals with adversaries.

A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section.

Restatement (Third) of Law Governing Lawyers § 51 cmt. c (2000) (emphasis added).

An illustration provides an example.

Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence to Defendant. Lawyer may, however, be subject to litigation sanctions for having asserted a claim without proper investigation

Restatement (Third) of Law Governing Lawyers § 51 cmt. c, illus. 1 (2000).

Case Law

Introduction. As early as 1879 the United States Supreme Court held that lawyers may not be sued by third parties for malpractice, absent intentional misconduct or privity of contract. Savings Bank v. Ward, 100 U.S. 195 (1879).

However, as in many other areas of the law, the protection has eroded over the years. A Wyoming Supreme Court case provided an excellent discussion of such claims by non-clients. In Connely v. McColloch (In re Estate of Drwenski), 83 P.3d 457 (Wyo. 2004), the lawyer represented the husband in a divorce. The lawyer failed to finalize the divorce before the client died. The client left an estate of over \$3,000,000, and his wife claimed her elective share under Wyoming law. The client's daughter sued the lawyer, claiming that the wife (her stepmother) would not have been entitled to her elective share if the lawyer had properly finished the divorce action.

The Wyoming Supreme Court provided a history of non-clients' malpractice claims against lawyers. It noted that only four states (New York, Texas, Ohio, Nebraska) "continue to hold there is no recovery for nonclients" (id. at 463). The court explained that many states recognize a "third party beneficiary contract theory," under which a designated beneficiary under a client's will can bring a malpractice action against the client's lawyer -- because "the client's intent to benefit the non-client was the direct purpose of the attorney-client relationship" (id. at 462). As the court explained it,

[t]he duty does not extend to those incidentally deriving an indirect benefit Neither does it extend to those in an adversarial relationship with the client. The third party beneficiary test requires the plaintiff to prove clearly that

(1) the client intended to benefit the plaintiff by entering into a contract with the attorney, (2) the attorney breached his contract with the client by failing to perform under its terms, and (3) giving the plaintiff the right to stand "in the client's shoes" would be appropriate to give effect to the intent of the contract.

Id.

The Wyoming Supreme Court identified the jurisdictions adopting this approach: Illinois; Maryland; Oregon; Pennsylvania. It also explained that Arizona recognizes a variation of the test, and "requires plaintiffs to prove negligence by the attorney toward the client, not just a deleterious effect upon the beneficiary due to the attorney's negligence" (id. at 463).

More recently, an article described the breakdown in the traditional "privity" requirement, and the various standards under which courts sometimes find lawyers liable to third parties for negligence.

- Kevin H. Michels, Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard, 22 Geo. J. Legal Ethics 143, 145-199 (2009) (explaining the current rules governing a non-client's ability to file a malpractice case against a lawyer; first explaining the "privity" doctrine; "The privity-of-contract principle holds that only 'those who have entered into a contract for legal services with the lawyer' may sue an attorney for negligence. Thus, the privity standard would in its purest form ban all nonclient claims for negligence against an attorney. Many states have general pronouncements in their case law to this effect." (footnote omitted); next explaining the "third-party beneficiary doctrine": "The third-party beneficiary doctrine derives from 'the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person. Thus, if two parties enter into a contract intending that a third party receive some benefit from the promised performance under the contract, then the third party has the right to enforce such promise against the promisor. Because third-party beneficiary law is a principle of contract law, the intentions of the contracting parties are the touchstone: those whom the

contracting parties do not intend to benefit, termed incidental beneficiaries, have no right to enforce the agreement." (footnotes omitted); also explaining the California "balancing" test; "The California 'balancing' approach offers an array of factors to consider in determining whether to recognize an attorney duty of care to a third party. The balancing test was first announced in Biakanja v. Irving [320 P.2d 16 (Cal. 1958)], in which a notary erred in supervising the attestation of a will." (footnote omitted); "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (quoting Biakanja, 320 P.2d at 19); also explaining the "Restatement" approach: "Section 51 of the Restatement implicitly rejects the California balancing approach to third-party liability, and instead seeks to capture the specific instances in which attorneys owe a duty of care to nonclients. Under Section 51(2), a lawyer owes a duty to a nonclient if the lawyer or client 'invited' the nonclient to rely on the lawyer's opinion or provision of other legal services and the third party is not too remote to warrant such protection. Under Section 51(3), a lawyer owes a duty to a nonclient when the 'lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient,' provided that such duty will not 'significantly impair' the lawyer's client duties, and the absence of such duty would make enforcement of this duty unlikely." (footnote omitted)).

Cases Allowing Negligence Actions Only by Clients. Some states continue

to rely on the traditional rule that only permitted clients to sue lawyers for negligence.

- Kirschner v. KPMG LLP, 938 N.E.2d 941, 945 (N.Y. 2010) (in a 4-3 decision, responding to certified questions from the Second Circuit and a Delaware state court, explaining that under New York law creditors cannot sue third parties such as lawyers because of the lack of privity between creditors and the lawyer; "In these two appeals, plaintiffs ask us, in effect, to reinterpret New York law so as to broaden the remedies available to creditors or shareholders of a corporation whose management engaged in financial fraud that was allegedly either assisted or not detected at all or soon enough by the corporation's outside professional advisers, such as auditors, investment bankers, financial advisers and lawyers. For the reasons that follow, we

decline to alter our precedent relating to in pari delicto, and imputation and the adverse interest exception, as we would have to do to bring about the expansion of third-party liability sought by plaintiffs here.").

- Leff v. Fulbright & Jaworski, L.L.P., 911 N.Y.S.2d 320, 321 (N.Y. App. Div. 2010) ("In New York it is well established that absent fraud, collusion, malicious acts or similar circumstances, the draftsman of a will or codicil is not liable to the beneficiaries of other third parties not in privity who might be harmed by his or her professional negligence."; "Plaintiff's subjective belief that she had engaged in joint estate planning or was jointly represented with her late husband is insufficient to establish such privity."), appeal denied, 952 N.E.2d 1092 (N.Y. 2011) (decision without published opinion).
- Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W. 3d 780, 783 (Tex. 2006) (holding that plaintiff may pursue an "estate-planning malpractice claim" against lawyers, in their capacity as their father's personal representatives; "Thus, in Texas, a legal malpractice claim in the estate-planning context may be maintained only by the estate planner's client. This is the minority rule in the United-States -- only eight other states require strict privity in estate-planning malpractice suits. In the majority of states, a beneficiary harmed by a lawyer's negligence in drafting a will or trust may bring a malpractice claim against the attorney, even though the beneficiary was not the attorney's client." (footnote omitted)).

Some states have recognized a fairly narrow exception to this general rule, if the lawyer has committed fraud or some other intentional wrongdoing (which might also give such non-clients standing under traditional tort rules).

- See, e.g., Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1170, 1171-72 (Ohio 2008) (holding that beneficiary could not file a lawsuit against the decedent's lawyer, whom negligently prepared a will; noting that "The necessity for privity may be overridden if special circumstances such as 'fraud, bad faith, collusion or other malicious conduct' are present." (citation omitted); "We decline the appellants' invitation to relax our strict privity rule. Although the court of appeals commented that this rule does not allow a remedy for the wrong, that is not necessarily so. Other courts have suggested that a testator's estate or a personal representative of the estate might stand in the shoes of the testator in an action for legal malpractice in order to meet the strict privity requirement. . . . While recognizing that public policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate

planning and preserves an attorney's loyalty to the client. In this case, for example, Gindlesberger maintains that he did exactly what Margaret Schlegel wished. She wished to transfer the Hanna farm but also wanted to retain a life estate. The deed Gindlesberger prepared accomplished just that. Moreover, appellants' claim is that the deed and the will drafted by Gindlesberger created a tax liability for the estate that depleted its assets. It is conceivable that a testator may not wish to optimize tax liability, instead seeking to further a different goal. In those instances, what is good for one beneficiary may not be good for another beneficiary, or for the estate as a whole. In this case, the basis for extending liability is even more tenuous because the increased tax liability to the estate arose from the transfer of the Hanna farm, not from the decedent's will. A holding that attorneys have a duty to beneficiaries of a will separate from their duty to the decedent who executed the will could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties.").

Cases Allowing Negligence Actions by Third Parties Invited to Rely on the Lawyer's Services. As explained above, the Restatement indicates that non-clients who were invited to rely on a lawyer's services can sue that lawyer for negligence.

This situation most frequently involves corporate transactions in which the client sends the lawyer's legal opinion to a lender or other party to a transaction, etc. It should come as no surprise that such non-clients invited to rely on the lawyer's opinion can sue for negligence. These lawsuits might focus on the client who invited the reliance, but it is a short step from there to allowing a direct lawsuit against the lawyer.

