LITIGATION ETHICS: PART I (COMMUNICATIONS)

Hypotheticals and Analyses*

Thomas E. Spahn
McGuireWoods LLP

* 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.

TABLE OF CONTENTS

Hypo No.	*Description*	*Page*
	Lawyers' Communications about Cases	
1	Basic Principles	1
2	Defining the Limits	10
3	Application to Prosecutors	19
	Lawyers' Communications about Judges	
4	Basic Principles	26
5	Defining the Limits	58
	Ex Parte Communications: Basic Principles	
6	Ex Parte Communications with Represented Persons: Basic Principle	60
7	Application Only to Lawyers "Representing" a Client: Lawyers Acting in Other Capacities	61
8	Application to Lawyers Communicating with Those with Whom the Lawyer Had a Previous Relationship	66
9	Application to Lawyers Representing Themselves Pro Se or Acting as Clients	68
10	Application to Lawyers Giving "Second Opinions"	75
11	Definition of "Matter"	78
12	Required Level of Knowledge that the Third Person Has a Lawyer	85
13	When Does a "Representation" Begin?	89
14	When Does a "Representation" End?	96
15	Meaning of "Communication"	99

Hypo No.	Description	Page

Ex Parte Communications: Application

16	Application Outside Litigation and Adversarial Settings	102
17	Irrelevance of the Adversary's Consent	105
18	Using "Reply to All" Function	113
19	"Authorized by Law" Exception	116
20	Clients' Direct Communication with Represented Persons	124
21	Lawyers' Participation in Clients' Communications	126
22	Lawyers' Participation in Other Lawyers' Communications	139
23	Ex Parte Communications with Government Employees	142
24	Application to Prosecutors	151
25	Limitations on the Substance of Permitted Ex Parte Communications	160

Ex Parte Communications: Application in the Corporate Setting

26	Ex Parte Communications with a Corporate Adversary's Employees	165
27	Applying the "Regularly Consults" Standard	188
28	Ex Parte Communications with a Corporate Adversary's Former Employees	190
29	Ex Parte Communications with a Corporate Adversary's In-House Lawyer	203
30	Application Only to Lawyers "Representing" a Client: Lawyers Playing Nonlegal Roles in Corporations	208

Ex Parte Communications: Defensive Measures

31	Claiming or Establishing an Attorney-Client Relationship	210
32	Request to Avoid Ex Parte Communications	217

Hypo No.	*Description*	*Page*

Threatening Adversaries

33	Threatening Civil Litigation	224
34	Threatening Criminal Charges	225
35	Presenting Criminal Charges	233
36	Alluding to Criminal Charges	236
37	Threatening Disciplinary Charges	240
38	Dealing with an Adversary's Ethics Violation	243

Basic Principles

Hypothetical 1

You occasionally have lunch with your favorite law school professor, and enjoy a vigorous "give and take" on abstract legal issues that you never face in your everyday practice. Yesterday you spent the entire lunch discussing whether lawyers lose their First Amendment rights when they join the profession.

Should there be any limits on lawyers' public communications about matters they are handling (other than their duty of confidentiality to clients, duty to obey court orders, avoiding torts such as defamation, etc.)?

YES

Analysis

Surprisingly, the ABA did not wrestle with the issue of lawyers' public communications until the 1960s. The l964 Warren Commission investigating President Kennedy's assassination recommended that the organized bar address this issue. The move gained another impetus in 1966, when the United States Supreme Court reversed a criminal conviction because of prejudicial pre-trial publicity. Sheppard v. Maxwell, 384 U.S. 333 (1966).

ABA Model Rules

The ABA finally adopted a rule in 1968. ABA Model Rule 3.6 (entitled "Trial Publicity") starts with a fairly broad prohibition.

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

ABA Model Rule 3.6(a). The ABA adopted the "substantial likelihood of material prejudice" standard after the United States Supreme Court used that formulation in Gentile v. State Bar, 501 U.S. 1030, 1075 (1991).

ABA Model Rule 3.6 cmt. [1] acknowledges in its very first sentence that "[i]t is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression." As Comment [1] explains, allowing unfettered public communications in connection with trials would bypass such important concepts as the "exclusionary rules of evidence." On the other hand, there are "vital social interests" served by the "free dissemination of information about events having legal consequences and about legal proceedings themselves." Thus, the limitations only apply if the communications will be disseminated to the public, and might prejudice the proceeding.

ABA Model Rule 3.6 then lists what amount to "safe harbor" statements that lawyers may publicly disseminate.

> Notwithstanding paragraph (a), a lawyer may state:
>
> > (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> >
> > (2) information contained in a public record;
> >
> > (3) that an investigation of a matter is in progress;
> >
> > (4) the scheduling or result of any step in litigation;
> >
> > (5) a request for assistance in obtaining evidence and information necessary thereto;
> >
> > (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that

> there exists the likelihood of substantial harm to an individual or to the public interest; and
>
> (7) in a criminal case, in addition to subparagraphs (1) through (6):
>
> > (i) the identity, residence, occupation and family status of the accused;
> >
> > (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
> >
> > (iii) the fact, time and place of arrest; and
> >
> > (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

ABA Model Rule 3.6(b).

Comment [5] contains an entirely separate list of public statements that would generally be <u>prohibited</u> under the ABA Model Rules standard.

> There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> > (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
> >
> > (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
> >
> > (3) the performance or results of any examination or test or the refusal or failure of a person to submit to

> an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

ABA Model Rule 3.6 cmt. [5].

Thus, the ABA Model Rules' approach to this issue involves a unique mix of: a general prohibition; a specific list of generally acceptable statements; and a specific list of generally unacceptable statements.

Restatement

The Restatement articulates the same basic prohibition.

> (1) In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness in the proceeding.

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

The Restatement explains the competing public policy principles in much the same way as the ABA Model Rules.

> Restrictions on the out-of-court speech of advocates seek to balance three interests. First, the public and the media have an interest in access to facts and opinions about litigation because litigation has important public dimensions. Second, litigants may have an interest in placing a legal dispute before the public or in countering adverse publicity about the matter, and their lawyers may feel a corresponding duty to further the client's goals through contact with the media. Third, the public and opposing parties have an interest in ensuring that the process of adjudication will not be distorted by statements carried in the media, particularly in criminal cases. The free-expression rights of advocates, because of their role in the ongoing litigation, are not as extensive as those of either nonlawyers or lawyers not serving as advocates in the proceeding.

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

The Restatement also provides some insight into how court or bar disciplinary authority could apply the prohibition.

> Subsection (1) prohibits trial comment only in circumstances in which the lawyer's statement entails a substantial likelihood of material prejudice, that is, where lay factfinders or a witness would likely learn of the statement and be influenced in an in inappropriate way. If the same information is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice. For example, if the lawyer for a criminal defendant simply repeats to the media outside the courthouse what the lawyer said before a jury, the lawyer's out-of-court statement cannot be said to have caused prejudice. However, the fact that information is available from some other source is not controlling; the information must be both available and likely in the circumstances to be reported by the media.

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

State Approaches

Every state has adopted some limitation on lawyers' public communications. As in so many other areas, states often adopt their own variation on the ABA Model Rules

approach. A few examples suffice to show the great variation among the states' positions.

For instance, Florida follows a dramatically different approach -- applying the prohibition to lawyers who are not working on the matter.

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

Florida Rule 4-3.6(a). The Florida rules do not list either the "safe harbor" or the prohibited types of statements.

Virginia also applies a different standard.

> A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

Virginia Rule 3.6(a) (emphases added).[1] Virginia does not have any specific list of "safe harbor" or prejudicial statements.

[1] Virginia did not take this approach voluntarily. In 1979, the Fourth Circuit found the then-current Virginia publicity rule unconstitutional. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). As Virginia's Committee Commentary explains, "one lesson of Hirschkop v. Snead . . . is that a rule, such as the ABA Model Rule, which sets forth a specific list of prohibited statements by lawyers in connection with a trial, is constitutionally suspect." Virginia Rule 3.6, Comm. Commentary.

Courts' Gag Orders

Courts fashioning traditional gag orders necessarily balance the same competing interests.

- United States v. McGregor, 838 F. Supp. 2d 1256, 1267 (M.D. Ala. 2012) (declining to enter a gag order, but reminding the lawyers of their ethical duty not to make certain public statements; "The court declined to grant the government's proposed gag order because it was not the least restrictive alternative and it would not have been fully effective in curbing trial publicity. Instead, the court adopted a middle-ground approach: instructing the attorneys to follow the guidelines embodied in Alabama Rule of Professional Conduct 3.6. The court emphasized that comments about a witness's credibility would be disfavored and presumptively prejudicial."; "A gag order is a prior restraint on speech. As such, the court engaged in a rigorous First Amendment inquiry. Because the government's proposed gag order targeted only the attorneys and not the defendants or the media, the court had to determine whether extrajudicial comments created a substantial likelihood of material prejudice to the proceedings. Furthermore, a gag order had to be narrowly tailored and could only be granted if less burdensome alternatives were ineffective."; "The court declined to impose the government's proposed gag order. The court, however, attempted to strike a balance between defense counsel's First Amendment rights and the government's interest in a fair trial."; "Accordingly, rather than granting the government's motion for a gag order . . . , the court employed the less restrictive alternative of requiring the attorneys and their trial teams to comply with Alabama Rule of Professional Conduct 3.6. The court found that the Rule 3.6 alternative worked well.").

Courts' Other Restrictions

In addition to wrestling with traditional gag orders, some courts have addressed other possible restrictions on lawyers' public statements that might impact ongoing litigation.

Somewhat surprisingly, the Eastern District of Michigan enjoined well-known Michigan lawyer Geoffrey Fieger from publishing certain advertisements before his criminal trial on alleged campaign contribution violations (on which he was ultimately acquitted).

- United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008) (addressing Fieger's advertisements which, among other things, compared the Bush Administration to the Nazi party; noting that the advertisements began to appear before Fieger's criminal trial on alleged campaign contribution violations involving his support for Democratic primary candidate John Edwards;"The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.")

Not surprisingly, new forms of communications such as social media increase the stakes in such judicial scrutiny.

- Richard Griffith, A Double-Edged Sword For Defense Counsel, Law360, July 31, 2012) ("If you have been following the national news, you know that Florida prosecutors have charged George Zimmerman, a Florida neighborhood watch volunteer, with second-degree murder in the shooting death of an unarmed teenager, Trayvon Martin. You may have also seen images of the injuries Zimmerman purportedly received during his struggle with Martin prior to the shooting, and you may have heard conflicting arguments and conclusions as to whether the images are consistent with Zimmerman's claim of self-defense. What you may not know, however, is that Zimmerman's counsel, Mark O'Mara, is engaged in a social media campaign to manage a flood of incoming inquiries and to provide real-time damage control for negative reports and publicity against his client. As part of that effort, O'Mara has launched Facebook and Twitter accounts and created a blog about the case. While the use of social media may provide additional information about the defendant and his side of the case and assist with damage control, O'Mara's approach also creates risks and obligations. The risks include violating restrictions placed on attorneys related to commenting on an active legal matter, potentially in violation of state ethics rules. In addition, O'Mara risks tainting the jury pool (although this could be a calculated risk if O'Mara believes the jury pool is already contaminated against his client to a point where he could not reasonably expect an unbiased jury of his peers). Further, while one of O'Mara's goals may be to manage or balance adverse publicity, his social media efforts may actually generate new evidence in the case, some of which could be damaging to Zimmerman's defense.").

In 2013, a court declined to order a lawyer to remove references on his website to avoid the possibility that jurors might find them during some improper internet search.

- Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 157, 165 (Cal. Ct. App. 2013) (holding that a court could not order a lawyer handling the case before the court to remove references on his website; "An attorney's Web site advertised her success in two cases raising issues similar to those she was about to try here. The trial court admonished the jury not to 'Google' the attorneys or to read any articles about the case or anyone involved in it. Concerned that a juror might ignore these admonitions, the court ordered the attorney to remove for duration of trial two pages from her website discussing the similar cases. We conclude this was an unlawful prior restraint on the attorney's free speech rights under the First Amendment. Whether analyzed under the strict scrutiny standard or the lesser standard for commercial speech, the order was more extensive than necessary to advance the competing public interest in assuring a fair trial. Juror admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case."; "The trial court properly admonished the jurors not to Google the attorneys and also instructed them not to conduct independent research. We accept that jurors will obey such admonitions. . . . It is a belief necessary to maintain some balance with the greater mandate that speech shall be free and unfettered. If a juror ignored these admonitions, the court had tools at its disposal to address the issue. It did not, however, have authority to impose, as a prophylactic measure, an order requiring Farrise [lawyer] to remove pages from her law firm website to ensure they would be inaccessible to a disobedient juror. Notwithstanding the good faith efforts of a concerned jurist, the order went too far.").

Best Answer

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

n 12/11; b 1/13; B 1/15

Defining the Limits

Hypothetical 2

Your state's chief justice just appointed you to a commission reviewing your state's ethics rules provision dealing with lawyers' public communications. You wrestle with some basic issues as you prepare for the commission's first meeting.

(a) Should limits on lawyers' public communications about their cases apply to all lawyers, (rather than just lawyers engaged in litigation)?

NO

(b) Should limits on lawyers' public communications about their cases apply only to criminal cases?

NO

(c) Should limits on lawyers' public communications about their cases apply only to jury cases?

NO

(d) Should limits on lawyers' public communications about their cases apply only to pending cases?

YES

(e) Even if it would otherwise violate the limit on lawyers' public communications, should lawyers be permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES

Analysis

(a) The ABA Model Rules apply the prohibition to a lawyer who "is participating or has participated in the investigation or litigation of a matter." ABA Model

Rule 3.6(a). Although the term "investigation" extends the prohibition beyond ongoing litigation, the rule clearly focuses on lawyers engaged in litigation, or the preparation for litigation.

(b) Interestingly, the original ABA Code applied the limit on lawyers' public communication only to criminal matters. ABA Model Code of Prof'l Responsibility DR 7-107(A) (1980).

However, neither ABA Model Rule 3.6 nor the Restatement (Third) of Law Governing Lawyers § 109 (2000) limits the general prohibition on lawyers' public communications to criminal matters.

A comment to ABA Model Rule 3.6 discusses the difference between criminal and civil cases.

> Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

ABA Model Rule 3.6 cmt. [6].

Nearly all of the case law involves criminal rather than civil cases, and most criminal cases involve statements by prosecutors rather than defense lawyers. However, some criminal defense lawyers have also faced sanctions for making public statements or otherwise disclosing potentially litigation-tainting information.

- In re Gilsdorf, No. 2012PR00006, Hearing Board of Ill. Attorney Registration & Disciplinary Comm'n (June 4, 2013) ("This matter arises out of the Administrator's two-count Complaint, filed on February 6, 2012, as amended by the Administrator's motions on April 5, 2012, and September 28, 2012.

The charges of misconduct arose out of the Respondent knowingly posting on an Internet site, and showing to others, a DVD video he received from the state's attorney while representing a criminal defendant. The video showed the undercover drug transaction between Respondent's client and a confidential police source. The Respondent entitled the video 'Cops and Task Force Planting Drugs,' which was false. By posting the video while his client's criminal case was pending, Respondent intended to persuade residents of the county that the police or other government officials acted improperly in the prosecution of his client. The Hearing Board found that the Respondent engaged in the misconduct charged in both counts. Specifically, he revealed information relating to the representation of a client without the informed consent of his client and without the disclosure being impliedly authorized in order to carry out the representation; failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished; made extrajudicial statements that the lawyer reasonably knows will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding; engaged in conduct prejudicial to the administration of justice; and engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Respondent be suspended from the practice of law for a period of five (5) months.").

- In re Litz, 721 N.E.2d 258, 259-60 (Ind. 1999) (publicly reprimanding a criminal defense lawyer was publicly reprimanded for writing a letter to the editor containing such improper information as his client's passing a lie detector test, his opinion that his client was innocent, and his characterization of the prosecution's decision to retry the case against his client as "abominable.").

Courts occasionally address the application of these rules to lawyers involved in civil cases.

In 2011, the Massachusetts Supreme Court held that a law firm representing a malpractice client against another law firm had not violated Rule 3.6.

- PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 320, 321 (Mass. 2011) (finding that a lawyer from Bickel & Brewer had not violated Mass. Rule 3.6 by publicly commenting on a malpractice case that Bickel & Brewer was pursuing against Seyfarth Shaw; concluding that the Bickel & Brewer's public statements essentially tracked the complaint; "A review of the record establishes that Brewer's remark quoted in the National Law Journal falls well within these two exceptions. Brewer's statement that Seyfarth Shaw, 'in an

> attempt to relieve itself of its responsibility to . . . Converge [defunct company whose assets were bought by plaintiff],' filed court papers 'that not only misstated the facts, but stated the facts in a way' that supported Costigan's [former Converge employee who had won a judgement against it] notion of PCG's successor liability, in large measure tracks directly the allegations of PCG's complaint."; "To the extent the complaint itself does not allege that Seyfarth Shaw's motion to withdraw 'misstated' facts, the public court filings in the Norfolk County action do reflect the misstatement to which Brewer referred. Those court filings are matters of 'public record.'" (citation omitted); rejecting Seyfarth Shaw's efforts to prevent a Bickel & Brewer lawyer from being admitted pro hac vice).

In one widely-publicized opinion, a Rhode Island court fined Rhode Island's Attorney General for criticizing several lead paint manufacturers during a civil case.

- Eric Tucker, Court papers: AG held in contempt for comments in lead paint case, Associated Press (May 5, 2006 10:44PM) ("A judge fined [Rhode Island] Attorney General Patrick Lynch $5,000 and held him in civil contempt after he publicly accused former lead paint makers of twisting the facts during the state's landmark lawsuit against the companies, according to newly unsealed court documents. In a ruling dated Dec. 6, Superior Court Judge Michael Silverstein said Lynch's remarks violated Rhode Island rules of professional conduct regulating what lawyers may say publicly about cases. The judge weeks earlier had issued a written ruling ordering Lynch to comply with those rules. . . . The first contempt finding came after Lynch referred to the companies as 'those who would spin and twist the facts' during comments made outside court, according to a Nov. 17 article in The Providence Journal. Lynch made the comment after Silverstein rejected mistrial motions filed by the four defendants a few weeks after the trial began. After the Nov. 17 article, Millennium Holdings filed a motion to have Lynch held in contempt, arguing that Lynch's comments represented a 'direct and unambiguous assault upon the very character and credibility of the defendants' and the words 'spin' and 'twist' were prejudicial. The state argued against the fine, saying that the companies were focused on a 'half sentence' in a newspaper article and that it was not even clear to whom Lynch was referring in his remark. The state also said Lynch was responding to an accusatory remark allegedly made by a spokesperson for the companies.").

Several years earlier, the Iowa Supreme Court dealt with a civil defense lawyer's letter to the editor about a case brought against an insurance agency that the lawyer represented. Iowa Supreme Court Bd. of Prof'l Ethics v. Visser, 629 N.W.2d 376 (Iowa

2001). The letter initially summarized his client's defense, criticized the lawsuit and indicated that he and his client expected the client would be exonerated "from the claims of this unhappy and confused former employee." Id. at 379. The State Disciplinary Board recommended a public reprimand, but the Iowa Supreme Court found no violation, based in large part on the absence of any evidence that the letter to the editor would cause prejudice.

> In applying the rule as so interpreted, we look to the facts surrounding the statements at the time they were made, but we also look at the ex post evidence that relates to the likelihood of prejudice. See Gentile, 501 U.S. at 1047, 111 S. Ct. at 2730, 115 L. Ed. 2d at 905 (plurality opinion). The newspaper article spawned by the respondent's letter was published in Waterloo, which is over fifty miles from Cedar Rapids, where the trial was held. This article, which was the only one published in connection with the case, was published on November 6, 1998 -- almost two years before the trial. None of the jurors had even heard of the parties. Patrick Roby, an attorney testifying for Visser before the commission, said he did not believe the Courier article had any impact on the trial, stating "I don't know where you'd find a Waterloo Courier in Cedar Rapids."

Id. at 382. The Iowa Supreme Court found that Visser had violated the general prohibition on deceptive statements by incorrectly stating in the letter to the editor that "'one judge has already determined that [the former employee] is unlikely to succeed on the merits of his far-fetched claims.'" Id. at 383. The court found this statement deceptive, because the ruling was in the injunction phase of litigation and the judge expressed no opinion on the merits of the lawsuit in connection with which Visser sent the letter. The Supreme Court admonished Visser for violating the anti-deception rule.

More recently, a named partner in the well-known litigation firm Quinn Emmanuel faced judicial scrutiny after publicly disclosing evidence that the trial court had excluded from the widely-publicized litigation between Apple and Samsung.

- Ryan Davis, Samsung Attorney Defends Release Of Banned Apple Trial Evidence, Law360, Aug. 1, 2012 ("Quinn Emanuel managing partner John Quinn on Wednesday defended his decision as Samsung Electronics Company Ltd's attorney to publicly release evidence that had been excluded from the company's patent trial with Apple Inc., telling the judge irritated by the move that the release was protected by the First Amendment."; "As the trial got underway Tuesday, United States District Judge Lucy Koh refused to allow evidence that Samsung says proves it could not have copied the design for the iPhone, as Apple alleges it did, because it had a similar phone in the works before the Apple device was released. Later in the day, Samsung sent the evidence to media outlets and issued a statement complaining about its exclusion."; "The statement angered Judge Koh, who demanded in court that Quinn, of Quinn Emanuel Urquhart & Sullivan LLP, explain who drafted and authorized it."; "In a declaration filed Wednesday, Quinn said that he authorized the release and maintained that he had done nothing wrong, since all the evidence was available in publicly filed court documents. Moreover, statements to the press by attorneys are protected free speech, he said."; "In an order on Sunday, Judge Koh excluded both pieces of evidence, ruling that their disclosure was untimely. In court on Tuesday, Quinn implored the judge to reconsider, arguing that the exclusion threatened the integrity of the trial."; "'In 36 years, I've never begged the court. I'm begging the court now,' he said."; "Judge Koh refused to admit the evidence, telling Quinn, 'Please don't make me sanction you. I want you to sit down, please.'"; "Later in the day, Samsung sent the excluded evidence to media outlets, along with a statement arguing that Judge Koh's decision to keep it out means that Samsung would 'not allowed to tell the jury the full story.'"; "'The excluded evidence would have established beyond doubt that Samsung did not copy the iPhone design. Fundamental fairness requires that the jury decide the case based on all the evidence,' the statement said."; "Apple's attorneys immediately complained to Judge Koh that Samsung's release could influence the jurors. The judge told Samsung's attorneys in court that she wanted to know who authorized the release."; referring to the Declaration of John B. Quinn, which stated as follows: "Samsung's brief statement and transmission of public materials in response to press inquiries was not motivated by or designed to influence jurors. The members of the jury had already been selected at the time of the statement and the transmission of these public exhibits, and had been specifically instructed not to ready any form of media relating to this case. The information provided therefore was not intended to, nor could it, 'have a substantial likelihood of material

> prejudicing an adjudicative proceeding.' See Cal. R. Prof. Res. 5-120(A)"; "[E]ven courts that have chosen to restrict the parties' communications with the public have recognized that '[a]fter the jury is selected in this case, any serious and imminent threat to the administration of justice is limited' because 'there is an "almost invariable assumption of the law that jurors will follow their instructions."'").

The court ultimately declined to sanction Quinn.

(c) Neither the ABA nor the Restatement limits the prohibition to jury trials.

ABA Model Rule 3.6 cmt. [1] explains that some restrictions are justified, "particularly where trial by jury is involved." ABA Model Rule 3.6 cmt. [6] acknowledges that "[c]riminal jury trials will be most sensitive to extrajudicial speech. . . . Non-jury hearings and arbitration proceedings may be even less affected."

The Restatement also provides some guidance.

> There may be a likelihood of prejudice even if the tribunal can sequester the jury because sequestration may be imposed too late and, in any event, inflicts hardship on members of a jury. Taint of a lay jury is of most concern prior to trial, when publicity will reach the population from which the jury will be called. When a statement is made after a jury has rendered a decision that is not set aside, taint is unlikely, regardless of the nature of the statement. Additional considerations of timing may be relevant. For example, a statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or ongoing proceeding.

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

(d) The ABA, the Restatement and every state impose limits only if the public communications could affect a proceeding. Thus, any limit by definition applies only before the proceeding. The possibility of retrial, remand, related proceedings, etc., obviously might affect the limit's applicability in a particular matter.

(e) The United States Supreme Court's seminal decision in Gentile v. State Bar, 501 U.S. 1030 (1991) involved a criminal defense lawyer attempting to rebut statements that others had made about his client.

Three years later, the ABA added what amounts to a self-defense exception.

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

ABA Model Rule 3.6(c).

Comment [7] explains this exception.

> Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

ABA Model Rule 3.6(c) cmt. [7].

The Restatement includes a similar exception, as the second sentence in the general rule.

> However, a lawyer may in any event make a statement that is reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer's client.

Restatement (Third) of Law Governing Lawyers § 109(1) (2000).

Best Answer

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

n 12/11; b 1/13; B 1/15

Application to Prosecutors

Hypothetical 3

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

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

YES

Analysis

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

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

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

> The prosecutor in a criminal case shall: . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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

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

ABA Model Rule 3.8 cmt. [5].

The Restatement also has its own rule directed to prosecutors.

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

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

> Lawyers who serve as prosecutors or otherwise as government lawyers have significantly diminished free-expression rights to comment publicly on matters in which they are officially involved as advocates. Accordingly, prohibitions against pretrial and trial comment by such lawyers can be more extensive. When the position of the governmental lawyer is filled by popular election, restriction may be particularly necessary to prevent improper extrajudicial comment made for vote-getting purposes. In all events, prosecutors must observe the heightened limitations on extrajudicial comment stated in Subsection (2).

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

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

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

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

- In re Brizzi, 962 N.E.2d 1240, 1249 (Ind. 2012) (publicly reprimanding a prosecutor for his public comment; "Some of Respondent's statements,

however, fall well outside even these parameters, including the statements that Respondent would not trade all the money and drugs in the world for the life of one person, let alone seven, that Turner deserved the ultimate penalty for this crime, that the evidence was overwhelming, and that it would be a travesty not to seek the death penalty. We conclude that when these statements were made, Respondent knew or reasonably should have known that they would have a substantial likelihood of (a) materially prejudicing an adjudicative proceeding in the matter and (b) heightening public condemnation of the accused, and thus violated Professional Conduct Rules 3.6(a) and 3.8(f).").

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

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

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

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

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

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

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

- Virginia LEO 1768 (11/26/02) (nothing in the general provisions governing lawyer communications or the specific provisions governing prosecutors' statements prohibits a prosecutor from stating in open court before a criminal defendant and the defendant's lawyer that the defendant will face a jury trial under certain circumstances; in that jurisdiction, it is "commonly known" that juries impose longer sentences than judges).

- Virginia LEO 1594 (6/14/94) (determining if a Commonwealth's Attorney's statements to a newspaper reporter about a pending case constitute a danger of interfering with the fairness of a trial by jury raises a legal question beyond the Bar's jurisdiction; if a "finder of fact" ultimately determines that the

statements did constitute such a danger, the "fact that the matter was not ultimately tried by a jury is not dispositive").

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

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

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

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

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

> 23. Between March 27 and March 31, 2006, Nifong made the following statements to a reporter for NBC 17 TV News: "The information that I have does lead me to conclude that a rape did occur"; "I'm making a statement to the Durham community and, as a citizen of Durham, I am making a statement for the Durham community. This is not the kind of activity we condone, and it must be dealt with quickly and harshly"; "The circumstances of the rape indicated a deep racial motivation for some of the things that were done. It makes a crime that is by its nature one of the

> most offensive and invasive even more so"; and "This is not a case of people drinking and it getting out of hand from that. This is something much, much beyond that."
>
> . . . .
>
> 26. Between March 27 and March 31, 2006, Nifong made the following statements to a reporter for MSNBC: "There is evidence of trauma in the victim's vaginal area that was noted when she was examined by a nurse at the hospital"; "her general demeanor was suggested-suggestive of the fact that she had been through a traumatic situation"; "I am convinced there was a rape, yes, sir"; and "The circumstances of the case are not suggestive of the alternate explanation that has been suggested by some of the members of the situation."
>
> 27. Between March 27 and March 31, 2006, Nifong stated to a reporter for the Raleigh News and Observer newspaper, "I am satisfied that she was sexually assaulted at this residence."
>
> . . . .
>
> 33. Between March 27 and March 31, 2006, Nifong stated to a reporter for WRAL TV News, "What happened here was one of the worst things that's happened since I have become district attorney" and "[w]hen I look at what happened, I was appalled. I think that most people in this community are appalled."

Id. (emphases added).

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

---

[1] Abdon M. Pallasch, "Mikva Criticizes United States Attorney's Comments on Ex-Governor Blagojevich," Chicago Sun-Times, July 30, 2009 ("Speaking to 200 lawyers from around the country Thursday, retired appellate Judge Abner Mikva criticized U.S. Attorney Patrick Fitzgerald for showing a bit too much enthusiasm at a news conferences announcing charges against former Governor Rod Blagojevich. 'I certainly don't like the prosecutor coming out and trying his case [in the media] and possibly tainting the jury pool with a big press conference announcing he has indicted so-and-so, or, in Blagojevich's case, has arrested so-and-so -- he hadn't even reached an indictment yet,' Mikva said at the

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

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

Best Answer

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

n 12/11; b 1/13, B 1/15

American Bar Association convention. 'The argument is made by some prosecutors that this is a part of a public information factor of a prosecutor's job, and they have to do it. That's nonsense.' Fitzgerald gained a reputation during his first seven years as United States attorney for avoiding colorful language at news conferences and refusing to entertain questions that fell outside 'the four corners of the indictment.' But when he arrested Blagojevich in December, Fitzgerald said Blagojevich 'has taken us to a truly new low.' He said Blagojevich's alleged shaking down of potential appointees to the United States Senate for campaign contributions 'would make Lincoln roll over in his grave.' Mikva said that hyperbole crossed the line. 'I suppose prosecutors have first amendment rights, but . . . somehow there's something wrong and inconsistent with a prosecutor who is supposed to try that case in court and is supposed to be the public persona [of justice] announcing to the world that you've got this guy dead-to-rights and he should go to jail for a long time,' Mikva said.").

Basic Principles

Hypothetical 4

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

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

NO

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

NO

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

MAYBE

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

NO (PROBABLY)

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

NO

Analysis

Introduction

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

- See, e.g., Conservatives, Liberals, Media Advocates Rally Behind Man Jailed For Criticizing Indiana Judge, FoxNews.com, Mar. 3, 2013 ("A group of free-speech advocates is rallying behind an Indiana inmate serving two years for

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

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

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

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

ABA Model Rule 8.2(a) (emphasis added). Interestingly, none of the comments to ABA Model Rule 8.2 actually discuss this black-letter rule. Instead, the first two of the three comments to this Rule deal with judges running for election, and the third comment encourages lawyers to defend unjustly criticized judges.

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

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

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

The Restatement follows the same basic formulation.

> A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or integrity of an incumbent of a judicial office or a candidate for election to such an office.

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

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

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

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

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

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

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where

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

- Smith v. Pace, 313 S.W.3d 124, 126-27 (Mo. 2010) (reversing a jury's conviction of a lawyer for a criminal contempt resulting from a lawyer's filing of a pleading critical of the presiding judge at the trial court; explaining the factual background; "Smith was prosecuted for criminal contempt of court for strong words he used in petitioning the court of appeals for a writ seeking to quash a subpoena issued for a grand jury in Douglas County. Referring to the prosecuting attorney and the judge overseeing the grand jury, Smith wrote: 'Their participating in the convening, overseeing, and handling the [sic] proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so.'"; holding that "[w]ith respect to lawyers, however, it is not nearly as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide if a lawyer should be disciplined for his or her speech."; "Since Gentile [Gentile v. State, 501 U.S. 1030 (1991)], numerous state courts have considered the regulation of lawyer speech. Almost all of these cases, however, have involved situations in which a lawyer is disciplined under his or her state's ethics rules."; "In any event, cases involving lawyers' statements require some knowledge of falsity or, at the very least, a reckless disregard for whether the false statement was true or false. The disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or

falsity of the lawyer's statements. Monetary sanctions pursuant to Rule 55.03(c) rather than incarceration also may be more suitable." (footnote omitted); finding that the jury was not properly instructed, because the instructions did not require a mental state; "There can be no doubt that the First Amendment protects truthful statements made in judicial proceedings. It is essential, therefore, to prove that the lawyer's statements were false and that he either knew statements were false or that he acted with reckless disregard of whether these statements were true or false. In this case, there was no mental state (mens rea) requirement in the jury instruction. The instruction did not require the jury to find that Smith knew his statements were false or that Smith showed reckless disregard for the truth. The only contested issue the instruction asked the jury to find was whether Smith's written statements to the court of appeals 'degraded and made impotent the authority of the Circuit Court of Douglas County, Associate Circuit Division and impeded and embarrassed the administration of justice.'" (footnote omitted)).

