CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS

PART II

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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Law Firm Non-Compete Arrangements

Hypothetical 1

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 ("The 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; "It 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; b 10/14

Other Law Firm Restrictions

Hypothetical 2

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.
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> 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.

- Arthur J. Ciampi, Enforceability of Notice Provisions in Law Firm Agreements, N.Y. L.J. Online, May 23, 2014 ("Springtime is often the time of year when partners leave their firms for greener pastures. Making 'the move' is frequently a difficult process fraught with twists, turns and surprises that sometimes hinder and unnecessarily complicate the departure. Among the difficulties is that many partnership agreements contain a 'notice provision' which requires a partner to remain at the firm until the specified notice period expires. The enforceability and propriety of a notice provision frequently become a point of contention between a partner and his soon-to-be former firm. In this month's column, we analyze notice provisions in law firm partnership agreements and discuss their enforceability. . . . Most law firm agreements contain a notice provision which sets forth: (i) the manner in which notice of a partner's departure must be given; (ii) the length of time a partner must remain at the firm before departing; and (iii) the ability of the law firm, in its discretion, to waive or shorten the notice period."; "[A] long notice provision could conceivably run afoul of Rule 5.6 if determined to be a disguised restriction on the practice of law. An extreme example would be a one-year notice period. This would cause partners to remain at a firm for at least an additional year and could conceivably be viewed as an unethical restriction on the practice of law despite the label as a notice provision. In addition, if a partner who challenges the provision can demonstrate that its intent -- as written or applied -- is to restrict competition and not to provide a reasonable transition period, that fact could also undermine its viability. . . . Courts and commentators have opined that reasonable notice of departure is required when law firm partners leave a firm. Thus, a provision in a law firm agreement that merely embodies this duty should sustain scrutiny. At the same time, however, the sole court to address the enforceability of a notice provision in a law firm partnership agreement has maintained that, to be enforceable, such provisions should not unreasonably delay a partner's departure to another law firm. In Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, [179 N.J. 246 (2004)] the departing partner, Robert Borteck, resigned from his firm after providing 'little or no formal notice' despite that the law firm

agreement included a 90-day written notice provision. Borteck sued his former firm for declaratory relief, seeking to enforce the early retirement payment provision in the law firm agreement. The firm counterclaimed for, among other things, breach of the firm's 90-day notice provision. Borteck claimed, in part, that the 90-day notice provision violated Rule 5.6." (footnotes omitted); "Firms should also periodically review all of the provisions of their partnership agreements concerning the rights and obligations of the firm and its departing partners. Firms with notice provisions should evaluate whether the provision in place is necessary and whether it is reasonable or in need of amendment because it 'unreasonably delay[s] an attorney's orderly transition from one firm to another.' In this process, firms should further discern how they have addressed the notice issue with prior departing partners and whether the firm shortened the time period and if so for what reason.").

- 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, Am. L. 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.

- In re Truman, 7 N.E.3d 260, 260, 261 (Ind. 2014) (issuing a public reprimand of a lawyer who hired an associate under terms of an employment agreement that restricted the associate's ability to practice after leaving the firm; "In October 2006, Respondent hired an associate ('Associate') to work in his law firm. As a condition of employment, Associate signed a Confidentiality/Non-Disclosure/Separation Agreement ('the Separation Agreement'). If Associate left the firm, the Separation Agreement provided that only Respondent could notify clients that Associate was leaving, prohibited Associate from soliciting and notifying clients that he was leaving, and prohibited Associate from soliciting and contacting clients after he left. The Separation Agreement also included provisions for dividing fees if Associate left the firm that were structured to create a strong financial disincentive to prevent Associate from continuing to represent clients he had represented while employed by the firm."; "The Separation Agreement hampered both Associate's right to practice law and Associate's Clients' freedom to choose a lawyer by restricting Associate's ability to communicate with the clients and creating an unwarranted financial disincentive for Associate to continue representing them." (emphasis added)).

- 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.").

At least one court has upheld an employment agreement requiring a withdrawing lawyer to pay his former firm a percentage of contingent fees he recovers at his new firm.

- Ruby v. Abington Mem'l Hosp., 50 A.3d 128, 129, 131, 135-36 (Pa. Super. Ct. 2012) (upholding a lawyer's employment agreement requiring the lawyer to give his old firm 75% of fees earned on cases that the lawyer takes with him to a new firm; "'The record reveals that in 1996 Mr. Erbstein signed an 'Employment Agreement' with Beasley [law firm], wherein Mr. Erbstein specifically agreed to immediately reimburse the Beasley Firm any outstanding case costs and pay 75% of any fees recovered thereon should he leave the firm for any reason.'" (internal citation omitted); quoting the employment agreement provision: "'Section 6 of the Employment Agreement (Exhibit 'C') states '[i]n the event that you leave this office for any reason and a client or clients choose(s) to continue with your representation, you will receive 25% of the net fee on any case you take with you regardless of its age, or the time spent on the file before or after you leave the office. You will immediately reimburse the office for all costs then expended on the file before the file(s) leave(s) the office.' (emphasis added)"; "By its terms, a restrictive covenant is simply a promise not to engage in some conduct otherwise permitted but for the presence of the covenant. YRCH [appellant law firm] proffers no evidence suggesting that either YRCH or Erbstein could not obtain its own clientele, successfully engage in the practice of law, or was either geographically or temporarily limited in their practice because Beasley receives a share of a recovery in the cases it formerly held. YRCH purports that somehow Erbstein was restricted because he could not continue representation of the Rubys without compensating Beasley. We are not persuaded by YRCH's argument that one's ability to procure clients is constrained by some ancillary obligation having no bearing on clients retained

after the dismissal of the obliged attorney." (emphasis added); "[T]o the extent that YRCH argues that the employment agreement somehow negatively impacts a client's right to choose his or her attorney, we disagree.").

Interestingly, a North Carolina court and the North Carolina Bar both dealt with this issue about a year apart. The court seemed to indicate that the withdrawing lawyer and the old firm must address the issue on a quantum meruit basis.

- Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 730 S.E.2d 763, 765, 766, 767 (N.C. Ct. App. 2012) (analyzing the implications of a lawyer moving from one firm to another firm, having signed an employment agreement with the first firm that contained the following provision: "'Mr. Snyder agrees to pay to the firm 70% of the fees he may receive from his continued representation of the client in the matter for which the firm was representing the client at the time of his departure.'"; explaining that the North Carolina Bar found the provision unethical; "Snyder sought an opinion [2008 FEO 8] from the North Carolina State Bar regarding the enforceability of the pertinent sections of his compensation agreement with Crumley. . . . The opinion concluded the 70/30% fee-split and provision requiring repayment of advanced costs within thirty days did not comply with the provisions of Rule 5.6 of the Rules of Professional Conduct."; "We believe the law is settled in North Carolina that counsel, who has provided legal services pursuant to a contingency fee contract and is terminated prior to a resolution of the case and the occurrence of the contingency upon which the fee is based, has a claim in quantum meruit to recover the reasonable value of those services from the former client, or, where the entire contingent fee is received by the former client's subsequent counsel, from the subsequent counsel." (emphasis added); "[T]he fact that the fee-splitting agreement was determined to be in violation of the Rule of Professional Conduct and unenforceable is of no consequence to Crumley's right of recovery in quantum meruit."; "Costs advanced for a client are the client's financial responsibility; a departing lawyer may not be made liable to a prior law firm for this debt."; nevertheless allowing the former firm to recover under quantum meruit for the work it performed on the case before the case settled).

However, about a year later the North Carolina Bar seemed to approve a pre-arranged split of any contingent fee recovered.

- North Carolina LEO 2012-12 (1/25/2013) (finding that a lawyer who was leaving the firm could ethically enter into a settlement agreement at that time, in which the lawyer agreed to pay the law firm 50 percent of any fees collected on cases that the lawyer brought with him to a new firm; "Attorney B,

an associate in Attorney A's firm, resigned from the firm effective February 28, 2005. At the time of his resignation, Attorney B signed an agreement with the firm. The agreement provided that Attorney B would take all of the active client files for which the clients had indicated a desire for Attorney B to continue to represent them. The agreement also contained the following provision: 'With respect to those files in which the client chooses Attorney B to conclude his or her active claim, upon recovery made by Attorney B on each such file, Attorney B shall forward to Attorney A, at the time of disbursement, 50% of the attorney's fee collected on each settlement. This will include medical payments fees as well. Attorney B will also pay to Attorney A upon recovery the total amount of expenses due to Attorney A in accordance with [a computer expense printout provided by Attorney A]. Finally, Attorney B will forward to Attorney A a copy of the settlement sheet signed by the client reflecting the disbursements on each such file. All settlements negotiated by Attorney B through February 28, 2005, will be handled through Attorney A's trust account."; "In the current inquiry, the agreement was negotiated and entered into after Attorney B announced that he was leaving Attorney A's firm. The agreement was, apparently, part of a global settlement of all issues relative to Attorney B's departure. It was not entered into as a condition of continued employment, as were the agreements analyzed in 2008 FEO 8. It did not deter Attorney B from leaving the firm or from continuing to represent clients who chose to follow him to his new firm. In fact, the agreement specifically contemplated that Attorney B would continue to represent those clients. In light of the various stages of his cases at the time of his departure, a 50% split of the contingent fees to be earned on the cases cannot be viewed as 'onerous' or 'punitive.' Such a division of fees would favor Attorney B in some cases and disfavor him in others. A division of fees based upon a fixed percentage that fairly allocates, over the range of cases, the value of the time and work expended before and after a lawyer leaves a firm is a reasonable means of achieving an efficient equitable resolution of the fee division issues between a departing lawyer and the firm. Provided the lawyers deal fairly and honestly with each other without intimidation, threats, or misrepresentation, this type of agreement should be encouraged. The provision of the agreement addressing costs advanced is consistent with 2008 FEO 8, which provides that the agreement 'may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client.'" (emphasis added)).

(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 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; finding the specific arrangement discussed in the opinion to be unethical, but recognizing that such arrangements might be acceptable; 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.").

- 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, 365, 367 (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; reversing the lower court conclusion that the provision violated the ethics rules, and finding that the provision "was to insure 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; b 10/14

Restrictions in Connection with a Law Firm's Retirement Program

Hypothetical 3

One of your firm's founders just left your firm to open up a competing boutique firm just across the street. Her departure was ugly, and as your firm's managing partner you are now being pressured to adopt a partnership provision to withhold retirement benefits from any of your partners who leave under such circumstances and compete with your firm.

(a) May your law firm make the payment of retirement benefits contingent on the retirees' compliance with a non-compete?

YES

(b) Does it matter at what age the retirement benefits begin?

YES

Analysis

(a) ABA Model Rule 5.6(a)'s prohibition on non-competes contains an explicit exception for "an agreement concerning benefits upon retirement."

> An exception recognized in all the lawyer codes is for restriction of a lawyer's right to practice law that is to be enforced upon a lawyer's retirement. The restriction is supportable because it only minimally interferes with the ability of clients to choose counsel freely, given the lawyer's intent to retire from practice.

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

Thus, law firms may condition the payment of retirement benefits on a retiree's compliance with a non-compete.

(b) Because the ethics rules do not define "retirement," courts and bars have had to explain that a "retirement" under Rule 5.6(a) must meet the common-sense definition of that term.

An ABA legal ethics opinion has explained the effect of this general rule.

- ABA LEO 444 (9/13/06) (explaining that under Rule 5.6(a), lawyers and their employers have "significant latitude" in restricting lawyers' rights to engage in the practice of law if the restrictions are tied to a legitimate "retirement benefit"; further explaining that to constitute a legitimate "retirement benefit," "the benefit must be one that is available only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers."; noting that normally, the benefit should be payable upon the satisfaction of some minimum age and minimum years of service, and include such indicia as "(i) the presence of benefit calculation formulas, (ii) benefits that increase as the years of service to a firm increase, and (iii) benefits that are payable over the lifetime of a retired partner," or interrelationship with other retirement or Social Security benefits; recognizing that other indicia include a separate partnership or other employment provision dealing with the benefit, and an extended pay-out period; warning that the term does not include a partner's capital account or previously earned income; acknowledging that if they are tied to a legitimate "retirement benefit," the restrictions can range from a permanent cessation of practicing law to geographic, temporal or practice limitations; concluding that lawyers willing to forfeit their retirement benefit will not be bound by the restrictions, although permissible arrangements could include forfeiture of future benefits or the disgorgement of previous benefits if a lawyer violates the restrictions.).

The Annotated ABA Model Rules also explain that "benefits upon retirement"

> refers to amounts separately owed the departing lawyer out of the firm's retirement plan, over and above any other money due. It does not mean payment for the departing lawyer's interest in the firm's capital account or in its uncollected or undistributed earnings. . . . Retirement benefits are generally payable from future firm revenues, disbursed over an extended period, and conditioned upon age and length of service.

ABA Annotated Model Rules of Professional Conduct R. 5.6, at 494-95 (5th ed. 2003).

The Restatement takes the same approach.

> The "retirement" exception has been held to apply only to bona fide retirements at the end of a career of practice. . . . The exception cannot properly be interpreted to apply to any departure from a firm to compete with it.

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

Accord Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 5.6:201 at 824-25 (2d ed. 1998 Supp.) ("[t]he 'benefits upon retirement' exception should therefore be triggered only where the firm is actually paying periodic retirement benefits to its former partner or associate.

The case law generally takes the same position.

- Sara Randazzo, Arbitrator Backs Stroock in Retirement Pay Fight, Orders Ex-Partner to Pay Firm's $163,000 Legal Tab, AmLaw Daily, July 2, 2012 ("A New York arbitrator has sided with Stroock & Stroock & Lavan in a dispute with former Los Angeles partner Michael Perlis, ruling that Perlis is not entitled to retirement benefits under the firm's partnership agreement because he continues to practice law at a competing firm. The award, which would typically remain private, emerged in court documents filed last week in a related action in New York state court."; "To recap the events leading up to arbitrator Charlotte Moses Fischman's June 18 ruling: Perlis, who moved his securities litigation practice to Locke Lord last July after spending more than two decades with Stroock, sued his former firm in California state court two weeks later, claiming he should still be able to collect benefits under Stroock's retirement plan. Perlis amended the complaint in September to include allegations that the firm had retaliated against him for, among other things, speaking out about how it handled sexual harassment and hostile work environment claims filed against it. That same month, Stroock argued that in line with the firm's partnership agreement, the dispute should have been filed in New York and should be arbitrated there. In January, a judge agreed to uphold the arbitration clause. An arbitration hearing took place May 9—without Perlis in attendance—and ended with Fischman fully backing Stroock's position, but also ordering Perlis to pay the firm $163,643 in attorney's fees."; referring to the award of arbitrator, which contained the following: "'The 2006 Amended and Restated Partnership Agreement dated January 1, 2006 ('the Partnership Agreement') contains an arbitration provision, is governed by New York law and is the version currently in effect."; "There was no evidence that Perlis ever asserted that he was not bound by the Partnership Agreement, during the time he was a partner at Stroock."; "Stroock at all relevant times has maintained a Partners Supplement

Retirement Plan (the 'Partners Retirement Plan') . . ., which was adopted and incorporated into the Partnership Agreement pursuant to Section 11 of the Partnership Agreement. The Parties Retirement Plan provides for lifetime benefits for equity partners who retire after age 59½ . The Plan was intended to provide an incentive for partners to finish their legal careers with the Firm and to transition clients to insure that the clients remain with the Firm even after the partners retire."; "Perlis did not retire upon his withdrawal from Stroock and has not retired to date."; "On August 5, 2011, Perlis filed suit against the Firm in California Superior Court seeking a declaratory judgment and alleging that he was 'entitled to certain retirement benefits' pursuant to the Partners Retirement Plan."; "Section 6.01(i) of the Partners Retirement Plan sets forth, in relevant part, that a 'Pension Partner shall not otherwise be entitled to practice law except on behalf of the Firm, or on a pro bono basis, or the teaching of law, or as a judge, or as an employee of the Federal or a State or municipal government or as the Executive Committee may approve.'"; "The arbitration provision is valid and enforceable."; "Perlis is not entitled to retirement benefits pursuant to the Firm's Partnership Agreement and/or Partners Retirement Plan." (emphasis added); "Perlis is also not eligible for retirement benefits pursuant to Section 6.01(i) of the Partners Retirement Plan because he continues to practice law with another law firm. Thus, he is also precluded from receiving benefits by virtue of Section 6.01(i) of the Partners Retirement Plan." (emphasis added); "Stroock has requested that it be permitted to recover fees incurred not just by outside counsel, but also by in-house counsel for the Firm, citing authorities that appear to support that request in some judicial contexts. . . . However, in the absence of explicit language in the arbitration clause authorizing an award of in-house attorneys' fees or authorities in an arbitration context authorizing such an award, the Arbitrator declines to do so."; "Stroock is entitled to recover a total of $147,513.76 as its reasonable attorneys' fees to Proskauer Rose LLP, incurred in the arbitration of this matter.").

- Hoffman v. Levstik, 860 N.E.2d 551, 553, 554 (Ill. App. Ct. 2006) (upholding a partnership agreement provision which allows withdrawing lawyers to receive a benefit known as "retirement capital" only if they retire from the practice of law when they leave the firm; noting that the plaintiff moved to another law firm and challenged the enforceability of the provision; upholding the provision because it is "not conditioned upon the departing partner's agreement to refrain from competing with" his former firm; also pointing to deposition testimony by the plaintiff that the provision did not interfere with any of his clients' decision to move with him to his new firm).

- Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 724, 729 (Ariz. 2006) (upholding a law firm's shareholder agreement "requiring a departing lawyer to tender his stock to a professional corporation for no compensation if he thereafter competes with the corporation in the practice of

law"; holding that Arizona Ethics Rule 5.6 only prohibits rules restricting the right of a lawyer to practice; "Although the rule prohibits -- and we will hold unenforceable -- agreements that forbid a lawyer to represent certain clients or engage in practice in certain areas or at certain times, its language should not be stretched to condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment. Such agreements, as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard.").

- Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP, 844 A.2d 521, 529 (N.J. 2004) (analyzing a situation in which Borteck withdrew from his law firm at the age of 53, and sought his retirement benefits despite competing with his former firm; reversing a trial court's ruling in Borteck's favor, but the New Jersey Supreme Court reversed; pointing to the following factors: (1) the retirement provision's requirement that the partner receiving the benefits be at least 55 years old; (2) the Partnership Agreement's handling of withdrawal and retirement in two separate sections; (3) the provision requiring that retirement benefits be paid to retired partners over a four-year period; (4) the fact that benefits were "funded at least in part from revenues 'that post-date the withdrawal of the partner.'").

- Hoff v. Mayer, Brown & Platt, 772 N.E.2d 263, 269 (Ill. App. Ct.) (analyzing a situation in which a partner withdrew from Mayer, Brown to found another law firm; noting that the partner sued Mayer, Brown for his retirement benefits, which the firm had denied because he was competing with it; explaining that the Mayer, Brown provision paid retirement benefits to partners who were at least 60 years old, and had practiced at the firm for at least 20 years [the opinion does not indicate the period over which the retirement benefits would be paid out]; analyzing numerous cases from other states, and ultimately concluding that the Mayer, Brown retirement plan was a "bona fide retirement plan."), appeal denied, 786 N.E.2d 183 (Ill. 2002).

Best Answer

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

b 1/11; b 10/14

Law Firms' Remedies Against Withdrawing Lawyers

Hypothetical 4

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.

A 2013 article describes the increasingly complicated contractual negotiations between firms and withdrawing lawyers.