Cases Allowing Negligence Actions by Third Party Beneficiaries of the Lawyer's Services. As explained above, the Restatement extensively analyzes a lawyer's malpractice liability to third-party beneficiaries of the lawyer's services to a client.

A large number of courts have addressed this issue -- most frequently in the trust and estate context.

To be sure, courts sometimes analyze the issue in the context other than an estate beneficiary's claim against the decedent's lawyer for estate planning negligence.

- Sickler v. Kirby, 19 Neb. App. 286, 310 (Neb. Ct. App. 2011) (reversing summary judgment for a lawyer in a malpractice case; finding that co-owners of a company could pursue a malpractice case against the lawyer representing the company they owned; "[W]hile Steve and Cathy may not have a direct attorney-client relationship with the defendants, they were, as a matter of law, third parties to whom the defendants owed the duty of exercising such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.").
- Anderson v. Pete, No. 2010-CA-000472-MR, 2011 Ky. App. LEXIS 193, at *11, *12 (Ky. Ct. App. Oct. 7, 2011) (holding that the beneficiaries of an estate could sue the estate's lawyer for malpractice in pursuing a wrongful death action on behalf of the estate; "When an attorney is retained to file a wrongful death action by the administrator of an estate, the attorney clearly intends to benefit both the client estate and the individuals in the estate who will receive a share of the damages under KRS 411.130 should he successfully defend the suit. They are two side of one coin that cannot be logically divided from one another. Indeed, the individuals named in KRS 411.130(2) are the real parties in interest in such a suit."; "[T]he result is inescapable that Pete owed a duty to Michael and Malik - whether as attorney to client or as attorney to intended beneficiary.").
- Reddick v. Suits, 2011 IL App (2d) 100480, ¶37 (holding that an estate executor and corporate defendants could not pursue an action against a lawyer who represented a company in allegedly committing malpractice in attempting to reinstate the dissolved corporation; "[T]he primary purpose and intent of Suits' [lawyers] representation of RPF [company] was to reinstate it from administrative dissolution. That RPF's directors and officers would benefit by being freed of the possibility of personal liability for business conducted by RPF is incidental to the primary purpose and intent of restoring RPF to good standing. That incidental benefit does not transform the primary purpose and intent of Suits' representation into protecting RPF's directors and officers.").

- Estate of Schneider v. Finmann, 933 N.E.2d 718, 719 (N.Y. 2010) ("At issue in this appeal is whether an attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability. We hold that a personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the estate.").
- Credit Union Central Falls v. Groff, 966 A.2d 1262 (R.I. 2009) (holding that a lender could sue the lawyer for a borrower, because the lender was the intended third-party beneficiary of the lawyer's services).

Most of the case law dealing with such possible liability arises in a trust and estate setting, in which a beneficiary or would-be beneficiary sues the decedent's lawyer for estate planning negligence.

A number of courts have held that the named beneficiary can sue the decedent's lawyers for malpractice.

- Calvert v. Scharf, 619 S.E.2d 197, 207 (W. Va. 2005) ("[W]hile a majority of courts grant intended beneficiaries standing to sue a lawyer who negligently drafts a will, they have imposed various limitations on such a cause of action. Accordingly, we now hold that direct, intended, and specifically identifiable beneficiaries of a will have standing to sue the lawyer who prepared the will where it can be shown that the testator's intent, as expressed in the will, has been frustrated by negligence on the part of the lawyer so that the beneficiaries' interest(s) under the will is either lost or diminished.").
- Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. Ct. App. 2004) (holding that the beneficiary of a will could sue the will's drafting attorney because he had not advised her that as a care custodian to the testator she was presumptively disqualified from taking under the will unless she had taken a certain specified step under California law).
- Harrigfeld v. Hancock (In re Order Certifying Question of Law), 90 P.3d 884, 888, 888-89 (Idaho 2004) ("[W]e hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in

the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed. The testamentary instruments from which the testator's intent is to be ascertained would not include any will, codicil, or other instrument that had been revoked."; "Our extension of the attorneys' duty is very limited. It does not extend to beneficiaries not named or identified in the testamentary instruments. The attorney has not duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments. . . . An attorney preparing a document that revokes or amends a client's existing testamentary instrument(s) has no duty to the beneficiaries named or identified in such instruments to notify them, consult with them, or in any way dissuade the testator from eliminating or reducing their share of his or her estate. Likewise, that attorney could not be held liable to such beneficiaries based upon their assertion that the testator would not have intended to revoke such instrument(s). This extension of an attorney's duty will not subject attorneys to lawsuits by persons who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive.").

- Pinckney v. Tigani, C.A. No. 02C-08-129 FSS, 2004 Del. Super. LEXIS 386, at *16, *16-17, *18-19, *21, *28-29 (Del. Super. Ct. Nov. 30, 2004) ("Strict privity . . . is the approach historically followed by courts, but it has become outdated. In order to recover for legal malpractice, plaintiff must show that the attorney owed a duty of care to plaintiff, the attorney breached that duty, and the attorney's negligence proximately caused plaintiff's injury and damages. Privity is a contract-based principle, preventing actions against the attorney by parties who do not have a significant nexus with the attorney. Privity helps establish whether an attorney-client relationship exists. That relationship triggers the duty, the first prong of liability." (footnotes omitted); "Strict privity, the rule in Alabama, Maryland, Nebraska, Ohio, Texas, and, as mentioned, New York, completely bars malpractice actions by beneficiaries against estate planning attorneys." (footnotes omitted); "In the estate planning context, an attorney is usually sued by a disappointed heir or intended beneficiary rather than the client's estate. The client's death often triggers the action. The client's injury, if discovered in time, is the expense of redrafting the will, whereas the intended beneficiary's loss is the bequest. The prevailing rule now is that under some circumstances an intended beneficiary may bring a negligence action against an attorney. Courts rely on various theories, but the vast majority gives at least some beneficiaries standing to sue estate planning attorneys for legal negligence." (footnotes omitted); "Connecticut, Virginia, Oregon, Michigan and most importantly for present

purposes, Pennsylvania have adopted the third-party, beneficiary rule articulated in § 302 of the Restatement (Second) of Contracts." (footnotes omitted); "The settlor's original, testamentary intent was clear enough. It undisputed that Jeanne [deceased mother of plaintiff] intended to create a trust for Plaintiff. And it is equally undisputed that Defendant drafted a trust agreement reflecting the settlor's original intent. The bequest undeniably failed because the settlor's money went elsewhere. Although the court appreciates that, in theory, the estate could have been restructured to fund Plaintiff's share of the trust, the settler would have had to hire Plaintiff, or someone else, to review her financial situation. Then she would have had to agree to divert money from elsewhere. And although the court further appreciates that Defendant's alleged negligence may have contributed to the settlor's failure to discover and correct her misimpression about her assets, Plaintiff's position nonetheless creates a series of 'what ifs' involving someone who has passed on. This goes to the heart of the concerns favoring a privity requirement, and mandates the outcome here.").

- Leak-Gilbert v. Fahle, 55 P.3d 1054, 1056, 1058, 1060-61, 1062 (Okla. 2002) (providing an answer to a question certified from the United States federal court; "We hold that: (1) when an attorney is retained to prepare a will, the attorney's duty to prepare the will according to the testator's wishes does not ordinarily include an investigation of a client's heirs independent of, or in addition to, the information provided by the client, unless the client requests such an investigation; and (2) an intended will beneficiary may maintain a legal malpractice action under either negligence or contract theories against the drafter when the will fails to identify all the decedent's heirs as a result of the attorney's substandard professional performance."; "[T]o hold that an attorney has a duty to confirm heir information by conducting an investigation into a client's heirs independent of, or in addition to, the information provided by the client, even when not requested to do so, would expand the obligation of the lawyer beyond reasonable limits. The duty between an attorney and third persons affected by the attorney-client agreement should not be any greater than the duty between the attorney and the client. Although some exceptional circumstances might exist which would give rise to such a duty, none are present here. Consequently, we hold that, unless the client requests such an investigation, when an attorney is retained to draft a will, the attorney's duty to prepare a will according to the testator's wishes does not include the duty to investigate into a client's heirs independent of, or in addition to, the information provided by the client."; "A few jurisdictions refuse to allow non-client, intended beneficiaries to bring such malpractice actions. However, our decision is Hesser [Hesser v. Cent. Nat'l Bank & Trust Co. of Enid, 956 P.2d 864 (Okla. 1998)] is in accord with the majority of jurisdictions