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

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

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

- Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001), cert. denied, 535 U.S. 930 (2002) ("Although the language of rule 4-8.2(a) closely tracks the subjective "actual malice" standard of New York Times, following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions. The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.").

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

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1014, 1016 (Wyo. 2009) (explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re

Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

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

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

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

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

Decisions Punishing Lawyers for Criticizing Judges

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

- Lawrence Buser, Memphis Lawyer Vows To Fight 60-Day Suspension For Criticizing Judge, Commercial Appeal, Jan. 6, 2013 ("Few colleagues have ever accused veteran Memphis lawyer R. Sadler Bailey of being subtle, including the three-member disciplinary panel that recently recommended he be suspended for 60 days."; "The suspension, which Bailey plans to appeal, stemmed from the 'disrespect and sarcasm' in comments he made to Circuit Court Judge Karen Williams during a medical malpractice trial in 2008 that the panel described as 'contentious, combative and protracted.'"; "Bailey called opposing counsel a liar in court and told Williams she might 'set a world record for error' in her rulings."; "'The primary issue before this panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the judge during open court,' said the opinion of the Tennessee Board of Professional

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

Responsibility panel."; "'We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney's client may be, or how poorly the judge may be performing or how difficult or unethical the adversary counsel may be. . . . Simply abusing or insulting the court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.'").

- Disciplinary Counsel v. Shimko, 983 N.E.2d 1300, 1302, 1303, 1303-04, 1304, 1305, 1306, 1307, 1309 (Ohio 2012) (in a 4-3 decision, suspending a lawyer for one year based on the lawyer's criticism of a judge, but staying the suspension; explaining that the lawyer Shimko made the following derogatory comment about the trial judge in the courtroom; "'Mr. Shimko: Well, Your Honor, I think we have all avoided speaking about the 400-pound gorilla elephant that's in the room. And I still must go on the record to say that the Angelini Defendants have no confidence that they can obtain a fair trial in this case.'"; "'Mr. Shimko: Unless they call them in their direct case-in-chief, and that's what they did. And I'm entitled to cross-examine in his case-in-chief, Your Honor. The Court: I appreciate your position. Mr. Shimko: Don't appreciate yours.'"; also explaining that Shimko made the following statements in briefs: "'When the trial court realized that the Answers to the Interrogatories mandated a judgment in favor of Jeffrey Angelini and against First Federal, the trial court's bias once again surfaced and he contrived a means to find that the jury was now somehow confused, even though they had followed his instructions to the letter. The court's ruling, motivated by its own agenda, was nothing but an abuse of discretion. Throughout the trial, the trial judge was so vindictive in his attitude toward appellant's counsel that he became an advocate for First Federal. In short, the trial judge was trying First Federal's counsel's case for him.'"; "'The absurdity of the trial court's conduct in this instance ought to underscore the whimsical lengths to which it was willing to go to deny Jeffrey Angelini his verdict. In fact, the trial court felt that its contention that the jury was confused was so thin that it had to resort to manufacturing allegations of attorney misconduct to obscure his own abuse of discretion. When the trial court realized that the jury had returned a verdict for Jeffrey Angelini, he arbitrarily disregarded the protocol he had originally adopted, and fabricated allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct.'"; explaining that the lawyer defended himself by arguing that he believed his statements to be true; "Shimko does not deny writing any of the above comments in his briefs or affidavits. He indicates that he believed them to be true. He denies that he intended them to impugn Judge Markus's integrity and claims that to find a violation of Prof. Cond. R. 8.2(a) and 8.4(h) would chill the right of future litigants to file affidavits of bias. Shimko argues that he had a 'firmly held belief that Judge Markus violated his duty as a judge and that Shimko had a right to complain about the conduct of Judge Markus. He refers to Gardner [Disciplinary Counsel v. Gardner, 793 N.E. 2d 425 (Ohio 2003)], which cited

with approval the rationale from courts of other states that 'an objective malice standard strikes a constitutionality permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.'" (citation omitted); rejecting a subjective analysis; "The board found such a subjective test unworkable for the test of falsity or reckless disregard of it. We note that the difference between acceptable fervent advocacy and misconduct is not always distinguishable."; ultimately concluding that the lawyer's statements were false, but not dealing with the reckless disregard standard; "The board considered numerous statements concerning Judge Markus, which Shimko admits to writing. The board concluded that these statements were proved by clear and convincing evidence to be unreasonable and objectively false with a mens rea of recklessness."; "There is, admittedly, a fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science."; "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the Disciplinary Counsel."; three judges joined in the dissent, which included the following criticism of the majority opinion: "[T]he majority does damage to the bright-line Gardner rule by waxing poetic about the 'fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science.' . . . I do not agree that the line is so fine.").

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

- Scialdone v. Commonwealth, 689 S.E.2d 716, 718 (Va. 2010) (reversing and remanding a contempt finding entered by a trial court judge against two lawyers for allegedly tampering with evidence and violating a Virginia statute by using a Yahoo username "westisanazi" during a case presided over by Judge Patricia West; explaining that Judge West found (among other things) that the lawyers violated Virginia Code Section 18.2-456 [which indicates that

the "courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following: . . . (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect to any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding"]; ultimately holding that the trial court had not provided sufficient due process before holding the lawyers in contempt).

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

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey

nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

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

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

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79, 80, 82, 90 (Iowa 2008) (suspending for three months a lawyer (and former judge) for accusing the judge handling a DUI case against him of "not being honest" in statements to a reporter; also analyzing the lawyer's second drunk driving charge, and finding that the offense "reflected adversely on his fitness to practice law"; explaining that "[w]hether an attorney's criminal behavior reflects adversely on his fitness to practice law is not determined by a mechanical process of classifying conduct as a felony or a misdemeanor";

explaining that in any analysis of the lawyer's criticism of a judge, "'truth is an absolute defense'" (citation omitted); further explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements'" (citation omitted); ultimately concluding that "[w]e are persuaded by the rationale given in support of applying an objective standard in cases involving criticism of judicial officers"; ultimately finding that the lawyer's statements about the judge could result in discipline; "We conclude Weaver did not have an objectively reasonable basis for his statement that Judge Dillard was not honest when he stated his reasons for sentencing Weaver to the Department of Corrections. Therefore, Weaver's conduct reflects a reckless disregard for the truth or falsity of his statement. Accordingly, this statement is not protected speech"; "Weaver did not claim he was expressing an opinion that Judge Dillard was 'intellectually dishonest,' in the sense that Judge Dillard's sentencing decision might have been based upon an unstated premise or hidden bias. . . . Instead, Weaver accused a judge of a specific act of dishonesty which he characterized at the hearing before the Commission as a 'knowing concealment' of the judge's reasons for sentencing him. He was utterly unable to provide a reasonable basis for this charge at the hearing. Under these facts, we conclude that the First Amendment does not protect Weaver from being sanctioned for professional misconduct.").

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

- Williams & Connolly, LLP v. People for Ethical Treatment of Animals, Inc., 643 S.E.2d 136, 138-39, 142, 144, 145, 146 (2007) (affirming the entry of sanctions against several lawyers from Williams & Connolly for having filed a pleading accusing Fairfax County Circuit Court Judge David T. Stitt of allegedly improper ex parte communications with PETA, Williams & Connolly's client's adversary; noting that pleadings filed by Williams & Connolly lawyers accused Judge Stitt of "inexcusable" consideration of PETA's ex parte communication and of "ignoring the basic tenets of contempt law"; "Initially, we are compelled to observe that the Feld Attorneys' [Williams & Connolly and a Virginia firm] brief filed with this Court contains a striking omission. The Feld Attorneys do not mention the fact that in the motions, they used language that directly accused Judge Stitt of unethical

conduct. These allegations of unethical conduct were stark and sweeping, stating that Judge Stitt '[v]iolated [h]is [e]thical [o]bligations,' 'ignored his ethical responsibilities,' and 'acted directly counter to [those ethical responsibilities].' We therefore must consider the Feld Attorneys' arguments in the additional context of those written statements contained in the motions."; "Although the Canons of Judicial Conduct are not a source of law, we nevertheless consider the cited provision from the Canons because they are 'instructive' on a central issue before us, namely, whether the Feld Attorneys had an objectively reasonable basis in law for contending that Judge Stitt violated his ethical duties in considering the ex parte petition and in issuing the rule to show cause."; "Reasonable inquiry by the Feld Attorneys would have shown that the routine practice of the Circuit Court of Fairfax County is to consider ex parte petitions for a rule to show cause and to issue rules to show cause upon the filing of a sufficient affidavit by the petitioning party. At the time the Feld Attorneys made the motions, there was a long-standing published order entered in the Circuit Court of Fairfax County stating: 'It is the practice of this Court to issue summons on a rule to show cause upon affidavit or ex parte evidence without notice. . . .' The published order in Alward, available upon simple legal research, would have informed the Feld attorneys that Judge Stitt merely followed the routine practice of the Circuit Court of Fairfax County when he considered the petition and issued the rule to show cause. In addition, the record shows that counsel for PETA obtained this same information concerning this routine practice of the Circuit Court of Fairfax County by placing a telephone call to a deputy clerk of the circuit court."; "The fact that the Feld Attorneys were seeking the recusal of the trial judge did not permit them to use language that was derisive in character. Yet they liberally employed such language. As stated above, the Feld Attorneys alleged in the motion to recuse that Judge Stitt 'ignore[ed] the basic tenets of contempt law,' 'create[d] an appearance, at the very least, that [he] will ignore the law in order to give a strategic advantage to PETA,' and 'ignored his ethical responsibilities [and] acted directly counter to them.'"; "We hold that the record before us demonstrates that the Feld Attorneys' motions were filed for an improper purpose and, thus, violated clause (iii) of the second paragraph of Code § 8.01-271.1. Contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for [an] improper purpose,' within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1. Such language and representations are wholly gratuitous and serve only to deride the court in an apparent effort to provoke a desired response."; upholding that Judge Stitt's imposition of $40,000 sanctions against the lawyers, and revoking pro hac vice admission of a Williams & Connolly lawyer).

- Brandon Glenn, Lawyer's 'Happy Meal' comment eats at judge, Crain's Chicago Business, May 29, 2007 ("A Chicago lawyer's comment to a

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

- Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1284-86 (Pa. 2006) (disbarring a Pennsylvania lawyer for an escalating series of criticisms of a judge; noting that the criticisms began in 1997, and included such statements as allegations that the judge "'has a personal bias or prejudice,'" "'has knowledge of criminal misconduct in this matter,'" "'engages in criminal misconduct,'" engages in conduct that "'was similar to that of priests who molested young boys,'" is a "'despicable person'" who was "'perpetrating more harm to America than the Al Quida [sic] bombers did on September 11, 2001.'" (internal citations omitted)), cert. denied, 549 U.S. 1181 (2007).

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

But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence.' Barnhill also included the following statement in the petition: '[I]f you attack the King, kill the King; otherwise, the King will kill you.'").

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

- Anthony v. Va. State Bar ex rel. Ninth Dist. Comm., 621 S.E.2d 121, 123 (Va. 2005) (affirming a public reprimand of Virginia lawyer Joseph Anthony, who had written several letters directly to the Virginia Supreme Court, accusing its justices of "'an extreme desire/need to protect some group and/or person'" because the court had declined to disclose what Anthony alleged to have been improper ex parte communications between the Supreme Court justices and parties in a case that he was handling; rejecting Anthony's First Amendment claims), cert. denied, 547 U.S. 1193 (2006).

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

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer

thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] . . . . A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- In re Nathan, 671 N.W.2d 578, 581-82, 583 (Minn. 2003) (indefinitely suspending a lawyer who wrote that one judge was "'a bad judge'" who "'substituted his personal view for the law'" and "'won election to the office of judge by appealing to racism'"; also noting that "[t]wo days later Nathan sent the judge a letter stating that if the judge did not schedule a hearing and provide 10 items of relief he was requesting, he would publish an article in area newspapers. Enclosed was an article entitled The Young Sex Perverts with the judge's name prominently displayed below the title. Nathan published the article in the St. Paul Pioneer Press as a paid advertisement on November 3, 2000, shortly before election day.").

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

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

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

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

- In re Dinhofer, 690 N.Y.S.2d 245, 246 (N.Y. App. Div. 1999) (suspending lawyer for 90 days for telling a judge she was "corrupt" in a phone conference).

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

- Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 181, 182 (Ky. 1996) (noting that a lawyer had included the following language in his memorandum entitled "Legal Authorities Supporting the Motion to Dismiss": "'Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . . .'"; noting that the lawyer had included the following statement in another pleading: "'Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined -- first lost -- then won.'"; noting that the lawyer had responded to a motion to show cause why he should not be held in contempt in a pleading entitled: "Memorandum In Defense of the Use of the Term 'As-Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office"; noting that the lawyer had added the following "P.S." in another pleading: "'And so I place this message in a bottle and set it adrift on a sea of papers -- hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form . . . [o]r is it too formitable (sic) a task and will you yourself have to forego a place at the trough? There is a better and happier way and -- with due temerity I claim to have found it -- it requires one to identify an ass hole when he sees one.'" (alterations in original), cert. denied, 519 U.S. 1111 (1997).

- In re Palmisano, 70 F.3d 483, 485-86, 486, 487 (7th Cir. 1995) (affirming disbarment of a lawyer who included the following statements in correspondence with judges, court administrators and prosecutors: "'Judge Siracusa is called "Frank the Fixer" or "Frank the Crook".'"; "'Like [Judge Robert] Byrne, Frank the Crook is too busy filling the pockets of his buddies to act judicially.'"; "'Judge Lewis, another crook, started in about me . . .'."; "The crooks calling themselves judges and court employees . . .'."; "'I believe and state that most of the cases in Illinois in my experience are fixed, not with the passing of money, but on personal relations, social status and judicial preference.'"; "Chief Justice Peccarelli [sic], your response is

illustrative of the corruption in the 18th Judicial District.'"; '"When I stand outside the Court stating that Judge Peccarelli is a crooked judge who fills the pockets of his buddies, I trust Judge Peccarelli will understand this his conduct creates the improper appearance, not my publication of his improper conduct."'; '"I believe [Justices Unverzagt, Inglis, and Dunn] are dishonest. . . . If the case has been assigned to any of these three, I would then petition the court for a change of venue. Everyone should be assured that the court is honest and not filing [sic] the pockets of those favored by the court."'; explaining that "[f]ederal courts, no less than state courts, forbid ex parte contacts and false accusations that bring the judicial system into disrepute. . . . Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning -- for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct."; holding that "[e]ven a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty."; explaining that the court would have had to deal with the criticism if the lawyer had "furnished some factual basis for his assertions," but noting that he had not; "Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction.").

- In re Atanga, 636 N.E.2d 1253, 1256, 1257 (Ind. 1994) (addressing statements made by lawyer Jacob Atanga, a self-made immigrant from Ghana, who graduated from law school when he was 36 and became president-elect of his local bar association; explaining that Atanga told a local court that he could not attend a hearing in a criminal matter because he had a previously scheduled a hearing in another city; noting that the judge had changed the hearing date, but later reset the hearing for the original date after the prosecutor's ex parte application to reschedule; noting further that the day before the hearing, Atanga sought a continuance because of the conflicting hearing that had been scheduled in the other city; explaining that the local judge refused, and warned Atanga that he would be held in contempt if he did not attend the hearing; noting that Atanga did not attend, and was arrested, fingerprinted, photographed and even given a prisoner's uniform -- which Atanga wore even though the judge eventually accepted Atanga's apology and removed the contempt; noting that Atanga later told the local newspaper that he thought the judge was """ignorant, insecure, and a racist. He is motivated by political ambition."""; eventually upholding a thirty-day suspension, although acknowledging that the local court's procedures were "unusual"; "Ex parte communication between the prosecution and the court,

without notice to opposing counsel of record, should not be done as matter or course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality.").

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

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

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

- Reply Brief of Appellant-Petitioner at 3-4, 3 n.5, 6, Al-Adahi v. Obama, No. 10-487, 2010 U.S. Briefs 487 (U.S. Dec. 29, 2010) (in a pleading filed by lawyers from King & Spalding and Sutherland Asbill & Brennan, criticizing a District of Columbia circuit court decision; "To avoid [purported precedent], the Court of Appeals created a new 'conditional probability' rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error are discussed in Al-Adahi's petition. The circuit created a standard, contrary to [the precedent], permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony." (footnotes omitted); "'Conditional probability' is rightly described by the dissent as 'a bizarre

> theory' and 'gobbledy-gook' -- strong words -- in the probable cause decision that gave rise to it. Prandy-Binett, 995 F.2d at 1074, 1077 (dissenting opinion)."; "The author of Al-Adahi in the Court of Appeals also wrote [other decisions]. . . . As a senior judge, the author of Al-Adahi is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled 'The Guantanamo Mess', he stated publicly that this Court erred in Boumediene. Judge A. Raymond Randolph, The Guantanamo Mess, The Center for Legal and Judicial Studies -- Joseph Story Distinguished Lecture (Oct. 10, 2010), http://www.heritage.org/Events/2010/10/Guantanamos-Mess. No prevailing petitioner has survived a trip to that court, and multiple petitions for certiorari now pending -- and more are coming -- in Guantánamo cases seeking this Court's attention. The court of appeals radically departed from this Court's dispositive precedent in [the earlier case], creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in Boumediene, but to announce a wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions." (footnote omitted)).

Geoffrey Fieger's Dispute with the Michigan Judicial System

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

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

> In 1994, complaining about two then-recent Court of Appeals cases, Mr. Fieger publicly insulted Chief Justice (then-Court of Appeals Judge) Clifford Taylor, calling him "amazingly stupid" and saying:
>
> > Cliff Taylor and [Court of Appeals Judge E. Thomas] Fitzgerald, you know, I don't think they ever practiced law, I really don't. I think they got a law degree and said it will be easy to get a - they get paid $ 120,000 a

> year, you know, and people vote on them, you know, when they come up for election and the only reason they keep getting elected [is] because they're the only elected officials in the state who get to have an incumbent designation, so when you go into the voting booth and it says "Cliff Taylor", it doesn't say failed Republican nominee for Attorney General who never had a job in his life, whose wife is Governor Engler's lawyer, who got appointed when he lost, it says "Cliff Taylor incumbent judge of the Court of Appeals," and they vote for him even though they don't know him. The guy could be Adolf Hitler and it says "incumbent judge" and he gets elected.

Mr. Fieger said more about Chief Justice (then Court of Appeals Judge) Taylor:

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

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

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

- Jacob Gersham, Michigan Ex-Justice Admits Guilt in Fraud, Associated Press, Jan. 29, 2013 ("Former Michigan Supreme Court Justice Diane Hathaway pleaded guilty Tuesday to a felony fraud charge in connection with a real-estate scheme that allegedly helped her avoid a debt payment of up to $90,000. The case is the latest setback for Michigan Democrats, who waged

> a bruising, high-profile election battle last fall for three of the court's seven seats, but failed to tip the balance of power in the court, occupied by four Republicans. Governor Rick Snyder is expected to fill Ms. Hathaway's seat with a member of his party, widening the slim Republican majority. On Tuesday, Ms. Hathaway admitted to making fraudulent claims in a debt-forgiveness application to ING Direct, now a subsidiary of Capital One Financial Corporation. She pleaded guilty to a single felony charge of bank fraud in federal court in Ann Arbor. Ms. Hathaway couldn't be reached for comment. Federal prosecutors on January 18 accused Ms. Hathaway of lying about a Florida home she owned in order to dodge a payment of as much as $90,000 as she sought ING's approval for a short sale on a Michigan property. In a short sale, a home is sold for less than the mortgage owed. Ms. Hathaway, 58 years old, had abruptly announced her retirement from the court days before the prosecutors filed criminal charges. Earlier, the state's judicial watchdog had called for her suspension, describing the allegations as 'unprecedented in Michigan judicial disciplinary history.' . . . . Ms. Hathaway was on a trial court for 16 years before she was elected to an eight-year term on Michigan's high court in 2008.").

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

The Michigan Supreme Court recited Fieger's statements.

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

> size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

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

According to newspaper accounts, Fieger's lawyer said "the comments were made in [Fieger's] role as a radio show host, not as a lawyer, and enjoyed absolute protection under the First Amendment." Dawson Bell, Fieger's case at center of free speech debate, Detroit Free Press, Mar. 9, 2006.

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

---

[2] Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive

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

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

---

conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution."; "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

[3] Fieger v. Mich., Civ. A. No. 06-11684, 2007 U.S. Dist. LEXIS 64973, at *19 & *22 (E.D. Mich. Sept. 4, 2007), vacated and remanded, 553 F.3d 955 (6th Cir. May 1, 2009), cert. denied, 558 U.S. 1110 (2010).

[4] Fieger v. Mich. Supreme Court, 553 F.3d 955, 960, 957 (6th Cir. 2009) (holding that well-known lawyer Geoffrey Fieger did not have standing to challenge the constitutionality of the Michigan ethics rules prohibiting critical statements about judges; noting that "plaintiffs [Fieger and another lawyer] neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments of the United States Constitution."; noting that the district court had held certain provisions of the Michigan ethics rules unconstitutionally vague, but reversing that decision, and remanding for dismissal; "We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction.

Perhaps not coincidently, Fieger played a prominent role in a later case involving limits on lawyers' advertisements that might be seen as tainting a jury pool. The federal government prosecuted Fieger for campaign contribution violations involving his support for Democratic primary candidate John Edwards (the jury ultimately acquitted Fieger). Just before his trial, Fieger ran several advertisements implying that the Bush Administration was attempting to silence him. The district court handling the criminal prosecution prohibited Fieger from running the advertisements.

> The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.

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

Judges' Criticism of Other Judges

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

Some majority opinions severely criticize dissenting judges.

- Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan

---

We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief."), cert. denied, 558 U.S. 1110 (2010).

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

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

> "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."

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

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

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

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

- HSBC Bank USA, N.A. v. Taher, 962 N.Y.S.2d 301, 304 (N.Y. App. Div. 2013) (using harsh language and criticizing a trial judge; "[W]e take this opportunity to remind the Justice of his obligation to remain abreast of and be guided by binding precedent. We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity

to be heard by any party . . . , was improper and should not be repeated." (emphasis added)).

- Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1220 (Del. 2012) (criticizing Delaware Court of Chancery Chief Judge Leo Strine; "[T]he court's excursus on this issue strayed beyond the proper purview and function of a judicial opinion. 'Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it.' We remind Delaware judges that the obligation to write judicial opinions on the issues presented is not a license to use those opinions as a platform from which to propagate their individual world views on issues not presented. A judge's duty is to resolve the issues that the parties present in a clear and concise manner. To the extent Delaware judges wish to stray beyond those issues and, without making any definitive pronouncements, ruminate on what the proper direction of Delaware law should be, there are appropriate platforms, such as law review articles, the classroom, continuing legal education presentations, and keynote speeches." (footnotes omitted) (emphasis added)).

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

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

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

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

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

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

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

- In re Isaac, 903 N.Y.S.2d 349, 350, 351 (N.Y. App. Div. 2010) (holding that the bar would not discipline a lawyer for calling a judge a "prick" in a private conversation; "[W]e agree with the Panel that respondent's comments about this Court and his ability to influence the Court, made in a private conversation, are not subject to professional discipline as they were uttered 'outside the precincts of a court.'" (citation omitted)).

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

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

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

Interestingly, at least one state's former ethics code limited how a lawyer criticized the judge, rather than the criticism itself. See former Va. Code of Prof'l Responsibility EC 8-6 ("While a lawyer as a citizen has a right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.").

Best Answer

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

n 12/11; b 3/15

Defining the Limits

Hypothetical 5

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

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

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

YES

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

YES

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

MAYBE

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

NO (PROBABLY)

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

NO

Analysis

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

Best Answer

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

n 12/11; b 1/13

Ex Parte Communications with Represented Persons: Basic Principle

Hypothetical 6

You are representing one of your clients in a lawsuit against a large retailer. The retailer's litigator has been very difficult, and you think that he is "short stopping" some of your settlement offers without passing them along to the retailer's vice president who is supervising the litigation for the defendant retailer. You think that you might be able to resolve the case if you can "work around" the retailer's "scorched earth" litigator.

Without the retailer's lawyer's consent, may you contact the retailer's vice president who is supervising the litigation, and try to settle the case?

NO

Analysis

The ABA Model Rules prohibit such communication.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.

Best Answer

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

B 1/13

Application Only to Lawyers "Representing" a Client: Lawyers Acting in Other Capacities

Hypothetical 7

You have read your state's Rule 4.2, and see that is begins with the phrase "[i]n representing a client . . . ." You and your partners have a varied civil practice, and you wonder how that rule applies to some of what you and your partners do on a daily basis.

(a) One of your partners sometimes acts as a guardian ad litem for minor children. In playing that role, can she communicate ex parte with one of the child's parents -- without the parent's lawyer's consent?

YES (PROBABLY)

(b) One of your partners sometimes serves as a bankruptcy trustee. In playing that role, will he be able to communicate ex parte with a represented debtor -- without the debtor's lawyer's consent?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

This hypothetical addresses the "[i]n representing a client" phrase.

On its face, the prohibition on ex parte communications (absent the other lawyer's consent) only applies if a lawyer engaging in such ex parte communications does so "in representing a client."

(a) In some situations involving ex parte contacts, lawyers are not acting as client representatives. Many of these situations involve lawyers acting as guardians or guardians ad litem.

- North Carolina LEO 2006-19 (1/19/07) (holding that the ex parte communication rule "does not apply to a lawyer acting solely as a guardian ad litem").

- Maryland LEO 2006-7 (2006) (holding that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer; contrasting the role of a guardian with that of a lawyer; "A guardian is not an agent of a ward, because guardians are not subject to the ward's control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of the tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian." (citations omitted); "In contrast, an attorney-client relationship is 'an agent-principal relationship.' . . . 'A client's right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one.'"; "From this explication, it does not appear that the member appointed by the court as Guardian 'represents' the Resident. From your recitation of the facts, no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility.").

- North Carolina LEO 2002-8 (1/24/03) ("[A] lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.").

The ex parte communications rule does apply to lawyers acting in a dual capacity, including in a representational role.

- Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation.").

Although the majority rule seems to permit ex parte communications by a lawyer acting solely as a guardian ad litem, one state has indicated that another lawyer involved in the case must obtain the guardian ad litem's consent to speak with the child or other participant on whose behalf the guardian ad litem serves.

- Utah LEO 07-02 (6/10/07) ("When a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent.").

This approach seems to recognize that a guardian ad litem acts as a "representative" of the party, which might likewise trigger the prohibition on the guardian ad litem's communications with any other participant who has a lawyer.

The majority rule that the ex parte contact rule does not apply to lawyers acting in these other capacities highlights one popular misconception about the ex parte contact prohibition. If the rule's sole purpose was to prevent lawyers from using their

persuasive skills to prejudice an adversary, the prohibition would apply in these circumstances. However, the rule's language generally renders the rule inapplicable here.

(b) States take varying approaches to Rule 4.2's application to lawyers acting as bankruptcy trustees.

Some states apply Rule 4.2 to lawyers acting in that role.

- Virginia LEO 1861 (2/21/12) (because a lawyer/trustee in a Chapter 7 bankruptcy proceeding acts as a fiduciary, he or she may not communicate ex parte with a represented debtor without the debtor's lawyer's consent -- unless such communications are "authorized" or mandated by law; noting that examples of such authorized communicates include "notices that, by statute or court rule, must be sent to the debtor personally, or a scheduled and noticed proceeding such as a meeting of creditors pursuant to 11 U.S.C. §341."; also noting that another statute (18 U.S.C. § 1302(b)(4)) authorizes a "wide variety of communications" between Chapter 13 trustees and debtors.).

Other states permit ex parte contacts by lawyers acting solely as trustees.

- North Dakota LEO 09-04 (7/16/09) ("[I]f the RA [lawyer requesting the opinion] has or will have a dual capacity (1) as representative of the estate, and (2) as legal counsel for the representative of the estate, communication with a represented Debtor is prohibited under Rule 4.2. However, if the RA is not representing the bankruptcy estate as legal counsel, and is acting solely as trustee for the bankruptcy estate, Rule 4.2 does not prohibit direct contact with the represented Debtor as long as RA makes it clear to all persons involved in the action that RA is not representing the bankruptcy estate or the trustee as legal counsel and that there is no attorney-client relationship.").

- Arizona LEO 03-02 (4/2003) (addressing ex parte contact with debtors by lawyers who are acting as bankruptcy trustees; "The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.").

Best Answer

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

n 12/11

B 2/13

Application to Lawyers Communicating with Those with Whom the Lawyer Had a Previous Relationship

Hypothetical 8

You recently lost an expensive and contentious case, and later had a dispute with your main testifying expert about his fee. The expert had essentially broken down on the stand, and you blame him for the loss. However, the expert disagreed, and has now hired his own lawyer and sued you for his fees. You think that you might be able to resolve the dispute if you can rekindle the good relationship you had before the trial began.

Without the expert's lawyer's consent, can you contact the expert to discuss his bill?

NO

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

The issue here is whether Rule 4.2 applies any differently to a lawyer's communications with a former client, expert, etc., with whom the lawyer had previously

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

worked as an ally. In other words, does the previous relationship allow the ex parte communication?

This hypothetical comes from a 2011 Ohio case, in which the court suspended the lawyer for one year (although staying the suspension).

- Medina County Bar Ass'n v. Cameron, 958 N.E.2d 138, 141 & n.1 (Ohio 2011) (suspending for one year (but staying a suspension) a lawyer who contacted a former expert witness who had sued the lawyer for not having paid his expert witness fees; noting that the lawyer knew that the expert witness had hired a lawyer to represent him in the lawsuit; "[W]e agree with the board that the evidence is clear and convincing that Cameron violated Prof. Cond. R. 4.2 when he contacted the expert after STE's lawsuit was filed and discussed settlement of that suit without the consent of STE's attorney."; "Although Cameron did not raise the issue whether an attorney who is acting pro se in a lawsuit as a party can contact the other party, we note other jurisdictions have said that the contact violates a similar professional rule.").

Best Answer

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

b 2/13

Application to Lawyers Representing Themselves Pro Se or Acting as Clients

Hypothetical 9

All your work as an associate and a young partner paid off last year, when you and your husband finally built your "dream home." However, since then you have discovered several major structural problems with your home. You sued the general contractor, who hired a local "scorched earth" litigator. You are hoping there is a way that you can communicate directly with the general contractor himself (with whom you had a fairly cordial relationship during the building process).

(a) If you are representing yourself pro se in litigation, may you contact the general contractor without his lawyer's consent?

NO (PROBABLY)

(b) If you hired a lawyer to represent you in the litigation, may you contact the general contractor without his lawyer's consent?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

This hypothetical addresses the "in representing a client" phrase. Specifically, this hypothetical deals with lawyers either representing themselves pro se or acting as litigants while being represented by another lawyer. If the ex parte communication rule rested solely on the law's worry that sneaky and persuasive lawyers would take advantage of an unrepresented person during ex parte communications, the prohibition would apply in either situation -- because the lawyer has the same persuasive skills whether representing himself or acting solely in the role as a litigant (and thus represented by another lawyer). However, the majority rule prohibits the lawyer from conducting ex parte communications in the former setting but not the latter setting. Such an approach demonstrates that the ex parte prohibition rests on other considerations beside the worry that an unrepresented person will be somehow prejudiced when communicating with a skillful lawyer.[2]

In a 2009 article, Professors Hazard and Irwin articulated courts' and bars' explanation of the basis for Rule 4.2's restrictions.

> Courts and commentators have elaborated on the ways in which Rule 4.2 serves its three functions of

---

[2] In a 2009 article, Professors Hazard and Irwin explained the history of Rule 4.2.

> Model Rule 4.2's version of the no-contact rule, set forth above, is currently in force in substantially similar form in all U.S. jurisdictions. Its roots can be found in Canon 9 of the 1908 ABA Canons of Professional Ethics, which advised that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Canon 9 was effectively a rule of evidence, however, and its no-contact concept was much more limited than that of today's provision. Case law addressing the canon generally focused on whether concessions or admissions obtained directly from a represented person should be denied legal effect.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 799 (Mar. 2009) (footnotes omitted).

> protecting the client, the lawyer, and the client-lawyer relationship. They have explained that the Rule guards a party against rhetorical attack by opposing counsel, which could undermine the party's confidence in her lawyer's competence and assessment of a case. The Rule prevents opposing counsel from causing a party to ignore her lawyer's advice and from "driving a wedge" between a party and her lawyer. And it protects the attorney-client privilege -- critical to a strong client-lawyer relationship -- by precluding inadvertent of legally imprudent disclosures of privileged information.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 802 (Mar. 2009) (footnotes omitted).

(a) Courts and bars have disagreed about whether lawyers representing themselves should be treated (for the prohibition on ex parte contacts with represented parties) as: (1) lawyers (in which case they may contact a represented person only with that person's lawyer's consent); or (2) clients (in which case they have the absolute right to contact the other person without that person's lawyer's consent).

Interestingly, the Restatement takes a distinct minority view in this area. The Restatement could not be any clearer.