- Arthur J. Ciampi, Separation Agreement, N.Y. L.J., Jan. 25, 2013 (describing increasing use of contractual agreements between law firms and lawyers who withdraw; "Today, the topic of 'lawyer mobility' is boring. Twenty-five years ago, when this author began representing lawyers and law firms, the concept

of lawyer mobility was novel if not revolutionary. The norm was for lawyers to begin and end their careers at the same firm, and law firms rarely asked partners to leave."; "Today, the pendulum has swung to the other extreme. Lawyers routinely move firms to benefit their careers and provide better services to their clients. In addition, law firms, for good or bad, are run more like businesses (well sort of) and partners who are perceived as unproductive or whose practice is deemed not to be compatible with their current firms are often asked to leave."; "The bottom line is that lawyers change firms with regularity. Just like partners who are planning on sticking together should have a solid partnership agreement to govern them, partners who are moving on should have a solid separation agreement to govern their departure."; "Often the most contentious and important issue to negotiate in a separation agreement is exit compensation. The time of year, the circumstances surrounding the departure, and the type of practice often determine the complexity of the agreement and the difficulty of the negotiation in this regard."; "A related issue is the return of capital. A partner's capital account in a law firm is either the amount contributed by the partner as cash from an initial or periodic capital contributions or is a partner's accumulation of yearly undistributed earnings. Taxes are paid on these contributions and accordingly the return of capital to a partner is tax-free and the loss of capital is therefore the loss of tax-free money which should be avoided."; "Separation agreements should also set forth the nature and duration of so-called bounce back messages on the departing partner's email and voicemail. These messages are important and provide necessary information to clients and third parties that the partner is no longer a partner and to honor the client's choice of counsel and should provide the partner's new contact information or at a minimum direct the caller or email sender to someone at the firm who can direct the call as appropriate."; "Separation agreements sometimes include non-disparagement and confidentiality provisions. Depending on the relationship of the firm and departing partner, a non-disparagement agreement may be called for. In some circumstances it is not needed and in others the parties would prefer to speak freely about one another and such a provision is not included. In addition, at a large firm it is very difficult to monitor and enforce such a provision among all the partners nonetheless diluting the efficacy of such a provision. Confidentiality provisions are more common and typically require the reasons for the departure and the economic terms of the departure to not be disclosed."; "Separation agreements often contain provisions by which the departing partner will assist her former firm in collecting fees from clients of the former partner. Sometimes this cooperation includes a direct monetary component by which the former partner is paid a percentage of the fees collected. In other situations there is no direct correlation. Regardless, separation agreements often contain such provisions requiring reasonable cooperation in collection of client receivables including the finalizing of bills."; "It is not uncommon for separation agreements to not have releases. While it is desirable for the parties to move

on with the protection of a release, it is often difficult to obtain a release concerning the departure of a partner from a firm. Often the parties, believing that their relationship is complex, cannot come to terms concerning a broad general release. In the situations where such an agreement is reached, a broad general release should be included which carves out, among other things, the separation agreement, any pension plans, and insurance coverage.").

Legal publications frequently carry a number of stories about such threats or actions.

- Peter Vieth, A Salvo After Lawyers Jump Ship: Virginia law firm sues ex-associates after they start their own firm, Va. Laws. Wkly., Nov. 11, 2013 ("A Virginia law firm is trading charges in court with two former associates after the pair jumped ship and started their own competing law firm."; "The Boleman Law Firm PC filed suit October 10 demanding $2.35 million from former employees Julia B. Adair and Deanna H. Hathaway, both of Richmond. The lawsuit in Richmond Circuit Court includes a demand for treble damages for statutory conspiracy."; "Boleman claims the two former employees used fraud and deceit to solicit clients for their new bankruptcy practice while still working at Boleman. In their answer to the lawsuit, the two former employees say the lawsuit is motivated by 'spite and ill will,'and they deny any impropriety."; "The case casts a light on thorny issues that arise when lawyers plan to leave a firm for greener pastures, from the handling of existing clients to the use of company resources."; "A prominent feature of the lawyers' employment contracts is hardly mentioned in the court papers."; "Attached to the Boleman lawsuit were the two contracts, both of which included explicit noncompete agreements barring work at a competing business for one year after termination."; "Such noncompete agreements generally are considered unethical -- there is even a provision in the Virginia Rules of Professional Conduct barring such practice restrictions after termination."; "'It is improper for both a law firm and a lawyer to enter into a noncompete agreement,' said Virginia State Bar Ethics Counsel James M. McCauley, speaking generally about the rule. 'It's a pretty clear prohibition,' he said."; "The Boleman lawsuit did not mention the noncompete clauses, but Adair and Hathaway contended their contracts were obtained unlawfully and for unlawful purposes by Boleman. They pointed specifically to Rule of Professional Conduct 5.6 (a) which generally bars lawyers from offering or making an agreement restricting the right of a lawyer to practice after termination.").

- Pete Brush, New York Plaintiffs Firm Says Attorney Schemed to Siphon Clients, Law360, Nov. 8, 2012 ("Antin Ehrlich & Epstein LLP hit one of its former lawyers with a $1 million suit on Wednesday, accusing attorney Frank

Trief of concocting a stealth plan to quit and solicit the New York City plaintiffs firm's clients under false pretenses."; "Trief, who recently set up his own law office in Midtown Manhattan, abruptly left the Garment District-based personal injury firm on October 15 and declined to tell Antin Ehrlich where he was going, according to the civil suit."; "A week after Trief left, Antin Ehrlich began receiving stop work letters as the defendant lawyer embarked on a campaign to grab clients using 'devious tactics to convince these clients to switch,' according to the complaint."; "With respect to at least some of those clients, 'it is evident that Trief solicited them before his departure in violation of his fiduciary duty to plaintiff,' according to the suit."; "In hindsight, according to the complaint, it was clear that Trief was 'acting in bad faith' in the run-up to his departure."; "'Trief would be in his office with the door closed talking on his cellphone much more often. During that time period, Trief would also stand outside in front of plaintiff's building, speaking on his cellphone,' the suit says."; "The suit says Trief unlawfully interfered with contracts between Antin Ehrlich and its clients, breached his fiduciary duty to his former law firm and misappropriated documents. It seeks an injunction blocking Trief from soliciting Anton Ehrlich clients and $1 million in damages.").

- Dan Packel, Swartz Campbell Sues Rival Firm Over Loss Of Fla. Office, Law360, Sept. 12, 2012 ("Philadelphia-based law firm Swartz Campbell LLC has sued local rival The Chartwell Law Offices LLP in state court, alleging in a complaint filed Monday that Chartwell improperly poached employees, including one still bound to Swartz by a partnership agreement, and took over the firm's operations in Fort Myers, Florida."; "Swartz Campbell contended a former partner of the firm, James Myers, violated the partnership agreement when he shuttered a profitable Fort Myers office and immediately began an affiliation with Chartwell. Swartz Campbell is suing Chartwell on multiple claims of tortious interference, as well as unfair competition, misappropriation and civil conspiracy."; "'Chartwell benefited financially from the breach by Myers of the LLC agreement, because Chartwell gained a ready-made Fort Myers office without the startup costs, ended the Fort Myers operation and Florida presence of a competitor law firm, gained numerous Swartz Campbell clients by assisting Myers in communicating that they had no meaningful alternative for representation besides Chartwell, and gained additional fees and revenue which it is not entitled by causing the early and abrupt abandonment by Myers,' the complaint said."; "Swartz Campbell, which initiated the lawsuit in August with a writ of summons in Philadelphia's Court of Common Pleas, claimed its operations in Fort Myers came to an unexpected halt on July 24, when the three members of the office -- Myers, an associate and a paralegal -- announced their resignation."; "According to the complaint, Myers, who joined Swartz Campbell in 2001, had informed the firm earlier in July that he intended to resign as a partner and begin an affiliation with Chartwell, while retaining his existing clients. Shortly afterward, the managing partner of Swartz Campbell, Jeffrey McCarron, told Myers his

actions violated a four-month notice provision in the partnership agreement and ordered him to cease notifying his clients about his intended transition, according to the complaint.").

- Zoe Tillman, Former Smith Currie Partners, Now At Fox Rothschild, Sue Over Split, Nat'l L.J., Apr. 19, 2012 ("Two former partners in the Washington office of Smith, Currie & Hancock filed suit against their old firm yesterday in District of Columbia Superior Court, accusing the firm of wrongfully refusing to return their capital contributions after they left for Fox Rothschild."; "The complaint offers a behind-the-scenes look at the August 2011 departure of Smith Currie's small Washington team to Fox Rothschild. Fox Rothschild not only took in Smith Currie attorneys and staff, but the lease for Smith Currie's old office space as well."; "Schwartz said that when Haire and Jones decided to leave, the five associates and five non-attorney staff working in the office at the time asked to come with them. 'They knew that without the office's two rainmakers, there wouldn't be any work and things would dry up and Smith Currie would be left with a whole lot of expense and not a lot of revenue coming in,' Schwartz said."; "Fox Rothschild agreed to take the team and also take over Smith Currie's building lease, paying Smith Currie about $250,000 for other assets, such as furniture and equipment, according to the complaint. Haire and Jones not only contributed surplus revenues to the firm while they were working there, the complaint argues, but they saved Smith Currie money by helping to facilitate Fox Rothschild's takeover of the building lease. 'Smith Currie thus suffered no damages related to their departure,' the complaint states.").

- Zach Lowe, Sonnenschein Hit with $30 Million Poaching Suit, Am. L. 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.").

- Brian Baxter, Perkins Coie Sues Ex-Intellectual Property Associate Who Left Firm for Rival, Am. L. 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.").

- Henry Gottlieb, Suit Over Ravin, Sarasohn's Collapse Tests Limits of Luring Other Firms' Lawyers, N.J. L.J., Feb. 2, 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.").

- 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 Bus. 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." (emphasis added); "The 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."; "The law firm should preferably be notified before the clients are notified." (emphasis added); "Joint notification of clients is preferable." (emphasis added; 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." (emphasis added); "[T]here 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." (emphasis added); 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.").

- 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 tortuous 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.").

- Ky. 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.

- Fla. Bar v. Winters, 104 So. 3d 299, 300, 301 (Fla. 2012) (suspending one lawyer for 91 days and another lawyer for 60 days for improperly taking clients and breaching their fiduciary duty when leaving their old law firm; "[T]he complaints alleged that in 2001, Winters and Yonkers made secret plans to leave the Mulholland Firm and begin practicing together, and that in the process, Winters and Yonker: (1) themselves and through a former paralegal for the Mulholland Firm, solicited Mulholland Firm clients to terminate representation by the Mulholland Firm and be represented by Winters' and Yonker's new firm; (2) made misrepresentations to the Mulholland Firm and to Mulholand Firm clients; (3) made copies of and took possession of Mulholland Firm client files without authorization; and (4) improperly used a third attorney's name, who never actually joined the new firm, in their new firm name on documents. The complaints alleged that through this conduct, Respondents violated numerous Rules Regulating the Florida Bar." (footnote omitted); "The referee . . . found that when Winters and Yonker decided to leave the Mulholland Firm they 'began contacting clients who they had represented during the course of their employment with the Mulholland law firm.' He further found that Respondent Yonker took client files from the Mulholland Firm over a lunch period and had information from those files copied for his own personal use, and that such 'was not within the scope of his employment and was not done for advancing the good of the law firm,' and that Respondent Winters 'maintained control over less than ten files' after leaving the law firm, and that those files were recovered within a few days by the law firm.").

- Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 764 (Ill App. Ct.) (upholding a law firm's judgment against two former partners of the firm, who had

solicited Allstate as a client before they left the firm; acknowledging that 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"; instead relying on a former paralegal, who testified that one of the withdrawing partners told her that they had lined up Allstate before they left the firm; pointing 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; upholding 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, and profits the law firm would have earned had Allstate stayed with the firm.), appeal denied, 823 N.E.2d 964 (Ill. 2004).

Third, states have also condemned withdrawing lawyers' advance efforts to lure other lawyers or employees away from the firm.

- Feldman & Pinto, P.C. v. Seithel, Civ. A. No. 11-5400, 2011 U.S. Dist. LEXIS 147655, at *30-31, *31, *32, *33-34 (E.D. Pa. Dec. 22, 2011) (granting a law firm's motion for preliminary injunction to restrain a former lawyer from improperly recruiting a plaintiff's law firm's employees; also concluding that the former lawyer made false statements in marketing materials; "[B]ased on these facts alone, it is also evident that Seithel's [former lawyer] statement that she had a leadership role in the various drug litigation matters was false for at least some of these cases. A person that took part in zero of twenty-five depositions, or who had absolutely no contact with certain clients, can hardly be said to have a leadership role in a litigation."; "Seithel stated that she had an 'experienced team in place with over twenty years of combined experience.' However, Seithel's 'team' consisted of one attorney with ten years of experience, a paralegal with ten years of experience, an administrative assistant, and a 'couple of interns.' The Court agrees with the Plaintiff's expert witness, Thomas Wilkinson ('Wilkinson'), that the unsophisticated client would assume that Seithel referred to twenty years of combined attorney experience, rather than twenty years of combined attorney and non-attorney experience."; "[T]he Court agrees with Plaintiff that Seithel's representation that she 'left the firm of Feldman & Pinto' was misleading, because it suggests that the separation was voluntary."; "It was also misleading for Seithel to have indicated in her letters, sent on July 7, 9, and 12, 2011, that she was now practicing under the law firm of Seithel Law, LLC, when in fact, the Articles of Organization for Seithel Law, LLC were not filed with the Secretary of State for South Carolina until July 20, 2011. . . . [T]he Court agrees with Wilkinson's testimony that omitting the fact that Seithel was not licensed to practice in Pennsylvania was also a misrepresentation that potentially mislead the clients who received her letter.").

- 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).

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.").

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).

One bar took a fairly restrictive approach.

- North Carolina LEO 2009-3 (1/15/10) (holding that a lawyer may not encourage a nonlawyer employee to disclose client confidences; "May a nonlawyer employee of a law firm, who recently changed law firms, write to clients of his/her former employer with whom the nonlawyer had established relationships to inform the clients that the nonlawyer is employed with a new law firm and that the new law firm handles the same type of legal matters?"; "[A] lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.").

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

- 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).

Seventh, and not surprisingly, law firms and any withdrawing lawyers must take all reasonable steps to protect clients. In 2014, the California Bar indicated that all lawyers from a dissolved law firm must take such "reasonable steps" -- even if they have not dealt with that client during the law firm's lifetime.

- California LEO 2014-190 (2014) ("Rule 3-700(A)(2) of the California Rules of Professional Conduct, provides that a member may not withdraw from the representation of a client until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The requirements of rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by the dissolution of the attorney's law firm. In the event of dissolution, all attorneys who are employed by or partners of the firm are required to comply with rule 3-700(A)(2) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm. What 'reasonable steps' an attorney must take to protect a particular client's rights may vary considerably, however, depending on the circumstances, including the attorney's relationship to the client and its matter and the attorney's position within the firm.").

Eighth, law firms and withdrawing lawyers must address various logistical issues. For instance, in the pre-electronic communications age, mail arriving at the law firm addressed to the now-withdrawn lawyer might have involved clients remaining at the firm, but alternatively might have involved clients whom the withdrawing lawyer was

now representing at a new firm. Theoretically, the law firm could not open and read the latter envelopes, but presumably they could do so to distinguish between the former and the latter type of correspondence.

In 2013, the Philadelphia Bar indicated that law firms could continue to examine a withdrawn lawyer's email account -- for the same purposes.

- Philadelphia LEO 2013-4 (09/2013) (finding that a law firm could examine a withdrawn lawyer's email account; "Additional fallout from B's departure from the firm relates to B's email account at the firm which the inquirer advises has been set up to reply that B is no longer with the firm. It appears that under this arrangement, the emails are received and read by the firm and forwarded to B if they relate to a matter B took with him. This practice is based on the Inquirer's position 'that any email that comes into the firm is presumptively firm email.' For his part, B has asked that the firm program his former address so that emails simply 'bounce back' (presumably unread) to the senders with a message that B's email account has been closed."; "[T]he Committee believes there is an obligation on the part of the law firm to immediately provide to inquiring clients and former clients sufficient information that would allow the client to make prompt contact with the ex-partner prior to offering the firm's services as an alternative.").

Similar issues arise when law firms of withdrawing lawyers discuss how long the withdrawing lawyer's email account or voicemail greetings will be left operative, what receptionists or secretaries should say if someone calls and asks for the now-withdrawn lawyer, etc. The apparent lack of case law and ethics opinions probably means that lawyers and their former firms generally work out such logistics without having to seek a third party's involvement.

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; b 10/14

In-House Lawyers' Practice Limitations

Hypothetical 5

You have been very successful in your tenure at a high-tech company's in-house law department. You recently received an offer from another company to join its law department, at a substantial pay increase. That company sends you a proposed employment agreement that would: (1) prevent you from serving in the in-house law department of any of the company's competition for a period of one year after you leave the company; and (2) preclude your representation of any clients adverse to the company for a period of five years after you leave the company.

(a) May you sign an employment agreement under which you agree not to serve in a competitor's in-house law department for one year after you leave the company?

NO

(b) May you sign an employment agreement under which you agree not to take any representations adverse to the company for a period of five years after you leave the company?

NO

Analysis

Not surprisingly, in-house lawyers must sometimes deal with their employer's requests that they sign noncompetition clauses, or agree contractually to more restrictions than required in the ethics rules.

(a) The ethics rules flatly prohibit stark noncompetition clauses.

Under ABA Model Rule 5.6(a),

> [a] lawyer shall not participate in offering or making:
>
> (a) 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 an agreement concerning benefits upon retirement.

Not surprisingly, most court and bar analyses of this provision deal with law firms' partnership and employment agreements. However, the ethics rule on its face covers in-house lawyers -- and some bars have also applied the provision to corporate law departments.

The New Jersey Supreme Court condemned a noncompete agreement that BASF's general counsel reportedly required all of that chemical company's in-house lawyers to sign.

- New Jersey LEO 708 (7/3/06) (analyzing and ultimately finding unethical an employment agreement required by a company [identified in the press as BASF] of all of its in-house lawyers, under which the lawyers agreed that for a period of one year after the in-house lawyer left the company "'I will not become employed by, provide services to or assist, whether as a consultant, employee, officer, director, proprietor, partner or other capacity, any person, firm business or corporation which (i) is a Competitor of [Employer] (as defined in paragraph 9 below) or (ii) is seeking to become a Competitor of [Employer]; provided however, that the provisions of this subparagraph (a) shall not apply if my employment is terminated by [Employer] without cause'"; noting that the ABA and several other states have found that the ethics rules generally prohibiting non-competes apply with equal force to in-house lawyers; holding that the "fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment"; also explaining that "[n]ot all duties of an in-house lawyer may involve the practice of law. It is conceivable that an in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by RPC 1.6 or the attorney-client privilege. Therefore, it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer in the course of performing legal functions beyond the scope of the RPCs. Because the terms of the agreement presented by the inquirer make no reference either to the latter's functions and duties as a lawyer or to the RPCs, the requirements of Section 3 of the agreement in question are impermissible."; also finding that the ethics rules prohibited a "anti-raiding provision" in the retainer agreement required of the company's in-house lawyers).

Other states have also taken this approach. See, e.g., Virginia LEO 1615 (2/7/95) (a lawyer hired as a company's inside general counsel may not enter into a noncompetition agreement with the company (under which the lawyer could not serve as any competitor's in-house counsel for a period of one year); noting that the lawyer must protect the former client's confidences and secrets if the lawyer begins to represent a competitor).

Some companies ask their in-house lawyers to sign agreements pledging to retain the confidentiality of information that the in-house lawyers have learned. Such restrictions probably pass muster. An old ABA LEO did not condemn such a provision. ABA Informal Op. 1301 (3/25/75) (a company's employment agreement provision restricting in-house lawyers from representing a competitor for two years in connection with any products about which the in-house lawyer acquired confidential information did not violate the ethics rules, but amounted to "undesirable surplusage"). A more recent opinion specifically approved such a restriction. Arizona LEO 95-04 (4/18/95) (upholding a termination agreement between a corporation and an in-house lawyer which had strict confidentiality agreements; explaining that the provision essentially matched the lawyer's preexisting ethics duty of confidentiality, and was designed to give the corporation contractual remedies for the in-house lawyer's ethics breach).

However, as explained above, the New Jersey Supreme Court recently condemned a confidentiality provision in a noncompete -- because it did not refer to the ethics rules.

The analysis becomes more difficult if the noncompete purports to restrict only the in-house lawyers' nonlegal responsibilities. As long as the noncompete explicitly or

implicitly excludes from its reach activities that are the practice of law, it probably would pass muster.

(b) Given the bars' condemnation of in-house lawyers' noncompetes generally, it would be safe to assume that bars would also condemn any restrictions that extend beyond the ethics rules.

In ABA LEO 381 (5/9/94), the ABA indicated that a corporation may not demand that an outside lawyer accept a retainer agreement in which the outside lawyer pledged never to represent anyone against the corporation in the future. Presumably, bars would have the same trouble with a provision covering in-house lawyers.

Best Answer

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

b 1/11

Litigation Settlements: General Rule

Hypothetical 6

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 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.

[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.").

