

APPLYING ABSTRACT ETHICS RULES IN THE REAL WORLD: EX PARTE CONTACTS AND THE WITNESS- ADVOCATE RULE

Hypotheticals and Analyses*

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

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Ex Parte Communications with Represented Persons: Basic Principle

Hypothetical 1

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**.

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Witness-Advocate Rule: Basic Principle

Hypothetical 2

You helped your small manufacturing client negotiate a contract with a large retailer. In some negotiation sessions you and your client were the only participants from your side. You also had one-on-one telephone calls with the retailer's lawyer about the contract. After only six months, the retailer reneged on several provisions. Your client wants you to file a breach of contract action against the retailer. You and your client agree that you will have to testify about some of the negotiations and your telephone calls with the retailer's lawyer -- but your client also wants you to try the case.

May you act as an advocate at the trial in which you are sure to be a witness for your client?

NO

Analysis

Under ABA Model 3.7,

[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

ABA Model Rule 3.7(a). Absent one of the exception's applicability, you will not be able to testify on your client's behalf and also try the case.

Best Answer

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

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

Hypothetical 3

You have read your state's Rule 4.2, and see that it 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

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

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.").

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**.

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Application to Lawyers Representing Themselves Pro Se or Acting as Clients

Hypothetical 4

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

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

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 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).

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 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 or 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**.

Application to Lawyers Giving "Second Opinions"

Hypothetical 5

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.

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 restriction on ex parte communications to situations in which a lawyer is "representing a client" allows lawyers to communicate with represented clients seeking 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 6

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 "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.'

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 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.").

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).

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 prepaid 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**.

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Required Level of Knowledge that the Third Person Has a Lawyer

Hypothetical 7

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. The mere fact that an organization has in-house counsel does not render the organization automatically represented with respect to all matters." (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**.

When Does a "Representation" Begin?

Hypothetical 8

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

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. I (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

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

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.").

- 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

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

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 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.").

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 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 9

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.

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.").

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

- 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 10

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

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

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 11

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).

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.").

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.

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 12

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

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).

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 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 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 though 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 13

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 14

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 though 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).

Grosso 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 15

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 16

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]ounseling 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 17

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 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.

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 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.

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

Best Answer

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

n 12/11

Ex Parte Communications with Government Employees

Hypothetical 18

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

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.").

constitutional right to petition allows a lawyer to establish such ex parte contacts if the 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

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

- Applies only in the course of an official proceeding;⁵

A 2011 North Carolina legal ethics opinion explained that lawyers could rely on the "authorized by law" exception in filing 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

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.").

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.").

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)).

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 19

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 20

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.").
- Hanantz 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

Application Only to Lawyers "Representing" a Client: Lawyers Playing Nonlegal Roles in Corporations

Hypothetical 21

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.

Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 22

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 23

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

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

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 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 24

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. 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. Virginia 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

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

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 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.").

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.

- 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.

Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 25

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

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").

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 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

Claiming or Establishing an Attorney-Client Relationship

Hypothetical 26

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

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 that 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 or 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)).

(a)-(b) 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 27

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 he 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**.

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Rationale for the Witness-Advocate Rule

Hypothetical 28

You and a friend have been discussing the reason why every state's ethical rule generally prohibits the same lawyer from acting both as a witness and as an advocate in the same trial. You disagree about the effect of such a dual role on a jury. You think that a jury will give less weight to the factual testimony of a lawyer who is also acting as an advocate in that case, because the lawyer is so obviously interested in the outcome of the case for his client. Your friend thinks that the jury will give more weight to the lawyer's testimony, because she obviously is acting as an officer of the court in the proceeding itself.

Is the jury likely to provide less weight to the factual testimony of a lawyer who is acting as an advocate in the trial?

MAYBE

Analysis

The witness-advocate rule (sometimes called the advocate-witness rule),¹ has a long history, but a very uncertain rationale.

Early History

Interestingly, one court has traced the attorney-client privilege back to an incident during Roman times that actually involved the witness-advocate rule. In Evergreen Trading, LLC v. United States, the Court of Federal Claims explained that in 70 BC Cicero refrained from calling as a witness an advocate for Sicily's governor (whom Cicero was prosecuting for corruption).² Thus, perhaps the earliest mention of the

¹ Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (E.D.N.Y. Nov. 19, 2007).

² Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 128 n.6 (Fed. Cl. 2007).

attorney-client privilege involved the inconsistency between a lawyer acting as a witness and as an advocate.

In 2007, another court explained that the origins of the witness-advocate rule "may be traced to the common law principle of evidence that neither a party nor his agent is competent as a witness on the party's behalf." Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist. LEXIS 6897, at *9 (S.D. Tex. Jan. 31, 2007) (quoting FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1311 (5th Cir. 1995)). It therefore appears that the inconsistency between lawyers acting both as witnesses and as advocates initially prevented the lawyers from testifying on behalf of their clients. The rule now has exactly the opposite effect -- demanding that the lawyers act as witnesses rather than as advocates if they have to make a choice.

The United States Supreme Court first dealt with the witness-advocate rule in 1886. The Court held that the trial court had erred in not permitting the plaintiff to call his lawyer as a witness on his behalf.

There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.

French v. Hall, 119 U.S. 152, 154-55 (1886) (emphasis added). This certainly represented an inauspicious start for what eventually became an ethics rule of great

strength -- prohibiting exactly the type of behavior that the United States Supreme Court permitted.

Ethics Codes and Rules

By 1908, the organized bar had adopted a canon prohibiting lawyers from playing both roles at the same trial.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

ABA, Canons of Professional Ethics, Canon 19 (1908).

The well-known University of Texas professor John Sutton defended a strict interpretation of the witness-advocate rule in an influential 1963 Texas Law Review article.³ Among other things, Professor Sutton argued that an individual witness-advocate's disqualification should be imputed to an entire law firm.

The old ABA Model Code placed the witness-advocate rule in Canon 5, which dealt with conflicts of interest -- rather than the canon dealing with trial tactics. ABA Model Code DR 5-101(B); DR 5-102. The old ABA Model Code also prohibited a lawyer from accepting employment in a matter if the lawyer knew or it was obvious that the lawyer (or any other lawyer in the firm) "ought" to be called as a witness. ABA Model Code DR 5-101(B).

³ John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

ABA Model Rule 3.7 deals with the witness-advocate rule with a very different approach from the old Code.

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

ABA Model Rule 3.7 (emphases added).

The Restatement takes the same basic approach, but with more detail, and with provisions that deal with issues not addressed in the ABA Model Code or the ABA Model Rule.⁴

⁴ Restatement (Third) of Law Governing Lawyers § 108 (2000) ("(1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which: (a) the lawyer is expected to testify for the lawyer's client; or (b) the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify. (2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if: (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding; or (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or (c) consent has been given by (i) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create. (3) A lawyer may not represent a client in a litigated matter pending before a tribunal when the lawyer or a lawyer in the lawyer's firm will give testimony materially adverse to the position of the lawyer's client or materially adverse to a former client of any such lawyer with respect to a matter substantially related to the earlier representation, unless the affected client has consented as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the testimony would create. (4) A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.").

Most states follow the new ABA Model Rule formulation, although a number of states have unique provisions that dramatically affect the analysis. For instance, the California witness-advocate rule on its face applies only to jury trials.⁵

Rationale for the Rule

From the beginning, bars and courts have not been able to agree on the underlying rationale for the witness-advocate principle. Every authority agrees that there are three constituents which deserve protection.

First, some authorities suggest that the rule is designed to protect the lawyer's client. As one ABA legal ethics opinion explained,

[b]ut given a choice between two or more witnesses competent to testify as to contested issues, and other factors being equal, a client's cause is best served by having the testimony from the witness not subject to impeachment for interest in the outcome of the trial. Because a trial advocate clearly possesses such an interest, his testimony, or that of a lawyer in his firm, is properly subject to inquiry based on such interest, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted and in some cases the effect will be detrimental to the client's cause.

ABA LEO 339 (1/31/75) (emphasis added). A number of courts adopt this approach.⁶

The Restatement also mentions the client's protection.⁷

⁵ Cal. Rules of Prof'l Conduct 5-210 (2007) ("A member shall not act as an advocate before a jury which will hear testimony from the member unless: (A) The testimony relates to an uncontested matter; or (B) The testimony relates to the nature and value of legal services rendered in the case; or (C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal. ").

Second, some courts emphasize that the rule protects the adversary.

The rule is designed to protect the adverse party, as the "jury may view an attorney as possessing special knowledge of a case and therefore accord a testifying attorney's arguments undue weight."

Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005) (citation omitted; emphasis added). The ABA Model Rules recognize the adversary's interest.⁸ A number of courts agree with this approach.⁹

Third, some authorities point to the rule's benefit in avoiding damage to the adversarial system itself. For instance, one court explained that

[t]he basic reasoning behind disqualification under the "advocate-witness" rule, is to prevent the unseemly spectacle of the attorney who is representing a party on trial, leave counsel table and testify as a witness. Further, the attorney should not vouch for his own testimony on opening or summation. Finally, it avoids conflicts between the testifying attorney and his client.

⁶ Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981); John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

⁷ Restatement (Third) of Law Governing Lawyers § 108 cmt. b (2000) ("Rationale. Combining the role of advocate and witness creates several risks. The lawyer's role as witness may hinder effective advocacy on behalf of the client. The combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table. Concomitantly, an advocate may not interfere with an opposing counsel's function as advocate by calling him or her to the witness stand, except for compelling reasons (see Subsection (4) & Comment I). When a lawyer will give testimony adverse to the lawyer's client, a conflict of interest is presented that must either be avoided by withdrawal of the lawyer and the lawyer's firm or, where permitted, consented to by the client as provided in §122 (see Subsection (3) & Comment f).").

⁸ ABA Model Rule 3.7 cmt. [2] ("The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.").

⁹ Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (S.D.N.Y. Nov. 19, 2007).

Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9 (N.Y. Sup. Ct. Nov. 22, 2005) (emphasis added). A number of courts recognize this interest.¹⁰ The ABA Model Rules cite the need to protect the tribunal in several comments to Model Rule 3.7.¹¹

In 2009, the Second Circuit provided a laundry list of interests that seemed to touch all three of these concerns.

We have identified four risks that Rule 3.7(a) is designed to alleviate: (1) the lawyer might appear to vouch for his own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when she has to cross-examine her lawyer-adversary and attempt to impeach his credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred, and the jury confused.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009).

It seems odd for such a long-standing and well-recognized rule to rest on such indefinite grounds. Perhaps the rule is intended to serve all three functions.¹²

Effect on the Jury

The lack of any clear rationale for the rule also reflects itself in courts' descriptions of how a jury might react to hearing factual testimony from a lawyer who also acts as an advocate for a party in the trial.

¹⁰ MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

¹¹ ABA Model Rule 3.7 cmts. [1], [2], [3].

¹² Restatement (Third) of Law Governing Lawyers § 108 cmt. b (2000).

A comment to the old ABA Model Code described both possible effects on the jury, without explaining which one presented the greater worry.

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

ABA Model Code EC 5-9 (1980) (emphasis added).¹³

The courts dealing with this issue are also almost unapologetically unclear. For instance, one court explained that

[a]ny statements they would make at trial regarding the foreclosure or any subsequent, related events would completely confuse a jury because they would attribute too much, or possibly too little, weight to the attorneys' testimony.¹⁴

Stewart v. Bank of Am., N.A., 203 F.R.D. 585, 587 (M.D. Ga. 2001) (emphases added).

This uncertainty about the jury's reaction highlights the argument in favor of the witness-advocate rule that focuses on the systemic interests, rather than the client's or the adversary's interests.

¹³ Discussed in article by Erik G. Luna, Avoiding a 'Carnival Atmosphere': Trial Court Discretion and the Advocate-Witness Rule, 18 Whittier L. Rev. 447, 458 n.87 (1996-1997).

¹⁴ Other courts have said essentially the same thing. World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F. Supp. 1297, 1303 (D. Colo. 1994) ("Here, there is a substantial risk that a jury will be confused by an advocate also appearing as a witness. The jury may attribute too much or too little weight to Zalon's testimony because of his dual role.").

Other Issues

As courts have dealt with other witness-advocate issues, a number of points have emerged.

First, most courts reject what was at one time the general rule -- prohibiting lawyers from testifying if they were also acting as advocates.¹⁵ On the other hand, the Restatement explains that courts may sometimes exclude such testimony.¹⁶

Second, the witness-advocate rule involves such institutional concerns that some courts raise the rule's application sua sponte, even if no party before the court raises it.¹⁷

Third, a few states still allow an interlocutory appeal of an order disqualifying a lawyer under the witness-advocate rule.¹⁸ Not surprisingly, some appellate courts reverse the trial court's order disqualifying a lawyer under the witness-advocate rule, while other courts affirm the disqualification. In those jurisdictions which do not permit interlocutory appeals, a client will be hard pressed to establish any provable prejudice from losing his trial counsel to the witness-advocate rule. For instance, in 2007 the Eighth Circuit found that the lower court had abused its discretion in prohibiting a

¹⁵ M.K.B. v. Eggleston, 414 F. Supp. 2d 469 (S.D.N.Y. 2006); Beneficial Dev. Corp. v. City of Highland Park, 606 N.E.2d 837 (Ill. App. Ct. 1992), aff'd in part and rev'd in part, 641 N.E.2d 435 (Ill. 1994). But see Smith v. Wharton, 78 S.W.3d 79 (Ark. 2002). This approach certainly is consistent with the emphasis on searching for the truth -- which is more likely to come from the mouth of witnesses than advocates.

¹⁶ Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000).

¹⁷ Estate of Andrews v. United States, 804 F. Supp 820 (E.D. Va. 1992); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

¹⁸ A.B.B. Sanitec West, Inc. v. Weinstein, 2007 Ohio 2116 (Ohio Ct. App. 2007); D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 147 P.3d 414 (Utah 2006); Amos v. Cohen, 806 N.E.2d 1014 (Ohio Ct. App. 2004); McKenzie v. City of Omaha, 668 N.W.2d 264 (Neb. Ct. App. 2003); State v. Van Dyck, 827 A.2d 192 (N.H. 2003); Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001).

disqualified lawyer from engaging in any pretrial activities.¹⁹ However, the circuit court found that the trial court's denial of counsel to the client was harmless error.

The Drostes have not indicated what, if anything, their original lawyer would have done differently with respect to pretrial matters, or indicated how they were prejudiced by the conduct of substitute counsel. We therefore conclude any error the district court committed when it made the disqualification effective immediately was harmless.

Droste v. Julien, 477 F.3d 1030, 1036 (8th Cir. 2007).

Fourth, some courts have articulated the basic and common-sense rule that "doubts about whether a lawyer may be called as a witness should be resolved in favor of the lawyer being permitted to testify and against the lawyer acting as an advocate."²⁰

Best Answer

Given the murky rationale for the witness-advocate rule and opinions which do not provide any clear guidance, it is unclear whether a jury will provide more or less weight to the testimony of a lawyer who is also acting as an advocate. The best answer to this hypothetical is **MAYBE**.