> A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals.

Restatement (Third) of Law Governing Lawyers § 99 cmt. e (2000) (emphasis added).

However, most authorities disagree.

- Disciplinary Bd. v. Lucas, 789 N.W.2d 73, 76 (N.D. 2010) (issuing a public reprimand against a lawyer for engaging in ex parte communication with a represented counsel in an action in which the lawyer represented himself pro se; "Lucas argues he did not violate Rule 4.2 because the rule does not apply when an attorney is representing himself. His view is too narrow. The rule protects 'a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the

matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.' N.D.R. Prof. Conduct 4.2 cmt. 1. Most courts have held Rule 4.2 applies to attorneys representing themselves because it is consistent with the purpose of the rule."; "Lucas relies on a Connecticut Supreme Court decision to argue Rule 4.2 does not apply when he is representing himself because he is not representing a client. . . . We join the majority of courts in rejecting the rationale of the court in Pinsky [Pinsky v. Statewide Grievance Committee, 578 A.2d 1075, 1079 (Conn. 1990)].").

- Maryland LEO 2006-3 (2006) (assessing the propriety of a lawyer representing himself or herself pro se engaging in ex parte communications with the other party; "[T]here is authority to suggest that a lawyer, acting pro se, is not subject to the restrictions of what is sometimes known as the 'anti-contact rule' contained in Rule 4.2. In that regard, the Restatement of Law (3d) makes a specific exception to the anti-contact rule when a lawyer is a party to a matter and represents no other client in the matter. Section 99(1) of the Restatement of Law (3d) . . . ."; noting that other authorities and states have reached the opposite conclusion; "We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive.").

- In re Disciplinary Proceeding Against Haley, 126 P.3d 1262, 1271-72 (Wash. 2006) (noting the vigorous debate among courts, bars and other authorities about the ethical propriety of lawyers representing themselves pro se contacting represented adversaries; ultimately concluding that Washington's Rule 4.2 "prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel," but reducing to a reprimand the sanctions awarded against a lawyer for violating the rule, because the matter was "impermissibly vague" in Washington until this decision).

- Alaska LEO 2006-1 (1/27/06) ("[W]hen representing herself, for purposes of Rule 4.2, the lawyer may not act as if she is a 'party' who is not bound by the ethical rules that govern lawyers' contact with represented individuals. Rather, even when representing herself, a lawyer is subject to the dictates of Rule 4.2.").

- Hawaii LEO 44 (4/24/03) ("a lawyer who is a party in a matter and who is proceeding pro se cannot communicate directly about the subject of the representation with another person who is known to be represented by counsel in the matter without first obtaining consent from the other person's lawyer or is authorized to do so by law or a court order").

- District of Columbia LEO 258 (9/20/95) ("[a] lawyer who is a party in a matter and is proceeding pro se cannot communicate directly with another party who is known to be represented by counsel in the matter without first obtaining consent from the other party's lawyer").

- Virginia LEO 1527 (5/11/93) (a lawyer/shareholder who has filed a suit in his or her own name against a corporation may not contact its officers, directors, or "control group" employees without the consent of the corporation's lawyer).

- Virginia LEO 521 (8/1/83) ("even lawyers representing themselves may not contact an opponent who is represented by another lawyer").

Thus, lawyers must examine the law of the pertinent jurisdiction before proceeding.

(b) This scenario presents even a more difficult question, because here the lawyer is definitely a "client" -- having hired a lawyer to represent him or her.

The Restatement considers a represented lawyer to be a client -- thus presumably placing the lawyer off-limits to ex parte contacts by an adversary's lawyer, but freeing the lawyer/client to initiate ex parte contacts on his or her own. The Restatement explains that

> [a] lawyer represented by other counsel is a represented person and hence covered by this Section.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000)).

Most states take this approach.

- Virginia LEO 1819 (9/19/05) (describing the ex parte contact prohibition as a rule which applies only when a lawyer is "representing a client").

- Virginia LEO 771 (3/11/86) (a lawyer who is a litigant (but not proceeding pro se) may directly contact the adversary).

However, this rule certainly runs counter to the spirit of ABA Model Rule 4.2 -- which focuses at least in part on a lawyer's ability to take advantage of an unrepresented person. For instance, the District of Columbia Bar described these

lawyerly powers (although addressing the prohibition of the lawyer's ex parte communications) when representing himself or herself pro se, the language could apply equally to lawyers acting as clients in these circumstances.

> [U]nlike the lay party, the pro se lawyer brings her professional skills and legal knowledge with her whenever she deals with her lay adversary. The lawyer-party, no matter whether she is acting in her "lawyer" or her "party" capacity, still retains a presumptively unfair advantage over an opposing party. We therefore conclude that a lawyer must comply with the requirements of Rule 4.2(a) when she represents a client, be that client the lawyer herself or another party.

District of Columbia LEO 258 (9/20/95).

In a 2009 article, Professors Hazard and Irwin explained that Rule 4.2 does not currently provide guidance on the permissibility of ex parte contacts by a lawyer who is a party to the matter.

> There is little consensus about the proper approach to these situations. Model Rule 4.2 is silent on the issue, while the Restatement (Third) includes an exception for a "lawyer [who] is a party [to the matter] and [who] represents no other client in the matter." State courts and ethics committees have split on the issue, some holding that the Rule does not apply in such situations, some holding that it does, and some adopting an intermediate approach. Minnesota, for example, provides that "a party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the other lawyer[], or unless the other party manifests a desire to communicate only through counsel." One court has explained that when proceeding pro se, "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." We agree. A lawyer poses the same threat to the adverse party whether representing a client, proceeding pro se, or being represented by another lawyer. In all cases, the lawyer can use her training in the law to influence or even

> intimidate the adverse party and to interfere with the adversary's client-lawyer relationship.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 830-31 (Mar. 2009) (footnotes omitted). Professors Hazard and Irwin proposed a change in Rule 4.2 to address this issue.

> We therefore propose changing the text of the Rule from "In representing a client, a lawyer shall not . . . ." to "A lawyer participating in a matter shall not . . ." We also propose a comment that states: "This Rule applies to a lawyer who is a party to a proceeding in the same matter as it does to a lawyer representing a client."

Id. at 831 (citation and footnote omitted).

Lawyers considering such ex parte communications should check the applicable ethics rules. They should also confirm that the pertinent court would not be offended by such communications, even if they would pass muster under the literal language of the applicable rule.

Best Answer

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

n 12/11

Application to Lawyers Giving "Second Opinions"

Hypothetical 10

Because you have had a few run-ins with your state bar, you have tried to be very cautious in all of your litigation-related conduct. You just received a call from a local businesswoman who says that she has become dissatisfied with her current lawyer handling a commercial case for her, and would like to talk with you. It sounds like she wants a "second opinion" from you about her current lawyer's competence, and might want to hire you -- depending on the outcome of your analysis.

May you discuss the businesswoman's case (including the conduct of her current lawyer) without that other lawyer's consent?

YES

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical addresses the "[i]n representing a client" phrase.

The restriction on ex parte communications to situations in which a lawyer is "representing a client" allows lawyers to communicate with represented clients seeking

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

a "second opinion" -- because those lawyers are not yet "representing a client" in that matter. ABA Model Rule 4.2 cmt. [4] ("[n]or does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter").

The Restatement also takes this approach.

> A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000).

Not surprisingly, state bars take the same approach.

- Louisiana LEO 07-RPCC-014 (10/12/07) ("Rule 4.2 of the Louisiana Rules of Professional Conduct generally serves to prohibit a lawyer, while representing a client in a matter, from communicating about the subject of the representation with another person the lawyer knows to be already represented by counsel in the same matter. However, the Committee believes that when a person already represented by counsel in a matter initiates contact and communication with a lawyer who does not represent anyone in connection with that matter, the Rule does not prohibit that lawyer from responding to or communicating further with that person, such as when providing an initial consultation and/or a second opinion sought by that person, nor does it prohibit a lawyer from communicating with such persons concerning matters outside the scope of the representation." (emphasis added); noting that many Louisiana lawyers believe that Rule 4.2 prohibits them from providing second opinions to other lawyers' clients; "The Committee simply takes this opportunity to point out that Rule 4.2 does not serve to prevent the already-represented client from seeking such a second opinion nor does it serve to prevent the would-be second lawyer from communicating with the already-represented client who initiates contact with the lawyer when that lawyer does not already represent a client in connection with the same matter. In short, despite the beliefs and/or hopes of some lawyers -- especially those made uncomfortable by a mistaken belief that their clients are engaging in some imagined form of 'professional adultery' -- Rule

4.2 is not an 'anti-poaching' rule and cannot be used to shield clients from their own decisions to consult another lawyer.").

- Utah LEO 07-02 (6/10/07) ("When a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent.").

Best Answer

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

n 12/11

Definition of "Matter"

Hypothetical 11

You were just hired last week to represent a passenger seriously injured in a traffic accident. The civil litigation has not yet begun, but you have learned that one of the drivers involved in the accident has hired a criminal lawyer (who does not handle any civil cases) to represent him in dealing with a federal investigation into contraband goods found in that driver's truck after the accident. You would like to speak with that other driver, but you wonder whether you need his criminal lawyer's consent to do so.

Without the truck driver's lawyer's consent, may you communicate with the truck driver about the accident?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the term "matter" in the rule.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Courts and bars sometimes must determine whether a communication relates to the same "matter" in which the person is represented. This issue sometimes arises when there are factually-related civil cases or civil and criminal cases.

The Oregon Supreme Court dealt with this issue -- although the pertinent Oregon rule's prohibition used the term "subject" rather than "matter."

- In re Newell, 234 P.3d 967, 971, 972, 972-73, 973-74, 976 (Or. 2010) (publicly reprimanding a Oregon lawyer who deposed a witness in a civil case about the subject of incidents that were also involved in a criminal case against the witness; noting that the lawyer realized that the witness was represented by a criminal lawyer in a related criminal matter, but did not notify the criminal lawyer of the deposition; rejecting the lawyer's argument that he did not have ex parte communications on the same "subject" as that in which the witness had a criminal defense lawyer; noting that the disciplinary panel concluded that Oregon's Rule 4.2 "covers 'instances such as the present case in which the [a]ccused knew the witness to be represented in a pending criminal proceeding but nevertheless proceeded to interrogate the witness about that subject'"; agreeing with the panel; "In this case, there is no dispute that the accused communicated with Fahey in the course of representing Jewett-Cameron, that Fahey was represented in the criminal action, and that the accused knew that he was communicating with Fahey on the subject on which Fahey was represented. The only question is whether the communication concerned the subject on which the accused represented Jewett-Cameron and on which Coit represented Fahey. As a factual matter, the answer to that question is 'yes.' The subject on which the accused represented Jewett-Cameron was Greenwood's alleged overstatement of its inventory. The accused sought to recover part of the purchase price from Greenwood on the theory that Greenwood's assets were less than its books showed. Coit represented Fahey on that same subject. The criminal action was based on Fahey's embezzlement from Greenwood, which resulted in Greenwood's overstated inventory. Factually, each lawyer's representation involved a common subject -- whether Greenwood's books were overstated." (emphases added); "[T]he accused argues that his communication with Fahey would violate RPC 4.2 only if Coit represented Fahey in Jewett-Cameron's action against Greenwood and if the accused knew that fact."; "'Subject,' the word that the rule uses, is broader than the word 'matter,' as the accused defines it." (emphasis added); "[I]t is sufficient for the purposes of this case to hold, as we do, that the accused communicated with Fahey on the subject on which Coit represented Fahey and on which the accused represented Jewett-Cameron. The accused's communication accordingly was a 'communicat[ion] on the subject of the representation' within the meaning of

RPC 4.2."; also rejecting the lawyer's argument that his deposition of the witness was "authorized by law").

Just a few months earlier, the Illinois Supreme Court held that prosecutors had not acted unethically in communicating with a mother suspected of child abuse, without the consent of the lawyer appointed to represent the mother in the child custody matter.

- People v. Santiago, 925 N.E.2d 1122, 1128-29, 1129 (Ill. 2010) (finding that prosecutors had not violated the ex parte communication rule by communicating with a mother who is a suspect in a criminal child abuse case without the consent of a lawyer appointed to represent the mother in a child protection case involving the same underlying facts; "The disagreement in this case turns on the phrases 'the subject of the representation' and 'that matter.' Defendant argues that 'the subject of representation' and 'that matter' in this case were the injury to S.H. and defendant's culpability regarding the circumstances of that injury. Defendant claims that 'the subject of the representation' is not the theory under which she may be culpable, but rather the facts supporting her culpability. Defendant maintains that there was such an integral relationship between the criminal and child protection cases that, pursuant to Rule 4.2, defendant's child protection attorney should have been contacted and allowed to be present when defendant was questioned by prosecutors concerning the criminal case."; "The State counters that the use of the phrase 'that matter,' when read together with the introductory clause 'during the course of representing a client' and the phrase 'subject of the representation,' indicates that the drafters intended the application of the rule to be case specific: specific to the matter in which the party is represented. Thus, because attorney MacGregor did not represent defendant in the criminal investigation, she had no right to be present or to object to the questioning of defendant in that investigation."; "Because defendant was not represented by counsel in the criminal matter, Rule 4.2 did not prohibit the prosecutors from communicating with defendant in that case." (emphasis added)).

In some fairly rare situations, the definition of "matter" becomes an important issue in a purely civil context. In 2011, the Northern District of West Virginia allowed lawyers representing CSX to call former clients of a plaintiffs' law firm that CSX had sued for improper conduct in asbestos cases.[2] The plaintiffs' law firm argued that the

[2] CSX Transp., Inc. v. Gilkison, Peirce, Raimond & Coulter, P.C., Civ. A. No. 5:05CV202, 2011 U.S. Dist. LEXIS 130118, at *16-17, *19, *20 (N.D. W. Va. Nov. 9, 2011) (allowing plaintiff CSX to call

"matter" about which CSX's lawyers wanted to contact the law firm's former clients obviously related to the law firm's previous representation of those clients. The court disagreed that this relationship prohibited the ex parte contacts.

> These fraud, conspiracy, and RICO claims are separate and distinct matters from the Peirce Firm's representation of a client in a third-party asbestos claim, and they are separate and distinct from a client's Federal Employees Liability Act ('FELA') claim against CSX. While this Court acknowledges that the clients' claims against CSX and/or third-party manufacturers and this action brought by CSX against the Peirce Firm defendants are similar in the sense that they may involve the subject of a client's asbestos-related injury claim, they are different matters within the meaning of Rule 4.2. . . . Although Rule 4.2 is broad enough to encompass a variety of transactions, it is not so broad as to prevent communication regarding all subjects that may happen to share the same underlying facts as the 'matter.'

CSX Transp., Inc. v. Gilkison, Peirce, Raimond & Coulter, P.C., Civ. A. No. 5:05CV202, 2011 U.S. Dist. LEXIS 130118, at *17 & *19 (N.D. W. Va. Nov. 9, 2011).

---

former clients of a law firm CSX had sued for improper conduct in asbestos cases; "Rule 4.2 only applies when the person with whom the lawyer seeks to communicate is represented in the same matter as the matter in which the communicating lawyer is representing his client. In this case the subject of the representation is CSX's allegations of fraud against the Peirce Firm defendants. The third amended complaint sets forth a claim that the Peirce Firm orchestrated a scheme to inundate CSX and other entities with thousands of asbestos cases without regard to their merit, in violation of the federal Racketeer Influenced and Corrupt Organizations Act ('RICO'), 18 U.S.C. § 1961, et seq. Third Am. Compl. ¶ 1-3. In the third amended complaint, the plaintiff also argues that the Peirce Firm defendants' conduct supports claims for common law fraud and conspiracy. Id. at ¶ 3. These fraud, conspiracy, and RICO claims are separate and distinct matters from the Peirce Firm's representation of a client in a third-party asbestos claim, and they are separate and distinct from a client's Federal Employees Liability Act ('FELA') claim against CSX. While this Court acknowledges that the clients' claims against CSX and/or third-party manufacturers and this action brought by CSX against the Peirce Firm defendants are similar in the sense that they may involve the subject of a client's asbestos-related injury claim, they are different matters within the meaning of Rule 4.2."; "Although Rule 4.2 is broad enough to encompass a variety of transactions, it is not so broad as to prevent communication regarding all subjects that may happen to share the same underlying facts as the 'matter.'"; "Rule 4.2, which references a party known to be represented by a lawyer, cannot be construed to bar communications with a person who is no longer represented by counsel because his claims have been resolved. . . . If representation has been terminated, however, Rule 4.2 is inapplicable.").

Of course, the safest course for any lawyer involved in a situation like this is to obtain the consent of whatever lawyer is representing the person in an arguably related matter. However, the questioning lawyer obviously must live with whatever answer he or she receives, so taking that safe course might essentially preclude ex parte communications with an important witness.

This issue might also arise if a lawyer wishes to communicate with a former client about unpaid fees. In 2011, the New York City Bar explained that a lawyer normally may communicate with a former client about unpaid fees, unless the lawyer knows that his or her replacement counsel is representing the former client in connection with the unpaid fees.

- New York City LEO 2011-1 (2011) ("We address the question of whether a lawyer may contact, on her own behalf, a former client to discuss matters relating to the prior representation without the prior consent of successor counsel. This issue arises in a number of contexts including, for example, where a lawyer seeks to collect a fee or permission to return or destroy client files after she has been discharged by the client and replaced by new counsel. We conclude that a lawyer may not contact her former client regarding matters as to which the lawyer knows the client is represented by successor counsel."; "Rule 4.2, of course, does not flatly prohibit all contact with former clients and there appears to be no reason to adopt any such blanket prohibition. Indeed, we believe that such a per se rule would unduly restrict an attorney's ability to communicate with a former client regarding matters as to which the client is not represented by counsel. In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees."; "In contrast, when a lawyer knows that the former client has secured new counsel, Rule 4.2 prohibits direct contact regarding any matter within the scope of the representation -- even where the lawyer is acting pro se -- unless the lawyer obtains the prior consent of successor counsel."; "To be sure, this conclusion may not be fully supported by the language of the first clause of Rule 4.2, which lawyers might justifiably interpret as permitting contact whenever the attorney initiating the communication is acting pro se and thus not 'representing a client.' Nevertheless, we believe that our construction, and

> that of most courts and ethics committees that have considered the question, comports with and furthers one of the salutary policy objectives of the rule, namely, to protect 'a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter."'" (citation omitted).

The definition of "matter" can also arise if the lawyer (or the lawyer's agents) engage in essentially nonsubstantive communications with a represented person. This issue might also implicate the "communicate" term as it is used in ABA Model Rule 4.2, but it probably makes more sense to analyze such situations under the "matter" prong of the rule.

Courts and bars sometimes indicate that such nonsubstantive communications do not run afoul of the ex parte communications rule.

- Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation." (emphasis added)).

- Alaska LEO 2006-1 (1/27/06) (dealing with a situation in which a lawyer has a consumer complaint about a local company, disagrees with a local newspaper's editorial policy, or has concerns as a homeowner with a municipal government's decision on a building permit; among other things, discussing whether any of the scenarios involved a "matter" in which the store, newspaper or government is represented; "In the three examples set forth above, the key question posed in each instance is whether there is a 'matter' that is 'the subject of the representation.' An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a 'matter' that is 'the subject of representation.'

> The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance. . . . The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a 'matter that is the subject of representation' depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party." (emphasis added)).

- Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002) (denying defendant's motion for protective order that would prohibit class-action plaintiffs' agents from posing as consumers to interact with Shell gas station managers and videotaping what they allege to be racial discrimination; finding that the gas station managers were in the Rule 4.2 "off-limits" category, but that the contacts between the investigators and the gas station employees did not constitute "communications" sufficient to trigger the Rule 4.2 prohibition; "Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera. These interactions do not rise to the level of communication protected by Rule 4.2. To the extent that employees and plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial." (emphases added)).

Lawyers engaging in (or arranging for others to engage in) such nonsubstantive communications should be very wary, because not all courts and bars might be this forgiving.

Best Answer

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

n 12/11

b 2/13

Required Level of Knowledge that the Third Person Has a Lawyer

Hypothetical 12

You are representing a landowner in an ugly dispute with his neighbor about a stream that crosses both of their lots. You would like to speak with the neighbor in an effort to resolve the dispute, but you do not know if the neighbor has a lawyer. Your client has told you that the neighborhood "gossip" is that the neighbor has hired a high-priced lawyer from a large downtown law firm, but you do not know the accuracy of that gossip.

May you communicate ex parte with the neighbor?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the "knows to be represented by another lawyer" standard.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Courts and bars must sometimes determine if a lawyer making ex parte contacts "knows" that the contacted person is represented by another lawyer in the matter.

ABA Model Rule 1.0 defines "knows" as denoting

> [a]ctual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). However, the ABA Model Rules then seem to back off a pure "actual knowledge" standard. A comment to ABA Model Rule 4.2 explains that

> [t]he prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

ABA Model Rule 4.2 cmt. [8] (emphases added). The ABA has also explained that

> Rule 4.2 does not, like Rule 4.3 [governing a lawyer's communications with an unrepresented person], imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" . . . actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication with a represented person simply by closing her eyes to the obvious.

ABA LEO 396 (7/28/95) (emphasis added).

The safest course (and perhaps the required course) is for a lawyer in this situation to begin any ex parte communication by asking the person whether he or she has a lawyer in the matter. If so, the lawyer must of course immediately end the communication. In that circumstance, the lawyer would also be wise to alert the person's lawyer about the contact and the lawyer's termination of the communication

immediately upon learning that the lawyer represented the person in the matter. Not advising the person's lawyer might render the questioning lawyer vulnerable to an ethics charge or some court sanction.

The ABA has explained that a lawyer's representation of a client on "all matters" does not actually create the type of attorney-client relationship on a specific "matter" that triggers the prohibition on an adversary's ex parte communication about that matter.

> By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters -- the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.
>
> Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

ABA LEO 396 (7/28/95) (emphases added).

Bars take the same approach.

- Wisconsin LEO E-07-01 (7/1/07) ("When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise

> or regularly consult with the organization's lawyer concerning the matter, who have the authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their [sic] role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. <u>The mere fact than an organization has in-house counsel does not render the organization automatically represented with respect to all matters.</u>" (emphasis added)).

Defense lawyers occasionally find themselves in an awkward position when dealing with this provision. Some people threatening to sue corporations (such as employees, former employees, users of allegedly defective products or others) claim to be represented by a lawyer -- but are bluffing. Once someone in that position claims to have a lawyer, the defense lawyer is essentially paralyzed -- and cannot communicate with the person unless she admits that she was lying about having a lawyer.

Best Answer

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

n 12/11

When Does a "Representation" Begin?

Hypothetical 13

Your largest client was just served with a class action complaint. The named plaintiff is claiming to have been injured by relying on your client's public misstatements when buying the client's stock. The plaintiff seeks to represent other similarly situated purchasers of the stock. You think you might be able to gain some insight into the case if you can interview some of the class members. You also hope that you might be able to settle some of their individual claims, which would reduce the number of folks seeking damages in the case if a court certifies the class.

Without class counsel's consent, can you communicate with members of the purported class before class certification?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the "represented by another lawyer in the matter" phrase in a class action context.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

In class action situations, this issue normally involves a debate about whether the attorney-client relationship has begun.

A comment to the ABA Model Rules explains that "unnamed members of the class are ordinarily not considered to be clients of the lawyer" representing the class.[2] However, this comment deals with characterizing those unnamed class members as "clients" for conflicts of interest purposes, not for ex parte communication purposes.

An ABA legal ethics opinion addressed this issue in the context of ex parte communications. That ethics opinion explained that

> [a] client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.

ABA LEO 445 (4/11/07).[3] Thus, the Model Rules "do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class." Id.

---

[2] ABA Model Rules, Rule 1.7 cmt. [25] ("When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.").

[3] ABA LEO 445 (4/11/07) (in the class action context, "a client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired"; thus, Model Rules 4.2 and 7.3 "do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class"; both lawyers must comply with Model Rule 4.3 if they communicate with potential class members; plaintiffs' lawyer must comply with Model Rule 7.3 if they are soliciting membership in the class, but those restrictions "do not apply to contacting potential class members as witnesses"; "both plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified"; "restricting defense communication with potential plaintiffs could inhibit the defendant from taking remedial measures to alleviate a harmful or dangerous condition that has led to the lawsuit; a defendant in a class action lawsuit also would be prevented from attempting to reach conciliation agreements with members of the potential class without going through a

The Restatement also takes this approach.

> A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

Restatement (Third) of Law Governing Lawyers § 99 cmt. l (2000) (emphasis added).

Most courts and bars take the same approach.

- Winans v. Starbucks Corp., No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136, at *7 (S.D.N.Y. Dec. 15, 2010) (in an opinion by Magistrate Judge Francis; "The complication here arises from the fact that the ASMs are members of the putative class. Because the class has not yet been certified, Starbucks is under no general prohibition against speaking with them.").

- Hernandez v. Vitamin Shoppe Indus. Inc., 95 Cal. Rptr. 3d 734 (Cal. Ct. App. 2009) (holding that a lawyer representing an individual plaintiff could not communicate with class members after class certification, unless the class counsel consented).

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of

---

lawyer whom the potential class member may have no interest in retaining"; "the court may assume control over communications by counsel with class members.").

professional conduct."; "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Debra L. Bassett, Pre-Certification Communication Ethics in Class Actions, 36 Ga. L. Rev. 353, 355-56 (Winter 2002) ("The majority view, embraced by most courts, the Restatement, and the leading class action treatise, holds that before class certification, putative class members are not 'represented' by class counsel." (footnotes omitted)).

- Blanchard v. Edgemark Fin. Corp., No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *19 (N.D. Ill. Sept. 11, 1998) (recognizing that class members are represented "'[o]nce a class has been certified'" (citation omitted)).

The minority view recognizes an attorney-client relationship between a class lawyer and class members before certification.

- Philadelphia LEO 2009-1 (4/2009) ("The majority rule in most jurisdictions is that after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of a putative class is permitted, because prior to class certification only those class members with whom plaintiffs' counsel maintains a personal attorney-client relationship are considered clients."; "However, Pennsylvania courts have not followed this majority rule. Rather, Pennsylvania courts have interpreted Rule 4.2 as barring defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel)." (emphasis added)).

That Philadelphia legal ethics opinion dealt with the interesting dilemma facing lawyers working on related cases in differing jurisdictions taking opposite approaches to this issue. In that legal ethics opinion, the Philadelphia Bar dealt with both in-house and

outside lawyers working together in defending a company from class actions in Pennsylvania and New Jersey federal courts. Philadelphia prohibited ex parte communications with class members before certification, while New Jersey apparently allowed such communications. The Philadelphia Bar explained that the governing rule would depend on where the litigation was pending, not where the witness lived. The Philadelphia Bar suggested a difficult, if not unworkable, solution:

> The Committee is of the strong opinion that the ideal way to proceed would be to retain independent counsel admitted in New Jersey to conduct the New Jersey interviews to obtain the information, and then avoid having this information transmitted in any fashion to those attorneys working on the Pennsylvania case until and if the Pennsylvania court is notified of and grants permission for its use. In this fashion, in the New Jersey matter the client is allowed full access to information available under New Jersey law, while the attorneys working on the Pennsylvania case are protected from disqualification, and thus the adverse consequences of being forced to change counsel during the course of the litigation.

Philadelphia LEO 2009-1 (4/2009).[4]

[4] Philadelphia LEO 2009-1 (4/2009) (addressing the following situation: "The inquirer's client is a defendant to a class action lawsuit pending in Pennsylvania federal court. In that case, the plaintiffs seek certification of a nationwide class of a certain position of the defendant's employees."; "In a separate lawsuit pending in federal court in New Jersey, the same defendant is defending a class action that raises identical substantive claims as those raised in the Pennsylvania federal court case."; explaining that employees who are putative members of the New Jersey class might also be members of the nationwide class in the Pennsylvania action; "The defendant is represented by in-house counsel in both causes of action. These attorneys are not barred in Pennsylvania or New Jersey but have been admitted pro hac vice. In-house counsel has a substantive role in the litigation and conducts all discovery and trial work. The in-house lawyers defending the Pennsylvania case are not the same in-house counsel lawyers working on the New Jersey case; however all attorneys involved in these cases work together in the same legal department and are fully aware of the allegations, procedural status, and litigation strategy of each case."; "The majority rule in most jurisdictions is that after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of a putative class is permitted, because prior to class certification only those class members with whom plaintiffs' counsel maintains a personal attorney-client relationship are considered clients."; "However, Pennsylvania courts have not followed this majority rule. Rather, Pennsylvania courts have interpreted Rule 4.2 as barring defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via

Lawyers clearly put themselves in harm's way if they communicate ex parte with a class representative after a court certifies the class.

> Jackson Lewis was disqualified from a potentially big class action against Barnes & Nobel last month, demonstrating the hidden risks of trying to gut class actions by settling with named plaintiffs. Alameda County, Calif., Superior Court Judge Steven Brick acknowledged that ousting the firm was a "drastic" move, but indicated from the bench that it was necessary in this case. Disqualification was a strategy more in vogue with both sides of the bar before the rules of litigating wage-and-hour class actions firmed up in the past five years. But Brick's decision shows the threat is still alive. "It's a trap for the unwary," said Francis "Tripper" Ortman, a partner in Seyfarth Shaw's San Francisco office who wasn't involved in the case. "You've got to be very sensitive when you're dealing with the class representative." Sara Minor, a former community relations manager at a Barnes & Noble store, sued over unpaid mileage and wrongful termination in Merced County, Calif., Superior Court. Then, she became class representative in a suit that San Diego plaintiffs firm Clark & Markham filed in Alameda County, which alleges that Barnes & Nobel illegally paid its California workers with checks from out-of-state banks. She said she only took the $13,500 Jackson Lewis offered her to settle her Merced suit because she and her husband were facing eviction. She didn't want to withdraw as class representative, she said, but it was part of the deal, and she needed the money. The trouble stemmed from Clark & Markham's claims that it had no idea Jackson Lewis was luring away its class representative. They were aware some negotiations had taken place, they say, but thought they'd ended. In his tentative ruling, Brick noted that Jackson Lewis had put

---

deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel)." (emphasis added); explaining that the issue of ex parte communications will be governed by the ethics rules of the court in which the case is pending, not the location of where the witnesses reside; inexplicably suggesting that the law department set up an ethics screen between the two sets of lawyers working on the New Jersey and the Pennsylvania cases, although the cases raise "identical substantive claims"; "The Committee is of the strong opinion that the ideal way to proceed would be to retain independent counsel admitted in New Jersey to conduct the New Jersey interviews to obtain the information, and then avoid having this information transmitted in any fashion to those attorneys working on the Pennsylvania case until and if the Pennsylvania court is notified of and grants permission for its use. In this fashion, in the New Jersey matter the client is allowed full access to information available under New Jersey law, while the attorneys working on the Pennsylvania case are protected from disqualification, and thus the adverse consequences of being forced to change counsel during the course of the litigation.").

> Minor's lawyer, Amy Carlson of San Jose firm Williams, Pinelli & Cullen, in an ethically compromising position and "intruded upon the attorney-client relationship between Minor and class counsel without the consent of class counsel, thereby threatening that relationship."

Kate Moser, Jackson Lewis Disqualified Over Deal With Class Representative, Law.Com, Oct. 14, 2010. Lawyers also risk sanctions if they communicate ex parte with absent class members after certification.

In a 2009 article, Professors Hazard and Irwin explained courts' and bars' mixed rules governing ex parte communications with absent class members before class certification, and after certification but before expiration of the opt-out period. To clarify the situation, they proposed the following comment:

> Once a proceeding has been certified as a class action and any opt-out period has expired, members of the class are considered represented persons for purposes of this Rule. Prior to that time, only those members of the class with whom the class's lawyer maintains a personal client-lawyer relationship are considered represented persons.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 843 (Mar. 2009).

Best Answer

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

b 2/13

When Does a "Representation" End?

Hypothetical 14

Last year, you defended a car dealership in a lawsuit brought by a software vendor, which claimed that your client breached a software delivery contract. You won a jury trial, and the appeals period ended three months ago. You are now facing the possibility of a lawsuit from an auto parts vendor, and you think it would be worthwhile for you to interview the CEO of the software vendor about his dealings with your client.

Without the consent of the lawyer who represented the software vendor in the litigation against your client, may you communicate with the software vendor's CEO about the vendor's dealings with your client?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the "represented by another lawyer in the matter" phrase -- as applied to post-litigation communications.

For obvious reasons, it can be difficult to know when a representation ends.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

- CSX Transp., Inc. v. Gilkison, Peirce, Raimond & Coulter, P.C., Civ. A. No. 5:05CV202, 2011 U.S. Dist. LEXIS 130118, at *20 (N.D. W. Va. Nov. 9, 2011) (allowing plaintiff CSX to call former clients of a law firm CSX had sued for improper conduct in asbestos cases; "Rule 4.2, which references a party known to be represented by a lawyer, cannot be construed to bar communications with a person who is no longer represented by counsel because his claims have been resolved. . . . If representation has been terminated, . . . Rule 4.2 is inapplicable."; also finding that CSX's lawyer could communicate with the former clients about their claim against the law firm, which was not the same "matter" as the now-resolved asbestos cases in which the plaintiffs' law firm represented the clients against CSX).