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.

- Indiana LEO 2014-1 (2014) ("The Indiana State Bar Association's Standing Committee on Legal Ethics ("the Committee") has received an inquiry concerning the ethics issues implicated when an attorney for a party is asked to assume obligations to an adverse party as a condition to a settlement that is agreeable to the attorney's client. The particular inquiry concerns "non-disparagement" clauses that are sometimes contained in settlements of various types of civil matters. For the reasons discussed in further detail below, the Committee believes that ethical prohibitions applicable to counsel for both parties come into play, depending on the scope and interpretation of the particular clause. More specifically, the Committee believes that clauses that would extend to the attorney's advocacy on the part of other clients or that would prohibit the attorney from providing information to the public concerning the attorney's experience in the particular type of case or other matters are prohibited by Ind. R. Prof. Cond. 5.6(b), and that such agreements also raise issues under Ind. R. Prof. Cond. 3.4(f). Whether such provisions are enforceable in light of the applicable ethics rules, the First Amendment to the Constitution of the United States of America, or Article 1, §§ 9 and 10 of the Constitution of Indiana, are beyond the scope of this opinion."; "Several other bar associations have considered whether other restrictions on an attorney's conduct in a settlement agreement violate Rule

5.6(b). For example, both the ABA and several state and local bar associations have opined that a portion of a confidentiality clause prohibiting an attorney from "using" any information gained from a case in the future violates the Rule because such a provision "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." ABA Formal Op. 00-417; accord D.C. Bar Legal Ethics Committee Opinion No. 35 (1977); Arizona Opinion No. 90-6 (1990); Colorado Bar Ethics Committee Opinion No. 92 (1993). Some have opined that settlement provisions that prevent an attorney from advertising that the attorney has handled a particular type of case or cases against a particular opponent also violate the Rule. South Carolina Opinion 10-04 (2010); San Francisco Bar Association Opinion 2012-1. Other opinions conclude that agreements forbidding an attorney from disclosing publicly available facts about litigation against a defendant in law firm promotional materials violate the Rule. D.C. Bar Legal Ethics Committee Opinion 335 (2006). The Indiana Supreme Court has left open the question of whether agreements to restrict advertising may violate Rule 5.6. Blackburn v. Sweeney, 659 N.E.2d 131, 133 (Ind. 1995)").

- Office of Attorney Ethics, Supreme Court of N.J., 2012 State of Attorney Disciplinary System Report, July 8, 2013 ("Charles X. Gormally - Reprimanded on December 19, 2012 (212 *N.J.* 486) for making an agreement in which a restriction on the lawyer's right to practice was part of the settlement of a controversy between the parties. Charles Centinaro appeared before the Supreme Court for the OAE and Michael R. Griffinger appeared for the respondent."; "Sean Alden Smith - Admonished on December 19, 2012 (212 N.J. 486) for his subordinate role in an agreement in which a restriction on the lawyer's right to practice was part of the settlement of a controversy between the parties. Charles Centinaro appeared before the Supreme Court for the OAE and Michael R. Griffinger appeared for the respondent.").

- Cardillo v. Bloomfield 206 Corp., 988 A.2d 136, 137, 140 (N.J. Super Ct. App. Div. 2010) (analyzing a situation in which a plaintiff's lawyer agreed not to represent other clients adverse to a defendant with which her client had settled; noting that the lawyer herself can challenge the enforceability of the agreement to which she entered; "Attorneys may not circumvent the import of RPC 5.6(b) by stating that the settlement of litigation is separate from the agreement to restrict the practice of law where the agreements were negotiated contemporaneously and are interconnected."; "Defendants argue that principles of equitable estoppel preclude Cardillo from challenging the validity of the Cardillo Agreement on the basis that it is tied to the Rubinstein litigation because she had consistently asserted during negotiations that the Rubinstein settlement and the Cardillo Agreement were separate and independent from each other."; "This equitable doctrine is not appropriately applied here. First, defendants, in negotiating an agreement that violated RPC 5.6(b), cannot be said to have acted with good reason or in good faith.

Second, enforcement 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."; ultimately holding that the agreement was void and unenforceable under Rule 5.6).

- 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]

Best Answer

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

n 2/12

[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.").

Litigation Settlements: Other Possible Provisions

Hypothetical 7

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 Opinion[1] 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.
- Requiring a plaintiff's lawyer to reveal the names of all potential clients who have approached the lawyer for possible representation.

[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).").

A Pennsylvania legal ethics opinion[2] 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").

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.

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[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)).

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**.

n 2/12

Sale of Goodwill

Hypothetical 8

You have practiced for nearly 40 years as a solo practitioner, and are ready to retire. Although you are willing to just "walk away" from the practice of law, you also want to explore the possibility of receiving some compensation for the goodwill that you have generated over your years of practice.

May you sell your law practice (including a component for goodwill) to another lawyer?

YES

Analysis

States traditionally prohibited lawyers from obtaining compensation for goodwill when retiring from the practice of law and selling their practice.

As with so many "bedrock" ethics principles, courts and bars had great difficulty articulating the reason for this prohibition. Some authority pointed to the prohibition on sharing fees with non-lawyers, while others worried about the disclosure of client confidences, or feared that such transactions treated clients as if they were merchandise.

In 2014, the ABA issued a legal ethics opinion that described the reasons why lawyers traditionally could not sell their law practice.

> Various reasons were typically given for the traditional prohibition on the sale of a law practice. First, the uniform position of the courts and bar associations was that there was no legally or ethically recognized "good will" in a law practice that a lawyer might sell, pledge, assign, or even give away.
>
> . . .

> A second reason was concern that the sale of a law practice, whether by the estate or the survivor of a deceased sole practitioner to a lawyer or by a lawyer or law firm to another lawyer or law firm, would constitute an impermissible sharing or division of legal fees.
>
> . . .
>
> A third reason was the long-established ban on payments by a lawyer to anyone for recommending the lawyer's services.
>
> . . .
>
> A fourth reason was concern that confidential client information might be disclosed as the result of the sale of a law practice.

ABA LEO 468 (10/8/14).

Perhaps as a result of an increase in average law firm size, commentators increasingly noted that lawyers in large firms are compensated when they leave the practice of law for a value greater than their share of the assets (through various retirement plans) -- while solo practitioners completely forfeit this undeniable value when they retire.

For this and perhaps other reasons, the ABA adopted a rule in 1990 permitting lawyers to sell their law practice (including goodwill) under very specific rules. ABA Model Rule 1.17.

Under the ABA Model Rule 1.17 approach, a lawyer or law firm may sell or purchase a law practice (including goodwill) if:

- The seller "ceases to engage in the private practice of law" (or at least in the practice area of law being sold) in the geographic area (or jurisdiction) in which the seller formerly practiced.
- The seller conveys an entire practice or an entire area of practice.

- The seller provides written notice to each client describing the proposed sale (including the presumption discussed below), the client's rights to hire other counsel, and the client's right to his or her files.
- A client's consent to the transfer is presumed if the client does not object within 90 days of receiving the notice.
- The seller cannot provide a client notice, then transfer cannot take place absent a court order.
- The client's fees "shall not be increased by reason of the sale."

ABA Model Rule 1.17.

The comments provide additional explanation. For instance, the comments permit the disclosure of information about the practice without violating the confidentiality rules – just as in a law firm merger or lateral hiring situation. Id. cmt. [7].[1] The seller must make an entire practice or area of practice available for purchase -- but the fact that some clients do not agree to the transfer does not result in a violation. Id. cmt. [2]. If a lawyer sells an area of practice, the seller cannot accept or act as co-counsel in any such matter in the same geographic area. Id. cmt. [5]. The purchaser of a practice area must undertake all the client matters offered for sale -- absent a client's objection or conflict of interest. Id. cmt. [6].

ABA LEO 468 (10/8/14) explained changes in other Model Rules accommodating such sale.

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[1] Accord Arizona LEO 6-01 (4/2006) ("A lawyer seeking to sell his or her solo law practice may disclose limited client-specific information to the prospective lawyer-buyer without client consent to the disclosure. The selling lawyer must sell at least an entire legal area of practice throughout the geographic area or areas where that practice is being conducted. After the sale, the selling lawyer may be able to resume practicing law, depending on what part of the lawyer's law practice was sold. The selling lawyer may not seek through contractual provisions to avoid prohibitions in the Ethical Rules on his or her ability to practice law after the sale. Nonetheless, the parties may negotiate a covenant not to compete and/or a covenant not to solicit within the sale contract. The selling lawyer may supplement his or her notice of sale to clients with additional information as long as the notice at least meets the requirements of ER 1.17.").

> Other provisions of the Model Rules have been amended to reflect the changes made by Rule 1.17. For example, with respect to the prohibition of the sharing of legal fees with a nonlawyer, Rule 5.4(a)(2) now permits a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer to pay, pursuant to the provisions of Rule 1.17, the agreed-upon purchase price to the estate or other representative of that lawyer. An exception to the general ban expressed in Rule 7.2(b) on payments for recommending a lawyer to clients was adopted that permits a lawyer to "pay for a law practice in accordance with Rule 1.17." Comment [13] to Rule 1.6 now recognizes that lawyers may need to disclose limited information to each other to detect and resolve conflicts of interest in various situations, including when considering the purchase of a law practice. And Comment [3] to Rule 5.6, which generally prohibits agreements that restrict the right of a lawyer to practice, explains that the rule does not apply to "restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17."

ABA LEO 468 (10/8/14).

Interestingly, the Restatement does not directly discuss a lawyer's sale of a practice. Restatement § 10 cmt. b notes that "[j]urisdictions disagree as to the permissibility of a sale of the practice of a deceased or retired lawyer and, if permitted, how it may be accomplished." Restatement § 46 cmt. b explains that "[i]f the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale."

Over 30 states allow lawyers to sell their practice -- either with a rules change or through legal ethics opinions.

- District of Columbia LEO 294 (12/21/99) (allowing the sale of law firms through an LEO analysis rather than a rules change).
- North Carolina LEO 98-6 (4/16/98) (explaining the North Carolina rule on the sale of a law firm).

This area of the law continues to evolve. The ABA adopted a provision in 2002 permitting lawyers to sell parts of their practice to different buyers, and continue to practice in other areas of their practice that they have not sold. ABA Model Rule 1.17(b). The earlier rule required that the seller convey the entire practice to a single buyer.

Several bars have dealt with lawyers' ability to continue practicing law after selling their practice.

In 2014, ABA LEO 468 explained the selling lawyer may help with the transition to the buyer, but may not bill for her time.

> The requirement of Rule 1.17(a) that the seller of a law practice or area of practice must cease to engage in the private practice of law, or in the area of practice that has been sold, does not preclude the seller from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period of time after the closing of the sale. However, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

ABA LEO 468 (10/8/14).

Several state bars have also dealt with this issue.

- Maine LEO 210 (7/14/14) (analyzing the Maine ethics rules' requirement that lawyers selling their practice must discontinue practicing; posing the question as follows: "Attorney H is a solo practitioner who is reaching the stage in his practice where he would like to start phasing out of the practice of law. He would like to be able to sell the practice, and then come back as an employee or independent contractor without all the headaches and liabilities that are involved with the actual ownership of the firm. <u>May Attorney H sell his practice and then continue to practice law in some limited capacity without running afoul of the Maine Rules of Professional Conduct?</u>" (emphasis added); "Rule 1.17 provides in relevant part: . . . (a) [T]he selling attorney or each attorney in the selling firm [must] cease[] to engage in the private practice of law in the State of Maine. (b) If the seller is or was a solo practitioner, then the entire law practice must be sold as a single unit. . . .

The entire law practice, for purposes of this rule, shall mean all client files, for open and closed engagements, except only those cases in which a conflict-of interest is present or may arise."; "We conclude that in order to remain in the practice of law within the state (excepting the limited exceptions noted supra), Attorney H, as a solo practitioner, would have to retain an ownership stake in his practice. This Rule incentivizes the selling attorney to take on and properly mentor or otherwise train a new partner before making a total exit from the practice of law. The goal of such a provision is to ensure competent legal service as well as to aid the clients in the transition by slowly introducing them to, and acquainting them with, new attorney. Attorney H then seemingly would be free to withdraw as a partner, relieving himself of some of the demands and rigors of ownership, while still practicing law in a more limited capacity." (emphasis added)).

- Nebraska LEO 13-03 (2013) ("[R]egardless of the structure of the transaction involved in the sale of a law practice to an existing owner or employee of the law practice, the transfer should not be deemed a 'sale' for purposes of Neb. Ct. R. of Prof. Cond. 3-501.17. However, attorneys should be mindful of the fact that a client of one attorney in a law practice may not wish to become a client of another attorney in the same law practice for a variety of reasons. To be sure, it is quite possible that the client of an attorney selling a practice may have an attorney from an entirely different practice as his or her subsequent choice. Accordingly, any attorney or law firm transferring a practice to an associate attorney or existing owner is encouraged to provide notice to the clients concerning the timing and nature of the proposed transfer in order to maintain such attorney's diligence and communication responsibilities with the client as envisioned by Neb. Ct. R. of Prof. Cond. 3-501.3, 3-501.4 and other applicable rules contained with the Nebraska Rules of Professional Conduct."; "As noted, Neb. Ct. R. of Prof. Cond. 3-501.17 follows the general structure of ABA Model Rule 1.17 and permits a lawyer to sell a law practice if certain conditions are satisfied. ABA Model Rule 1.17 provides, among other conditions, that the seller must cease to engage in the private practice of law, or in the area of practice that has been sold [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted. Unlike ABA Model Rule 1.17, Rule 1.17, completely omits the foregoing prohibition. The Committee interprets this omission as an affirmative determination by the Nebraska Supreme Court that a Nebraska attorney need not cease the private practice of law following the sale of the attorney's practice, regardless of whether Rule 501.17 applies, and therefore may continue to practice law in the State of Nebraska following the transfer, including practice in an 'of counsel' capacity. The attorney may, of course, be subject to contractual non-compete provisions as part of the transaction of sale as may be permitted by the Nebraska Rules of Professional Conduct." (emphasis added)).

As might be expected, odd issues arise from time to time. For instance, South Carolina has ruled that disbarred lawyers may not sell their practice -- although they can transfer their physical assets. South Carolina LEO 03-06 (2003).

Best Answer

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

b 1/11; b 8/15

Selling All or Part of a Law Practice

Hypothetical 9

You practice law in a state that recently enacted ethics rule changes that permit lawyers to sell their practice. This idea intrigues you because you have wanted to slow down a bit. In particular, you would like to sell your litigation practice, but maintain your trust and estate practice.

May you sell your litigation practice, and keep your trust and estate practice?

YES

Analysis

ABA Model Rule 1.17 allows lawyers to sell part of their practice, while maintaining another part of their practice in the same area. ABA Model Rule 1.17. Most states follow the same approach.

ABA Model Rule 1.17(a) contains brackets around a reference to a specific geographic area in which the seller will stop practicing. This means that states have the option of requiring a statewide sale of a practice area, or permitting the sale of a practice area only in a certain geographic area.

In 2002, the ABA changed the rule governing lawyers' sales of their practice. The new version permits lawyers to sell parts of their practice to different buyers, and continue to practice in other areas of their practice that they have not sold. ABA Model Rule 1.17(b). Most states take this approach.[1]

[1] Arizona LEO 6-01 (4/06) ("A lawyer seeking to sell his or her solo law practice may disclose limited client-specific information to the prospective lawyer-buyer without client consent to the disclosure. The selling lawyer must sell at least an entire legal area of practice throughout the geographic area or areas where that practice is being conducted. After the sale, the selling lawyer may be able to resume practicing law, depending on what part of the lawyer's law practice was sold. The selling lawyer may not seek through contractual provisions to avoid prohibitions in the Ethical Rules on his or her ability to

Best Answer

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

b 1/11

practice law after the sale. Nonetheless, the parties may negotiate a covenant not to compete and/or a covenant not to solicit within the sale contract. The selling lawyer may supplement his or her notice of sale to clients with additional information as long as the notice at least meets the requirements of ER 1.17.").

Forms of Practicing Law

Hypothetical 10

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]

- 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").

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[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."

- 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

Limiting the Scope of Representation

Hypothetical 11

A local businessman called you this morning to see if you could work on a few matters for him. You know that the businessman has used several law firms before approaching you, and your first meeting reinforces your impression that the client is a "hot head" who might be trouble in the future. You would like to make sure that you carefully define the exact scope of the work that you agree to do for him.

(a) May your retainer agreement limit the scope of your work in one litigation matter to litigation in the trial court, and explicitly exclude any appeal work?

YES

(b) May your retainer agreement limit the scope of your work in another litigation matter to the filing of a defense, but exclude any analysis of the issues or description of the risks?

NO (PROBABLY)

Analysis

For obvious reasons, lawyers may not limit their liability to their clients by cleverly defining the scope of their work so narrowly as to essentially eliminate any responsibility for failure.

Basic Rules

Clients and their lawyers can agree to a limited representation. See, e.g., ABA Model Rule 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent").[1]

[1] New York City LEO 2001-3 (2001) (explaining that a lawyer may ethically limit the scope of a representation in an effort to avoid conflicts; providing a litigation example; "In one common litigation situation, a law firm may agree to defend a corporate client in a lawsuit which does not appear to pose a conflict with any other client of the law firm. As fact development proceeds, an amendment to the complaint is filed adding as a defendant an additional party, such as the company's accounting firm,

However, the ethics rules recognize some limits on this freedom.

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

ABA Model Rule 1.2 cmt. [7].

The Restatement takes essentially the same approach.

> (1) Subject to other requirements stated in this Restatement, a client or lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances. (2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.

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which is also a client of the attorney's firm in unrelated matters. At this juncture, an actual conflict still may not exist if the positions of the client company and its accounting firm appear to be united in interest or are not directly adverse. But if facts develop that suggest the client company may possess a cross-claim against the accounting firm, or vice versa, a conflict may emerge that could impact the lawyer's ability ethically to continue its representation of the corporate client. In this context, the question arises whether the law firm can ethically avoid the conflict by limiting the scope of the engagement for the corporate client to exclude any involvement in the aspect of the matter that is adverse to the accounting firm. Absent the ability of the lawyer to limit the engagement, the Code requires the attorney to withdraw from her representation of the corporate defendant."; "The Committee concludes that the scope of a lawyer's representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client, provided that the client whose engagement is limited consents to the limitation after full disclosure and the limitation on the representation does not render the lawyer's counsel inadequate or diminish the zeal of the representation. An attorney whose representation has been limited, however, must be mindful of her duty of loyalty to both clients. Where the portion of the engagement to be carved out is discrete and limited in scope, such a limitation may well resolve the conflict presented.").

Restatement (Third) of Law Governing Lawyers § 19 (2000). A comment explains the basis for this rule.

> Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice . . . . In some instances, such as an emergency, a restricted representation may be the only practical way to provide legal services . . . .
>
> On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers . . . . Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

Restatement (Third) of Law Governing Lawyers § 19 cmt. b (2000).

The next comment explains the many limitations on this general rule -- obviously designed to assure that lawyers do not take advantage of clients.

> Clients and lawyers may define in reasonable ways the services a lawyer is to provide (see § 16), for example to handle a trial but not any appeal, counsel a client on the tax aspects of a transaction but not other aspects, or advise a

client about a representation in which the primary role has been entrusted to another lawyer. Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed. They are therefore treated separately under many lawyer codes as contracts limiting the objectives of the representation. Clients ordinarily understand the implications and possible costs of such arrangements. The scope of many such representations requires no explanation or disclaimer or broader involvement.

Some contracts limiting the scope or objectives of a representation may harm the client, for example if a lawyer insists on agreement that a proposed suit will not include a substantial claim that reasonably should be joined. Section 19(1) hence qualifies the power of client and lawyer to limit the representation. Taken together with requirements stated in other Sections, five safeguards apply.

First, a client must be informed of any significant problems a limitation might entail, and the client must consent (see § 19(1)(a)). For example, if the lawyer is to provide only tax advice, the client must be aware that the transaction may pose non-tax issues as well as being informed of any disadvantages involved in dividing the representation among several lawyers . . . .

Second, any contract limiting the representation is construed from the standpoint of a reasonable client . . . .

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation . . . .

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modifications.