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¹⁹ Droste v. Julien, 477 F.3d 1030 (8th Cir. 2007).

²⁰ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *12 (E.D. Tenn. Mar. 27, 2007).

Application of the Witness-Advocate Rule to Judge Trials and Pretrial Proceedings

Hypothetical 29

You and a friend had been debating the rationale for an application of the witness-advocate rule. After deadlocking in your discussion of the jury's reaction to the same lawyer acting as both a witness and an advocate, you seem to agree on one point -- that the witness-advocate rule should not apply to judge trials or pretrial proceedings before a judge. Both of you think that judges should be capable of distinguishing between the different roles that lawyers play, and therefore will not suffer from the confusion that a jury might face.

- (a) Should the witness-advocate rule apply to trials before a judge?

MAYBE

- (b) Should the witness-advocate rule apply to pretrial proceedings?

MAYBE

Analysis

Although the basic witness-advocate rule can be easily stated, applying the principle presents a number of very difficult issues. Among other things, courts have debated the rule's applicability to judge trials, and to pretrial proceedings.

In some states, the applicable rule itself extends only to jury trials.¹

In states with ethics rules that are less clear, courts must deal with this issue.

¹ Cal. Rules of Prof'l Conduct 5-210 (2007) ("A member shall not act as an advocate before a jury which will hear testimony from the member unless: (A) The testimony relates to an uncontested matter; or (B) The testimony relates to the nature and value of legal services rendered in the case; or (C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.").

(a) Because most of the academic and judicial discussion about the witness-advocate rule involves possible jury misperception, some courts hold that the rule simply does not apply to judge trials. For instance, in 2007 one court refused to apply the rule to the trial in which the judge will act as a factfinder.

The cases cited by Plaintiff are all cases from Georgia state courts, which presumably involved jury trials. In the instant case, neither party has timely requested a jury trial; therefore, the matter will be tried before the undersigned, who will act as fact-finder. When a judge is the trier of fact, the danger that the trier of fact will be unable to distinguish between testimony and advocacy is eliminated.

Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), Ch. 7 Case No. 05-91725, Adv. No. 06-6253, 2007 Bankr. LEXIS 2160, at *6 (Bankr. N.D. Ga. May 29, 2007) (emphasis added); State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003) ("Unlike a jury, a judge is unlikely to confuse the roles of advocate and witness or to deem an attorney credible simply because he is an attorney.").

On the other hand, a number of courts have just as vigorously argued that the rule applies to judge trials just as it does to jury trials. For instance, in Estate of Andrews, Judge Robert Payne of the Eastern District of Virginia found that Virginia's rule applied to judge trials.

Although this matter is to be tried to the court without a jury, the court finds that the VCPR's ethical mandates, particularly those founded on concerns of institutional integrity, apply equally to jury and non-jury trials. Indeed, it would be unsound to make the applicability of the witness-advocate rule turn on whether the case is a bench trial because, for example, a lawyer could be perceived as acting for his or her self-interest in waiving a jury trial simply in order to continue the representation.

Estate of Andrews v. United States, 804 F. Supp 820, 827 n.2 (E.D. Va. 1992)

(emphasis added).

The Restatement follows this approach.²

(b) Determining the witness-advocate rule's applicability to pretrial proceedings depends on whether the rule should be applied literally or in light of its rationale (however confusing that is).

On its face, ABA Model Rule 3.7 applies the witness-advocate rule only to trials. ABA Model Rule 3.7. The Restatement applies the rule to "a contested hearing or trial of a matter."³ Some states' rules will apply a variation of this theme. For instance, the Virginia Rule 3.7 applies to "an adversarial proceeding."⁴ The Restatement uses the term "contested proceedings."⁵ One authority has relied on the applicable rule's literal language in applying the witness-advocate rule to only trials.⁶

However, other authorities warn that the rules should not be interpreted too literally. For instance, an early New York City Bar ethics opinion urges a more expansive interpretation.

² Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000) ("The basic prohibition against an advocate testifying. The advocate-witness rule applies in all contested proceedings in which a lawyer appears as both advocate and witness, including trials, hearings on motions for preliminary injunction and for summary judgment, and trial-type hearings before administrative agencies. The rule applies whether the case is being tried to a judge or jury. In trials to a judge, less need may exist for exacting application of the rule in some situations, such as when dealing with contested pretrial matters, particularly where the testimony of the advocate will not be lengthy (also see Comment g).").

³ Restatement (Third) of Law Governing Lawyers § 108 (2000).

⁴ Virginia Rule 3.7(a).

⁵ Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000).

⁶ Pennsylvania LEO 96-15 (3/20/1996).

Read literally, the language of DR 5-101 and DR 5-102 applies only to trial proceedings. Problems inherent in the dual role of advocate and witness, however, are not confined to trial. . . . See also General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 715-16 (6th Cir. 1982) (rejecting the notion that references to the word 'trial' in the disciplinary rules under Canon 5 should be read literally). It would be artificial to confine operation of the lawyer-as-witness rule to representation at trial merely because the rule speaks to the most common context in which the problem arises.

New York City LEO 1988-9 (11/28/88) (emphases added).

A number of courts have applied the witness-advocate rule to such pretrial proceedings as a sentencing hearing⁷ or a summary judgment hearing in which a lawyer filed an affidavit.⁸

If the court applies the witness-advocate rule to a pretrial proceeding, the next issue is whether a lawyer who has testified at a pretrial proceeding (forfeiting her opportunity to be an advocate at that proceeding) may become involved again as an advocate later in the case. This debate involves the scope of permissible activities by an individually disqualified lawyer.

Best Answer

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

⁷ United States v. Dyess, 231 F. Supp. 2d 493 (S.D. W. Va. 2002).

⁸ Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001).

Best Time to Address the Witness-Advocate Rule

Hypothetical 30

You and your friend disagree about the best time for a trial court to address any witness-advocate issues. Your friend thinks that the trial court should address the issue as soon as possible, so that all of the parties and their lawyers know what role they can play in the pretrial proceedings and the trial itself. You vehemently disagree, contending that it does not make sense to address the witness-advocate issue until the last minute -- both because most cases settle before trial (meaning that the judge will never have to bother with any witness-advocate issues) and because it will not be clear until the end of discovery whether the lawyer will or will not have to testify.

Should trial courts address any witness-advocate issues as soon as possible?

MAYBE

Analysis

Courts take varying views on the appropriate time to address any witness-advocate issue. Not surprisingly, their view largely depends on whether the court applies the rule only to trials (in which case the court would tend to postpone any analysis until just before the trial) or whether the court applies the rule to pretrial activities (in which case the court would analyze the issue as soon as possible).

Early Consideration

Given the traditional concept that a lawyer who might later serve as witness should have little if anything to do with a case, older authorities tended to emphasize the need for an early application of the witness advocate rule.

The ABA Code's formulation affected this analysis. The old ABA Model Code indicated that lawyers knowing that they "ought to" be witnesses on behalf of the client

"shall not accept employment in contemplated or pending litigation." DR 5-101(B).

Thus, the ABA Model Code applied even to a lawyer's decision whether to accept employment or not.

Courts taking this basic attitude have explained that they can deal with the witness-advocate rule even though there has not been any discovery.¹ For instance, one decision indicated that the court could disqualify a lawyer under the witness-advocate rule even before the lawyer's deposition.²

Some courts applying this approach (either under the old Code formulation or the new Rule formulation) cite a party's failure to raise the witness-advocate rule early enough as essentially waiving the right to object.³

Interestingly, even after New York changed its ethics rules in 2009 and adopted the general ABA approach, New York state courts and federal courts looked unfavorably at the late timing of a disqualification motion.⁴ In 2009, the Second Circuit used some harsh language in denying MetLife policyholders' motion to disqualify the law firm of Debevoise & Plimpton from representing MetLife in their lawsuit against MetLife based on its demutualization process.

¹ Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002).

² Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23 (D. Mass. 2006).

³ Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993) (holding that a party must assert the witness-advocate rule in a timely fashion or waive it); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y. App. Div. 1994) (holding that the plaintiff had waited three years to raise a witness-advocate rule (until after the discovery was over), and therefore had forfeited the chance to seek disqualification of the adversary's lawyer).

⁴ Forward v. Foschi, No. 9002/08, 2010 N.Y. Misc. LEXIS 1066, at *61 (N.Y. Sup. Ct. May 18, 2010) (unpublished opinion).

The timing of the motion should also be considered, especially in light of using the motion as a litigation tactic to cause the respondent hardship or delay.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009).

A number of courts have taken the common-sense approach that a party falling short of the standard for disqualifying the adversary's lawyer under the witness-advocate rule can always try again if circumstances change. Metropolitan P'ship, Ltd. v. Harris, Civ. A. No. 3:06CV522-W, 2007 U.S. Dist. LEXIS 68606 (W.D.N.C. Sept. 17, 2007) (explaining that a litigant had fallen short in establishing that the adversary's lawyer's testimony was necessary, but could return to court if circumstances changed).⁵

⁵ Gabayzadeh v. Taylor, 639 F. Supp. 298, 303, 304 (E.D.N.Y. 2009) (analyzing the witness-advocate rule; finding that lawyers from Proskauer Rose were not likely to be necessary witnesses and were not planning to "play any role as an advocate in the trial of this action"; "Rule 3.7(b), which states that '[a] lawyer may not act as advocate before a tribunal in a matter if . . . (1) another lawyer in the lawyer's firm, is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client,' N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.29(b)(1), may arguably be applicable to the within motion. However, whether disqualification is necessary under this Rule would be merely speculative at this point. Accordingly, while disqualification is not currently warranted, should this action not be dismissed, as recommended in the accompanying Report and Recommendation issued this same date, plaintiff is permitted to renew her motion for disqualification when additional facts are available as to relevance and any applicable privileges relating to such testimony."; "For the foregoing reasons, plaintiff's motion to disqualify Proskauer pursuant to Rule 3.7 is denied."); Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005) (declining to disqualify a lawyer, but indicating that the adversary can try again if the issue on which the lawyer could testify becomes material); Golomb & Honik P.C. v. Ajaj, 51 Pa. D. & C.4th 320 (C.P. 2001) (holding that the lawyer need not be disqualified under the witness-advocate rule for now).

Later Consideration

Many courts take exactly the opposite approach. These courts explain that determining the witness-advocate rule's applicability should wait until the facts develop -- so the court can determine if the lawyer is a necessary witness.⁶

As one court explained,

[a]s to all such factual matters, however, it is unclear at this early stage of the proceedings which, if any, of the events to which Aretakis was a witness will ultimately remain contested issues at trial. The parties may well agree to the existence of certain facts which would obviate the necessity for Aretakis' testimony on those matters. Other issues may be dismissed from the litigation of the case through voluntary dismissal, defendants' presently pending motion to dismiss a portion of the amended complaint or on a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Thus, at this stage the scope of the Lyman's claims which will remain at issue for trial has not been resolved nor have the factual issues which will be in dispute at trial [sic]. Absent such determinations, it would require undue speculation to determine whether issues will remain for trial as to which Aretakis ought to testify.

Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359, at *10-11 (N.D.N.Y. Feb. 12, 2007).

⁶ Gormin v. Hubregsen, No. 08 Civ. 7674 (PGG), 2009 U.S. Dist. LEXIS 15507, at *7, *9, *10 (S.D.N.Y. Feb. 26, 2009) (assessing the witness advocate rule; "Here, there appears to be little risk to the trial process, because Defendants have already represented that Greenwald will not appear as trial counsel in this matter. This concession largely, if not completely, eliminates the concerns about 'trial taint' noted above. Indeed, numerous courts in this District have held that DR 5-102 addresses counsel's participation at trial, and does not bar counsel's participation in pre-trial proceedings." (footnote omitted); "The reality is that at this stage of the litigation, it is impossible to determine how significant Greenwald might be as a witness or whether he is likely even to be called as a witness; whether his testimony would likely hurt or help his client; or whether his testimony would or would not be cumulative of other witnesses. Based on such a record, courts in this District commonly deny disqualification motions."; "Whether Greenwald's discussions with Gorwin have a greater significance than appears at present will have to await discovery. At present, this case falls within a well established line of cases, including those cited above, in which courts have concluded that disqualification motions made pre- or during discovery are premature."; denying defendant's motion to disqualify the lawyer).

Some courts have explained that the court might avoid the entire issue because the case might settle or certain issues become irrelevant. Norman Reitman Co. v. IRB-Brasil Resseguros S.A., No. 01 Civ. 0265 (RCC), 2001 U.S. Dist. LEXIS 16073 (S.D.N.Y. Sept. 24, 2001); ABA LEO 1529 (10/20/89). A number of courts have taken a similar approach, and declined to address the issue because it was premature.⁷ One court bluntly held that it was too early to hear any witness-advocate motions because there were still nine months before the trial.⁸ Another court explained that determining whether a lawyer must be a witness necessarily "awaits the eve of trial."⁹

Some courts insist that any analysis of the witness-advocate rule should wait until the lawyer has been deposed.

Because Merolla has not yet been deposed, however, there is no proof of the substance of Merolla's deposition testimony. At this point, Richelo's claim that he needs Merolla's testimony to support his defense is based upon his mere speculation as to what that testimony might entail and is insufficient to serve as a basis to automatically disqualify Merolla. . . . Otherwise, any party could successfully move to disqualify an opposing attorney by simply averring that the opposing attorney might possess information that is damaging to the attorney's client's case and, therefore, that the attorney is likely to be a necessary witness in the moving party's case. To approve of such a tactic would be opening the door to blatant misuse of a rule that already has great potential for abuse.

⁷ Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist. LEXIS 6897 (S.D. Tex. Jan. 31, 2007) (holding that it was too early to determine if the lawyer was a necessary witness).

⁸ First Republic Bank v. Brand, 51 Pa. D. & C.4th 167 (C.P. 2001).

⁹ Albert M. Greenfield & Co. v. Alderman, 52 Pa. D. & C.4th 96, 116 (C.P. 2001).

Clough v. Richelo, 616 S.E.2d 888, 894 & n.7 (Ga. Ct. App. 2005) (footnote omitted),
cert. denied, No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005).

One case presented an interesting example of how changes in the context might alter the analysis. In 1995, a court disqualified a lawyer from acting as an advocate because the lawyer had testified as an expert in a pretrial patent issue, and apparently hurt his client's position. However, the Federal Circuit later articulated a different standard for patent cases, which meant that the lawyer's testimony actually did not prejudice his client. Given this change, Judge Constance Baker Motley vacated her earlier disqualification of the lawyer. Genentech, Inc. v. Novo Nordisk A/S, 923 F. Supp. 61 (S.D.N.Y. 1996).

Best Answer

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

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Application of the Witness-Advocate Rule to Lawyers Representing Themselves

Hypothetical 31

Even though you normally represent clients in litigation, it looks as if you might soon be involved in litigation as a party. You have begun to wonder about the witness-advocate rule's applicability to several situations that might arise in the near future.