- which recognize that intended beneficiaries harmed by a lawyer's malpractice may maintain a cause of action against lawyers who draft testamentary documents even though no attorney-client relationship exists. Some of these courts have recognized such actions as negligence actions, while others have determined that in an intended will beneficiary may proceed under either negligence or contract theories." (footnotes omitted); "Those allowing an intended beneficiary of a will to assert a third party breach of contract theory generally recognize that when such a breach occurs, named intended beneficiaries of a will also hold third party beneficiary status under the agreement between the testator and the attorney to draft a will according to the testator's wishes."; "[W]e hold that an intended will beneficiary may maintain a legal malpractice action under negligence or contract theories against an attorney when the will fails to identify all of the decedent's heirs as a result of the attorney's substandard professional performance.").
- Timmons v. J.D., 49 Va. Cir. 201, 201, 201-02, 202, 203, 204 (Va. Cir. Ct. 1999) (finding that a malpractice case against the lawyer should proceed; explaining the background: "Plaintiff avers that Leslie Ann Marshall ('decedent') hired the Defendant to draft a will for her in January of 1979. Under the terms of the will, decedent's property was to be given to Grandville T. Johnson and Betty Angieline Timmons ('Plaintiff') in equal shares, or to the survivor should either beneficiary predecease the decedent. Johnson died in 1986, leaving Plaintiff as the sole beneficiary under the will."; "Plaintiff claims that an implied contract arose between decedent and Defendant that Defendant would exercise reasonable care in safeguarding the will, that Defendant would deliver the will to a proper third party in the event of decedent's death, and that Defendant would deliver the will to Plaintiff (who was also the administrator of the estate) at decedent's death. Decedent died on July 8, 1993, after which time decedent's heirs-at-law filed a claim in this court seeking to recover their shares of decedent's estate on the presumption that decedent died intestate. Decedent apparently did not retain a copy of the will, and Defendant never notified Plaintiff or the heirs of its existence. Plaintiff claims that, under intestate succession, she received only approximately \$2,500.00 of the \$33,000.00 estate, and she is suing for the difference."; acknowledging that a normal malpractice case would be barred because of "a lack of privity"; relying on Copenhaver v. Rogers, 238 Va. 361 (1989), in explaining the Virginia rule; "[T]he rule that emerges from Copenhaver is that in these circumstances, the Plaintiff must allege that the decedent clearly and directly intended to benefit the beneficiaries when she entered into the contract for legal services with her attorney."; ultimately finding the plaintiff's motion for judgment should proceed; "The most conspicuous factor that suggests that the decedent 'clearly and definitely

intended' to benefit the Plaintiff is that she singled out only two beneficiaries in her will. This scenario is thus unlike one in which a testator identifies dozens of beneficiaries in the will, making it unlikely that the overriding purpose in contracting for legal services was to benefit a specific person. In this case, however, decedent specified that she wanted her modest estate to go to two specific individuals, rather than to her heirs-at-law. Thus, the overriding purpose in hiring Defendant to draft the will was to channel her estate to two specific people. Otherwise, she would not have wasted the time and money in hiring an attorney if she was content to die intestate. The size of the estate also weighs in the balance because it is difficult to argue that the decedent's purpose was avoiding taxes when her estate was so small. Therefore, based on the number of beneficiaries, the size of the estate, and the fact that the Plaintiff was not the primary intestate taker, the Court concludes that Plaintiff has adequately alleged facts sufficient to draw the inference that the decedent's overriding purpose in contracting with Defendant was to benefit the Plaintiff."; overruling defendant's demurrer).

On the other hand, a number of courts have rejected negligence claims by non-clients in this setting, explaining that the decedent could have changed the trust or estate plan before his or her death, or for some reason could have deliberately decided not to complete whatever trust and estate planning the decedent had initiated.

- Harrison v. Lovas, 234 P.3d 76, 78 (Mont. 2010) (holding that expected beneficiaries of a change in a trust could not sue the lawyer who represented the client considering the change in the trust; rejecting the plaintiffs' argument that the grantor wanted the trust amended so they could obtain more money; "We observe at the outset that, contrary to Plaintiffs characterization of the record, it is not self-evident that the Harrisons [grantors] intended that the Trust be amended. The record reflects that Lovas [Harrisons' lawyer] needed, among other things, legal descriptions of the property to be transferred in order to complete the proposed amendment. It is not disputed that Lovas advised the Harrisons of this in her office, and again on the telephone and in two subsequent letters. The record does not reflect why the Harrisons failed to respond. The only thing that is clear from the record is that Lovas did not complete the amendment because the Harrisons failed to provide the information necessary to do so."; "[W]hile Plaintiffs were named beneficiaries of an existing Trust, their complaint against Lovas is premised entirely upon a potential, unexecuted amendment to that existing Trust. The documents at issue in this case were never even prepared because the

Harrisons failed to provide Lovas with information that she required. Plaintiffs in this case therefore had merely a hope for, but not legal entitlement to, revised beneficiary status."; affirming summary judgment for the lawyer).

- Peleg v. Spitz, 2007 Ohio 6304 (Ohio Ct. App. 2007) (holding that a trust's residual beneficiary could not bring a malpractice action against the attorney who drafted the trust, because the trust settlor could have changed the trust before her death), aff'd without published opinion, 889 N.E.2d 1019 (Ohio 2008).
- Featherson v. Farwell, 20 Cal. Rptr. 3d 412, 415-16, 416, 417 (Cal. Ct. App. 2004) (affirming a judgment in favor of a lawyer who did not immediately deliver a deed that would have benefited one of client's daughters; holding that the beneficiary of a deed that a lawyer prepared for a client could not sue the lawyer for not having recorded the deed before the client died; explaining that the decedent might not have wanted the deed delivered; "[T]he cases have repeatedly held that an attorney who assumes preparation of a will incurs a duty not only to the testator client, but also to his intended beneficiaries, and lack of privity does not preclude that testamentary beneficiary from maintaining an action against the attorney based on either the contractual theory of third party beneficiary or the tort theory of negligence.' . . . But the lawyer's liability to the 'intended beneficiary' is not automatic or absolute, and there is no such liability where the testator's intent or capacity is questioned."; "But liability to a third party will not be imposed where there is a question about whether the third party was in fact the intended beneficiary of the decedent, or where it appears that a rule imposing liability might interfere with the attorney's ethical duties to his client or impose an undue burden on the profession."; "The primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent, the courts simply will not impose that insurmountable burden on the lawyer."), review denied and ordered not published, No. S129892, 2005 Cal. LEXIS 2025 (Cal. Feb. 23, 2005).

Courts dealing with similar situations have taken a similarly narrow view.

- See, e.g., New Hope Methodist Church v. Lawler & Swanson, P.L.C., 2010 Iowa App. LEXIS 1368, at *17-18, *20, *21, *21-22, *22-23, 791 N.W.2d 710 (Iowa 2010) (unpublished opinion) (finding that a lawyer who prepared a will was not liable to a contingent beneficiary, because it was not a "direct,

intended and specifically identifiable" beneficiary; "The Churches first contend Lawler had a duty to send notices to the Churches as devisees under the will pursuant to Iowa Code section 633.304 (2005). This claim fails for two reasons. First, the duty to give notice under section 633.304 is imposed upon the executor. Iowa Code § 633.304 ('On admission of a will to probate, the executor . . . as soon as practicable give [sic] notice . . . by ordinary mail to . . . each heir of the decedent and each devisee under the will admitted to probate. . . .' (emphasis added)). Lawler was not the executor."; "Second, the Churches are not devisees. Section 633.3 defines various terms used in the probate code (chapter 633). Subsection 11 provides: 'Devise--when used as a noun, includes testamentary disposition of property, both real and personal,' and in subsection 12, 'when used as a verb, to dispose of property, both real and personal, by a will.' A '[d]evisee--includes legatee.' Id. § 633.3(13). And a 'legatee' is 'a person entitled to personal property under a will.' Id. § 633.3(26). Thus a devisee is the person entitled to property disposed of by a will."; "Similarly Iowa Code section 633.478 imposes a duty upon the 'personal representative' to give notice of the final report to 'all persons interested.' Lawler was not the personal representative of the probate estate."; "The Churches wish to have this court equate Lawler's duties to third parties co-extensive with those of the executor, but this result is not supported by our courts' prior holdings. Rather, only in those circumstances noted in Estate of Leonard, 656 N.W. 2d at 145-46, will we recognize a duty extending to a third party and the Churches have failed to present evidence of any of them."; "Our conclusion is in line with the rulings of several other jurisdictions. See Young v. Woodard, [2007 Wash. App. LEXIS 2033] (Wash. Ct. App. 2007) (rejecting claim that attorney for personal representative committed malpractice in failing to give the spouse of the deceased notice of probate proceedings noting the statutory provision 'requires the personal representative to give notice of the pendency of the probate proceedings to each heir,' not the attorney); see also Allen v. Stoker, [61 P.3d 622, 624] (Idaho Ct. App. 2002) ('The attorney is not hired to benefit any particular heir, but to assist the personal representative in the performance of his or her duties. The imposition of a duty owed by the attorney to the heirs would create a conflict of interest whenever a dispute arose between the personal representative and an heir. '); Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734, 738-39 (Minn. Ct. App. 1995) (holding 'the estate beneficiaries lack standing to sue the personal representative's attorney because the attorneys were not hired for their direct benefit, other procedures are available to protect the beneficiaries' interests from malpractice, and the potential for conflict of interest would unduly burden the legal profession').").