Fifth, the terms of the limitation must in all events be reasonable in the circumstances . . . . When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver -- typically, a reduced legal fee or the ability to retain a particularly able lawyer -- could reasonably be considered

> to outweigh the potential risk posed by the limitation. It is also relevant whether there were potential circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.
>
> The extent to which alternatives are constrained by circumstances might bear on reasonableness. For example, a client who seeks assistance on a matter on which the statute of limitations is about to run would not reasonably expect extensive investigation and research before the case must be filed. A lawyer may be asked to assist a client concerning an unfamiliar area because other counsel are unavailable. If the lawyer knows or should know that the lawyer lacks competence necessary for the representation, the lawyer must limit assistance to that which the lawyer believes reasonably necessary to deal with the situation.
>
> Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval.

Restatement (Third) of Law Governing Lawyers § 19 cmt. c (2000).

Several illustrations provide examples of such limitations. The first two illustrations represent acceptable limitations.

> Corporation wishes to hire Law Firm to litigate a substantial suit, proposing a litigation budget. Law Firm explains to Corporation's inside legal counsel that it can litigate the case within that budget but only by conducting limited discovery, which could materially lessen the likelihood of success. Corporation may waive its right to more thorough representation. Corporation will benefit by gaining representation by counsel of its choice at limited expense and could readily have bargained for more thorough and expensive representation.
>
> A legal clinic offers for a small fee to have one of its lawyers (a tax specialist) conduct a half-hour review of a client's

> income-tax return, telling the client of the dangers or opportunities that the review reveals. The tax lawyer makes clear at the outset that the review may fail to find important tax matters and that clients can have a more complete consideration of their returns only if they arrange for a second appointment and agree to pay more. The arrangement is reasonable and permissible. The clients' consent is free and adequately informed, the clients gain the benefit of an inexpensive but expert tax review of a matter that otherwise might well receive no expert review at all.

Restatement (Third) of Law Governing Lawyers § 19 illus. 1, 2 (2000).

The third illustration provides an example of an unacceptable limitation.

> Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information. Moreover, allowing such general waivers would seriously undermine competence requirements essential for protection of the public, with little compensating gain. On prohibitions against limitations of a lawyer's liability, see § 54.

Restatement (Third) of Law Governing Lawyers § 19 illus. 3 (2000).

Interestingly, lawyers can also agree to expand their responsibilities to clients.

> The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act . . . or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar . . . or by forbidding the

> lawyer to speak on matters of public concern whenever the client disapproves.
>
> Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting witness interviews.

Restatement (Third) of Law Governing Lawyers § 19 cmt. e (2000).

(a) This type of limitation would almost surely pass muster.

(b) Courts and bars have struggled with retainer agreements that might as a practical matter reduce or even eliminate the lawyer's obligation to comply with the ethics duty of diligence, competence, communication, etc., and the lawyer's common law fiduciary duties.

It seems clear that a lawyer may not enter into a retainer agreement that eliminates as a practical matter the lawyer's other ethical duties to the client. ABA Model Rule 1.8 cmt. [14] (explaining that the ABA Model Rule prohibiting a lawyer from entering into an agreement prospectively limiting the lawyer's liability to a client does not prohibit "an agreement in accordance with [Model] 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").

Similarly, the Restatement illustration quoted above highlights the inability of lawyers to limit the representation in a way that guts their responsibilities.

Best Answer

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

b 1/11

"Unbundled" Legal Services

Hypothetical 12

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.

Commentators and the ABA have encouraged this type of limited representation.

- Esther Lardent, Do Our Ethics Rules Impair Access to Justice? Nat'l L. J., May 30, 2013 ("The 'justice gap,' along with client cost concerns and desire for more control of their cases, have resulted in a flood of self-represented litigants and driven a movement to enable lawyers to provide discrete, unbundled legal assistance. In a number of jurisdictions, courts and lawyers have embraced this development. In others, the ethics rules have not kept pace with these developments. Judges are uncertain about the role they can and should play when one or both parties are not represented by counsel,

and lawyers are concerned that providing limited-scope representation may be considered unethical. Not all clients want or can afford full-service representation, but their choice is not consistently respected or supported by existing ethics rules.").

- Linda Chiem, ABA To Push For More Unbundled Legal Services, Law360, Feb. 12, 2013 ("The American Bar Association on Monday [February 11, 2013] approved a resolution introduced by its House of Delegates that encourages lawyers to consider providing unbundled services, when appropriate, to improve access to legal assistance. Resolution 108 pushes for unbundled services, also known as limited-scope representation, in which lawyers provide some but not all of the work involved in a legal matter as a means to facilitate greater access, as more people seek legal help from sources other than lawyers."; citing the revised resolution as adopted by the ABA House of Delegates: "RESOLVED, That the American Bar Association encourage practitioners, when appropriate, to consider limiting the scope of their representation as a means of increasing access to legal services. FURTHER RESOLVED, That the American Bar Association encourage and support the efforts of national, state, local and territorial bar associations, the judiciary and court administrations, and CLE providers to take measures to assure that practitioners who limit the scope of their representation do so with full understanding and recognition of their professional obligations. FURTHER RESOLVED, That the American Bar Association encourage and support the efforts of national, state, local and territorial bar associations, the judiciary and court administrations, and those providing legal services to increase public awareness of the availability of limited scope representation as an option to help meet the legal needs of the public.").

States have been moving in that direction for the past decade or so, with nearly every state approving some form of "unbundled legal services."

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, and 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, b 2/15

Limiting Liability: General Rule

Hypothetical 13

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, particulary 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 14

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 Protect Former Clients

Hypothetical 15

Your law firm recently received a subpoena to produce the files from a matter you handled several years ago. It appears that the client has now disappeared, and one of his creditors hopes that your files will shed some light on both the former client's whereabouts, and perhaps other relevant matters. You know that your firm's file contains both privileged and non-privileged documents. It would take approximately ten hours of an associate's time to separate out the privileged documents.

Must you separate out the privileged documents before producing your firm's files to your former client's adversary?

MAYBE

Analysis

This situation involves both ethical and fiduciary duties.

Under ABA Model Rule 1.16(d)

> [u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

ABA Model Rule 1.16(d).

The Restatement provides a more detailed analysis of a lawyer's duty to former clients. The Restatement requires lawyers to:

> (a) observe obligations to a former client such as those dealing with client confidences . . . , conflicts of interest . . . , client property and documents . . . , and fee collection . . . ; (b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client; (c) take reasonable steps to convey to the former

> client any material communication the lawyer receives relating to the matter involved in the representation; and (d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

Restatement (Third) of Law Governing Lawyers § 33(2) (2000). In addition to the obvious duties to preserve the client's confidences, etc., and avoid taking advantage of the earlier representation, the Restatement therefore continues at least a minimal duty of communication.

Not many courts have dealt with this issue, but at least one court seemed to go a bit farther than the Restatement.

- See, e.g., Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn, LLP, 743 N.Y.S.2d 72 (N.Y. App. Div. 2002) (requiring a client's former law firm to continue looking for a file generated during its representation of the client, but which could not immediately be located; allowing the firm to charge the client for the cost of providing the missing files).

Best Answer

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

b 1/11

File Ownership

Hypothetical 16

You represented a local car dealer in a landlord-tenant dispute until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of all of your file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

(a) Must you give your former client the file?

YES PROBABLY

(b) May you bill the former client for copying the file?

YES

(c) May you retain a copy of the file over your former client's objections?

YES

Analysis

Lawyers face a number of ethics issues involving the file they create while representing clients.

Introduction

State bars generally permit lawyers to essentially retain all of their files in electronic form -- as long as that way of maintaining the files does not prevent lawyers from complying with all of the applicable ethics rules.

- New York City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from

the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").

- Arizona LEO 07-02 (6/2007) ("In appropriate cases, a lawyer may keep current and closed client files as electronic images in an attempt to maintain a paperless law practice or to more economically store files. After digitizing paper documents, a lawyer may not, without client consent, destroy original paper documents that belong to or were obtained from the client. After digitizing paper documents, a lawyer may destroy copies of paper documents that were obtained from the client unless the lawyer has reason to know that the client wants the lawyer to retain them. A lawyer has the discretion to decide whether to maintain the balance of the file solely as electronic images and destroy the paper documents.").

- Florida LEO 06-1 (4/10/06) ("Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.").

- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").

- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

- New York LEO 680 (1/10/96) ("[A]ny lawyer who chooses to transfer existing paper records to computer images must insure that all required copies are in fact transferred before any paper records are disposed of; the lawyer who fails to do so acts at the peril of engaging in spoliation, and will be at risk to suffer the severe consequences of such conduct. DR 9-102(I) (failure to maintain and produce records as specified by disciplinary rules subjects lawyer to discipline)."; "Records required to be maintained by the Code in the form of 'copies' may be stored by reliable electronic means, as noted above, and records that are initially created by electronic means may be retained in that form, but other records that are specifically described by the Code must be retained in their original format.").

Some bars have also wrestled with the length of time that a lawyer should keep a file after a matter has closed.

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.").

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "'probate or estate matters, homicide cases, life sentence cases and lifetime probation case.'"; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client

prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved.").

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

- Colorado LEO 104 (4/17/99) "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

Bars have explained that clients and lawyers can agree in a retainer letter how long the lawyer will retain the file.

- See, e.g., New York City LEO 2010-1 (2010) ("Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or

all such documents, subject to certain exceptions."; offering the following sample provision: "Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that 'materials' include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process."; "Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.").

(a) Ethics and property law considerations affect states' approach to clients' ownership of files generated by their lawyers.

It is important to recognize the distinction between a lawyer's ethics duty to turn over all or part of a file to a former client (either with or without the former client's request) and a lawyer's obligation to produce documents in response to a discovery request in a dispute between the lawyer and the former client. The normal discovery rules generally define the latter duty.

ABA Model Rules

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Restatement

The Restatement deals with a lawyer's file in two sections -- articulating a general rule and also explaining a lawyer's right to retain the file under certain conditions.

As a general matter, the Restatement explains that

> On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(2), (3) (2000).

A comment describes the type of documents that a lawyer must furnish the client even without the client asking.

> Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies

> of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances -- for example, when a client retained a lawyer to recover and destroy a confidential letter -- a lawyer may keep copies of documents when furnished to a client.
>
> If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. d (2000).

Another comment describes three situations in which a lawyer may refuse to provide the client access to the file.

First,

> [a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another . . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime . . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000).

Second,

> [u]nder conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

Id.

Third,

> [a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

Id.

State Courts and Bars

The debate over a lawyer's obligation to provide the file to a former client involves several aspects.

First, states disagree about what portions of the file a lawyer must turn over to a former client.

- Travis v. Supreme Court Comm. on Prof'l. Conduct, 306 S.W.3d 3, 7 (Ark. 2009) (noting the debate between the states about whether a lawyer must disclose to the client the lawyer's "entire file" or just the "end product" of the

lawyer's services; finding it unnecessary to decide which one Arkansas would follow).

- Jones v. Comm'r of Internal Revenue, 129 T.C. 146, 157 (T.C. 2007) (noting the debate among the states about ownership of a lawyer's file; finding it unnecessary to decide how Oklahoma would address the issue, because the material at issue did not amount to work product and therefore belonged to the client; "Because the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have served a property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under either approach, the documents in issue in this case belong property to petitioner's client, McVeigh [Oklahoma City bomber], and not to petitioner.").

- D.C. LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)." (footnote omitted); "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly,

Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).").

Most states follow the majority rule, which requires lawyers to turn over essentially their entire substantive file.

- Virginia Rule 1.16(e) ("All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.").

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention

stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "'probate or estate matters, homicide cases, life sentence cases and lifetime probation case.'"; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).

- New York City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems

automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter." (emphasis added)).

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").

- Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 819 (Iowa 2007) ("In general, there are two approaches for determining who owns the documents within a client's file -- the 'entire file' approach and the 'end product' approach. . . . The majority of jurisdictions that have addressed this issue conclude that a client owns his or her entire file, including attorney work product, subject to narrow exceptions. . . . We agree with the majority of

jurisdictions and adopt the 'entire file' approach to this issue." (emphasis added)).

- Hiatt v. Clark, 194 S.W.3d 324, 329, 330 (Ky. 2006) (holding that a criminal defendant can obtain his lawyer's files; acknowledging that the files deserve work product protection, but holding that the lawyer could not withhold them from his client; "It is meant to protect an attorney, but not from his own former client, and it does not override questions of ownership."; "For the reasons set forth herein, we hold that a writ of mandamus is the most appropriate form of remedy available to Appellant and find that he is entitled to the entirety of his client file from Mr. Eardley [staff attorney for Fayette County Legal Aid who represented defendant], including work product materials, and therefore we hereby grant the relief sought.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party." (emphasis added)).

- D.C. LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)."; "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank,

127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998))." (emphasis added)).

- Loeffler v. Lanser (In re ANR Advance Transp. Co.) v. Lancer, 302 B.R. 607, 614 (E.D. Wisc. 2003) (assessing different states' approach to ownership of a lawyer's file upon termination of the attorney-client relationship; contrasting the majority rule (permitting the client access to all of the files) and the minority, which indicates that the client is only entitled to "end product" documents; finding that the bankruptcy trustee was entitled to files in the possession of the lawyer; acknowledging that lawyers may assert work product protection, but refusing to allow a lawyer to withhold documents from the client's successor).

- Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37, 39 (Ga. 2003) ("A minority of courts have ruled that a document belongs to the attorney who prepared it, unless the document is sought by the client in connection with a lawsuit against the attorney. . . . A majority of courts have ruled that a document created by an attorney belongs to the client who retained him."; adopting the majority view (emphasis added)).

- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").

- Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879, 882, 883 (N.Y. 1997) (rejecting the minority view under which a lawyer must only provide the "end product" of the lawyer's work to the client upon request; holding that "[b]arring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation" (emphasis added)).

Other authorities indicate that lawyers may withhold from clients non-final documents such as drafts, legal memoranda, etc.

- 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at *4 n.2, *5 (E.D. Wis. Feb. 29, 2008) (analyzing implications of a joint representation by the law firms of Blank Rome and Quarles & Brady and a parent and its wholly owned subsidiary, which the parent sold to another company; noting that the change in the subsidiary's "ownership does not alter its existence"; explaining that the former subsidiary had now sued its former parent; "The parties agree that Wisconsin law governs the issues of document ownership and attorney-client privilege inasmuch as this is a diversity case. In Wisconsin, 'end product' documents such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client or opposing counsel belong to the client."; ultimately concluding that the two law firms jointly represented the parent and the wholly owned subsidiary in the sales transaction, and therefore had to produce pre-transaction documents and some post-transaction documents that referred to the law firm's service before the transaction (emphasis added)).

- Pennsylvania LEO 2007-100 (2007) (holding that the client owns the files created by a lawyer while representing the client; explaining that the client might not be entitled to some internal documents; "Examples of items that might fall outside the scope of the formal 'file' are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem. Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file." (footnote omitted); noting the debate between states following the "entire file" approach and the "limited file" approach; following the latter, but with a proviso: "A substantial subset of the 'entire file' group of jurisdictions allow other 'non-substantive' items, generally those associated with law practice management, to be excluded from the 'file' that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel."; noting that clients and lawyers can address file ownership in a retainer agreement, although "it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer"; adopting the following guidelines: "A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations,

or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client. The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in response to a generalized request for access to or possession of the 'file', the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request. So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.").

- Utah LEO 06-02 (6/2/06) ("An unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation."; "Comment 9 of Rule 1.16 states: 'It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.'"; "[D]epriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the 'client's file,' and the client may

deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client."; "Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution of filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.").

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine

'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to under stand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense tot he [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Most states permit lawyers to withhold from their former clients purely administrative internal law firm documents.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client." (emphasis added)).

- Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 Tenn. App. LEXIS 84, at *19 (Tenn. Ct. App. Feb. 25, 2009) (holding that a lawyer did not have to make invoices available to the client; "We agree that the invoices are property of the law firm. . . . The invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered." (emphasis added)).

- Arizona Op. No. 04-01 (1/04) ("While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests, if withheld from the client.").

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents

that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled."; also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request" (emphasis added)).

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld."; "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view." (footnote omitted); "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that

certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- Illinois LEO 94-13 (1/1995) (explaining what materials a lawyer must provide to a former client; "With respect to the sixth category, internal administrative materials, the Committee does not believe that a client is entitled to copies of or access to such materials under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use. Nor are these materials property of the client that a lawyer must deliver upon request. Thus the failure of the lawyer to deliver or provide access to such materials will not prejudice the client."; "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."; "With respect to the seventh category, which comprises the lawyer' notes and factual or legal research material, including the type of investigative materials involved in the present inquiry, the Committee is aware that various courts and ethics committees have taken differing positions on the nature of such materials. In the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client."; "In summary, the Committee concludes under the facts presented that the lawyer may properly refuse to provide or disclose the lawyer's materials to the client because the materials in question are the lawyer's property and disclosure to the client could lead to harm to the client and his former wife. The Committee also notes that the lawyer could, in the exercise of the lawyer's professional judgment, release the materials to the client, but the lawyer is not required to do so by the Rules of Professional Conduct." (emphasis added)).

Not surprisingly, lawyers normally can withhold other clients' documents that have been placed in the file.

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled."; also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request" (emphasis added)).

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld."; "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel

assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view." (footnote omitted); "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled." (emphasis added)).

- Delaware LEO 1997-5 (11/25/97) ("In the Committee's view, the Inquiring Attorney's obligations to his former client under Rule 1.16(d) do not, under the circumstances presented, include surrendering information which Inquiring Attorney received pursuant to the Joint Defense Agreement. First, it does not appear that the information is 'papers and property to which the client is entitled.' The information was provided to the Inquiring Attorney by counsel for B pursuant to express limitations set forth in the Joint Defense Agreement. Moreover, to the extent that the information includes the Inquiring Attorney's impressions and work product, it is not property to which A is automatically entitled."; "Second, Rule 1.16(d) requires an attorney whose engagement is

terminated to take steps that are 'reasonably practicable' to protect the former client's interest. In the Committee's view, it would be 'reasonably practicable' for the Inquiring Attorney to breach the Joint Defense Agreement by providing the information to a person who is outside the scope of the Agreement. Doing so could be extremely prejudicial to B, who while not the client of the Inquiring Attorney, is still owed a duty of fairness. *See* Rule 3.4 (addressing fairness to opposing party in litigation setting) and Rule 4.4 (prohibiting a lawyer from using methods of obtaining evidence that would violate the rights of third parties including adverse parties in litigation). Indeed, if the Inquiring Attorney revealed the information to A's new attorney, the Inquiring Attorney would violate B's right under the Joint Defense Agreement."; "Third, A's new attorney presumably can gain access to the information by becoming a party to the Joint Defense Agreement. Thus, to the extent the new attorney needs the information, there appears to be a readily available way for him to get it without prejudicing B."; "Finally, the Committee does not believe that Inquiry Attorney's refusal to surrender the information constitutes a violation of Rule 1.9. The failure to turn over the information does not constitute using the information to the former client's disadvantage as contemplated by Rule 1.9.").

Some states allow lawyers to withhold other material.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule

1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").

- North Carolina RPC 227 (7/18/97) (holding that under North Carolina ethics rules a lawyer does not have to supply the lawyer's personal notes to a client who asks for a copy of the file).

- North Carolina RPC 178 (10/21/94) (holding that a lawyer must provide the lawyer's files to multiple clients, although the lawyer can withhold personal notes before providing a copy to the clients).

- North Carolina RPC 169 (1/14/94) (explaining North Carolina's unique provision allowing a lawyer to withhold the lawyer's '"personal notes"' when providing a file to a former client (citation omitted)).

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.").

- San Diego LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(b) States differ in their approach to a lawyer's right to charge the former client for copying the file that the lawyer turns over to the former client.

The Restatement addresses a lawyer's right to charge the client for copying the file.

> Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be

> compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000).

Courts also disagree about the lawyer's ability to bill the client for copies of the files that the client requests.

Some bars have explained that a lawyer can charge the client for such copies.

- Illinois LEO 94-14 (1/1995) ("All original papers delivered to the lawyer by the client must be returned to the client. The lawyer may make copies of such material, if desired, at the lawyer's expense. With respect to other parts of the lawyer's file to which the client is entitled to access, including copies of documents that the client has already received, the originals may be retained by the lawyer and the client should be permitted to have copies at the client's expense. Consistent with Opinion No. 94-13, the Committee does not believe that a lawyer is required to act as a storage facility for clients, and therefore the lawyer is entitled to compensation for the reasonable expense involved in retrieving the files in question and providing copies of materials that the client has already received. The lawyer is also entitled to compensation for the reasonable expense of providing copies of any materials, such as routine administrative correspondence with third parties, that the client may not have received because the lawyer had no duty to provide the client with copies of such materials in the normal course of the representation, but to which the client is entitled to access upon reasonable request.").