- K-Mart Corp. v. Helton, 894 S.W.2d 630, 631 (Ky. 1995) ("The Court of Appeals correctly observed that the continued representation of an individual after the conclusion of a proceeding is not necessarily presumed and that the passage of time may be a reasonable ground to believe that a person is no longer represented by a particular lawyer. Rule 4.2 is not intended to prohibit all direct contact in such circumstances. Here counsel for plaintiffs had reasonable grounds to believe that the petitioners were not represented by counsel when he took the Pittman statement. In considering the fact that no contact was made by an attorney on behalf of K-Mart until more than one year after the incident which gave rise to this action and almost one year after plaintiffs' counsel took the statement, we believe that the communication with the K-Mart employee was not with a party the attorney knew was represented by another attorney in the matter.").

Bars have also wrestled with the issue. For instance, Virginia LEO 963 (9/4/87) indicated that a lawyer may not send an adversary a letter during the time an appeal may be filed if the adversary was represented during the trial, even though no appeal has been filed and the adversary's lawyer has not indicated that an appeal will be filed. More recently, Virginia LEO 1709 (2/24/98) indicated that a lawyer may not contact an adversary ex parte after the adversary has non-suited a case, because "the entry of a non-suit does not terminate the representation of a party." The Virginia Bar explained that the presumption of representation continues after the non-suit, just as the presumption continues during the period when an appeal might be filed after a final judgment.

Best Answer

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

b 2/13

Meaning of "Communication"

Hypothetical 15

You have been representing a client in litigation that has dragged on now for over three years. You suspect that the other side's lawyer has not been informing his client of important facts -- such as your client's position on the key issues, and the evidence supporting those positions. You and your client believe that if the other side knew of your client's positions and the evidence, the case might be resolved. You are trying to think of a way that you can arrange this, but you worry about the reaction of the other side's very aggressive trial lawyer.

Without the other side's lawyer's consent, can you send a copy of your client's interrogatory answers to the other side -- without any cover letter or other communication.

NO

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the meaning of "communicate about the subject of the representation."

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Sending a represented person any type of "communication" presumably violates the prohibition -- whether the "communication" consists of a publicly-filed pleading or any other type of communication.

In a way, this seems counterintuitive. The lawyer representing the adversary almost surely has an ethical duty to pass along pleadings (or at least the substance of the pleadings) to his or her client. The sending lawyer might simply argue that he or she is "assisting" the adversary's lawyer in fulfilling that ethical duty. Such an argument would almost surely fail.

No court or bar seems to have dealt with another interesting issue involving the term "communication." It is unclear whether a lawyer can attend a meeting between his or her client and a represented person -- without that person's lawyer's consent. If "communication" means oral communication, such a lawyer might seek to avoid the rule's prohibition by simply not saying anything or responding to the represented person -- but merely observing. To the extent that the lawyer and the represented person exchange social pleasantries about the weather, the local football team, etc., the lawyer could argue that those communications did not relate to the "matter" on which the represented person has retained a lawyer.

Such an action seems to fall outside the literal language of the rule's prohibition, but would also seem to give that lawyer an unfair advantage that the rule might prohibit -- being able to witness the represented person's unguarded communications, demeanor, body language, etc.

Best Answer

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

n 12/11

Application Outside Litigation and Adversarial Settings

Hypothetical 16

You are representing a dry cleaner in connection with a customer's complaint about a ruined dress. The customer is a paralegal at a local law firm, and has advised your client that one of the law firm's young lawyers is helping her determine what to do. So far the disagreement has been fairly amicable, with your client and the customer both indicating that they want to avoid litigation.

Your client just told you that another customer has volunteered to support his version of one heated conversation he had with the complaining customer in the store. Although the other customer is willing to help support your client's story, he has asked his lawyer brother-in-law to help him determine how to help your client without being dragged into the dispute by the complaining customer. You would like to work things out informally.

(a) Because litigation has not begun or even seems likely, may you call the complaining customer without her lawyer's consent?

NO

(b) Because the other customer/witness seems to be an ally rather than an adversary, may you call him without his lawyer's consent?

NO

Analysis

(a) The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical deals with the reach of the rule, and its applicability in nonadversarial settings.

ABA Model Rule 4.2 formerly used the term "party" rather than "person." However, in 1995 the ABA switched to the term "person." The ABA itself explained that the change represented a clarification rather than a change in meaning.

States take the same approach. See, e.g., Indiana LEO 1 (2003) ("[t]he Committee here emphasizes that Rule 4.2 is not limited to circumstances in which a lawsuit has been filed").

(b) ABA Model Rule 4.2 and every state's counterpart apply to any ex parte contacts with a represented person -- whether that person is a friend or a foe.

The Restatement explains that the prohibition

> is not limited to situations of opposing parties in litigation or in which persons otherwise have adverse interests. Thus, the rule covers a represented co-party and a nonparty fact witness who is represented by counsel with respect to the matter, as well as a nonclient so represented prior to any suit being filed and regardless of whether such suit is contemplated or eventuates.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000) (emphases added).

Of course, contacting a friendly person ex parte might not draw any complaint by her lawyer or result in an ethics charge, but the prohibition applies nevertheless.

---

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Best Answer

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

n 12/11

Irrelevance of the Adversary's Consent

Hypothetical 17

For six months, you have represented your corporate client in a dispute with a sophisticated and very wealthy inventor. This evening, the inventor called you on your cell phone. The inventor tells you that he thinks his lawyer is actually an obstacle to resolving the dispute short of litigation. He proposes to negotiate a resolution directly with you.

(a) May you continue speaking with the inventor about the resolution?

NO

(b) May you continue speaking with the inventor if he tells you that his lawyer consents to the conversation?

NO (PROBABLY)

(c) May you continue speaking with the inventor if he tells you that he has fired his lawyer?

MAYBE

Analysis

Introduction

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the

This hypothetical addresses the "consent of the other lawyer" phrase.

ABA Model Rule 4.2 and every state's variation require the other person's lawyer's consent. The other person's consent does not suffice.

> The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

ABA Model Rule 4.2 cmt. [3].

The Restatement takes the same approach.

> The general exception to the rule . . . requires consent of the opposing lawyer; consent of the client alone does not suffice . . . .

Restatement (Third) of Law Governing Lawyers § 99 cmt. b (2000).

> The anti-contact rule applies to any communication relating the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication

Restatement (Third) of Law Governing Lawyers § 99 cmt. f (2000).

In a 2009 article, Professors Hazard and Irwin explained that the ex parte contact rule does not permit the client to waive the protection in circumstances where waiver would be inappropriate.

> A represented person's lawyer, but not a represented person himself, can waive the protections of Model Rule 4.2. If represented persons have the authority to waive the protections of other ethical rules, the question arises why the

---

subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

> same is not true with respect to the no-contact rule. The answer lies in the logic of the no-contact rule, which is premised on the notion that a layperson is fatally vulnerable to an opposing lawyer's importunities.
>
> Accordingly, the rule's protections cannot be waived by a client, even if the client is sophisticated, and even if the client has good reason for wanting to communicate with another lawyer involved in a matter. One can envision many such situations. A high-level whistleblower might want to contact a government lawyer to offer information about the corporate target of a government investigation. A spouse in a domestic relations matter might be dissatisfied with counsel and interested in other or joint representation. A criminal co-defendant, mistrustful of counsel, might want to initiate a conversation with the prosecutor regarding possible cooperation.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 825-26 (Mar. 2009) (footnotes omitted) (emphasis added).

Although acknowledging that the majority view does not permit the client to consent to such ex parte communications, professors Hazard and Irwin suggest that in certain limited circumstances such a consent should be recognized. Professors Hazard and Irwin proposed an amendment to Rule 4.2 to address this issue.

> [W]e would add a general exception to Model Rule 4.2 for client waiver. But we would qualify it with the safeguard that the lawyer must memorialize in writing the client's initiation of the communication. Accordingly, we propose specifying in new paragraph (a) that the Rule's prohibition does not apply where "the represented person initiates the communication, a fact that is confirmed in writing."

Id. at 828.

There is little indication that any state bar has adopted this approach, although it makes sense in certain limited circumstances.

(a) Under the majority view requiring the represented person's lawyer's consent (and not just the person's consent), lawyers have faced severe sanctions for communicating with represented persons.

- Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517, 518, 521 (E.D. Pa. 1995) (disqualifying a plaintiff's lawyer, who had communicated ex parte with someone who apparently was a senior executive at a company the plaintiff's lawyer had threatened to sue, and which the plaintiff's lawyer knew was represented by counsel; explaining the factual context; "Halberstadt [plaintiff's lawyer] received a telephone call from Gregg Falberg [senior executive at International Zinc, the company plaintiff had threatened to sue, and which the plaintiff's lawyer knew was represented by a lawyer]. Falberg called Halberstadt to again try to settle things without litigation. Halberstadt advised Falberg that it would be best if Halberstadt communicated with Falberg's counsel, but continued speaking with Falberg anyway. The telephone call lasted approximately 90 minutes and consisted of matters relevant to the litigation, including Falberg's relationship with ICI [plaintiff], Falberg's dealings with Defendant Polyset, Falberg's customers, Polyset's manufacturing processes, potential witnesses, and Falberg's opinions of the patents at issue. D-6; D-7. During their conversation, Halberstadt took 24 pages of notes. In the period between Halberstadt's conversation with Falberg and the filing of the Complaint, Halberstadt revised his draft of the Complaint."; holding that the plaintiff's lawyer had a duty to avoid the communication, even though the company's executive had initiated the conversation; also noting that the company was prejudiced, because the plaintiff's lawyer had revised the complaint as a result of the conversation; ordering the plaintiff's lawyer to produce all of his notes of the conversation, and also ordering replacement counsel to certify that he did not have access to any of the information obtained during the improper conversation; "Defendants' Motion to Disqualify Plaintiff's Counsel (Halberstadt and his law firm) from further participation in this action for violation of Rule 4.2 of the Pennsylvania Rules of Professional Conduct is granted. Plaintiff and its counsel will also be required to produce all notes and memoranda related to the ex parte contact with Defendant Gregg Falberg. In addition, this Court will allow ICI ten days to obtain new counsel, which counsel will certify that it does not have access to the information obtained pursuant to the unethical communication. Finally, this court will seal all of the records containing reference to the unethical communication.").

- Monceret v. Board of Prof'l Responsibility, 29 S.W.3d 455, 457, 461 (Tenn. 2000) (affirming a private admonition critical of a plaintiff's lawyer who deposed a witness who was represented in the matter, but without the witness's lawyer's consent; explaining that the plaintiff's lawyer had

> "discussed the absence of Mealer's attorney with Mealer [witness] before beginning the deposition, and Mealer elected to proceed in the absence of counsel"; noting that "[a]n apparent majority of courts have followed this interpretation and have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate"; "In light of this authority, we reject Monceret's contention that even thought he did not consult with Mealer's attorney, Mealer herself waived her right to the presence of counsel. Such a holding would be inconsistent with the plain language and spirit of DR 7-104(A)(1). We likewise reject Monceret's argument that the issuance of a subpoena satisfies the 'authorized by law' exception found in DR 7-104(A)(1). Such a conclusion would minimize the attorney's ethical obligation under the Rule and would create an exception that would threaten to swallow the Rule.").

In some situations, courts' application of this rule seems too harsh. For instance, the Northern District of Illinois disqualified the defense lawyer for negotiating a settlement with an individual class member through negotiations with the class member's lawyer -- but without class counsel's explicit consent. The court was not deterred by evidence that the class counsel knew of the settlement negotiations.

- Blanchard v. Edgemark Fin. Corp., No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *23-24 (N.D. Ill. Sept. 14, 1998) (disqualifying a defense lawyer for violating the ex parte communication rule; explaining that the defense lawyer had negotiated settlement with a plaintiff's lawyer, but without notice to class counsel representing a class that included the individual plaintiff; inexplicably finding that class counsel's knowledge of the individual negotiation did not relieve the defense lawyer of the obligation to seek explicit consent; "[W]e agree with the Magistrate Judge that Hedlund's [class counsel] apparent acquiescence to the negotiations is insufficient to remove this case from the ambit of Rule 4.2 While Hedlund may have been aware of the negotiations and did not object or attempt to intervene, there is no indication that Hedlund affirmatively consented to the communications. We have not discovered, nor have defendants cited, any authority that would excuse such an ethical violation merely because the party's counsel failed to take affirmative steps to prevent the communication. As the Magistrate Judge correctly noted, it is the responsibility of each lawyer to make sure that his or her conduct is in compliance with the pertinent ethical rules. Therefore, we reject defendants' contention that Gravelyn [defense lawyer] should be excused from his unethical conduct because Hedlund did nothing to prevent it.").

On the other hand, one court upheld a settlement agreement despite an alleged violation of this rule.

- Myerchin v. Family Benefits, Inc., 76 Cal. Rptr. 3d 816 (Cal. Ct. App. 2008) (assessing a situation in which a plaintiff settled a breach of contract case by accepting $200,000, but refused to dismiss the case by alleging that the settlement agreement was unenforceable based on the defendant's lawyer's ex parte negotiation of a settlement agreement with the plaintiff rather than through the plaintiff's lawyer; noting that plaintiff refused to return the $200,000; ultimately concluding that the plaintiff could not renege on the settlement agreement despite the ex parte communications).

(b) It may seem counterintuitive, but a lawyer takes an enormous risk by accepting at face value even a highly sophisticated person's assurance that the person's lawyer has consented to an ex parte communication. See, e.g., New York City LEO 2005-04 (4/2005) (applying the ex parte prohibition even to communications initiated by what the bar called a "sophisticated non-lawyer insurance adjustor"; "[a] lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent").

As explained above, Professors Hazard and Irwin proposed such an exception in a 2009 article, but no bar seems to have taken the bait.

(c) Courts and bars have wrestled with the lawyer's obligations if the person indicates that she has fired her lawyer.

The ABA has explained that a lawyer may proceed with an ex parte communication with a person only if the lawyer has "reasonable assurance" that the representation has ended. ABA LEO 396 (7/28/95).

In 2012, a Washington court sanctioned a lawyer who responded ex parte to an adversary's email in which the adversary indicated (among other things) that the adversary "did not wish to be represented by her attorney."

- Engstrom v. Goodman, 271 P.3d 959, 961, 964 (Wash. Ct. App. 2012) (imposing a $3,000 sanction against a lawyer who responded ex parte to a represented litigant who is an adversary of the lawyer's client; explaining that a defendant sent an email to the plaintiff's lawyer "in which she said she did not agree to a new trial and she did not wish to be represented by her attorney"; explaining that the plaintiff's lawyer prepared a declaration that the defendant signed, which the plaintiff used to strike the defendant's pleading; "Engstrom [plaintiff] contends there was no violation of the rule because it was Hardesten [defendant] who initiated the communication with Williams [plaintiff's lawyer] by sending him the e-mail message."; "The fact that Hardesten first approached Williams is irrelevant."; "Engstrom further argues that Williams should be excused for soliciting Hardesten's declaration because her e-mail message gave him a reasonable basis to believe she was unrepresented. Engstrom is mistaken. The question is whether there is a reasonable basis for an attorney to believe a party may be represented. If so, the attorney's duty is to determine whether the party is in fact represented. . . . Williams did not fulfill this duty. As Hardesten's attorney had not withdrawn, Williams had a reasonable basis for believing Hardesten was still represented, despite her statement that she did not 'wish to be represented' by that attorney. By taking the matter into his own hands, Williams took advantage of Hardesten." (footnote omitted); "Williams could have simply forwarded the e-mail to Hardesten's attorney. Alternatively, he could have submitted it to the court under RCW 2.44.030."), review denied, 175 Wn. 2d 1004 (Wash. Sept. 5, 2012).

On the other hand, the Texas Supreme Court has held that

> Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. Confirmation may be necessary in some circumstances before an attorney can determine whether a person is no longer represented, but it is not required by Rule 4.02 in every situation, and for good reason. The attorney may not be able to provide confirmation if, as in this case, he and his client have not communicated. And while a client should certainly be expected to communicate with his attorney about discontinuing representation, the client in

> some circumstances may have reasons for not doing so immediately.

In re Users Sys. Servs., Inc., 22 S.W.3d 331, 334-35 (Tex. 1999) (emphases added).

Lawyers undertaking such communications undoubtedly put themselves in harm's way, but apparently do not violate the ethics rules in every jurisdiction.

Best Answer

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

b 2/13

Using "Reply to All" Function

Hypothetical 18

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply to All" function, and defending your client's positions in the negotiations?

MAYBE

Analysis

As in other ethics contexts, the increasing use of electronic communications has complicated matters.

Also as in other ethics contexts, the New York City Bar seems to be the first (and so far only) bar to have dealt with the "Reply to All" function. In a 2009 legal ethics opinion, the New York City Bar indicated that in some circumstances lawyers may safely use the "Reply to All" function.

- New York City LEO 2009-1 (2009) (explaining that lawyers might be permitted ethically to use the "reply to all" function on an email that the lawyer receives from a lawyer representing an adversary, and on which the other lawyer has copied his or her client; "The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining 'prior consent' to the

direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication."; "We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting."; explaining a few considerations that affect the analysis; "Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a 'reply to all' response from any one of the email's recipients."; "Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the 'cc' cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to 'reply to all' communications."; "Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent."; "We are mindful that the ease and convenience of email communications (particularly 'reply to all' emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequence of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addresses to avoid sending emails to represented persons whose counsel have not consented to the direct communication.").

Given the novelty of this issue in the New York City Bar's explanation (especially the difference between a friendly negotiation context and an adversarial context), lawyers would be wise not to respond with a "Reply to All" email -- at least until other bars add their voice to this issue.

Best Answer

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

n 12/11

"Authorized by Law" Exception

Hypothetical 19

You represent the owner of a small apartment building in a nearby college town. Your client has had a running feud for nearly six months with one of her tenants -- a law student, who has hired a local civil rights lawyer to represent him. The tenant has already filed two ethics charges against you. You think that the charges are groundless, but you obviously are a bit "skittish." Your client just asked you to send a notice to the tenant indicating that your client is terminating the apartment lease at the end of the school year. One of the lease provisions requires that such a notice be sent directly to the tenant. Now you wonder whether the tenant will file another ethics charge if you send the notice directly to the tenant.

May you send the termination notice directly to the tenant?

YES (PROBABLY)

Analysis

Introduction

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical addresses the "authorized to do so by law" phrase.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

The court "authorized by law" standard generally involves one or more of five issues.

First, courts have dealt with that standard's application to court processes and discovery of litigants or nonlitigants. Some communications of that sort clearly fall within the "authorized by law" exception -- but others clearly do not. The Oregon Supreme Court addressed this issue.

> Without the "authorized by law" exception or the consent of the opposing party's lawyer, a lawyer could not cross-examine the opposing party at trial, depose that party, or subpoena a represented witness to testify before the grand jury. . . .
>
> The "authorized by law" exception permits a lawyer to communicate directly with another party in those situations without the consent of that party's lawyer. However, nothing in the terms of that exception or the cases interpreting it suggests that the exception goes as far as the accused would take it. The accused would interpret the exception to permit an end-run around the represented person's lawyer. As we understand the accused's argument, as long as a lawyer can subpoena a nonparty witness to testify at trial or in a deposition before the witness has an opportunity to contact his or her own lawyer, the "authorized by law" exception would permit the lawyer to ask that witness unlimited questions without the opportunity for the witness's lawyer to protect his or her client's interests. That interpretation of the exception, if accepted, would undermine the purpose of the rule. . . .
>
> . . . .
>
> . . . [T]he "authorized by law" exception does not extend so far that it permits one lawyer to unilaterally exclude a represented witness's lawyer from the deposition.

In re Newell, 234 P.3d 967, 974, 976 (Or. 2010).[2] Significantly, in that case the Oregon Supreme Court publically reprimanded an Oregon lawyer who had deposed a witness in a civil case without the consent of the witness's criminal lawyer handling a related criminal case.

[2] In re Newell, 234 P.3d 967, 971, 972, 972-73, 973-74, 974, 976 (Or. 2010) (publicly reprimanding a Oregon lawyer who deposed a witness in a civil case about the subject of incidents that were also involved in a criminal case against the witness; noting that the lawyer realized that the witness was represented by a criminal lawyer in a related criminal matter, but did not notify the criminal lawyer of the deposition; rejecting the lawyer's argument that he did not have ex parte communications on the same "subject" as that in which the witness had a criminal defense lawyer; noting that the disciplinary panel concluded that Oregon's Rule 4.2 "covers 'instances such as the present case in which the [a]ccused knew the witness to be represented in a pending criminal proceeding but nevertheless proceeded to interrogate the witness about that subject.'"; agreeing with the panel; "In this case, there is no dispute that the accused communicated with Fahey in the course of representing Jewett-Cameron, that Fahey was represented in the criminal action, and that the accused knew that he was communicating with Fahey on the subject on which Fahey was represented. The only question is whether the communication concerned the subject on which the accused represented Jewett-Cameron and on which Coit represented Fahey. As a factual matter, the answer to that question is 'yes.' The subject on which the accused represented Jewett-Cameron was Greenwood's alleged overstatement of its inventory. The accused sought to recover part of the purchase price from Greenwood on the theory that Greenwood's assets were less than its books showed. Coit represented Fahey on that same subject. The criminal action was based on Fahey's embezzlement from Greenwood, which resulted in Greenwood's overstated inventory. Factually, each lawyer's representation involved a common subject -- whether Greenwood's books were overstated.";"[T]he accused argues that his communication with Fahey would violate RPC 4.2 only if Coit represented Fahey in Jewett-Cameron's action against Greenwood and if the accused knew that fact."; "'Subject,' the word that the rule uses, is broader than the word 'matter,' as the accused defines it."; "[I]t is sufficient for the purposes of this case to hold, as we do, that the accused communicated with Fahey on the subject on which Coit represented Fahey and on which the accused represented Jewett-Cameron. The accused's communication accordingly was a 'communicat[ion] on the subject of the representation' within the meaning of RPC 4.2."; also rejecting the lawyer's argument that his deposition of the witness was "authorized by law"; "Without the 'authorized by law' exception or the consent of the opposing party's lawyer, a lawyer could not cross-examine the opposing party at trial, depose that party, or subpoena a represented witness to testify before the grand jury."; "The 'authorized by law' exception permits a lawyer to communicate directly with another party in those situations without the consent of that party's lawyer. However, nothing in the terms of that exception or the cases interpreting it suggests that the exception goes as far as the accused would take it. The accused would interpret the exception to permit an end-run around the represented person's lawyer. As we understand the accused's argument, as long as a lawyer can subpoena a nonparty witness to testify at trial or in a deposition before the witness has an opportunity to contact his or her own lawyer, the 'authorized by law' exception would permit the lawyer to ask that witness unlimited questions without the opportunity for the witness's lawyer to protect his or her client's interests. That interpretation of the exception, if accepted, would undermine the purpose of the rule."; "[T]he 'authorized by law' exception does not extend so far that it permits one lawyer to unilaterally exclude a represented witness's lawyer from the deposition.").

Other courts have likewise rejected the argument that depositions or other discovery fall within the "authorized by law" exception to the prohibition on ex parte communications.

- See, e.g., Monceret v. Board of Prof'l Responsibility, 29 S.W.3d 455, 457, 461 (Tenn. 2000) (affirming a private admonition critical of a plaintiff's lawyer who deposed a witness who was represented in the matter, but without the witness's lawyer's consent; explaining that the plaintiff's lawyer had "discussed the absence of Mealer's attorney with Mealer [witness] before beginning the deposition, and Mealer elected to proceed in the absence of counsel"; noting that "[a]n apparent majority of courts have followed this interpretation and have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate"; "In light of this authority, we reject Monceret's contention that even thought he did not consult with Mealer's attorney, Mealer herself waived her right to the presence of counsel. Such a holding would be inconsistent with the plain language and spirit of DR 7-104(A)(1). We likewise reject Monceret's argument that the issuance of a subpoena satisfies the 'authorized by law' exception found in DR 7-104(A)(1). Such a conclusion would minimize the attorney's ethical obligation under the Rule and would create an exception that would threaten to swallow the Rule." (emphasis added)).

Thus, the "authorized by law" exception to the prohibition on ex parte communications applies to some court processes, but not others.[3]

Second, a lawyer's ex parte communications with government officials sometimes implicate the "authorized by law" standard.

- See, e.g., Kansas LEO 00-6 (2000) ("Communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter fall under the 'authorized by law' exception to Rule 4.2 and are therefore permissible.").

[3] To the extent a lawyer defending a witness argues that any deposition questions (absent his or her consent) violate the ex parte communication prohibition and do not fall within the "authorized by law" exception, the questioning lawyer might have to obtain a court order requiring responses to the discovery -- thus falling within the "court order" exception in ABA Model Rule 4.2 and similar state rules.

Most courts and bars analyzing such communications rely instead on the constitutional provisions permitting citizens to petition the government, but in some circumstances the "authorized by law" exception seems appropriate as well.

Third, courts have struggled with reconciling applicable ethics rules and certain statutes that seem to permit ex parte contacts.

For instance, Section 10 of the Federal Employers' Liability Act ("FELA") provides that

> [a]ny contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from voluntarily furnishing information to a person in interest as to facts incident to the injury or death of any employee, shall be void.

45 U.S.C. § 60 ("FELA § 10").

In one case, the District of Massachusetts noted the enormous variation among courts determining whether this provision trumps the ethics rules.

> There is a sharp division among district courts on the question of whether FELA § 60 [sic] overrides ethical rules prohibiting a plaintiff's lawyer from contacting employees of a defendant, in a railroad or Jones Act action, without the awareness of defense counsel.
>
> For cases interpreting FELA § 60 [sic] as superseding or preempting Rule 4.2: see Pratt v. AMTRAK, 54 F. Supp. 2d 78 (D. Mass. 1999); Blasena v. CONRAIL, 898 F. Supp. 282 (D.N.J. 1995); United Transp. Union Local Unions 385 & 77 v. Metro-North Commuter R.R., 1995 U.S. Dist. LEXIS 15989, 1995 WL 634906 (S.D.N.Y. Oct. 30, 1995).
>
> For cases apply[ing] Rule 4.2 over FELA § 60 [sic]: see Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001) (reviewing the Jones Act); Woodard v. Nabors Offshore Corp., 2001 U.S. Dist. LEXIS 177, 2001 WL 13339 (E.D. La. Jan. 4, 2001) (reviewing the Jones Act); Belote v. Maritrans Operating Partners, L.P., 1998 U.S. Dist.

> LEXIS 3571, 1998 WL 136523 (E.D. Pa. Mar. 20, 1998); Tucker v. Norfolk & W. Ry. Co., 849 F. Supp. 1096 (E.D. Va. 1994).

Groppo v. Zappa, Inc., No. 03-CV-10384-MEL, 2005 U.S. Dist. LEXIS 5651, at *6 & n.2 (D. Mass. Mar. 30, 2005). The court ultimately found that the FELA provision did not trump the state ethics rules, but that the uncertainty over the issue made sanctions on the plaintiff's lawyer inappropriate.

Other courts have reached the opposite conclusion. Mayfield v. Soo Line R.R., No. 95 C 2394, 1995 U.S. Dist. LEXIS 18051(N.D. Ill. Nov. 29, 1995) (finding that provision of the FELA trumps any violation of Rule 4.2, so that the plaintiff may contact ex parte interviews of defendant railroad's employees).

Fourth, provisions in privately negotiated contracts or leases present a more difficult question, because they are not based on statutes or rules.

Still, the Restatement takes an expansive view.

> Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated nonclient, even if represented in the matter, is authorized to comply with legal requirements of the contract.

Restatement (Third) of Law Governing Lawyers § 99 cmt. g (2000).

State bars take the same basic approach.

- Virginia LEO 1375 (10/1/90) (contractually required notices between a landlord and a tenant are permissible even if the parties are represented by lawyers, although courtesy would demand that a copy of the notice be sent to the recipient's lawyer).

- Illinois LEO 85-05 (12/1985) (finding that a lawyer representing a purchaser under a real estate contract requiring notice to "the seller" may send the required notice directly to the seller even though the seller is represented by a lawyer, because "the terms of the contract would authorize the lawyer acting

for the purchaser to communicate such notice as is required by the contract directly to the seller").

As could be expected, the sending lawyer in these circumstances must limit the communication to the contractually required language.

- Indiana LEO 1 (2003) (recognizing the exception, but advising lawyers to limit any such notice to the position or intent of the sending person, so the notice does not amount to a "communication" within the meaning of Rule 4.2).

- Illinois LEO 85-05 (12/1985) (finding that a lawyer representing a purchaser under a real estate contract requiring notice to "the seller" may send the required notice directly to the seller even though the seller is represented by a lawyer, because "the terms of the contract would authorize the lawyer acting for the purchaser to communicate such notice as is required by the contract directly to the seller"; warning that "it would be improper for the lawyer in question to expand the communication with the seller beyond such notice as is specifically required by the contract (to include a counter-offer or to seek an extension of the time for obtaining a mortgage commitment for example)."

Although lawyers might be able to take advantage of the "authorized by law" exception in the context of a private contract, they should be wary of doing so. To the extent that the lawyer wants to communicate herself rather than work with the client to send such a contractual notice or similar communication, the lawyer's effort to intimidate or impress the represented person in essence establishes why the prohibition should apply.

Fifth, two academics have argued that the ex parte contact rule should contain an exception for emergency communications that might ultimately be authorized by a court order, but which the communicating lawyer does not have time to obtain.

In a 2009 article, Professors Hazard and Irwin explained that there are emergency situations in which an ex parte communication should be permissible.

> One can envision several situations in which a lawyer might want to contact a represented person directly in order

> to avert imminent harm. A lawyer might want to warn a represented person that the lawyer's client is likely to engage in violent acts. Or a lawyer might want to communicate directly with a represented spouse or partner regarding a child's whereabouts or health emergency. Recognizing such exigencies, the Restatement (Third) includes an exception "to protect life or personal safety and to deal with other emergency situations . . . to the extent reasonably necessary to deal with the emergency." Model Rule 4.2 has no such express qualification. Rather, it addresses the issue in Comment 6, which states that an emergency may justify a court order authorizing communication. Obtaining such an order may of course be appropriate in some situations, but it is insufficient for addressing an immediate risk of harm.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 829 (Mar. 2009) (footnotes omitted).

Professors Hazard and Irwin proposed an amendment to the Comment to Rule 4.2 as follows:

> Communications necessary in light of what the lawyer reasonably believes to be an emergency include communications that the lawyer believes necessary to address an imminent and reasonably certain risk of death, substantial bodily harm or compromised personal safety. They may also include communications that the lawyer believes necessary to address an imminent risk of harm to the financial interests or property of another, in furtherance of which the lawyer's client used the lawyer's services. See Rule 1.6. Where the risk of harm is not imminent, a lawyer should seek a court order prior to engaging in the communication.

Id. at 829-30.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**. n 12/11

Clients' Direct Communication with Represented Persons

Hypothetical 20

As the only in-house lawyer for your relatively small client, you frequently appear as counsel of record in litigating cases as well as providing daily advice to your client's executives. You are currently working on a nasty piece of litigation in which your adversary has hired an aggressive and unreasonable lawyer. You think the case might settle if the other lawyer were not involved in the discussions.

Without your adversary's lawyer's consent, may your client's CEO call the adversary's CEO to discuss the case?

YES

Analysis

This area of ethics law is so confusing and difficult to apply in part because the strictly enforced prohibition on lawyers' ex parte contacts with represented persons stands alongside an equally powerful rule -- clients only speak with clients.

An ABA Model Rule comment makes this very clear.

> Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

ABA Model Rule 4.2 cmt. [4].

Courts and bars take the same approach.

- Illinois LEO 04-02 (4/2005) (explaining that "a client's 'absolute right' to negotiate and resolve her legal affairs will not be interfered with absent fraud and an attempt to keep her from consulting with her lawyer. . . . The client has the absolute right to negotiate directly and sign agreements without her lawyer's presence or consent." (emphasis added)).

- Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., No. 00 C 5658, 2002 U.S. Dist. LEXIS 11915 (N.D. Ill. July 11, 2002) ("A represented party

> may directly contact a represented opposing party; no rule prohibits such communication").

A much more perplexing situation involves the extent to which a lawyer can suggest or assist clients in exercising their undeniable right to communicate directly with another represented person.

Best Answer

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

b 2/13

Lawyers' Participation in Clients' Communications

Hypothetical 21

You are acting as counsel of record for your small company in litigation against an adversary represented by an aggressive and unreasonable lawyer. You think that direct communications between your client's CEO and the adversary's CEO might resolve the case. You are considering how to raise this issue with your client's CEO.

(a) If your client's CEO proposes to call the adversary's CEO directly, must you discourage your CEO from doing so?

NO (PROBABLY)

(b) May you "suggest" that your client's CEO call the other CEO directly (without the adversary's lawyer's consent)?