A number of other courts have explained that those not named as beneficiaries generally cannot sue the decedent's lawyer for malpractice.

Most typically, this type of case involves the plaintiff alleging that the decedent's lawyer should have realized that the decedent must have meant to include the plaintiff in the decedent's estate planning, yet did not make such arrangements.

- Soignier v. Fletcher, 256 P.3d 730, 733, 734 (Idaho 2011) ("[L]awyers have no duty to testamentary beneficiaries with regard to what share they receive from the testator's estate, if any. . . . Attorneys do not have to postulate whether a testator intended to do something other than what is expressed in the will."; "[A]ttorneys have no ongoing duty to monitor the legal status of the property mentioned in a testamentary instrument.>").
- Rydde v. Morris, 675 S.E.2d 431 (S.C. 2009) (holding that a prospective beneficiary could not sue the decedent's lawyer for not having prepared a will before the decedent died).
- Harrigfeld v. Hancock (In re Order Certifying Question of Law), 90 P.3d 884, 888, 888-89 (Idaho 2004) ("[W]e hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed. The testamentary instruments from which the testator's intent is to be ascertained would not include any will, codicil, or other instrument that had been revoked."; "Our extension of the attorneys' duty is very limited. It does not extend to beneficiaries not named or identified in the testamentary instruments. The attorney has not duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments. . . . An attorney preparing a document that revokes or amends a client's existing testamentary instrument(s) has no duty to the beneficiaries named or identified in such instruments to notify them, consult with them, or in any way dissuade the testator from eliminating or reducing their share of his or her estate. Likewise, that attorney could not be held liable to such beneficiaries based upon their

- assertion that the testator would not have intended to revoke such instrument(s). This extension of an attorney's duty will not subject attorneys to lawsuits by persons who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive.").
- Swanson v. Ptak, 682 N.W.2d 225, 232 (Neb. 2004) (affirming summary judgment for a lawyer, who was sued by a client's niece because the lawyer was not able to arrange for the beneficiaries of the client's estate to share part of the estate with the niece; "We have held that the duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury resulting from negligent draftsmanship. . . . Here, the basis for extending the lawyer's duty to a third party is even more tenuous than in those cases, given the nature of Swanson's [niece] claim to a share of the estate. No lawyer, and particularly not one who serves as the personal representative of an intestate estate, could compel persons who are lawful heirs to share the estate with persons who are not. We therefore conclude that as an attorney, Ptak [lawyer] had no professional duty to secure a gratuitous agreement from Wilma's [decedent] heirs for the benefit of Swanson.").
 - Leak-Gilbert v. Fahle, 55 P.3d 1054, 1056, 1058, 1060-61, 1062 (Okla. 2002) (providing an answer to a question certified from the United States federal court; "We hold that: (1) when an attorney is retained to prepare a will, the attorney's duty to prepare the will according to the testator's wishes does not ordinarily include an investigation of a client's heirs independent of, or in addition to, the information provided by the client, unless the client requests such an investigation; and (2) an intended will beneficiary may maintain a legal malpractice action under either negligence or contract theories against the drafter when the will fails to identify all the decedent's heirs as a result of the attorney's substandard professional performance."; "[T]o hold that an attorney has a duty to confirm heir information by conducting an investigation into a client's heirs independent of, or in addition to, the information provided by the client, even when not requested to do so, would expand the obligation of the lawyer beyond reasonable limits. The duty between an attorney and third persons affected by the attorney-client agreement should not be any greater than the duty between the attorney and the client. Although some exceptional circumstances might exist which would give rise to such a duty, none are present here. Consequently, we hold that, unless the client requests such an investigation, when an attorney is retained to draft a will, the attorney's duty to prepare a will according to the testator's wishes does not

include the duty to investigate into a client's heirs independent of, or in addition to, the information provided by the client."; "A few jurisdictions refuse to allow non-client, intended beneficiaries to bring such malpractice actions. However, our decision is Hesser [Hesser v. Cent. Nat'l Bank & Trust Co. of Enid, 956 P.2d 864 (Okla. 1998)] is in accord with the majority of jurisdictions which recognize that intended beneficiaries harmed by a lawyer's malpractice may maintain a cause of action against lawyers who draft testamentary documents even though no attorney-client relationship exists. Some of these courts have recognized such actions as negligence actions, while others have determined that in an intended will beneficiary may proceed under either negligence or contract theories." (footnotes omitted); "Those allowing an intended beneficiary of a will to assert a third party breach of contract theory generally recognize that when such a breach occurs, named intended beneficiaries of a will also hold third party beneficiary status under the agreement between the testator and the attorney to draft a will according to the testator's wishes."; "[W]e hold that an intended will beneficiary may maintain a legal malpractice action under negligence or contract theories against an attorney when the will fails to identify all of the decedent's heirs as a result of the attorney's substandard professional performance.").

The analysis can be more subtle than one might think.

For instance, one decision explained that a named beneficiary might not automatically be the intended recipient of the client's gift or estate planning.

- Copenhaver v. Rogers, 384 S.E.2d 362, 368,-69 (Va. 1989) (finding that under Virginia law only the direct third party beneficiary of a contract can sue a lawyer for malpractice; affirming a judgment for a lawyer in an action brought by individuals who never alleged such a contract of which they were the intended beneficiaries; "There is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client. A set of examples will illustrate the point: A client might direct his lawyer to put his estate in order and advise his lawyer that he really does not care what happens to his money except that he wants the government to get as little of it as possible. Given those instructions, a lawyer might devise an estate plan with various features, including inter vivos trusts to certain relatives, specific bequests to friends, institutions, relatives and the like. In this first example, many people and institutions might be beneficiaries of the estate, but none could fairly be described as beneficiaries of the contract between the client and his attorney because the intent of that arrangement was to avoid taxes as much as

possible. By contrast, a client might direct his lawyer to put his estate in order an advise his lawyer that his one overriding intent is to ensure that each of his grandchildren receive one million dollars at his death and that unless the lawyer agrees to take all steps . . . necessary to ensure that each grandchild receives the specified amount, the client will take his legal business elsewhere. In this second example, if the lawyer agrees to comply with these specific directives, one might fairly argue that each grandchild is an intended beneficiary of the contract between the client and the lawyer.").

Clients as Fiduciaries Relying on the Lawyer's Services. As explained above, the Restatement recognizes possible negligence liability by a lawyer representing a fiduciary -- who sometimes can be sued by the beneficiaries of the fiduciary's duties.

Most case law on this issue focuses on the "fiduciary exception" to the attorney-client privilege rather than on liability.

California "Balancing Test." California frequently creates its own test for various legal doctrines.

Among other things, California has created a multi-factor test to determine if a non-client can sue a lawyer for malpractice. States outside California have adopted the test as well.

- France v. Podleski, 303 S.W.3d 615, 619, 620 (Mo. Ct. App. 2010) (holding that lawyers representing a county's public administrator in guardianship and related proceedings does not owe a duty to the wards that are beneficiaries of the public administrator's fiduciary duty; "The question of the legal duty owed by an attorney to non-clients is determined by weighing six factors: (1) the existence of a client's specific intent that the purpose of the attorney's services be to benefit the non-client plaintiffs' (2) the foreseeability of harm to the plaintiffs as a result of the attorney's negligence; (3) the degree of certainty that the plaintiffs will suffer injury from the attorney's misconduct; (4) the closeness of the connection between the injury and the attorney's conduct; (5) the policy of preventing future harm; and (6) the burden on the

profession of recognizing liability in those circumstances."; "While it is true that the Public Administrator was a fiduciary to Appellants, we decline to hold that the fiduciary relationship between the Public Administrator and Appellants extended to Respondents on these facts. Appellants fail to cite any case law stating that Respondents' representation of the Public Administrator created a legal duty of Respondents to represent Appellants, and to demonstrate that the Public Administrator had the specific intent that Respondents' purpose in representing the Public Administrator be to benefit Appellants, as opposed to representing the Public Administrator before the probate court. In addition, were we to hold that Respondents owed a duty to Appellants in this case, we would place other attorneys representing a public administrator in a rather precarious position. Essentially, a public administrator would be appointed as guardian or conservator of someone deemed incompetent by the probate court, and a public administrator's attorney would then be forced to argue on behalf of the ward that the ward was competent and that the appointment of a public administrator as guardian or conservator was unnecessary. We decline to issue a holding that would create such a conflict. Finding that Appellants have not met their burden of alleging facts to support the first element of their malpractice claim, we need not consider the others. Point III is denied.").