- Illinois LEO 94-13 (1/1995) (addressing the obligation of a lawyer to provide files to a former client; holding that the lawyer must provide "reasonable access" to correspondence between the lawyer and the client, but does not have to "recreate or provide new copies of correspondence previously provided the client unless the client is willing to compensate the lawyer for the reasonable expense involved"; also holding that the "Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative correspondence with third parties, such as correspondence with court reporters or other service providers. A client is entitled under Rule 1.4(a) to reasonable access to copies of correspondence that the client has already received as well as copies of routine administrative correspondence with third parties. However, the lawyer is not required to provide copies of such materials unless the client is willing to compensate the

lawyer for the reasonable expense involved."; adopting the same approach to pleadings that have been filed in court or with administrative agencies; also holding that the "client is entitled under Rule 1.4(a) to reasonable access to copies of the final version (as distinguished from the lawyer's drafts or working copies) of such documents in the lawyer's files, but the Committee believes that a lawyer is not required to furnish a client with additional copies unless the client is willing to compensate the lawyer for the reasonable expense involved"; explaining that clients are not entitled to copies of "internal administrative materials" even for the lawyer's internal use; "'A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.'" (quoting Restatement (Third) of the Law Governing Lawyers § 58 cmt. d); "[T]he Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client"; reaching essentially the same conclusion about a lawyer's research materials).

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to under stand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense tot he [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Other bars hold that lawyers must pay for such copies themselves.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the

lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . .

Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- San Diego LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(c) One bar has indicated that lawyers may retain a copy of the client's file at the lawyer's expense -- even over the client's objection.

- New York LEO 780 (12/8/04) (assessing a lawyer's right to retain a copy of the client's file after termination of the attorney-client relationship; "Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest."; "In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense. This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to

> prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." (footnote omitted); also holding that "[a] lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.").

This principle could become important if the lawyer suspects that the client has used the lawyer's services to engage in some wrongdoing, and wants to retain a copy in case anyone challenges the lawyer's actions.

Best Answer

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

b 1/11

File Ownership if the Client has not Paid the Lawyer

Hypothetical 17

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

YES (PROBABLY)

Analysis

States take different positions on a client's right to the file a lawyer generates while representing the client. The matter becomes more complicated (and usually more frustrating for lawyers) if the client has not fully paid the lawyer.

ABA Model Rules

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Restatement

The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

One Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

> Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

Restatement (Third) of Law Governing Lawyers § 43(2) (2000).

A comment provides more explanation.

> Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

Not surprisingly, the Restatement acknowledges tribunals' ability to deal with such liens.

> A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the

> property to the client or lawyer, and grant such other relief as justice may require.

Restatement (Third) of Law Governing Lawyers § 43(3) (2000).

Another Restatement section deals with such a retaining lien covering the file.

> Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

Restatement (Third) of Law Governing Lawyers § 43(1) (2000).

A comment explains how a lawyer's "retaining" lien applies to the file.

> A lawyer ordinarily may not retain a client's property or documents against the client's wishes . . . . Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid . . . . That law is not followed in the Section; instead it adopts the law in what is currently the minority of jurisdictions.
>
> While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute

> arises, a retaining lien would give little advance assurance of payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges . . . . Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However[,] the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

The next comment deals with a lawyer's right to retain particular documents that the client has not specifically paid for.

> A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert) ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000).

The Restatement provides two useful illustrations of how this principle works.

> Client retains Lawyer to prepare a series of memoranda for an agreed compensation of $100 per hour. Lawyer is to send bills every month. Client pays the first two bills and then stops paying. After five months, Client requests copies of all memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 1 (2000).

> The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client

> has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 2 (2000).

State Courts and Bars

Not surprisingly, states sometimes deal with a lawyer's general security interest in property that the client already possesses or might acquire (such as in a future judgment).

- Plummer v. Day/Eisenberg, LLP, 108 Cal. Rptr. 3d 455, 463 (Cal. Ct. App. 2010) ("The California Supreme Court has held 'an attorney who secures payment of hourly fees by acquiring a charging lien against a client's future judgment or recovery has acquired an interest that is adverse to the client, and so must comply with the requirements of rule 3-300. (Fletcher v. Davis (2004) 33 Cal.4th 61, 71 [14 Cal.Rptr.3d 58, 90 P.3d 1216].").

- Ropes & Gray LLP v. Jalbert, 910 N.E.2d 330, 333 (Mass. 2009) (answering the following two questions in the affirmative: "1. Does [G. L. c. 221, § 50,] grant a lien on patents and patent applications to a Massachusetts attorney for patent prosecution work performed on behalf of a client? 2. If [G. L. c. 221, § 50,] does grant a lien and the issued patents or patent applications are sold, does the attorney's lien attach to the proceeds of the sale.?'").

Of course, lawyers hoping to take advantage of such liens must comply with the required state process.

- See, e.g., A Attorney LLC v. Olson, 75 Va. Cir. 28, 29 (Va. Cir. Ct. 2008) (acknowledging that a divorce lawyer could rely on Virginia Code § 54.1-3932(a) (regarding torts) for asserting an attorney lien for fees, but holding that the lawyer had not properly perfected the statutory lien in the situation before the court "[b]ecause written notice of the lien was not given prior to the property settlement agreement").

States have also dealt with a lawyer's right to withhold the file from a client who has not fully paid the lawyer. This is a subset of the more general retaining lien issue.

This issue involves the propriety of viewing a lawyer's relationship with a client as essentially the same as the relationship between an auto mechanic and a customer. Auto mechanics normally can keep a customer's car until the customer pays the bill. Traditionally, lawyers have had the same power. However, the trend is clearly in the opposite direction.

Some courts and bars cling to the traditional approach -- essentially allowing lawyers to retain a file until the client pays for it.

- Brickell Place Condo Ass'n v. Joseph H. Ganguzza & Assoc., P.A., 31 So. 3d 287, 289, 290 (Fla. Ct. App. 2010) (holding that a lawyer who had arranged to charge an condominium association a flat fee for collection and foreclosure matters was bound by the ethics rules governing contingent fees, because the law firm was not paid until collection; ultimately holding that the law firm could not refuse to turn over its files until the contingency had occurred; "[T]he law firm filed a retaining lien and refused to provide the Associations with a copy of their files unless the Associations paid the law firm for its services on the pending collection and foreclosure cases even though the delinquent unit owners had not brought their accounts current."; "The Associations, therefore, claimed that the law firm[] could only recover the reasonable value for its services, limited by the maximum contract fee, upon the successful occurrence of the contingency. Because the contingency upon which the services were based has not yet occurred (the collection of the delinquent unit owners' fees), the law firm is not yet entitled to be paid for its services and the retaining lien filed by the law firm cannot be legally or ethically maintained. We agree."; "It is well recognized, and the Associations do not dispute, that an attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted."; "American courts, with few exceptions, have held that in cases where the client, not the attorney, terminates the relationship, the client cannot compel his former attorney to deliver up papers or documents in the attorney's possession that are secured by a retaining lien. Wintter [Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 1993)], 618 So. 2d at 377. The exceptions are where the client pays the fees due; the client furnishes adequate security for the payment which may be due or which is subsequently found to be due; there is a clear necessity in a criminal case and a defendant cannot post security; or a lawyer's misconduct caused his withdrawal. . . . An additional exception is in contingency fee cases where the contingency has not occurred."; "An

attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. Because the contingency has not occurred, the law firm could not assert a retaining lien for fees it contends it is owed on collection matters that were still pending when it was discharged. If the law firm believes it is owed money for services it rendered in the collection of delinquent unit owner fees, it may file a charging lien and is entitled to the reasonable value of its services on the basis of quantum meruit, limited by the contract flat fee the parties agreed to.").

- See, e.g., Johnson v. Cherry, 256 F. App'x 1, 4-5, 5 (7th Cir. 2007) (unpublished opinion) (holding that a lawyer had not forfeited her right to a quantum meruit recovery, although the lawyer had asserted a retaining lien and failed to turn over the files to the client or her replacement lawyer; noting that the client had not pointed to any particular documents in the file that were necessary or unavailable from other sources; "But there is no actual evidence in the record before us that supports these assertions. Green [client's new lawyer] has never identified, for example, what documents he needed from the file in Clinite's [discharged lawyer] custody that were not available from other sources: e.g., from the public court file, from the court reporter(s) who recorded the depositions that were taken in this case, or from the defendants' attorneys. In that regard, Clinite made two noteworthy representations at the fees hearing below that have never been contradicted. First, Clinite stated that Johnson [client] and her counsel had obtained copies of all of the discovery from defendants' counsel, and that Johnson herself retained the original copies of any documentary evidence she had provided to Clinite."; concluding that there was no showing that the withheld documents "were essential to Green's ability to resolve the case on terms favorable to Johnson"; reversing and remanding directions to award the discharged lawyer "fees in the amount of $3,333 and costs in the amount of $786.93").

Although courts and bars taking this traditional approach might provide some comfort to lawyers who want to withhold the file, those lawyers must also bear in mind the possible liability issues. A client claiming some prejudice due to the lawyer's withholding the file might file a malpractice claim against the lawyer, or file a malpractice counterclaim if the lawyer sues the former client for payment of the lawyer's bills. Withholding of the file might not violate the ethics rules, but it could support a malpractice claim or counterclaim, and at the least affect the "atmospherics" of the dispute over the lawyer's

fees. In fact, those other issues normally "trump" the ethics consideration, and prompt lawyers to turn over the file even if the ethics rules do not require it.

Those courts and bars which have moved away from the traditional "auto mechanic" approach to a retaining lien sometimes articulate standards under which the client can obtain the file without paying for it. These standards represent a spectrum of the type of prejudice the client must claim before the lawyer becomes ethically obligated to turn over the file even if the client has not paid his bills.

Bars and courts have articulated the following standards.

Substantial Prejudice

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be

treated by you as 'a cost of doing business' and should not be billed to the client.").

- Pennsylvania LEO 94-35 (5/12/94) ("Except as provided herein, the Committee concludes that where the client has not paid for services rendered, the lawyer may retain papers and other things of the client relating to the unpaid services. No law prohibits the retention of such papers and things. Except as provided herein, it is the opinion of the Committee that a client is not entitled to papers and things in a pending matter where all fees have not been paid to the lawyer. The exception to the rule is that where retention of such papers and things would cause substantial prejudice to the client, then the lawyer must return the papers and things to the client. The Committee further concludes that where the lawyer has retained papers or other property for the convenience of the client and where the client has paid for the services relating to those papers or property, then the lawyer is obligated to return such property to the client promptly upon demand. For example, where a lawyer prepares a will and is paid for that service and, subsequently, a dispute arises regarding another matter, the lawyer cannot withhold the will from the client. The client is entitled to papers and property for which he or she has paid and such papers and property must be surrendered promptly to the client. In contingency matters, the lien may not be asserted until after the happening of the contingency. If the contingency has not occurred, then the attorney may not assert the lien and must return to the client anything in the lawyer's possession that is the property of the client. Additionally, in contingency matters, if retention of certain things that are not necessarily property of the client, such as exhibits or evidence, would cause substantial prejudice to the client (as in the case where a matter is ready to go to trial or where a facet of the litigation requires the use of those things), then the lawyer must make such things available to the client. In certain circumstances, where a lawyer's right to a lien is arguable, a lawyer should not withhold client papers or other property, even though the lawyer, arguably, has a right to retain such property. Rule 1.16(d) makes it clear that, where withholding such property would cause substantial prejudice [sic] the client, then the lawyer may not assert a lien against that property and papers. In these circumstances, it is recommended that even where fees are owed to a lawyer, the lawyer consider returning to clients papers and other property and subsequently to bring suit for the recovery of such fees. The lawyer may contemplate the possibility of such an action in a retainer letter. Actions on a contract or in quantum meruit against the former client to recover the value of the services should be considered as an alternative to assertion of the lien."); Minnesota LEO 13 (6/15/89) ("A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. . . . A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's

interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).").

Prejudice

- Arizona LEO 04-01 (1/2004) ("The inquiring attorney's assertion of a retaining lien on the entire file is improper. Because the inquiring attorney's asserted retaining lien does not extend to materials given to inquiring attorney for use at trial, it is unethical to assert a lien as to such materials. As to the remaining items in the file against which the inquiring attorney desires to assert a lien, the inquiring attorney bears the burden of establishing that his lien attaches to identified items in the file based on a particularized inquiry into the circumstances, and the requirements of Arizona law. No lien can attach to documents when the attachment would prejudice the client's rights. The limited facts provided by the inquiring attorney do not establish that he is entitled to a lien on the documents in the file. Therefore, he should assert no lien on the documents, and should promptly return or provide to the client the documents on which he has no lien claim. Not only do the plain terms of ER 1.16 compel the documents' return upon the client's request, so do the requirements of ER 1.15(d), which states '[A] lawyer shall promptly deliver to the client or third person any . . . other property that the client . . . is entitled to receive and, upon request by the client . . ., shall promptly render a full accounting regarding such property.").

- San Diego LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

Harm

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.").

At least one bar has defined the standard in a different way -- requiring a lawyer to turn over the file if withholding it would deprive the client of "essential" documents.

- Alaska LEO 2004-1 (1/15/04) ("In summary, an expert or investigator's report is part of the client's file. . . . A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount. The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case." (footnote omitted).

At the other extreme, some states explicitly indicate that lawyers may not retain files until the lawyer has been paid.

- See, e.g., Virginia Rule 1.16(e) (requiring Virginia lawyers to turn over certain portions of their file to clients "whether or not the client has paid the fees and costs owed the lawyer.").

- North Carolina LEO 2006-18 (1/19/07).

Best Answer

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

b 1/11

Duty to Disclose Possible Malpractice

Hypothetical 18

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).

- Vaxiion 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]dvise 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 19

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 20

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

Effect of Clients' Claims: Continued Representation

Hypothetical 21

You have assisted a small businesswoman in substantially all of her business transactions for nearly 20 years. Although you have always considered your relationship with this client to have a "love-hate" element, you were shocked by the call you just received from her. She said that she intends to sue you for malpractice in an earlier transaction -- but she hopes that there are no "hard feelings" (she assumes that your carrier will ultimately bear all the financial costs). She also specifically asks whether you can continue to represent her in other transactions. At first you thought her call was a cruel joke, but when she explains that she is serious you begin to consider what to do.

If the client consents, may you continue representing the client in one matter while the client is suing you in another matter?

MAYBE

Analysis

A lawyer sued, accused, or even criticized by a client for some wrongdoing obviously faces a conflict of interest if the lawyer continues to represent the client. While bound by ethical and fiduciary duties to advance the client's interests, the lawyer obviously will be considering his or her own interests as well.

This type of conflict requires a careful analysis, and does not permit a "one size fits all" conclusion.

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) (emphasis 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 provides "informed consent." ABA Model Rule 1.7(b).[1]

A lawyer's concern about her own possible liability represents a classic "rheostat" conflict. A client's sarcastic comment about a lawyer "screwing up" at a deposition almost surely would not create a conflict preventing the lawyer from continuing to represent the client. On the other hand, it might be difficult for a lawyer to continue representing a client (absent consent) if the client has repeatedly complained that the lawyer committed malpractice during the course of discovery.

An ABA Model Rules comment recognizes the possibility that the lawyer faces a conflict if the client questions the lawyer's conduct.

> [I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

ABA Model Rule 1.7 cmt. [10].

In dealing with the abstract issue, several courts and bars have avoided a per se rule prohibiting such continued representation.

- Oregon LEO 2009-182 (10/2009) (analyzing the effect of a client's filing of a bar complaint against a lawyer representing the client in a matter set for trial one week later; holding that the lawyer was not obligated to withdraw, but "should consider whether the filing of a Bar complaint creates a conflict of interest under Oregon RPC 1.7, such that continued representation would potentially result in a violation of the Rules. If so, withdrawal would likely be required by Oregon RPC 1.16(a)(1)."; "Under Oregon RPC 1.7(a)(2), Lawyer has a conflict of interest if there is a 'significant risk' that Lawyer's representation will be 'materially limited' by a 'personal interest' of Lawyer. Under the facts presented, the potentially limiting interest would presumably be Lawyer's desire to avoid discipline by the Bar. It is also possible that Client's filing a Bar complaint could create such personal resentment that it

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

would compromise Lawyer's ability to effectively represent Client. Regardless of the specific personal interest involved, if it creates a substantial risk that Lawyer's representation would be materially limited, Lawyer may continue the representation only with Client's informed consent, confirmed in writing. Moreover, Lawyer may seek Client's consent only if Lawyer reasonably believes that competent and diligent representation can be provided to Client notwithstanding the conflict."; explaining that "[w]hile it is apparent that the filing of a disciplinary complaint could raise concerns on a case-by-case basis, it does not appear to create a per se conflict of interest."; "Although it has repeatedly rejected a per se approach, the Supreme Court has clearly suggested that at some point a potential malpractice claim might cause the interests of lawyer and client to diverge, thereby implicating Oregon RPC 1.7.").

- Los Angeles County LEO 521 (5/21/07) ("The Committee concludes: (1) a fee dispute does not require a lawyer or law firm to seek to withdraw; (2) a fee dispute, by itself, does not create an ethical conflict of interest; and (3) a fee dispute, where the lawyer does not have any lien rights, is not an adverse pecuniary interest in a client's property."; also holding that a lawyer would not be able to sue the client for fees unless the lawyer withdraws as counsel of record for the client).

In some circumstances, clients seek to have their lawyers continue the representation despite complaints about the lawyer. Several bars have approved such continued representations.

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

minimize the risk of a conflict, such as avoiding the assignment to Attorney of cases and projects involving the same or similar factual or legal issues raised in his lawsuit.").

- Virginia LEO 1637(4/19/95) (as long as the client consents, a law firm may continue to represent it even though the client is suing the firm for unrelated legal malpractice; "[A]n informed consent is a product of an adequate explanation of the nature, extent and implications of a conflict of interest, including the possible effect on the exercise of the lawyer's independent professional judgment on behalf of the client."; the law firm must advise the client that one of its lawyers will cross-examine the client in the malpractice action; the firm may not reveal to its malpractice counsel any confidences or secrets it obtained from its client through a representation of the client in unrelated matters; although "[c]onsent may be oral or written," written consent would be best here; "Significantly, client consent is not contractually binding; it may be withdrawn at any time.").

In other circumstances, lawyers have sought to withdraw from a representation after clients complained about their services -- apparently over the clients' objections. In both criminal and civil settings, courts have permitted such withdrawals.