YES (PROBABLY)

(c) May you prepare your client's CEO for such a direct communication?

YES (PROBABLY)

Analysis

Introduction

Determining in what way a lawyer may participate in a client's direct ex parte communication with a represented adversary highlights the competing rules underlying the ex parte contact prohibition: lawyers are absolutely prohibited from such ex parte communications (except in a few specific situations), while clients are absolutely free to do so.

ABA

The old ABA Model Code version of Rule 4.2 contained the phrase "or cause another to communicate" -- thus explicitly prohibiting lawyers from "causing" their clients

to initiate ex parte contacts. ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). In 1983, the ABA explicitly deleted that phrase when adopting Model Rule 4.2. Illinois dropped the "cause another" language when it revised its ethics rules in 2010. The New York ethics rules still contain that phrase. New York Rule 4.2(a).

In 1992, the ABA pointed to lawyers' duties of competence, diligence and communication in concluding that a lawyer may advise a client about the client's right to initiate ex parte communications on his or her own. ABA LEO 362 (7/6/92). Specifically, the ABA indicated that a lawyer who does not believe that a settlement offer is making it to another party "has a duty [to his client] to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party." Id. (emphases added).

The ABA left "for another day" the application of the more general provision in ABA Model Rule 8.4(a), which provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. Thus, the ABA had a difficult time reconciling the overall prohibition on lawyers "doing indirectly what [they] may not do directly" and the conscious deletion of that principle in the reformulation of ABA Model Rule 4.2 in 1983.

In 2011, the ABA revisited this issue. ABA LEO 461 (8/4/11). The ABA acknowledged the tension between Rule 8.4's prohibition on a lawyer violating the ethics rules through the actions of another, and Rule 4.2 cmt. [4]'s permission for lawyers to advise their clients about communications "that the client is legally entitled to make." The ABA noted that some states prohibiting lawyers for even suggesting that

their client call a represented adversary had not adopted such a comment. The ABA also explained that restricting a lawyer's involvement in suggesting or assisting with such ex parte communications might disadvantage unsophisticated clients who did not recognize the benefits of such communications and who might require a lawyer's assistance in undertaking them.

The ABA eventually adopted a very permissive rule.

> [A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who -- the lawyer or the client -- conceives of the idea of having the communication.
>
> . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. . . . The client also could request that the lawyer draft the basic terms of a proposed settlement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution.

Id. However, the ABA concluded with a warning that lawyers may not engage in "overreaching."

> Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the

> other party to consult with his lawyer before signing the agreement.

Id. This ABA LEO appears to go further than any state has gone in permitting lawyers' involvement in their clients' ex parte communication with represented persons.

Restatement

The Restatement is somewhat more explicit, indicating in Section 99 that the general prohibition on ex parte contacts

> does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

Restatement (Third) of Law Governing Lawyers § 99(2) (2000). As the Restatement explains,

> [p]rohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.

Restatement (Third) of Law Governing Lawyers § 99 cmt. k (2000). Another section of the Restatement explains the public interest involved in this approach.

> For purposes of the prohibition against inducing a nonlawyer to act in the lawyer's stead, whether a client is such a nonlawyer depends on the nature of the purported violation, and many situations involve close questions. Thus, a lawyer may not offer an unlawful inducement to a witness . . . and the lawyer may not assist or induce a client to do so. Similarly, a lawyer may not file a nonmeritorious motion . . . and a lawyer may not assist or induce a client to file such a motion pro se. On the other hand, because of the superior legal interest in recognizing the right of the client to speak directly to an opposing party and not only through that

> party's lawyer, and because of the superior interest in providing clients a full range of legal services relevant to a matter, the client's lawyer may counsel the client about the content of a communication directly with an opposing party known to be represented by counsel under the limitations stated in § 99(2) and Comment k thereto.

Restatement (Third) of Law Governing Lawyers § 5 cmt. f (2000) (emphasis added).

The Restatement provides an example of a lawyer's permissible involvement in a client's communication.

> Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section.

Restatement (Third) of Law Governing Lawyers § 99, illus. 6 (2000).

Courts and Bars

States take differing positions on this issue.

At least one state has dealt with this issue in a rule rather than an opinion. New York's Rule 4.2 indicates that in representing a client, a lawyer "shall not communicate or cause another to communicate" about the pertinent subject matter with another party known to be represented by a lawyer. New York Rule 4.2(a) (emphasis added). The rule also explicitly requires a lawyer who counsels his or her client to communicate with a represented person must give a "heads up" to that person's lawyer.

> [A] lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives

> reasonable advance notice to the represented person's counsel that such communications will be taking place.

New York Rule 4.2.

Some courts and bars take a fairly strict view, and generally prohibit lawyers from assisting their clients in ex parte communications with other represented persons.

- Bd. of Prof'l Responsibility v. Melchior, 269 P.3d 1088, 1091 (Wyo. 2011) (issuing a public censure of a lawyer who arranged for his divorce client to communicate ex parte with the client's husband and have him sign a settlement agreement; "Respondent has acknowledged that he violated this Rule when he created and gave to his client a divorce settlement agreement and a confidential financial statement at a time when Respondent knew or reasonably should have known that there was a substantial risk that she would deliver them to the husband, whom Respondent knew was being represented by counsel.").

- In re Pyle, 91 P.3d 1222, 1227, 1227-28 (Kan. 2004) (issuing a public censure of a lawyer who arranged for his client to prepare and present for signature an affidavit to a represented party; explaining that the lawyer represented a woman injured in her boyfriend's driveway; explaining that the girlfriend's lawyer prepared an affidavit for the boyfriend to sign that admitted negligence, but that the lawyer hired by the insurance company to represent the boyfriend denied liability; further explaining that the lawyer threatened the insurance defense lawyer with disciplinary charges for ignoring the insured's position on the accident and taking the insurance company's position; quoting the lawyer's cover letter to his client; "'Enclosed please find a proposed affidavit to be signed by Mr. Gutzman [boyfriend, who is then being represented by the insurance defense lawyer]. As a party to the case, you have the right to communicate with Mr. Gutzman. Therefore, please talk with him and see if he will sign the enclosed affidavit.'" (emphasis added by the court); noting the lawyer's argument in response to an allegation that he impermissibly acted through his client in ex parte communications with a represented person; "Pyle [lawyer] argues that he did not communicate with Gutzman when he prepared the second affidavit. He maintains he told Molie [lawyer's client] that he could not communicate with Gutzman but that she could, and he asserts he prepared the second affidavit at her direction."; finding an ethics violation; "Pyle prepared an affidavit for Gutzman concerning the very nature of the case, albeit at his client's request, and encouraged Moline to deliver it to Gutzman, who was represented by counsel. Pyle knew Moline would obtain Gutzman's signature on the affidavit without opposing counsel's consent. Pyle, through his client, communicated with Gutzman about the subject of the case without Conderman's [Gutzman's lawyer]

approval. Pyle circumvented the constraints of KRPC 4.2 by encouraging his client to do that which he could not." (emphasis added)).

- In re Anonymous, 819 N.E.2d 376, 377-78, 378-79, 379 & n.1 (Ind. 2004) (issuing a private reprimand against a lawyer who arranged for his client to have a represented person sign an affidavit; "After the client took the respondent [lawyer] to the client's home, the respondent took out a copy of the proposed affidavit that had been faxed to employee's counsel, handed it to his client, and explained that he and his co-counsel were trying to sever the client's trial from the employee's. He further explained that the proposed affidavit had been faxed to employee's counsel in order to sever the trials, but that employee's counsel had not given the respondent any indication whether the employee would to sign it. The client then returned to the store to see if the employee sign the affidavit. About ten minutes later, the client returned to his house with the employee who had the affidavit in his hand. The employee attempted to speak with the respondent about it, but the respondent told him that he would not speak with him without the employee's counsel present. The employee and the client then talked, and the employee signed the affidavit. The employee never talked to his counsel about the affidavit. The respondent did not specifically know that the employee had not discussed the affidavit with his counsel, but he also had no reason to believe that the two had discussed it."; "[T]he Commission and the respondent stipulate that even though his client may not have been acting as the respondent's agent in obtaining the signature on the affidavit, the respondent ratified his client's direct contact with the employee by failing to take steps to intervene when the client presented the affidavit for signature, by failing to take steps to contact employee's counsel while he was waiting for him to sign the affidavit, by thereafter taking control of the affidavit once it was signed, and by filing the document with the federal court. The parties agree that respondent attempted to take procedural advantage of the signed document before abandoning that attempt when employee's counsel objected to its use."; "If an attorney simply received the affidavit obtained by a client without suggesting, directly or indirectly, any contact between the two, no violation would have occurred. . . . Although ratification of a client's independently initiated communication is not sufficient to constitute violation, we believe the respondent's active participation in the events leading to the employee signing the affidavit amounts to more than mere ratification of his client's actions. Instead, the events of August 24 reflect the respondent's instigation of a series of contacts calculated to obtain the employee's signature on the affidavit despite the respondent's unsuccessful attempts to obtain the employee's signature through opposing counsel. The respondent visited his client's store, a place where he knew the employee worked, bringing with him the unsigned affidavit. He presented the affidavit to his client and explained that counsel had given no indication whether or not the employee would sign it. He made no effort to dissuade his client from speaking directly with the

employee about signing the affidavit." (emphasis added); "Although the respondent minutes later directly told the employee that he could not speak with him about the case without counsel present, the respondent did not intervene or attempt to contact counsel when the employee signed the document in his presence after again discussing the matter with the client. Under these facts, we find that the respondent violated Prof. Cond. R. 4.2." (emphasis added); "'The comment to Prof. Cond. R. 4.2 provides, inter alia, that 'parties to a matter may communicate directly with each other. . .' However, that statement is not intended to insulate from scrutiny situations where a party communicates with another at the insistence of or in the presence of the party's counsel and while the adverse party's counsel is absent and unaware of the contact.'" (emphasis added)).

- Holdren v. General Motors Corp., 13 F. Supp. 2d 1192, 1193, 1194, 1195, 1195-96, 1196 (D. Kan. 1998) (entering a protective order stopping a plaintiff from communicating with defendant's employees; explaining the situation; "At some point thereafter, perhaps as a result of these concerns, plaintiff asked his counsel whether he should attempt to obtain signed sworn statements from certain GM employees. According to plaintiff's deposition testimony, his counsel responded, 'That would be a good idea. Yeah.' In this same conversation, plaintiff's counsel advised his client on the 'effect of out of court statements' and the 'value' of written statements. Plaintiff's counsel also discussed with his client the costs associated with alternative methods of discovery. Finally, at plaintiff's request, plaintiff's counsel advised his client how to draft an affidavit. . . . Plaintiff testified that he obtained written statements from at least four GM employees and has sought statements from several others."; holding that "since plaintiff's counsel is barred under Rule 4.2 from communicating with certain GM employees, he may not circumvent Rule 4.2 by directing his client to contact these employees."; "A review of the few decisions addressing whether an attorney has 'caused' his or her client to act suggests that there is a broad spectrum of conduct that constitutes a violation of this disciplinary rule. At one end of the spectrum are those cases which an attorney actually requests or engineers a contact or action by the client that would otherwise be prohibited by the disciplinary rules. See, e.g., In re Marietta, 223 Kan. 11, 569 P.2d 921 (1977) (publicly censuring lawyer who 'caused his client' to communicate with opposing party in violation of DR 7-104(a)(1) where lawyer prepared release of liability for client to deliver to opposing party). At least one case, however, has suggested that an attorney's mere knowledge of a client's contact or action is sufficient to constitute an ethical violation. See Massa v. Eaton Corp, 109 F.R.D. 312, 313 (W.D. Mich. 1985) (plaintiff's counsel violated DR 7-104(A)(1) by 'allowing' his client to conduct informal interviews of managerial level employees of corporate defendant)." (emphasis added); explaining that "[t]he conduct of plaintiff's counsel in this case falls somewhere on the spectrum between two extremes. Here, plaintiff began discussing the facts of his case

with GM employees before his lawsuit was filed and before either 'party' was represented by counsel. Thus, plaintiff clearly made the decision to discuss his case with GM employees without any influence or suggestion by his counsel. Although plaintiff's contacts continued after both parties had retained counsel, and plaintiff's counsel knew of his client's contacts, 'there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct.'"; "The circumstances described by the parties, however, indicate that plaintiff's counsel had more than mere knowledge of his client's contacts. Significantly, plaintiff's counsel encouraged plaintiff to obtain affidavits from GM employees by advising him of the difference between 'out of court statements' and signed affidavits for trial purposes. Counsel also discussed with his client the costs associated with formal methods of discovery (presumably, depositions). Moreover, albeit at his client's request, counsel facilitated his client's actions by advising him how to draft an affidavit. While it is true that plaintiff's counsel encouraged his client's actions only after plaintiff specifically asked about obtaining written statements, the court finds that such conduct crosses the line and violates Rule 4.2 'through the acts of another.'" (emphases added); "The court notes, however, that there is no evidence or allegation that plaintiff's counsel knowingly or deliberately violated the disciplinary rules. Rather, it seems that plaintiff's counsel, while attempting to walk the appropriate line ever so delicately, has simply stepped over that line. Nonetheless, he violated the rule and defendants are entitled to relief. Accordingly, defendants' motion for a protective order is granted." (emphasis added)).

- Massa v. Eaton Corp., 109 F.R.D. 312, 313 (W.D. Mich. 1985) (entering a protective order preventing plaintiff from communicating with defendant's managerial employees; "It is unclear exactly how many Eaton employees, other than the three identified above, have been contacted by the Plaintiffs since the institution of this suit. It is equally unclear whether any of these contacts have been made with the prior knowledge of, or at the behest of, Plaintiffs' attorney. It is, however, conceded by Plaintiffs' counsel that he has been the beneficiary of these investigative efforts and that he does not intend to direct his client to cease their ex parte contacts unless ordered to do so by the Court.").

In a 1993 legal ethics opinion, the California Bar even condemned what many lawyers would think permissible (and might even routinely engage in) -- drafting communications for their clients to send to a represented person.

- California LEO 1993-131 (1993) (warning that a lawyer representing a husband in a divorce action must be very careful in providing any guidance to the husband related to the husband's direct contact with the wife; also warning that "[c]ounselling clients regarding such communication" can violate the California ethics rules; explaining that "by discouraging direct communication between the parties themselves, an attorney may be failing to act competently by foreclosing opportunities to efficiently settle or resolve the dispute"; "When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney. An attorney is also prohibited from sending the opposing party materials and simultaneously sending copies to the party's counsel. Providing copies to opposing counsel does not diminish the prohibited nature of the communications with the opposing party." (emphases added); "An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney."; "When the content of the communication to be had with the opposing party originates with and is directed by the client, it is permitted by rule 2-100. Thus, an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general nature of the communication the client intends to initiate with the opposing party as long as the communication itself originates with and is directed by the client and not the attorney." (emphasis added)).

Other courts seem more forgiving.

- Jones v. Scientific Colors, Inc., 201 F. Supp. 2d 820 (N.D. Ill. 2001) (denying plaintiffs' motion for sanctions and to disqualify defendant's lawyer for arranging for undercover investigators to speak with represented employees to determine if they were engaging in wrongdoing; explaining that the lawyer had not specifically directed the undercover investigators to speak with the represented employees).

Needless to say, many situations fall between the extreme of a lawyer merely advising a client of the client's right to communicate ex parte with a represented person, and the lawyer "causing" the client to engage in such communications (or, to put it another way, undertaking actions indirectly that the lawyer could not undertake directly).

Some states try to draw the line between "direction" and "suggestion."

- Virginia LEO 1820 (1/27/06) (explaining that in-house lawyers may not "direct" those working for them to initiate prohibited ex parte contacts, but would require more facts to determine whether the contacts "occurred with sufficient involvement" of the in-house counsel to trigger Rules 4.2 and 8.4(a)).

- Virginia LEO 1755 (5/7/01) ("while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party").

- Virginia LEO 233 (1/3/74) (explaining that a lawyer may not instruct a client to communicate with an adverse party without obtaining the consent of the adverse party's lawyer).

To be sure, some of the situations addressed in these decisions involve manifest abuse. For instance in Vickery v. Commission for Lawyer Discipline, 5 S.W.3d 241 (Tex. App. 1999), a Texas court dealt with a multimillionaire lawyer who was sued for malpractice. The Texas court set the scene for what came next.

> Vickery told his wife, in 1990, that their personal assets were in danger. At that time, Vickery proposed a divorce. He explained to Helen that a divorce would allow them to shield half their assets from any judgment arising out of the malpractice claim.
>
> Helen did not favor the idea of a divorce for a[t] least two reasons: (1) Helen believed she and Glenn had a happy marriage, and (2) they had a daughter, Jessica. Vickery told Helen the arrangement was necessary purely to protect their assets. Moreover, by filing the divorce in Harris County, instead of Liberty County where they were living at the time, Vickery promised to keep the proceeding quiet. He also promised to reunite as soon as the malpractice suit was concluded. Vickery even recited some of their friends as examples of couples who had allegedly employed this very technique to protect their own assets. Because Helen had always allowed Vickery to take the lead in managing their financial and legal affairs, she reluctantly agreed to the divorce.

Id. at 249. Vickery's planning did not end there.

> Vickery instructed Helen that, for the sake of appearance, they would have to live apart from each other until the malpractice action had been resolved. He suggested that his wife and daughter should remain on their Moss Hill Ranch in Liberty County while he moved into one of their other residences in Harris County.

Id.

Vickery's wife soon realized what was happening.

> First, Helen discovered that Vickery had married one of her close friends, Lucille. Second, Vickery immediately instituted an action to evict his former wife and daughter from the Moss Hill Ranch where they had lived during the marriage. Third, Helen discovered that significant assets had not been included in the property division.

Id. at 249-50.

After his wife hired a lawyer, Vickery "induced" one of his friends to set up a meeting with his ex-wife and try to resolve the matter. The Texas court found the contact improper, and suspended Vickery for two years.

(a) No state seems to require lawyers to actively discourage their clients from exercising their absolute right to contact a represented party on their own, although setting up the communication and then standing silent while it occurs might cause problems in the most strict states.

(b) The ABA and the Restatement would not prohibit this, but some states might continue to bar such a "suggestion."

(c) Depending on the state, "assisting" the client might be appropriate. However, lawyers practicing in states taking a strict approach should be very wary of providing any substantive assistance.

Best Answer

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

B 2/13

Lawyers' Participation in Other Lawyers' Communications

Hypothetical 22

You represent a plaintiff in a medical malpractice case against a doctor, based on the doctor's use of a relatively novel medical treatment/procedure. You just learned that another local plaintiff's lawyer is about to depose the doctor in a case that involves the same medical treatment/procedure, but a different plaintiff. You wonder to what extent you can coordinate with that other lawyer.

Without the consent of the defense lawyer in your case, may you provide suggested deposition questions to the other lawyer who will be deposing the doctor who is also a defendant in the malpractice case you are handling?

MAYBE

Analysis

This hypothetical deals with whether a lawyer impermissibly engages in ex parte communications indirectly through another lawyer.[1]

This hypothetical comes from a 2004 North Carolina legal ethics opinion.[2]

---

[1] In addition to this general prohibition, some states also have retained the old ABA Model Code's prohibition on lawyers "causing another" to engage in impermissible ex parte communications. Although most situations implicating this principle involve lawyers acting through their clients, they might act through other lawyers as well.

[2] North Carolina LEO 2004-4 (7/16/04) (holding that a lawyer representing a plaintiff against a doctor in a medical malpractice case can prepare general deposition questions that another lawyer representing another plaintiff in an unrelated case can ask the defendant doctor, who is acting as an expert in the other case; explaining the factual context: (1) "Attorney A represents Roe, a plaintiff in a medical malpractice lawsuit against Dr. Jones (Lawsuit #1). Dr. Jones is represented by Attorney X. Attorney B represents Doe, a plaintiff in an entirely different medical malpractice lawsuit against Dr. Smith (Lawsuit #2). Dr. Smith is represented by Attorney Y. The two cases are unrelated and involve different plaintiffs, hospitals, defendants, and venues. Attorney A and Attorney B are also in different law firms. The medical treatment/procedure that is the basis for the malpractice claims is the same in both lawsuits."; "At the request of Attorney Y, Dr. Jones agrees to act as an expert witness for the defense in Lawsuit #2. Attorney B schedules Dr. Jones' deposition. Prior to the deposition, Attorney A hears that the defendant in his lawsuit will be testifying as an expert witness in Lawsuit #2. Attorney A asks Attorney B to include a series of questions in the deposition of Dr. Jones. The questions do not relate to the specific facts in either case but rather ask the doctor to explain or opine about the medical treatment/procedure that is at issue. The answers to the questions will be relevant to both lawsuits. Attorney A does however hope that the questions will solicit answers from Dr. Jones that will be helpful to the plaintiff's case against Dr. Jones. Attorney A does not notify Attorney X that he has submitted questions for Dr. Jones to Attorney B." (emphasis added); finding the lawyer's conduct permissible; "Rule

The North Carolina Bar held that the first lawyer could suggest questions that the second lawyer could pose to the doctor, as long as the questions "do not relate to the specific facts in either case, but rather ask the doctor to explain or opine about the medical treatment/procedure that is at issue."[3] In contrast, the first lawyer would need the doctor's malpractice defense lawyer's consent if the suggested questions "would probe the facts and circumstances at issue" in the first lawyer's malpractice case.[4]

The North Carolina Bar's explanation for this line-drawing effort is not any more satisfactory than the line drawing itself.

> A lawyer may not circumvent the prohibition in the rule by asking another person to engage in the prohibited communications for him. Nevertheless, lawyers are encouraged to consult with other lawyers who practice in the same field or who handle similar cases in order that they might learn from each other and thereby improve the representation of their clients.

North Carolina LEO 2004-4 (7/16/04).

4.2(a) of the Rules of Professional Conduct prohibits a lawyer, during the representation of a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law. A lawyer may not circumvent the prohibition in the rule by asking another person to engage in the prohibited communications for him. Nevertheless, lawyers are encouraged to consult with other lawyers who practice in the same field or who handle similar cases in order that they might learn from each other and thereby improve the representation of their clients. See, e.g., Rule 1.1 ('A lawyer shall not handle a legal matter that the lawyer knows of [sic] should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter . . . .)." (emphasis added); contrasting the presentation of general questions with more specific questions about the first malpractice case; "[I]f the proposed questions will probe the facts and circumstances at issue in Lawsuit #1, Attorney A must notify Attorney X of the date and location of the deposition. Rule 4.2 helps to prevent the dangers of overreaching, interference with the client-lawyer relationship, and uncounselled disclosure of information relating to the representation. In the current inquiry, these dangers can be avoided if Dr. Jones's lawyer is notified of the scheduled deposition of Attorney X's client so that Attorney X may cho[o]se to attend the deposition. The duty to provide this notice falls upon Attorney A, the lawyer for the plaintiff in the action against Dr. Jones, because the potential for unrepresented communication arises in that lawsuit." (emphasis added)).

[3] Id.

[4] Id.

Best Answer

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

n 12/11

Ex Parte Communications with Government Employees

Hypothetical 23

Because your child has had developmental problems since birth, you have become somewhat of a crusader for the type of school programs that help such children. Last month you began to represent another parent with a child needing such programs, and filed a lawsuit against the school board -- alleging failure to meet federal guidelines. Having tussled with the school board's lawyer several times, you know that the litigation will not be easy.

(a) Without the school board's lawyer's consent, may you call the chairman of the school board and discuss the pertinent school programs?

YES (PROBABLY)

(b) Without the school board's lawyer's consent, may you call a teacher and discuss the pertinent school programs?

MAYBE

Analysis

Introduction

Ex parte contacts with a government entity follow some of the traditional analysis, but with a constitutional twist.

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical addresses both the "in representing a client" phrase and the ABA rule comment addressing permissible ex parte communications with constituents of a represented organization.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

ABA Model Rule 4.2 contains the standard exception, which permits ex parte communications that are "authorized" by law. Comment [5] explains how this exception applies to ex parte contacts with government officials.

> Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

ABA Model Rule 4.2 cmt. [5].

The ABA explained this issue in ABA LEO 408 (8/2/97) (although generally a lawyer may not have ex parte contacts with a represented government entity, the constitutional right to petition allows a lawyer to establish such ex parte contacts if the

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

official has authority to "take or recommend action in the controversy, and the sole purpose of the communication . . . is to address a policy issue, including settling the controversy"; the lawyer must give advance notice of such contact to the government lawyer and provide copies of any written materials to be presented to the government official).

The Restatement devotes an entire rule to this issue. According to the Restatement, the general prohibition

> against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity.
>
> . . . In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy.

Restatement (Third) of Law Governing Lawyers §101(1) & (2) (2000).

Restatement § 101 cmt. b provides a lengthy justification for this approach, emphasizing the First Amendment right to petition the government, and the "dubious" need of "the government for the broad protection of the anti-contact rule. " Comment b explains that the limit on ex parte contacts "should be limited to those instances in which the government stands in a position closely analogous to that of a private litigant and with respect to contact where potential for abuse is clear." Restatement (Third) of Law Governing Lawyers § 101 cmt. b.

Academics have also analyzed this issue. In a 2009 article, Professors Hazard and Irwin explained the ABA's and the Restatement's approach to citizens contacting government officials.

> An ABA formal opinion in 1997 concluded that a lawyer representing a private party in a suit against the government can communicate directly with a public official who has authority "to take or recommend action in the matter of communication" if two conditions are met: (i) the communication is for the purpose of addressing a policy issue, and (ii) government counsel is given reasonable advance notice of the intent to communicate. The ABA opinion concluded that notwithstanding this exception, Rule 4.2 applies in full force in contexts "where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication."
>
> The Restatement (Third) articulates an exception, independent from the "authorized by law" exception, which permits direct communications "with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity." But the Restatement (Third) then articulates an exception to this exception: the no-contact rule continues to apply "[i]n negotiation or litigation by a lawyer or a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity." The coherence of this formulation depends on definitions of "specific claim" and "official capacity." The Restatement (Third)'s comment offers little additional guidance regarding the intended meanings of these phrases, but observes that "[w]hen the government is represented in a dispute involving a specific claim, the status of the government as client may be closely analogous to that of any other organizational party."

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 820 (Mar. 2009) (footnotes omitted).

Bars take differing approaches to this issue.

For instance, the D.C. Bar has a specific black-letter rule on this issue.

> This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

D.C. Rule 4.2(d). The D.C. Rule also has a unique comment.

> Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

D.C. Rule 4.2 cmt.[11].

- Accord District of Columbia LEO 340 (6/2007) ("Under D.C. Rule 4.2(d) [which differs from the ABA Model Rules, and permits ex parte contact with "government officials who have the authority to redress grievances of the lawyer's client"], a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government's counsel to discuss substantive legal issues [not just public policy issues], so long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. In addition, the lawyer may also contact officials at other government agencies who have the authority to affect the government's position in the litigation concerning matters, provided that the lawyer makes the same disclosures as stated above. The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel."; "[The government official] is not obligated to engage in the communication and may ask the lawyer to communicate with government counsel rather than directly with the official.").

- District of Columbia LEO 280 (3/18/98) (explaining the D.C. approach, and indicating that any concern about a lawyer being able to "overwhelm the lay person" is "not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive, " and because "government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present").

A 2006 North Carolina legal ethics opinion explained that in that state the prohibition:

- Applies only to "negotiation or litigation of a specific claim";[2]
- Applies only to upper level governmental officials;[3]
- Requires notice to the government's lawyer;[4]
- Applies only in the course of an official proceeding;[5]

---

[2] North Carolina LEO 2005-5 (7/21/06) ("[T]here is some authority that the Rule 4.2(a) prohibition should only apply to communications with a government agency or employee if the communication relates to negotiation or litigation of a specific claim of a client. We agree."; "Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. The rationale for this partial exception is that the limitations on communications under Rule 4.2(a) should be confined to those instances where the government stands in a position analogous to a private litigant or any other private organizational party. Under these circumstances, the government agency or official should be protected because the opportunity for abuse is clear.").

[3] North Carolina LEO 2005-5 (7/21/06) ("The protections under Rule 4.2(a) only extend to County Manager and department heads if, with respect to this employment matter, 1) they supervise, direct, or consult with County Attorney, 2) they can bind or obligate County as to its position in litigation or settlement; 3) their acts or omissions are at issue in the litigation; or 4) they have participated substantially in the legal representation of County. Because it is likely that the human resources director and the county manager fall within one or more of these categories in an employment dispute, and because Attorney A should have known that County Attorney represented County on this matter, Attorney A must obtain consent from County Attorney before communicating a threat of litigation directly to County Manager and Human Resources Director.").

[4] North Carolina LEO 2005-5 (7/21/06) ("Under Rule 4.2(b), in representing a client who has a dispute with a represented government agency or body, a lawyer may communicate orally about the subject of the representation with elected officials who have authority over such government agency or body so long as the lawyer gives 'adequate notice to opposing counsel.' Adequate notice should be meaningful notice: that is, sufficient information for opposing counsel to act on it to protect the client's interests. The time and place of the intended oral communication with the elected official must be included as well as the identity of the elected official or officials to whom the communication will be directed. Notice must also be reasonable and give opposing counsel enough time to act on it and be present if he so chooses.").

A 2011 North Carolina legal ethics opinion explained that lawyers could rely on the "authorized by law" exception in filling freedom of information act requests.

- North Carolina LEO 2011-15 (10/21/11) (explaining that a lawyer may communicate ex parte with a government official to identify and request access to public records; "Adopted in 1995, RPC 219 rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. Chap. 132, for the purpose of making a request to examine public records related to a representation although the custodian and the government entity employing the custodian are adverse parties and the lawyer for the custodian and the government entity does not consent to the communication."; "ABA Formal Ethics Opinion 95-396 (1995) observes that Model Rule 4.2's exception permitting a communication 'authorized by law' is satisfied by a 'constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.'"; "N.C. Gen. Stat. §132-6(a) requires that: '[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.'"; "The statute authorizes direct communication with a custodian of public records for the purpose of inspecting and furnishing copies of public records and remains an exception to the communications prohibited in current Rule 4.2(a)."; "A lawyer may communicate with a custodian of public records for the purposes set forth in N.C. Gen. Stat. §132-6(a), to inspect, examine, or obtain copies of public records. To the extent that the lawyer must communicate with the custodian to identify the records to be inspected, examined, or copied, the communication is in furtherance of the purpose of the Public Records Act to facilitate access to public records and is allowed without obtaining the consent of opposing counsel. Such communications should be limited to the identification of records and should not be used by the lawyer as an opportunity to engage in communications about the substance of the disputed matter." (footnote omitted)).

---

[5] North Carolina LEO 2005-5 (7/21/06) ("Attorney A appears at a public meeting of the elected Board of County Commissioners. Prior to the board meeting, Attorney A approaches a member of the board to tell him that he is there to advise the board of a grave injustice that has been done to his client, and that County Attorney is trying to prevent Attorney A from bringing this matter to the board's attention."; finding that the communication violates the ex parte communication rule; "Pursuant to Rule 4.2(b), a communication with an elected official may only occur under the following circumstances: 1) in writing, if a copy is promptly delivered to opposing counsel, 2) orally, with adequate notice to opposing counsel, or 3) in the course of official proceedings. To the extent RPC 202 differs from this opinion and Rule 4.2(b), it is hereby overruled.").

Virginia takes an interesting approach that is directly contrary to the ABA approach. In Virginia, a lawyer apparently may engage in ex parte contacts with lower government officials but not those with decision-making power.

- Virginia LEO 1537 (6/22/93) (a lawyer representing a child and parents adverse to a school board may directly contact school board employees who are not in a position to bind the school board; the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist).

- Virginia LEO 777 (4/22/86) (a lawyer suing a county board may not contact a board member, but may contact county employees if they are "not charged with the responsibility of executing board policy").

Some courts and bars seem to generally allow such ex parte communications -- relying on the constitutional standard, the "authorized by law" exception or simply their own analysis.

- Kansas LEO 00-6 (2000) ("Communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter fall under the 'authorized by law' exception to Rule 4.2 and are therefore permissible.").

- Alabama LEO 2003-03 (9/18/03) (holding that a lawyer for one state agency may "communicate directly with members of the County Board of Education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education").

- Kansas LEO 00-6 (8/28/02) ("communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter falls under the 'authorized by law' exception to Rule 4.2 and are therefore permissible. The Comment to KRPC 4.2 specifically states that 'communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.' The mere fact that a city has a legal department does not create a barrier between elected and appointed officials and counsel representing private clients. We also counsel lawyers to consider KRPC 3.9 in these situations, which we believe excludes the application of KRPC 3.5(c) in the context of a zoning board process. If this request was set in the context

of litigation, it would require a different type of analysis. However, this situation comports with constitutional guarantees of freedom of access to government. Counsel may want to heed the advice given by one commentator who believes that such contact is permissible even over the objection of the government's counsel, but who advises that counsel should notify the government's counsel of the fact of the contact as a reasonable accommodation.").