Various courts have adopted the California test in the trust and estate setting.

Some courts applying the standard have permitted non-clients to sue a decedent's lawyer for malpractice.

- Osornio v. Weingarten, 21 Cal. Rptr. 3d 246, 263 (Cal. Ct. App. 2004) ("[I]t is readily apparent that Osornio could have alleged that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio, would be presumptively qualified because of her relationship as Ellis's care custodian. Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of section 21350(a); he was also negligent in failing to address Osornio's presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a Certificate of Independent Review required by section 21351(b)." (footnote omitted); allowing the non-client to file an amended complaint against the lawyer).
- Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 626-27, 627, 627-28, 628, 628-29 (Mo. 1995) (adopting the California "balancing test" in describing the ability of a non-client to sue for malpractice; explaining that

intended beneficiaries of a trust transfer sued the lawyer which had set up the transfers; explaining that "[t]he more complicated question is whether the intended beneficiaries, in this case, Donahue and McClung, have standing to bring a legal malpractice action against Stamper and the law firm because the lawyers failed to effectuate a transfer in accordance with the wishes of their client, Stockton"; noting the national debate about the ability of a non-client to sue a lawyer for malpractice; "Courts of other states have considered whether an attorney can be held liable for negligence to a person other than the client. Generally, the analysis begins with the historical rule requiring privity of contract to maintain an action for professional negligence."; noting that some courts have adopted what is called the California "balancing" test, while others have relied on "the concept of a third party beneficiary contract"; "The two most common approaches do not appear to be irreconcilable. The first factor of the balancing test addresses the extent to which the transaction was intended to benefit the plaintiff and bears a remarkable resemblance to the third party beneficiary theory. The question of whether the client had a specific intent to benefit the plaintiff plays an important role in determining if a legal duty exists under the balancing of factors test. The first factor identified in Westerhold [Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967)] and Lucas [Lucas v. Hamm, 364 P.2d 685 (Cal. 1961)] should be should be modified to reflect that the factor weighs in favor of a legal duty by an attorney where the client specifically intended to benefit the plaintiffs. With that modification, that approach is an appropriate method for determining an attorney's duty to non-clients. The weighing of factors allows consideration of relevant policy concerns and is consistent with prior case law, as expressed in Westerhold. Concurrently, the ultimate factual issue that must be pleaded and proved is that an attorney-client relationship existed in which the client specifically intended to benefit the plaintiff."; ultimately adopting a balancing test; "To summarize, the Court concludes that the first element of a legal malpractice action may be satisfied by establishing as a matter of fact either that an attorney-client relationship exists between the plaintiff and defendant or an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test. The factors are: (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs. (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence. (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct. (4) the closeness of the connection between the attorney's conduct and the injury. (5) the policy of preventing future harm. (6) the burden on the profession of recognizing liability under the circumstances.";

concluding that the intended beneficiaries could pursue a malpractice claim against the lawyer).

Other courts applying this standard have held that non-clients could not maintain a malpractice action against the decedent's lawyer.

- Hall v. Kalfayan, 118 Ca. Rptr. 3d 629, 636, 637 (Cal. Ct. App. 2010) ("We agree with the Radovich [Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573(Cal. Ct. App. 1995)] and Chang [Chang v. Lederman, 90 Cal. Rptr. 3d 758 (Cal. Ct. App. 2009)] courts that there is a need for a clear delineation of an attorney's duty to nonclients. The essence of the claim in the case before this court is that Kalfayan failed to complete the new estate plan for Ms. Turner and have it executed on her behalf by her conservator before her death, thereby depriving Hall of his share of her estate. In the absence of an executed (and in this instance, approved) testamentary document naming Hall as a beneficiary, Hall is only a potential beneficiary. Kalfayan's duty was to the conservatorship on behalf of Ms. Turner; he did not owe Hall duty of care with respect to the preparation of an estate plan for Ms. Turner."; This conclusion is particularly appropriate in this case, where Ms. Turner herself had not expressed a desire to have a new will prepared and had only limited conversation with Kalfayan about the disposition of her estate. In addition, there is no certainty that the court would have approved the PSJ. We also observe that extending Kalfayan's duty to potential beneficiaries of Ms. Turner's estate would expose him to liability to her niece, whose share of the estate would have been reduced. This is precisely the type of unreasonable burden on an attorney that militates against expanding duty to potential beneficiaries."; "As a matter of law, Hall cannot establish duty, a necessary element for his claim for professional negligence. The trial court properly granted summary judgment on this basis.").
- Perez v. Stern, 777 N.W.2d 545, 550-51, 553 (Neb. 2010) ("The substantial majority of courts to have considered that question have adopted a common set of cohesive principles for evaluating an attorney's duty of care to a third party, founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. And courts have repeatedly emphasized that the starting point for analyzing an attorney's duty to a third party is determining whether the third

party was a direct and intended beneficiary of the attorney's services." (footnote omitted); "[W]e have held that an attorney who prepared a decedent's will owed no duty to any particular alleged beneficiary of the will. Similarly, we have held that an attorney acting as the personal representative of an estate owed no duty to nonbeneficiaries of the estate to secure a gratuitous agreement from the beneficiaries to share their inheritance. We have also held that the attorney for a joint venture owed no duty to three individual partners that was separate from the duty owed to the joint venture as a whole. And we have held that an attorney owed no duty to the guarantors of leases which the attorney's clients defaulted on, and that an attorney for a debtor owed no duty to a creditor based on allegedly defective collateral for the debt." (footnotes omitted); "Courts to have considered the question have generally concluded that policy considerations weigh in favor of recognizing an attorney's duty to a decedent's next of kin in a wrongful death action. We agree. In this case, it is clear that the children were direct and intended beneficiaries of the transaction. Stern was certainly aware of Guido's intent to benefit the children." (footnote omitted)).

- Boronian v. Clark, 20 Cal. Rptr. 3d 405, 411 (Cal. Ct. App. 2004) (directing a judgment in favor of a lawyer, in an action brought by a beneficiary who claimed to have been wrongfully disinherited by a decedent shortly before her death; "[A] lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific asset bequeathed to someone else).
- Goldberger v. Kaplan, Strangis and Kaplan, P.A., 534 N.W. 2d 734, 738, 738-39, 739 (Minn. Ct. App. 1995) (holding that an estate beneficiary could not sue the decedent's lawyer for malpractice; "The exception is that a nonclient may maintain a cause of action against an attorney for professional malpractice as an intended third-party beneficiary in those limited situations where the client's sole purpose in retaining the attorney is to benefit the nonclient directly, and the attorney's negligence instead causes the nonclient to suffer a loss. . . . Determining whether an attorney owes a duty to a nonclient involves a balancing of factors, including: (1) the extent to which the transaction was intended to affect the nonclient; (2) the foreseeability of harm to the nonclient; (3) the degree of certainty that the nonclient suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue

burden on the profession. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 687-88, 15 Rptr. 821 (Cal. 1961), cert. denied, 368 U.W. 987 (1962)."; concluding that "[h]ere, appellants are not the direct, intended beneficiaries of the personal representative's attorneys' services. As permitted by statute, the personal representative hired the attorneys to assist and advise him in fulfilling his fiduciary duty to manage the estate in accordance with the terms of the will and the law and 'consistent with the best interests of the estate.'" (citation omitted); explaining that "[m]oreover, an estate beneficiary's interests may not necessarily coincide with those of the estate. Until an estate is closed, it is uncertain whether any attorney malpractice actually injures a beneficiary."; "We hold, therefore, that the estate beneficiaries lack standing to sue the personal representative's attorneys because the attorneys were not hired for their direct benefit, other procedures are available to protect the beneficiaries' interests from malpractice, and the potential for conflict of interest would unduly burden the legal profession.").

(a) It is likely that an intended named beneficiary can sue the decedent client's lawyer for negligence which cost the beneficiary tax savings because of the lawyer's malpractice.

(b) It is not likely that a distant relative of a decedent could sue the decedent's lawyer for negligent failure to include the beneficiary in the decedent's estate plan.

Best Answer

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

n 2/12

Lawyers Representing an Adversary's Lawyer in an Unrelated Matter

Hypothetical 20

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

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

MAYBE

Analysis

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

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

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

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

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

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

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

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

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

First, the attorney-client relationship with the adversary's lawyer might be so material to you or the other lawyer that it could conceivably affect your loyalty to the client, and thus trigger the conflicts rules. For instance, if the other law firm was defending you in a case involving the bulk of your assets and your license, the client might worry that you would not be aggressive enough on its behalf when dealing with the other lawyer.