- (a) May you represent yourself as an advocate pro se even if you have to testify as a fact witness in the trial?

YES

- (b) If you are acting as an executor, may you testify and also act as an advocate at trial?

NO (PROBABLY)

- (c) May you represent a corporation of which you are the sole shareholder, if you will have to testify as a fact witness at the trial?

MAYBE

- (d) You, your husband, and your daughter are all plaintiffs in an action against a school board, alleging discrimination against your disabled daughter. May you represent yourself, your husband, and your daughter at the trial?

NO (PROBABLY)

Analysis

Bars and courts have debated the witness advocate rule's applicability to lawyers representing themselves pro se in different capacities.

- (a) A number of courts have held that lawyers representing themselves pro se may act as both witnesses and advocates at the same trial. Zito v. Fischbein Badillo

Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526 (N.Y. Sup. Ct. Nov. 22, 2005). The Restatement¹ and an ethics opinion² take this approach. Not surprisingly, courts have taken this approach in lawsuits in which lawyers have sued clients for unpaid fees³ and in clients' malpractice cases against lawyers.⁴ Interestingly, the Texas ethics rules have an explicit exception which allows lawyers to represent themselves pro se even if they must be witnesses.⁵

Not surprisingly, the Southern District of New York has held that a lawyer may not be both a class representative and a class lawyer. Jacobs v. Citibank, N.A., No. 01 Civ. 8436 (JSR)(KNF), 2003 U.S. Dist. LEXIS 2880 (S.D.N.Y. Feb. 25, 2003), appeal dismissed, 82 F. App'x 735 (2d Cir. 2003) (unpublished opinion). The Restatement follows the same approach.⁶

(b) Lawyers representing themselves in their role as executor do not necessarily fall under the general rule which permits lawyers representing themselves pro se to also testify as fact witnesses.

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000) ("An advocate appearing pro se. A lawyer (or any other party) appearing pro se is entitled to testify as a witness, but the lawyer is subject to the Section with respect to representing other co-parties as clients. The tribunal may order separate trials where joinder of the pro se lawyer-litigant with other parties would substantially prejudice a co-party or adverse party. When a lawyer appears as the advocate for a class and claims to be the party representative of the class as well, a tribunal may refuse to permit the litigation to proceed in that form.").

² North Carolina LEO 2011-1 (4/22/11) (explaining that a lawyer "who is a litigant and who is likely to be a necessary witness" may nevertheless represent himself at a trial).

³ Presnick v. Esposito, 513 A.2d 165 (Conn. App. Ct. 1986); Illinois LEO 92-13 (1/22/1993).

⁴ Farrington v. Law Firm of Sessions, Fishman, 687 So. 2d 997 (La. 1997).

⁵ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007).

⁶ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000).

For instance, Judge Robert Payne of the Eastern District of Virginia held that the general approach permitting lawyers to represent themselves pro se did not apply when the lawyer was acting as an executor.

This rationale does not apply to the facts of this case. Although Payne is a named party, his status as a party is a mere formality. Payne is a party only in his representative capacity as a co-executor of the Estate. Consequently, he has no personal stake or interest in the outcome of the suit. . . . Payne's role is closer to that of a witness-advocate than to that of a lawyer-litigant-witness.

Estate of Andrews v. United States, 804 F. Supp 820, 827 (E.D. Va. 1992).

One New York case addressed this issue in detail. In re Estate of Walsh, 840 N.Y.S.2d 906 (Sur. Ct. 2007). The court held that a lawyer could not represent himself as executor, because he was acting as the fiduciary for others rather than acting on his own behalf.

Weighing the public policy reasons for disqualification of an attorney under the advocate-witness rule against the public policy reasons for granting parties the right to self-representation, the former must prevail where the attorney is not a party, individually, but instead, is a party as the personal representative of an estate. The obvious rationale for the right to self-representation is that litigants have a right to advocate on their own behalf where their own freedom or property interests are at stake. Here, the petitioner has no such interest at stake. The fact that the attorney-executor would receive a larger statutory commission should the estate prevail in this proceeding is not the type of direct of [sic] financial interest that attorneys must have as litigants in order to represent themselves notwithstanding that they will testify at the trial. No attorney would ever be disqualified under the advocate-witness rule if they were permitted to argue that they will incur a direct financial loss due to lost fees.

Id. at 910-11 (emphasis added). Interestingly, the court held that "the same result may not occur where the attorney-fiduciary is the sole beneficiary of the estate or where a surcharge is being sought against the attorney-fiduciary in an accounting or other proceeding." Id. at 911.

This seems like an odd result. The court found that the lawyer's freedom to represent himself pro se applied only when the lawyer had his own money at stake. Yet that would be the precise situation when the witness-advocate rule would seem to apply with the greatest strength as well. In other words, one might think that the witness-advocate rule would prevent lawyers from representing themselves when their own money was at stake, but the pro se rule has exactly the opposite effect.

In analyzing this issue, the court explained another dichotomy that establishes just how complex this rule can be.

[W]here attorneys are themselves parties to litigation, including litigation involving a partnership of which the attorney is a partner, the right of litigants to represent themselves usually trumps disqualification under the advocate-witness rule with the result that attorney-litigants may represent themselves pro se, as well as the partnerships of which they are members, notwithstanding that they will testify at the trial.

Id. at 909. Thus, just this one New York case held that (1) a lawyer may not represent himself as an executor if he has to testify at the trial, unless he is the sole beneficiary of the estate; and (2) a lawyer may represent his partnership even if he has to testify at the trial. It is very difficult to discern any logical reason for these quite different rules.

(c) Several courts have addressed this issue where the attorney is the sole shareholder.

A New York state court explained that a lawyer who is the sole shareholder of a closed corporation may not represent the corporation if she had to testify at the trial.

[W]here an attorney, the sole shareholder of a close corporation, sought to both represent the corporation and testify at the trial, the court, in weighing the competing public policies of the right to pro se representation and disqualification under the advocate-witness rule, determined that disqualification was necessary because the attorney was representing a separate legal entity, the corporation, and not herself, individually, pro se.

In re Estate of Walsh, 840 N.Y.S.2d 906, 909 (Sur. Ct. 2007).

An earlier Iowa Supreme Court case took exactly the opposite approach, holding that the situation is analogous "to pro se representation by an individual lawyer-litigant." National Child Care, Inc. v. Dickinson, 446 N.W.2d 810, 812 (Iowa 1989). The Iowa Supreme Court found the analogy "instructive" and explained that it "illustrates that the policy reasons underlying [the witness-advocate rule] simply do not apply to the situation involving [the lawyer's] representation of [the corporation of which he is sole shareholder] in the present litigation." Id.

(d) An Ohio court addressed this situation. Horen v. Board of Educ., 2007 Ohio 6883 (Ohio Ct. App. 2007). The mother was also a lawyer, and represented herself, her husband, and her daughter in filing the lawsuit. The court first held that the mother could represent herself in the lawsuit, citing several other cases allowing the lawyer to represent herself in the lawsuit. Id. ¶ 31 (explaining that "[t]here are several

federal courts that have addressed the issue and held that an attorney may always represent himself in his own litigation even if he must testify as to the substantive facts of the case"). Among other things, the court explained that a lawyer representing himself pro se "is already subject to cross-examination regarding his own case," and that "the jury would be able to understand that the attorney has a personal interest in the outcome of [the claim] and it could evaluate the credibility of the attorney's testimony on that basis." Id.

However, the court disqualified the lawyer from representing her husband and daughter in the case. Thus, the case proceeded with the mother representing herself (and testifying as a witness), but with another lawyer representing the husband and the daughter.

The Virginia Bar has indicated in a similar situation that a lawyer can represent himself pro se, as well as represent another co-defendant.⁷

The Restatement mentions the possibility of separate trials in this situation.⁸

Best Answer

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

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⁷ Virginia LEO 1498 (12/14/92) (a lawyer who is named as a co-defendant may act as an advocate for the client and a witness and advocate for himself or herself, unless the lawyer's testimony would be prejudicial to the client).

⁸ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000).

Effect of the Adversary's Intent to Call the Lawyer as a Witness

Hypothetical 32

You assisted your client in a transaction last year, which is now the subject of litigation. Mindful of the witness-advocate rule, you do not believe that you are a "necessary" witness on your client's behalf. You are very certain that any testimony you might provide would assist rather than prejudice your client. However, your adversary has indicated that it intends to notice your deposition and call you as a trial witness.

- (a) May the adversary take your deposition during the discovery phase of the case?

NO (PROBABLY)

- (b) Must you be disqualified if the adversary calls you as a witness at the trial?

NO (PROBABLY)

Analysis

Much of the witness-advocate rule analysis involves a lawyer's decision whether to testify on behalf of her client, or the court's decision that the lawyer should testify regardless of the client's desires.

The adversary's intent to depose or call the lawyer as a witness implicates other issues.

- (a) Not surprisingly, an effort by one litigant's lawyer to depose the adversary's lawyer raises privilege and other issues.

Given the role of lawyers in the adversarial system and their general personality tendencies, it should come as no surprise that lawyers' depositions of their opponents

would frequently degenerate into unbecoming fights.¹ As one court noted, such depositions disrupt the adversarial system, "lower the standards of the profession," "add to the costs and time spent in litigation," trouble the lawyer being deposed, and "create a chilling effect between the attorney and client."² In addition to the systemic and emotional issues, the court also noted that such a deposition "involves forays into the area most protected by the work product doctrine—that involving an attorney's mental impressions or opinions."³

For all these reasons, most courts apply special standards when determining whether one litigant's lawyer will be allowed to depose the adversary's lawyer.

Courts recognizing the inherent dangers (both to the system and to privilege and work product doctrine protections) of allowing an adversary's lawyer to depose the other adversary's lawyer began to set a higher standard for such depositions.

In 1986, the Eighth Circuit articulated what has become a widely used standard. In Shelton v. American Motors Corp.,⁴ the Eighth Circuit held that a party asking to depose another party's lawyer had to demonstrate that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is

¹ Prevue Pet Prods., Inc. v. Avian Adventures, Inc., 200 F.R.D. 413, 418-19 (N.D. Ill. 2001).

² N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987).

³ Id.

⁴ 805 F.2d 1323 (8th Cir. 1986).

relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."⁵

Many courts follow this Shelton standard or a variation of the Shelton standard.⁶ Courts following the basic Shelton approach have also adopted similar protections, such as requiring the party seeking the deposition to depose others first before trying to establish grounds for deposing the lawyer.⁷ Some courts (such as the Second Circuit) explicitly decline to follow the Shelton standard.⁸ Other courts are less protective than Shelton, but will sometimes limit the scope of the inquiry or take some other less protective steps.⁹

Because most of the systemic risks of deposing an adversary's lawyer are far more acute in situations involving opposing trial counsel, some courts have found that the Shelton standard does not apply to an adversary's transaction lawyer who will not be trial counsel.¹⁰ Other courts apply the Shelton standard even to those depositions, but note that depositions of those lawyers are more likely to pass muster under Shelton.¹¹

⁵ Id. at 1327 (citations omitted).

⁶ Delor v. Intercosmos Media Group, Inc., Civ. A. No. 04-3262 SECTION "J" (2), 2005 U.S. Dist. LEXIS 13410, at *3 (E.D. La. June 24, 2005).

⁷ Theriot v. Parish of Jefferson, Civ. A. No. 95-2453, 1996 WL 586386, at *3 (E.D. La. Oct. 9, 1996).

⁸ Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman, 350 F.3d 65, 71 (2d Cir. 2003).

⁹ Sadowski v. Gudmundsson, 206 F.R.D. 25 (D.D.C. 2002).

¹⁰ Anserphone of New Orleans, Inc. v. Protocol Commc'ns, Inc., Civ. A. No. 01-3740 SECTION "A" (1), 2002 U.S. Dist. LEXIS 16876 (E.D. La. Sept. 9, 2002).

¹¹ United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 (JGK)(THK) & 98 Civ. 3099 (JGK)(THK), 2000 U.S. Dist. LEXIS 12669, at *10-11 (S.D.N.Y. Aug. 31, 2000).

Reflecting their worry about both the systemic issues and the privilege and work product issues, some imaginative courts have directed that any discovery of an adversary's lawyer be limited in some fashion. Courts have ordered the following limitations:

- The lawyer's deposition should not take place until after others have been deposed;¹²
- The lawyer's deposition could proceed only when a court would be available to rule on any questions as they arise;¹³
- Any deposition could be limited to a certain number of hours;¹⁴
- Any deposition could be limited in scope to certain questions;¹⁵
- Any deposition could specifically exclude questions about the lawyer's opinions;¹⁶
- Any deposition could be taken by written questions.¹⁷

Courts less inclined to protect lawyers from such depositions have noted that "written questions and interrogatories would be an extremely cumbersome and

¹² Singer v. Guckenheimer Enters., Inc., Civ. A. No. 03-0026, 2004 U.S. Dist. LEXIS 13258, at *19 (E.D. Pa. July 13, 2004).

¹³ City of Oldsmar v. Kimmins Contracting Corp., 805 So. 2d 1091 (Fla. Dist. Ct. App. 2002).

¹⁴ Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 355 (D.N.J. 1990).

¹⁵ Chivers v. Central Noble Cmty. Schs., Cause No. 1:04-CV-00394, 2005 U.S. Dist. LEXIS 16057, at *13-14 (N.D. Ind. Aug. 4, 2005).

¹⁶ Nguyen v. Excel Corp., 197 F.3d 200, 210 (5th Cir. 1999).

¹⁷ Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1423 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

ineffective discovery technique."¹⁸ Another court called oral deposition "a far superior discovery tool to one by written questions."¹⁹

(b) For obvious reasons, an adversary's stated intent to call the opposing lawyer as a witness does not necessarily result in that lawyer's disqualification under the witness-advocate rule. If it did, lawyers would think of an excuse in every case to depose the other lawyer, thus knocking him out of the case.²⁰

Numerous courts have stated the general proposition that

[t]he fact that an opposing party intends to call an attorney as a witness is not dispositive; rather, "[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary . . . [, a] finding [that] takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence"

Nicola v. Barrett, 840 N.Y.S.2d 677, 679-80 (N.Y. App. Div. 2007) (emphasis added).

Another New York state court opinion also held that a party's "assertion that she plans to depose and then call [as] a trial witness one or more of the attorneys" representing the other side "because they have 'information or records pertinent to the trial of this action'" is, as the court put it, "plainly insufficient to warrant disqualification at this time."

¹⁸ United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 (JGK)(THK) & 98 Civ. 3099 (JGK)(THK), 2000 U.S. Dist. LEXIS 12669, at *20 (S.D.N.Y. Aug. 31, 2000).

¹⁹ Delor v. Intercosmos Media Group, Inc., Civ. A. No. 04-3262 SECTION "J" (2), 2005 U.S. Dist. LEXIS 13410, at *5 (E.D. La. June 24, 2005).