- United States v. Blackledge, 751 F.3d 188, 191, 192, 194-95, 196, 198-99 (4th Cir. 2014) (vacating and remanding a criminal conviction, because the trial court erroneously refused to allow a criminal defendant's lawyer to withdraw; "On July 10, 2012, Attorney Allen filed a motion to withdraw as counsel on the ground that an internal conflict had arisen and she could 'no longer continue to ethically represent' Blackledge. . . . Speaking carefully to avoid violating client confidences or revealing trial strategies, Attorney Allen represented at a hearing on the motion that her internal ethical conflict arose from the fact that Blackledge requested to see certain items that she could not provide him. She added that Blackledge wished to proceed with new counsel and that she had located a panel attorney experienced in § 4248 hearings who could take over the matter immediately. Blackledge also stated at the motions hearing that Attorney Allen had failed to provide him certain documents he requested, and that he felt ignored by her, which made it very difficult for them to communicate."; "On July 23, 2012, Attorney Allen appealed the magistrate judge's ruling to the district court, and on July 30, 2012, she filed a second motion to withdraw. The second motion asserted that Blackledge had filed a state bar grievance against her, causing a conflict of interest where she could not defend against the bar complaint while also representing Blackledge." (emphasis added); "In this case, the district court did not meet its obligation to thoroughly inquire into the extent of the communications breakdown or the basis of the asserted conflict. Despite the

representations from Attorney Allen and Blackledge on the morning of trial that they had not done any trial preparation or spoken about whether Blackledge would testify, the court did not ask when they had last seen each other or communicated about the case. . . . The court's failure to probe deeply into the basis of Attorney Allen's conflict seriously undermines its decision, and this factor weighs heavily against the court's ruling." (emphasis added); "Certainly, not every bar complaint against an attorney by her client will result in a conflict of interest, and we have previously expressed our unwillingness to 'invite [those] anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial.'. . . However, in this case, Blackledge threatened and ultimately submitted a seemingly non-frivolous grievance against Attorney Allen that forced her to choose between protecting her own reputation and arguing in her client's best interest that Blackledge should not be made to bear the consequence of her own errors in submitting the renewed motion to appoint Dr. Plaud (expert)." (emphasis added); "Attorney Allen also asserted an internal ethical conflict, and because the district court failed to conduct an adequate inquiry, it is unclear if this conflict was ever resolved prior to trial. Moreover, the district court made no inquiry whatsoever into the scope and nature of this conflict. As a result, we have no way of knowing whether Attorney Allen's internal ethical conflict was indeed so significant that it required her withdrawal as counsel. The fact that she told the magistrate judge that she would represent Blackledge zealously 'with great difficulty' if the motion were denied . . . is of little help, because, having been made aware of its existence, the court had a sua sponte obligation to examine the extent of this conflict. . . . '[A] trial court must inquire into a conflict of interest 'when it knows or reasonably should know that a particular conflict exists.') . . . Indeed, to the extent that Attorney Allen did opine that she could continue to represent Blackledge, this assertion cannot be isolated from her repeated protestations that she could not do so ethically." (emphasis in original); "In total, in proceedings that could result in lifelong incarceration for a person who has already served his full sentence, Blackledge was forced to be represented by a lawyer asserting multiple conflicts of interest with whom he had not prepared for trial because of their inability to communicate. We cannot conclude that the court's abuse of discretion in requiring Attorney Allen to continue as counsel was harmless. We therefore vacate the court's judgment as to the motions to withdraw and remand for the court to reconsider these motions after engaging in the appropriate inquiry regarding the extent of Attorney Allen's conflicts.") (emphasis added)

- MasTec N. Am., Inc. v. Consol. Edison, Inc., 2008 N.Y. Slip Op. 30565U, at 3, 3-4, 4 (N.Y. Sup. Ct. Feb. 1, 2008) (addressing a situation in which the law firm of Cozen O'Connor sought to withdraw as counsel for a client who had claimed that Cozen had committed malpractice; "While MasTec [client] itself cites these opinions, it represents that it is generally satisfied with Cozen's

work and that it wishes to continue to be represented by Cozen. MasTec further contends that a conflict of interest will not develop if Cozen successfully prosecutes its remaining causes of action, in which event it will not have a claim for malpractice based on the loss of the lien foreclosure cause of action." (emphasis added); "This contention is without merit. As the ethics opinions persuasively reason, in the case of a potential irremediable malpractice claim 'not only [is] there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued.'. . . Cozen also cogently points out that its continued representation of MasTec would place it in the anomalous position of having to demonstrate the merits of MasTec's claims, while at the same time anticipating a malpractice defense that would require it to establish that MasTec could not have prevailed on its claim."; "While the court thus finds that a conflict of interest exists, the parties have not addressed or submitted authority on the issue of whether the conflict is waivable under the circumstances of this case by MasTec, a sophisticated commercial entity. On this record, therefore, the court will not reach the issue of whether Cozen's withdrawal is mandatory. Nor need the court do so because permissive withdrawal is, in any event, proper.").

Lawyers hoping to continue a representation in these circumstances must obviously comply with the conflicts rules.

- 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 and 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.").

Best Answer

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

b 1/11; b 2/15

Agreements to Arbitrate Fee Disputes

Hypothetical 22

A number of disgruntled former clients have sued your firm in fee disputes, and as your firm's new managing partner you would like to reduce these distractions. You have been reading about the advantage of arbitrating fee disputes with clients, and you wonder if such retainer letter provisions might be worth pursuing.

May you include a provision in your standard retainer letter requiring clients to arbitrate any fee disputes?

YES

Analysis

As might be expected in a judicial system that encourages arbitration rather than litigation,[1] courts and bars look favorably on arbitration of lawyer-client fee disputes.

The ABA has issued a legal ethics opinion confirming that lawyers and clients can agree to arbitrate fee disputes.

- ABA LEO 425 (2/20/02) (lawyers and clients may agree to arbitrate fee and malpractice disputes, but: the client would have to be independently represented if the agreement limits the lawyer's possible liability (for instance, by precluding punitive damages that would be available in a lawsuit); the lawyer must explain "the possible adverse consequences as well as the benefits" of such an arrangement, such as the client's waiver of jury trial, broad discovery and appellate rights, the details of arbitration process and the possibility that the client may have to pay fees and costs of arbitration).

The Restatement also confirms that lawyers and clients can arbitrate fee disputes. Interestingly, the Restatement provision discussing this possibility in an

[1] At least one state has mandated arbitration of all disputes between lawyers splitting fees. Shimko v. Lobe, 813 N.E.2d 669 (Ohio 2004) (upholding the constitutionality of an Ohio ethics rule that requires arbitration of fee disputes between lawyers).

almost off-handed way contrasts sharply with the Restatement's hostility to arbitration of client claims against lawyers.

> In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration; in others, both lawyers and client must consent. The procedures vary in the extent to which arbitration results are binding on one or both parties. Lawyers and clients might agree to arbitration under general arbitration statutes. An agreement to arbitrate should meet standards of fairness, particularly as regards designation of arbitrators. A client and lawyer may also resort to other forms of nonjudicial dispute resolution.

Restatement (Third) of Law Governing Lawyers § 42 cmt. b(iv) (2000).

Every bar seems to permit clients and lawyers to agree in advance to arbitrate fee disputes between them. The real issue is what steps must precede the agreement, and what disputes the agreement covers.

One of the important areas of difference between jurisdictions is whether the client must be separately represented in entering into such a binding arbitration provision covering fee disputes.

- Some bars do not require that the client be separately represented.[2]
- Some bars require that the client be advised of the opportunity to consult with independent counsel.[3]

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[2] Virginia LEO 1586 (4/11/94) (a retainer letter requiring arbitration of fee disputes does not amount to a per se violation of the Code as long as: there is "full and adequate disclosure as to all possible consequences" of the agreement; the client consents; and the arrangement is not "unconscionable, unfair, or inequitable when made"); Philadelphia LEO 91-5 (3/91) (holding that an agreement requiring arbitration of fee disputes would be upheld even if the client had not been separately represented in entering into it).

[3] North Carolina LEO 107 (4/12/91) (upholding an arbitration provision "assuming that the nature of the alternative dispute resolution procedures is fully disclosed to the client and the client is given full opportunity to consult independent counsel relative to the wisdom of foregoing other possible remedies in favor of alternative dispute resolution"); New York County LEO 723 (7/17/97) (upholding an arbitration provision covering fee disputes; explaining that "we respectfully disagree with the opinion of the District of Columbia bar . . . that an arbitration agreement is unethical unless the client first consults with independent counsel concerning the arrangement"; also disagreeing with the Maryland bar).

- Some jurisdictions require that the client be separately represented.[4]

Another area of difference concerns the requirement of a written explanation of the arbitration provision, and a written consent.

- Some jurisdictions require written disclosure and consent.[5]
- One jurisdiction indicated that it would be "better" if the lawyer explains the arbitration provision in writing, and the client consents in writing.[6]

The final area of disagreement among states involves the degree and nature of disclosure required for the arbitration provision to be effective.

For instance, in New York County LEO 723 (7/17/97), the New York County Bar held that an arbitration provision must define the forum in which the arbitration would take place. The LEO also listed the types of disclosures required -- "[c]hief among these differences is that an agreement to arbitrate amounts to a waiver of the right to a jury trial."

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[4] District of Columbia LEO 211 (5/15/90) ("a lawyer may not insist that a client enter into a fee agreement containing a clause mandating arbitration of fee and malpractice disputes unless the client is represented by other counsel. . . . In summary, this Committee has come to the conclusion that it is unrealistic to expect lawyers to provide enough information about arbitration to a prospective client, particularly on a first visit, so that the client can make an informed consent to a mandatory arbitration provision. It is equally unrealistic to conclude that limited disclosure coupled with the advice to seek independent legal counsel will cure the problem. How many clients either will see or can afford to see a second lawyer as a condition of entering into an agreement with the first? Therefore, we now conclude that Opinion 190 was incorrect in supposing that adequate disclosures concerning mandatory arbitration could be made to lay clients. Accordingly, mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counselled by another attorney.").

[5] District of Columbia LEO 218 (6/18/91) ("A retainer agreement providing for mandatory arbitration of fee disputes before the DC Bar Attorney-Client Fee Arbitration Board is not unethical provided the client is advised in writing of the availability of counselling by the staff of the ACAB and provided the client consents in writing to the mandatory arbitration.").

[6] Connecticut LEO 97-5 (3/4/97) ("We therefore conclude that an engagement letter providing for mandatory arbitration of fee disputes is ethically permissible. In light of the significance of this provision, it may be better that the lawyer inform the client in writing and the client consents in writing to the mandatory arbitration.").

> The right to a jury trial is not the only material difference between litigation and arbitration. Other differences may include, but may not be limited to, the extent of discovery rights, the right to compel production of witnesses and documents, the availability of relief, the availability of appellate review on the merits, the fees and costs payable to the arbitrator, the availability of a public forum, and the like.

Id.

Other states have also provided examples of the type of disclosures that are required or appropriate.[7]

Given the wide variation in how states approach agreements to arbitrate fee disputes, it is not surprising that courts take differing approaches to the arbitration agreements that come before them for review.

- Some courts uphold arbitration provisions.[8]

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[7] Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial."); Virginia LEO 1707 (1/12/98) (although a "lawyer's fiduciary duties extend to preliminary consultation by a prospective client with a view to engagement," it is not per se improper for a client engagement agreement to provide for binding arbitration of legal malpractice claims as long as there is adequate disclosure and consent; like fee agreements, such initially-acceptable engagement agreement provisions might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation"; the Bar declines to require any specific disclosures or insist that the client actually consult another lawyer before entering into such an agreement (in Virginia LEO 638, the Bar seemed to require that the client must be advised to seek independent counsel regarding an arbitration provision); appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award").

- Some courts find the arbitration provision unenforceable because it did not sufficiently describe the rights that the client was forfeiting.[9]

- Some courts find that the firm had not followed the required procedure, and therefore could not insist on or enforce an arbitration provision.[10]

Best Answer

The best answer to this hypothetical is **YES**. b 1/11

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[8] Schatz v. Allen Matkins Leck Gamble & Mallory LLP, 198 P.3d 1109 (Cal. 2009) (holding that lawyers can include arbitration clauses in retainer agreements that require binding arbitration of fee disputes between the lawyer and the client); Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial."); Ervin, Cohen & Jessup, LLP v. Kassel, 54 Cal. Rptr. 3d 685 (Cal. Ct. App. 2007) (as long as a client has waived the statutory right to engage in non-binding arbitration, the client can agree to binding arbitration of fee disputes with his lawyer); Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App. 2000) (compelling arbitration; finding that determination of the attorney-client relationship did not invalidate the arbitration agreement).

[9] See, e.g., Pre-Paid Legal Servs., Inc. v. Battle, 873 So. 2d 79 (Miss. 2004).

[10] Woods v. Patterson Law Firm, P.C., 886 N.E.2d 1080 (Ill. App. Ct. 2008) (finding that a law firm had forfeited its right to arbitrate a malpractice claim brought by a former client by engaging in discovery during the client's legal malpractice lawsuit against the law firm); Positive Software Solutions, Inc. v. New Century Mortgage Corp., 436 F.3d 495 (5th Cir. 2006) (vacating an arbitration award because the arbitrator had not disclosed an early co-counsel relationship with one of the arbitration party's law firms).

Agreements to Arbitrate Malpractice Disputes

Hypothetical 23

Several years ago, your firm began to insist that all clients sign retainer agreements containing a provision requiring arbitration of fee disputes. Now you wonder if that provision can be expanded to cover malpractice claims a client asserts against your firm.

May you include a provision in your standard retainer letter requiring clients to arbitrate malpractice disputes?

YES

Analysis

Mandatory arbitration provisions covering substantive malpractice claims raise essentially the same issue as provisions covering fee disputes -- although arguably clients forfeit more rights in the former type of provision.

Interestingly, the ABA dealt with both types of mandatory arbitration provisions in the same legal ethics opinion, and provided the same analysis.[1]

The Restatement (which absolutely prohibits any prospective limitation on a lawyer's liability for malpractice) permits such arbitration provisions.

> [A] lawyer and client may properly take certain measures that may have the effect of narrowing or otherwise affecting the lawyer's liability . . . A client and lawyer may agree in advance [subject to some restrictions] to arbitrate claims for legal malpractice, provided that the client receives proper [sic] of the scope and effect of the agreement, and if the

[1] ABA LEO 425 (2/20/02) (lawyers and clients may agree to arbitrate fee and malpractice disputes, but: the client would have to be independently represented if the agreement limits the lawyer's possible liability (for instance, by precluding punitive damages that would be available in a lawsuit); the lawyer must explain "the possible adverse consequences as well as the benefits" of such an arrangement, such as the client's waiver of jury trial, broad discovery and appellate rights, the details of arbitration process and the possibility that the client may have to pay fees and costs of arbitration).

> relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable.

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

Bars generally follow the same approach in addressing mandatory provisions governing malpractice as they do in mandatory arbitration provisions covering fee disputes.

- Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.").

- Virginia LEO 1707 (1/12/98) (although a "lawyer's fiduciary duties extend to preliminary consultation by a prospective client with a view to engagement," it is not per se improper for a client engagement agreement to provide for binding arbitration of legal malpractice claims as long as there is adequate disclosure and consent; like fee agreements, such initially-acceptable engagement agreement provisions might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation"; the Bar declines to require any specific disclosures or insist that the client actually consult another lawyer before entering into such an agreement (in LEO 638, the Bar seemed to require that the client must be advised to seek independent counsel regarding

an arbitration provision); appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award").

- Virginia LEO 1550 (10/20/93) (a lawyer may not prospectively limit liability to a client, but may secure a release from the client for "specific completed acts" in exchange for consideration if the client consents after full disclosure, is "first advised to seek independent counsel as to whether to sign such an agreement" and if the transaction was not "unconscionable, unfair or inequitable when made"; the Bar reaffirmed the ethical propriety of arbitration provisions in retainer agreements covering any malpractice claims as long as the client consents after full disclosure and "is advised to seek independent counsel in regard to the advisability of such a provision").

- Virginia LEO 638 (12/3/84) (a retainer agreement may contain an arbitration provision covering malpractice claims as long as the client is fully informed of the provision's effect and is advised to seek independent legal advice).

As with arbitration provisions covering fee disputes, bars have disagreed about the enforceability of such provisions entered into by clients who were not separately represented.

In Oklahoma LEO 312 (8/18/00), for instance, the Oklahoma Bar upheld an arbitration clause covering all disputes "arising under the retainer agreement." The Bar explained that "[w]e disagree with the opinion of several other bars that a fee agreement containing a clause mandating arbitration of fee and malpractice disputes is unethical per se unless the client first consults with independent counsel concerning the arrangement." The Bar cited ethics opinions from Washington, District of Columbia, Maryland and Michigan as taking that position (id. at n.6), while agreeing with ethics opinions from New York and Ohio that it is not necessary for lawyers to have their clients hire another lawyer before entering into an arbitration agreement covering malpractice.

Other courts have not been as generous -- requiring that clients be separately represented when entering into such broad binding arbitration provisions. In Thornton v. Haggins, No. 83055, 2003 Ohio App. LEXIS 6440 (Ohio Ct. App. Dec. 24, 2003), for instance, the court analyzed an arbitration provision covering "any controversy or claim arising out of or relative to [Haggins' retainer agreement] or breach thereof." Id. at *2. The Ohio court noted that that "other jurisdictions have reached divergent conclusions" (id. at *6) on the enforceability of such an arbitration provision absent the client being separately represented. The court explained that Colorado and New York[2] do not require such independent representation, while Texas did.

> We are persuaded by the cases finding such agreements unenforceable with regard to the malpractice disputes, and we find the reasoning set forth in Opinion 96-9 compelling. We agree that the best interests of the client require consultation with an independent attorney in order to determine whether to prospectively agree to arbitrate attorney-client disputes. Such agreements are therefore not knowingly and voluntarily made absent such independent consultation.

Id. at *7.

In addressing the scope of binding arbitration provisions, courts and bars obviously must analyze the language in the provision.

The Eastern District of Pennsylvania found that an arbitration provision covering "any future dispute" between the Dilworth Paxson law firm and a client covers the client's malpractice claim against the firm -- noting that the client was a "highly sophisticated, highly educated businessman," and agreed that he had been separately

[2] Interestingly, the Oklahoma Bar just three years earlier listed New York as not requiring that the client have separate representation.

represented in entering into the agreement. Paxson v. Asensio, Civ. A. No. 02-8986, 2003 U.S. Dist. LEXIS 7719, at *16 (E.D. Pa. May 5, 2003).

Other courts and bars have taken a less generous approach, finding that the following arbitration clause language did not cover malpractice claims.

- Requiring arbitration of "any other aspect of our attorney-client relationship."[3]
- Requiring arbitration of "disagreement arising out of or relating to our firm's employment."[4]
- Requiring arbitration "[i]n case any controversy shall arise between Client and Attorney."[5]

One California court dealt with a law firm's imaginative arbitration argument. In Matei v. Alioto, No. A105778, 2005 Cal. App. Unpub. LEXIS 1 (Cal. Ct. App. Jan. 3, 2005), two former Alioto law firm clients sued the firm for malpractice. Alioto argued that the settlement agreement in the underlying lawsuit in which they had represented the clients required the clients to arbitrate their malpractice claims against the Aliotos, because the settlement agreement contained a strict arbitration clause, and was signed by the clients and by the law firm. The court rejected the law firm's argument.

Best Answer

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

b 1/11

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[3] Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989) (finding that an arbitration clause requiring arbitration of "any other aspect of our attorney-client relationship" applied only to fee disputes and not to malpractice and breach of fiduciary duty claims), review denied, No. S009642, 1989 Cal. LEXIS 4710 (Cal. May 17, 1989).

[4] Connecticut LEO 99-20 (6/22/99).

[5] Gemmell Pharmacies, Inc. v. Vienna, No. B161303, 2003 Cal. App. Unpub. LEXIS 11352 (Cal. Ct. App. Dec. 4, 2003).

Settlement of Clients' Claims

Hypothetical 24

You recently botched a litigation matter for an elderly client. The client fired you, and now has to deal with her belief that you have committed malpractice. You would like to try to resolve the dispute before your former client talks to any other lawyers who might make your life even more miserable.

May you settle a malpractice claim by a former client who is not currently represented by another lawyer?

MAYBE

Analysis

Several courts and bars have addressed situations in which a lawyer wishes to settle a claim that the client could assert against the lawyer.

ABA Model Rules

Although ABA Model Rule 1.8(h)(1) requires that a client be separately represented in prospectively limiting liability to the lawyer, the Model Rules require slightly less protection for clients who are settling existing claims they can bring claims against their lawyers.

> A lawyer shall not . . . settle a claim or a potential claim for such liability with an unrepresented client or a former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

ABA Model Rule 1.8(h)(2) (emphasis added). Comment [15] explains the basis for the ABA's approach.

> Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of

> an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

ABA Model Rule 1.8 cmt. [15] (emphasis added).

Restatement

Just as the Restatement flatly prohibits prospective limitations on a lawyer's malpractice liability to a client, it also takes a more restrictive view than the ABA Model Rules of a client's settlement of an existing claim.

The Restatement takes differing approaches to the enforceability of a malpractice settlement and a lawyer's vulnerability to an ethics charge.

First, the Restatement explains that a client can rescind a malpractice settlement agreement if the client was not independently represented when entering into it.

> The client or former client may rescind an agreement settling a claim by the client or former client against the person's lawyer if: (a) the client or former client was subjected to improper pressure by the lawyer in reaching the settlement; or (b) (i) the client or former client was not independently represented in negotiating the settlement, and (ii) the settlement was not fair and reasonable to the client or former client.

Restatement (Third) of Law Governing Lawyers § 54(3) (emphasis added).[1]

A comment explains just how client-friendly this provision is.