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

In discussing the imputation of such a disqualification, the ABA indicated that any non-curable conflict would disqualify the representing lawyer's entire firm, but that the

representation of a lawyer in a purely personal matter would not result in disqualification of the represented lawyer's entire firm.

Second, the attorney-client relationship might generate confidentiality problems. For instance, if a plaintiff's lawyer hires one of your partners to prepare her estate plan, your partner might learn what the plaintiff's lawyer expects to receive in certain cases that the lawyer is handling against your clients.

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

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

- Pennsylvania LEO 2007-027 (1/2/08) (assessing the following situation: "Inquirer asks if X may represent inquirer's child when Inquirer and X represent opposing parties (the 'Pending Case') in an unrelated matter."; holding that the "best practice here" would be to obtain informed consent).
- N.Y. City LEO 1996-3 (4/2/96) ("Whether a lawyer may undertake the representation of, or whether a lawyer may retain, an adversary attorney, with or without the consent of the clients being represented by the respective attorneys, depends upon an analysis of the particular facts and circumstances, including: (a) the intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries' relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms.").
- New Jersey LEO 678 (11/21/94) ("This Committee has not previously addressed the inquirer's question, i.e., whether an attorney may represent an

- opposing attorney in a matter unrelated to the matter in which the attorneys are adversaries."; "[W]e find that the inquirer's proposed representation of his adversary in an unrelated matter would create an appearance of impropriety. In so holding, we recognize that the only other ethics tribunal to have considered this question under the appearance of impropriety doctrine reached a different result from ours. See Illinois Opinion 822 (April 4, 1983), ABA/BNA Lawyers' Manual on Professional Conduct: Ethics Opinions 1980-1985 at 801:3015. Nevertheless, we find the proposed conduct to be impermissible.").
- Iowa LEO 92-28 (2/18/93) ("You state that in your community of 8000 you and lawyer A frequently are adversaries in litigation. A personal injury action has been brought against him in his personal, non-lawyer, part-ownership of an apartment building. His insurance carrier has requested you to defend him."; "In actual practice lawyers are entitled to be defended by counsel even as non-professionals are. The mere fact that the lawyers involved have been adversaries in other, non-related litigation should not affect their professional responsibilities or conduct.").
 - New York LEO 579 (3/20/87) (explaining that "[t]his Committee has not previously addressed the question whether Attorney A, who is engaged in litigation as opposing counsel to Attorney B, may represent Attorney B in a personal and unrelated matter"; "It is the view of this Committee that the Code does not mandate a per se disqualification. In the first instance, both Attorney A and Attorney B must satisfy themselves that the creation of an attorney-client relationship between them will not compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties. If there is doubt in the mind of either attorney that the dual representation by Attorney A might affect any settlement recommendation, litigation strategy or other professional judgments either attorney might be called upon to make on behalf of those existing clients, then Attorney A should decline the proffered employment. If, on the other hand, both attorneys are confident that representation of their existing clients will not be compromised in any manner by Attorney A's acceptance of Attorney B as a client in an unrelated matter and if the existing clients in the pending litigation both give their informed consent to the dual representation following full disclosure, then Attorney A may properly accept employment by Attorney B. In addition, it must be apparent that representation of Attorney B will not call upon either attorney to reveal or use any confidences or secrets of the existing clients under circumstances proscribed by DR 4-101. Should either client decline to give consent, then the multiple representation is, of course, impermissible." (footnote omitted); ultimately concluding that "provided both

clients consent and the other standards set forth in this opinion are met, an attorney for a client in a pending lawsuit may simultaneously represent counsel for the adverse party in a personal and unrelated litigation.").

- Illinois LEO 822 (4/1983) ("It is not improper for Lawyer B to represent Lawyer A when each frequently represent [sic] clients adverse to each other provided Lawyer B makes full disclosure to such clients and obtains consents therefrom.").
- Maryland LEO 82-4 (12/3/81) ("You state that a partner in your law firm is defending Attorney X in a legal malpractice action. Attorney X represents a client in an unrelated personal injury claim against a party who is being defended by a member of your firm."; "You ask whether there is a conflict or other ethical consideration which precludes your law firm from defending one or both of the above matters. You further ask whether there is a conflict or other ethical consideration which applies to Attorney X."; "A majority of the Committee believes that, at the very least, full disclosure should be made to the personal injury clients of Attorney X and your law firm and that the consent of Attorney X, his client and your client are necessary before you undertake the defense of the claim. A majority of the Committee believes that the full disclosure requirement of DR 5-105(C) is met by informing the respective clients that the representation involves a separate, independent personal matter, without specifying the nature of the representation.").
- Michigan LEO CI-649 (6/15/81) ("Where a lawyer represents a second lawyer in said second lawyer's divorce action the second lawyer's views as to appropriate litigation tactics, negotiating techniques, property division, support levels, and other aspects of divorce practice, are secrets of the lawyer-client and may not thereafter be used by the first lawyer to the disadvantage of the lawyer-client, whether in the latter's personal or professional capacity."; "Where a lawyer represents a second lawyer in said second lawyer's divorce action, the first lawyer may not then or thereafter represent a party to another divorce action in which the opposing party is represented by said second lawyer, as such representation must necessarily involve use of the second lawyer's secrets to his or her disadvantage, or representation less zealous than is ethically required, or both, and creates the appearance of impropriety."; "Where a lawyer represents a second lawyer in said second lawyers divorce action, the first lawyer may not during such representation represent a party to another divorce action in which the opposing party is represented by said second lawyer, as the first lawyer's independent professional judgment with respect to each client must necessarily be adversely affected, the consent of all persons involved, if given, is of no consequence as it is not obvious that the first lawyer can adequately

represent the interest of each, and the dual representation would create the clear appearance of impropriety."; "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.").

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

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

Best Answer

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

n 1/12

Public Policy Disagreements Between Lawyers and Their Clients

Hypothetical 21

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

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

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

NO

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

NO

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

MAYBE

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

MAYBE

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

YES

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

YES

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

YES

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

NO

Analysis

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

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

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

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

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

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

ABA Model Rule 1.2 cmt. [5].

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

The Restatement also acknowledges the issue:

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

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

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

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

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

The Restatement deals with a less extreme example.

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

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

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

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

Id.

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

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

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

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

Lawyer represents Corporation in negotiating with the Internal Revenue Service to permit Corporation to employ accelerated depreciation methods for machinery purchased in a prior tax year. At the same time, Lawyer believes that the accelerated depreciation laws for manufacturing equipment reflect unwise public policy. Lawyer has been working with a bar-association committee to develop a policy statement against the allowance, and the committee chair has requested Lawyer to testify in favor of the report and its

proposal to repeal all such depreciation allowances. Any new legislation, as is true generally of such tax enactments, would apply only for current and future tax years, thus not directly affecting Corporation's matter before the IRS. Although the proposed legislation would be against Corporation's economic interests, Lawyer may, without Corporation's consent, continue the representation of Corporation while working to repeal the allowance.

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

Bars have also dealt with this issue.

- N.Y. County Laws. Ass'n LEO 744 (10/19/11) ("Rule 6.4 does not require a lawyer to obtain client consent to speak publicly at a law reform forum, notwithstanding that the reform may affect the interests of a client of the lawyer. It is permissible for a lawyer to participate in law reform activities even if the client objects, provided the attorney does not divulge any confidential information. The lawyer must, however, take into consideration and be mindful that conflicts of interest may, in certain circumstances, require the lawyer to cease the client representation, or cease the law reform activity, under Rule 1.7. Rule 6.4 also requires that the lawyer disclose to the law reform organization when a lawyer knows that the client's interests may be materially benefitted by a decision in which the lawyer participates.").
- N.Y. City LEO 1997-3 (1997) ("A lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised."; "[I]t is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy. Of course, the question of whether zealous advocacy may be compromised can arise in numerous situations. A lawyer must exercise sound judgment in determining whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a particular client. In certain cases, while client consent may not be required, it may nevertheless be desirable to give the client an opportunity to terminate the representation before the lawyer openly takes an

opposing personal position on the same subject." (footnote omitted); "The rule of imputed disqualification that applies with respect to legal services rendered by different lawyers within the same law firm, see DR 5-105(D), should not automatically extend to a case involving personal views espoused as such by a lawyer in the firm not working on the relevant matter. In any case where there may be a question, it is recommended that the lawyer begin his or her remarks with a disclaimer to the effect that the views expressed are his or her own. In the Committee's view, the interests of the legal system are best served by encouraging lawyers to speak out about their personal convictions, even if they are not always in harmony with the interest of a client." (footnote omitted)).