²⁰ As in the Shelton standard applied to depositions, most courts do not permit one lawyer to list the other lawyer as a trial witness absent "compelling need." Mettler v. Mettler, 928 A.2d 631, 635-36 & n.2 (Conn. Super. Ct. 2007); Restatement (Third) of Law Governing Lawyers § 108 cmt. I (2000).

Andiero Partners, L.P. v. Duggan, [No number in original], 2007 N.Y. Misc. LEXIS 2246, at *17-18 (Sur. Ct. Jan. 29, 2007).²¹

As courts have loosened the witness-advocate standard in other respects, they have increasingly declined to disqualify a lawyer called as a witness by the adversary unless the lawyer's testimony would harm the lawyer's client.

Even if the testimony is relevant and highly useful, it may not be strictly necessary If an attorney will not testify on behalf of the client, the Court must still consider the effects of the attorney being called to testify by opposing counsel. Then, disqualification will be required only if it is apparent that the attorney's testimony will be prejudicial to the testifying attorney's client.

Forward v. Foschi, No. 9002/08 , 2010 N.Y. Misc. LEXIS 1066, at *60-61 (N.Y. Sup. Ct. May 18, 2010) (unpublished opinion).

Of course, in that circumstance, there is an undeniable conflict between the lawyer and the lawyer's client.

²¹ Aberkals v. Blake, Civ. A. No. 08-cv-01080-CMA-KMT, 2009 U.S. Dist. LEXIS 14194, at *14-15, *16-17 (D. Colo. Feb. 9, 2009) (prohibiting plaintiff from calling one of the defendants' lawyers as a trial witness, explaining that the lawyer was acting in a legal capacity; "Here, it is not the attorney who is asserting the work product doctrine to protect information received by an investigator or employee of the trucking company in the ordinary course of business, but the attorney who is asserting the work product doctrine to protect information received by him in his role as attorney for the defendant trucking company."; "Plaintiff's disclosure of Mr. Martinez as a witness, and then submission of discovery requests to Defendant Priority Transportation, LLC, requesting information related to Mr. Martinez's representation of the defendant, seems to be a blatant attempt to force Mr. Martinez's withdrawal from the case and also to cause undue burden or expense."; granting defendants' Motion for Protective Order prohibiting the deposition).

Best Answer

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

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Application of the Witness-Advocate Rule When a Lawyer's Testimony Will Hurt the Client

Hypothetical 33

You handled a client's business transaction last year, and now want to represent that client in litigation involving the transaction. The other side has moved to disqualify you from representing your client. It argues that it intends to call you as a witness (both in a deposition and at the trial), and that your testimony will hurt your client because you will contradict your corporate client's president's recollection about several key meetings.

If your testimony would contradict your client's president's testimony, is your adversary likely to succeed in seeking your disqualification?

YES

Analysis

One might think that a lawyer's adversary should not be able to seek her disqualification based on an argument that the lawyer's testimony will hurt her client. An argument like that seems transparently tactical. If the lawyer's testimony would actually hurt her client, why wouldn't the adversary welcome that situation?

The ABA Model Rules indicate that

[i]n determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who

might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7.

ABA Model Rule 3.7 cmt. [6].

Several courts have disqualified lawyers in this situation. For instance, one federal court disqualified a lawyer because (among other things) his testimony contradicted his client's testimony. Omnicare, Inc. v. Provider Servs., Inc., No. 1:05 CV 2609, 2006 U.S. Dist. LEXIS 6497 (N.D. Ohio Feb. 21, 2006). Another federal court disqualified a lawyer who was representing his secretary in a personal injury case. The court noted that the secretary claimed substantial damages, but that the lawyer hoping to represent his secretary hired her as a full-time employee shortly after the accident. Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858 (E.D. La. Jan. 25, 2000).

To be sure, courts clearly view with great skepticism an adversary's attempt to disqualify a lawyer on this basis. For instance, Judge Robert Payne of the Eastern District of Virginia indicated that a lawyer seeking to disqualify her counterpart under this standard faces a "substantial burden." Personalized Mass Media Corp. v. Weather Channel, Inc., 899 F. Supp. 239, 243 (E.D. Va. 1995) (disqualifying Howrey & Simon). Other courts have similarly held that an advocate hoping to disqualify the other side's

lawyer must point to specific prejudice, and establish a "substantial likelihood" of prejudice.¹

In 2009, the Second Circuit held that a party seeking to disqualify the adversary's lawyer because of possible prejudice to the adversary must prove "specifically" how the lawyer's testimony would prejudice the client, and show how the prejudice was "substantial."² The Second Circuit concluded by noting that "the showing of prejudice is required as a means of proving the ultimate reason for disqualification: harm to the integrity of the judicial system."³

¹ Solow v. Conseco, Inc., No. 06 Civ. 5988 (BSJ)(THK), 2007 U.S. Dist. LEXIS 40479 (S.D.N.Y. June 4, 2007) (refusing to disqualify Kirkland & Ellis from representing its client in litigation over the sale of the GM Building in Manhattan); Occidental Hotels Mgmt., B.V. v. Westbrook Allegro L.L.C., 440 F. Supp. 2d 303 (S.D.N.Y. 2006); United States v. Poulsen, No. CR2-06-129, 2006 U.S. Dist. LEXIS 68214 (S.D. Ohio Sept. 12, 2006); Pereira v. Allboro Bldg. Maintenance, Inc. (In re Allboro Waterproofing Corp.), 224 B.R. 286 (Bankr. E.D.N.Y. 1998) (denying the motion to disqualify); Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. Oct. 12, 2005) (refusing to disqualify Gibson Dunn); Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000) ("A lawyer serving in a capacity other than that of a courtroom advocate is not precluded from being a witness for the lawyer's client. For example, a lawyer is not subject to the rule who does not appear on a list of counsel, or will not sit at counsel table or otherwise physically appear in support of advocacy. The rule does not require disqualification if the lawyer gives testimony in a proceeding separate from the matter in which the lawyer appears as advocate. Similarly, a lawyer who testifies before a judicial officer concerning only a preliminary motion is not thereby disqualified from serving as advocate at a subsequent trial before a jury.").

² Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178-79 (2d Cir. 2009) ("[W]e now hold that a law firm can be disqualified by imputation only if the movant proves by clear and convincing evidence that [A] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result. This new formulation is consistent with our prior efforts to limit the tactical misuse of the witness-advocate rule. . . . Even if we assume that some portion of the Debevoise lawyers' testimony will be adverse to MetLife (when considered in a context that we cannot fully evaluate or appreciate on this interlocutory appeal), plaintiffs have failed to establish the clear and convincing evidence of prejudice necessary to justify the extreme remedy of disqualification by imputation.").

³ Id. at 178.

Some courts have found that the adversary has met this heavy burden, and disqualified the other side's lawyer.⁴

Most courts analyzing the prejudice issue do not note the irony of a litigant moving to disqualify the adversary's lawyer lest that lawyer hurt the adversary's case.

Best Answer

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

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⁴ United States v. Dyess, 231 F. Supp. 2d 493 (S.D. W. Va. 2002) (disqualifying the United States government's chief prosecutor); Feinstein v. Carl, 791 N.Y.S.2d 869 (N.Y. Sup. Ct. 2004) (unpublished opinion); Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004) (affirming disqualification of a lawyer).

Standard for Judging the Need for a Lawyer's Testimony

Hypothetical 34

You handled a business transaction for a client last year, which is now the subject of litigation. Your adversary has moved to disqualify you, arguing that it intends to call you as a witness on two factual issues.

- (a) Will your adversary succeed in seeking your disqualification if you must testify about a comment your adversary's president made in your presence about a relatively minor issue?

NO (PROBABLY)

- (b) Will your adversary succeed in seeking your disqualification if you must testify about a meeting at which each side in the negotiation was represented by two lawyers and two corporate representatives?

MAYBE

Analysis

Courts attempting to apply the witness-advocate rule often have a very difficult time determining whether the lawyer who hopes to act as an advocate must also be a fact witness.

Not surprisingly, this issue does not arise if the client and his lawyer decide that the lawyer will testify on the client's behalf. In that event, the lawyer can continue acting as an advocate only under one of the exceptions to the witness-advocate rule. In other words, the court does not need to address the necessity for the lawyer's factual testimony if the lawyer decides to testify.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) ("The effect of an advocate's announced intent or status as a material witness. Subsection (1)(a) generally prohibits a

The court must address the necessity of a lawyer's testimony only if the adversary announces the intent to call the lawyer as a witness. For obvious reasons, the adversary's merely calling the lawyer as a witness cannot automatically justify disqualifying the lawyer -- or else litigants would try that tactic in every case. Instead, the adversary announcing an intent to call the other side's lawyer as a witness must demonstrate that the lawyer should be a witness. The issue here is what level of necessity the adversary must establish.

In some situations the issue involves the client's ability to consent to foregoing the lawyer's helpful testimony in order to keep the lawyer as the client's advocate. Assuming that the client chooses not to call her lawyer as a witness, the other side might argue that the lawyer should be a witness and therefore cannot also act as an advocate. Here, it seems appropriate for courts to take a very skeptical view of the adversary's concern about a client putting on its best case. This situation has generated considerable debate about just how "necessary" the lawyer's testimony might be.

The old ABA Model Code formulation indicates the lawyer may not act as an advocate if the lawyer "ought" to be a fact witness at the same trial. As the Colorado Supreme Court explained,

[i]nterpretation of "ought to be called" under the Code often reverberated between two strict polar opposite requirements. Some courts imposed disqualification even if the attorney's testimony was minimally useful. See Supreme Beef

lawyer from being both advocate and witness. Prohibition is not affected by the character of the testimony as cumulative.").

Processors, Inc. v. Am. Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977) (holding that the client is entitled to "every scrap of favorable evidence," not just that which is essential to the case). Other jurists strictly interpreted the Code to require disqualification only if the lawyer's testimony was "crucial," "indispensable," "obligatory," or "pivotal." See Luna, supra, at 454; accord Wickes v. Ward, 706 F. Supp. 290, 292 (S.D.N.Y. 1989). It appears, however, that the majority of courts read the Code's "ought to be called" language as requiring that the lawyer's testimony be "necessary" or "indispensable" and not just useful. See John J. Dalton, The Advocate-Witness Rule: Problems and Pitfalls, C641 ALI-ABA Continuing Legal Education 313, 317 (1991). Thus, while not requiring that the attorney's testimony be indispensable, by its adoption of the "necessary" language, the Rule places a higher burden on the moving party, signaling the ABA's retreat from the stricter standard that required disqualification if the testimony was even somehow useful.

Fognani v. Young, 115 P.3d 1268, 1273 (Colo. 2005).

To be sure, most courts equated the "ought to" standard in the old ABA Model Code formulation to mean "necessary" (which is the word used in the ABA Model Rules).²

Even under the ABA Model Rule formulation requiring disqualification only if the lawyer is a "necessary" witness,³ courts have had difficulty defining that standard.

Courts seem to focus on several factors.

Testimony may be relevant and even highly useful but still not strictly necessary A finding of necessity takes into

² Norman Reitman Co. v. IRB-Brasil Resseguros S.A., No. 01 Civ. 0265 (RCC), 2001 U.S. Dist. LEXIS 16073 (S.D.N.Y. Sept. 24, 2001); Hakimian Mgmt. Corp. v. Richard C. Fiore, Inc., 847 N.Y.S.2d 896 (N.Y. Sup. Ct. 2007) (unpublished opinion); Sicurelli v. Sicurelli, No. 99-12169, 2005 N.Y. Misc. LEXIS 3244, at *5 (N.Y. Sup. Ct. Feb. 4, 2005); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y. App. Div. 1994). But see MacArthur v. Bank of New York, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981) (explaining that the "ought to" standard means that the lawyer's testimony would be "significantly useful").

³ ABA Model Rule 3.7(a).

account such factors as the significance of the matters,
weight of the testimony, and availability of other evidence.

Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *7-8 (N.Y. Sup. Ct. Oct. 12, 2005). Thus, courts tend to analyze (1) the materiality of the issue, and (2) the importance of the lawyer's testimony on that issue.

Not surprisingly, courts disagree about the level of necessity that the adversary must establish before the court will disqualify a lawyer. The various court approaches reflect a spectrum of necessity.

Some courts tend to disqualify a lawyer only if her testimony is both material and unavailable through any other source of evidence.

For instance, in 2006 the District of Massachusetts disqualified a lawyer.

The proposed testimony of the plaintiff's counsel is not only material and relevant, it is also not cumulative and is unobtainable elsewhere. As mentioned above, there is no one else who could testify to the matters about which the plaintiff's counsel will be able to testify. Indeed, without the testimony from the plaintiff's attorneys, it is hard to see how the plaintiff's case could even go forward. The attorneys are crucial witnesses who will be able to offer testimony which will make or break the plaintiff's case. No one else is in that unique position, not even the plaintiff herself. In short, it is clear that the plaintiff's lawyers are necessary witnesses, as that term is understood in Rule 3.7.

Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23, 31 (D. Mass. 2006). The Eastern District of New York reached the same conclusion in a criminal case.

As such, Majid's testimony is necessary to plaintiffs' case because first, it is undisputed that the only direct evidence regarding the conversations between Majid and the DA's Office is the testimony of Majid himself and of the

ADAs, respectively. Second, as discussed supra, defendants dispute both the timing and the substance of these alleged conversations, leaving Majid's testimony as the only direct evidence supporting plaintiffs' depiction of certain critical events -- specifically, the alleged phone conversations between Majid and the DA's office.

Crews v. County of Nassau, No. 06-CV-2160 (JFB)(WDW), 2007 U.S. Dist. LEXIS 6572, at *14 (E.D.N.Y. Jan. 30, 2007) (emphasis added).

Similarly, the Eighth Circuit affirmed a lower court's disqualification of a lawyer, explaining that the standard essentially means that the lawyer must be "the 'only' person who could testify to a disputed issue." Droste v. Julien, 477 F.3d 1030, 1033 (8th Cir. 2007). One court held that even "highly useful" testimony does not meet the "necessary" standard.⁴ Another court explained that a lawyer is a necessary witness only if she has "unique" knowledge.⁵ Other courts take the same approach.⁶

⁴ Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *7-8 (N.Y. Sup. Ct. Oct. 12, 2005).

⁵ Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005).