> First, under Subsection (3) the settlement is not enforceable over the objection of the client or former client if it was the

[1] In a comment, the Restatement explains that even an independently represented client can rescind a settlement agreement if the lawyer had imposed improper pressure "such as the lawyer's improper refusal to return documents or funds except upon the release of the malpractice claim." Restatement (Third) of Law Governing Lawyers § 54 cmt. c.

> product of improper pressure, such as the lawyer's improper refusal to return documents or funds except upon release of the malpractice claim . . . . This is so even if the client was independently represented, because representation does not necessarily dispel improper pressure.
>
> Even absent improper pressure, such a settlement will not be enforced if the client or former client was not independently represented and, in addition, the settlement was not fair and reasonable to client or former client. Independent counsel includes a lawyer serving as inside legal counsel. The client or former client may, however, elect to enforce a settlement voidable under this Section.

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

Second, the Restatement indicates that

> [f]or purposes of professional discipline, a lawyer may not . . . settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Restatement (Third) of Law Governing Lawyers § 54(4)(b). A comment explains this provision.

> Second, and regardless of the enforceability of the agreement, under Subsection (4)(b) the lawyer is subject to disciplinary sanctions unless the client or former client was independently represented or the lawyer, before the settlement, informed the client or former client in writing that independent representation was appropriate in connection therewith.
>
> The rules stated in the Section apply because a client or former client may continue to rely on the good faith of the client's lawyer or former lawyer and thus surrender a valid claim for inadequate consideration. Also, many clients without independent representation cannot confront a legally knowledgeable adversary on an equal footing in a situation where their interests directly conflict. Lastly, lawyers should treat clients and former clients fairly and without deriving

> improper benefit from their knowledge of client confidences or from other advantage . . . .

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

Thus, the Restatement provides a slight break to lawyers who hope to avoid ethics charges, but allows clients to back out of a malpractice settlement agreement which they entered into without a lawyer advising them.

States

States tend to take the more forgiving ABA Model Rule approach rather that the stricter Restatement approach.

- See, e.g., 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.'").

As might be expected, courts deal harshly with lawyers who violate these rules.

- In re Disciplinary Proceeding Against Greenlee, 143 P.3d 807, 811 (Wash. 2006) (suspending for six months a lawyer who arranged for his client to sign a release of a possible malpractice claim without complying with the

> Washington ethics rules' requirement that the client be advised in writing of the "'desirability of seeking'" advice from an independent lawyer).

- In re Carson, 991 P.2d 896 (Kan. 1990) (issuing a public censure of a lawyer who had settled a potential malpractice claim without the required written disclosure that the client should hire another lawyer to represent it).

As tempting as it would be for lawyers to include in any settlement the client's agreement not to pursue an ethics charge against the lawyer, lawyers should be careful.

> It is generally agreed that settlement of a fee or malpractice dispute can never be conditioned on the client's consent not to file a grievance or report the misconduct to the appropriate discipline area authority.

ABA/BNA Lawyers' Manual of Professional Conduct § 51:1110 (citing cases from Colorado, New Jersey, New York, Oklahoma and Maryland, and legal ethics opinions from Arizona, District of Columbia and North Carolina).

Illinois deals with this issue in an explicit ethics rule.

> It is professional misconduct for a lawyer to . . . enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

Illinois Rule 8.4(h).

Best Answer

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

b 1/11

Lawyers' Liability to Third Parties for Negligence

Hypothetical 25

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 of care

> 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

[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).

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 2009 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)).

Several years earlier, a Wyoming Supreme Court case provided a similar analysis.

- Connely v. McColloch (In re Estate of Drwenski), 83 P.3d 457, 463, 462, 463 (Wyo. 2004) (addressing a situation in which a lawyer represented the husband in a divorce; explaining that the lawyer failed to finalize the divorce before the client died; noting that the client left an estate of over $3,000,000, against which his wife claimed her elective share under Wyoming law; explaining that 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; ultimately concluding that the daughter could not assert a malpractice action; providing a history of non-clients' malpractice claims against lawyers; noting that only four states (New York, Texas, Ohio, Nebraska) "continue to hold there is no recovery for nonclients"; explaining 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"; explaining that "[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."; identifying the jurisdictions adopting this approach: Illinois; Maryland; Oregon; Pennsylvania; explaining 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").

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 draftsperson 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 deposition 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)).

- Boranian 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

Breach of Contract

Hypothetical 26

You were a bit shaken by the results of researching a lawyer's possible liability to third parties for malpractice and intentional torts, and you are about to research a lawyer's possible liability to third parties under contracts that the lawyer has negotiated on a client's behalf. You assume that this research will result in some better news.

May lawyers be held liable under contracts that they negotiate on their clients' behalf?

YES

Analysis

The Restatement discussion of this issue explains that lawyers can be held liable in two circumstances.

First, lawyers might face liability when dealing for a nondisclosed client principle, or when the other side relies on the lawyer as much as on the lawyer's client.

> Unless at the time of contracting the lawyer or third person disclaimed such liability, a lawyer is subject to liability to third persons on contracts the lawyer entered into on behalf of a client if: (a) the client's existence or identity was not disclosed to the third person; or (b) the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit.

Restatement (Third) of Law Governing Lawyers § 30(2) (2000).

Second, lawyers acting without authority from their client can face liability as well.

> A lawyer is subject to liability to a third person for damages for loss proximately caused by the lawyer's acting without authority from a client under § 26 if: (a) the lawyer tortiously misrepresents to the third person that the lawyer has authority to make a contract, conveyance, or affirmation on behalf of the client and the third person reasonably relies on the misrepresentation; or (b) the lawyer purports to make a

> contract, conveyance, or affirmation on behalf of the client, unless the lawyer manifests that the lawyer does not warrant that the lawyer is authorized to act or the other party knows that the lawyer is not authorized to act.

Restatement (Third) of Law Governing Lawyers § 30(3) (2000).

A comment provides additional analysis.

> An agent who negotiates a contract for a disclosed principal is usually not liable for its breach, but is liable if the other person does not know that the agent is acting for another or does not know the identity of the principal, and the agent or other person has not disclaimed liability . . . . In such situations, the other person relies on the credit of the agent rather than on that of the unknown principal. When the other person knows of the existence and identity of the principal, however, the person will generally be assumed to have relied on the credit of the principal. The agent is therefore not liable, unless the agent was considered an additional party to the contract. Those principals are applicable to contracts negotiated by lawyers.
>
> Even when the client is a disclosed principal, a lawyer is liable for the compensation of a court reporter, printer, expert, appraiser, surveyor, or other person the lawyer has hired who provides goods or services used by lawyers, and who when doing so reasonably relies on the lawyer's credit . . . . Liability attaches unless the lawyer disclaims liability or the circumstances show that the third person did not rely on the lawyer's credit, for example if the lawyer was inside legal counsel of the client. Merely disclosing the client's name does not convey that the client rather than the lawyer is to pay. Such persons are likely to rely on the credit of the lawyer because they regularly deal with lawyers, while investigating the reliability of the client might be costly. . . . The lawyer's liability does not foreclose the supplier from proceeding, additionally or alternatively, against the client in whose behalf the lawyer obtained the goods or services.

Restatement (Third) of Law Governing Lawyers § 30 cmt. b (2000).

A comment explains this possible liability for unauthorized actions.

> A lawyer who acts beyond the authority conferred by a client might cause harm to a third person. As a consequence, a third person dealing with the lawyer might lose the benefit of a contract that had been negotiated or suffer other harm. The third person, although foreclosed from recovering from the client, can in appropriate circumstances recover damages from the lawyer whose pretense of authority caused the harm. Subsection (3) states two different bases for liability, employing the formulation of the Restatement Second of Agency. As stated in Subsection (3)(a), the suit might be one for tortious misrepresentation, if the lawyer negligently or intentionally misrepresented the lawyer's authority . . . . Alternatively, as stated in Subsection (3)(b), the third person can also sue in contract, for the lawyer is deemed to have given an implied warranty of authority . . . . Choice of one theory over another can affect the measure of damages . . . .

Restatement (Third) of Law Governing Lawyers § 30 cmt. c (2000).

Although there is not much case law on this issue, the Restatement analysis should prompt lawyers to analyze their possible liability.[1]

Best Answer

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

b 1/11

[1] At least one court has taken a somewhat more forgiving view. Freedman v. Brutzkus, 106 Cal. Rptr. 3d 371, 372, 374 (Cal. Ct. App. 2010) (holding that a party to a contract cannot sue the other side's lawyer who signed off on the contract under the statement "approved as to form and content"; "Apart from the signature approving the agreement 'as to form and content,' Freedman does not allege, nor does the record show, that Brutzkus made any representation as to the agreement's validity, or affirmed any representation of his clients. We find little authority in California or elsewhere addressing the meaning of this recital."; "We conclude that the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties.").

Intentional Wrongdoing

Hypothetical 27

Your college roommate became a doctor, and for the past 20 years you and he have good-naturedly kidded each other about which profession faces a greater risk of lawsuits. Your doctor friend recently "rubbed your nose" in the fact that doctors can only be sued by their patients, while lawyers can be sued by non-clients. He bets you a drink on each type of liability to non-clients that he has listed.

May lawyers be sued by non-clients for the following intentional torts:

(a) Fraud?

YES

(b) RICO violations?

YES

(c) Fair Debt Collection Practices Act (FDCPA) violations?

YES

(d) Worker Adjustment and Retraining Notification (WARN) Act violations?

YES

(e) Age Discrimination in Employment Act violation?

YES

(f) Violations while acting as a guardian ad litem?

MAYBE

(g) Violations of health document privacy laws by showing medical records to an expert?

MAYBE

Analysis

(a)-(e) Lawyers may be sued for at least the following:[1]

- Fraud[2]

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[1] The Restatement deals with the possible judicial remedies that a client or non-client can seek for the lawyer's misconduct.

> For a lawyer's breach of a duty owed to the lawyer's client or to a nonclient, judicial remedies may be available through judgment or order entered in accordance with the standards applicable to the remedy awarded, including standards concerning limitation of remedies. Judicial remedies include the following: (1) awarding a sum of money as damages; (2) providing injunctive relief, including requiring performance of a contract or enjoining its nonperformance; (3) requiring restoration of a specific thing or awarding a sum of money to prevent unjust enrichment; (4) ordering cancellation or reformation of a contract, deed, or similar instrument; (5) declaring the rights of the parties, such as determining that an obligation claimed by the lawyer to be owed to the lawyer is not enforceable; (6) punishing the lawyer for contempt; (7) enforcing an arbitration award; (8) disqualifying a lawyer from a representation; (9) forfeiting a lawyer's fee (see § 37).

Restatement (Third) of Law Governing Lawyers § 6 (2000).

[2] NOVA Assignments, Inc. v. Kunian, 928 N.E.2d 364, 368, 369 (Mass. App. Ct. 2010) (holding that a third party may sue a lawyer for fraud; explaining that "[i]n certain circumstances, a lawyer may owe a duty of care to a nonclient for the knowing or negligent provision of false information."; also explaining that "[b]ar membership provides no cloak of immunity for an attorney's false representations. Rather it imposes a high duty of ethical conduct in the practice of our shared profession."; remanding for a further factual determination); Amalfitano v. Rosenberg, 903 N.E.2d 265, 267, 268 (N.Y. 2009) (finding that a lawyer can be liable for treble damages under a New York statute even if the lawyer's attempted deceit was unsuccessful; "Judiciary Law § 487 does not derive from common law fraud. Instead, as the Amalfitanos point out, section 487 descends from the first Statute of Westminster, which was adopted by the Parliament summoned by King Edward I of England in 1275."; "As this history shows, section 487 is not a codification of a common law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England. The operative language at issue -- 'guilty of any deceit' -- focuses on the attorney's intent to deceive, not the deceit's success."); Amato v. KPMG LLP, 433 F. Supp. 2d 460 (M.D. Pa. 2006) (holding that investors who purchased improper tax shelters could sue the law firm that provided an opinion letter); Davin, L.L.C. v. Daham, 746 A.2d 1034, 1045, 1045-46 (N.J. Super. Ct. App. Div. 2000) (allowing a lawsuit to proceed against a lawyer for a landlord who had added a covenant of quiet enjoyment to a lease, despite the lawyer knowing that a foreclosure proceeding meant that the tenant was not likely to be able to stay for the ten-year lease term; "Defendants' claims against Jaffe appear to be based upon their contention that Jaffe owed them a duty to disclose 'any factual and/or legal impediments which might follow or encumber the subject lease.' Moreover, they contend that Jaffe owed them a duty not to include in the proposed lease a covenant of quiet enjoyment in light of the pending foreclosure."; "We conclude that Jaffe, as an attorney who participated to the extent he did in the efforts to stave off foreclosure, had an affirmative obligation to be fair and candid with defendants.

- RICO violations[3]
- Fair Debt Collections Practices Act (FDCPA)[4]

Moreover, he had an obligation not to insert the covenant of quiet enjoyment in the lease. He had an obligation to advise his clients, the Kresses, that they should disclose to defendants the fact that the property was in foreclosure. He also had a duty to advise his clients that the lease should not contain a covenant of quiet enjoyment in light of the fact that it was highly unlikely that defendants would obtain the benefits of the covenant in light of the foreclosure. If they failed to follow his advice, he had the right, if not the duty, to cease representing them. Certainly, he had an obligation not to insert the covenant of quiet enjoyment in the lease."; "When Jaffe prepared the lease, he was keenly and acutely aware of the fact that it was extremely unlikely that defendants would be able to occupy the premises for the term of the lease. . . . [W]e merely hold today that Jaffe was obliged to recommend disclosure of that fact to defendants, or their attorney, and cease representation if they failed to follow that recommendation. Instead, Jaffe negotiated with Goins regarding the addendum. He knew the Kress' title to the property went to the very heart of the lease. He knew that as a result of the foreclosure proceedings, and the Kress' apparent inability to stave it off, their title to the property was, to say the least, in a precarious position. Jaffe was aware of that fact. It was highly unlikely that Kresses would have title to the property for the duration of the period set forth in the lease, including the potential extension. Again, Jaffe was keenly aware of that fact. It was extremely unlikely that the Kresses would be able to comply with the covenant of quiet enjoyment contained in the lease drafted by Jaffe."); Fla. Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996) (disbarring a lawyer who leased equipment under someone else's name; holding that the lawyer had engaged in an affirmative misrepresentation); In re Westreich, 212 A.D.2d 109 (N.Y. App. Div. 1995) (disbarring a lawyer for his actions representing a company which had borrowed money from an investor, but failed to tell the investor that the lawyer's brother (a key member of management at the bar) was under indictment); In re Hendricks, 462 S.E.2d 286 (S.C. 1995) (disbarring a lawyer for (among other things) issuing an inaccurate title insurance policy); Slotkin v. Citizens Cas. Co. of N.Y., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a $1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy); Chase Manhattan Bank, N.A. v. Perla, 65 A.D.2d 207 (N.Y. App. Div. 1978) (reinstating an action against a lawyer who had affirmatively misrepresented what he would do with the proceeds of a sale); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901 (Cal. Ct. App. 1976) (reversing the dismissal of an action against a lawyer for fraud based on an opinion letter that the plaintiff relied on in loaning money); Monroe v. State Bar of Cal., 358 P.2d 529 (Cal. 1961) (suspending for nine months a lawyer who misrepresented the amount of money held in escrow; explaining that the lawyer had received a check, but never cashed it). But see Matsumura v. Benihana Nat'l Corp., 542 F. Supp. 2d 245 (S.D.N.Y. 2008) (holding that a party to a business transaction may not sue the adversary's lawyer for oral misrepresentation that amounted to opinions, even though the party was represented by that lawyer in unrelated matters). See also Thompson v. Paul, 547 F.3d 1055 (9th Cir. 2008) (holding that federal law rather than state law governs a lawyer's liability to non-clients for possible misconduct in connection with a settled claim based on a transfer of stock); Topping v. Jams Assocs., No. A-1659-04T5, 2006 WL 2787158 (N.J. Super. Ct. App. Div. Sept. 29, 2006) (unpublished opinion) (a lawyer representing a real estate seller may have a duty to make required disclosures to the purchasers).

Lawyers may also be indicted for having deprived their clients of "honest services" in violation of 18 U.S.C. § 1346. United States v. Munson, No. 03 CR 1153-4, 2004 U.S. Dist. LEXIS 15465 (N.D. Ill. July 28, 2004).

[3] See, e.g., Seippel v. Jenkens & Gilchrist, P.C., 315 B.R. 148 (S.D.N.Y. 2004) (dismissing the RICO claims).

- Worker Adjustment and Retraining Notification (WARN) Act violations[5]
- Age Discrimination in Employment Act violation[6]
- State consumer protection laws.[7]

Other courts have been more forgiving, and rejected various causes of action asserted against lawyers.

- Simpson Strong-Tie Comp., Inc. v. Gore, 230 P.3d 1117 (Cal. 2010) (holding that the anti-SLAPP (strategic lawsuit against public participation) statute prevented a company from filing a defamation case against a plaintiff's law firm for the law firm's advertisements seeking business).

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[4] Kaltenbach v. Richards, 424 F.3d 524 (5th Cir. 2006) (holding that a lawyer can be considered a "debt collector" under the Fair Debt Collection Practices Act); Pettway v. Harmon Law Offices, P.C., No. 03-CV-10932-RGS, 2005 U.S. Dist. LEXIS 21341 (D. Mass. Sept. 27, 2005) (applying the Fair Debt Collection Practices Act to a law firm handling mortgage foreclosures); Stolicker v. Muller, Muller, Richmond, Harms, Myers, & Sgroi, P.C., No. 1:04-CV-733, 2005 WL 2180481 (W.D. Mich. Sept. 9, 2005) (holding a law firm liable under the Fair Debt Collection Practices Act); Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 60 (2d Cir. 2004) (law firm represented an apartment owner, and sent out notices of rent arrearages; the law firm sought dismissal of the FDCPA claims by noting that "it had derived only $5,000 in revenues from the issuance of three-day notices during the one-year period immediately preceding the commencement of this action, amounting to 0.05% of its $10,000,000 revenue over that period"; the Second Circuit reversed and remanded, finding that the law firm could be seen as a "regular" debt collector because it had issued 145 three-day notices over the previous year).

[5] McCaffrey v. Brobeck, Phleger & Harrison, L.L.P., No. C 03-2082 CW, 2004 U.S. Dist. LEXIS 2768 (N.D. Cal. Feb. 17, 2004) (refusing to dismiss WARN claims against Morgan Lewis as the Brobeck firm's successor, even though Morgan Lewis could not be considered the "alter-ego" of Brobeck); see also Patterson v. O'Neil, 673 F. Supp. 2d 974, 979, 986 (N.D. Cal. 2009) (granting a motion to dismiss filed by several law firms who had hired former employees of the now-defunct Thelen Law Firm; finding that the hiring of a defunct law firm's employees did not amount to a "sale of part or all of a employer's business" sufficient to trigger obligations under the Federal WARN Statute; "Plaintiffs will need to allege facts sufficient to support the conclusion that 1) the Law Firm Defendants participated in a 'sale' of part or all of Thelen's business, as opposed to merely hiring Thelen's employees or extending partnership offers to Thelen's partners; and 2) the context of the sales [sic] was such that the Law Firm Defendants were effectively 'ordering' mass layoffs or plant closings by choosing not to hire Plaintiffs.").

[6] EEOC v. Sidley Austin Brown & Wood, LLP, No. 1:05-cv-00208 (N.D. Ill. filed Jan. Jan. 13, 2005) (reported in 20 [Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 43 (Jan. 26, 2005)).

[7] Pepper v. Routh Crabtree, APC, 219 P.3d 1017 (Alaska 2009) (holding that Alaska lawyers were subject to Alaska's Unfair Trade Practices and Consumer Protection Act when suing a debtor without sending a written demand to the debtor); Crowe v. Tull, 126 P.3d 196 (Colo. 2006) (holding that a law firm could be sued under the Colorado Consumer Protection Act for allegedly broadcasting false advertisements on television).

- Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP, 230 P.3d 1275, 1283(Colo. App. 2010) (dismissing a lawsuit against the law firm Hogan & Hartson under a Colorado "bait and switch advertising" statute; rejecting plaintiff's claim that Hogan & Hartson had represented that a senior partner would be working on the client's case; the senior partner moved to the law firm's D.C. office and spent very little time on the case; acknowledging that "a bait and switch might have occurred, for example, if Hogan & Hartson had refused, upon plaintiffs' initial request, to assign Cobb [senior partner] to the case and, instead, had persuaded plaintiffs to accept a less experienced attorney as lead counsel. However, to the contrary, plaintiffs were not prevented or discouraged from hiring Cobb; rather, Cobb himself met with plaintiffs and promised them that they would receive his services as primary counsel. And plaintiffs did receive those services, if only for a brief time.").