- American Canoe Ass'n v. City of St. Albans, 18 F. Supp. 2d 620, 621 (S.D.W. Va. 1998) (holding that ex parte contact with government agencies is "authorized by law" and therefore "permissible").

Other courts and bars are more restrictive.

- United States v. Sierra Pac. Indus., 759 F. Supp. 2d 1198, 1201, 1213 (E.D. Cal. 2010) (finding that defendant's lawyer improperly engaged in ex parte communications with lower level government employees; explaining that defendant's lawyer took a field trip (open to the public) with United States Forest Service tour guides, and asked them various questions during the tour; finding that "Schaps' actions were not an exercise of a First Amendment right to seek redress of a particular grievance, but were rather an attempt to obtain evidence from these employees."; "There is little to support the characterization of Schaps' communications with the employees as an exercise of the right to petition a policy level government official for a change in policy or to redress a grievance. Rather, the facts show and the court finds that he was attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery. SPI surely has the right to conduct discovery. But interviewing Forest Service employees, without notice to government's counsel, on matters SPI considers part of its litigation with the government -- even if not successful in obtaining relevant evidence -- strikes at and, indeed questions they very policy purpose for the no contact rule.").

(a)-(b) Ironically, under the ABA approach, it would be more likely that the ethics rules permit contact with the chairman of the school board rather than with a lower level employee -- while at least one state (Virginia) takes exactly the opposite approach.

Best Answer

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

n 12/11

Application to Prosecutors

Hypothetical 24

After a few unsuccessful years in private practice, you became a prosecutor. You were surprised the first time that one of your colleagues said you could conduct a non-custodial interview of a suspected criminal you know to have hired a lawyer. That seemed inconsistent with the rule with which you were familiar while in private practice.

Without a criminal suspect's lawyer's consent, may you conduct a non-custodial interview of the suspect?

YES (PROBABLY)

Analysis

This issue has caused considerable (and heated) debate between prosecutors and bar officials -- on all levels of government from the federal to the local.

In a 2009 article, Professors Hazard and Irwin explained the history of federal prosecutors' interpretation of the "authorized by law" exception.

> The Rule's application in the context of investigatory activities has a long and contentious history, which gained prominence after the Second Circuit's decision in United States v. Hammad [846 F.2d 854 (2d Cir.), modified, 858 F.2d 834 (2d Cir. 1988)]. There, the Second Circuit held that Rule 4.2 prohibited communications with suspects of a criminal investigation prior to the initiation of formal proceedings. The original opinion was withdrawn and replaced by an opinion conceding that "legitimate investigation techniques" can sometimes be "authorized by law," but the Department of Justice (DOJ) nevertheless reacted with alarm. The DOJ worried that the decision would deprive government lawyers of important tools of investigation and would chill their investigative efforts. Accordingly, in June 1989, Attorney General Richard Thornburgh issued a department memorandum stating that the law enforcement activities of DOJ lawyers were "authorized" by federal law and therefore exempt from application of states' no-contact rules. The defense bar and

> the ABA countered that the memorandum's approach was impermissible in so far as it attempted to exempt DOJ lawyers from the ethical obligations generally applicable to lawyers.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 807 (Mar. 2009) (footnotes omitted).

Professors Hazard and Irvin explained that the DOJ issued a new no-contact rule in 1994, which was rejected by a 1998 congressional action called the "McDade Amendment" -- which provided that all government lawyers were subject to state ethics rules. However, the congressional action did not end the debate.

> In any event, the McDade Amendment does not address the key issue of what communications are "authorized by law" and therefore permissible. Relying on this ambiguity, the DOJ continues to assert the validity of its policy that certain lawful investigatory techniques are authorized by law and permissible under the Rule. Courts, meanwhile, continue to disagree on whether Rule 4.2 applies to federal prosecutors engaged in investigations that are otherwise entirely lawful.
>
> Attempting to reconcile the positions of the DOJ, Congress, and the defense bar, the ABA's Ethics Committee and the Ethics 2000 Commission recommended substantial amendments to Model Rule 4.2 in 2002. Among other changes, the amendments would have authorized (i) communications with represented persons by federal agents acting under direction of government lawyers prior to the initiation of formal law enforcement proceedings, and (ii) communications with a represented organization's agent or employee who initiated a communication relating to a law enforcement investigation. The ABA declined to adopt the proposed amendments.

Id. at 810 (footnotes omitted).

Professors Hazard and Irwin explained that most authority permits government lawyers to engage in ex parte communications with a represented person before "the

initiation of formal law enforcement proceedings" (id. at 810), but also hold that a defendant "cannot waive the no-contact rule's protections under any circumstances." Id. at 813.

The ABA Model Rules devote part of a comment to this issue.

> Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a governmental lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

ABA Model Rule 4.2 cmt. [5].

In ABA LEO 396 (7/28/95), the ABA explained that a number of court decisions held the ex parte prohibition "wholly inapplicable to all pre-indictment non-custodial contacts, . . . or holding it inapplicable to some such contacts by informants or undercover agents." Although the ABA clearly did not endorse that line of cases, it indicated that "so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being 'authorized by law' within the meaning of that exception stated in the Rule. " Id.

The Restatement devotes a lengthy comment to this issue, after noting that

> [c]ontroversy has surrounded the question whether prosecutors are fully subject to the rule of this Section with respect to contact, prior to indictment, with represented nonclients accused or suspected of crime.

Restatement (Third) of Law Governing Lawyers § 99 cmt. h (2000).

After articulating the arguments against and in favor of applying the ex parte contact rule in this setting, the Restatement also notes that

> [i]t has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors, or, to the contrary, whether the authorized-by-law exception . . . entirely removes such limitations.

Id.

The Restatement concludes that "[p]rosecutor contact in compliance with law is within the authorized-by-law exception." Id.

D.C. also has its own comment on this issue, although it provides little guidance.

> This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

D.C. Rule 4.2 cmt. [12].

As expected, the case law and legal ethics opinions tend to give the government leeway. These courts and bars generally either point to the "authorized by law" exception, conclude that the prosecutor's communications do not relate to the same "matter" on which the witness has a lawyer (if the lawyer is handling a civil matter), or rely on some other argument in refusing to condemn such ex parte contacts.

- South Carolina LEO 11-04 (5/20/11) (holding that Rule 4.2 did not prohibit a federal investigator from contacting a represented person ex parte, because the investigator was not representing a client; "As a federal investigator, Inquirer is not 'representing a client,' and therefore the prohibition does not apply. However, Inquirer should take care to avoid overreaching.").

- People v. Santiago, 925 N.E.2d 1122, 1129 (Ill. 2010) (refusing to suppress statements made by a criminal defendant interviewed by a prosecutor about possible child abuse, even though the prosecutor knew that the defendant was represented by a lawyer in a child protection case based on the same underlying facts; "The State counters that the use of the phrase 'that matter,' when read together with the introductory clause 'during the course of representing a client' and the phrase 'subject of the representation,' indicates that the drafters intended the application of the rule to be case specific: specific to the matter in which the party is represented. Thus, because attorney MacGregor did not represent defendant in the criminal investigation, she had no right to be present or to object to the questioning of defendant in that investigation."; "We agree with the State that a plain reading of Rule 4.2 demonstrates the rule was not violated in this case. Defendant focuses on the phrases 'the subject of the representation' and 'that matter' in arguing that the 'matter' and 'the subject of the representation' was the injury to S.H. However, defendant fails to reconcile her interpretation of Rule 4.2 with the language of the rule as a whole.").

- United States v. Carona, 630 F.3d 917, 921, 921-22, 922 (9th Cir. 2010) (holding that government lawyers did not violate the prohibition on ex parte communications by providing a friendly witness fake court documents in an effort to trigger communication by the target of an investigation; "To determine whether 'pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties' violated Rule 2-100, we have adopted a 'case-by-case adjudication' approach rather than a bright line rule. . . . We have recognized the possibility that such conversations could violate the rule and 'declined to announce a categorical rule excusing all such communications from ethical inquiry.' . . . Nonetheless, our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100."; "We have not previously needed to consider the question of whether providing fake court papers to an informant to use during a conversation with a represented party is conduct that violates Rule 2-100. Under the facts presented here, we conclude that it does not."; "The use of a false subpoena attachment did not cause the cooperating witness, Haidl, to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor. Haidl was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court or from any other circuit, with the exception of Hammad [United States v. Hammad, 858 F.2d 834 (2d Cir. 1988)], has held such indirect contacts to violate Rule 2-100 or similar rules."; "The false documents were props used by government to bolster the ability of the cooperating witness to elicit incriminating statements from a suspect."; "It would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained

counsel."; "There were no direct communications here between the prosecutors and Carona. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor. On the facts presented in this case, we conclude that there was no violation of Rule 2-100.").

- Nebraska LEO 09-03 (2009) ("If the victim in a criminal case has retained counsel to represent him in a civil case arising from the same set of facts and involving common issues and evidentiary questions, and that attorney has requested that contact with the victim regarding those aspects of the prosecution be made only through him, Rule 4.2 prohibits the prosecutor from having direct contact with the victim regarding those aspects of the case."; analyzing whether the criminal and the civil cases involved the same "matter" for purposes of Rule 4.2, citing various cases and bar opinion explaining that they did involve the same "matter"; "In light of the foregoing authorities, the Committee believes that Rule 4.2 would prohibit a prosecutor from directly contacting a victim/witness for the purpose of obtaining from him a release for his medical records. Although the criminal prosecution and the civil case in which the victim is represented by counsel are different cases, they clearly arise from the same set of facts and involve at least some common issues. In addition, the evidence the prosecutor seeks for the criminal prosecution will likewise no doubt be relevant in the associated civil litigation. Thus, the decision as to what medical information the victim should voluntarily release for the prosecution is one that his attorney may properly insist be made only with the attorney's counsel. Obviously, that conclusion may render the prosecutor's job more difficult and time consuming. However, it does not prevent him from effectively carrying out his prosecutorial duties."; "[I]f the attorney for the victim/witness insists that all communications regarding the medical records go through him, he is obligated to respond to the prosecutor's requests in a reasonable and timely manner. If efforts to work through the attorney are unsuccessful, there are still avenues available to the prosecutor to obtain the information needed for prosecution, such as a subpoena, or if necessary, a search warrant.").

- State v. Clark, 738 N.W.2d 316, 339 (Minn. 2007) (affirming the murder conviction despite police officers' ex parte communications with the defendant after his arraignment; holding that the ex parte communications violated Minnesota Rule 4.2, although they provided the defendant's lawyer notice of the interview and an opportunity to be present; "[W]e conclude that when a government attorney is involved in a matter such that Minn. R. Prof. Conduct 4.2 applies, the state may not have any communication with a represented criminal defendant about the subject of the representation unless (1) the state first obtains the lawyer's consent; (2) the communication is 'authorized by law' as discussed below; or (3) the state obtains a court order authorizing the communication. We reach our conclusion on the plain and unambiguous

language of the rule as currently written. Accordingly, to the extent that any of our past cases suggest that the state can meet the requirements of Rule 4.2 by providing the defendant's lawyer notice and an opportunity to be present, those cases are no longer good law.").

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?").

- United States v. Balter, 91 F.3d 427 (3d Cir.) (in an opinion by Judge Alito, the Third Circuit found that New Jersey's Rule 4.2 did not apply to prosecutors' contacts with criminal suspects in the course of an investigation, because the contacts were "authorized by law"), cert. denied, 519 U.S. 1011 (1996).

In 2010, a Texas legal ethics opinion seemed to place some limits on what government lawyers can do.

- Texas LEO 600 (8/2010) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a Texas governmental agency is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority with regulated persons who are represented by lawyers. However, a lawyer for a governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter of a lawyer who has not consented to the communications and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such

> communications by employees over whom the lawyer has direct supervisory authority.").

In a related context, courts and bars seem to ignore the ex parte communication prohibition when lawyers or those acting under the lawyer's direction engage in some socially-worthwhile project such as housing discrimination tests. In most situations, of course, such tests are essentially "sting" operations -- taking place before the discriminating landlord has hired a lawyer on the discrimination charge. Thus, those situations sometimes do not implicate the rule at all. However, one would think that cases would have dealt with repeated efforts of those seeking to stop housing discrimination to find violations at various locations of a large corporate landlord, apartment owner, etc. The apparent absence of any case law or bar opinions on this issue probably means that the courts and bars simply recognize an exception without articulating it.

In a 2009 article, Professors Hazard and Irwin proposed an amendment to Rule 4.2 which recognizes the benefits of ex parte communications by testers engaged in housing discrimination tests, etc.

> A communication is authorized by law when it is in connection with: . . . . (2) transmittal of legally required or permitted notice, such as service of process; [or] (3) an investigative procedure permitted by public policy, notwithstanding that it involves an element of deception, such as by discrimination testers.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 824-25 (Mar. 2009).

Despite the ABA's obvious frustration with this sort of communication, it is unlikely that courts or bars will prohibit them.

Best Answer

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

B 2/13

Limitations on the Substance of Permitted Ex Parte Communications

Hypothetical 25

You represent a plaintiff who was hit by a school bus. You are carefully following your state's ethics rules, and calling only those school employees who are "fair game" for such ex parte contacts.

(a) May you ask a school bus driver (not involved in the accident) what guidance she received from the school board's lawyers about talking to you or other plaintiff's lawyers?

NO

(b) May you continue interviewing a former school bus driver after she tells you that she signed a confidentiality agreement that prohibits her from talking to anyone about her job, except upon a court's order?

NO (PROBABLY)

Analysis

Entirely apart from the permitted ex parte contacts, the ethics rules govern the substance of those contacts that the ethics rules allow.

(a) A comment to ABA Model Rule 4.2 indicates that

> [i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

ABA Model Rule 4.2 cmt. [7]. That comment refers to ABA Model Rule 4.4, which discusses the rights of third persons, including "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." ABA Model Rule 4.4 cmt. [1]. Accord ABA LEO 359 (3/22/91) (indicating that seeking to induce a former employee to

violate the privilege would itself violate Rule 4.4's requirement that lawyers respect third persons' rights).

The Restatement takes a different approach that limits more types of communications, and even puts some people "off-limits."

> A lawyer communicating with a nonclient in a situation permitted under § 99 may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.

Restatement (Third) of Law Governing Lawyers § 102 (2000) (emphasis added). A comment provides an additional explanation.

> Several decisions have held that a lawyer representing a client in a matter may not communicate concerning the representation with a nonclient agent who the lawyer knows is likely to possess extensive and relevant confidential and privileged information, or similar legally protected information of another nonclient interested in the matter that is confidential with respect to the lawyer's client. Those decisions typically involve a person -- for example, an expert witness or paralegal assisting opposing counsel -- whose employment has entailed exposure to extensive confidential information about the principal, who likely possesses little information that is not privileged, and whose role as confidential agent should have been apparent to the inquiring lawyer. They also involve situations in which confidentiality occurs by operation of law and not solely, for example, through a contractual undertaking of the agent.

Restatement (Third) of Law Governing Lawyers § 102 cmt. d (2000) (emphasis added).

In a 2009 article, Professors Hazard and Irwin proposed an amendment to ABA Model Rule 4.2 to emphasize limits on the substance of any permitted ex parte communications.

> A lawyer engaged in communication permitted by this Rule shall not seek or obtain information protected by the

> attorney-client privilege or work-product immunity, and shall comply with the standard and conduct set forth in Rule 4.3.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 844 (Mar. 2009).

Courts routinely instruct lawyers engaging in permissible ex parte contacts to avoid asking questions that would intrude into the attorney-client privilege.

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of professional conduct." (emphasis added); "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7(E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It

was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

- Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55, 56 (N.Y. App. Div. 2006) (reversing a lower court's disqualification of a defense lawyer who spoke for three hours ex parte with plaintiff company's former chief operating officer; noting that "[a]t the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel"; finding that a document entitled "Timeline" that the former executive shared with defense counsel did not deserve attorney-client privilege because the document was "essentially a list of events" and therefore did not meet the standard for the attorney-client privilege, which requires that the "communication itself must be primarily of a legal, not factual, character").

- District of Columbia LEO 287 (10/20/98) (finding that a lawyer may conduct ex parte contacts with unrepresented former employees of a corporate adversary, but may not seek privileged information during the contacts).

- Brown v. State Dep't of Corrections, 173 F.R.D. 265, 269 (D. Or. 1997) (holding that a lawyer making ex parte contacts with current or former employees of a corporate adversary "may neither ask nor permit a current or former employee to disclose privileged communications").

- Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899, 904 (E.D. Pa. 1991) ("We find that Rule 4.2 permits defense counsel to make ex parte contacts with the former employees currently working for Pilot Air. Opposing counsel may inquire into the underlying facts giving rise to the dispute but

must refrain from soliciting information protected by the attorney-client relationship.").

- Hanntz v. Shiley, Inc., 766 F. Supp. 258, 271 (D.N.J. 1991) ("It is appropriate for counsel to communicate, ex parte, with former employees so long as no attorney-client confidences of the corporation are part of the inquiry. No absolute bar to ex parte communications is required to protect such attorney-client confidences. It is sufficient that ethical considerations prevent an attorney from breaching the attorney-client privilege of the corporation." (citation omitted)).

Most lawyers would probably realize that they cannot intrude into some other client's privileged or confidential communications. They would also probably recognize that a nonlawyer could not be expected to sort out these questions, and decide what information the witness may or may not disclose.

(b) At least one court has also applied the same approach to information protected by a confidentiality agreement.

- Philip Morris Co. v. American Broadcasting Co., 36 Va. Cir. 1, 24 (Va. Cir. Ct. 1995) ("Any confidentiality agreement protects covered material from disclosure except on formal discovery. It would not prevent the employee from disclosing the fact that he held confidential information, but he could not disclose the information without violating the agreement absent formal discovery.").

Best Answer

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

n 12/11

Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 26

You represent a plaintiff injured when she was hit by a truck. The trucking company lawyer has been "running you ragged" in an effort to force a favorable settlement. You are trying to think of ways that you can gather evidence without the cost of depositions.

Without the trucking company lawyer's consent, may you interview:

(a) The trucking company's chairman?

NO

(b) The trucking company's vice chairman, who has had nothing to do with this case and who would not be involved in any settlement?

MAYBE

(c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?

YES (PROBABLY)

(d) A truck driver who has worked for the trucking company for the same number of years as the driver who hit your client (to explore the type of training she received)?

YES (PROBABLY)

(e) The trucking company's mechanic, who checked out the truck the day before the accident?

MAYBE

(f) The truck driver who hit your client?

NO

Analysis

Introduction

Of all the ex parte contact issues, the permissible scope of ex parte contacts with employees of a corporate adversary has the most practical consequences, and (unfortunately) the most subtle differences from state to state.

The ABA Model Rules address this issue in a comment.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

Significantly, the Ethics 2000 changes deleted an additional category of corporate employees that had formerly been off-limits:

> or whose statement may constitute an admission on the part of the organization.

Thus, the ABA Ethics 2000 changes liberalized the Rule, expanding the number of corporate employees who are fair game for ex parte contacts.

The Restatement defines a "represented nonclient" who is off-limits to ex parte contacts as follows:

> [A] current employee or other agent of an organization represented by a lawyer:
>
> (a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

> (b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or
>
> (c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Restatement (Third) of Law Governing Lawyers § 100(2) (2000). The first two categories match ABA Model Rule 4.2 cmt. [7], but the third category is quite different.

Elsewhere, the Restatement explains that

> [m]odern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

Restatement (Third) of Law Governing Lawyers § 100 cmt. e (2000). Thus, the Restatement takes the same position as the ABA Ethics 2000 change.

In a 2009 article, Professors Hazard and Irwin explained the confusion about permissible ex parte communications with employees of a corporate adversary. After a lengthy discussion, they proposed to add a Comment to Rule 4.2 to explain the standard.

> In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 840 (Mar. 2009).

In 2002, the Nevada Supreme Court issued an opinion which provided an excellent summary of the principles involved in this issue, the competing approaches and the advantages and disadvantages of those approaches. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

The Nevada Supreme Court listed various interests furthered by restricting contacts between the corporation's adversary and corporate employees.

- "[P]rotecting the attorney-client relationship from interference." Id. at 1242.
- "[P]rotecting represented parties from overreaching by opposing lawyers." Id.
- "[P]rotecting against the inadvertent disclosure of privileged information." Id.
- "[B]alancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information." Id.

The Nevada Supreme Court also listed the interests that would justify some ex parte contacts between a plaintiff's lawyer and corporate employees.

- "[T]he lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely." Id.
- "[P]ermitting more equitable and affordable access to information pertinent to a legal dispute." Id.
- "[P]romoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation." Id.
- "[P]ermitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11." Id.
- "[E]nhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely." Id.

The Nevada Supreme Court described the pros and cons of six possible tests.

First, the "blanket test" prohibits all ex parte contacts with employees of a corporate adversary.

The blanket test has the advantages of clarity, and offering the most protection to the organization. However, the blanket test limits or eliminates counsel's opportunity to "properly investigate a potential claim before a complaint is filed," and also forces all discovery to be taken through expensive depositions. Id. at 1243.

Second, the "party-opponent admission test" prohibits ex parte contacts with

> any employee whose statement might be admissible as a party-opponent admission under FRE 801(d)(2)(D) and its state counterparts.

Id.

Under this approach, an employee's statement "is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment." Id. The party-opponent admission test has the advantage of protecting the organization "from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence." Id. The organization's interest in avoiding such a situation is "particularly strong because such admissions are generally recognized as a very persuasive form of evidence." Id.

The party-opponent admission test has a disadvantage of "essentially cover[ing] all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included

within the Rule." Id. This means that the test can "effectively serve as a blanket test." Id.

Third, the "managing-speaking agent test" prohibits ex parte contacts with

> those employees who have "speaking" authority for the organization, that is, those with legal authority to bind the organization.

Id. at 1245 (footnote omitted).

Identifying such off-limits employees must be "determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law." Id. The managing-speaking agent test has the advantage of balancing the competing policies of "protecting the organizational client from overreaching . . . and the adverse attorney's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery." Id. The managing-speaking agent test has the disadvantage of "lack of predictability." Id.

Fourth, the "control group test" prohibits ex parte contacts with

> only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion.

Id.

The control group test has the advantage of reducing discovery costs by increasing the number of fair-game employees. The control group test has the disadvantage of being narrower than the attorney-client privilege rule expressed in

Upjohn. It also lacks predictability, because it is not easy to tell who is within the "control group." Id.

Fifth, the "case-by-case balancing test" looks at each case and determines which ex parte contacts would be appropriate. According to the Nevada Supreme Court, "this test has been applied only when a lawyer seeks prospective guidance from a court." Id. at 1246.

Sixth, the "New York test" prohibits ex parte communications with

> corporate employees whose acts or omissions in the matter under inquiry are binding on a corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.

Id. This is the approach adopted by the Restatement, and is also called the "alter ego test." This approach "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued." Id. The advantages of the New York test are its balancing of protection of the organization and the need for informal investigation. Its disadvantages are its unpredictability, and the possibility that it provides too much protection for the organization.

The Nevada Supreme Court ultimately selected the "Managing-Speaking Agent Test." The court explained that this approach does not prohibit ex parte contacts with "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. at 1248. The off-limits employees under this test are only those whose statements can "bind" the corporation in a "legal evidentiary sense." Id. An employee is not deemed off-limits "simply because his or her statement may be admissible as a party-opponent admission." Id.

States take varying approaches to this common situation. For instance, some jurisdictions include their approach in the black-letter rule.

> For purposes of this Rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2(c). In a comment, D.C. Rule 4.2(c) explains that "the Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." D.C. Rule 4.2 cmt. [4].

Some states include their approach in a comment to their ethics rules.

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

Most states follow the basic ABA Model Rule and Restatement approach -- considering "off-limits" corporate employees with managerial responsibility or involvement in the pertinent incident.

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter.").

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?").

- North Carolina LEO 97-2 (1/16/98) (finding that a lawyer for an employee may not communicate ex parte with an adjuster for an insurance workers' compensation insurance carrier; "Although an adjuster for an insurance

> company may not be considered a 'manager' or 'management personnel' for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.").

However, the ABA Model Rules' dramatic changes in its approach (essentially rendering "fair game" for ex parte communications large numbers of corporate employees) and variations among states' ethics rules have generated considerable confusion in many states.

Examining federal and state courts' decisions in just two states -- Illinois and Virginia -- shows how confusing all of this can be. In some ways, this confusion plays to the advantage of corporations' lawyers, because it certainly might deter ex parte communications by lawyers representing the corporation's adversaries.

Illinois

Illinois seems to have a mismatch between its federal courts and its state courts. (As explained below, the Illinois Bar issued an opinion that provides at least some consistency.)

In Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001), the Seventh Circuit upheld the Southern District of Illinois's adoption of the ABA approach.

The Seventh Circuit acknowledged that an earlier Illinois court decision applied Illinois Rule 4.2

> only to those members of a corporate defendant's "control group" who have "the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice."

Id. at 881-82 (quoting Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill. App. Ct. 1984)).

The Seventh Circuit half-heartedly explained that federal courts were free to take a different approach than Illinois courts in applying the same Illinois rule.

> Nonetheless, the district court considered the Fair Automotive test in its order denying Shane's Rule 60(b) motion and concluded that, because Fair Automotive was decided under a prior version of the Illinois Rules, it is not clear that the Illinois courts would still apply the control group test. In any event, the district court was construing its own local rule, and even though in this case the district court has incorporated Illinois's rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate Illinois court. (We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretations of the Illinois rules, much less to follow decisions from other Illinois courts.) The district court was within its discretion in choosing to follow the ABA test rather than the control group test, and we will not disturb that decision.

Id. at 882.

Illinois federal court decisions issued since Weibrecht follow the same approach -- ignoring the Illinois state court interpretation of Rule 4.2 in favor of the ABA version. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878-79 (N.D. Ill. 2002) (finding that

managers at a gas station were within the "off-limits" category of Rule 4.2; "In determining whether Rule 4.2 covers non-managerial employees, courts have recognized the tension between a party's need to conduct low-cost informal discovery, and an opposing party's need to protect employees from making ill-considered statements or admissions . . . . The conduct of station attendants is at the heart of this litigation, and it is being offered as an example of the alleged discrimination of the defendants. As a result, the employees fall under the second category of Rule 4.2: employees whose acts or omissions in the matter at issue can be imputed to the organization."); Mundt v. U.S. Postal Serv., No. 00 C 6177, 2001 U.S. Dist. LEXIS 17622, at *12 (N.D. Ill. Oct. 25, 2001) ("In Weibrecht, the Seventh Circuit upheld the District Court's adoption of a three-part test, set out in the American Bar Association's official commentary to the Model Rules of Professional Conduct, to determine whether an employee is to be considered represented. See ABA Model Rules of Professional Conduct Rule 4.2 cmt. 4 (1995). Under that test, a defendant's employee is regarded as being represented by the defendant's lawyer if any of three conditions are met: (1) the employee has 'managerial responsibility' in the defendant's organization, (2) the employee's acts or omissions can be imputed to the organization for purposes of liability, or (3) the employee's statements constitute an admission.").

To make matters even more complicated, the ABA has changed its Model Rule 4.2 since the Seventh Circuit issued this opinion. One is left to wonder whether an Illinois federal court would follow the old ABA approach or the new ABA approach.

In at least one respect, the Illinois Bar provided some clarification. In Illinois LEO 09-01, the Illinois Bar rejected its earlier "control group" analysis and adopted the

ABA Model Rule approach. Illinois LEO 09-01 (1/2009) (rejecting earlier Illinois law which placed off-limits ex parte communications by a corporation's adversary only those within the corporate "control group"; instead adopting the ABA Model Rule 4.2 standard; "A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication."; also explaining that "a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization"; holding that former employee could be contacted ex parte).

However, this still leaves a mismatch between the federal and the state courts. As explained above, the Illinois federal courts' adoption of the ABA Model Rule approach included the prohibition on ex parte contacts with a corporate employee whose statements would be admissible against the corporation.

The Illinois Bar's current approach does not include that prohibition, but instead adopts the post-2000 ABA Model Rule approach -- which renders those employees fair game for ex parte contacts.

Virginia

Virginia has had trouble reconciling its Bar's approach with its federal courts' approach.

The Virginia ethics rules contain a unique comment describing folks who are off-limits to ex parte communications with representatives of a corporate adversary.

> In the case of organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

The "control group" reference seems fairly clear -- because it piggybacks on the Upjohn United States Supreme Court case. However, the comment does not describe who "may be regarded as the 'alter ego' of the organization." That term usually comes up in cases involving plaintiffs' efforts to pierce the corporate veil and hold others responsible for a corporation's liabilities.

Neither the "control group" nor "alter ego" phrase would seem to include some corporate employees or other representatives who should clearly be off-limits -- defined in ABA Model Rule 4.2 cmt. [7] as those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In essence, that exclusion includes the bus company employee who ran over a plaintiff's client. The bus driver clearly is not in the bus company "control group." In traditional corporate terms, the bus driver clearly is not the "alter ego" of the bus company. Thus, the Virginia Bar and Virginia courts have had to deal with this obvious hole in the Virginia rules' definition of those immune from ex parte communications by the corporation's adversary.

On a number of occasions, the Virginia Bar held that a lawyer may contact the employee of a corporate adversary unless the employee could "commit the corporation to specific courses of action" or could be characterized as the corporation's "alter ego." See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 530 (11/23/83); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82); Virginia LEO 347 (12/4/79). The Virginia Bar has even referred to the pre-Upjohn "control group" test. See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86).

Although the Virginia Bar has not explained exactly where the line should be drawn, it has provided some hints. For instance, in Virginia LEO 507 (3/30/83), the Virginia Bar held that a lawyer could not contact his corporate opponent's "regional manager." Accord Virginia LEO 459 (7/21/82) (store managers deemed off-limits).

On the other hand, in one Legal Ethics Opinion the Virginia Bar indicated that lawyers initiating such ex parte contacts must disclose their adversarial role, and then

try "to ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity." Virginia LEO 905 (3/17/89). A lawyer concluding that the employee "feels" this way must presumably end the communication.

Virginia court decisions are hopelessly confused. Four cases decided in a little over ten months in the mid-1990s would leave any practitioner perplexed.

In Queensberry v. Norfolk & Western Railway, 157 F.R.D. 21 (E.D. Va. 1993), the Eastern District of Virginia dealt with a railroad's motion to prohibit plaintiff (an injured railroad worker proceeding under the Federal Employers' Liability Act ("FELA")) from conducting ex parte communications with the railroad's employees. The court acknowledged that its local rule adopted as the applicable ethics standards the then-current Virginia Code of Professional Responsibility. The court quoted Virginia Code of Prof'l Responsibility DR 7-103(A), and then noted that its language was "identical" to what was then the ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). For some reason, the court did not rely on the Virginia Code comment describing who is fair game and off-limits within an organization, but instead relied on ABA LEO 359 (3/22/91). The ABA approach has always been different from Virginia's approach.

Focusing on what was then the ABA prohibition on ex parte contacts with those "whose statement may constitute an admission on the part of the organization" -- a prohibition that has never appeared in the Virginia Code or the Virginia Rules -- the court then turned to Federal Rule of Evidence 801(d)(2) in concluding that "'virtually any employee may conceivably make admissions binding on his or her employer.'"

Queensberry, 157 F.R.D. at 23. Thus, the court granted the railroad's motion, and prohibited the plaintiff from conducting ex parte interviews of railroad workers.

Just a few months later, the Roanoke (Virginia) Circuit Court dealt with an identical request by the same railroad to prohibit a plaintiff from conducting ex parte interviews of railroad employees. Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). The state court explained that "while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia's Disciplinary Rules in this situation and therefore do not follow his guidance on the point." Id. at 328.

> Though there is no Virginia appellate decision on point, the standing committee on Legal Ethics of the Virginia State Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's control[] group and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. See, e.g., Legal Ethics Opinion Nos. 347, 530, 795; Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)." Legal Ethics Opinion No. 1504, December 14, 1992.
>
> While the Virginia State Bar's "control group" test may not be the one followed in the majority of jurisdictions, the overwhelming weight of authority rejects the Railway Company's argument that the Disciplinary Rules prohibit contact with any employee of the corporate defendant. See, e.g., Niesig v. Team I, et al., 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), a persuasive opinion by the current chief judge of New York's highest court.
>
> The railway company relies for support of its interpretation of DR 7-103(A)(1) on a memorandum opinion of another trial judge. Queensberry v. Norfolk and Western Railway Company, 157 F.R.D. 21 (E.D. Va. 1993). The plaintiff argues, and I agree, that in deciding that case, the

> federal district judge was justifiably concerned with the effect, under the Federal Rules of Evidence, of any admission that even the lowest-level employee might make. As the plaintiff notes, such a concern does not exist in Virginia's state courts, where the Federal Rules do not apply. Thus, the plaintiff suggests, Queensberry should be distinguished from the case at bar.

Id. at 327-28. The court therefore denied the railroad's motion.