⁶ Natural Res. Def. Council, Inc. v. County of Dickson, No. 3:08-0229, 2010 U.S. Dist. LEXIS 134568, at *10-11 (M.D. Tenn. Dec. 20, 2010) (holding that defendants had not established that plaintiff's lawyer was a "necessary" witness -- noting that the standard required the witnesses testimony to be "unobtainable elsewhere"); People v. Pasillas-Sanchez, No. 05CA2625, 2009 Colo. App. LEXIS 449, at *7-8, *11, *14 (Colo. Ct. App. Mar. 19, 2009) (assessing the witness advocate rule, and ultimately disqualifying a criminal defense lawyer from acting as advocate, because he would have to be a witness; "Determining whether counsel is 'likely to be a necessary witness' is based not on subjective trial strategy, but on the circumstances of the particular case. . . . The court must consider the nature of the case, with emphasis on (1) the subject of the lawyer's testimony; (2) the weight the testimony might have in resolving disputed issues; and (3) the availability of other witnesses or documentary evidence that might independently establish the relevant issues."; "Here, the crux of defendant's argument is that Lozow was going to testify only to uncontested facts, and then argue to the jury the inference the jury should draw from those facts -- namely, that the victim wanted to maintain her relationship with defendant. The People, however, respond that defendant misreads Colo. RPC 3.7(a). They argue that the rule contemplates not just that the facts be undisputed, but that those facts go to an issue that is undisputed and that, here, the facts and issues to which Lozow intended to testify -- namely, the nature and status of the defendant's relationship with the victim -- were in dispute."; rejecting the criminal defendant's argument that he would suffer a "substantial hardship" if his lawyer was disqualified; "Determining whether disqualification would cause substantial hardship requires a court to consider all relevant factors

Other courts are much more likely to disqualify a lawyer -- finding that the lawyer may not act as an advocate even if the matter is not critical to the case, and even if the lawyer is not the only possible source of evidence. For instance, one court has used the phrase "central" issue.⁷

A 2009 Iowa legal ethics opinion suggested a common sense approach:⁸

- Iowa LEO 09-03 (8/25/09) ("Anytime you believe there is a possibility that you will hear your name or the name of your law firm in court, not as an advocate but in the context as evidence as to what you or your firm did or did not do regarding the underlying transaction, it is probable that you have a conflict.").

This standard would undoubtedly tempt an adversary to think of some reason to mention a lawyer's or law firm's name in court.

in light of the specific facts before the court, including (1) the nature of the case; (2) the financial hardship to the client, giving weight to the stage of the proceedings at which the disqualification is requested; (3) the time at which the attorney became aware of the likelihood of his testimony; and (4) whether the client has secured alternative representation."); Pu v. Greenthal Mgmt. Corp., No. 08 Civ. 10084 (RJM) (RLE), 2009 U.S. Dist. LEXIS 19554, at *18-19 (S.D.N.Y. Mar. 10, 2009) (assessing the witness advocate rule "[t]he Court finds that Pu has failed to prove that testimony from Seyfarth [Seyfarth Shaw law firm] is obvious or necessary. His arguments are speculative at best and he has failed to show the necessity of any Seyfarth attorney as a witness, even were the allegations against them to prevail to the point of trial. Further, Pu has not demonstrated that testimony from Seyfarth would be nonduplicative, unprivileged, or prejudicial to the other Defendants or Pu. His motion to disqualify under the 'lawyer as witness' rule is DENIED.").

⁷ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693, at *10 (W.D. Tex. Feb. 6, 2007).

⁸ Iowa LEO 09-03 (8/25/09) (addressing Iowa's witness advocate rule; explaining that "the lawyer may act as advocate where the lawyer's testimony would be cumulative, or related solely to uncontested fact, or, if recusal would cause an unfairness or hardship to the client."; "We note that the rule does not use the term 'sole evidence,' which leaves open the possibility that other evidence may exist by which to prove or disprove a proposition. Consequently, to determine what is nor is not necessary, one must engage in a form of qualitative analysis which is by its very nature subjective and greatly influenced by the motive of the individual performing the analysis. For example, in one instance, the client's opponent may determine that the client's lawyer has 'necessary' evidence that can prove or disprove a point. Obviously the lawyer and the lawyer's client disagree. Or the conflict may be more discrete as in the situation where the lawyer is reluctant to relinquish the role of advocate and assume the duties of a witness."; "We recognize that each situation must be judged on its own merits. But, in those situations where there is doubt, we suggest the following simple best practice approach: Anytime you believe there is a possibility that you will hear your name or the name of your law firm in court, not as an advocate but in the context as evidence as to what you or your firm did or did not do regarding the underlying transaction, it is probable that you have a conflict.").

At the other end of the spectrum, courts have debated whether a lawyer must be disqualified if he is not the only source of evidence. Some courts take a fairly basic approach to this issue, declining to disqualify a lawyer if her testimony would be "cumulative."⁹

Other courts are far more likely to disqualify a lawyer even if others can testify about the same factual matter. For instance, in 2007 one court explained that

[t]hough other witnesses could testify as to what occurred at the meeting, [lawyer's] testimony may be the preferred course to authenticate the minutes and to explain their content.

Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist.

LEXIS 23950, at *13 (E.D. Tenn. Mar. 27, 2007) (emphasis added). That court

ultimately concluded that "any person testifying to a contested issue is a necessary witness." Id. (emphases added). The Restatement takes this type of approach.

As recognized in Subsection (1)(b), in certain circumstances a lawyer is a necessary witness and subject to the prohibition against advocacy, regardless of the lawyer's possible inclination not to testify. A lawyer's testimony is material within the meaning of the Subsection when a reasonable lawyer, viewing the circumstances objectively, would conclude that failure of the lawyer to testify would have a substantially adverse effect on the client's cause. The forensic value of evidence must be assessed in practical terms. If other evidence is significantly less probative or credible or the issue is critical and contested, the lawyer's

⁹ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007); ODS Optical Disc Service GmbH v. Toshiba Corp., 838 N.Y.S.2d 503 (N.Y. App. Div. 2007); Latimi v. New York City Transit Auth., No. 080217/2006, 2007 N.Y. Misc. LEXIS 5424 (N.Y. Civ. Ct. July 3, 2007); Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359 (N.D.N.Y. Feb. 12, 2007); Clough v. Richelo, 616 S.E.2d 888 (Ga. Ct. App. 2005), cert. denied, Case No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005).

testimony, although cumulative, may be of significant forensic value and thus material.

Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) (emphasis added).

Not surprisingly, this debate often involves scenarios that many lawyers face -- either as the transactional lawyers who were involved in the facts being litigated, or as eye witnesses to incidents that become important in the case.¹⁰ One court has warned transactional lawyers that they might have to drop out of a representation if the transaction results in litigation.

Finally, defendant objects that the effect of the court's ruling, if consistently applied, would be to prevent a law firm from maintaining a continuing relationship with a client. That fear is groundless. A lawyer can choose, as McNicol did here, to participate actively in a client's business affairs--not just as an adviser, but also as a negotiator and agent. (McNicol was also a director and a member of the executive committee of the company that plaintiff claims to have rehabilitated.) Such conduct is entirely proper. But if an attorney chooses to become intimately involved in the client's business, then he or she must be prepared to step aside if the matters involved result in litigation. This may be displeasing to firms that wish to have some members act as businessmen and others as litigators. But when these firms place themselves in the position of having an attorney acquire information that makes his testimony necessary, they must accept the consequences.

MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 (S.D.N.Y. 1981) (emphasis added).

¹⁰ Restatement (Third) of Law Governing Lawyers § 108 cmt. e, illus. 1 (2000) ("1. Lawyer One represented Seller in negotiating the sale of Seller's real estate and at the closing of the transaction. In each negotiating session and at the closing, the only parties present were Seller, Lawyer One, Buyer, and Buyer's lawyer. Buyer has now filed suit against Seller to rescind the transaction for fraud, alleging that Seller and Lawyer One made misrepresentations during the negotiations and at the closing. The evidence of what was said is sharply conflicting. Lawyer One would be regarded as a material witness for Seller.").

One astute court has also explained that litigants have only so much control over whether their lawyers will be witnesses at the trial.

Whether Miller intends to utilize Benson as a witness or not, as a practical matter Benson cannot avoid being a witness. At any trial of this case, Miller will be asked, whether by Benson or by counsel for Colorado Farms, about his communications with his lawyer, about the advice which the lawyer provided, and about his reliance upon the advice. And who was that lawyer? Mr. Benson, who stands before the jury as advocate for Miller. Thus, even if Benson did not testify at the trial, he would appear to the jury as a mute witness with regard to the matters about which Miller will testify. Whether intended or not, Benson would not be able to present this case to a jury without being both witness and advocate to the events which are at the heart of this case.

Miller v. Colorado Farms, Civ. A. No. 97-WY-2015-WD, 2001 U.S. Dist. LEXIS 7553, at *12-13 (D. Colo. May 30, 2001) (emphasis added).¹¹

Many courts have declined to disqualify lawyers under the witness-advocate rule, finding that they are not necessary witnesses.¹² Other courts have disqualified lawyers whom they have found to be necessary witnesses.¹³

¹¹ Accord United States v. Kerik, No. 07 Cr. 1027, 2008 U.S. Dist. LEXIS 5056 (S.D.N.Y. Jan. 23, 2008).

¹² United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007); Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (E.D.N.Y. Nov. 19, 2007); Bedree v. Lebamoff, Cause No. 1:04-CV-427, 2007 U.S. Dist. LEXIS 84630 (N.D. Ind. Nov. 14, 2007); Eaton v. Siemens, No. 2:07-cv-0315 FCD KJM, 2007 U.S. Dist. LEXIS 58621 (E.D. Cal. Aug. 10, 2007); Metropolitan P'ship, Ltd. v. Harris, Civ. A. No. 3:06CV522-W, 2007 U.S. Dist. LEXIS 68606 (W.D.N.C. Sept. 17, 2007); Solow v. Conseco, Inc., No. 06 Civ. 5988 (BSJ)(THK), 2007 U.S. Dist. LEXIS 40479 (S.D.N.Y. June 4, 2007); Nicola v. Barrett, 840 N.Y.S.2d 677 (N.Y. App. Div. 2007); Mettler v. Mettler, 928 A.2d 631 (Conn. Super. Ct. 2007); State v. Oster, Civ. A. No. P1-02-3047A, 2007 R.I. Super. LEXIS 169 (R.I. Super. Ct. Nov. 28, 2007); Andiero Partners, L.P. v. Duggan, [No number in original], 2007 N.Y. Misc. LEXIS 2246 (Sur. Ct. Jan. 29, 2007); Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. Oct. 12, 2005); McKenzie v. City of Omaha, 668 N.W.2d 264 (Neb. Ct. App. 2003); State v. Van Dyck, 827 A.2d 192 (N.H. 2003); Security Gen. Life Ins. Co. v. Superior Court, 718 P.2d 985 (Ariz. 1986).

Best Answer

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

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¹³ Williams v. Borden Chem., Inc., 501 F. Supp. 2d 1219 (S.D. Iowa 2007); Kent v. Scamardella, No. 07 Civ. 844 (SHS), 2007 U.S. Dist. LEXIS 50376 (S.D.N.Y. July 11, 2007), complaint dismissed, 2007 U.S. Dist. LEXIS 78648 (S.D.N.Y. Oct. 18, 2007); Beller v. Crow, 742 N.W.2d 230 (Neb. 2007); Weige v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004); Sokolow, Dunaud, Mercadier & Carreras LLP. v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002); Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001); World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc., 866 F. Supp. 1297 (D. Colo. 1994).

Effect of Client Consent

Hypothetical 35

You have represented a small businesswoman for nearly a decade. Among other things, you just filed a lawsuit on her behalf against a rival company, claiming various business torts. You have warned your client that the other side might move to disqualify you as an advocate, because you were either the only participant or one of only a few participants in several communications that might be important in the case. Your client has told you that she is willing to forego whatever helpful testimony you might offer on those matters -- in order to keep your services as an advocate. You are flattered by your client's loyalty, but wonder about its effectiveness.

May a client forego a lawyer's helpful testimony to retain the lawyer's services as an advocate?

MAYBE

Analysis

Courts' analysis of a client's consent in this setting highlights the systemic nature of the interests involved in the witness-advocate rule's application.

One might think that a sophisticated client should be able to decide whether to forego favorable testimony to keep a favorite litigator as the trial lawyer. On the other hand, it might make sense for the court to play some role in that determination -- either to protect clients making bad decisions, or to protect the institutional interests of the court.

The Restatement allows the client to make the decision.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) ("The decision whether a lawyer whose testimony is material should continue in the matter as advocate is one for the client (see § 22). Since the lawyer might be disinclined to testify in order to remain as advocate, a conflict of interest is presented (see § 125). The conflict is consentable when the lawyer can adequately represent the client in the litigation without providing the testimony (see § 122(2)(c)), and when the client gives informed consent to the conflict (see § 122(1)). The client must understand the implications of consent.");

The courts are about evenly split on the issue of client consent.

In United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007), for instance, the court held that a criminal defendant may consent to give up helpful testimony from his lawyer in order to keep the lawyer as his advocate. Interestingly, the court noted that the criminal defendant had hired a separate lawyer to help him make this decision. Accord BSW Dev. Group v. City of Dayton, Case No. C-3-93-438, 1995 U.S. Dist. LEXIS 22183, at *15 n.11 (S.D. Ohio Sept. 13, 1995) ("[w]hen a sophisticated client makes an informed choice not to call its attorney as a witness, even though counsel may be a potential witness, courts have held that it is not necessary to disqualify counsel. . . . Therefore, if Plaintiffs decide that Brannon's testimony is not necessary, the basis for disqualifying him will have disappeared.").

Another decision issued by a New York court questioned the idea of ignoring the client's wishes.

Where a client knowingly chooses to forego the testimony of its lawyer because it prefers to continue the representation of its law firm, it is curious indeed for the adversary to insist that the lawyer ought to be called as a witness for that client, and for a court on that basis to disqualify the lawyer or the lawyer's firm.

Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000) ("When a lawyer's material testimony as a necessary witness (see Comment e) would be favorable to the lawyer's client, the lawyer's announced intention not to testify and to continue as advocate should be accepted by the tribunal when it appears that the lawyer's client has adequately consented after appropriate consultation (see generally § 122 & Comment e hereto). If the client gives informed consent to the lawyer's not testifying for the client, other parties have no standing to object to the lawyer's failure to testify. If the lawyer proposes to testify, opposing parties have standing to invoke the rules of Subsections (1), (2) and (3). If an opposing party proposes to call the lawyer as a witness, the client or lawyer has standing to invoke the rule of Subsection (4) (see Comment I hereto).").

Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *8 (N.Y. Sup. Ct. Oct. 12, 2005) (emphasis added) (refusing to disqualify the law firm of Gibson, Dunn).

In contrast, a Northern District of New York decision flatly stated that "[t]he rule does not permit a client to waive his attorney's testimony if it would be significantly useful in order to retain him as counsel." Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359, at *9 (N.D.N.Y. Feb. 12, 2007). This ruling followed a much earlier Southern District of New York decision which explained this approach in more detail.

Nor may the client waive the rule's protection by promising not to call the attorney as a witness. The ostensible paternalism of disregarding such waivers is justified by the circumstances in which the problem arises. The client will generally be reluctant to forego the assistance of familiar counsel or to incur the expense and inconvenience of retaining another lawyer. The most serious breaches of the rule, in which an attorney has become intimately involved in the subject matter of the dispute, will often be the very situations in which withdrawal is most burdensome. Moreover, the party will generally be guided in its decision by the very attorney whose continued representation is at issue. At the same time, the attorney will be reluctant to jeopardize good relations with the client and may -- against his better judgment -- defer to the client's desire for representation.