A number of states have developed an odd doctrine that essentially immunizes lawyers from any liability for statements they make (or even actions they take) in litigation.

The doctrine started as a defamation principle, which essentially expanded the absolute privilege afforded pleadings and testimony to include statements that adversaries' lawyers make to one another in pre-litigation or litigation communications. Restatement (Second) of the Law of Torts, § 586 (1977).

For some reason, a number of states have expanded that doctrine to include essentially any type of otherwise actionable tort in the litigation context.

- Fernandez v. Haber & Ganguzza, LLP, 30 So. 3d 644, 646 (Fla. Ct. App. 2010) (holding that the Florida litigation privilege required dismissal of a lawsuit against a lawyer for the filing of a lis pendens; "In Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007), the Florida Supreme Court held that absolute immunity applies to any act occurring during the course of a judicial proceeding, whether the underlying claim constitutes a common law tort or a statutory violation, including tortuous interference with a business relationship, so long as the act has some relation to the proceeding. . . . In the case before us, it is undisputed that the lis pendens filed by Ganguzza's firm was filed during the course of the judicial proceeding brought by the Association [defendant's client] against Fernandez. There was undisputed evidence in the record that the law firm was directed by the Association to prevent the sale, thus the firm was privileged in placing

the lis pendens in connection with the action for injunctive relief. Any proceeding based on statements made in connection with a judicial proceeding are not actionable.").

- Unarco Material Handling, Inc. v. Liberato, S.W.3d 227, 232-33, 233, 238, 239 (Tenn. Ct. App. 2010) (affirming the dismissal of an action against a lawyer who allegedly assisted a client in breach of a confidentiality agreement with the client's former employer; explaining that Tennessee had adopted an absolute "litigation privilege" in a context of defamation claims; "[A]t least in the context of a defamation action, which pertains to communication as distinguished from conduct, the privilege encompasses the publication of a statement by an attorney that is related to the subject matter of proposed litigation, which is under serious consideration by the attorney acting in good faith, provided the attorney has a client or identifiable prospective client at the time the communication is published and there is a reasonable nexus between the publication in question and the litigation under consideration."; "The matters at issue here, however, do not pertain to communications by an attorney, as is the case in a defamation action. The issue here is conduct, specifically the tort of inducing a breach of contract. No Tennessee court has ruled on this issue in the context of the litigation privilege, though courts in other jurisdictions have."; noting that other states recognize only a qualified privilege in that setting, but that Tennessee has adopted an absolute privilege; ultimately extending the absolute privilege to conduct as well as defamatory statements; "[W]e have concluded that the litigation privilege in Tennessee applies to an attorney's conduct prior to the commencement of litigation if (1) the attorney was acting in the capacity of counsel for a client or identifiable prospective client when the conduct occurred, (2) the attorney was acting in good faith for the benefit of and on behalf of the client or prospective client, not for the attorney's self interest, (3) the conduct was related to the subject matter of proposed litigation that was under serious consideration by the attorney, and (4) there was a real nexus between the attorney's conduct and litigation under consideration."; "In the context of conduct of an attorney that is alleged to constitute tortuous interference with contractual rights of a client's adversary or potential adversary, the conduct shall not be privileged if the attorney employed wrongful means. . . . In this context, wrongful means includes, inter alia, fraud, trespass, threats, violence, or other criminal conduct."; nevertheless warning lawyers that their conduct might violate the ethics rules even if they do not create a cause of action; "A violation of a Rule of Professional Conduct does not give rise to a cause of action, as is specifically stated within the rules; thus, if Cohen's [defendant] conduct constitutes a violation, that conduct would not give rise to a cause of action in this case. However, an attorney is subject to sanctions for conduct that violates the Tennessee Rules of Professional Conduct." (footnote omitted)).

(f) Bars everywhere have struggled with both the ethical duties and the liability of lawyers acting as guardians ad litem -- because those lawyers are not only technically representing the minor or other beneficiary of their duties, but also representing the court in some manner.[8]

Some states recognize absolute immunity for lawyers acting as guardians ad litem because of their judicial role.[9]

(g) Although courts undoubtedly will have to carefully apply various federal regulations involving private health records used and disclosed by lawyers, one state

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[8] Virginia LEO 1844 (12/18/08) (explaining that a lawyer acting as a guardian ad litem for a 7-year-old girl (who has asked the lawyer not to disclose her father's abusive behavior -- which the father denies) must balance the duty of confidentiality with his role as a GAL under Virginia Supreme Court Rule 8:6; noting that "lawyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules," and must generally protect the child's confidences; concluding that the GAL's compliance with Supreme Court Rule 8:6 and the Standards governing GALs "may justify the disclosure of confidential information pursuant to Rule 1.6(b)(1)" -- which allows the disclosure of confidences "to comply with law or a court order"; providing an example: "the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian" -- because "the GAL not only serves as the child's advocate but is obliged to identify and recommend the outcome that best serves the child's interests," the GAL "needs to investigate information obtained from and about the child in order to ascertain certain facts," after which the GAL can assess "the risk of probable harm to the child" and then determine "whether the GAL has a duty, as an advocate for the child's best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child"; "[D]isclosure would be permitted in light of the Committee's analysis earlier in this opinion of Rule 1.6(b)(1), where a lawyer can reveal protected information to the extent reasonably necessary to comply with law."); Virginia LEO 1729 (3/26/99) (although lawyers acting as guardians ad litem generally must comply with the ethics rules, "the relationship of the GAL and child is different from the relationship of attorney and client," and the "specific duty of the guardian ad litem should prevail" if there is any conflict with a lawyer's standard ethics responsibility; a guardian ad litem who must testify on a disputed issue of material fact may continue to represent the child despite the witness-advocate rule, because the lawyer's statutory duty to "advise the court" about the child's interest and welfare trumps the witness-advocate rule (which would otherwise prohibit the guardian's representation of the child in the hearing)); Virginia LEO 1725 (4/20/99) (lawyers who serve as guardians ad litem must follow the ethics rules "whether or not an attorney-client relationship exists" with the child, and therefore must obtain consent if the lawyer will simultaneously be representing the Department for Social Services on some matters and acting as guardians ad litem on other unrelated matters; the lawyers need consent because "even where the legal matters are dissimilar, the simultaneous representation of adverse clients is improper unless the clients consent and waive the conflict"; because the children are incapable of giving consent, a court must grant the consent).

[9] Sarkisian v. Benjamin, 820 N.E.2d 263 (Mass. Ct. App. 2005); Bluntt v. O'Connor, 737 N.Y.S.2d 471 (N.Y. App. Div. 2002); Peterson v. Molepske, 580 N.W.2d 289 (Wis. 1998).

court found that a defense law firm had not violated a Minnesota medical record privacy law by showing the plaintiff's medical record to the defendant's expert.[10] Another court was not so generous to a lawyer.[11]

Best Answer

The best answer **(a)** is **YES**; the best answer to **(b)** is **YES**; the best answer to **(c)** is **YES**; the best answer to **(d)** is **YES**; the best answer to **(e)** is **YES**; the best answer to **(f)** is **MAYBE**; and the best answer to **(g)** is **MAYBE**.

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[10] Newman v. Brendel & Zinn, Ltd., 691 N.W.2d 480 (Minn. Ct. App. 2005).

[11] Hageman v. Sw. Gen. Health Ctr., 893 N.E.2d 153 (Ohio 2008) (holding that a lawyer representing a wife in a custody dispute could be sued for breach of privacy by the husband for disclosing the husband's psychiatric records to a government prosecutor).

Aiding and Abetting the Client's Wrongdoing

Hypothetical 28

Your firm's managing partner just appointed you as the firm's first general counsel, and you are trying to determine what sort of liability your firm might face. Although it sounds fairly simple minded, you wonder why lawyers are not automatically sued as "aiders and abettors" every time that a plaintiff sues the lawyer's client for some wrongdoing.

Can a lawyer be sued for aiding and abetting a client's wrongdoing?

YES

Analysis

The ABA Model Rules do not deal with this issue, which involves malpractice more than ethics.

The Restatement generally takes a limited view of lawyers' possible liability for their clients' wrongdoing.

> [T]he civil liability of lawyers is restricted where necessary to facilitate effective advocacy and advice. A lawyer is not liable to a third person merely because the lawyer's client commits a nonintentional tort, even if the tort occurs because of the lawyer's negligent advice to the client . . . . A lawyer's liability for malicious prosecution is limited . . . . Similarly, a privilege often protects lawyers from liability for defamation . . . .

Restatement (Third) of Law Governing Lawyers § 30 cmt. a (2000).

The Restatement deals with lawyers' derivative liability in the criminal context.

> The traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code are relevant factors for the tribunal in assessing the propriety of the lawyer's conduct under the criminal law. In other respects, a lawyer is guilty of an offense for an act committed in the course of

> representing a client to the same extent and on the same basis as would a nonlawyer acting similarly.

Restatement (Third) of Law Governing Lawyers § 8 (2000). An illustration explains how this principle works.

> Knowing that Client would submit a document to a government agency in compliance with a reporting requirement, Lawyer knowingly prepares the document with materially false statements. Client, relying on Lawyer's representations, believes the statements to be true and submits the false document. Client, lacking knowledge, is guilty of no offense. Lawyer, who acted with knowledge and with intent that Client submit a false document, is guilty as a principal for the offense of submitting a false document to a government agency.

Restatement (Third) of Law Governing Lawyers § 8 cmt. d, illus. 1 (2000).

A comment deals with a lawyer's possible role as an accomplice in a client crime.

> [A] lawyer is not an accomplice if the lawyer terminates complicity prior to the commission of the offense and acts so as to negate the effectiveness of the lawyer's former participation in the commission of the offense, gives timely warning to law-enforcement authorities, or otherwise makes proper effort to present the commission of the offense . . . .

Restatement (Third) of Law Governing Lawyers § 8 cmt. e (2000).

Courts engage in the same debate about a lawyer's aiding and abetting liability. Some courts hold that lawyers may be held liable under an aiding and abetting theory.

- See, e.g., Chalpin v. Snyder, No. 1 CA-CV 06-0371, 2008 Ariz. App. LEXIS 156 (Ariz. Ct. App. Oct. 21, 2008) (recognizing a cause of action against a client's lawyer for aiding and abetting the client's misconduct).

Some courts hold that lawyers cannot be held liable for aiding and abetting a client's wrongdoing.

- Art Capital Group, LLC v. Neuhaus, 896 N.Y.S.2d 35, 37 (N.Y. App. Div. 2010) (overturning a lower's courts denial of a motion to dismiss by a lawyer

accused of aiding and abetting a client's improper conduct; "[I]t is recognized that public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients . . . . As to defendant's specific conduct, plaintiffs allege that she gave Krecke and Rose indispensable legal advice and counsel, documented and negotiated loan transactions between their competing entities and plaintiffs' current and prospective clients, and provided legal services to secure office space for Krecke and Rose. . . . [W]e find that plaintiff's causes of action are not viable because all of the aforementioned acts fall completely within the scope of defendant's duties as an attorney. The five quotes from the complaint cited by the dissent do not warrant a contrary conclusion inasmuch as they do not even suggest that defendant acted in any capacity other than as an attorney.").

- Reynolds v. Schrock, 142 P.3d 1062, 1068-69 (Or. 2006) (assessing a claim against a lawyer for aiding and abetting a client's breach of fiduciary duty; recognizing a "qualified privilege" for advisors or agents acting on their client's behalf; "Our tort case law also makes clear, however, that, if a person's conduct as an agent or on behalf of another comes within the scope of a privilege, then the person is not liable to the third party. In this case, we extend those well-recognized principles to a context that we have not previously considered and hold that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party. Accordingly, for a third party to hold a lawyer liable for substantially assisting in a client's breach of fiduciary duty, the third party must prove that the lawyer acted outside the scope of the lawyer-client relationship.").

- Stanziale v. Pepper Hamilton LLP (In re Student Finance Corp.), 335 B.R. 539 (D. Del. 2005) (holding that a company's lawyers may not be held liable for aiding and abetting the directors' and officers' breach of fiduciary duty; applying Pennsylvania law).

Best Answer

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

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Lawyers' Liability for Conspiring with Clients

Hypothetical 29

You are defending a company in a lawsuit accusing it of conspiring with a closely related affiliate. Among other things, you have sought to dismiss the claims by arguing that the company and its affiliate cannot conspire with each other because they are so closely aligned. As you prepare for an argument on your motion, you wonder if the same theory would apply to clients and their lawyers accused of conspiring with one another.

May lawyers be sued for conspiring with their clients to commit an intentional wrongdoing?

MAYBE

Analysis

Courts disagree about this issue.

Some courts recognize that clients and their lawyers can conspire to commit intentional wrongdoing.

- In re Nat'l Century Fin. Enters., Inc., Case No. 2:03-md-1565, 2008 U.S. Dist. LEXIS 39931, at *20, *20-21, *23 (S.D. Ohio May 2, 2008) (holding that a law firm acting as outside counsel of the seller of preferred stock could not be held liable for misrepresentations in the offering documents, because it had only provided the buyer of the preferred stock with an opinion letter on such matters as the seller's corporate existence and power to enter into the stock agreement; "The complaint alleges that National Century violated the Blue Sky law because the offering materials were false and misleading. However, the opinion letter does not warrant that the private placement memoranda, financial statements, and audit reports that National Century and Credit Suisse gave to Pharos would not contain material misrepresentations or omissions of fact. Simply put, Purcell & Scott's opinion letter did not undertake to speak on the veracity of the offering materials Pharos received from National Century and Credit Suisse."; also dismissed plaintiff's negligent representation claim; "The complaint asserts a claim for negligent misrepresentation based on the alleged misrepresentations in the opinion letter. The negligent misrepresentation claim fails for two reasons. First, the opinion letter does not contain a misrepresentation, for the reasons just discussed above in Part III.B.1. Second, Purcell & Scott is entitled to attorney

immunity. 'Under Ohio law, attorneys enjoy immunity from liability to third persons arising from acts performed in good faith on behalf of, and with the knowledge of, their clients.'" (citation omitted); also dismissing the aiding and abetting claim against the law firm; "The complaint does not allege that Purcell & Scott acted with malice. At most, it alleges that Purcell & Scott had knowledge of the misstatements in the offering materials. Even then, the complaint does not contain specific allegations of knowledge but instead generally alleges knowledge based on Purcell & Scott's access to National Century's records, and personnel and its service as counsel in most of National Century's securitization transactions. These allegations do not support an inference that Purcell & Scott acted with an ill will or conscious disregard for Pharos's rights when it drafted the opinion letter."; also dismissed conspiracy and Blue Sky complaints against the law firm).

- Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446 (5th Cir. 2005) (allowing plaintiff tire company to sue lawyers representing a former employee; noting that the lawyers had obtained and then leaked a damaging affidavit from the former employee, causing the plaintiff's stock price to drop; allowing the company to proceed with tortuous interference and conspiracy claims against the lawyer).

- Banco Popular N. Am. v. Gandi, 876 A.2d 253 (N.J. 2005) (holding that a non-client may sue a lawyer for conspiracy to defraud).

- Greenberg Traurig of N.Y., P.C. v. Moody, No. 14-02-00581-CV, 2004 WL 2188088 (Tex. App. Sept. 30, 2004) (acknowledging that Greenberg Traurig could be accused of conspiracy with its client, but reversing what was reported to be a $55,000,000 verdict because the court improperly allowed an expert on legal matters; reported in 20 [Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 508 (Oct. 20, 2004)); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768 (Ill. App. Ct. 2003) ("Illinois courts recognize that claims for conspiracy may be maintained against attorneys' [sic] where there is evidence that the attorneys participated in a conspiracy with their clients"), appeal denied, 807 N.E.2d 982 (Ill. 2004).

On the other hand, some courts have found that clients and their lawyers cannot be found liable for conspiring with one another.

- Panoutsopoulos v. Chambliss, 68 Cal. Rptr. 3d 647 (Cal. Ct. App. 2007) (holding that California law did not allow plaintiff to claim that a law firm and its client conspired to injure plaintiff; noting that California agency law generally did not allow for a conspiracy claim against an agent as long as the agent was acting in that capacity).

- Farese v. Scherer, 342 F.3d 1223, 1232 (11th Cir. 2003) ("We agree with the well-reasoned recent opinion of the Third Circuit and hold that as long as an attorney's conduct falls within the scope of the representation of his client, such conduct is immune from an allegation of a § 1985 conspiracy.").

Best Answer

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

b 1/11

Clients' Vicarious Liability for their Lawyers' Misconduct

Hypothetical 30

You represent a developer in a long-running dispute with an architectural firm which claims that your client owes substantial amounts of money for services the architectural firm allegedly rendered. The architectural firm recently obtained a judgment on one portion of the dispute. Its law firm immediately sent letters to a number of your client's joint venture partners, which caused some of them to abandon their projects with your client. Needless to say, your client has urged you to seek compensation for what you think is tortious interference. You are not sure that the architectural firm's lawyers have the assets or the insurance sufficient to satisfy the judgment you hope to receive from them, so you are considering suing the architectural firm itself -- alleging vicarious liability for its lawyer agent's tortious conduct.

May you sue another law firm's client for the law firm's conduct, alleging vicarious liability?

MAYBE

Analysis

This hypothetical comes from an Illinois Supreme Court case. Horwitz v. Holabird & Root, 816 N.E.2d 272 (Ill. 2004).

In that case, the Appellate Court had ruled that the client could be vicariously liable for its law firm's tortious acts.

In its opinion, the Illinois Supreme Court explained that:

> The courts of our sister states are, however, divided on the issue of imposing vicarious liability for the actions of attorneys. In some jurisdictions, the courts find no vicarious liability [citing cases from New Jersey, California, Georgia, Florida, North Carolina, New York]. Other jurisdictions impose vicariously liability, holding the attorney-client relationship is a principal-agent relationship [citing cases from Oregon, Texas, Arkansas, Indiana, Alaska, Maine].

Id. at 278.

The Illinois Supreme Court eventually sided with the states which generally find no vicarious liability.

> [a]fter careful consideration of this conflicting authority, we conclude that when, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions. . . . Individuals more often than not seek the assistance of an attorney because they are unfamiliar with the law and unable to perform the work themselves. . . . Therefore, an attorney usually pursues a client's legal rights without specific direction from the client, using independent professional judgment to determine the manner and form of the work.

Id. at 278-79.

Thus, the answer to this hypothetical depends on the state's approach to this issue.

In most situations, clients are not liable for their lawyer's misconduct.

- See, e.g., NC-DSH, Inc. v. Garner, 218 P.3d 853, 860, 861, 862 (Nev. 2009) (holding that a defendant could not enforce a settlement entered into by a lawyer who forged his client's signatures and then disappeared with the settlement money; "We recognize the substantial countervailing argument that a client who hires a lawyer establishes an agency relationship and that, ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt. . . . However, courts 'do not treat the attorney-client relationship as they do other agent-principal relationships . . . when the question is whether a settlement agreed to by the attorney binds the client.' Grace M. Giesel, Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship, 86 Neb. L. Rev. 346, 348 (2007). While a lawyer has apparent authority to handle procedural matters for a client, '[m]erely retaining a lawyer does not create apparent authority in the lawyer' to settle his client's case. Restatement (Third) of the Law Governing Lawyers § 27 cmt. d (2000); see id. § 22(1)."; agreeing with the lower court that the lawyer "accomplished his fraud without the express, implied, or apparent authority of his clients."; rejecting the argument by the defendant in the underlying case that the lawyer's clients waited too long to act; "[T]he Garners learned of Davidson's misconduct from the State Bar of Nevada within weeks of the court entering

the stipulation and order of dismissal, yet they waited almost 18 months before filing their NRCP 60(b) motion. During this time, they cooperated with the federal government in its criminal prosecution of Davidson and with the State Bar in its disbarment proceeding against him, and submitted a claim to the Nevada State Bar's Client Security Fund, for which they received $6,834.56."; finding that there is "'no time limitation'" for seeking relief from a judgment based on fraud upon a court (citation omitted); "[T]he district court did not err in failing to deny the Garners relief based on the 18 months that elapsed between entry of the judgment and the NRCP 60(b) motion.").

Best Answer

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

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