A few months after that, another Eastern District of Virginia judge addressed an identical request by the same railroad. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096 (E.D. Va. 1994). The court followed what it called the "thoughtful" opinion in Queensberry in granting the railroad's request. Id. at 1099. Interestingly, the court indicated that "both parties in this action agree" that the ex parte prohibition applies only "after a lawsuit is filed." Id. at 1098. This is an incorrect statement of the law in every state. The court therefore allowed the plaintiff to re-interview employees his lawyer had spoken with before litigation began, although they would not be able to obtain any "new information" from them. Id. at 1101.

Several months later, the Winchester, Virginia Circuit Court addressed this issue in connection with a hospital's motion to prevent plaintiff from engaging in ex parte communications with the hospital's nurses about a malpractice case. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). The state court judge cited the Virginia Rule, but quoted from the ABA comment -- as well as noting the Queensberry and Tucker cases. The court found that the hospital's nurses were not the "alter ego" of the hospital, but that they would be off-limits under either the Virginia precedent or the ABA approach.

> However, the nurses' negligent acts may make the Medical Center vicariously liable in that the nurses may "act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation." LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the Plaintiff. This LEO 905 language, which LEO 1504 characterizes as "dispositive," is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee's relationship to the corporation ("make decisions on behalf"), which is the traditional control group analysis, or the employees's participation in the events giving rise to the cause of action ("act on behalf of the corporation"), which is closely akin to the substance of the official comment to ABA Rule 4.2.

Id. at 108. As the court explained,

> [w]here the employees are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego. A corporation may have many heads and even more hands, and any one or more of the heads and hands may bind the corporation. There is no reason why a corporation or other organization, which must act through surrogates, should be afforded less protection under the rules of discovery than a natural person. Therefore, the better rule to be applied in the context of permissible discovery and ex parte contacts would be that of the official comment to ABA Model Rule 4.2 and LEO 905. Accordingly, the plaintiff may not contact The Medical Center's nurses who were, or may be, directly involved in the sponge issue in this case outside the discovery process. However, to the extent that employees of the Medical Center are not persons "whose act or omission in connection with that matter [in litigation] may be imputed to the organization for purposes of civil . . . liability or whose statement may constitute an admission on the part of the organization," those corporate employees may be contacted ex parte by the Plaintiff.

Id. at 108-09. The court entered an order prohibiting the plaintiff from ex parte contacts with

> the nurses who attended to the physician and who may have negligently placed the sponges. However, to the extent that there are other nurses or employees who are not involved in the sponge placement process of this particular plaintiff, then the plaintiff is free to talk to such nurses outside the discovery process so long as traditional rules of patient confidentiality and the principles discussed in this order are not transgressed.

Id. at 109-10.

A federal court decision in Virginia on this topic also followed the ABA approach rather than the Virginia approach. In Lewis v. CSX Transportation, Inc., 202 F.R.D. 464 (W.D. Va. 2001), the court addressed CSX's motion to enjoin a plaintiff's lawyer from conducting ex parte interviews of CSX employees. The court relied on the Tucker and Queensberry approach. The court acknowledged that the Western District of Virginia Local Rules adopt the Virginia ethics rules, but noted that the court can "'look to federal law in order to interpret and apply those rules.'" Id. at 466 (quoting McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993)). The court also cited Federal Rule of Evidence 801 -- noting that an employee's statement can amount to an admission.

Of course, all of these cases were decided under the old ABA approach, which placed off-limits corporate employees whose statements were admissible as admissions against their corporate employer's interest. In fact, that was the explicit provision on which all three federal district court decisions rested. Now that the ABA has changed its approach, and rendered those corporate employees fair game for ex parte contacts, there is simply no telling what the federal courts would do in Virginia.

In 2005, a Virginia state court decision dealing with this topic followed the Virginia rules. Pruett v. Virginia Health Servs., Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005)

(permitting plaintiff's lawyer to initiate ex parte communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting ex parte contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting ex parte contacts with former nursing home "control group" and non "control group" employees).

The most recent Virginia state court to deal with this topic extensively analyzed both the "control group" and "alter ego" definition in Virginia Rule 4.2 cmt. [7]. In Yukon Pocahontas Coal Co. v. Consolidation Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), defendant's lawyer communicated briefly with several limited partners of plaintiffs' limited liability partnerships. The court concluded that the limited partners were not members of the plaintiffs' "control group," because "[b]y definition, a limited partner cannot bind or act on behalf of" plaintiffs. Id. at 91.

However, the court held that the limited partners were somehow "alter egos" of the plaintiffs, because the plaintiffs' partnership agreements allowed them to "make decisions on behalf of [plaintiffs] in the particular area which is a subject matter in the underlying litigation" -- voting on the general partner's proposed partnership agreement amendments dealing with his power to act on plaintiffs' behalf (which the court described as the issue being litigated). Id. at 92. The court pointed to several old Virginia legal ethics opinions, which defined as "alter egos" of a corporation those agents who can commit the organization because of their authority or some other law providing that power. The court also pointed to the Pruett case, in which another circuit

court found off-limits to ex parte communications floor nurses who obviously were not in the nursing home's "control group," but who allowed the nursing home to carry on its business through their "'hands on' interaction." Id. (quoting Pruett v. Virginia Health Servs., Inc. at 84-85).

This strange definition of "alter ego" does not come from any standard corporate law jurisprudence. Instead, it appears to be a judicial effort to plug the hole left in Virginia Model Rule 4.2 cmt. [7], which does not include the obvious prohibition on ex parte contacts with those (as characterized in ABA Model Rule 4.2 cmt. [7]) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, this definition of "alter ego" does not exactly match with the ABA Model Rule definition of those off-limits lower level employees. It makes sense to prevent ex parte contacts with non-control group corporate employees whose "act or omission" might put the corporation at risk, but these Virginia courts' definition of "alter ego" employees goes beyond that group and apparently includes witnesses whose acts or omissions would not have that effect.

The most recent Virginia federal court opinion takes the same inexplicable approach as an earlier federal court decision.

- Smith v. United Salt Corp., Case No. 1:08cv00053, 2009 U.S. Dist. LEXIS 82685, at *9-10, *9, *11 (W.D. Va. Sept. 9, 2009) (analyzing a corporate defendant's effort to enjoin lawyers for a sexual harassment and discrimination plaintiff from ex parte contacts with company employees; declining to apply the holding in Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) because that case involved ex parte contact with "the very employees who used and maintained the piece of equipment at issue," which meant that their statements would "be an admission of liability imputable to the employer"; inexplicably analyzing the issue as the Lewis court had done, in light of the standard found in an earlier version of ABA Rule 4.2 (which prohibited ex parte communications with persons "'whose statement[s] may

> constitute an admission on the part of the corporate party'"); ultimately declining to enjoin ex parte contacts by the plaintiff's lawyer with employees "whose statements could not be used to impute liability upon the employee," but prohibiting "ex parte contact in this context with any supervisory or managerial employee").

All in all, Virginia case law presents a confusing and contradictory amalgam of current and obsolete Virginia and ABA principles.

Best Answer

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

n 12/11

Applying the "Regularly Consults" Standard

Hypothetical 27

You are trying to determine if you can communicate ex parte with a corporate adversary's executive. Based on your deposition of that executive, you know that the executive had a few conversations with the company's lawyer about your litigation against the company. Other than that, the executive has had nothing to do with the case.

Is this executive off-limits to ex parte communications?

NO (PROBABLY)

Analysis

ABA Model Rule 4.2 cmt. [7] places off-limits a constituent of an organization who (among other things) "regularly consults with the organization's lawyer concerning the matter."

In 2007, the Wisconsin Bar dealt with this issue. The Bar explained that the ex parte communication prohibition

> is specific to the 'matter' in question. In large organizations, some management constituents may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR 20:4.2. However, if the chief financial officer was a witness to the alleged act of discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule.

Wisconsin LEO E-07-01 (7/1/07).[1] The Bar clearly indicated that

[1] Wisconsin LEO E-07-01 (7/1/07) (explaining that Wisconsin's Rule 4.2 allows even senior executives to be contacted ex parte by a corporation's adversary, depending on the subject matter; "[T]he

> a constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not 'regularly consult' with the organization's lawyer.

Id.

Although this approach complies with the literal language of most states' version of Rule 4.2, lawyers approaching upper level corporate managers based on this standard face the risk of an ethics violation or court sanctions if the employee with whom they communicate ex parte is later found to have been "off-limits" under this standard.

Best Answer

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

n 12/11

---

category is specific to the 'matter' in question. In large organizations, some management constituents may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and thus be covered by SCR 20:4.2. However, if the chief financial officer was a witness to the alleged act of discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule."; "a constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not 'regularly consult' with the organization's lawyer").

Ex Parte Communications with a Corporate Adversary's Former Employees

Hypothetical 28

You represent an accounting firm in defending a malpractice case brought by a bank whose vice president embezzled several hundreds of thousands of dollars undetected. You have heard from various sources that the bank's president was having an affair with the vice president's wife, and "turned a blind eye" to obvious warning signs that something was wrong. You think that several former bank employees might be able to corroborate these rumors.

(a) Without the bank's lawyer's consent, may you interview the bank's former senior vice president?

YES (PROBABLY)

(b) Without the bank's lawyer's consent, may you interview a former bank teller (who allegedly saw evidence of the president's affair)?

YES (PROBABLY)

Analysis

Introduction

Unlike other areas involving ex parte communications, the ethics authorities seem to be unanimous in this area -- although the courts are not.

A comment to ABA Model Rule 4.2 clearly indicates that the

> [c]onsent of the organization's lawyer is not required for communication with a former constituent.

ABA Model Rule 4.2 cmt. [7]. See also ABA LEO 396 (7/28/95); ABA LEO 359 (3/22/91).

The Restatement is just as clear, and even provides an explanation.

> Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a

> category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel.

Restatement (Third) of Law Governing Lawyers § 100 cmt. g (2000).

Thus, under both the ABA Model Rules and the Restatement, former corporate employees are fair game for ex parte communications initiated by the corporation's adversary's lawyer -- even if they would have clearly been off-limits while still with the company.

In a 2009 article, Professors Hazard and Irwin explained the mixed approach the courts take towards ex parte communications with a corporate adversary's former employees. They proposed a revision to the comments to Rule 4.2 as follows:

> In the case of a represented organization, consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent is represented by the organization's lawyer through an independent engagement or unless a lawyer knows or reasonably should know the former constituent's conduct materially contributed to the matter underlying the representation. In communicating with a former constituent, a lawyer shall not seek to elicit privileged or confidential information.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 842 (Mar. 2009).

Courts take differing approaches. Most courts find such ex parte communications permissible.

- Rubis v. Hartford Fire Ins. Co., Civ. No. 3:11CV796 (WWE), 2012 U.S. Dist. LEXIS 52982, at *8-9, *11-12 (D. Conn. Apr. 16, 2012) (declining to disqualify a lawyer who had conducted ex parte communications with a former manager of a corporate adversary; noting that "[a] minority of courts . . . have applied Rule 4.2 to former employees in certain situations, such as where the former

employee was a member of an organization's management or control group, or where the former employee had privileged or confidential information, or where the conduct of the former employee could have been imputed to the employer." [citing Serrano v. Cintas Corp., Civ. A. No. 04-40132, 2009 U.S. Dist. LEXIS 120068 (E.D. Mich. Dec. 23, 2009)]; "Without deciding the motion to disqualify at this time, and considering the nuanced approach counseled in Serrano at the deposition stage, the Motion for Protective Order [Doc. #56] is GRANTED, to the extent that counsel may not inquire at the deposition about communications Mr. Kemp had with Madsen, Presley & Parenteau, LLC, concerning his involvement in the termination of these plaintiffs. There is no claim that Mr. Kemp possesses either privileged or confidential information concerning plaintiffs' claims. The Hartford may inquire whether its former employee Gary Kemp has communicated to plaintiffs' counsel knowledge that may support a claim of discriminatory pattern and practice beyond his involvement in the termination of plaintiffs. A fair subject of inquiry includes Mr. Kemp's past involvement in reduction in force initiatives and/or termination of others' employment, conversations with The Hartford's lawyers, his access to confidential and/or privileged materials, and specific litigation strategies in other cases. The Hartford's counsel may inquire by naming employees and/or the lawsuit or describe the litigation so that Mr. Kemp will be able to recall his involvement and counsel can determine whether Kemp has specific privileged and/or confidential information that could prejudice The Hartford in this lawsuit. At this time, defendant has only speculated that Mr. Kemp was exposed to privileged/confidential information during his employment that could prejudice The Hartford in this lawsuit.").

- Arista Records LLC v. v. Lime Group LLC, 715 F. Supp. 2d 481, 500 (S.D.N.Y. 2010) (declining to issue a protective order preventing plaintiffs from ex parte communications with a defendant's former chief technology officer; "The Court will not issue a protective order prohibiting Plaintiff's from speaking with Bildson [a defendant's former chief technology officer]. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide him with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed.").

- MCC Mgmt. of Naples, Inc. v. Arnold & Porter, LLP, Case Nos. 2:07-cv-387-FtM-29SPC & -420-FtM-29DNF, 2009 U.S. Dist. LEXIS 44992, at *65-66 (M.D. Fla. May 29, 2009) ("An attorney may ethically communicate with a former officer or employee of a corporation on an ex parte basis even though the attorney knows that the corporation is represented by counsel.").

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7(E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

- Muriel Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55 (N.Y. App. Div. 2006) (assessing a defense lawyer's ex parte interview of one of plaintiff's former employees; noting that the lower court had disqualified the lawyer because of an "appearance of impropriety," despite the inapplicability of the ex parte contact prohibition on ex parte communications with former employees of a corporate adversary); also noting that "[h]ere, after the litigation had commenced, plaintiff terminated its chief operating officer. After plaintiff's counsel informed defense counsel that the executive was no longer within its control, both attorneys agreed that it would be appropriate for defense counsel to subpoena the witness for deposition. Before that deposition was held, defense counsel conducted a pre-deposition interview of the witness for approximately three hours. At the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with

plaintiff's counsel."; reversing the disqualification), appeal granted, No. M-4630, 2006 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. Oct. 12, 2006).

- Snowling v. Massanutten Military Acad., 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the 'control group' when they were employed by MMA.").

- Turnbull v. Topeka State Hosp., 185 F.R.D. 645, 652 (D. Kan. 1999) (a party's lawyer could ethically interview former employees of a corporate adversary).

- Olson v. Snap Prods., Inc., 183 F.R.D. 539, 544 (D. Minn. 1998) ("likewise, a majority of Courts which have considered the issue agree that, in general, Rule 4.2 does not bar ex parte attorney contacts with an adversary's former employees who are not themselves represented in the matter. A minority of Courts, which are concerned over the unfairness of litigants being able to obtain the sensitive information of an opponent from the opponent's past employees, extend the 'no contact' rule to former employees." (citations omitted)).

- Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956, 959 (D. Md. 1997) (holding that the Maryland ethics code does not prohibit ex parte contacts with former employees, and refusing to disqualify a law firm for conducting an ex parte interview of a former employee who was "not an attorney or an investigator, but was simply a marketer").

Other courts and bars treat former employees the same way they treat current employees.

- North Carolina LEO 97-2 (1/16/98) (addressing an adversary's ability to communicate ex parte with former employees of a corporate adversary; distinguishing between permissible ex parte contacts with a former employee who was not heavily involved in the legal representation of the corporation in the pertinent matter and impermissible ex parte communications with a former employee who played such a role while at the company; holding that a lawyer representing a sexual harassment plaintiff could communicate ex parte with a former employee who might have engaged in alleged sexual harassment; addressing the following situation: "Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of other employees of Corporation. An action alleging sexual harassment based on Employee X's conduct was brought against Corporation. Although he is

not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?"; finding the communications permissible; "Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting ex parte contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee '. . . whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization,' should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization."; contrasting this scenario with an adversary's ex parte communication with a former corporate employee who had played an intimate role in the legal issues while employed by the company; "The protection afforded by Rule 4.2(a) to 'safeguard the client-lawyer relationship from interference by adverse counsel' can be assured to a represented organization only if there is an exception to the general rule that permits ex parte contact with former employees of an organization without the consent of the organization's lawyer. See RPC 81 (permitting a lawyer to interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.").

- Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir. 1995).

- MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712 (D. Conn. 1991) (disqualifying a law firm for improper ex parte contacts with a former employee of a litigation adversary).

- Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037 (D.N.J. 1990).

- American Protection Ins. Co. v. MGM Grand Hotel -- Las Vegas, Inc., Nos. Civ.-LV-82-26 HEC, LV-82-96 HEC, 1983 WL 25286 (D. Nev. Dec. 8, 1983) (disqualifying a law firm for improper ex parte contacts and payments to a former employee of the litigation adversary).

One court concocted an interesting process.

- Equal Employment Opportunity Comm'n v. First Wireless Group Inc., No. CV-03-4990 (JS)(ARL), 2006 U.S. Dist. LEXIS 67694, at *3-5 (E.D.N.Y. Sept. 20, 2006) ("With respect to the non-managerial former employees, the court agrees with the EEOC that there is no basis for prohibiting the EEOC's contact with former employees. . . . The only justification for restricting contact with a former employee would be to protect privileged information that the employee may possess. . . . This circumstance typically arises only with former managerial or supervisory employees. Accordingly, by September 27, 2006, First Wireless is to identify, from the list provided, any former managerial or supervisory employees with access to privileged information. As to each of these employees, First Wireless is to provide the EEOC with a declaration identifying the position held by each such employee, as well as a description of their duties and responsibilities. Upon receipt of the list form [sic] First Wireless, the EEOC is to provide First Wireless with the subject matter of its intended communication with such employees by September 29, 2006. If, after reviewing the subject matter of the intended communication, First Wireless believes that those employees may be asked about information protected by a privilege belonging to First Wireless, it shall communicate its concern to the EEOC. If the issue cannot be resolved by the parties, First Wireless may then renew its application for a protective order with respect to the 'manager-level' employees.").

In some states, the answer might depend on the court and even the geographic area where the lawyer acts.

Virginia provides a good example of how confusing this can be. The Virginia ethics rules could not be any clearer: "[t]he prohibition [on ex parte contacts] does not apply to former employees or agents." Virginia Rule 4.2 cmt. [7]. Several Virginia state court cases reaffirmed this approach.

- Pruett v. Va. Health Servs., Inc., 69 Va. Cir. 80 (Va. Cir. Ct. 2005) (declining to prohibit a plaintiff's lawyer from ex parte contacts with any former employees of defendant nursing home).

- Snowling v. Massanutten Military Acad., 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the "control group" when they were employed by MMA. I have reviewed the opinion of the Honorable John E. Wetsel Jr., Judge of the Twenty-sixth Judicial Circuit, in Dupont v. Winchester Medical Center, 34 Va. Cir. 105 (Circuit Court of the City of Winchester, 1994). While I do not disagree with Judge Wetsel's reasoning, there is, in my view, an important difference between the situation presented there and the one at hand. That distinction lies in the employment status of the persons with whom the Plaintiff seeks contact. In our case, these persons are no longer employed by the Defendant. I realize this ruling puts me at odds with Magistrate Judge Sargent in Armsey v. Medshares Management Services, 184 F.R.D. 569 (W. D. Va. 1998); however, I find myself in agreement with the opinions handed down in those several cases cited in Armsey where ex parte contact with former non-managerial employees was allowed.").

In 1998, a Western District of Virginia federal court case relied on the court's inherent power to preclude ex parte communications with a corporate defendant's former employees whose "statements, actions or omissions" could be imputed to the corporate defendant.

- Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569, 574 (W.D. Va. 1998) ("I agree with the committee that former employees may no longer bind their corporate employer by their current statements, acts or omissions. Yet, this does not prevent liability being imposed upon their former employer based on the statements, acts or omissions of these individuals which occurred during the course of their employment. In fact, Plaintiffs' counsel in

> this case has informed the court that it seeks to speak to each of these former employees because Plaintiffs believe that they can impute liability upon Medshares through the statements, actions or omissions of these former employees. Under these facts, I do not believe ex parte communications with these former employees is proper." (citations omitted)).

However, ten years later another Western District of Virginia decision concluded that Virginia Rule 4.2 "strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and a protection of a corporate party's privileged and confidential information." Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 953 (W.D. Va. 2008). The Bryant court distinguished the Armsey case because the plaintiff was not seeking to impute the former employees' "statements, conduct or actions" to the corporate defendant. Id.[1] However, Bryant clearly represents a fundamental disagreement with

[1] Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 950, 953, 953-954 (W.D. Va. 2008) (assessing the permissibility of plaintiff's ex parte communications with former employees of a corporate adversary; explaining that the Virginia State Bar has issued legal ethics opinions permitting such ex parte communications, while another Western District of Virginia case (Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998) prohibited such ex parte communications; noting "the vast divergence of opinion in state and federal courts in other jurisdictions on the issue of ex parte communications between counsel and former management employees of an adverse corporate party."; explaining several policy reasons in favor of the bar approach; "First, as this issue is an ethical one, it is critical to provide clear guidance to practicing lawyers. Lawyers need to know where the electrified third rail lies. The bright line rule set forth in the text and comments to Virginia Rule 4.2 serves this purpose. Indeed, any lack of clarity in this area can only serve to foster more discovery disputes requiring the parties and the courts to expend resources to resolve. Second, requiring discovery of former employees only through formal means will needlessly raise the cost of litigating with corporate parties. Third, the court in Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233, 238 (D. Me. 2005), appropriately inquired as to 'why the onus should not be on counsel for the witness' former employer to offer him or her counsel,' and suggested that '[s]uch efforts could be undertaken by defense counsel as a matter of course when a plaintiff seeks to hold a corporate defendant vicariously liable for the wrongful acts of a former employee.'"; finding the situation distinguishable from that in Armsey because the plaintiff did not seek to impute the former corporate employee's "statements, conduct or actions" to the corporate defendant; ultimately allowing such ex parte communications; "In sum, the court believes that the approach taken by the Virginia State Bar Committee on Legal Ethics and the Rules of Professional Conduct strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and the protection of a corporate party's privileged and confidential information. . . . Thus, although the Rules allow communication with former corporate employees, including those with managerial responsibilities, opposing counsel must tread very carefully to avoid discussing information which 'may reasonably be foreseen as stemming from attorney/client communications,' Virginia LEO 1749, or to 'use methods of obtaining evidence that violate the legal rights

the Armsey case, so it is unclear where the Western District of Virginia now stands on that issue. The Eastern District of Virginia has not spoken, so it would be difficult to guess its approach.

Thus, Virginia practitioners apparently may conduct ex parte communications with former employees if they are litigating in state court, may not engage in such ex parte communications if they are litigating in western Virginia federal courts, and will have to guess what they can do if they are litigating in eastern Virginia federal courts.

A far more difficult dilemma arises if the lawyer wants to communicate ex parte with a former employee who is clearly fair game under the ethics rules, but who has been so infused with privileged or confidential information that the lawyer almost inevitably risks obtaining such information. For instance, a lower level employee of a corporate adversary might have had extensive discussions with the corporation's lawyer about an incident. Lawyers undertaking ex parte communications with such persons risk disqualification, even if they try to avoid explicitly asking questions calling for such information, or stumbling into such information.

Some courts take a surprisingly liberal (and trusting) view.

---

of such a person.' Va. R. Prof'l Conduct 4.4."; imposing several procedural requirements on such communications; "1. Upon contacting any former employee, plaintiff's counsel shall immediately identify himself as the attorney representing plaintiff in the instant suit and specify the purpose of the contact. 2. Plaintiff's counsel shall ascertain whether the former employee is associated with defendant or is represented by counsel. If so, the contact must terminate immediately. 3. Plaintiff's counsel shall advise the former employee that (a) participation in the interview is not mandatory and that (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for the defendant. Counsel must immediately terminate the interview of the former employee if he or she does not wish to participate. 4. Plaintiff's counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate materials. In the course of the interview, plaintiff's counsel shall not attempt to solicit privileged or confidential corporate information and shall terminate the conversation should it appear that the interviewee may reveal privileged or confidential matters. 5. Plaintiff shall create and preserve a list of all former employees contacted and the date(s) of contact(s) and shall maintain and preserve any and all statements or notes resulting from such contacts, whether by phone or in person, as they may be subject to in camera review to ensure compliance with this Order.").

- Gianzero v. Wal-Mart Stores, Inc., Civ. A. No. 09-cv-00656-REB-BEB, 2011 U.S. Dist. LEXIS 50630 (D. Colo. May 5, 2011) (allowing a company's adversary to communicate ex parte with a former company employee, even though the former employee had been exposed to privilege communications while working at the company).

- Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 417 (S.D.N.Y. 2011) (allowing a corporation's adversary to communicate ex parte with a former company employee; "The Court will not issue a protective order prohibiting Plaintiffs from speaking with Bildson. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide them with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed above."; "Because Bildson had access to privileged information while at LW[plaintiff], however, the Court believes that it is sensible and fair to order additional precautions to ensure that Bildson does not reveal privileged information to Plaintiffs in the future. Accordingly, the Court orders Plaintiffs: (1) not to request privileged information from Bildson; (2) to stop Bildson from revealing privileged information, if Plaintiffs become aware that he is doing so; and (3) to promptly provide Bildson and his attorney with a copy of this order, and to ensure that Bildon's attorney discusses with Bildson his obligation not to disclose privileged information.").

- Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55, 56 (N.Y. App. Div. 2006) (reversing a lower court's disqualification of a defense lawyer who spoke for three hours ex parte with plaintiff company's former chief operating officer; noting that "[a]t the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel"; finding that a document entitled "Timeline" that the former executive shared with defense counsel did not deserve attorney-client privilege because the document was "essentially a list of events" and therefore did not meet the standard for the attorney-client privilege, which requires that the "communication itself must be primarily of a legal, not factual, character").

One court did not criticize a lawyer for ex parte communications with such a former high-level official of a corporate adversary, but prohibited the defendants from using the fruits of the communications.

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7 (E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

Other courts are more restrictive.

- Weber v. Fujifilm Medical Systems, U.S.A., No. 3:10 CV 401 (JBA), 2010 U.S. Dist. LEXIS 72416 (D. Conn. July 19, 2010) (holding that several former employees of a corporate defendant were off limits for ex parte communications because they had been exposed to privileged communications while at the company).

(a)-(b) Either of these ex parte contacts would be acceptable under the ABA Model Rules, the Restatement, and most (if not all) state ethics rules.

However, court decisions might prohibit or restrict such ex parte contacts.

Best Answer

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

B 2/13

Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 29

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

(a) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

YES (PROBABLY)

(b) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

This hypothetical addresses the "[i]n representing a client" phrase.

Introduction

It is difficult enough in a case of individual lawyers to properly characterize them as "clients" or as "lawyers" for purposes of analyzing Rule 4.2, but trying to assess the role of in-house lawyers complicates the analysis even more.

The ABA Model Rules and Comments are silent on the issue of in-house lawyers. However, the ABA issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers.

- ABA LEO 443 (8/5/06) (explaining that Rule 4.2 is designed to protect a person "against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding the representation"; concludes that the protections of Rule 4.2 "are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization," so "inside counsel ordinarily are available for contact by counsel for the opposing party"; noting that adverse counsel can freely contact an in-house lawyer unless the in-house lawyer is "part of a constituent group of the organization as described in Comment [7] of Rule 4.2 as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute" or the in-house lawyer "is in fact a party in the matter and represented by the same counsel as the organization"; acknowledging that "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; not analyzing the circumstance in which an in-house lawyer is "simultaneously serving as counsel for an organization in a matter while also being a party to, or having their own independent counsel in, that matter").

The Restatement similarly explains that

> [i]nside legal counsel for a corporation is not generally within Subsection (2) [those off limits to ex parte communications], and contact with such counsel is generally not limited by § 99.

Restatement (Third) of Law Governing Lawyers § 100 cmt. c (2000).

Both the ABA legal ethics opinions and the Restatement deal with ex parte communication to an in-house lawyer.

Most states follow the same approach as the ABA and the Restatement take.

- Wisconsin LEO E-07-01 (7/1/07) ("A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.").

- Virginia LEO 1820 (1/27/06) (holding that an in-house lawyer "is not a party to the dispute but instead is counsel for a party").

- District of Columbia LEO 331 (10/2005) (concluding that "[i]n general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity's other counsel"; explaining that "if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel's personal lawyer").

Other states disagree.

- Rhode Island LEO 94-81 (2/9/95) (indicating that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents).

- North Carolina LEO 128 (4/16/93) (explaining that "a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel").

The ABA legal ethics opinions and the Restatement do not address communications by an in-house lawyer who is not otherwise clearly designated as a lawyer representing the corporation in litigation or some transactional matter. Because clients can always speak to clients, characterizing an in-house lawyer as a "client" rather than a lawyer presumably frees such in-house lawyers to communicate directly

with a represented adversary of the corporation -- without the adversary's lawyer's consent. This seems inappropriate at best (although presumably corporate employees with a law degree may engage in such ex parte communications as long as they are not "representing" their corporation in a legal capacity).

In any event, at least one bar has forbidden such communications by in-house lawyers.

- Illinois LEO 04-02 (4/2005) (holding that a company's general counsel may not initiate ex parte contacts permitted by Rule 4.2).

Of course, lawyers and their clients must consider other issues as well. For instance, in-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than as lawyers might jeopardize their ability to have communications protected by the attorney-client privilege.

(a) Although the answer might differ from state to state, it seems likely that ex parte contacts would be appropriate with an in-house lawyer who has signed on as "counsel of record" on the pleadings -- because that lawyer should appropriately be seen as representing the corporation.

(b) This scenario presents a more difficult analysis, because the in-house lawyer has not signed on as the corporation's representative in the lawsuit. Therefore, the answer to this hypothetical would depend on the state's approach.

Although the pertinent ABA legal ethics opinion and the Restatement would permit such ex parte communications, lawyers would be wise to check the applicable state's approach.

Best Answer

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

n 12/11

Application Only to Lawyers "Representing" a Client: Lawyers Playing Nonlegal Roles in Corporations

Hypothetical 30

After about 20 years in private practice, you became general counsel of your firm's largest client. After 10 years in that role, you moved just yesterday to another position -- Senior Vice President for Operations. You no longer have a legal title, and no role in the law department. The company's CEO just called you up to her office to meet with the president of the company's largest customer, in an effort to resolve a dispute about the timeliness of some deliveries. You know that the customer has a lawyer representing it in connection with this dispute, because you have spoken to that lawyer several times while in your previous General Counsel position.

Without the customer's lawyer's consent, may you participate in the meeting between your company's CEO and the customer's CEO in an effort to resolve the dispute?

YES (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical addresses the "[i]n representing a client" phrase.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Lawyers acting in a nonlegal capacity while employed by corporations frequently face this dilemma. If the ex parte communication rule rested solely on the worry that lawyers would gain some advantage when communicating with a nonlawyer, such lawyers would still be governed by the ex parte communication rule even after moving into a non-representational role.[2]

On the face of the ethics rules, a lawyer in this situation presumably could participate in the meeting and communicate ex parte with represented persons.

However, there are several reasons why a lawyer in this setting (especially so soon after a shift to the business side) would want to at least notify (if not obtain the consent from) the represented person's lawyer. First, such a sign of good faith would avoid poisoning the business relationship. Second, a court might use its inherent power or some other rule or common law principle to sanction the lawyer, despite the literal language of the applicable ethics rule.

Best Answer

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

n 12/11

[2] No court or bar seems to have addressed the issue of whether this "representing a client" phrase means "representing" a client in a legal capacity or "representing" a client in the way that a salesperson "represents" a company. It is probably safe to assume that the phrase means the former rather than the latter.

Claiming or Establishing an Attorney-Client Relationship

Hypothetical 31

You have been working with in-house counsel at one of your largest clients, defending several employment discrimination cases being handled by a very aggressive plaintiff's lawyer. The lawyer has filed discovery asking for the home addresses and telephone numbers of several hundred current and former employees. From the nature of the discovery, it is obvious that the plaintiff's lawyer intends to informally (and ex parte) approach those current and former employees. Your in-house lawyer contact has asked you what you can do to prevent such communications (she worries that some of the employees might be so "disgruntled" with the company that they would assist the plaintiff).

(a) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the current employees, because you represent them?

NO

(b) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the former employees, because you represent them?

NO

(c) Should you recommend to the in-house lawyer that you (or she) formally represent the most important employees?

NO (PROBABLY)

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

(a)-(b) This hypothetical addresses the "represented by another lawyer in the matter."

As tempting as it is for outside or in-house lawyers to essentially render "off-limits" company employees by asserting an attorney-client relationship with them, state bars routinely find such a statement essentially irrelevant.

- Wisconsin LEO E-07-01 (7/1/07) ("When an organization is represented in a matter, SCR 20:4.2 prohibits a lawyer representing a client adverse to the organization in the matter from contacting constituents who direct, supervise or regularly consult with the organization's lawyer concerning the matter, who have the authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. All other constituents may be contacted without consent of the organization's lawyer. Consent of the organization's lawyer is not required for contact with a former constituent of the organization, regardless of the constituent's former position. When contacting a current or former constituent of a represented organization, a lawyer must state their [sic] role in the matter, must avoid inquiry into privileged matters and must not give the unrepresented constituent legal advice. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the constituent. A lawyer representing an organization may not assert blanket representation of all constituents and may request, but not require, that current constituents refrain from giving information to a lawyer representing a client adverse to the organization. The mere fact than an organization has in-house counsel does not render the organization automatically represented with respect to all matters." (emphasis added)).