MacArthur v. Bank of New York, 524 F. Supp. 1205, 1209 (S.D.N.Y. 1981) (emphasis added). A number of other courts have taken this approach.²

² Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993); Estate of Andrews v. United States, 804 F. Supp. 820 (E.D. Va. 1992).

Best Answer

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

"Substantial Hardship" Exception

Hypothetical 36

You have represented a local businessman in essentially all of his matters for the past twenty years. You just helped him in a transaction last year, and now want to act as his trial lawyer in the litigation even though you probably will be called as a necessary witness.

May you avoid disqualification by arguing that losing you as the trial lawyer will cause your client a "substantial hardship"?

NO (PROBABLY)

Analysis

The witness-advocate rule contains a number of exceptions. If one of the exceptions applies, the same lawyer may act both as an advocate and as a witness in the same proceeding.

Under ABA Model Rule 3.7, the exceptions apply if

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

ABA Model Rule 3.7(a). Of course, these exceptions only apply if the adversary seeks the lawyer's disqualification -- not if the lawyer's testimony will hurt the client.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. f (2000).

The first exception applies to such matters as the uncontested introduction of a document or some other basic fact.² The second exception applies to a post-trial effort by the lawyer to recover attorneys' fees under some statute or contractual provision.³

Most of the judicial debate involves the third exception, called the "substantial hardship" exception.

Every court seems to worry about this exception swallowing the rule.

One Eastern District of New York decision explained how most courts approach this issue.

The "substantial hardship" exception[] must be narrowly construed, . . . and does not favor the retention of Majid as counsel in this case. First, to satisfy the exception, a party must show that the hardship derives from the "distinctive value" offered by the attorney as counsel in this case. Plaintiffs have failed to present any distinctive benefit that would be conferred on plaintiffs by Majid's continued representation in this case Second, plaintiffs cannot

² ABA Model Rule 3.7 cmt. [3] ("Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical."); Restatement (Third) of Law Governing Lawyers § 108 cmt. g (2000) ("An advocate may testify for the lawyer's client to establish a necessary fact that is not significantly contested, for example, to establish the chain of custody or genuineness of a document. Thus, it is customary for advocates to attest to the genuineness of documents when supporting a motion based on facts. Even at a trial, counsel ordinarily may assume that the opposing party will stipulate to apparently uncontested facts. Refusal of an opposing party to do so should not put the advocate's client to the risks and expense of obtaining either other witnesses or other counsel.").

³ ABA Model Rule 3.7 cmt. [3] ("Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony."); Restatement (Third) of Law Governing Lawyers § 108 cmt. g (2000) ("The value of legal services rendered in the proceeding may be testified to by an advocate. The exception applies only with respect to legal services rendered in the proceeding in which the testimony will be given and in ancillary proceedings. The exception rests on the need for testimony on such questions by lawyers who participated in providing the services and on the assumption that the issue will normally be tried before a judge in a collateral proceeding rather than before the jury hearing the merits, such as in many fee-shifting situations. However, the exception also applies to jury-tried issues.").

satisfy the exception by merely pointing to the cost and delay of obtaining substitute counsel. For the purposes of the witness-advocate rule, "substantial hardship" does not include such "[c]ost and delay": "if [the] cost of retaining substitute counsel were, without more, deemed to constitute 'substantial hardship' . . . the exception would swallow the rule."

Crews v. County of Nassau, No. 06-CV-2610 (JFB)(WDW), 2007 U.S. Dist. LEXIS 6572, at *17-18 (E.D.N.Y. Jan. 30, 2007) (citation omitted) (emphasis added).

Another court from Ohio echoed this approach.

Ohio courts have interpreted this exception under the prior disciplinary rules as requiring that the attorney prove that his counsel has a distinctive value and that the inability to utilize his counsel would result in a substantial hardship to the client. . . . Distinctive value is defined as legal expertise. . . . Mere familiarity with the case or additional expenses is insufficient to meet this exception.

Horen v. Board of Educ., 2007 Ohio 6883, at ¶ 28 (Ohio Ct. App. 2007) (emphases added) (disqualifying a lawyer from representing her husband and daughter in a lawsuit against a school district based on alleged discrimination against her disabled daughter; allowing the lawyer to represent herself as the daughter's mother). Most courts take this approach.⁴

⁴ People v. Pasillas-Sanchez, No. 05CA2625, 2009 Colo. App. LEXIS 449, at *7-8, *11, *14 (Colo. Ct. App. Mar. 19, 2009) (assessing the witness advocate rule, and ultimately disqualifying a criminal defense lawyer from acting as advocate, because he would have to be a witness; "Determining whether counsel is 'likely to be a necessary witness' is based not on subjective trial strategy, but on the circumstances of the particular case. . . . The court must consider the nature of the case, with emphasis on (1) the subject of the lawyer's testimony; (2) the weight the testimony might have in resolving disputed issues; and (3) the availability of other witnesses or documentary evidence that might independently establish the relevant issues."; "Here, the crux of defendant's argument is that Lozow was going to testify only to uncontested facts, and then argue to the jury the inference the jury should draw from those facts -- namely, that the victim wanted to maintain her relationship with defendant. The People, however, respond that defendant misreads Colo. RPC 3.7(a). They argue that the rule contemplates not just that the facts be undisputed, but that those facts go to an issue that is undisputed and that, here, the facts and issues to which Lozow intended to testify -- namely, the nature and status of the defendant's relationship

The Restatement provides a list of factors to analyze in making this determination.

Relevant factors include the length of time the lawyer has represented the client, the complexity of the issues, the client's economic resources, the lawyer's care in attempting to anticipate or avoid the necessity of testifying, the extent of harm to the lawyer's client and opposing parties from the blending of the roles of advocate and witness, additional expense that disqualification would entail, and the effect of delay upon the interests of the parties and the tribunal.

Restatement (Third) of Law Governing Lawyers § 108 cmt. h (2000).

The ABA has provided some examples of situations in which the "substantial hardship" principle might apply.

Despite these considerations, exceptional situations may arise when these disadvantages to the client would clearly be outweighed by the real hardship to the client of being compelled to retain other counsel in the particular case. For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps to have to seek a delay of the trial.

with the victim -- were in dispute."; rejecting the criminal defendant's argument that he would suffer a "substantial hardship" if his lawyer was disqualified; "Determining whether disqualification would cause substantial hardship requires a court to consider all relevant factors in light of the specific facts before the court, including (1) the nature of the case; (2) the financial hardship to the client, giving weight to the stage of the proceedings at which the disqualification is requested; (3) the time at which the attorney became aware of the likelihood of his testimony; and (4) whether the client has secured alternative representation."); Estate of Andrews v. United States, 804 F. Supp 820, 829 (E.D. Va. 1992) ("The 'substantial hardship' exception to the witness-advocate rule is construed narrowly. . . . It is therefore well-settled that the expense and possible delay inherent in any disqualification of counsel are insufficient to satisfy the 'substantial hardship' exception to the witness-advocate rule."); A.B.B. Sanitec West, Inc. v. Weinsten, 2007 Ohio 2116 (Ohio Ct. App. 2007); Fognani v. Young, 115 P.3d 1268, 1275 (Colo. 2005) ("[W]hen determining whether the disqualification would impose a substantial hardship on the client, we consider all relevant factors in light of the specific facts before the court, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, and the time at which the attorney became aware of the likelihood of his testimony. In addition, we also consider whether the client has secured alternative representation.").

Similarly, a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue.

ABA LEO 339 (1/31/75).⁵

Not surprisingly, courts examine a number of factors in applying the "substantial hardship" test.

First, courts sometimes look at the foreseeability of the lawyer's testimony in applying the substantial hardship test.⁶ These courts reason that a litigant who should have known that her lawyer would be disqualified under the witness-advocate rule should not be permitted to claim "substantial harm" in arguing against disqualification.

Second, courts also look at the time left before trial -- the greater the time before the trial, the less likely the client is to succeed in a "substantial hardship" argument.⁷ Of course, those courts which hold off on analyzing the witness-advocate rule until late in

⁵ ABA Model Rule 3.7 cmt. [4] ("[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.").

⁶ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950 (E.D. Tenn. Mar. 27, 2007); Beller v. Crow, 742 N.W.2d 230 (Neb. 2007); Horen v. Board of Educ., 2007 Ohio 6883 (Ohio Ct. App. 2007); Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004).

⁷ Kent v. Scamardella, No. 07 Civ. 844 (SHS), 2007 U.S. Dist. LEXIS 50376 (S.D.N.Y. July 11, 2007), complaint dismissed, 2007 U.S. Dist. LEXIS 78648 (S.D.N.Y. Oct. 18, 2007); Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001) (holding that the client had not met the standard, and noting that there had been no discovery and no trial date set).

the proceeding obviously deal with a stronger argument by the litigant who might lose her lawyer just before the trial. One court held that it could avoid any substantial hardship to the client by delaying the trial until the client could arrange for a new lawyer.⁸ Other courts have looked to whether the client has local counsel who can take over.⁹ The Restatement explains that the court can order other remedial steps.¹⁰

Two cases show the varying approaches that courts take to the substantial hardship rule. In one case, a New Hampshire state court refused to disqualify plaintiff's lawyer.

It is beyond question that Attorney Schulte's knowledge of the transactions involved in the present case is extensive. He has represented the plaintiff in these matters for six years. He has become intimately familiar with the numerous details involved. He has participated in the discovery process, and has a consummate understanding of his client's needs.

In determining whether Attorney Schulte's knowledge of this case is unique, so as to justify the application of the hardship exception, we must ask whether the facts and transactions involved are significantly complex. The numerous transactional relationships, both personal and professional, that gave rise to this litigation are not simple. The conduct of the parties exists against a backdrop of complex business and personal transactions that vex the unfamiliar observer. A master's compilation of the essential facts numbers a full fourteen pages in length. The operation of Action Enterprises involved no fewer than three complex separate business agreements, including two partnerships and a corporation. Intricate and lengthy negotiations took place. Under these circumstances, we think that Attorney

⁸ Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858 (E.D. La. Jan. 25, 2000).

⁹ Beller v. Crow, 742 N.W. 2d 230 (Neb. 2007).

¹⁰ Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000).

Schulte's extended involvement with this case renders him particularly and uniquely qualified to represent the plaintiff, so that his departure would work an unreasonable hardship upon his client.

McElroy v. Gaffney, 529 A.2d 889, 893 (N.H. 1987).

In stark contrast, the District of Massachusetts disqualified a lawyer, despite noting that the case had been pending for twelve years.

Another of the plaintiff's arguments is that the motion should not be allowed because disqualification will work a substantial hardship on her. Specifically, says the plaintiff, she works full-time, lives out of state and has contacted two other firms which have declined to take her case. Moreover, the plaintiff asserts that since this case has spanned twelve years, for successor counsel to get up to speed on the case would be a "staggering" undertaking. . . . Unfortunately for the plaintiff, she has not shown that the substantial hardship exception to Rule 3.7 applies to her case.

Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23, 31 (D. Mass. 2006) (noting that the exception is "construed narrowly," and requires "something beyond the normal incidents of changing counsel, such as the loss of extensive knowledge of a case based upon the long-term relationship between the client and counsel and substantial discovery conducted in the actual litigation" (quoting Brown v. Daniel, 180 F.R.D. 298, 302 (D.S.C. 1998))).

Not surprisingly, some clients succeed in convincing the court that they will suffer "substantial hardship" if they lose their trial lawyer.¹¹ One state court decision demonstrated this fairly forgiving view.

¹¹ United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007); Xcentric Ventures, LLC v. Stanley, No. CV-07-00954-PHX-NVW, 2007 U.S. Dist. LEXIS 55459 (D. Ariz. July 27, 2007); Calhoun v. City of Austin,

Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced. Franklin has stated that he will not be called to testify on behalf of the Knottses and, in fact, has no information that it is crucial to the Knottses claims against Zurich. We agree with the Court of Appeals that disqualification of Franklin would work a substantial hardship upon the Knottses and would result in irreparable harm.

Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001) (emphases added).

Other courts have no problem disqualifying such lawyers.¹²

Best Answer

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

No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007); D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 147 P.3d 414 (Utah 2006).

¹² 155 North High, Ltd. v. Cincinnati Ins.Co., 650 N.E.2d 869 (Ohio 1995) (disqualifying the lawyer after finding no substantial hardship); Amos v. Cohen, 806 N.E. 2d 1014 (Ohio Ct. App. 2004) (affirming disqualification of the lawyer).

Imputation of Disqualification

Hypothetical 37

You and your client agree that you will have to testify on her behalf in an upcoming trial.

May one of your partners serve as trial counsel in the trial if you have to testify as a witness in that trial?

YES

Analysis

One of the most dramatic signs that the witness-advocate rule has diminished in its intensity over the past few decades involves the imputation of an individual lawyer's disqualification.

Under the old ABA Model Code formulation, neither an individually disqualified lawyer nor anyone in that lawyer's firm could act as an advocate. ABA Model Code DR 5-101(B). An influential 1963 Texas Law Review article argued in favor of such a broad imputation rule.¹ Several old decisions mercilessly imputed an individual lawyer's disqualification.²

The ABA Model Rules totally changed the standard imputation rule. The imputation of an individually disqualified lawyer now varies with the lawyer-witness's role -- as a witness for the client or as a witness whose testimony would harm the client.

¹ John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

² MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

Under the current ABA approach, "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."³

In situations not implicating the exception, the client either decides to call his or her lawyer as a helpful witness, or the adversary successfully convinces the court that the lawyer should testify as a witness on behalf as his or her client. In those situations, that individual lawyer's disqualification is not imputed to his or her entire firm.

Numerous court decisions⁴ have applied the current ABA approach, which disqualifies only the lawyer who must actually testify as a fact witness. States moved in this direction at varying speeds. For instance, New York did not drop its imputation rule until 1990.⁵ Ohio did not switch until 2006.⁶

It is unclear why bars have dropped the imputation rule, apart from their general retreat from a strict witness-advocate rule approach. A comment to the ABA Model Rules provides an unconvincing explanation.

³ ABA Model Rule 3.7(b).

⁴ Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), Ch. 7 Case No. 05-91725, Adv. No. 06-6253, 2007 Bankr. LEXIS 2160 (Bankr. N.D. Ga. May 29, 2007); Eon Streams, Inc v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950 (E.D. Tenn. Mar. 27, 2007); Hakimian Mgmt. Corp. v. Richard C. Fiore, Inc., 847 N.Y.S.2d 896 (N.Y. Sup. Ct. 2007)(unpublished opinion); NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 784 N.Y.S.2d 840 (N.Y. Civ. Ct. 2004); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002); Talvy v. American Red Cross, 618 N.Y.S. 2d 25 (N.Y. App. Div. 1994); Illinois LEO 93-7 (1/21/94); Beneficial Dev. Corp. v. City of Highland Park, 606 N.E.2d 837 (Ill. App. Ct. 1992), aff'd in part and rev'd in part, 641 N.E.2d 435 (Ill. 1994).