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

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

- Oasis West Realty, LLC v. Goldman, 106 Cal. Rptr. 3d 539, 544, 548, 549, 550, 551 (Cal. Ct. App. 2010) (reversing a judgment against a former Reed Smith lawyer who represented a real estate developer in connection with a Beverly Hills project, and then publicly opposed the project two years after the representation ended; explaining that "[o]n May 6, 2008 he [Reed Smith partner Kenneth Goldman] addressed the city council, opposing a rule which required individuals seeking signatures on the referendum petition to carry with them the entire EIR and other documents, totaling about 15 pounds. Goldman's statement was that the requirement was unnecessary and unfair 'whether you're for the Hilton or for the Referendum.'"; "On May 12, 2008, he and his wife spent about 90 minutes soliciting signatures on the referendum petition from their neighbors. At 4 or 5 houses, they left a 'dear neighbor' note which they both signed, expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition, and urging the neighbor to do the same."; "But Goldman never undertook a second employment, or developed any other relationship which could create

conflicting fiduciary duties. He was not placed in the position of choosing between clients, because there was no second client."; "If, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Professions Code section 6068."; "However, there is no evidence that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he was basing his opposition on that information. He did not trade on his former representation of Oasis to lend credence to his opposition. Such conduct would imply that he had confidential information and was basing his actions on that information, and would be tantamount to revealing confidential information."; "Our analysis does not end with the rules and the Business and Professions Code. An attorney's duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations."; "[W]e turn again to the facts, and conclude that a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions."; "However, when Goldman asked his neighbors to sign the petition (indeed, when he signed it himself) he unquestionably acted against the interest of his former client, on the issue on which he was retained. Did this breach the duty of loyalty?"; "This is a sweeping statement, and read literally would bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against Measure H. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf."; "Oasis seeks to impose something like a rule against the appearance of impropriety, but California has not adopted such a rule."; explaining that Professor Hazard [reporter for original ABA Model Rules] has called the "appearance of impropriety" standard a "garbage" standard" (citation omitted); "We thus see no authority for a rule which would bar an attorney from doing that Goldman did here: signing a petition in opposition to the Hilton project, and asking his neighbors to sign such a petition, when he had once represented the developer concerning the project. To the extent that Oasis asks us to create such a rule, we decline the invitation. We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest."), reversed and superseded by 250 P.3d 1115 (Cal. 2011).

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

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

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

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

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

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

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

A comment provides a further explanation.

The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of

confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

ABA Model Rule 1.10 cmt. [3].¹

Best Answer

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

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

Sexual Relationships Between Lawyers and Their Clients

Hypothetical 22

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

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

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

Analysis

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

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

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

The current ABA Model Rules adopt a bright line test.

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

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

ABA Model Rule 1.8(j).

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

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

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

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

Id. at cmt. [18].

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

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

ABA Model Rule 1.8 cmt. [19].

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

Interestingly, the Restatement takes a more nuanced approach.

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

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

State ethics rules take differing positions on this issue.

Those states addressing this issue by rule tend to follow the basic ABA approach -- prohibiting sexual relations between lawyers and their clients unless the relationship pre-dates the attorney-client relationship, and would not prejudice the client.

See, e.g., California Rule 3-120; Michigan Rule 1.8(j); Washington State Rule 1.8(k).

Some states following the basic ABA Model Rule approach have fine-tuned the limitations.

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

Some states have experienced an interesting history dealing with this issue. For instance, the Oklahoma Bar adopted a per se prohibition on sexual relationships ("except in a situation involving a spouse") in Oklahoma LEO 308 (12/9/94). A little over three months later, the Oklahoma Bar withdrew that opinion. Several years later, Oklahoma adopted Oklahoma LEO 311 (10/16/98), which indicated that lawyers initiating a sexual relationship with a client during the attorney-client relationship "will more likely than not" violate the ethics rules.

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

- Lawyer Disciplinary Bd. v. Stanton, 695 S.E.2d 901 (W. Va. 2010) (revoking a license of a West Virginia lawyer who had sexual relationships with a former client -- but who had lied to prison authorities by claiming that he represented the former client in a successful effort to meet her in prison for sex).
- Commonwealth v. Stote, 922 N.E.2d 768, 771 n.1, 772-73, 778 (Mass. 2010) (affirming a criminal defendant's motion for a new trial based on his lawyer's failure to advise him that his lawyer was engaged in an "intimate relationship" with the prosecutor; "The affidavits of Walsh [lawyer for criminal defendant Stote] and the ADA [prosecutor] reveal the following facts about the nature of their relationship. The ADA attests in her affidavit that she and Walsh did not live together at any time during their relationship. Walsh similarly attests that they lived separately. The ADA also states that she does not know whether the relationship was 'monogamous.' Although neither affidavit states whether the relationship was sexual, we can safely assume that it was, given that the relationship lasted more than one year, the participants were mature adults, neither of them has denied it, and the ADA's reference to a 'monogamous' relationship implies as much. The ADA further states that Walsh did not bring legal work to her home, did not to her knowledge receive telephone calls at her home regarding legal matters, and did not discuss Stote's case with her or disclose confidential information to her. She states that, while she and Walsh were seeing each other, they did not 'substantively' discuss their 'respective legal concerns' and that their work did not 'overlap in any respect'. Although she was aware that Walsh was working on 'an appellate brief,' she did not

know of its contents, and 'even if' she knew the defendant's name 'at that time,' she did not know anything about Stote's case until she read our 2000 opinion, which was issued after the relationship ended. Walsh similarly attests that he did not discuss Stote's case or appeal with the ADA and that he did not disclose any confidential information to her. Shortly after the relationship ended, according to the ADA's affidavit, Walsh began living with another woman who he later married." (footnote omitted); "We conclude that in the circumstances of this case, there was neither an actual conflict of interest nor a potential conflict that resulted in material prejudice in Stote's appeal. We remind members of the bar of their professional obligation under rule 1.7(b) to disclose to their clients any intimate personal relationship that might impair their ability to provide untrammelled and unimpaired assistance of counsel. See Croken [Commonwealth v. Croken, 717 N.E.2d 272 (Mass. 1999)], supra at 273. Even if an attorney reasonably believes that he or she can continue to represent the client vigorously, the attorney should err on the side of caution by disclosing the relevant facts, which need not include the name of the third person, and asking whether the client consents to the representation. This dispute could well have been avoided if Walsh had simply informed Stote of his relationship with a colleague of the prosecutor who sought affirmance of the conviction. Stote would then have had the opportunity either to give informed consent to the continued representation or to retain different appellate counsel, as Stote attests he would have done. The order denying Stote's second motion for a new trial is affirmed." (footnote omitted)).

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

Some high-powered lawyers have run afoul of these provisions. For instance, in 2000, the Washington Supreme Court suspended for one year the former Washington State Bar president -- who had carried on sexual relationships with six clients while

representing them in matrimony matters.² More recently, the Oklahoma Bar issued a public reprimand of the Oklahoma Bar Association's General Counsel.³

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

- In re Hammond, 56 So. 3d 199, 201-02 (La. 2011) (permanently disbaring a lawyer who arranged for a sixteen year old girl (whom "he identified as his 'assistant'") to perform oral sex on two clients while videotaping the encounter, after explaining that the lawyer "believed he could obtain a reversal of their convictions, resulting in an immediate release from jail, but that he would need samples of their semen in order to do so").
- Iowa Supreme Court Attorney Disciplinary Bd. v. Bowles, 794 N.W.2d 1 (Iowa 2011) (suspending for eighteen months a lawyer who had engaged in sexual misconduct with a client in a courthouse library).
- Iowa Supreme Court Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 765, 766, 766-67 (Iowa 2010) (suspending a lawyer who might have engaged in a sexual relationship with a client; finding evidence of that relationship inadequate to demonstrate an improper relationship, but finding that the lawyer had improperly disclosed information about his client -- even though the information was publicly available at the time; "Factually, there is no doubt that Marzen publicly disclosed Doe's [client] prior history with and litigation involving her former probation officer. Further, there is no factual question that Marzen learned this information through a confidential conversation with his client. Doe also testified that she never consented to Marzen's disclosure. The question thus presented is whether an attorney violates the rules of confidentiality by disclosing information learned through client confidences when that information is also available in the public forum." (footnote omitted); "[T]he rule of confidentiality must apply to all communication between the lawyer and client, even if the information is otherwise available."; "[I]t is not clear from Marzen's statements to the media that he was attempting to mount a defense; rather, it would appear that he was attempting to defame Doe. The ability to defend, moreover, is not absolute. A lawyer can reveal confidential client information only in the appropriate forum and only to the extent necessary to offer protection. While certainly the revelation of Doe's