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter." (emphasis added)).

- Virginia LEO 1589 (4/11/94) (explaining that a corporation's lawyer may not simply advise a former employee that the lawyer is representing the former employee individually and direct the former employee not to speak with opposing counsel; noting former employees have the right to choose their own counsel, and until they have done so the corporation's lawyer must treat them as unrepresented parties with potentially adverse interests (and thus may only advise them to secure counsel)).

In 2008, the Colorado Bar not only found such an assertion irrelevant. It also found that a factually inaccurate claim of an attorney-client relationship violates two other ethics rules -- the prohibition on false statements, and the prohibition on "unlawfully obstruct[ing] another party's actions as to evidence."

- Colorado LEO 120 (5/17/08) (finding it improper for a lawyer representing a company to essentially impose an attorney-client relationship on the company employees, in order to prevent the corporation's adversary from ex parte communications; "In general, it is improper for a lawyer who represents an organization to assert that he or she represents some or all of the constituents of the organization unless the lawyer reasonably believes he or she has in fact been engaged by the constituent or constituents. Knowingly, making such assertion without having a reasonable belief that he or she has in fact been engaged by the constituent or constituents would violate Rule 4.1 on truthfulness in statements to others. Further, such an assertion may violate Rule 3.4(a), which prohibits unlawfully obstructing another party's access to evidence." (emphasis added); "Courts have rejected the assertion that a lawyer representing an organization automatically represents its employees, because an attorney-client relationship cannot be formed unilaterally, at the direction of the lawyer or the organization." (emphasis added); finding that a lawyer taking such a position would be making an

> untruthful statement; "A lawyer who knowingly asserts that he or she represents current or former constituents of an organization automatically or unilaterally, without having a reasonable belief that he or she has in fact been engaged by the constituents, may violate at least two separate Rules. First, a lawyer knowingly making such an assertion without having such a belief would violate Rule 4.1 on truthfulness in statements to others. Second, a lawyer who unilaterally asserts that he or she represents current or former constituents of an organization may violate Rule 3.4. Among other things, Rule 3.4(a) prohibits a lawyer from 'unlawfully obstruct[ing] another party's actions as to evidence. . . .' If a lawyer asserts that an attorney-client relationship exists with current for former constituents of an organization client without actually hav[ing] an attorney-client relationship with the constituents, the effect is to prevent the adverse party's lawyer from communicating ex parte with those constituents without the consent of the lawyer, pursuant to Rule 4.2." (emphasis added)).

One court also warned lawyers that they could not create what essentially is an "opt out" attorney-client relationship.

- Harry A. v. Duncan, 330 F. Supp. 2d 1133, 1141-42 (D. Mont. 2004) (rejecting an argument by defendants' lawyer that he represents all employees; concluding that "an attorney-client relationship cannot be created unilaterally by the attorney or by the person's employer. . . . Pursuant to the basic contract law, as applied in this context by the Restatement § 14, the District's blanket letter to employees is insufficient by itself to create attorney-client relationships with all those employees. To form an attorney-client relationship, a prospective client must manifest to the lawyer the intent to be represented. Restatement § 14(1). The memorandum placed upon employees an obligation to 'opt-out' if they did not wish GLR to represent them. As a matter of law, however, the decision not to respond for the purpose of opting out does not constitute a manifestation to enter into a fiduciary or contractual relationship. Consent to enter into a contract must be 'free, mutual, and communicated by each party to the other.'" (citations omitted) (emphases added); permitting plaintiff's lawyer to conduct ex parte contacts that meet the Montana standard).

One bar seems to have taken a more forgiving approach -- essentially allowing such an assertion if the employees are otherwise off-limits under the applicable ethics rule.

- Utah LEO 04-06 (12/2/04) ("If corporate counsel has actually formed an attorney-client relationship with these employee-witnesses, and has fully

> complied with Utah Rules of Professional Conduct 1.7 (including obtaining informed consent from all multiple clients to joint representation and informing them of the possible need for withdrawal from representing any of them should an actual conflict arise), this is permissible and opposing counsel may not interview them. However, in the absence of such a fully formed and proper attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents, by asserting an attorney-client relationship unless these individuals were control group members, their acts could be imputed to the organization or their statement would bind the corporation with respect to the matter under Utah Rules of Professional Conduct 4.2. Similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship." (emphasis added)).

Thus, lawyers clearly cannot assert that they represent current or former employees unless there is a "meeting of the minds" agreement that such a relationship exists.

(c) Outside and (especially) in-house lawyers should only reluctantly and warily represent employees or former employees.

This issue obviously focuses on whether the person intended to be contacted is "represented" for purposes of placing them off-limits. Even if a lawyer actually represents a client, the representation must be fairly specific (rather than "general" or involving "all matters") before triggering the ex parte communication prohibition. The ABA has explained this issue.

> By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters --

> the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.
>
> Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

ABA LEO 396 (7/28/95) (emphases added). Thus, only a fairly specific representation will prevent an adversary from ex parte communications.

Creating such a relationship carries with it all of the duties that an attorney-client relationship brings -- including duties of loyalty, confidentiality (especially if the representation is considered a joint representation with the company) and other duties.

Under ethics and privilege rules, a lawyer jointly representing multiple clients in the same matter often cannot keep secrets from any of his/her jointly represented clients (absent an agreement to the contrary, entered into after full disclosure). In addition, a lawyer establishing an attorney-client relationship with a company employee cannot be adverse to that employee on any matter, absent a valid prospective consent or consent at the time. If a lawyer jointly represents multiple clients who eventually become adverse to one another, the lawyer frequently must abandon representation of all of the jointly represented clients.

Thus, the disadvantages of these rules might well outweigh the advantage of claiming a relationship with employees to place them off-limits to ex parte contacts from an adversary.

One New York state court took an extreme position in this context -- finding that Morgan Lewis lawyers had violated New York's ban on in-person solicitation by offering to represent current and former employees of their corporate client.

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

Thus, lawyers hoping to preclude ex parte communications by creating an actual attorney-client relationship with employees or former employees should definitely keep the "big picture" in mind.

Best Answer

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

n 12/11

Request to Avoid Ex Parte Communications

Hypothetical 32

You are the only in-house lawyer at a consulting firm with several hundred employees. A former employee just sued your company for racial discrimination, and you suspect that her lawyer will begin calling some of your company's current and former employees to gather evidence. You would like to take whatever steps you can to protect your company from these interviews.

(a) May you send a memorandum to all current employees "directing" them not to talk with the plaintiff's lawyer if she calls them?

NO (PROBABLY)

(b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

YES

(c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

MAYBE

(d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

YES (PROBABLY)

Analysis

Introduction

The ABA permits some defensive measures as an exception to the general prohibition on lawyers providing any advice to unrepresented persons.

> A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rule 3.4(f) (emphases added).

The Rule seems self-evident, although the ABA added a small comment.

> Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

ABA Model Rule 3.4 cmt. [4] (emphasis added). The ABA has not reconciled its use of the term "request" in the black-letter rule and its use of the term "advise" in the comment. The former seems weaker than the latter, and the distinction might make a real difference in the effect that the lawyer's communication has on the client employee/agent. An employee receiving an ex parte contact from an adversary might think that she can ignore her employer's lawyer's "request" to refrain from talking to the adversary's lawyer, but might feel bound if the employer's lawyer has "advised" her not to give information to the adversary's lawyer.

The Restatement addresses this issue as part of its ex parte contact provision. The Restatement uses the "request" standard, and even specifically warns that lawyers may run afoul of other rules if they "direct" their client employees/agents not to speak with an adversary's lawyer. The Restatement also answers a question that the ABA Model Rules leave open -- whether lawyers' requests that their client employees/agents not give information to the adversary limit in any way the adversary's lawyers from trying to obtain such information. The Restatement indicates that it does not.

> A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so (see § 116(4) & Comment e thereto). In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. However, even when lawful, such an instruction is a matter of intra-organizational policy and not a limitation against a lawyer for another party who is seeking evidence. Thus, even if an employer, by general policy or specific directive, lawfully instructs all employees not to cooperate with another party's lawyer, that does not enlarge the scope of the anti-contact rule applicable to that lawyer.

Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphases added).

Most states take this approach.

- See, e.g., New York City LEO 2009-5 (2009) ("In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (e.g., bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel." (emphasis added); "The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved."; "Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena. Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer."; "[T]his rule does not

prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer's adversary."; "The Rules also do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer's adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.").

Lawyers going beyond this fairly narrow range of permitted activity risk court sanctions or bar discipline.

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of professional conduct."; "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd., 284 F. App'x 826 (2d Cir. 2008) (unpublished opinion) (affirming a district court's order reprimanding the law firm of Cleary Gottlieb and ordering Cleary Gottlieb to pay $165,000 as a sanction for one of Cleary Gottlieb's lawyer's (a member of the law firm's executive committee based in Paris) efforts to persuade a potentially damaging witness from providing testimony against Cleary's client in the Congo; [in the district court opinion, Kensington Int'l Ltd. v. Republic of Congo, No. 03 Civ. 4578 (LAP), 2007 U.S. Dist. LEXIS 63115, at *8 (S.D.N.Y. Aug. 23, 2007), the court noted that the Cleary Gottlieb lawyer advised the

witness that he would be taking a great risk by appearing at a deposition without a lawyer, but that Cleary Gottlieb could not represent him at the deposition, and that the Cleary Gottlieb lawyer had told the witness that he should not testify "'out of patriotism'" (citation omitted); the district court noted that the witness testified that the Cleary Gottlieb lawyer "'told me as such not to go'" to the deposition, 2007 U.S. Dist. LEXIS 63115, at *8 (citation omitted); the district court also ordered that the formal reprimand "should be circulated to all attorneys at Cleary," 2007 U.S. Dist. LEXIS 63115, at *34]).

- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role is was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion; ultimately issuing a public censure of the lawyer).

(a) The ABA and state ethics rules only allow a lawyer to "request" that current client employees not provide information to the corporation's adversaries. The Restatement explains that "[i]n certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. " Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphasis added).

(b) The ABA, the Restatement and state ethics rules allow company lawyers to take this step. Another option is for the company's lawyers to advise company employees that they are free to meet with lawyers for the company's adversary, but that the company lawyers would like to attend such meetings.

(c) The ABA and Restatement provisions allow such "requests" only to current company employees and agents. To the extent that a former employee does not count as a company agent, presumably a lawyer could not request former

employees to refrain from providing information to the company's adversary. Some states explicitly allow company lawyers to make similar requests to "former" employees or agents. Virginia Rule 3.4(h)(2).

(d) Lawyers may find themselves facing another ethics rule if they do more than "request" that an employee or former employee not voluntarily provide facts to an adversary. For instance, lawyers advising an employee or former employee that they do not have to speak with the adversary's lawyer almost surely are giving legal advice to an unrepresented person.

The ABA Model Rules provide that

> The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3. A comment provides further guidance.

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

ABA Model Rule 4.3 cmt. [2].

Lawyers should be very careful to document the type of direction they give to any current or former employee who might misunderstand the "request," or turn on the company and its lawyer. To the extent that the witness incorrectly remembers that he

or she was "told" by the company's lawyer not to provide information, the lawyer might face court or bar scrutiny.

Best Answer

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

n 12/11

Threatening Civil Litigation

Hypothetical 33

Last year you moved next door to the "neighbor from Hell." Over your repeated objections and complaints, he has directed runoff from his roof directly onto your front yard.

May you threaten to sue your neighbor if he does not redirect the water away from your front yard?

YES

Analysis

The ABA Model Rule would prohibit such threats only if they were baseless, or brought for an improper purpose such as "to embarrass, delay, or burden a third person." ABA Model Rule 4.4(a); see also ABA Model Rule 3.1.

Every state has similar provisions.

Best Answer

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

n 12/11

Threatening Criminal Charges

Hypothetical 34

You represent a worker fired by a local engraving company. Your client claims that the company fired her because she complained about other employees dumping chemicals down a nearby storm sewer. The dumping would violate various criminal laws. You filed a lawsuit against the company for back wages.

May you threaten to report the company's unlawful dumping unless it settles the civil case your client has brought against it?

YES (PROBABLY)

Analysis

Introduction

This issue provides a fascinating insight into the national and state bars' approach to ethics -- and provides another excellent example of why lawyers cannot follow their "moral instinct" or "smell test" when making ethics decisions.

The old ABA Model Code contained a fairly straight-forward prohibition. The ABA Model Rules dropped its prohibition on such actions nearly thirty years ago, but Virginia and many other states have retained it.

> A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Model Code of Prof'l Responsibility DR 7-105(A) (1980).

When the ABA adopted its Model Rules in 1983, it deliberately dropped this provision.

The ABA explained its reasoning in a LEO issued about ten years later.

> The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters'

> position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C. W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

ABA LEO 363 (7/6/92) (footnote omitted).

In defending its decision, the ABA first dealt with the possibility that such threats could amount to extortion. ABA LEO 363 provides that

> [i]t is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services*." Model Penal Code, sec. 223.4 (emphasis added); see also sec. 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:
>
> A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification *for harm caused by the offense*.

Id. (emphases added; emphases in original indicated by italics). See Model Penal Code § 223.4 ("Theft by Extortion") ("It is an affirmative defense to prosecution based on

paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services."); Model Penal Code § 242.5 ("Compounding") ("A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.").

The ABA concluded as follows:

> The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

ABA LEO 363 (7/6/92).

The ABA also explained that wrongful threats of criminal prosecution could amount to violations of other ABA Model Rules, such as:

> Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability improperly to influence a government official or agency.
>
> Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person. . . ." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. See also Hazard & Hodes, supra, § 4.4:104.
>
> Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.
>
> Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

ABA LEO 363 (7/6/92).

The Restatement also deliberately excluded this prohibition -- dealing with the issue in an obscure comment to the rule governing statements to a non-client.

> Beyond the law of misrepresentation, other civil or criminal law may constrain a lawyer's statements, for example, the criminal law of extortion. In some jurisdictions, lawyer codes prohibit a lawyer negotiating a civil claim from referring to the prospect of filing criminal charges against the opposing party.

Restatement (Third) of Law Governing Lawyers § 98 cmt. f (2000).

Even as of 1992, the ABA explained that a number of states had chosen to continue the prohibition on such threats even after they shifted to a Model Rules format. The ABA listed the following states as having made this decision: Illinois; Texas;

Connecticut; Maine; D.C.; and North Carolina. The ABA also noted that the following states continued to follow the basic rule, but by way of legal ethics opinion rather than black-letter rule or comment: New Jersey and Wisconsin.

The ABA/BNA Lawyers' Manual on Professional Conduct § 71:601 provides a list (current as of 2003) of those states which have continued the prohibition in their rules, expanded the prohibition to include disciplinary charges, and adopted the prohibition by way of legal ethics opinion rather than by rule.

Some states follow the ABA approach.

- Delaware LEO 1995-2 (12/22/95) ("Attorney may use the threat of presenting criminal charges against Opposing Party in order to gain relief for Client in her civil claim without violating the applicable ethical standards if the criminal matter is related to Client's civil claim; Attorney has a well founded belief that both the civil claim and the criminal charges are warranted by Delaware law and the facts; Attorney is not attempting to exert or suggest improper influence over the criminal process; and Attorney and/or Client actually intend to proceed with presenting the charges if the civil claim is not satisfied. In addition, Attorney may agree to, or have Client agree to, refrain from reporting criminal charges in return for satisfaction of Client's civil claim."; explaining the meaning of extortion; "We note that extortion is defined as compelling or inducing another person to deliver property by means of instilling in him a fear that the threatener will 'accuse anyone of a crime or cause criminal charges to be instituted against him.' 11 Del C. §846(4). It is an affirmative defense to this crime, however, if the attorney believes the threatened criminal charge is true and his or her only purpose is to induce the opposing party to make good the wrong. 11 Dec. C. §847(b). Accordingly, where threatened criminal charges relate to a client's civil matter and an attorney seeks to recover from the opposing party no more than the amount the attorney believes the client is entitled to, an attorney will likely not violate 11 Del. C. §846 by threatening criminal prosecution."; "Finally, in reaching its conclusion, the Committee notes that the New Jersey Committee on Professional Ethics has reached a contrary conclusion. N.J. Comm. on Prof. Ethics, Op. 595 (1986) (ABA/BNA Law. Manual on Prof. Conduct 901:5804). The New Jersey Committee concluded that the omission of DR 7-105(A) from the New Jersey Rules on Professional Conduct was not deliberate because there is no record that its omission was affirmatively intended by the committee that recommended the New Jersey Model Rules and the New Jersey Supreme Court's explanatory comments do not refer to DR 7-105(A)'s non-adoption or explain the reasons

> therefore. Moreover, the New Jersey Committee concluded that the rule set forth in former DR 7-105(A) derives not from any formal cannon or code of ethics, but from generally accepted standards of professional conduct long enforced by the New Jersey Supreme Court. ABA Formal Op. 92-363 expressly rejects the New Jersey Committee's opinion and an 'incorrect' interpretation of the Model Rules. Id. at 7.").

Because the ABA has dropped the prohibition, states deciding to retain it must determine where in their rules they will insert the prohibition. Of course, states do not have this problem when adopting a variation of an ABA Model Rule -- because they use the same rule number, but include a different substance. With the prohibition on threatening criminal prosecution, there is no ABA Model Rule to use as a guide.

This makes it very difficult for practitioners to determine if a particular state continues to prohibit such conduct.

- Some states include the provision in their Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).
- Some states include the provision in their Rule 4.4 (entitled "Respect for Rights of Third Persons"): Tennessee Rule 4.4(a)(2); Texas Rule 4.04(b).
- Some states include the provision in their Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g); Illinois Rule 8.4(g).
- Those states having unique rules also must find a place to put a prohibition that they wish to retain: California Rule 5-100(A).

Some states follow essentially the same approach, but use legal ethics opinions rather than rules.

- North Carolina LEO 2009-5 (1/22/09) ("[A] lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."; "It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration to

gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.").

- North Carolina LEO 98-19 (4/23/99) ("Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.").

- West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

The answer to this hypothetical obviously depends on the applicable jurisdiction's ethics rules. To make matters even more complicated, it may be necessary to analyze a lawyer's home state ethics rules' choice of law provision to determine whether the lawyer has engaged in misconduct.

Interestingly, one bar has taken what could be seen as a counterintuitive (or overly risky) approach -- finding ethically permissible a lawyer's participation in a civil settlement that includes a non-reporting provision in which the civil plaintiff agrees not to report wrongful conduct to the law enforcement authorities.

- North Carolina LEO 2008-15 (1/23/09) ("Provided the agreement does not constitute the criminal offense of compounding a crime, is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence (including witness testimony), a lawyer may participate in a settlement agreement of a civil claim that includes a provision that the plaintiff will not report the defendant's conduct to law enforcement authorities.").

Many states would probably take a different approach, and prohibit such an arrangement.

Best Answer

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

n 12/11

Presenting Criminal Charges

Hypothetical 35

You represent a small machine shop, which has been sued by an employee who claims discrimination against Koreans. Your client is Korean himself, and takes the lawsuit very personally. During discovery, you learn that the plaintiff has not filed tax returns for the past three years. This also offends your client (an immigrant who has always "played by the rules"), and he wants you to take advantage of this fact. You worry about violating your state's clear prohibition on threatening criminal charges to gain an advantage in a civil matter.

(a) May you call the IRS to report the plaintiff's failure to pay taxes (without threatening to do so beforehand)?

MAYBE

(b) If your client wants to call the IRS himself, may you participate (for instance, by advising him of what number to call, what to say, etc.)?

MAYBE

Analysis

Courts and bars in those states rejecting the ABA Model Rules approach and retaining the traditional approach will sometimes deal with several sub-issues.

(a) Many lawyers erroneously believe that the ethics rule only prohibits threats to file a criminal charge, and that they would be immune from an ethics charge if they just go ahead and "do it."

The old ABA Model Code DR 7-105 prohibited presenting, participating in presenting or threatening to present criminal charges (if the motive was "solely" to obtain an advantage in a civil matter).

Most of the states retaining this old prohibition also prohibit a lawyer from "presenting" criminal charges under certain conditions -- not just the threat to do so.

On the other hand, some states have limited the prohibition to the threat and not the actual presentation of the criminal charges. For instance, Tennessee Rule 4.4(a) only includes the prohibition on threatening to present the criminal charge. California Rule 5-100(A) takes the same approach.

Whether the standard applies if the lawyer threatens to present criminal charges or just presents them, bars must also wrestle with the mental state that a disciplinary authority must prove before punishing a lawyer for either a threat or the presentation.

Most states retaining the general prohibition find that the conduct does not amount to an ethics violation unless the lawyer is "solely" motivated by gaining an advantage in a civil matter. See, e.g., New York Rule 3.4(e).

Some states do not require that the improper motive be the "sole" purpose for the lawyer's actions. For instance, some states' rules indicate that the conduct is improper if the lawyer acts for the purpose of obtaining "an advantage" in a civil matter. California Rule 5-100(A); Illinois Rule 8.4(g); Tennessee Rule 4.4(a)(2).

Virginia takes the more limited approach, prohibiting the conduct if the lawyer is acting "solely to obtain an advantage in a civil matter." Virginia Rule 3.4(i) (emphasis added).

One obvious issue for those states which prohibit the conduct only if it is designed "solely" to gain advantage in a civil matter is looking inside the lawyer's mind to determine the lawyer's motivation. For instance, in Virginia LEO 1555, the Virginia Bar indicated that a lawyer for an employer acted improperly in sending a letter to a former employee alleging that the former employee perjured himself at a hearing, and threatening to seek prosecution. The Bar indicated that it may be premature to

determine if the letter was sent "solely to gain an advantage in the civil matter," but that the lawyer's letter was "suspect as long as there is a possibility that an advantage to the employer would result in a simultaneously pending civil suit." Virginia LEO 1555 (10/20/93).

On the other hand, at least one state has indicated that a lawyer will not run afoul of the prohibition by waiting until the civil case is over before reporting the criminal conduct. Illinois LEO 93-5 (9/17/93) (holding that a lawyer may report a bounced check to the State's Attorney's Office after the civil matter was over, because "judgment has already been obtained in the underlying civil action giving rise to the dishonored payment").

(b) The client's actions might trigger disciplinary charges against the lawyer if the lawyer "participated" in the action (in those states retaining the prohibition on such "participation"), or if the bar seeks to argue that the lawyer cannot do indirectly what the lawyer cannot do directly.

Some states retaining the general prohibition on threatening representing criminal charges to gain an advantage to a civil matter have eliminated the "participation" element. See, e.g., Virginia Rule 3.4(i).

Best Answer

The best answer to **(a)** is **MAYBE**; the best answer to **(b)** is **MAYBE**. n 12/11

Alluding to Criminal Charges

Hypothetical 36

You represent a bakery in a lawsuit against a small trucking company which failed to deliver a load of wedding cakes to a local caterer -- which cost you a lucrative contract. Through discovery, you have learned that the trucking company employs illegal aliens, which amounts to a criminal violation under your state's strict laws. Your state's ethics rules prohibit lawyers from threatening or presenting criminal charges solely to gain an advantage in a civil matter. You are nevertheless considering how to use what you have learned to your advantage.

May you include the following sentence in your settlement offer letter:

(a) "If this case actually goes to trial, civil liability might be the least of your company's worries" (with a footnote to the criminal law prohibiting the hiring of illegal aliens)?

NO (PROBABLY)

(b) "If this case actually goes to trial, civil liability might be the least of your company's worries" (without any footnotes or other references to any criminal laws)?

NO (PROBABLY)

(c) "Have you considered what would happen if the INS heard everything that is going to be said at trial"?

NO (PROBABLY)

(d) "As we get closer to the trial, my client and I think that you will see just what a disaster this could be for your client"?

YES

Analysis

Possible allusions to criminal lawyers are as numerous as the nuances of our language.

Some courts apply a very strict standard.

For instance, a lawyer representing a wife in a divorce was found to have violated Illinois Rule 1.2(e) by writing in a letter to the husband's lawyer: "'My client was inclined, and still is inclined, to unveil this sham [the husband's alleged forgery of the wife's signature to a mortgage] to the bank and ask that [husband] be prosecuted.'" Illinois LEO 91-29 (5/26/92).

Similarly, in Virginia LEO 1582, the Virginia Bar indicated that a lawyer may not ethically send a letter to a client's adversary threatening to "seek assistance through law enforcement and legal avenues," because this alludes to criminal prosecution and apparently was done solely to gain an advantage in a civil matter (the lawyer had represented to the court that the lawyer had no interest in seeing a criminal prosecution begun). Virginia LEO 1582 (3/9/94).[1]

On the other hand, some courts are much more lenient (or naive). For instance, in In re Conduct of McCurdy, 681 P.2d 131 (Or. 1984), the Oregon Supreme Court analyzed the applicability of the Oregon equivalent (as of that time) of the old ABA Model Code provision, which indicated that a lawyer may not "threaten to present criminal charges solely to obtain an advantage in a civil matter." Or. Code of Prof'l

[1] Accord Virginia LEO 1569 (12/14/93) (a part-time Commonwealth's Attorney may represent a retailer in suing a delinquent customer if an independent special prosecutor is appointed to investigate or try any related criminal charges, but may not "allude to possible criminal prosecution, when corresponding with a debtor, for the sole purpose of advancing his client's civil claim"); Virginia LEO 1388 (1/14/91) ("advising" an adverse party that a criminal law might have been violated is tantamount to a threat and therefore unethical); Virginia LEO 776 (4/3/86) (a lawyer may not warn a debtor about the criminal sanctions that may be awarded under the Virginia Code, because mentioning the criminal sanctions would amount to a threat to bring criminal charges solely to gain an advantage in a civil matter); Virginia LEO 715 (8/30/85) (a lawyer may not threaten to present criminal charges to obtain an advantage in a civil matter, and may not allude to a possible criminal prosecution when corresponding with a debtor (if the sole purpose is to advance the client's civil claim)).

Responsibility DR 7-105(A). McCurdy represented a man who claimed that his car had been hit by a young woman's car. McCurdy sent the young woman's father a letter demanding payment for fixing the car ($267) and threatening to file a lawsuit within ten days if the father did not pay. The second paragraph of McCurdy's letter contained the following statement:

> "I am taking up this case because your daughter is clearly at fault and because you gave Mr. Krening such a hard time when he came over to your house. Mr. Krening had the courtesy to seek your daughter out, even though she had hit and run. She is guilty of a class A Misdemeanor for which she can receive a jail sentence of one year and a fine of $2,500. I am not telling you what the penalty is to threaten you, but I am telling you this to illustrate the kind of person that Mr. Krening is. He is giving you a break and is entitled to be paid for the damage to his car. Find enclosed two estimates for the damage."

Id. at 132 (emphasis added).

McCurdy's client eventually recovered a judgment of $150 from the young woman, and McCurdy earned $15 in fees. McCurdy eventually faced an ethics charge for allegedly threatening criminal prosecution.

McCurdy convinced the Oregon Supreme Court to dismiss the ethics charges against him, with the following explanation:

> The accused states that his letter is not a model of draftsmanship and that he prepared and mailed the letter in haste. He testified that he mentioned criminal penalties not to threaten criminal prosecution but to contrast his client's "reasonable efforts" to resolve the matter with the conduct of Mr. Fluaitt. The accused also testified that he thought his client had given the Fluaitts "a break" by not bringing criminal charges and that he thought Mr. Fluaitt had tried to use his greater age and experience to give Krening a "hard time."

Id. at 133.

Given the enormous variation in allusions to criminal charges, predicting the chance of disciplinary charges based on particular phrases depends more on these applicable state's attitude than the language employed.

Lawyers who are careless enough to send communications with an explicit quid pro quo (threatening to present criminal charges unless the client takes the actions specified in the same communication) obviously have bolstered the case that their actions were "solely" motivated by the advantage that they themselves have articulated.

Best Answer

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

n 12/11

Threatening Disciplinary Charges

Hypothetical 37

The lawyer on the other side of a case you are handling has a bad reputation, and now you see why. He has bullied and yelled at you and your client during mandatory settlement negotiations. At one point, he even said "I am not going to settle this case until I have earned enough fees to take a good ski vacation next winter." You have mentioned the other lawyer's outbursts several times to the judge handling the case, and she has said "I don't want that kind of behavior from either of you." Now you are considering what else you can do.

May you threaten to call the state bar if the other lawyer continues his tirades?

YES

Analysis

The old ABA Model Code DR 7-105(A) involved only "criminal charges."

Two years after the ABA explained its deletion of the prohibition on threatening criminal charges to gain an advantage in a civil matter, it analyzed threats to file disciplinary charges. ABA LEO 383 (7/5/94) (a lawyer's threat to file a disciplinary complaint against his adversary to gain an advantage in a civil case would violate the Model Rules if the adversary's conduct required reporting; the misconduct was unrelated to the civil matter; the disciplinary charges are not well-founded in fact or law; or the threat is designed solely to harass).

Some of those states which have retained the prohibition have likewise limited their prohibition to criminal charges. See, e.g., Connecticut Rule 3.4(7); Georgia Rule 3.4(h); New York Rule 3.4(e).

However, other states have added threatening, presenting or participating in presenting disciplinary charges to the prohibited activity. D.C. Rule 8.4(g); Illinois Rule 8.4(g); Tennessee Rule 4.4(a)(2); Texas Rule 4.04(b); Virginia Rule 3.4(i).

Florida has an entirely separate rule prohibiting this conduct. Florida Rule 4-3.4(h). California has restricted the improper conduct to threats (rather than the presentation or participation in the presentation of charges), and also eliminated the requirement that the lawyer be "solely" motivated by seeking to obtain an advantage in a civil dispute, but has added to the charges that can trigger the ethics violation -- Rule 5-100(A) mentions "criminal, administrative, or disciplinary charges." California Rule 5-100(A) (emphasis added).

Some states that have abandoned the prohibition on threatening criminal charges to gain an advantage in a civil matter have retained the prohibition on threatening disciplinary charges -- but by way of legal ethics opinion rather than rule.

- Maryland LEO 91-46 (5/1991) (noting that the Maryland ethics rules that went into effect on January 1, 1987, dropped the old prohibition relating to criminal charges: "Despite the changes in the applicable Rules, this Committee believes that a threat to file an attorney grievance proceeding in order to obtain an advantage in a civil matter nevertheless is unethical under the Rules of Professional Conduct presently in effect. Rule 8.4(d) provides that 'it is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.'").

No court or bar seems to have applied these limits to a lawyer's threat to seek Rule 11 sanctions (or their state equivalents).

- See, e.g., Virginia LEO 1603 (7/21/94) (although threatening a motion for sanctions under Rule 11 or its state equivalent does not violate the Code's prohibition on threatening disciplinary action, it may violate the Code's prohibition on advancing a claim unwarranted under existing law or merely for purposes of harassment). This conclusion seems obvious in those

> circumstances where a litigant may not seek sanctions without giving advance warning that the litigant will do so.

Of course, lawyers threatening any action might run afoul of the general prohibitions on asserting baseless or frivolous claims, or taking actions solely to harass.

Best Answer

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

n 12/11

Dealing with an Adversary's Ethics Violation

Hypothetical 38

You are representing a company trying to negotiate a withdrawing executive's severance package without resort to litigation. The executive's lawyer called your client's president without giving you advance notice, but fortunately the president knew enough not to talk with her. You sent a strong email to the other lawyer, asking that she never try such ex parte communications again. Last night you heard from your company's senior vice president, who told you that the executive's lawyer just called him at home too. Now you wonder what other steps you can take.

May you threaten to call the state bar disciplinary authorities if the other lawyer does not stop calling your senior executives?

YES (PROBABLY)

Analysis

The issue here is what a lawyer may do if the lawyer's adversary engages in obviously unethical conduct. If the lawyer threatens the adversary with an ethics charge, the lawyer herself could face an ethics charge.

The Virginia Bar dealt with this issue in Virginia LEO 1755. In that LEO, a lawyer whose adversary attempted various improper ex parte contacts with the lawyer's client sent a letter to the adversary -- threatening to "take the matter up with Judge and the Commonwealth's Attorney" if the ex parte calls continued. Virginia LEO 1755 (5/7/01).

The Virginia Bar held that the letter: (1) violated the first prong of the prohibition on threatening criminal charges "solely to obtain an advantage in a civil matter," because reference to the Commonwealth's Attorney "presents a definite threat of criminal prosecution"; (2) did not violate the second prong (that the threat be made "solely to obtain an advantage in a civil matter"), because "the letter does not make the

usual demand for payment/settlement by threatening prosecution," but instead was "meant to stop a certain action" (the ex parte contacts) that was itself improper. Id. The Bar's conclusion was based on the lawyer's apparent belief that the adversary's lawyer (rather than the adversary itself) was initiating the ex parte contacts. The Bar explained that "while a party is free on his own initiative to contact the opposing party, a lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party." Id.

Best Answer

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

n 12/11