⁵ Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *7 (N.Y. Sup. Ct. Nov. 22, 2005).

⁶ Stanley v. Bobeck, 2009 Ohio 5696, at ¶ 27 (Ohio Ct. App. 2009) ("The mere fact the counsel from the same firm representing a party may testify does not result in an immediate disqualification."); Omnicare, Inc. v. Provider Servs., Inc., No. 1:05 CV 2609, 2006 U.S. Dist. LEXIS 6497 (N.D. Ohio Feb. 21, 2006).

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

ABA Model Rule 3.7 cmt. [5]

To the extent that the jury might be affected by the obvious self-interest of a lawyer testifying on behalf of her client while also acting as the client's advocate, why wouldn't the jury be similarly influenced by one of the advocate's partners taking a stand? The testifying partner obviously shares the advocate's interest (both emotional and financial) in having the client win the case. Courts have not addressed the rationale for the rules change, instead usually just citing the change in declining to impute disqualification.

As indicated above, under the current ABA approach an individual lawyer's disqualification does not prevent others in his or her firm from trying the case -- "unless precluded from doing so by Rule 1.7 or Rule 1.9."⁷ The comment to the ABA Model Rules provides an explanation.

Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

⁷ ABA Model Rule 3.7(b).

ABA Model Rule 3.7 cmt. [7]. The Restatement takes the same approach.⁸

Best Answer

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

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⁸ Restatement (Third) of Law Governing Lawyers § 108 cmt. f (2000).

Application of the Witness-Advocate Rule to Nonlawyer Employees

Hypothetical 38

Your paralegal had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming trial.

May you continue to act as an advocate in the trial if your paralegal will testify about the conversation?

YES

Analysis

The witness-advocate rule applies only to lawyers.¹ As the Southern District of New York explained,

[a]s for the paralegals and interns, they are in principle no different from the office investigators that law firms typically call to testify to disputed facts.

M.K.B. v. Eggleston, 414 F. Supp. 2d 469, 471 (S.D.N.Y. 2006).²

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. j (2000) ("Testimony by nonlawyer employee or agent of an advocate. The rule of Subsection (1) does not apply to an advocate's nonlawyer employees or agents who do not sit at counsel table or otherwise visibly function in support of advocacy before the factfinder. The exception applies to paralegals, investigators, secretaries, accountants, or other nonlawyer employees, agents, or independent contractors such as investigators. Under rules of evidence, the relationship between such a witness and an advocate may be shown to impeach the person's testimony.").

² Accord Mettler v. Mettler, 928 A.2d 631 (Conn. Super. Ct. 2007); NYC Medical & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 784 N.Y.S.2d 840 (N.Y. Civ. Ct. 2004); Virginia LEO 1668 (2/28/96) (A law firm may represent the defendant beneficiaries in a will contest even though a lawyer at the firm prepared the will and nonlawyer employees witnessed the will, because (1) the lawyer preparing the will was no longer at the firm, and the witness-advocate rule only applies if the lawyer/witness still practices at the firm; and (2) the witness-advocate rule does not apply when nonlawyer employees are called as witnesses.); Virginia LEO 1521 (5/11/93) (A lawyer may represent a developer in litigation in which an employee of a title company (of which the lawyer is part owner) may have to testify, because the witness-advocate rule applies only when a lawyer must testify.)

One might wonder why courts are so quick to apply a totally different rule to nonlawyer employees. To the extent that the jury would either give extra credit or less credit to a lawyer's testimony because the lawyer is representing the client, one might wonder why the jury would not have exactly the same reaction to testimony by the paralegal assisting the lawyer.

Best Answer

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

Permissible Activities by Lawyers Who Will Testify at Trial on Their Client's Behalf

Hypothetical 39

You have always practiced on your own. Your largest client just asked you to represent her in an important commercial dispute headed for litigation. You played an integral role in the background incidents, and will therefore have to testify for your client at trial about meetings in which you were the only participant acting on your client's behalf. However, your client wants you to play as active a role as you possibly can before (and possibly after) the trial.

Even if you are disqualified by the witness-advocate rule from acting as your client's trial advocate, may you undertake the following activities on your client's behalf?

- (a) Work "behind the scenes" in drafting briefs, cross-examination outlines, etc.?

YES

- (b) Represent your client at settlement negotiations?

MAYBE

- (c) Take depositions?

MAYBE

- (d) Attend depositions on your client's behalf?

MAYBE

- (e) Argue at pretrial non-evidentiary hearings on issues (such as venue or summary judgment) that involve issues that will not come up again at the trial?

MAYBE

- (f) Argue at pretrial evidentiary hearings?

MAYBE

- (g) Testify at a pretrial evidentiary hearing, as long as the issue will not come up again at the trial?

MAYBE

- (h) Sit at counsel table during the trial?

NO (PROBABLY)

- (i) Argue on your client's behalf on appeal?

MAYBE

Analysis

As in so many other aspects of the witness-advocate rule, the trend has been toward decreasing the rule's stringent approach. However, courts still take widely varying views on exactly what activities an individually disqualified lawyer may undertake (assuming that the lawyer's testimony will help rather than hurt the client).

This issue differs from the analysis of the witness-advocate rule's applicability to pretrial proceedings or other activities. In those settings, the court must decide if the witness-advocate rule applies at that proceeding -- in other words, whether the lawyer may testify at the proceeding and also argue on behalf of her client at the proceeding.

In contrast, courts examining what activities lawyers can take after disqualification have to determine the scope of that disqualification. The paradigm

example is the lawyer who announces at the beginning of a case that he realizes he will have to testify on his client's behalf at the trial, and therefore will not act as an advocate at the trial. Similarly, the adversary might successfully move to disqualify the lawyer as the trial advocate, at a time where both parties have other activities to undertake in preparation for that trial.

In either of these situations, courts must decide what such a disqualified lawyer can and cannot do -- before the trial, at the trial or after the trial.

As early as 1989, the ABA indicated that an individually disqualified lawyer may undertake essentially any pretrial activity.

There are a number of reasons for applying this test and permitting the lawyer-witness to serve as an advocate during the pre-trial stage. First, the necessity to testify may not come about as the case may be settled and not go to trial. Second, even if the case does go to trial, other evidence may be available in place of the lawyer's testimony. Third, a client might choose to forego the testimony of the lawyer because the client prefers to have the lawyer continue to serve as advocate at trial. In any event, once there is client consent after consultation (as described below), there is little likelihood of prejudice to either the client or the justice system, particularly since under the Model Rules the lawyer's partner is permitted to assume the role of advocate at the trial. Moreover, the lawyer who is the potential witness may have more knowledge about the facts of the case than any lawyer in the firm, and it would be unfair to the client not to permit that lawyer to participate in pre-trial proceedings. Accordingly, a lawyer may serve as an advocate in taking depositions of witnesses and engaging in other pre-trial discovery as well as in arguing pre-trial motions and appeals from decisions on those motions as long as the other requirements of Rule 3.7 are met.

ABA LEO 1529 (10/20/89).

A number of courts have articulated this basic approach, without undertaking an activity-by-activity survey of permissible conduct. For instance, one Southern District of New York decision blithely allowed a law firm to continue as usual, but ordered it to designate a trial lawyer just before the trial.

Therefore it is ordered that the Manning firm be disqualified from acting as trial counsel for plaintiffs but be permitted to pursue pretrial activities. When the case is ready for trial, the firm of Manning & Carey is ordered to designate in the note of issue or pretrial order, as the case may be, the individual or firm which will represent plaintiffs at trial and to take no active role in the courtroom conduct of the case.

Norman Norell, Inc. v. Federated Dep't Stores, Inc., 450 F. Supp. 127, 131 (S.D.N.Y. 1978) (emphasis added).¹

Other courts have been much more strict (discussed below).

An Eighth Circuit decision highlighted courts' changing attitudes. The Eastern District of Missouri disqualified plaintiff's lawyer, who intended to testify on his clients' behalf. During a telephonic conference, the district court "made the disqualification

¹ Accord Gormin v. Hubregsen, No. 08 Civ. 7674 (PGG), 2009 U.S. Dist. LEXIS 15507, at *7, *9, *10 (S.D.N.Y. Feb. 26, 2009) (assessing the witness advocate rule; "Here, there appears to be little risk to the trial process, because Defendants have already represented that Greenwald will not appear as trial counsel in this matter. This concession largely, if not completely, eliminates the concerns about 'trial taint' noted above. Indeed, numerous courts in this District have held that DR 5-102 addresses counsel's participation at trial, and does not bar counsel's participation in pre-trial proceedings." (footnote omitted); "The reality is that at this stage of the litigation, it is impossible to determine how significant Greenwald might be as a witness or whether he is likely even to be called as a witness; whether his testimony would likely hurt or help his client; or whether his testimony would or would not be cumulative of other witnesses. Based on such a record, courts in this District commonly deny disqualification motions."; "Whether Greenwald's discussions with Gorwin have a greater significance than appears at present will have to await discovery. At present, this case falls within a well established line of cases, including those cited above, in which courts have concluded that disqualification motions made pre- or during discovery are premature."; denying defendant's motion to disqualify the lawyer); Clough v. Richelo, 616 S.E.2d 888 (Ga. Ct. App. 2005), cert. denied, No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005); Golomb & Honik P.C. v. Ajaj, 51 Pa. D. & C.4th 320 (C.P. 2001); First Republic Bank v. Brand, 51 Pa. D. & C.4th 167 (C.P. 2001); Greenfield & Co. v. Alderman, 52 Pa. D. & C.4th 96 (C.P. 2001).

effective immediately and gave the [plaintiffs] ten days in which to have a new lawyer enter an appearance on their behalf." On appeal, the Eighth Circuit reversed. Droste v. Julien, 477 F.3d 1030, 1034 (8th Cir. 2007). That court held that the trial court "abused its discretion in making the disqualification motion effective immediately." Id. at 1036.

One purpose of the necessary witness rule is to avoid the possible confusion which might result from the jury observing a lawyer act in dual capacities -- as witness and advocate. The jury is usually not privy to pretrial proceedings, however, so the rule does not normally disqualify the lawyer from performing pretrial activities; the one exception is when the "pretrial activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role." . . . In this case, there is no indication lawyer Adams's pretrial activity would have revealed her dual role at trial.

Id. at 1035-36.² Interestingly, the Eighth Circuit found that the court's error was harmless, because the plaintiffs could not point to anything that their original lawyer would have done that their new lawyer had not done after replacing him.

In contrast, some courts continue to take a remarkably strict view of what a disqualified lawyer may do before the trial.

Although Rule 3.7 states only that a lawyer who may be called as a witness should not be trial counsel, the Sixth Circuit has long held that, "when an attorney knows that he will or ought to be called as a witness, he should withdraw from representation." . . . This admonishment includes pre-trial activities as well as trial. The Sixth Circuit has stated

² Accord Levit v. Herbst (In re Thomas Consol. Indus., Inc.), 289 B.R. 647, 653-54 (N.D. Ill. 2003) ("The plain text of LR83.53.7(a), taken together with the committee comment, clearly contemplates that an attorney-witness will not be precluded from participating in all phases of a case, but rather only in trial and evidentiary proceedings involving the testimony of witnesses before a factfinder. Moreover, LR83.53.7(c) provides that 'nothing in this rule shall be deemed to prohibit a lawyer barred from acting as advocate in a trial or evidentiary proceedings from handling other phases of the litigation.' The caselaw decided under these provisions fully supports the plain reading of this language.").

that: "By Webster's Unabridged a 'trial' is: . . . 2. The formal examination of the matter in issue in a cause before a competent tribunal for the purpose of determining such issue: the mode of determining a question of fact in a court of law. . . . b. All proceedings from the time the parties are called to try their cases in court or from the time when issue is joined to the time of final determination." . . . The Federal Rules of Civil Procedure similarly provide that a trial is a "[s]eamless web to the ascertainment of issues at the pretrial proceedings. . . ." Id. at 716. Because of the "seamless" nature of a trial, whether a disqualification is operative pre-trial, for trial, or for both is a matter within the discretion of the court. Id. A court has the power to disqualify an attorney for pre-trial and trial proceedings.

Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *16-17 (E.D. Tenn. Mar. 27, 2007) (emphases added).

One court has articulated at some length why the witness-advocate rule should be applied to pretrial proceedings as well.

If the attorney-witness rule operated only at the trial stage of litigation as Plaintiff suggests, the policies inherent in RPC 3.7 would be defeated. An attorney facing disqualification at the trial stage might be too anxious to settle a dispute before trial. Conversely, opposing counsel, armed with the knowledge that opposing counsel faces disqualification, might be unwilling to accept an otherwise attractive settlement offer. Finally, allowing an attorney who will testify to continue as advocate up to the time of a trial would put me in the compromising position of choosing whether to force the advocate's client to start over with a new attorney on the eve of trial, to bar testimony necessary to decide the merits of the case, or to abrogate my duty to apply RPC 3.7. Such procedural distortions raise the specter of the 'appearance of impropriety' and the possibility of strategic procedural behavior to the detriment of reaching the merits of the case. Early application of the attorney-witness rule is necessary for the smooth operation of adversarial adjudication.

Freeman v. Vicchiarelli, 827 F. Supp. 300, 304 (D.N.J. 1993).

Not surprisingly, there are decisions going both ways on nearly every pretrial activity that a lawyer might undertake.

(a) **Behind the Scenes Activities.** Every court agrees that a disqualified lawyer may work "behind the scenes" to help his client.

One court explained that

all of those reasons should not prevent the attorney from working on the matter in a "behind the scenes" capacity. For example, the disqualified attorney herein, could assist the trial attorney to prepare for the questioning of witnesses, preparing motion papers, etc. To the extent that the court has disqualified attorneys herein, the disqualification is limited to appearances at trial, on depositions or at court appearances.

Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9-10 (N.Y. Sup. Ct. Nov. 22, 2005). Ethics opinions have taken the same approach.³

(b) **Representing the Client at Settlement Negotiations.** Courts disagree about individually disqualified lawyers' involvement in settlement negotiations.

As one court explained,

The dangers inherent in having a lawyer potentially testify as a witness stem from the strong possibility that the lawyer's credibility will be placed in issue or that the jury will be unduly influenced by the testimony. Such potential for prejudicial impact does not exist through and at a settlement

³ North Carolina LEO 2011-1 (4/22/11) (answering the following question in the negative: "Does the prohibition on serving as an advocate and a witness apply to pretrial work, settlement negotiations, or assisting with the trial strategy?"; explaining that "[t]he underlying reason for the prohibition -- confusion of the trier of fact relative to the lawyer's role -- does not apply when the lawyer's advocacy is limited to the activities outside the courtroom."; "Although a lawyer may continue to provide representation outside the courtroom, the lawyer should not use this as an excuse to delay withdrawal from representation in the litigation if the lawyer knows or reasonably should know that he is a necessary witness.").

or pre-trial conference where no testimony is being taken
and no jury is present.