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

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

- confidential information to the local media was necessary to defend Marzen's bid for county attorney, it was not necessary to defend him against the allegations of this disciplinary proceeding. We have considered all of Marzen's claims and find his conduct violated rule 32:1.6(a).").
- Lawyer Disciplinary Bd. v. Chittum, 689 S.E.2d 811, 815, 816, 817 (W. Va. 2010) (holding that a lawyer who had engaged in "flirtatious" communications with a client that he never met had not violated the prohibition on sexual relations with that client, but finding that the lawyer had engaged in other misconduct; "He was appointed pursuant to a pro bono program and received no fee or reimbursement of expenses. After receiving this appointment, Mr. Chittum initiated a flirtatious long distance telephone and letter writing relationship with Ms. Stevenson. However, Mr. Chittum and Ms. Stevenson never met each other in person."; "While there was no physical contact between the parties, the Board found that Mr. Chittum attempted to develop a sexual relationship with Ms. Stevenson which constituted a violation of Rules 8.4(a), 8.4(d) and 8.4(g) of the Rules of Professional Conduct."; "Mr. Chittum and Ms. Stevenson never physically met each other. Their relationship existed solely through telephone calls and letters. Mr. Chittum never attempted to physically have sexual intercourse with Ms. Stevenson or touch her in any manner. Mr. Chittum's telephone calls and letters implied the possibility of having a romantic relationship with Ms. Stevenson at some future date. This conduct does not rise to the level of 'sexual relations' as defined by Rule 8.4(g)."; "However, Mr. Chittum's flirtatious remarks were misconduct under Rule 8.4(a), because they were an attempt to establish a sexual relationship with his client. We condemn this conduct and find that Mr. Chittum's behavior was inappropriate and prejudicial to the administration of justice because his client was incarcerated and in a vulnerable position. Under the circumstances, Ms. Stevenson might have felt obligated to respond to Mr. Chittum's flirtatious overtures to ensure that he would fully pursue her interests in the divorce proceeding. We therefore agree with the Board's finding that Mr. Chittum's behavior was also a violation of Rule 8.4(d) of the Rules of Professional Conduct.").
 - In re Anonymous Member of S.C. Bar, 699 So. 2d 693, 695 (S.C. 2010) (admonishing a lawyer for engaging in an affair with a client's wife; "The practice of law is a laudable profession that should be held to the highest of standards; practicing law is a privilege. Respondent admits to a serious lapse in judgment in these circumstances, and rightly so. Sexual involvement with the spouse of a current client, while not expressly proscribed by the language of our Rules of Professional Conduct, unquestionably has the propensity to compromise the most sacred of professional relationships: that between an

attorney and his or her client. Attorneys who engage in a sexual relationship with their client's spouse do so at their professional peril. Consequently, this Court alerts the bar, in addition to admonishing Respondent, that a sexual relationship with the spouse of a current client is a per se violation of Rule 1.7, as it creates a significant risk that the representation of the client will be limited by the personal interests of the attorney.").

- Attorney Grievance Comm'n of Md. v. Hall, 969 A.2d 953 (Md. 2009) (suspending a lawyer for engaging in a sexual relationship with a client).
- In re Hoffmeyer, 656 S.E.2d 376 (S.C. 2008) (suspending for nine months a lawyer who admitted to having a sexual relationship with a client).
- Disciplinary Counsel v. Sturgeon, 855 N.E.2d 1221, 1223 (Ohio 2006) (disbarring a lawyer for improperly seeking sexual relations with his clients; noting among other things that the lawyer said to one client: "[y]ou have great breasts, can I see your tits? If I win your case, can I get a peek at them?").
- Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath, 713 N.W.2d 682 (Iowa 2006) (suspending for three years a lawyer who had engaged in sexual relationships with clients).
- State ex. rel. Counsel for Discipline v. Hogan, 717 N.W.2d 470 (Neb. 2006) (suspending for 18 months a lawyer who engaged in sexual misconduct, despite the lawyer's claim that he suffered from a "sexual compulsive disorder," and the lawyer's enrollment in "Sexaholics Anonymous" and "Sex Addicts Anonymous" groups).
- Cleveland Bar Ass'n v. Kodish, 852 N.E.2d 160, 169 (Ohio 2006) (indefinitely suspending a lawyer for a number of ethics violations, including a consensual sexual relationship with a corporate client's representative, despite no evidence that the affair "compromised client interest").
- Guiles v. Simser, 804 N.Y.S.2d 904 (N.Y. Sup. Ct. 2005) (finding that a lawyer who had engaged in a consensual sexual relationship could not be sued by the client for malpractice or breach of fiduciary duty).
- In re Disciplinary Proceedings Against Gamino, 707 N.W.2d 132 (Wis. 2005) (suspending for six months a lawyer who had engaged in sexual relationships with two clients).

- State ex rel. Okla. Bar Ass'n v. Downes, 121 P.3d 1058 (Okla. 2005) (suspending for one year a divorce lawyer for engaging in a consensual sexual relationship with a client).
- Bezold v. Kentucky Bar Ass'n, 134 S.W.3d 556 (Ky. 2004) (publicly reprimanding a lawyer who had engaged in a sexual relationship with a client).
- Attorney Grievance Comm'n v. Culver, 849 A.2d 423 (Md. 2004) (disbarring a divorce lawyer for engaging in an adulterous sexual relationship with a client).
- In re Berg, 955 P.2d 1240, 1246, 1247 (Kan. 1998) (disbarring a lawyer for improper sexual relationships with various clients, including a client who suffered from psychological abusive behavior by her husband, alcoholism, drug addiction, and suicidal tendencies; among other things, explaining that Berg had trouble finding one client with whom he had sexual relations; "In March 1996, A.C. lived in a mobile home. Respondent went to her home early in the morning on March 12, 1996. He went to A.C.'s former employer and inquired about where A.C. lived or worked. He later discovered A.C. lived in a mobile home. He could not find the home, so he went to the elementary school and asked for information about her children." rejecting lawyer's mitigation arguments; "In mitigation, respondent presented a large volume of testimony regarding his reform. He testified that he attends weekly Bible study and accountability groups (Promise Keepers). He attends a Sexaholics Anonymous meeting at least once a week.").

Some states take a less stringent approach.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Monroe, 784 N.W.2d 784, 785 (Iowa 2010) (suspending for thirty days a lawyer who had engaged in a sexual relationship with a client, but finding that the relationship was not prejudicial to the administration of justice; "[W]e reject the board's position that a sexual relationship between attorney and client automatically prejudices the administration of justice, requiring instead that there be proof the relationship actually hampered the proper functioning of the court system.").
- Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 2d 474, 478, 487, 489 (Miss. 2010) (dismissing a claim of a former client against his former lawyer [then president and chief operating officer of the Baker Donelson law firm], who admittedly had an affair with the client's wife; explaining that the affair began with what the lawyer described as "alcohol-related kissing"; concluding that "[n]o material facts have been

presented to support that the subject affair was in any way 'related to the representation or arising therefrom.' . . . As no genuine issue of material fact exists on the issue of whether an adulterous affair between Reed and Rebecca constituted a breach of fiduciary duty Reed owed to Sam, this Court concludes that the circuit court erred in denying partial summary judgment to Reed as to Sam's claim of breach of fiduciary duty."; also finding that the lawyer's firm of Baker Donelson was not liable for its lawyer's misconduct, because it was a "frolic").

- Virginia LEO 1853 (12/29/09) (although warning lawyers that initiating a sexual relationship with a client during the course of a representation will almost always be unethical for various reasons, declining to adopt a per se ban on such relationships; "It is apparent that entering into a sexual relationship with a client during the course of representation can seriously harm the client's interests. The numerous ethical obligations of a lawyer to a client are so fundamental to the attorney-client relationship that obtaining the client's purported consent to entering into a sexual relationship with the lawyer will rarely be sufficient to eliminate any potential ethical violation. Therefore, it is the opinion of this Committee that a lawyer should refrain from entering into a sexual relationship with a client. In most situations, the client's ability to give the informed consent required by Rule 1.7(b) is overwhelmed by the lawyer's position of power and influence in the relationship and the client's emotional vulnerability.").

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

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

South Carolina Rule 1.8(m).

The Alaska Bar has held

that sexual relationships with clients commenced during the course of the representation by either an attorney or the attorney's law firm are unethical [if they adversely affect the lawyer's ability to represent the client or would otherwise hurt

the client, create a possibility of a lawyer being a witness, began during an "emotionally charged" matter or are the result of coercion or in exchange for legal services].

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

Best Answer

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

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