Moyer v. 1330 Nineteenth Street Corp., 597 F. Supp. 14, 17 (D.D.C. 1984). Other
courts and opinions have taken the same approach.⁴

On the other hand, several courts have inexplicably indicated that an individually
disqualified lawyer could not represent his client in mediations.⁵

(c) Taking Depositions. Because depositions play such a critical role in
pretrial discovery, many decisions dealing with permissible pretrial activity involve
depositions.

As explained above, an ABA Legal Ethics Opinion flatly explained that a
disqualified lawyer "may serve as an advocate in taking depositions of witnesses." ABA
LEO 1529 (10/20/89). Some courts have likewise indicated that an individually
disqualified lawyer can take depositions.⁶

⁴ Id. (answering the following question in the negative: "Does the prohibition on serving as an
advocate and a witness apply to pretrial work, settlement negotiations, or assisting with the trial
strategy?"; explaining that "[t]he underlying reason for the prohibition -- confusion of the trier of fact
relative to the lawyer's role -- does not apply when the lawyer's advocacy is limited to the activities outside
the courtroom."; "Although a lawyer may continue to provide representation outside the courtroom, the
lawyer should not use this as an excuse to delay withdrawal from representation in the litigation if the
lawyer knows or reasonably should know that he is a necessary witness."); United States v. Gomez, 584
F. Supp. 1185, 1190 (D.R.I. 1984) ("Jaime need not be totally cut off from the perceived benefits of
Ruginski's counsel. Ruginski may (i) continue to handle pre-trial discovery and pre-trial motions for his
client, (ii) engage in Fed. R. Crim. P. 11 plea negotiations on Jaime's behalf; (iii) represent Jaime at pre-
trial and chambers conferences, and (iv) participate fully in sentencing and post-trial matters in the district
court, should the same come to pass. Ruginski may not, however, participate in the conduct of jury
empanelment or of the trial itself, nor may he be seated at counsel table." (footnote omitted)).

⁵ Fognani v. Young, 115 P.3d 1268 (Colo. 2005); Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J.
1993) (holding that the witness-advocate rule prevented an individually disqualified lawyer from
participating on behalf of his client).

⁶ Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist.
LEXIS 6897 (S.D. Tex. Jan. 31, 2007); Columbo v. Puig, 745 So. 2d 1106, 1108 (Fla. Dist. Ct. App.
1999).

Other courts have held that a disqualified lawyer may not take any depositions.

"To the extent that the court has disqualified attorneys herein, the disqualification is limited to appearances at trial, on depositions or at court appearances." Zito v.

Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9-10 (N.Y. Sup. Ct. Nov. 22, 2005); Massachusetts Sch. of Law v. ABA, 872 F. Supp. 1346, 1380-81 (E.D. Pa 1994).

One court took the same approach, and explained its reasoning.

Though the point is arguable under the Model Rules, the Court continues to believe it is appropriate to disqualify Mr. Culp from conducting or appearing at depositions. Depositions may be offered into evidence at trial and if Mr. Culp is the one taking the deposition, or appears at the deposition to defend or for some other purpose, there is a risk that the offer of the deposition at trial would reveal Mr. Culp's dual role to the factfinder, thus implicating the concern over factfinder confusion at the heart of the advocate-witness rule.

Williams v. Borden Chem., Inc., 501 F. Supp. 2d 1219, 1222 n.5 (S.D. Iowa 2007)

(emphasis added).⁷ Several years earlier, the Northern District of Illinois took the same approach in the context of videotaped depositions.

St. Paul has asked for a protective order barring Gross from participating in the depositions in this case. Its arguments are unpersuasive, except to the extent that a videotape of a deposition may be replayed at trial in place of the witness' trial testimony. Under that circumstance, Gross may not participate in the deposition or appear on the videotape. Otherwise, he is free to participate in any depositions taken in this action.

⁷ Accord World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F. Supp. 1297 (D. Colo. 1994).

AAA Plumbing Pottery Corp. v. St. Paul Ins. Co., No. 94 C 5245, 1995 U.S. Dist. LEXIS 15131, at *17 (N.D. Ill. Oct. 10, 1995).

In some situations, courts make distinctions that seem almost impossible to justify. For instance, in New Gold Equities Corp. v. Capital Growth Real Estate, Inc., No. 89 Civ. 5472 (LBS), 1990 U.S. Dist. LEXIS 3854 (S.D.N.Y. Apr. 9, 1990), the Southern District of New York addressed the issue of the plaintiff's president (who was also a lawyer) taking depositions. The court held that the president/lawyer would be allowed to depose party-witnesses, because "given Mr. Romer's [president/lawyer] knowledge of the facts, he could more efficiently question those witnesses." Id. at *3. However, the court held that the president/lawyer could not depose non-party witnesses. The court explained that

These depositions may ultimately become trial testimony and can always be used at trial for impeachment, and thus the jury may well hear questions that make it obvious that the questioning attorney was a participant in the events concerning which he is interrogating the witness. In the absence of any persuasive reason for permitting this sort of results, I conclude that Mr. Romer should not be permitted to depose non-party witnesses with whom he had contact in connection with the events that are the subject of the lawsuit.

Id. at *4.

Another decision barred a disqualified lawyer from taking depositions, and ordered that the lawyer's name be redacted from the depositions he had already taken.

The Court's decision does not bar Holtmann from acting as Defendants' counsel all together. He may serve as an advocate in pretrial motions and appeals from orders arising therefrom not involving appearance before a jury, non-evidentiary hearings and conferences. However, he

may not appear as counsel at any depositions and any depositions previously taken should be redacted to remove any reference to Holtmann serving as counsel in this action before being submitted as evidence in the trial. As in Lowe, Holtmann's name should be redacted from any pleadings on which Holtmann appears as counsel if the pleadings will be introduced as evidence that will be viewed by the jury. He will not be required to withdraw as counsel.

State Farm Mut. Auto. Ins. Co. v. Dowdy, 445 F. Supp. 2d 1285, 1289 (N.D. Okla. 2006)
(emphasis added).

(d) Attending Depositions. As explained above, some courts have ordered the redaction of a lawyer's name from the record of depositions already taken -- meaning that those courts presumably would not have allowed the lawyer to attend the depositions if they occurred after the lawyer's disqualification.

(e) Arguing at Pretrial Nonevidentiary Hearings. One Southern District of New York decision allowed an individually disqualified lawyer to handle a summary judgment argument at which no evidence would be taken. MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981). As explained above, the ABA took this approach in ABA LEO 1529 (10/20/89).⁸

In contrast, another case indicated that discovery and trial are a "[s]eamless web," so that the court could disqualify a lawyer from all "pre-trial and trial proceedings."⁹

⁸ Accord BSW Dev. Group v. City of Dayton, Case No. C-3-93-438, 1995 U.S. Dist. LEXIS 22183, at *13 (S.D. Ohio Sept. 13, 1995) (allowing a disqualified lawyer to participate in procedures "such as discovery and motion practice").

⁹ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *16-17 (E.D. Tenn. Mar. 27, 2007) (citation omitted).

(f) **Arguing at Pretrial Evidentiary Hearings.** Not many courts seem to have addressed this issue.

At least one court distinguished between a lawyer's role in pretrial activities that do not involve evidence (which presumably would be permissible) and pretrial activities which involve "obtaining evidence" -- which might ultimately be revealed to the factfinder at trial, and thus would not be permissible. Droste v. Julien, 477 F.3d 1030, 1036 (8th Cir. 2007).¹⁰

As indicated above, some courts simply permit pretrial activities without providing much detail. For instance, one court pointed to the "advocate at a trial" language in explaining that "therefore there is no reason why [the disqualified lawyer] cannot participate in all other stages of this proceeding." Power Up of S.E. La., Inc. v. Power Up U.S.A., Inc., Civ. A. No. 94-1441 SECTION "G," 1994 U.S. Dist. LEXIS 11918, at *8 (E.D. La. Aug. 24, 1994).

Of course, courts which do not permit lawyers to argue at non-evidentiary pretrial hearings presumably would not allow them to engage in such arguments at pretrial evidentiary hearings.

(g) **Testifying at Pretrial Evidentiary Hearings.** Although not many courts have addressed this situation, several courts have held that a lawyer could testify at a

¹⁰ Levit v. Herbst (In re Thomas Consol. Indus., Inc.), 289 B.R. 647, 653-54 (N.D. Ill. 2003) ("The plain text of LR83.53.7(a), taken together with the committee comment, clearly contemplates that an attorney-witness will not be precluded from participating in all phases of a case, but rather only in trial and evidentiary proceedings involving the testimony of witnesses before a factfinder. Moreover, LR83.53.7(c) provides that 'nothing in this rule shall be deemed to prohibit a lawyer barred from acting as advocate in a trial or evidentiary proceedings from handling other phases of the litigation.' The caselaw decided under these provisions fully supports the plain reading of this language.").

pretrial evidentiary hearing and still participate in the trial as counsel. United States v. Johnson, 131 F. Supp. 2d 1088 (N.D. Iowa 2001); accord Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000). The New Hampshire Supreme Court held that a lawyer's testimony at a pretrial matter would not necessitate his disqualification as trial counsel. State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003).

In contrast, the Virginia Bar took a very strict view of the witness advocate rule in a legal ethics opinion dealing with this issue.

In Virginia LEO 1709 (2/24/98), the Virginia Bar held that a lawyer could not act as trial counsel after having testified in a venue hearing, although the venue issue had been resolved by the court, and therefore "will not come up again during the trial on the merits." The Virginia Bar also held that the client could not hire another lawyer to file the complaint, testify himself at the venue hearing and then arrange to enter his appearance "as counsel of record after the pre-trial hearing on venue is concluded."

The use of another attorney only to file suit and examine the attorney-witness, so that the attorney-witness can then take over the case as an advocate and be substituted as counsel, violates DR 1-102(A)(2) (a lawyer may not circumvent a disciplinary rule through the actions of another). In addition, such a situation, if considered acceptable under the Code of Professional Responsibility, would enable the unscrupulous lawyer to manipulate and fashion his testimony to advance his own self-interest in prevailing as a[n] advocate for the client. Therefore, in the committee's opinion, the disqualification of the witness-advocate cannot be avoided by the limited employment of outside counsel with an understanding that the witness-advocate will appear later as counsel of record in the same case.

Virginia LEO 1709 (2/24/98).

(h) **Sitting at Counsel Table at Trial.** In 2006, one court found that an individually disqualified lawyer should not be allowed to sit at counsel table.

If Holtmann was allowed to sit at counsel table, he would be introduced as counsel for the Defendants as part of voir dire. Additionally, the Court notes that it is a standard jury instruction in this district, read by the presiding judge and then sent in written form into the jury room, that the statements of counsel are not to be considered as evidence. Finally, it would be fundamentally unfair to allow Defendants to have a fact witness who is able to hear the testimony of all other fact witnesses and consult with counsel regarding their examination and/or cross examination if Plaintiff were not given the same opportunity. The Rule was developed to level the playing field. Defendants' position would effectively add a twelfth man to Defendants' team.

State Farm Mut. Auto. Ins. Co. v. Dowdy, 445 F. Supp. 2d 1285, 1289 (N.D. Okla. 2006).¹¹

(i) **Arguing on Appeal.** As early as 1980, the ABA indicated that an individually disqualified lawyer may argue the appeal of a case in which he testified, as long as his testimony was not material in that appeal. ABA LEO 1446 (2/2/80).¹² Some courts explicitly indicate that disqualified lawyers may argue appeals.¹³ At least one court has generically indicated that a disqualified lawyer may participate in "post-trial proceedings of this cause." Columbo v. Puig, 745 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1999).

¹¹ Accord Smith v. Wharton, 78 S.W.3d 79 (Ark. 2002); United States v. Gomez, 584 F. Supp. 1185, 1190 (D.R.I. 1984).

¹² Accord ABA LEO 1503 (10/30/83); New York City LEO 1988-9 (11/28/88); New Jersey LEO 566 (8/15/85).

¹³ Klupt v. Krongard, 728 A.2d 727, 742 n.6 (Md. Ct. Spec. App. 1999).

Best Answer

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

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Permissible Activities by Lawyers Whose Testimony Will Hurt the Client

Hypothetical 40

You represented a new client in negotiating a franchise agreement. Your client and the franchisor eventually had a falling-out, and you have been representing the client in a lawsuit against the franchisor. As it turns out, your recollection of some important meetings with the franchisor and its lawyer differed dramatically from your client's recollection. Despite your efforts to avoid it, the court eventually disqualified you from acting as an advocate -- because your testimony would harm your client, based on the discrepancy between his and your testimony about the meetings. Now you wonder where that has left you and your firm.

- (a) Will your individual disqualification prevent one of your partners from trying the case for the client?

YES

- (b) May you continue to advise the client "behind the scenes"?

MAYBE

- (c) May you assist the client in reminding him of historical facts?

YES

Analysis

(a) Rule 3.7 prevents a lawyer from acting as an advocate if the lawyer is a "necessary witness" because the lawyer's testimony on an important matter will prejudice the client. ABA Model Rule 3.7.¹ In that situation the individual lawyer's disqualification will be imputed to the entire firm.

¹ ABA Model Rule 3.7 cmt. [6] ("In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is

A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ABA Model Rule 3.7(b) (emphasis added).

(b) One might think that a lawyer in that setting cannot assist the client in any way. However, even in those circumstances, courts must sometimes still wrestle with the law firm playing a role. For instance, in one case, the Eastern District of Louisiana applied that general approach in disqualifying an entire law firm. However, the court held that the firm's lawyers and staff could participate in some ways.

Finally, if Shushan is prohibited from serving as plaintiff's associate counsel, plaintiff requests that Shushan's firm and staff be allowed to continue with the preparation and presentation of plaintiff's case. The Court finds that it is necessary to disqualify Shushan from representing plaintiff at any stage of these proceedings, as there exists potential for his testimony to be prejudicial to plaintiff. In addition, Shushan's own conduct in hiring plaintiff as a permanent employee may be at issue, and this may impede his ability to give plaintiff impartial advice. In light of the upcoming trial date, however, the Court will not prohibit Shushan's staff from aiding Landry in his acquisition of knowledge of the facts and circumstances surrounding plaintiff's claims and in his preparation for presentation of plaintiff's claims at trial.

Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858, at *7 (E.D. La. Jan. 25, 2000) (emphasis added).

likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7.")

Courts seem not to have dealt with the possibility that the client could consent to the lawyer's continued "behind the scenes" assistance. Rules 1.7 and 1.9 provide for such consent. In a Rule 1.7 situation (involving adversity to current clients), lawyers must "reasonably" believe that he or she "will be able to provide competent and diligent representation to each affected client."

(c) The law firm's duty to its former client presumably would require it to continue acting as a source of historic knowledge.

Best Answer

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

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